No. COA 17-743 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Wake County

 )

TYLER BRYANT PEED )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUE PRESENTED**

I. Did the trial court lack jurisdiction to revoke Mr. Peed’s probation where the 12-month extension obtained on 17 February 2016 was based on Mr. Peed’s consent but was not for a purpose authorized by statute?

**STATEMENT OF THE CASE**

Tyler Bryant Peed was convicted of larceny from the person on 21 August 2013 in the District Court in Wake County. (R pp 1, 15-16) The Honorable Judge Vince Rozier sentenced Mr. Peed to a term of 6 to 17 months of imprisonment, suspended for 30 months of supervised probation. (R pp 1, 15) On 4 February 2014, his probation was modified, but not extended, following a violation report. (R pp 1, 26-27)

On 17 February 2016,[[1]](#footnote-1) shortly before Mr. Peed’s probation was set to expire, the Honorable Judge Donald Stephens of the Superior Court in Wake County entered an order extending Mr. Peed’s probation for 12 months. (R pp 1, 28-29) This order specified that Mr. Peed’s probation was being extended for 12 months “to complete Substance Abuse Treatment at Southlight,” and that probation would “[t]erminate when treatment is completed.” (R pp 1, 29)

On 2 June 2016, Mr. Peed’s probation officer filed a violation report alleging that Mr. Peed had violated the terms of his probation by absconding, by using or possessing marijuana, and by failing to complete substance abuse treatment. (R pp 2, 30-32) A hearing was held concerning the potential revocation of Mr. Peed’s probation at the 12 December 2016 Session of the Superior Court in Wake County, before then-Superior Court Judge Michael R. Morgan, Judge Presiding. (R p 2; T p 1) At this hearing, Mr. Peed moved to dismiss the alleged violations because the consent-based 12-month extension was not for the purposes of paying restitution or receiving medical or psychiatric treatment. (T pp 3-4, 10-11, 15-17) The trial court denied the motion to dismiss orally and in a written order dated 12 December 2016. (R p 33; T pp 15-18)

After the denial of his motion to dismiss, Mr. Peed admitted the willful violations alleged in the June 2016 violation report. (R pp 34-35; T pp 18-19) Mr. Peed entered oral notice of appeal in open court. (R pp 36-37; T pp 20-21)

**GROUNDS FOR APPELLATE REVIEW**

Pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1347(a), Mr. Peed appeals from the 12 December 2016 judgment revoking his probation.

**STATEMENT OF THE FACTS**

Mr. Peed was originally convicted of larceny from the person on 21 August 2013 and his sentence was suspended for 30 months of supervised probation. (R pp 15-16) On 17 February 2016, four days before Mr. Peed’s probation was set to expire, the Superior Court in Wake County entered an order extending his probation for 12 months. (R pp 28-29)

The February 2016 extension was based on Mr. Peed’s consent, rather than for “good cause” or a proven violation. On the judgment form, the box indicating that probation was extended for “good case shown, pursuant to G.S. 15A-1344(d)” was left unchecked.[[2]](#footnote-2) (R p 29) Instead, the trial court checked the box to specify that the extension was based on Mr. Peed’s “consent, pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d).” (R pp 1, 29)

Tracing the requirements of N.C. Gen. Stat. §§ 15A-1342(a) and 1343.2(d), the pre-printed portion of the February 2016 extension order provided that an extension under either statute “must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation.” (R p 29) However, the extension order specified that Mr. Peed’s probation was being extended “to complete Substance Abuse Treatment at Southlight,” and that probation would “[t]erminate when treatment is completed.” (R pp 1, 29) It did not state that probation was extended to allow Mr. Peed to complete or continue (1) a program of restitution, or (2) a program of court-ordered medical or psychiatric treatment. (R pp 28-29) Neither medical nor psychiatric treatment had been ordered, and regarding restitution, the February 2016 extension order provided that his “Balance/Obligation Due” was zero dollars. (R pp 15-18, 22-23, 26-27, 28-29) The state later noted that the restitution ordered in the original 2013 judgment had already been paid. (T p 18)

On 2 or 3 June 2016, more than three months after his probation would originally have ended, Mr. Peed’s probation officer filed a violation report alleging that Mr. Peed had violated the terms of his probation by absconding, by using or possessing marijuana, and by failing to complete substance abuse treatment. (R pp 2, 30-31) A hearing was held concerning the potential revocation of Mr. Peed’s probation at the 12 December 2016 Session of the Superior Court in Wake County before then-Judge Morgan. (R p 2; T p 1)

At this hearing, Mr. Peed moved to dismiss the alleged violations because, *inter alia*, the 12-month extension was not for the purposes of paying restitution or receiving medical or psychiatric treatment. (T pp 3-4, 10-11, 15-17) After discussing a separate issue regarding notice, Mr. Peed argued:

[T]his modification [was] made with the defendant’s consent . . . and as we look in that statute . . . the extension may be done for the purposes of allowing the defendant to complete a program of restitution, which is not applicable here, or continue medical or psychiatric treatment ordered as a condition of probation.

This modification here is for the defendant to obtain a substance abuse assessment and to complete treatment that is being imposed as part of the delegated authority. . . . Therefore, had this modification been made, it would not have been made under the parameters of that statute. With that in mind as well, Judge, I ask this Court [to] find this was not a valid modification of probation, therefore his probation should not have been extended the twelve months and therefore the Court does not have jurisdiction to hear the violations that are alleged today . . . .

(T pp 10-11) In response, the state argued that probation could be extended under the governing statutes “up to five years for any purpose and if the probation officer feels the defendant needs a substance abuse assessment and he signs agreeing to that, that’s a valid reason to extend it.” (T p 15)

After reviewing the extension order and listening to the arguments of counsel, the trial court observed that the February 2016 order “purports to show that there is the consent of the state and . . . Mr. Peed . . . to have his probation modified under conditions that were acceptable to him and the state . . . .” (T p 13) It then found that Mr. Peed “ha[d] agreed to terms that are within the purview of both the probation officer and the probationer” and concluded that the extension reflected “a valid modification” of Mr. Peed’s probation. (T p 15) For this reason, the trial court orally denied the motion to dismiss and entered a corresponding written order dated 12 December 2016. (R p 33; T pp 15-18)

Following the denial of his motion to dismiss the probation violations, Mr. Peed admitted the willful violations alleged in the June 2016 violation report. (R pp 34-35; T pp 18-19) Mr. Peed entered oral notice of appeal in open court. (R pp 36-37; T pp 20-21)

**STANDARD OF REVIEW**

“An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.” *State v. McCulloch*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 756 S.E.2d 361, 365 (2014) (quoting *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (brackets omitted)). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

**ARGUMENT**

**I. The trial court lacked jurisdiction to revoke Mr. Peed’s probation where the 12-month extension obtained on 17 February 2016 was based on Mr. Peed’s consent but was not for a purpose authorized by statute.**

Mr. Peed’s 30-month probationary sentence, originally imposed on 21 August 2013, was set to expire on 21 February 2016. However, just four days before the termination date, the Superior Court in Wake County entered an order on 17 February extending his probation for an additional 12 months. (R pp 28-29) Because the extension was based on Mr. Peed’s consent, it was permissible by statute only “(i) for the purpose of allowing [Mr. Peed] to complete a program of restitution, or (ii) to allow [Mr. Peed] to continue medical or psychiatric treatment ordered as a condition of the probation.” N.C. Gen. Stat. §§ 15A-1342(a); *accord* N.C. Gen. Stat. § 15A-1343.2(d) (“The court may with the consent of the offender extend the original period of the probation if necessary to complete a program of restitution or to complete medical or psychiatric treatment ordered as a condition of probation.”). However, the February 2016 extension was based on Mr. Peed’s consent and was for the articulated purpose of “complet[ing] Substance Abuse Treatment at Southlight.” (R pp 28-29) Thus, Mr. Peed’s probation was extended for a reason not authorized by our General Assembly.

 Because the extension was invalid as a matter of law, Mr. Peed’s probation should have terminated on 21 February 2016. *See, e.g.*, *State v. Gorman*, 221 N.C. App. 330, 335, 727 S.E.2d 731, 734 (2012) (holding that “the orders . . . extending defendant’s . . . probation . . . lack statutory authority and are, therefore, void” (citation omitted)); *State v. Craig*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 798 S.E.2d 438, 2017 N.C. App. LEXIS 287, \*11 (2017) (unpublished) (“Where a defendant’s probation is extended in violation of the relevant statutes, the extension is invalid.”). For that reason, the trial court lacked jurisdiction to revoke his probation in December 2016. *See* *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (“Except as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term.” (citation omitted)). Accordingly, this Court should vacate the trial court’s 12 December 2016 order revoking Mr. Peed’s probation.[[3]](#footnote-3) *See, e.g.*, *Satanek*, 190 N.C. App. at 657, 660 S.E.2d at 626 (“Since, the trial court lacked subject matter jurisdiction the judgment revoking defendant’s probation must be vacated.”).

1. **The 17 February 2016 extension of Mr. Peed’s probation was invalid because it was not for a purpose authorized by the General Assembly.**

Under the controlling statutory framework provided by our General Assembly, there are three ways a sentence of probation can be extended. First, a sentence can be extended, pursuant to N.C. Gen. Stat. § 15A-1345, for a proven willful violation. *See* N.C. Gen. Stat. § 15A-1345(e) (providing the steps the court must take “[b]efore revoking or extending probation” for an alleged violation). Second, a sentence can be extended, pursuant to N.C. Gen. Stat. § 15A-1344, for “good cause shown.” *See* N.C. Gen. Stat. § 15A-1344(d) (“the court may after notice and hearing and for good cause shown extend the period of probation . . . and may modify the conditions of probation”). Third, the trial court may extend probation with the consent of the probationer, but only to allow her to complete a program of treatment or restitution.

Two different statutes provide that probation may be extended for these purposes based on the probationer’s consent. N.C. Gen. Stat. § 15A-1342(a) provides in relevant part:

Extension. – In addition to G.S. 15A-1344, **the court with the consent of the defendant may extend the period of probation beyond the original period (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation.**

The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the original period of probation. Any probationary judgment form provided to a defendant on supervised probation shall state that probation may be extended pursuant to this subsection.

N.C. Gen. Stat. § 15A-1342(a) (emphasis and paragraph break added). Similarly, N.C. Gen. Stat. § 15A-1343.2(d) provides in relevant part:

Extension. – **The court may with the consent of the offender extend the original period of the probation if necessary to complete a program of restitution or to complete medical or psychiatric treatment ordered as a condition of probation.** This extension may be for no more than three years, and may only be ordered in the last six months of the original period of probation.

N.C. Gen. Stat. § 1343.2(d) (emphasis added). Our General Assembly has thus twice provided within Chapter 15A, Article 82 that probation may be extended by consent, but only for the purpose of (1) completing a program of restitution, or (2) completing previously-ordered medical or psychiatric treatment. “Where a defendant’s probation is extended in violation of the relevant statutes, the extension is invalid.” *Craig*, \_\_\_ N.C. App. at \_\_\_, 798 S.E.2d 438, 2017 N.C. App. LEXIS 287 at \*11.

 Here, the trial court extended Mr. Peed’s probation based on his consent. On the judgment form, the box for “good cause shown” was left unchecked, and the court marked instead the box showing that probation was extended based on Mr. Peed’s consent “pursuant to G.S. 15A-1342(a) or G.S. 15A-1343.2(d).” (R p 29) The pre-printed portions of that form put the trial court on notice of the statutory limitations by specifying that an extension under either statute “must be for the purpose of allowing the defendant to complete a program of restitution or continue medical or psychiatric treatment ordered as a condition of probation.” (R p 29) And later, even the judge who revoked Mr. Peed’s probation noted that the 17 February 2016 extension order was based on “the consent of the state and the defendant, the probationer here, Mr. Peed, to have his probation to be modified . . . .” (T p 13)

 However, Mr. Peed’s probation was extended “for 12 Months to complete Substance Abuse Treatment,” and not to complete restitution, medical treatment, or psychiatric treatment—the only purposes authorized by statute. (R p 29)[[4]](#footnote-4) Neither medical nor psychiatric treatment had been ordered as a condition of probation. (R pp 15-18, 22-23, 26-27) And Mr. Peed paid his restitution: The 17 February 2016 judgment extending his probation included a “Balance/Obligation Due” of zero dollars; defense counsel argued that “restitution . . . is not applicable here;” and counsel for the state informed the court that “restitution has been paid.” (R p 28; T pp 10, 18) Moreover, the June 2016 violation report did not allege that he had violated probation by failing to pay restitution, or by refusing to attend court-ordered medical or psychiatric treatment. (R pp 30-32) Accordingly, Mr. Peed’s probation was extended for a purpose not authorized by the controlling statutory framework.

1. **Because the extension was not authorized by statute, Mr. Peed’s probation concluded on 21 February 2016 and the trial court lacked jurisdiction to revoke it in December.**

“Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.” *Gorman*, 221 N.C. App. at 333, 727 S.E.2d at 733 (quoting *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295 (1987)); *cf. id.*, 727 S.E.2d at 733 (“It is well settled that a court’s jurisdiction to review a probationer’s compliance with the terms of his probation is limited by statute.” (citation omitted)). For that reason, “[e]xcept as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant’s probation after the expiration of the probationary term.” *Reinhardt*, 183 N.C. App. at 292, 644 S.E.2d at 27 (citation omitted). And where a trial court lacks jurisdiction to revoke probation, any order it enters doing so is void and should be vacated on appeal. *See, e.g.*, *Satanek*, 190 N.C. App. at 657, 660 S.E.2d at 626 (“Since, the trial court lacked subject matter jurisdiction the judgment revoking defendant’s probation must be vacated.”).

Here, the 17 February 2016 extension of Mr. Peed’s probation was invalid because it was (1) based on Mr. Peed’s consent, but (2) for a purpose other than those articulated in N.C. Gen. Stat. § 15A-1342(a) and N.C. Gen. Stat. § 1343.2(d). *See Gorman*, 221 N.C. App. at 335, 727 S.E.2d at 734 (holding that “the orders . . . extending defendant’s . . . probation . . . lack statutory authority and are, therefore, void” (citation omitted)); *Craig*, \_\_\_ N.C. App. at \_\_\_, 798 S.E.2d 438, 2017 N.C. App. LEXIS 287 at \*11 (“Where a defendant’s probation is extended in violation of the relevant statutes, the extension is invalid.”). As a result, Mr. Peed’s probation should have expired on 21 February 2016, well before the June 2016 violation reports that led to the revocation of his probation in December 2016. Because his probation should have ended in February 2016, the trial court lacked jurisdiction to revoke his jurisdiction in December. *See Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27. This Court should therefore vacate the 12 December 2016 order revoking Mr. Peed’s probation. *See Satanek*, 190 N.C. App. at 657, 660 S.E.2d at 626.[[5]](#footnote-5)

**CONCLUSION**

For all the foregoing reasons, Mr. Peed respectfully requests that this Court vacate the 12 December 2016 judgment revoking Mr. Peed’s probation.

Respectfully submitted this the 21st day of August, 2017.

By Electronic Submission:

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**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28**

 I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2)(B) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen point Century Schoolbook and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by the word-processing program used to prepare the brief.

This the 21st day of August, 2017.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the original Defendant-Appellant’s Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant’s Brief has been duly served upon Mr. Zachary Padget, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to zpadget@ncdoj.gov.

This the 21st day of August, 2017.

By Electronic Submission:

 Aaron Thomas Johnson

 Assistant Appellate Defender

North Carolina State Bar Number 46157

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APPENDIX

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(unpublished)

1. Page 2 of the Record on Appeal contains a typo. The extension order was dated 17 February 2016, not 2017. (R p 29) [↑](#footnote-ref-1)
2. The judgment did state a finding “that good cause has been shown to modify the original Judgment Suspending Sentence.” (R p 28) However, the box was not checked indicating that Mr. Peed had been provided notice and hearing as required by N.C. Gen. Stat. § 15A-1344(d). Similarly, there is no indication anywhere in the record that Mr. Peed received the notice and hearing required before his probation could be extended based on a showing of good cause. [↑](#footnote-ref-2)
3. Despite the fact that Mr. Peed has served his active sentence and been released, this appeal is not moot. Under N.C. Gen. Stat. § 15A-1340.16, a finding that a defendant has been found within the past ten years “in willful violation of the conditions of probation imposed pursuant to a suspended sentence” can serve as an aggravating factor. N.C. Gen. Stat. § 15A-1340.16(d)(12a). Therefore, if the 12 December 2016 judgment finding willful violations remains on his record, Mr. Peed will face these potential collateral consequences over the next several years. *See, e.g.*, *State v. Black*, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (“When the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.” (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (brackets omitted))). [↑](#footnote-ref-3)
4. Under the statutory framework, substance abuse treatment, restitution, and medical or psychiatric treatment are all listed separately as separate conditions of probation. *See* N.C. Gen. Stat. § 15A-1343(a1)(4) (substance abuse assessment, monitoring, or treatment; (b)(9) and (d) (restitution); (b1)(1) (medical or psychiatric treatment); (b2)(2) (psychiatric, psychological, or rehabilitative treatment for sex offenders). It is therefore apparent that the General Assembly did not intend for these conditions to be treated as equivalent or interchangeable. As a result, a condition requiring substance abuse treatment cannot reasonably be treated like a condition requiring medical or psychiatric treatment. [↑](#footnote-ref-4)
5. Should this Court somehow determine that the extension was for “good cause” under section 1344(d), rather than based on Mr. Peed’s consent, it would still have to vacate the judgment revoking probation because there is no indication that the extension followed sufficient notice and a hearing. *See Craig*, \_\_\_ N.C. App. at \_\_\_, 798 S.E.2d 438, 2017 N.C. App. LEXIS at \*17-19 (vacating a revocation order where probation had been improperly extended for good cause without notice and a hearing). [↑](#footnote-ref-5)