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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-750

Filed 16 April 2024

Burke County, Nos. 18 CRS 579-81

STATE OF NORTH CAROLINA

v.

TERRELL JAMALL AVERY

Appeal by defendant from judgments entered 12 December 2022 by Judge Jacqueline D. Grant in Burke County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa R. Atwater, for the State.

Cooper Strickland for defendant-appellant.

ZACHARY, Judge.

Defendant Terrel Jamaul Avery appeals from the trial court's judgments revoking his probation and activating his suspended sentences. Defendant argues that the trial court lacked subject-matter jurisdiction to revoke his probation, which he contends had expired. After careful review, we conclude that the trial court had subject-matter jurisdiction to enter the judgments revoking Defendant's probation

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and activating his modified suspended sentences, but remand for correction of a clerical error.

BACKGROUND

On 19 July 2018, in accordance with the terms of Defendant’s plea arrangement and upon his guilty pleas, the trial court entered judgments in 18 CRS 582 and 583 imposing two consecutive active sentences of 12 to 24 months in the custody of the Division of Adult Correction for two counts of common law robbery. That same day, the trial court also entered five judgments against Defendant in 18 CRS 579–81, sentencing Defendant to consecutive terms of 12 to 24 months each for two counts of second-degree burglary, two counts of common law robbery, and one count of second-degree burglary, as well as a term of 6 to 17 months for one count of attempted common law robbery.

The court suspended Defendant’s sentences in 18 CRS 579–81 and placed him on supervised probation for 36 months. The judgment suspending sentence for attempted common law robbery in 18 CRS 581 provided that the suspended sentence, during which Defendant would be on supervised probation, “shall run at the expiration of [the active] sentence imposed in file number [18 CRS 582.]” Each of the five judgments provided that “[t]his period of probation shall begin . . . when the defendant is released from incarceration[.]”

On 27 March 2020, Defendant was released from incarceration. During Defendant’s supervised probation, his probation officer filed multiple violation

reports, and at one point Defendant was “quick-dipped”—that is, he served a period of confinement in response to violations of the conditions of his probation.

The probation officer filed additional violation reports in January, July, August, and October 2022. On 12 December 2022, this matter came on for hearing, and Defendant admitted to the violations of the conditions of his probation alleged in the violation reports. The trial court entered five judgments upon revocation of probation in 18 CRS 579–81, revoking Defendant’s probation and activating modified sentences based on, among other violations, the willful violation of the condition that he “[c]ommit no criminal offense in any jurisdiction[.]”

Defendant did not give oral notice of appeal, but on 28 December 2022, he filed a signed handwritten statement that the clerk of court entered as his written notice of appeal. Recognizing the various deficiencies of his notice of appeal, on 13 September 2023, Defendant petitioned this Court to issue its petition for writ of certiorari, seeking this Court’s review and vacatur of the judgments revoking his probation and activating his suspended sentences.

Appellate Jurisdiction

In the instant case, Defendant filed a handwritten letter with the clerk of court stating: “My name is Terrel Avery. I am wanting to appeal my probation revocation in file number 18 CRS 579, 580, 581.” Defendant neglected to file a certificate of service, designate the court to which he intended to appeal, or otherwise indicate that he served this document on the State.

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Rule 4 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, that a “party entitled by law to appeal from a judgment . . . may take appeal by . . . filing notice of appeal . . . and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]” N.C.R. App. P. 4(a)(2). Rule 4(b) specifies that a written notice of appeal must “designate . . . the court to which appeal is taken[.]” N.C.R. App. P. 4(b).

Nonetheless, this Court has previously determined that a “party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the [State] here.” *State v. Hawkins*, 286 N.C. App. 427, 432, 880 S.E.2d 753, 757 (2022) (citation omitted), *disc. review denied*, 384 N.C. 40, ____ S.E.2d ____ (2023). Similarly, a defendant’s failure to designate the court to which the appeal is taken is not a jurisdictional defect. *See State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014) (“[F]ailure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled . . .”), *disc. review denied*, 368 N.C. 237, 768 S.E.2d 847 (2015). The deficiencies “should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake.” *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) (cleaned up).

Here, the State does not contend that it has suffered any prejudice as a result of Defendant's defective notice of appeal, "which we interpret to mean that the State was not misled by the defective notice." *Id.* Accordingly, "we conclude that a dismissal of Defendant's appeal is not warranted. We therefore dismiss Defendant's petition for writ of certiorari and proceed to address the merits of the appeal." *Sitosky*, 238 N.C. App. at 561, 767 S.E.2d at 625.

Subject-Matter Jurisdiction to Revoke Probation

Defendant argues that his term of probation had expired when the trial court revoked his probation on 12 December 2022, and that the court did not make the findings required by N.C. Gen. Stat. § 15A-1344; thus, he contends that the trial court lacked subject-matter jurisdiction to revoke his probation.

Standard of Review

"This Court reviews de novo the issue of whether a trial court had subject-matter jurisdiction to revoke a defendant's probation." *State v. Guinn*, 281 N.C. App. 446, 450, 868 S.E.2d 672, 676 (2022) (cleaned up). Under a "de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

Analysis

The trial court has the discretion to run a defendant's probationary period either concurrently with or consecutively to the defendant's active term of incarceration. N.C. Gen. Stat. § 15A-1346(b) (2023). But unless the trial court

provides to the contrary, “a period of probation commences on the day it is imposed and runs concurrently with any other period of . . . imprisonment to which the defendant is subject[.]” *Id.* § 15A-1346(a).

“[O]ther than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term.” *State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015). N.C. Gen. Stat. § 15A-1344(f) provides that a trial court may only extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

- (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
- (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
- (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
- (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f).

It is undisputed in the case at bar that the trial court did not “find[] for good cause shown and stated that [Defendant’s] probation should be extended, modified, or revoked.” *Id.* Therefore, Defendant’s argument hinges on whether he remained on probation when the trial court revoked his probation. The answer is contingent upon

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whether the trial court in its July 2018 judgments suspending the sentences sufficiently specified that the 36-month probationary terms began upon Defendant's release from incarceration, or whether the trial court did not so specify, with the default result that Defendant's 36-month probation ran concurrently with his active sentences. *See id.* § 15A-1346(a). If the former, then Defendant was on probation when the trial court revoked his probation, and the court did not err. If the latter, then Defendant was no longer on probation at the time the trial court revoked his probation, and the court lacked subject-matter jurisdiction to do so.

In the trial court's July 2018 judgments suspending Defendant's sentence, the court provides that the probationary period in 18 CRS 581 "shall run at the expiration of [the active] sentence imposed in file number [18 CRS 582.]" The trial court indicates on the judgment forms for each of the five suspended sentences that Defendant's "period of probation shall begin . . . when . . . [D]efendant is released from incarceration[.]" Yet the court failed to complete the boxes—situated adjacent to its provision that Defendant's probationary period would begin upon his release from incarceration—indicating the file number, offense, county, court, and date of the associated sentence imposing imprisonment. Defendant contends that this failure to complete the boxes renders the judgments incomplete and lacks adequate notice to Defendant of when his probationary period would begin.

This argument fails to persuade. Information regarding the file number, offense, county, court, and date of the associated sentence would not change the start

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date of Defendant's probationary period on 27 March 2020, when he was released from incarceration. Moreover, it is difficult to discern how there could be any confusion regarding the start date; the trial court clearly specified in the July 2018 judgments that the probationary periods were to run consecutive to Defendant's active sentence, beginning upon Defendant's "release[] from incarceration[.]"

Defendant's 36-month probationary period began on 27 March 2020, upon his release from incarceration imposed in 18 CRS 582 and 583; accordingly, Defendant remained on probation when the probation officer filed the violation reports in 2022, as well as when the trial court entered its judgments upon revocation of probation on 12 December 2022. Thus, the trial court had subject-matter jurisdiction to revoke Defendant's probation, and Defendant has failed to show that the trial court erred by doing so. *See Guinn*, 281 N.C. App. at 450, 868 S.E.2d at 676.

Clerical Error

Finally, Defendant contends that the spelling of his first and middle name in the case caption is incorrect, which the State does not dispute. In the caption, Defendant's name is spelled "Terrell Jamall Avery"; Defendant states that his name is correctly spelled "Terrel Jamaul Avery." Because misspelling Defendant's name "result[ed] from a minor mistake or inadvertence . . . in writing or copying something on the record," it is a clerical error. *State v. Allen*, 249 N.C. App. 376, 380, 790 S.E.2d 588, 591 (2016) (citation omitted). As a result, we must "remand the case to the trial

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court for correction because of the importance that the record speak the truth.” *Id.* at 379, 790 S.E.2d at 591 (citation omitted).

CONCLUSION

For the reasons set forth, we conclude that the trial court had subject-matter jurisdiction when it entered judgments revoking Defendant’s probation and activating his suspended sentences. We remand to the trial court for the limited purpose of correcting the clerical error in the judgment as indicated herein.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).