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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-195

No. COA21-393

Filed 15 March 2022

Catawba County, Nos. 11 CRS 5845, 5847

STATE OF NORTH CAROLINA

v.

HOLDEN SCOTT SWANSON

Appeal by defendant from judgments entered 11 February 2021 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 9 February 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie C. Lloyd, for the State.

Edward Eldred, for defendant.

DIETZ, Judge.

¶ 1 Defendant Holden Scott Swanson appeals the trial court's judgment revoking his probation. The judgment originally imposing that probation was one of multiple judgments entered against him for drug-related offenses a decade ago. Swanson received substantial prison time for some of those other convictions.

¶ 2 Swanson argues that, because the judgment imposing probation did not

indicate that the probationary period would run consecutively with his active sentences from the other judgments, his probationary period expired years ago and the court lacked jurisdiction to revoke his probation.

¶ 3 The State concedes error on this issue and, as explained below, we agree. We therefore vacate the probation revocation judgment.

Facts and Procedural History

¶ 4 In 2011, the State charged Swanson with multiple drug-related offenses. In 2012, Swanson pleaded guilty to ten of the charges. The State dismissed the remaining charges, and the trial court entered four judgments. The court sentenced Swanson to active sentences for the first two judgments but suspended the sentences for the remaining two judgments and, in each, imposed 30 months of supervised probation. In the first of those judgments imposing probation, File No. 11 CRS 5847, the trial court checked a box on the judgment form indicating that the "period of probation shall begin when the defendant is released from incarceration" on his active prison sentences. But in the second, File No. 11 CRS 5845, the trial court did not check that box on the judgment form.

¶ 5 Swanson began serving probation after completing his active sentences. In 2019, the State filed probation violation reports with respect to both of the judgments imposing supervised probation. The trial court imposed two 90-day periods of confinement in response to the violations. In 2020, the State again filed probation

violation reports. After a hearing in early 2021, the trial court revoked Swanson's probation and activated his sentences in both File No. 11 CRS 5847 and File No. 11 CRS 5845.

¶ 6 Swanson timely filed a *pro se* notice of appeal using a prison form intended for a different purpose. In it, Swanson indicated that he was seeking "to appeal my probation being revoked" and listed the applicable file numbers for the two judgments he sought to appeal. Although Swanson timely filed this document, he did not serve it on the State, the document did not designate the court to which he was appealing, and Swanson did not sign the document.

Analysis

I. Motion to dismiss appeal

¶ 7 The State moved to dismiss this appeal on the ground that the notice of appeal was insufficient to confer appellate jurisdiction on this Court.

¶ 8 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 and to sign the notice of appeal is not a jurisdictional defect. *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014).

¶ 9 Thus, for all of these procedural 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 asserted that it was misled by the procedural defects in the notice of appeal or prejudiced by the failure to be properly served with the notice when it was filed. Thus, under this precedent, the defects in the notice of appeal should not result in dismissal.

¶ 10 But, as Swanson acknowledges, our case law has not consistently followed this precedent. In other cases, this Court has held that the requirements to serve the opposing party, designate the court to which the appeal is taken, and sign the notice of appeal are "jurisdictional" requirements. *See*, *e.g.*, *State v. Thorne*, 2021-NCCOA-534, ¶ 10. Swanson thus petitioned for a writ of certiorari, which the State does not oppose, to ensure this Court has jurisdiction to address his appeal. Because, as explained below, Swanson raises a meritorious argument, we allow the petition and issue a writ of certiorari in our discretion to ensure we have proper jurisdiction to address the merits of Swanson's appeal. *See* N.C. R. App. P. 21.

II. Probation revocation

¶ 11 Swanson argues that the trial court lacked subject matter jurisdiction to revoke his probation in File No. 11 CRS 5845.

¶ 12 We review a challenge to a trial court's subject matter jurisdiction over a probation revocation hearing *de novo*. *State v. Tincher,* 266 N.C. App. 393, 395, 831

S.E.2d 859, 861 (2019). As is the case for all subject matter jurisdiction issues, we review the issue on appeal without regard to whether it was raised and preserved in the trial court. *Id.*

¶ 13 Under N.C. Gen. Stat. § 15A-1346, a period of probation ordinarily commences on the day it is imposed and runs concurrently with other periods of imprisonment, probation, or parole:

> (a) Commencement of Probation. Except as provided in subsection (b), *a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment* to which the defendant is subject during that period.

N.C. Gen. Stat. § 15A-1346(a) (emphasis added).

¶ 14 Subsection (b) of this statute permits the trial court to order a period of probation to run consecutively in certain circumstances:

> Consecutive and Concurrent Sentences. If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, *the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.*

N.C. Gen. Stat. § 15A-1346(b) (emphasis added).

¶ 15 In *Tincher*, the trial court imposed active sentences and probationary periods in two separate judgments. On the standard judgment form for one of those

judgments, the trial court did not check the box indicating that the period of probation would run consecutively with the defendant's active sentence in the other judgment. The State argued that this was an obvious clerical error given the parties' plea agreement and the fact that the trial court checked this box on the other judgment form. *Tincher*, 266 N.C. App. at 397, 831 S.E.2d at 862–63.

¶ 16 We rejected that argument, holding that, if a "correction of a clerical error affects the substantive rights of a party or if the correction corrects a substantive error, the Court is without authority to make a change." *Id.* We therefore vacated the challenged revocation, reasoning that the default statutory rule, imposing a concurrent period of probation, applied and the Court lacked authority to order the judgment to be changed as a clerical error. *Id.*

¶ 17 The facts in this case are indistinguishable from *Tincher*. As in *Tincher*, the trial court did not check the necessary box on the standard judgment form in File No. 11 CRS 5845 to indicate that the period of probation would run consecutively. Accordingly, as the State concedes, the trial court lacked jurisdiction to revoke Swanson's probation under that judgment. We therefore vacate the judgment revoking Swanson's probation in File No. 11 CRS 5845.

VACATED.

Judges MURPHY and JACKSON concur.

Report per Rule 30(e).