

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2019 IL App (4th) 170153-U

NO. 4-17-0153

FILED

February 28, 2019

Carla Bender

4th District Appellate Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
JOHN MARTINSON,)	No. 15CF72
Defendant-Appellant.)	
)	Honorable
)	Peter C. Cavanagh,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

- ¶ 1 *Held:* This court lacks jurisdiction to review the circuit court’s order vacating its earlier decision defendant’s probation was successfully terminated.
- ¶ 2 In October 2015, defendant, John Martinson, was sentenced to four years’ probation. Before the probation term expired, the circuit court, on an oral motion by the State, ordered probation successfully terminated. The State, noting its error, asked the court to vacate the order terminating probation under section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2016)). The court granted the State’s motion and informed defendant he must serve the sentence originally imposed.
- ¶ 3 Defendant appeals, arguing the circuit court impermissibly increased his sentence when it reimposed probation after terminating it. The State maintains this court lacks jurisdiction

over defendant's appeal. We agree with the State and dismiss the appeal.

¶ 4

I. BACKGROUND

¶ 5 Defendant, in October 2015, pleaded guilty to two counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2014)). In exchange for his plea, defendant agreed to pay \$450 in restitution and to a sentence of four years' probation, the maximum term. Restitution was to be paid in full within two years of defendant's plea. Defendant resided in Michigan, and the State had no objection to transfer his probation there.

¶ 6 In September 2016, the State filed a petition to revoke defendant's probation. The State asserted defendant violated conditions of his probation by failing to pay amounts due, including \$150 in restitution. The State noted on the petition the probation period would expire on October 1, 2019.

¶ 7 A hearing was held on the State's petition to revoke in November 2016. At the start of the hearing, defense counsel made the following statement:

“Judge, the only issue outstanding for [defendant] is payment of the restitution. [The State], I believe, just wants to continue this to give him more time to pay down that balance before the probation were to terminate. Defendant represents that he's anxious for this to terminate to allow him to move outside the state for work. I believe he has employment opportunities in Michigan that he wants to continue to pursue.”

¶ 8 The State agreed to continue the case so defendant could continue making payments: “Let's go ahead and continue it out to the January date. If everything gets taken care

of beforehand, we can terminate, via paperwork, and he doesn't need to come back." The hearing was continued to January 25, 2017. By mid-January, defendant paid his debts.

¶ 9 The January hearing on the State's petition to revoke was brief:

“[THE STATE]: Your Honor, also, on [defendant], the State is withdrawing the petition and terminating him successfully.

[DEFENSE COUNSEL]: That's great.

THE COURT: Excellent. Good job, sir.”

¶ 10 The docket sheet has two entries for January 25, 2017. The first states the following, in part: “The People withdraw the petition to Revoke. Probation is terminated successfully. CAUSE STRICKEN.” The second entry states, in part, “Disposition: Terminated Satisfied.”

¶ 11 One week later, on February 1, 2017, the State filed, under section 5/2-1301 of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2016)), a motion to vacate the court's order terminating probation. The State asserted it was unaware the probation term had 33 months remaining when it asked to terminate defendant's probation successfully. Defendant disputed the State's allegations, emphasizing the State's petition to revoke indicates the probation term did not expire until October 1, 2019. Defendant argued reimposing probation after it was terminated by the court amounted to an impermissible increase in his sentence.

¶ 12 On February 23, 2017, the circuit court held a hearing on the State's motion to vacate. At the hearing, the State reported a mistake had been made:

“I wasn't aware [defendant] still had 33 months left on his probation. I did incorrectly read the file ***. I take responsibility

for that. So, I asked this Court to terminate his probation. After getting back to the office and reviewing the file, I realized my error. I'm asking the Court to vacate that early termination of probation due to the seriousness of the offense. *** We are not asking the Court to extend probation, to add any additional conditions, just to follow the original terms of his probation, Your Honor.”

¶ 13 Defendant argued the order terminating his probation was final. Defendant emphasized he, as an over-the-road truck driver, informed his employer of the change in his status and his ability to take on longer hauls.

¶ 14 The circuit court concluded it was within its authority to vacate the ruling within 30 days. The court emphasized it was not adding terms or provisions of probation. The court stated the following:

“Certainly, the court to the extent that the court can be apologetic, I am apologetic for the inconvenience to you and having to travel, etc., and can certainly understand you wanting to take advantage of being terminated early as it would help your employment. I get that. But in terms of the benefit of the bargain, this was a negotiated disposition ***.

* * *

And these are exactly the terms that you agreed to, and due to inadvertence and something the court was not made aware of,

you got a deal you shouldn't have gotten. So, it is unfortunate with regard to how you feel about it, but you need to serve out your term of probation as it was originally ordered.”

¶ 15 The circuit court vacated the termination of defendant's probation.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant's appeal raises a jurisdictional question. Defendant maintains this court has jurisdiction under Illinois Supreme Court Rule 604(b) (eff. July 1, 2017), which applies to defendants who have been sentenced to probation. Defendant argues the substantive effect of the order, not the label of the order, determines appellate jurisdiction. Defendant contends, using the State's words, the order to vacate reinstated probation making it appealable as a sentence of probation.

¶ 19 The State disagrees, maintaining we lack jurisdiction over this appeal. The State maintains the circuit court vacated the earlier order, meaning the order was nullified and is treated as if it had never been entered. According to the State, the only order imposing probation occurred in October 2015 and the time to appeal that decision had long expired.

¶ 20 Our state constitution vests the Supreme Court of Illinois with authority to “ ‘provide by rule for appeals to the Appellate Court from other than final judgments of Circuit Courts.’ ” *People v. Bailey*, 2014 IL 115459, ¶ 11, 4 N.E.3d 474 (quoting Ill. Const. 1970, art. VI, § 6). In Rule 604(b), our supreme court authorizes appeals by defendants sentenced to probation and appeals from orders modifying or revoking probation: “A defendant who has been *** sentenced to probation *** may appeal from the judgment and may seek review of the

conditions of supervision, or of the finding of guilt or the conditions of the sentence, or both. He or she may also appeal from an order modifying the conditions of or revoking such an order or sentence.” Ill. S. Ct. R. 604(b) (eff. July 1, 2017). This court has a duty to dismiss an appeal if we find jurisdiction lacking. *People v. Trimarco*, 364 Ill. App. 3d 549, 550, 846 N.E.2d 1008, 1010 (2006).

¶ 21 The question of this court’s jurisdiction turns on whether the February order to vacate is an order imposing or modifying probation. To vacate a judgment means to nullify or cancel that judgment. *People v. Eidel*, 319 Ill. App. 3d 496, 504, 745 N.E.2d 736, 744 (2001) (citing Black’s Law Dictionary 1546 (7th ed. 1999)). “When a circuit court vacates and sets aside a judgment, *** the prior judgment is eliminated, and the case thereby returns to its status before the judgment was made.” *People v. Shinaul*, 2017 IL 120162, ¶ 14, 88 N.E.3d 760; see also *Applegate v. Department of Transportation*, 335 Ill. App. 3d 1056, 1063, 783 N.E.2d 96, 103 (2002) (“vacatur restores the status quo ante, as though a judgment had never been entered”).

¶ 22 Applying these principles, the February order restored the parties to the status quo. Probation was not imposed or reinstated. It is treated as if probation had always existed.

¶ 23 Defendant, however, challenges the circuit court’s authority to vacate the termination of probation. It follows, if the court lacked authority to vacate the earlier order, then the court’s February order effectively imposed probation, giving this court appellate jurisdiction under Rule 604(b). Defendant asserts three arguments challenging the court’s authority to apply section 2-1301(e): (1) section 2-1301 is a provision involving default judgments and civil proceedings that does not authorize circuit courts to “vacate the termination of probation on a

whim so long as it is done within 30 days;” (2) the more specific criminal provision, section 5-4.5-50(d) of the Unified Code of Corrections (730 ILCS 5/5-4.5-50(d) (West 2016)), which prohibits circuit courts from increasing a criminal’s sentence, prevails over section 2-1301(e), a general rule of civil procedure; and (3) case law establishes a court cannot modify probation after it has been terminated.

¶ 24 We begin with defendant’s argument section 2-1301(e), a rule of civil procedure regarding default judgments, provides no authority for the circuit court’s order to vacate. Section 2-1301(e) provides the following: “The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2016). The statute gives broad authority to circuit courts. *Id.* It does not expressly limit “final order[s] or judgment[s]” to only civil judgments or default judgments. *Id.*

¶ 25 We find unconvincing defendant’s allusion to the fact that section 2-1301(e) is a civil statute limits application to civil cases. Defendant cites no authority restricting section 2-1301(e)’s applicability on this basis. Such a conclusion is undermined by the fact Illinois courts have applied civil statutes in criminal cases. For example, criminals seeking postjudgment relief file claims under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). See, e.g., *People v. Boyd*, 356 Ill. App. 3d 254, 256, 825 N.E.2d 364, 366 (2005).

¶ 26 Moreover, section 2-1301(e) does not, as defendant argues, allow a circuit court to set aside a final judgment “on a whim.” The section plainly requires an order to vacate be based on “terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2016). Here, the decision to vacate was not “on a whim.” Contrary to defendant’s efforts to place the

mistake or inadvertence entirely on the State, defense counsel’s comments during the hearing on the petition to revoke introduced the issue of terminating defendant’s probation: “Judge, the only issue outstanding for [defendant] is payment of the restitution. [The State], I believe, just wants to continue this to give him more time to pay down that balance before the probation were to terminate.” While we find no nefarious purpose in defense counsel’s statement, it is misleading. It leads to the conclusion restitution is the only matter left before defendant’s probation could be terminated. The State then followed with, “Let’s go ahead and continue it out to the January date. If everything gets taken care of beforehand, we can terminate, via paperwork, and he doesn’t need to come back.” At the hearing, no party mentioned 33 months remained in defendant’s probation sentence—a sentence defendant agreed to serve. The court found the error was due to inadvertence and defendant should serve the probation term to which he agreed. The decision to vacate the judgment was reasonable.

¶ 27 Turning to defendant’s argument regarding section 5-4.5-50(d) of the Unified Code of Corrections (730 ILCS 5/5-4.5-50(d) (West 2016)), we find that section does not limit the circuit court’s authority to vacate the judgment terminating probation under section 2-1301(e). Section 5-4.5-50(d), entitled “Motion to Reduce Sentence,” states, in part, “[t]he court may not increase a sentence once it is imposed.” *Id.* The court’s order did not increase defendant’s probation sentence beyond its original, agreed-upon terms. Instead, the February order vacated the earlier termination order and returned the party to the status before the original order was entered—defendant had 33 months remaining in his probation term. No time was added.

¶ 28 The lone case defendant cites in support of this argument, *In re Estate of Smith*,

41 Ill. App. 2d 86, 190 N.E.2d 175 (1963), is distinguishable. The *Smith* court noted circuit courts generally had “an inherent right to vacate any judgment which had been entered within thirty days upon good cause shown” but found that right had been limited by the Probate Act, which listed specific grounds for vacating the appointment of an administrator. *Id.* at 91-92. Here, defendant identifies no applicable statute that limits the circuit court’s authority to vacate its earlier judgment.

¶ 29 We further find unconvincing defendant’s argument the circuit court impermissibly modified the terms of probation after it was terminated. Defendant’s case law states only that once the term of probation *expires*, circuit courts have no authority to revoke or modify probation. See *People v. Thoman*, 381 Ill. App. 3d 268, 274, 886 N.E. 2d 518, 523 (2008); *People v. Johnson*, 265 Ill. App. 3d 509, 511, 637 N.E.2d 700, 701 (1994). These cases do not establish a circuit court that orders probation terminated successfully before the sentence expired may not vacate that order under section 2-1301(e). Instead, the analysis in *Thoman* shows a court’s subject-matter jurisdiction over a probationer coexists with the duration of the probation sentence and that jurisdiction may be extended by statute. *Thoman*, 381 Ill. App. 3d at 274. Here, section 2-1301(e) extended the court’s subject-matter jurisdiction over defendant 30 days after the successfully terminated order. The same section authorized the court to vacate the earlier order, returning the defendant to the status of probationer until that term expires. No modification occurred.

¶ 30 The circuit court’s February order did not impose, modify, or revoke probation. Rule 604(b) does not provide this court with jurisdiction over defendant’s appeal. We must dismiss it.

¶ 31

III. CONCLUSION

¶ 32

The appeal is dismissed for lack of jurisdiction.

¶ 33

Appeal dismissed.