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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-864

Filed: 21 April 2020

Craven County, No. 17 CRS 53862

STATE OF NORTH CAROLINA

v.

PHILLIP ANTWARN CUMMINGS

Appeal by defendant from judgment entered 7 January 2019 by Judge John E. Nobles Jr. in Craven County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone, for the State.

Linda B. Weisel for defendant.

DIETZ, Judge.

Defendant Phillip Antwarn Cummings argues that the trial court made two separate, reversible errors in his criminal sentence. The State concedes these errors on appeal. We agree and therefore vacate and remand for resentencing.

We also note, as explained more fully below, that this case is an example of why we expect litigants to raise potential errors with the trial court at the time they

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occur. There is no indication that the trial court *intended* to commit either error asserted in this appeal and, had either Cummings or the State informed the court of the errors, they could have been corrected at the time, sparing the parties the expense of this appeal.

Facts and Procedural History

In 2017, law enforcement arrested Cummings for stealing an ATV and attempting to sell it in a Walmart parking lot. Cummings entered an *Alford* plea to misdemeanor possession of stolen goods. Under the plea agreement, Cummings was to be placed on supervised probation until he fully paid the imposed restitution, and then transitioned to unsupervised probation. Cummings stipulated to a restitution amount of \$473.72.

The trial court accepted Cummings's *Alford* plea, sentenced him to 120 days of imprisonment, suspended that sentence, and then ordered Cummings to pay \$473.72 in restitution, \$1032.50 in courts costs and attorneys' fees, and a monthly probation supervision fee of \$40 a month. The trial court also ordered Cummings to be placed on 24 months of supervised probation and orally stated that Cummings's unsupervised probation would begin "[o]nce all the monies are paid, including the restitution." The court's written judgment indicated that Cummings would transition to unsupervised probation "once in full compliance."

Cummings filed a *pro se* notice of appeal from the trial court's judgment.

Analysis

I. Defects in the Notice of Appeal

We first address Cummings's *pro se* notice of appeal and accompanying petition for a writ of certiorari. Cummings acknowledges that he violated Rule 4 of the North Carolina Rules of Appellate Procedure by failing to indicate the court to which the appeal is taken and by failing to serve the State with a copy of the notice.

Unlike the failure to timely *file* a notice of appeal, which is a jurisdictional defect compelling dismissal, this Court has held that failure to timely *serve* a notice of appeal is not a jurisdictional defect. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010). Likewise, the failure to properly designate the court to which the appeal is taken is not a jurisdictional defect. *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014).

Thus, for both of these deficiencies, the defect “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). Here, the State has not shown that it was misled by the notice of appeal or prejudiced by the failure to be properly served with the notice when it was filed. Accordingly, we hold that these defects do not deprive this Court of appellate jurisdiction.

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Cummings also asserts that he may not have a right to appeal under N.C. Gen. Stat. § 15A-1444 because the issues raised in this appeal do not fall squarely within any of the permissible statutory grounds for an appeal as of right. Because, as explained below, Cummings has meritorious arguments, we exercise our discretion to issue a writ of certiorari to ensure we have jurisdiction to hear this appeal. N.C. R. App. P. 21(a)(1).

II. Length of Probation

Cummings first argues that the terms of his probation are erroneous because the trial court imposed a probationary period that was not supported by the court's findings. The State concedes that the trial court erred, and we agree.

Under N.C. Gen. Stat. § 15A-1343.2(d), “a defendant who is sentenced to community punishment for a misdemeanor shall be placed on probation for no less than 6 months and no more than 18 months, unless the trial court enters specific findings that longer or shorter periods of probation are necessary.” *State v. Sale*, 232 N.C. App. 662, 664, 754 S.E.2d 474, 476 (2014). As the State concedes, the trial court imposed 24 months of supervised probation without making specific findings as to why this longer period was necessary. Thus, consistent with our precedent, we must “remand for entry of specific findings by the trial court indicating why a longer probationary period is necessary or reduction of defendant’s probation to a length of time authorized by section 15A-1343.2(d)(1).” *Id.*

III. Transition to Unsupervised Probation

Cummings next argues that the trial court erred by imposing ambiguous conditions with respect to his transition from supervised to unsupervised probation. Again, the State concedes that the trial court erred, and we agree.

Under the plea agreement, Cummings was to begin his unsupervised probation period “[o]nce restitution is paid.” But at his sentencing hearing, the trial court orally ordered that his unsupervised probation period would begin “[o]nce *all* the monies are paid, *including* the restitution.” In addition to restitution, the court also ordered Cummings to pay a sizable amount of court costs and attorneys’ fees. Then, in the trial court’s written judgment, the court ordered that Cummings would be transferred to unsupervised probation “once in full compliance,” leaving some ambiguity as to whether the court accepted the plea agreement, and whether the written order is consistent with both the plea agreement and the court’s oral pronouncement.

As the State concedes, this Court’s precedent requires us to remand when this sort of inconsistency or ambiguity is apparent in the judgment. *State v. Ross*, 273 N.C. 498, 503, 160 S.E.2d 465, 468 (1968). Accordingly, we vacate and remand for resentencing.

We close by noting that this case appears to be another example of why the law ordinarily expects litigants to inform the trial court of errors at the time they occur, rather than waiting to assert those issues on appeal. The parties agree that there is

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no indication that the trial court intended to impose a probationary term without the required findings, or to depart from the terms of the parties' plea agreement. It is likely that, had either Cummings or the State pointed out these issues at sentencing, the court would have addressed them at the time, eliminating the need for a costly appeal. Nevertheless, because we agree with the parties that these errors require correction under controlling precedent from this Court, we vacate and remand for resentencing.

Conclusion

We vacate the trial court's judgment and remand for resentencing.

VACATED AND REMANDED.

Judges BERGER and BROOK concur.

Report per Rule 30(e).