

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-818

Filed: 7 April 2015

Wake County, Nos. 06 CRS 70064—65

STATE OF NORTH CAROLINA

v.

MATTHEW SANDERS.

Appeal by defendant from judgment entered 7 January 2014 by Judge Alma L. Hinton in Wake County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

The Exum Law Office, by Mary March Exum, for defendant-appellant.

BRYANT, Judge.

Where defendant was not subject to a tolling period because his offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, defendant's probationary period had expired and the trial court lacked jurisdiction to revoke defendant's probation.

On 1 November 2006, defendant Matthew Sanders pled guilty to one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation in 06 CRS 70064—65, with sentencing to be continued. By judgment entered 17 April 2007, defendant was sentenced to a term of 35 to 42 months

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imprisonment. The trial court suspended defendant's sentence and imposed a term of supervised probation for 60 months.

On 13 November 2008, a violation report was filed alleging defendant had violated probation by testing positive for cocaine and marijuana and by being in arrears towards his monetary obligations. On 31 March 2009, the trial court entered an order finding defendant was in compliance with the terms of his probation and to continue with his probation.

A new violation report, filed 29 March 2010, alleged that defendant had violated his probation by testing positive for cocaine, being in arrears on his monetary conditions, and by being currently unemployed. After a hearing, the trial court entered an order on 11 May stating that defendant "continues to test positive for cocaine" and that "defendant has been [sic] violated once and was continued on probation. *This case is currently in Toll status.*" (emphasis added).

In August 2010, a third violation report was filed alleging defendant had tested positive for cocaine and marijuana, had been convicted of assault/threat against a government official in 09 CRS 209018, and received a new case of probation.¹ By order entered 2 December, the trial court ordered defendant to have a TASC assessment completed within 45 days of entry and to serve 10 days in jail. A second

¹ Other than defendant's probation case in 06 CRS 70064—65, no other probation cases are before this Court in this appeal.

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order entered by the trial court on 24 February 2011 ordered defendant to attend a residential program at Day Dart Cherry² for 90 days.

On 19 July 2012, a violation report was entered alleging defendant had tested positive for cocaine and marijuana. Another report, entered 10 August, raised the same allegation. A third report, entered 7 September, stated that defendant had violated probation by testing positive for marijuana. Additional reports entered 11 October and 8 November further alleged defendant had tested positive for marijuana; the 11 October report also stated that defendant had failed to report for a scheduled office appointment. On 3 December 2012, the trial court ordered defendant to report to jail on 1 January 2013 for violating probation. After defendant failed to comply with the trial court's order, another violation report was entered 4 January 2013 for failure to report as directed.

On 24 July 2013, a violation report was entered alleging defendant had been convicted and placed on twelve months supervised probation in 12 CRS 2111169 for driving while impaired. By order entered 7 January 2014, the trial court revoked defendant's probation and sentenced defendant to 35 to 42 months imprisonment, with credit for 314 days already served. Defendant appeals.

² Day Dart Cherry is a residential treatment facility for chemical dependency administered by the North Carolina prison system which assists probationers in transitioning back to their communities.

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On appeal, defendant raises two issues as to whether the trial court (I) lacked subject matter jurisdiction to revoke defendant's probation, and (II) lacked jurisdiction to enter orders prior to the revocation of probation.

I.

Defendant contends the trial court lacked subject matter jurisdiction to revoke defendant's probation. We agree.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

"A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)). Pursuant to N.C. Gen. Stat. § 15A-1344,

[a]t any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. . . . If a probationer violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345 . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any

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N.C.G.S. § 15A-1344(d) (2009). Prior to a 2009 amendment, a portion of subsection (d) read as follows: “The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which . . . could result in revocation proceedings against him for violation of the terms of this probation.” *Id.* However, other 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. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted). Pursuant to N.C.G.S. § 15A-1344(f), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* that a written probation violation report had been filed. Also, the trial court must find good cause for the extension, modification, or revocation. N.C.G.S. § 15A-1344(f). As such, a defendant's probation could be extended upon findings of specific actions that occurred prior to the end of a defendant's probationary period. However, on this record there is no indication that N.C.G.S. § 15A-1344(f) is applicable. Indeed, the State's argument as to jurisdiction is based solely on an application of the tolling provision. The tolling provision of N.C.G.S. § 15A-1344(d) was repealed in 2009, thus ending the tolling provision for defendants whose probation violation hearings were held after 1 December 2009. 2009 N.C. Sess. Laws ch. 372, § 20. Further, the tolling provision that was then

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moved to N.C.G.S. § 15A-1344(g) and allowed for a credit against a defendant's probation if a pending criminal charge resulted in an acquittal or dismissal was then removed when subsection (g) was repealed. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3. Therefore, because there was no applicable tolling period, the trial court had no jurisdiction to revoke defendant's probation for offenses committed before 1 December 2009 and where defendant's probation revocation hearing was held after 1 December 2009. We hold that the trial court's jurisdiction over defendant ended on or about 17 April 2012, 60 months after defendant was placed on probation on 17 April 2007.

Our holding in this case, that the trial court lacked jurisdiction to revoke defendant's probation, is controlled by this Court's recent opinion in *State v. Sitosky*, ___ N.C. App. ___, 767 S.E.2d 623 (2014), *review and stay denied*, ___ N.C. ___, ___ S.E.2d ___ (March 5, 2015); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.”).

In *Sitosky*, the defendant was placed on probation in 2008 for offenses committed in 2007. In a probation violation hearing held in 2014, the defendant's probation was revoked for offenses committed since her probation began in 2008. This Court vacated and remanded finding that based on the 2009 North Carolina Session Law, a defendant “who committed her offenses . . . *prior to 1 December 2009*

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but had her revocation hearing *after 1 December 2009* was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges.” *Sitosky*, ___ N.C. App. at ___, 767 S.E.2d at 626.

In reviewing the record before this Court, it is clear that defendant committed his offenses on 3 November 2006, prior to 1 December 2009. Defendant’s probation revocation hearing was held on 7 January 2014, almost seven years after his 60 month probation order was entered on 17 April 2007, and well after 1 December 2009. As such, based on this Court’s holding in *Sitosky*, the trial court lacked jurisdiction to revoke defendant’s probation. Accordingly, the order of the trial court revoking defendant’s probation must be vacated. Also, accordingly, we need not address defendant’s second issue on appeal.

VACATED.

Judges DILLON and DIETZ concur.