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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA21-693-2

Filed 21 February 2023

Davidson County, Nos. 20 CRS 50976, 21 CRS 681

STATE OF NORTH CAROLINA

v.

JONATHAN DANIEL ORE.

Appeal by defendant from judgments entered 22 June 2021 by Judge V Bradford Long in Davidson County Superior Court. This case was originally heard in the Court of Appeals 11 May 2022. *State v. Ore*, 283 N.C. App. 524, 2022-NCCOA-380, 874 S.E.2d 222 (2022). Upon remand by order from the Supreme Court of North Carolina.

Attorney General Joshua H. Stein, by Assistant Attorney General Shelby N.S. Boykin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

TYSON, Judge.

The Supreme Court of North Carolina vacated in part this Court’s prior holding that this Court “is without [statutory] authority to review, either by right or by

certiorari, the trial court’s modification of defendant’s probation.” *Ore*, 283 N.C. App. at 528, 2022-NCCOA-380, ¶ 14, 874 S.E.2d at 226 (citation omitted). The Supreme Court remanded this case for this Court to reconsider Defendant’s petition for writ of certiorari in light of “*State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), *State v. Thomsen*, 369 N.C. 22, 789 S.E.2d 639 (2016), *State v. Ledbetter*, 371 N.C. 192, 814 S.E.2d 39 (2018), and *State v. Killette*, 2022-NCSC-80[.]” The Supreme Court left the remaining portion of this Court’s opinion undisturbed, which reviewed and affirmed the trial court’s order holding Defendant in contempt.

Jonathan Daniel Ore (“Defendant”) petitions for appellate review of orders modifying his probation and holding him in contempt. Defendant has no statutory right to appeal the waiver of counsel or the modification of his probation. Defendant acknowledges the statute and has filed a petition for writ of certiorari (“PWC”). In the exercise of our discretion, Defendant’s PWC seeking review of the waiver of counsel and the modification of his probation is without merit and is denied. His purported appeal is dismissed.

I. Background

From this Court’s prior opinion: Defendant pleaded guilty to possession of methamphetamine on 3 November 2020. He was sentenced to serve a term of 8 to 19 months imprisonment, which was suspended, and he was placed on supervised probation for twelve months. Defendant’s suspension of sentence and probation judgment included, among other conditions, that he: (1) obtain a substance abuse

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assessment; (2) complete any recommended treatment; (3) if unemployed, complete the Treatment Accountability for Safer Communities (“TASC”) program; (4) submit to drug testing; and, (5) not engage in further criminal activity.

On 27 May 2021, N.C. Probation Officer Kierra Mobley (“Officer Mobley”) filed a probation violation report alleging Defendant had willfully violated the conditions of his probation by: (1) testing positive three times for controlled substances on 18 March 2021, 19 April 2021, and 27 May 2021; (2) failing to twice report to his probation officer on 25 May 2021 and 26 May 2021; (3) being charged with criminal trespass on 22 May 2021; and, (4) being discharged from TASC for failing to obtain a drug and alcohol assessment within 30 days of his referral.

A probation violation hearing was properly noticed for and held on 22 June 2021. At the hearing, Defendant repeatedly indicated he desired to represent himself in open court. The State requested of the trial court to conduct a colloquy into Defendant’s knowing and voluntary waiver of counsel prior to accepting Defendant’s request. The trial court inquired into Defendant’s request and informed him of potential adverse consequences of proceeding unrepresented. Upon Defendant’s express acknowledgement, after being so advised, the court accepted his waiver of counsel. Defendant signed a written waiver of all assistance of counsel in open court.

Officer Mobley was called and testified about Defendant’s multiple violations asserted in the 27 May 2021 probation violation report. Defendant did not cross-examine Officer Mobley, testify, or offer any evidence. The State recommended

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Defendant's probation be modified and extended for 6 months to allow him to undergo substance abuse treatment with the Drug and Alcohol Recovery Treatment Center ("DART Center").

The trial court agreed with the State's recommendation and ordered Defendant to be held in custody until he could enter the DART Center. Defendant stated he did not believe he was going to jail.

The trial court began to enter its findings when Defendant blurted out: "just activate my damn sentence. That's what you done." The trial court explained to Defendant that he would only be held in custody until he could enter and receive DART therapy. Defendant responded, "[t]hat's crazy. I mean, y'all just tricked me all the way. Dang. Be honest. Why don't you f--king be honest with me some Godd--n time. I mean, y'all--y'all are con artist (sic). Y'all con people." The trial court informed Defendant if he said "one more word" the court would "give [him] 30 days for direct criminal contempt."

The trial court found the State's evidence supported the violations, as alleged in the 27 May 2021 probation violation report, and concluded Defendant was in knowing and willful violation of supervised probation without justifiable excuse. The trial court extended Defendant's probation term for 6 months and ordered him to complete the "DART drug/alcohol treatment program maintained by the North Carolina Department of Corrections." The trial court also ordered Defendant to remain in custody until he could attend DART.

The trial court specifically clarified it would only allow Defendant to remain in custody for a maximum of two weeks, while waiting for an opening for DART. If no opening became available within two weeks, the trial court would revisit treatment options. As Defendant was exiting but still inside the courtroom, he stated: “Come on, ma’am. You tricked me, Mobley. Why’d you do me like this? Y’all start all this sh-- all over again.”

The trial court instructed the bailiffs to bring Defendant back before the court and began contempt proceedings. The trial court found Defendant to be in direct criminal contempt and ordered him to serve an active sentence of 30 days. The trial court made appellate entries for the contempt charge.

II. Jurisdiction

Defendant has no constitutional or common law right to appeal. “Similar to federal procedure, a North Carolina criminal defendant’s right to appeal a conviction is provided entirely by statute.” *State v. Berryman*, 360 N.C. 209, 214, 624 S.E.2d 350, 354 (2006) (citations omitted). Defendant entered no purported notice of appeal.

N.C. Gen. Stat. § 15A-1347(a) provides: “When a superior court judge as a result of a finding of a violation of probation, *activates a sentence or imposes special probation*, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant *may* appeal under G.S. 7A-27.” N.C. Gen. Stat. § 15A-1347(a) (2021) (emphasis supplied).

Defendant’s initial term of probation was modified and extended after

competent evidence was entered to support the findings and conclusions he had committed multiple and willful violations. His sentence was not activated, nor did the court impose a special condition of probation. *Id.* “[A] defendant does not have the right to appeal from an order that merely modifies the terms of probation where the [d]efendant’s sentence was neither activated nor was it modified to ‘special probation.’” *State v. Romero*, 228 N.C. App. 348, 350, 745 S.E.2d 364, 366 (2013) (citation and first quotation marks omitted). Defendant has no right to appeal the modification and extension of his probation unless one of the two statutory conditions set out above is met. *Id.*

Recognizing he has no right to appeal, Defendant petitioned for a writ of certiorari to purport to invoke this Court’s appellate jurisdiction, without a showing of merit or prejudice. *State v. Ricks*, 378 N.C. 737, 738, 862 S.E.2d 835, 837, 2021-NCSC-116, ¶ 1 (2021) (“[A]n appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing.”)

“*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Rouson*, 226 N.C. App. 562, 564, 741 S.E.2d 470, 471 (2013) (citing *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)) “A petition for the writ [of certiorari] must show merit or that [prejudicial and reversible] error was probably committed below.” *Id.* at 563-64, S.E.2d at 471.

Defendant’s PWC shows no merit or prejudice to support the issuance of his

requested discretionary writ. *See Ricks*, 378 N.C. at 738, 862 S.E.2d at 837, 2021-NCSC-116, ¶ 1 (“[A]n appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing.”). After review, and in the exercise of our discretion, we deny Defendant’s PWC. *See Stubbs*, 368 N.C. at 44, 770 S.E.2d at 76; *State v. Thomsen*, 369 N.C. at 26, 789 S.E.2d at 642; *State v. Ledbetter*, 371 N.C. at 197, 814 S.E.2d at 43; *State v. Killette*, 381 N.C. at 691, 2022-NCSC-80, ¶ 16, 873 S.E.2d at 320.

III. Conclusion

In the exercise of our discretion, Defendant’s PWC to review the trial court’s order modifying and extending his probation violation is wholly without merit or prejudice. Defendant’s PWC is denied, and his purported appeal is dismissed.

The trial court’s finding and this Court’s affirmation of Defendant’s willful conduct violated the direct criminal contempt remain undisturbed. N.C. Gen. Stat. § 5A-11 (2021). *It is so ordered.*

DISMISSED.

Judges DILLON and RIGGS concur.

Report per Rule 30(e).