STATE V. GREENHALGH

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KENT GREENHALGH,
Defendant-Appellant.

No. 31,358

COURT OF APPEALS OF NEW MEXICO

October 17, 2013

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, Thomas J. Hynes, District Judge

COUNSEL

Gary K. King, Attorney General, James W. Grayson, Assistant Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Acting Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

RODERICK T. KENNEDY, Chief Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, TIMOTHY L. GARCIA, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Chief Judge.

{1} In this case, we hold that the State failed to carry its burden in prosecuting a probation revocation when it failed to establish that Kent Greenhalgh (Defendant) had

been placed on a parole hold that would have tolled the time within which his probation could have been revoked. Without being tolled, Defendant's sentence had expired, and the district court lost jurisdiction to act. We further explain that a "parole retake" is not a "parole revocation" so as to satisfy NMSA 1978, Section 31-20-5(B)(2) (1985, amended 2003).

{2} The State concedes that the statute requires an actual revocation of parole by the parole board, which did not occur here, to stop the running of any concurrent probation. However, it maintains that, in a situation such as presented here, it is Defendant's burden to establish a negative—that the statutory prerequisite has not been met. We decline to shift the burden of establishing statutory prerequisites from the State to the defense in the context of a probation violation. Accordingly, we reverse the district court and remand this case for discharge of Defendant, who completed his probation.

I. FACTUAL BACKGROUND AND PROCEEDINGS

{3} Defendant pled guilty in 2008, and was sentenced to two years incarceration, to be followed by a two-year term of parole and two years of probation. He was released from prison and placed on probation with his probation term to end on May 22, 2011. He was arrested on March 22, 2011, on new charges. The Department of Corrections sent notification to the San Juan County District Attorney and district court that he was in custody in Albuquerque for a probation violation. A bench warrant was issued on April 7, 2011, for his arrest in San Juan County. On April 12, the district attorney filed a motion to revoke Defendant's probation and to remand him to the Department of Corrections' custody. The warrant was served on May 19, 2011. The related booking sheet indicates that Defendant was booked into San Juan County custody on May 19, 2011.[1]

{4} There are no documents in the record that indicate in whose custody Defendant reposed from March 22 through May 19, 2011, when someone transported Defendant from Albuquerque to San Juan County, although it is not disputed that Defendant resided in the Albuquerque jail. There is also no document in the record to indicate that parole revocation proceedings were ever commenced.[2] The San Juan County booking sheet lists the "Sheriff's Office" as the arresting agency on the warrant. The gap in the record regarding Defendant's custody is the center of the problem in this case. The Department of Corrections filed a certificate of discharge on Defendant's sentence on May 20, 2011.

{5} Defendant moved to dismiss the State's motion to revoke his probation on May 25, 2011, three days past the day his sentence was to be complete and five days following his discharge by the Department of Corrections. He argued that his parole and probation had continued to run while he was in custody in Albuquerque and that the district court lacked jurisdiction to revoke his probation because it failed to commence a revocation hearing before his sentence was completed. The district court heard arguments on the motion on May 31 and June 3, 2011, without deciding the question.

{6} The question at the hearing boiled down to whether or not Defendant's parole had been revoked. If it had, the time running in his probation would have stopped, extending the time for the district court to proceed to revoke his probation. The evidence loosely showed that Defendant had been booked on a "parole retake" on May 19. The district court, however, ruled that Defendant had been in the custody of the Department of Corrections since April 19, and that the running of his sentence was tolled from that date until May 20, 2011. On June 15, 2011, the district court entered its order, holding that Defendant had violated his probation and imposing a one-year extension of his supervised probation as a result. Defendant appealed.

II. DISCUSSION

{7} The State and Defendant agree that merely being placed in custody on a "retake" does not satisfy Section 31-20-5(B)(2), which states that, having been placed on probation after being incarcerated, a defendant's probation is served subsequent to any period of parole with time on parole credited against probation, except:

> in the event that the defendant violates any condition of that parole, the parole board shall cause him to be brought before it pursuant to the provisions of [NMSA 1978,] Section 31-21-14 . . . and may make any disposition authorized pursuant to that section and, if parole is revoked, the period of parole served in the custody of a correctional facility shall not be credited as time served on probation.

Section 31-20-5(B)(2). Upon supplemental briefing, the State concedes that there was no proof that Defendant's parole was revoked as necessary to stop the time, but that "it appears that the parties and the district court assumed that Defendant's parole had been revoked." The State then argues that, because Defendant has been discharged from his sentence, this appeal is moot.

A. Defendant Completed Sentence—District Court Lost Jurisdiction

{8} All participants in the case assumed that Defendant's parole had been revoked. We regard that assumption as unsupported. The lack of any evidence of revocation in the record supports the State's concession that there was no revocation. The State argues that the district court, by finding that Section 31-20-5(B)(2) applied to the case, "implicitly found that Defendant's parole had been revoked." We need not address this argument because that section requires actual revocation, not implied or assumed revocation. Thus, the district court never gained jurisdiction to revoke Defendant's probation. In addition, even if we were to accept that the district court could assume that parole was revoked as of the date of the "parole retake" on May 19, the district court would not have had jurisdiction to revoke Defendant's probation on June 15, 2011. Since the district court found that "[D]efendant's [p]robation restarted when he was released from prison on May 20, 2011," there was at most one day's tolling of Defendant's probation. The probation revocation hearing did not occur until

approximately twenty-five days later, well beyond completion of Defendant's sentence and, therefore, the district court would not have jurisdiction.

{9} The State's argument that jurisdiction is presumed and it is Defendant who bears the burden to establish a lack of jurisdiction fails. First, it is undisputed that Defendant's sentence was over on May 22, 2011, and he had been discharged by the Department of Corrections on May 20, 2011. Second, Section 31-20-5 states that the State may not proceed to revoke a prisoner's parole unless revocation is commenced within the time of his sentence, which is only extended by time represented by a previous parole revocation. It is the burden of the party seeking the revocation to establish the tolling of time that would allow the court to take jurisdiction. The burden is not on a defendant to show a negative under such circumstances when the time is presumptively beyond the end of a person's sentence, as it was here. *Slusser v. Vantage Builders, Inc.*, 2013-NMCA-073, ¶ 6, 306 P.3d 524 ("[T]he party claiming that a statute of limitation should be tolled has the burden of alleging sufficient facts that if proven would toll the statute." (internal quotation marks and citation omitted)); *State v. Thomas*, 1991-NMCA-131, ¶ 9, 113 N.M. 298, 825 P.2d 231 ("[T]he matter of denying credit when defendant is a fugitive must be raised and shown by the state."), *overruled on other grounds by State v. Jimenez*, 2004-NMSC-012, ¶ 11, 135 N.M. 442, 90 P.3d 461. We reject the State's attempt to shift the burden to Defendant.

{10} Defendant immediately raised the time bar to his probation revocation. By the time Defendant's probation revocation hearing convened on June 15, 2011, his sentence had ended, and the district court had lost jurisdiction, thus also foreclosing the ability of the State to enhance his sentence under the Habitual Offender Act. *State v. Roybal*, 1995-NMCA-097, ¶ 4, 120 N.M. 507, 903 P.2d 249 ("Once a defendant has completely served his or her underlying sentence, the [district] court loses jurisdiction to enhance that sentence, even if the [s]tate filed the supplemental information before the defendant finished serving the underlying sentence.").

B. The Case Is Not Moot

{11} The State argues that, because Defendant has completed his sentence, this Court should regard this case as demonstrating no controversy capable of resolution and therefore providing no opportunity for relief on remand. We disagree. Defendant's record in this case reflects an unjustified probation revocation and imposition of continued probation. Erroneous entries in the public record concerning criminal sentences follow a criminal defendant to his prejudice forever. Both public interest in accuracy of court documents reflecting criminal sentences and public policy in not attaching criminal opprobrium to citizens beyond what the law allows make Defendant's concern for a correction of the record in this case a matter of actual controversy and concern.

III. CONCLUSION

{12} We therefore reverse the district court's revocation of Defendant's probation and remand for entry of an order by the district court reflecting the dismissal of the motion to revoke probation for lack of jurisdiction, thereby rescinding the subsequent extension of Defendant's sentence based upon the violation of his probation.

{13} IT IS SO ORDERED.

RODERICK T. KENNEDY, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

TIMOTHY L. GARCIA, Judge

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1 The State refers in its briefing to "April 19," as does the district court's finding that Defendant was subjected of a parole retake on April 19, 2011. There is nothing cited from the record supporting this date in the finding, and we regard the use of the date in the district court's order as unsupported by the evidence in the record. The bench warrant, for failing to comply with probation, was executed on Monday, May 19, 2011, and, therefore, that is the date we use.

2 The State's reference in its supplemental briefing to matters not of record concerning parole revocation proceedings is not considered. *In re Aaron L.*, 2000-NMCA-024, ¶ 27, 128 N.M. 641, 996 P.2d 431 ("This Court will not consider and counsel should not refer to matters not of record in their briefs.").