

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-162

Filed: 5 November 2019

Mecklenburg County, No. 16CRS237763

STATE OF NORTH CAROLINA

v.

TIQUAN K. SUMMERS, Defendant.

Appeal by Defendant from order entered 6 August 2018 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for the Defendant.

DILLON, Judge.

Defendant Tiquan K. Summers appeals from an order dismissing his case from Mecklenburg County Superior Court on the basis of lack of jurisdiction.

I. Background

On 21 November 2016, officers arrested Defendant for embezzlement of \$1,284.00 from his employer.

In April 2017, Defendant and the prosecutor entered into a deferred prosecution agreement in district court whereby Defendant signed a document

stipulating to the facts as presented by the prosecutor. Pursuant to that agreement, the district court judge placed Defendant on probation for a period of 24 months.

Eight months later, in December 2017, Defendant's probation officer filed a report alleging that Defendant had violated the conditions of his probation. On 27 April 2018, following a hearing on the matter, the district court entered an order revoking Defendant's probation, the effect of which allowed the State to pursue prosecution. However, though the State had not yet restarted its prosecution of Defendant, he immediately filed a notice of appeal to superior court from that order.

After a hearing on the matter, the superior court dismissed the appeal, ruling that the superior court did not have jurisdiction. Defendant seeks review with our Court.¹ After careful review, we affirm.

II. Analysis

Where a defendant has been charged with a low level felony or a misdemeanor, the defendant and prosecutor can agree that prosecution be deferred and the defendant be placed on probation. *See* N.C. Gen. Stat. § 15A-1341(a1) (2017). Typically, under a deferred prosecution, the defendant signs an agreement admitting to the facts of the crime alleged; however, he is not actually entering a plea of guilty. *See State v. Ross*, 173 N.C. App. 569, 573, 620 S.E.2d 33, 37 (2005). If the defendant

¹ It is the State's position that Defendant's appeal is from an interlocutory order. Indeed, there is no final judgment entered against Defendant, as he has yet to be prosecuted. We note that Defendant has filed a petition seeking a writ of *certiorari*. To the extent Defendant does not have an appeal of right, we grant *certiorari* to reach the merits of Defendant's arguments.

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fails to comply with the terms of the agreement, the prosecutor is free to reinstate charges. *See State v. Courtney*, ___ N.C. ___, ___, 831 S.E.2d 260, 270 (2019) (“A prosecutor may reinstate charges . . . if a defendant fails to comply with the terms of a deferred prosecution agreement.”). Where the charges are so reinstated, the defendant is free, though, to plead “not guilty,” notwithstanding that he has previously admitted to the facts of the crime. *Ross, supra*. But where a defendant chooses to plead “not guilty,” the State may be able to use the defendant’s admissions in the agreement as evidence in the trial. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2017) (out-of-court statement of a party opponent is generally admissible).

Here, the district court revoked Defendant’s probation, determining that Defendant had violated the terms of the deferred prosecution agreement. Unlike most probation revocations, this revocation did not result in the activation of any sentence, as Defendant had not yet even been prosecuted. Notwithstanding, Defendant appealed the district court’s order to superior court.

We conclude that the General Assembly has not provided an appeal of right where probation has been revoked in a deferred prosecution context. Specifically, the General Assembly has provided that “when a district court judge, as a result of a finding of a violation of probation, *activates a sentence or imposes special probation*, the defendant may appeal to the superior court for a *de novo* hearing.” N.C. Gen. Stat. §15A-1347(a) (2018). But in the deferred prosecution context, no sentence is

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activated nor any special probation conditions imposed when probation is revoked. Rather, the effect of a revocation in this context is merely that the State is now free to prosecute: there is not yet any final judgment. *See State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004) (“Defendant’s sentence was neither activated nor was it modified to ‘special probation’ . . . Defendant therefore has no right to appeal.”). A defendant has *no right to appeal* the revocation until after he is adjudged guilty. Therefore, we conclude that the superior court did not err in dismissing Defendant’s appeal to that court from the district court’s order revoking probation.

We note, though, that the superior court does have the authority to issue writs of *certiorari* under Rule 19 of the General Rules of Practice for the Superior and District Courts, and that our Court has held that the superior court’s authority to issue such writs is “analogous to the Court of Appeals’ power to issue a writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c).” *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 833 (1993). It may be that had Defendant petitioned the superior court for *certiorari*, that court in its discretion would have granted the petition and reviewed whether the district court acted properly in revoking his probation, in the interest of judicial economy. But there is nothing in the record indicating that Defendant ever petitioned the superior court for a writ of *certiorari*.

III. Conclusion

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No sentence was activated nor was special probation invoked; thus, Defendant has no right of appeal to superior court. We, therefore, affirm the superior court's ruling dismissing Defendant's appeal to that court from the district court's order revoking probation.

AFFIRMED.

Judges STROUD and YOUNG concur.