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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-695

Filed: 6 February 2018

Forsyth County, No. 12 CRS 40079

STATE OF NORTH CAROLINA

v.

RICHY MAGADAN HERRERA

Appeal by defendant from judgment entered 6 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 29 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Dylan J.C. Buffum for defendant-appellant.

ARROWOOD, Judge.

Richy Magadan Herrera ("defendant") appeals the revocation of his probation. For the following reasons, we reverse and vacate.

I. Background

On 20 May 2012, defendant received a North Carolina Uniform Citation for impaired driving and for failing to give notice of an accident. Defendant pleaded

guilty to impaired driving in Forsyth County District Court on 6 August 2013 and other charges against him were dismissed. Upon determination that an aggravated level one punishment was proper because of defendant's prior impaired driving convictions and because defendant was driving while his license was revoked for impaired driving, judgment was entered on 6 August 2013 sentencing defendant to a term of 36 months. That term, however, was suspended on condition that defendant be placed on 36 months of supervised probation and serve an active term of 120 days as a condition of special probation.

On 18 April 2016, a violation report alleging three probation violations was filed in Forsyth County District Court. On 7 November 2016, a "Probation Violation Order" and an "Impaired Driving Judgment and Commitment Upon Revocation of Probation" were filed in Forsyth County District Court. Together, the order and judgment indicate that defendant "admits the violation[,]" revoke defendant's probation, and activate defendant's 36 month sentence with credit awarded for 147 days served. Defendant filed notice of appeal for a hearing *de novo* in the Forsyth County Superior Court on 15 November 2016.

Upon his appeal to superior court, on 5 January 2017, defendant filed a motion for appropriate relief ("MAR") and a motion to dismiss. In the MAR, defendant sought review of the probationary sentence, which he alleged was in violation of N.C. Gen. Stat. §§ 15A-1351(a) and -1343.2(d). In the motion to dismiss, defendant sought to

dismiss the revocation proceedings for lack of subject matter jurisdiction based on the alleged unlawful probationary sentence.

The case was heard in Forsyth County Superior Court before the Honorable Susan E. Bray on 6 February 2017. At the hearing, the court first considered defendant's MAR and motion to dismiss. Defense counsel explained that both motions raise an issue of statutory interpretation regarding whether the "36 months of probation [defendant] received exceeded the [trial court's] authority without making specific findings of fact." Upon consideration of the arguments, the trial court denied both motions, explaining as follows:

> All right. Well, DWIs are separate from structured sentencing. It's just that sentencing -- I believe when you're reading 15A-1351-179, 15A-1342, I believe that -- or the driving while impaired sentences, the period of probation can be up to five years, but it does not have to be a designation of whether that period is -- whether a particular period of probation is necessary for restitution or treatment or whatever condition where it might be under the structured sentencing parameters of sentencing.
>
> So I do find that this Court has jurisdiction, and I'm denying the motion for appropriate relief.

Then, upon a hearing *de novo*, the superior court revoked defendant's probation and activated his suspended sentence for impaired driving. The "Judgment and Commitment Upon Revocation of Probation – Misdemeanor" entered indicated that defendant waived a violation hearing and admitted he violated each of the three conditions of his probation set forth in the violation report, each of which the court

found was "in and of itself, a sufficient basis upon which [the court] should revoke probation and activate the suspended sentence." Defendant gave notice of appeal orally at the hearing and filed written notice of appeal.

II. Discussion

On appeal, defendant argues the Superior Court erred in denying his motion to dismiss the probation revocation proceedings for lack of subject matter jurisdiction. He contends the 36 months of probation imposed was not authorized by law without specific findings and the period of probation authorized by law absent specific findings had expired prior to the filing of the violations report.

As an initial matter, we must address the State's argument that defendant has waived the argument now on appeal. The State contends this appeal from the probation revocation judgment is an impermissible collateral attack on the 6 August 2013 judgment. In support of its argument, the State relies on *State v. Holmes*, 361 N.C. 410, 646 S.E.2d 353 (2007).

In *Holmes*, "[t]he trial court sentenced [the] defendant in the aggravated range for . . . kidnapping and assault charges and in the presumptive range for [an] accessory after the fact to rape charge. The court ordered all sentences to run consecutively, but suspended the sentences and placed [the] defendant on sixty months probation." *Id.* at 411-12, 646 S.E.2d at 354. The defendant did not immediately appeal his sentences, but did later challenge his sentence on appeal from

the revocation of his probation by arguing "his sentences for kidnapping and assault were unconstitutionally aggravated in violation of the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the aggravating factors were found by a judge and not submitted to a jury." *Id.* at 412, 646 S.E.2d at 354. This Court "determined that the aggravated sentences should be vacated and remanded to the trial court for resentencing in light of *Blakely*[,]" but our Supreme Court reversed this Court by holding that the defendant could not challenge his original sentences on appeal of the revocation of his probation because such a challenge is an impermissible collateral attack. *Id.* at 412-13, 646 S.E.2d at 355. The State contends defendant's only options to challenge the 6 August 2013 judgment were to move to withdraw the plea, to appeal the original judgment, or to petition for *writ of certiorari*. *See State v. Rush*, 158 N.C. App. 738, 740-41, 582 S.E.2d 37, 38-39 (2003).

Mindful of *Holmes* and *Rush*, we find the present case distinguishable. First, defendant is contesting the court's jurisdiction to revoke his probation, not the court's jurisdiction to enter the 6 August 2013 judgment. Although defendant's argument raises issue with the sentence imposed in the 6 August 2013 judgment, defendant's motion to dismiss does not seek to overturn that judgment. Second, defendant is not raising the issue of jurisdiction for the first time on appeal of the revocation of his probation; defendant raised the issue in a motion to dismiss, which the trial court

considered and denied prior to the revocation hearing. In any event, it has long been held that "[t]he question of subject matter jurisdiction may be raised at any time . . . ." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). Review of the trial court's denial of defendant's motion to dismiss for lack of jurisdiction is proper in this instance.

Moreover, along with his motion to dismiss, defendant filed an MAR questioning the propriety of the term of probation imposed in the 6 August 2013 judgment. Defendant's MAR requested that the court review the judgment and correct it to comply with the law. The trial court denied defendant's MAR at the same time and for the same reason that it denied defendant's motion to dismiss.

In *State v. Pennell*, the Court addressed "whether a defendant may collaterally challenge the validity of an underlying indictment by means of an appeal from revocation of his probation." 367 N.C. 466, 468, 758 S.E.2d 383, 385 (2014). Over the defendant's arguments "that a challenge to the trial court's jurisdiction 'may be raised at any time' and that 'a collateral attack is permissible when the underlying judgment is void[,]' " *id.*, the Court held that "[b]ecause a jurisdictional challenge may only be raised when an appeal is otherwise proper, . . . a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence[,]" *id.* at 471-72, 758 S.E.2d at 387 (internal citation omitted). The Court, however, specifically noted that "[t]he proper procedure

through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [N.C. Gen. Stat.] § 15A-1415(b) or petitioning for a writ of habeas corpus." *Id*. at 472, 758 S.E.2d at 387.

As stated above, in this case, defendant is not challenging the court's jurisdiction to enter the 6 August 2013 judgment. An MAR, however, is also the proper procedure to challenge a sentence that is unauthorized at the time imposed or otherwise invalid as a matter of law. N.C. Gen. Stat. § 15A-1415(b)(8) (2015). Along with the appeal of the trial court's denial of his motion to dismiss, defendant has filed a petition for *writ of certiorari* seeking this Court's review of the denial of his MAR. *See State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995) ("A trial 'court's ruling on a motion for appropriate relief pursuant to [N.C. Gen. Stat. §] 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari.' ") (quoting N.C. Gen. Stat. § 15A-1422(c)(3) (1988)). Because the same argument underlies both defendant's motion to dismiss and his MAR, we allow defendant's petition and address the underlying issue.

Defendant's argument that the court lacked jurisdiction in the revocation hearing because the term of probation authorized by law had expired prior to the State's filing of the violation report raises issues of statutory interpretation and jurisdiction.

> An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de*

> *novo*. This Court also reviews challenges to the jurisdiction of the trial court under a *de novo* standard. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Wainwright, 240 N.C. App. 77, 79-80, 770 S.E.2d 99, 102 (2015) (internal quotation marks and citations omitted); *see also State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) ("An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.") (internal quotation marks and brackets omitted). Our *de novo* review begins with the statutes.

N.C. Gen. Stat. § 20-179 governs the sentencing hearing after a conviction for impaired driving. Pertinent to this case, it provides that "[a] defendant subject to Aggravated Level One punishment . . . shall be sentenced to a term of imprisonment that includes a minimum term of not less than 12 months and a maximum term of not more than 36 months." N.C. Gen. Stat. § 20-179(f3) (2015). It also provides that "[t]he term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 120 days." *Id*. The statute, however, does not address the term of probation to be imposed if a sentence for impaired driving is suspended.

N.C. Gen. Stat. § 15A-1351 governs special probation and specifically states that "[a] defendant convicted of impaired driving under [N.C. Gen. Stat. §] 20-138.1 may . . . be sentenced to special probation." N.C. Gen. Stat. § 15A-1351(a) (2015).

Unlike N.C. Gen. Stat. § 20-179, N.C. Gen. Stat. § 15A-1351 does address the term of probation. It provides that "[t]he original period of probation, including the period of imprisonment required for special probation, shall be as specified in [N.C. Gen. Stat. §] 15A-1343.2(d), but may not exceed a maximum of five years, except as provided by [N.C. Gen. Stat. §] 15A-1342(a)." *Id.* In turn, N.C. Gen. Stat. § 15A-1343.2(d), which governs the length of probation terms under structured sentencing, provides that "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation . . . [f]or misdemeanants sentenced to intermediate punishment[] [shall be] not less than 12 nor more than 24 months[.]" N.C. Gen. Stat. § 15A-1343.2(d) (2013).[1] "If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years, as specified in [N.C. Gen. Stat. §] 15A-1342 and [N.C. Gen. Stat. §] 15A-1351." *Id.*

Despite the State's contentions to the contrary and the court's ruling below that "DWIs are separate from structured sentencing[,]" it is clear from the plain language of the above statutes that N.C. Gen. Stat. § 15A-1343.2(d)(2) is applicable in determining the original period of probation for defendant's impaired driving

[1] An impaired driving conviction is a misdemeanor, *see* N.C. Gen. Stat. § 20-138.1, and an aggravated level one punishment for impaired driving may be suspended only if special probation is imposed. N.C. Gen. Stat. § 20-179(f3). An intermediate punishment may include special probation as defined in N.C. Gen. Stat. § 15A-1351(a), *see* N.C. Gen. Stat. § 15A-1340.11(6), whereas active punishment and community punishment are defined to exclude special probation, *see* N.C. Gen. Stat. § 15A-1340.11(1) and (2).

charge. *See* N.C. Gen. Stat. § 15A-1351(a) (not excluding impaired driving from the terms of probation specified in N.C. Gen. Stat. § 15A-1343.2(d), as the statute specifically excludes impaired driving in other places). Therefore, absent specific findings that a longer period of probation was necessary, which there is no indication there were such findings in this case, the maximum term of probation the trial court could have imposed on defendant when suspending his active sentence was 24 months. The 36 months of probation imposed exceeded that authorized by law.

This Court has explained that "in order for a trial court to revoke a defendant's probation after the expiration of the period of probation, the State must have filed a written violation report *before* the expiration of the period of probation . . . ." *State v. Harwood*, __ N.C. App. __, __, 777 S.E.2d 116, 119 (2015) (discussing the requirements of N.C. Gen. Stat. § 15A-1344(f)) (emphasis in original). Because the 24 month period of probation authorized by law would have expired months prior to the State's filing of the violations reports in this case on 18 April 2016, defendant contends the court lacked jurisdiction to revoke his probation. Defendant likens his case to *State v. Hoskins*, 242 N.C. App. 168, 775 S.E.2d 15 (2015). We agree with the comparison.

In *Hoskins*, the defendant's original term of probation was extended and later revoked during the extended term. *Id.* at 169, 775 S.E.2d at 17. On appeal of the revocation of the defendant's probation, the defendant argued the trial court lacked

subject matter jurisdiction to revoke her probation because the extension of her probation was unlawful. *Id*. at 171, 775 S.E.2d at 18. Relying on its decision in *Gorman*, 221 N.C. App. 330, 727 S.E.2d 731, this Court held the trial court was without statutory authority when it ordered an extension of the defendant's probation and, therefore, the trial court was without subject matter jurisdiction when it later entered orders revoking the defendant's probation during the unlawful extension. *Hoskins*, 242 N.C. App. at 172-73, 775 S.E.2d at 19. We see no reason why the result in the present case should be different.

Because the term of probation authorized by law had expired prior to the filing of the State's violation report, we hold the trial court erred in denying defendant's motion to dismiss for lack of jurisdiction in this case. The trial court was without subject matter jurisdiction to revoke defendant's probation. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *Id*. at 172, 775 S.E.2d at 19 (internal quotation marks and citation omitted).

Defendant also argues that there were clerical errors committed during the entry of orders and judgment during the revocation proceedings. Having determined that the trial court was without jurisdiction in the revocation proceedings, we need not address the alleged clerical errors.

III. Conclusion

For the reasons discussed, we reverse the trial court's denial of defendant's motion to dismiss and vacate the "Judgment and Commitment Upon Revocation of Probation - Misdemeanor" entered 6 February 2017.

REVERSED AND VACATED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).