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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-982

Filed: 15 September 2020

Cumberland County, No. 16 CRS 57973

STATE OF NORTH CAROLINA

v.

DIRK ALVIN JIMMISON

Appeal by defendant from judgment entered 1 July 2019 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Stephen G. Driggers for defendant-appellant.

TYSON, Judge.

Dirk Alvin Jimmison (“Defendant”) appeals from the trial court’s revocation of his probation and activation of his suspended sentence. We dismiss his appeal.

I. Background

Defendant and his female friend engaged in an altercation. Defendant stole the female’s car in June 2016. Defendant was charged with common law robbery,

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felony larceny of a vehicle, possession of a stolen vehicle, unauthorized use of a motor vehicle, and assault on a female.

Pursuant to a plea arrangement, Defendant pled guilty to one count of unauthorized use of a motor vehicle and one count of assault on a female on 4 October 2018. Defendant was sentenced to 45 days for the conviction of unauthorized use of a motor vehicle. That judgment credits 119 days for pretrial confinement.

Defendant received a 75-day sentence for the assault on a female conviction. The sentence was suspended, and he was placed on supervised probation for 12 months. The assault judgment reflects no pretrial confinement credit. Defendant was sentenced on separate judgments for each conviction. The sentence for assault on a female was to be served consecutively to the sentence for unauthorized use of a motor vehicle.

Defendant's probation officer filed violation reports alleging Defendant had violated the terms of his probation by failing to report and by absconding supervision on 18 December 2018 and 26 April 2019. Defendant was arrested and served with these violation reports on 25 June 2019.

Defendant appeared before the trial court on 1 July 2019. He waived his right to counsel and represented himself at the probation violation hearing. Defendant admitted he had violated the terms of his probation as alleged in the 18 December

2018 report. Defendant claimed he did not understand that he was on probation and asserted he was entitled to 120 days of pretrial confinement credit.

The trial court revoked Defendant's term of probation and activated his suspended assault sentence of 75 days. The court's judgment notes 11 days of credit for pretrial confinement. Defendant immediately entered notice of appeal. Both parties acknowledge Defendant served the remaining 64 days of his sentence and had been released from custody before briefs were filed with this Court.

II. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2019).

III. Issue

Defendant asserts consecutive sentences are considered as one sentence for the purpose of receiving credit for pretrial confinement. He argues the trial court erred by awarding him only 11 days of pretrial confinement credit where he was entitled to 85 days.

IV. Analysis

N.C. Gen. Stat. § 15-196.1 (2019) provides, "credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing."

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In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment for more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit.

N.C. Gen. Stat. § 15-196.2 (2019).

Our statutes require the excess days Defendant awaited his trial and eventual plea to unauthorized use of a motor vehicle and assault on a female, should be “considered as one sentence for the purpose of providing credit.” *Id.* Defendant’s “sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, . . . as a result of the charge that culminated in the sentence or the incident from which the charge arose.” N.C. Gen. Stat. § 15-196.1.

The record Defendant filed on appeal does not reflect the full basis for the trial court’s calculation of 119 days of pretrial confinement allocated to the original unauthorized use of a motor vehicle judgment of 45 days. Our review of the record shows Defendant may have been entitled to some number of days of pretrial confinement credit exceeding the 11 days noted by the trial court upon activation of the suspended sentence in the assault judgment.

Generally, where the trial court errs by denying defendant proper pretrial confinement credit against his sentence, we would “reverse and remand for

resentencing with appropriate credit.” *State v. Lutz*, 177 N.C. App. 140, 144, 628 S.E.2d 34, 36 (2006).

A. Mootness

The State asserts Defendant’s appeal is moot and argues it should be dismissed. The State posits Defendant completed his activated sentence, was released from custody, and the issue he raises is no longer justiciable and is moot.

If a defendant has already served the sentence he complains of, this Court has held that issue is moot. “Generally, this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist. Once a defendant is released from custody, the subject matter of [that] assignment of error has ceased to exist and the issue is moot.” *State v. Stover*, 200 N.C. App. 506, 509, 685 S.E.2d 127, 130 (2009) (alteration in original) (quotation marks and citations omitted).

In *Stover*, the defendant argued his four months of special probation exceeded the statutory limit. *Id.* By the time this Court heard his appeal, the defendant had already served his four months of special probation and did not assert any collateral adverse legal consequences, which may result from the service of his sentence. *Id.* This Court held the issue of whether the defendant’s active sentence of four months exceeded the statutory limit was moot. *Id.* at 510, 685 S.E.2d at 131.

In criminal cases where the defendant has completed his sentence, an “appellate court decision would presumably have no effect on the punishment already

carried out, and the appeal would, pursuant to the general rule, appear to be moot.”

In re A.K., 360 N.C. 449, 453, 628 S.E.2d 753, 756 (2006).

B. Collateral Legal Consequences

Our appellate courts have also recognized “the continued existence of the judgment itself may result in collateral legal consequences for the appellant” in certain instances. *Id.* at 452, 628 S.E.2d at 755. Criminal convictions can result in “adverse consequences for the individual, including loss of citizenship rights, impeachment if called as a witness, and enhancement of sentencing if convicted of another crime.” *Id.* at 453, 628 S.E.2d at 756.

In *State v. Posey*, 255 N.C. App. 132, 134, 804 S.E.2d 580, 581 (2017), the defendant asserted he would “suffer collateral consequences as a result of the trial court’s alleged error in the event he is subsequently convicted of a new crime.” The defendant in *Posey* relied upon N.C. Gen. Stat. § 15A-1340.16(d)(12a).

This statute provides that, for sentencing purposes, an aggravating factor is found where “[t]he defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence.” N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2019).

Posey is relevant to the present case. The defendant in *Posey* argued, as Defendant does here, that “a result of the trial court’s alleged error in revoking

Defendant's probation is that Defendant may receive an enhanced sentence if he is ever convicted of a subsequent offense." *Posey*, 255 N.C. App. at 134, 804 S.E.2d at 581.

This Court held the defendant's argument was "misplaced" because he had made "no argument that the trial court had erred in finding him in willful violation of his probation, the factor that triggers N.C. Gen. Stat. § 15A-1340.16(d)(12a)." *Id.*

Here, Defendant also asserts he could potentially suffer future collateral legal consequence if convicted of another offense. A sentencing court could consider Defendant's willful violation of the conditions of his probation as an aggravating factor. *See* N.C. Gen. Stat. § 15A-1340.16(12a). At the hearing on the probation violation, Defendant admitted he had willfully violated the terms of his probation. This potential consequence has no bearing on alleged error in the calculation of credit for his pretrial confinement.

Defendant maintains he will suffer the collateral legal consequence of exacerbating his "emotional volatility." Defendant asserts being upset from having served unnecessary days in custody because the trial court did not credit additional days against his activated sentence. No court has recognized this as a "collateral legal consequence." We decline to do so.

For the first time in his reply brief, Defendant attempts to raise the possibility of future impeachment under Rule 609(b) of the Rules of Evidence as a "collateral

legal consequence.” *See* N.C. Gen. Stat. § 8C-1, Rule 609(b) (2019). Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, if a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief. *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015).

Defendant’s argument that error in calculating pretrial confinement causes a “collateral legal consequence” with respect to potential impeachment under Evidence Rule 609 is untimely and has been abandoned.

V. Conclusion

Presuming, without deciding, Defendant’s pretrial confinement credit was calculated in error, his issue on appeal is no longer justiciable. Defendant has served his sentence, was released from custody, and his appeal is moot. He has not shown any future collateral legal consequence from this otherwise nonjusticiable issue to warrant review. His appeal is dismissed. *It is so ordered.*

DISMISSED.

Judges HAMPSON and BROOK concur.

Report per Rule 30(e).