NO. COA02-144

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 93 CRS 45390
93 CRS 45392

RANDY DOVEN BRYANT

Appeal by defendant from judgments entered 28 September 1993 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 17 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, for the State.

Daniel Shatz for defendant appellant.

McCULLOUGH, Judge.

Defendant Randy Doven Bryant appeared before the trial court upon pleas of guilty to one count of first-degree rape and one count of first-degree kidnapping on 28 September 1993. At the plea hearing, the trial court asked defendant a number of questions to ensure that he understood the proceedings and was satisfied with the legal services rendered by his attorney. Defendant responded affirmatively to all the trial court's inquiries. The trial court then asked defendant a series of questions regarding his plea:

> THE COURT: Do you understand that you are pleading guilty to the felonies of one count of first degree rape and one count of first degree kidnapping?

A. Yes, sir.

THE COURT: Have these charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?

A. Yes, sir.

THE COURT: Do you understand that upon your plea you could be imprisoned for a possible maximum sentence of life plus forty (40) years?

A. Yes, sir.

THE COURT: Do you understand that you have the right to plead not guilty, to be tried by a jury and at such trial to be confronted with and to cross-examine the witnesses against you, and by this plea you give up these rights and your other constitutional rights relating to trial by jury?

A. Yes, sir.

THE COURT: Do you now personally plead guilty?

A. Yes, sir.

* * * *

THE COURT: And do you understand that upon your plea of guilty you will be treated as being guilty whether or not you admit your guilt?

A. Yes, sir.

* * * *

THE COURT: The district attorney and your lawyer have informed this Court that these are all the terms and conditions of your plea: That upon your plea the State will dismiss the charges pending in 93 CRS 45389, 45391, and 45393.

> Sentencing will be in the Court's discretion.
>
> Is this correct as being your full plea arrangement?
>
> A. Yes, sir.
>
> THE COURT: Do you now personally accept this arrangement?
>
> A. Yes, sir.
>
> THE COURT: Other than the plea arrangement between you and the district attorney has anyone made any promises or has anyone threatened you in any way to cause you to enter this plea against your wishes?
>
> A. No, sir.
>
> THE COURT: Do you enter this plea of your own free will, fully understanding what you are doing?
>
> A. Yes, sir.
>
> THE COURT: Do you have any questions about what I've just said to you or about anything else connected with your case?
>
> A. No, sir.

After instructing defendant to go over the plea transcript and sign it, the trial court allowed the State to make a factual showing.

The State called one of the victims to testify about the events of 30 June 1993. Ms. Michelle Cardon stated that she and several friends were drinking beer at a house on Ashe Avenue in Raleigh, North Carolina, when defendant approached the group and began talking to her and one of her friends. Ms. Cardon stated she had never met defendant prior to 30 June. Defendant later walked to a local convenience store with Ms. Cardon, purchased some wine,

and asked her to go to Pullen Park with him. She refused. Later that evening defendant and a man named Ely followed Ms. Cardon and her boyfriend, Milan Martin, and persuaded them to walk to a friend's house to drink more beer.

Once inside the house, defendant and Ely locked the door, turned off all the lights, and refused to allow either Ms. Cardon or Mr. Martin to leave. Ely told Ms. Cardon to take off her boots, and defendant told her to comply. Ely hit Ms. Cardon on the face and knocked her to the ground each time she tried to get away. After being hit repeatedly and seeing Ely hold a knife to Mr. Martin's throat, Ms. Cardon took off her boots. Ely forced both Ms. Cardon and Mr. Martin to undress, then sent defendant and Ms. Cardon upstairs, where defendant raped her. A knife was upstairs during the rape. Meanwhile, Ely forced Mr. Martin to perform oral sex, then the two men went upstairs. Ely and defendant took turns raping Ms. Cardon while Mr. Martin performed oral sex on the other. Ely tried to get another man to have sex with Ms. Cardon, but he refused.

Around 1:45 a.m., Ely took Mr. Martin's wallet and left to buy beer. Before leaving, he gave the knife to defendant and told him to keep everyone in the house. Defendant continued to rape Ms. Cardon upstairs, but finally allowed her to go downstairs to the bathroom. Defendant followed her into the bathroom and continued raping her there. While defendant and Ms. Cardon were in the bathroom, Mr. Martin escaped and called the police. Though defendant knew the police were on their way, he forced Ms. Cardon

to go back upstairs, where he continued raping her until the police knocked on the door. Once the police arrived, Ms. Cardon was able to escape. The officers found a knife under the bed upstairs and spoke with Ms. Cardon, who stated she did not consent to any of the sexual activity.

After hearing Ms. Cardon's testimony, the trial court stated defendant's due process hearing had been held and that it would accept defendant's guilty plea. The trial court then rendered the following judgment:

> In the matter of the State of North Carolina versus Randy Bryant, the defendant appeared in open court, pled guilty in 93 CRS 45392 to the offense of first degree rape, violation of General Statute 14-27.2.
>
> That is a felony Class B, maximum prison term allowed by law is life. There is no presumptive term.
>
> It is ordered, adjudged and decreed that the defendant be imprisoned for a term of life.
>
> The defendant also pled guilty in 93 CRS 45390 to the offense of first degree kidnapping. That's a violation of General Statute 14-39. It is a felony Class D. Maximum prison term allowed by law of forty (40) years, presumptive terms of twelve (12) years.
>
> The Court under the felony judgment finds the factors in aggravation and mitigation of punishment.
>
> Finds the factors in aggravation number 15, that the defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty (60) days[']confinement.

> This Court finds no mitigating circumstances and finds that the aggravating circumstances outweigh[] the mitigating circumstances by a preponderance of the evidence and in fact beyond a reasonable doubt.
>
> Therefore, it is ordered, adjudged and decreed that one, the first degree kidnapping, the defendant should be imprisoned for a term of forty (40) years and placed in the custody of the North Carolina Department of Corrections.
>
> This sentence to run at the expiration of the sentence in 93 CRS 45392.
>
> In the event that this defendant should hereinafter gain early release as a condition of parole this Court recommends the defendant be required to pay the court costs and reimbursement of counsel fees and other expenses in the amount of one-thousand dollars.
>
> He's in your custody, sheriff.

Pursuant to the plea agreement, the trial court dismissed the other three charges against defendant.

On 11 October 1993 defendant's attorney, Mr. Douglas Corkhill, received a letter from defendant, who was incarcerated at Central Prison. In his written notice of appeal dated 12 October 1993, Mr. Corkhill stated defendant's letter was dated 30 September 1993 and was postmarked 8 October 1993; he acknowledged that the notice of appeal was being filed after the ten-day appeal period had expired. On 19 October 1993, the Wake County Superior Court entered an order which stated:

> The defendant has entered a plea of guilty to these two offenses and was sentenced in the discretion of the Court within legal limits. There is no right to appeal.

> Therefore the defendant's purported appeal filed Oct. 12, 1993 is dismissed.
>
> Appearance Bond is denied. Defendant may Petition for Certiorari if he chooses to.

Thereafter, on 17 April 2001, defendant filed a petition for writ of certiorari, which was allowed on 4 May 2001. The order allowed review of defendant's sentence for first-degree kidnapping and instructed the trial court to determine whether defendant was entitled (1) to appointment of counsel, (2) to proceed as an indigent, (3) to a copy of the transcript at the State's expense, and (4) to be released on bond pending appeal. The order also stated that defendant's appeal would be deemed taken as of the date that the trial court determined whether defendant was entitled to appointment of counsel.

On appeal, defendant argues the trial court erred by (I) accepting his plea and entering a judgment for first-degree kidnapping when the indictment did not allege all the elements of that offense; (II) imposing sentences for both first-degree kidnapping and first-degree rape because doing so violated the rule against double jeopardy; and (III) accepting his plea without first informing him that one of the offenses to which he was pleading guilty carried a mandatory life sentence. For the reasons set forth herein, we agree with several of defendant's arguments, vacate the judgment, and remand for resentencing.

First-Degree Kidnapping Indictment

By his first assignment of error, defendant contends the trial court erred by entering a judgment against him for first-degree kidnapping because the indictment did not allege all the elements of that offense. We agree.

N.C. Gen. Stat. § 14-39 (2001) states:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

"[T]o properly indict a defendant for first degree kidnapping, it [is] necessary for the State to allege both the essential elements of kidnapping as provided in G.S. § 14-39(a) *and* at least one of the elements of first degree kidnapping listed in G.S. § 14-39(b)[.]" *State v. Bell*, 311 N.C. 131, 137, 316 S.E.2d 611, 614 (1984).

In the present case, defendant's indictment read as follows:

> The jurors for the State upon their oath present that on or about the 30th day of June, 1993, in Wake County, the defendant named above unlawfully, willfully, and feloniously did kidnap M.N. Cardon, a person over the age of sixteen years, by confining her and restraining her, and for the purpose of facilitating the commission of a felony, to wit: first degree rape. This act was done in violation of G.S. 14-39.

This indictment failed to allege that Ms. Cardon was not released by defendant in a safe place or that she was seriously injured or sexually assaulted. It was, therefore, insufficient to support a judgment against defendant for first-degree kidnapping. *See State v. Jerrett*, 309 N.C. 239, 261, 307 S.E.2d 339, 351 (1983). We note, however, that the indictment sufficiently alleges all the elements of second-degree kidnapping stated in N.C. Gen. Stat. § 14-39(b), which is a lesser-included offense of first-degree kidnapping. *See State v. Jeune*, 332 N.C. 424, 437, 420 S.E.2d 406, 414 (1992) (stating that "someone properly found guilty of first-degree kidnapping is *necessarily* guilty of second-degree kidnapping").

Both defendant and the State agree the indictment does not support a judgment for first-degree kidnapping. They disagree, however, on the remedy. The State contends that defendant's admission of guilt for the offense of first-degree kidnapping was knowing and voluntary, thus supporting a conviction for second-degree kidnapping. The State therefore requests that this Court vacate that judgment and remand to the trial court for sentencing for the crime of second-degree kidnapping. The State points out that, where a jury returns a verdict against a defendant for first-degree kidnapping based on a defective indictment, the remedy is to vacate the conviction for first-degree kidnapping and remand for entry of a verdict for second-degree kidnapping, then sentence defendant accordingly. *See State v. Jackson*, 77 N.C. App. 491, 504-05, 335 S.E.2d 903, 911 (1985). Though acknowledging that the present case revolves around a plea arrangement rather than a jury trial, the State believes the same result should ensue.

Defendant, on the other hand, requests that this Court vacate his guilty plea and remand the case to the trial court "to be repled or tried as the case may be." He believes it would be erroneous for the trial court to automatically sentence him for the crime of second-degree kidnapping. In support of his position, defendant argues a plea arrangement differs from a jury conviction in two respects. First, defendant points out that he entered one plea that covered both first-degree rape and first-degree kidnapping. He further argues that, because the indictment did not properly charge him with first-degree kidnapping, the trial court

lacked jurisdiction to accept the entire plea; its acceptance was void *ab initio* and should be vacated. *See McClure v. State*, 267 N.C. 212, 215-16, 148 S.E.2d 15, 17-18 (1966); and *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). Second, defendant believes a plea agreement is analogous to a contract. In this case, defendant believes his plea could not be executed as written because it required him to plead guilty to an offense (first-degree kidnapping) with which the indictment did not properly charge him. Defendant further points out that a plea agreement which calls for a judgment that cannot be lawfully imposed is unenforceable. He maintains the remedy is to vacate the plea and remand the case to the trial court to allow the parties an opportunity to negotiate a proper plea or to go to trial. *See State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998).

While defendant's arguments may have validity, they do not apply to the facts of the case *sub judice*. Here, defendant was well aware that he was pleading guilty to the first-degree kidnapping charge and faced a potential sentence of forty years for that offense. As his plea admitted all of the elements of the offense of second-degree kidnapping and the body of the indictment charged him with that crime, we do not believe that sustaining the second-degree kidnapping conviction violates the plea agreement in this case. Thus, as in *Jackson*, 77 N.C. App. 491, 335 S.E.2d 903, we vacate the sentence imposed for first-degree kidnapping and remand for resentencing for the crime of second-degree kidnapping.

Double Jeopardy

By his second assignment of error, defendant contends that the imposition of sentences for both first-degree rape and first-degree kidnapping violated the rule against double jeopardy. In light of our previous decision to vacate the judgment as to first-degree kidnapping, this assignment of error is moot and need not be addressed.

Advisement of Mandatory Life Sentence

By his final assignment of error, defendant contends the trial court erred by accepting his guilty plea without first advising him that the offense of first-degree rape required imposition of a life sentence. We do not agree.

While acknowledging that the trial court was statutorily required to inform defendant of any mandatory minimum sentences, *see* N.C. Gen. Stat. § 15A-1022(a)(6) (2001), the State contends defendant still cannot prevail for several reasons. First, the State points out that the order allowing defendant's petition for writ of certiorari limited appellate review to "reviewing petitioner's sentence in 93 CRS 45390 [the first-degree kidnapping judgment.]" The State believes defendant can later file a motion for appropriate relief if he wants this Court to review the sentence for the crime of first-degree rape.

Second, the State points to several instances during the plea hearing wherein the trial court did discuss the sentencing aspects of the plea agreement with defendant. When the trial court asked defendant if he understood that "upon your plea you could be imprisoned for a possible maximum sentence of life plus forty (40)

years[,]" defendant replied, "Yes, sir." Defendant also acknowledged that sentencing was in the sole discretion of the trial court. When rendering defendant's punishment, the trial court stated that first-degree rape was a "felony Class B, maximum prison term allowed by law is life. There is no presumptive term." According to the State, these statements by the trial court informed defendant that his plea of guilty to the charge of first-degree rape carried a mandatory life sentence.

Lastly, the State argues that, even if the trial court failed to comply with N.C. Gen. Stat. § 15A-1022(a)(6), defendant must still show that the trial court's shortcomings resulted in prejudicial error. *See State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000). The State further contends the trial court's failure to inform defendant of certain rights and to determine that defendant was aware of those rights does not mean a plea was not knowingly and voluntarily made under constitutional standards. According to the State, the trial court's failure to conduct a colloquy under N.C. Gen. Stat. § 15A-1022 was, at most, a statutory violation, which does not require vacation of defendant's plea.

Defendant, on the other hand, argues that the trial court's failure to advise him of the mandatory life sentence was harmful error and he is entitled to withdraw his plea as a result. Defendant points to *State v. Bozeman*, 115 N.C. App. 658, 446 S.E.2d 140 (1994) for the proposition that failure to advise a defendant under N.C. Gen. Stat. § 15A-1022(a)(6), while statutory, is also

based on constitutional principles and entitles a defendant to relief unless the State can show the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b); and *Bozeman*, 115 N.C. App. at 661-62, 446 S.E.2d at 142-43.

While defendant correctly states the reasoning of the *Bozeman* Court, that case actually holds that errors such as occurred here may not provide the relief defendant seeks. In *Bozeman*, the trial court failed to inform the defendant that the drug trafficking offense to which he pled guilty had a minimum sentence of seven years. Instead, the trial court only informed the defendant of the potential maximum (95 years). *Id.* at 660, 446 S.E.2d at 142. The *Bozeman* Court found that this error was harmless beyond a reasonable doubt and could not have reasonably affected the defendant's decision to plead guilty. *Id.* at 663, 446 S.E.2d at 143. The facts in the case at bar compel the same conclusion.

In their briefs, the parties disagree over whether defendant had the burden of demonstrating prejudice pursuant to N.C. Gen. Stat. § 15A-1443(a) (2001). The *Bozeman* Court held that the failure to inform the defendant of a minimum sentence was harmless beyond a reasonable doubt and thus satisfied the more stringent standard set forth in N.C. Gen. Stat. § 15A-1443(b). Upon application of N.C. Gen. Stat. § 15A-1443(b)'s "harmless error" standard to the set of facts and circumstances before us, we believe the State has carried its burden and has shown that the trial court's actions were harmless beyond a reasonable doubt. Again, we note that life imprisonment was both the minimum and

maximum sentence for the crime of first-degree rape. Accordingly, this assignment of error is overruled.

Upon careful review of the record and the arguments of the parties, we conclude the indictment failed to allege the elements of first-degree kidnapping and that it was error for the trial court to impose a sentence for that crime. However, because the indictment sufficiently alleged the elements of second-degree kidnapping, we remand for resentencing for that crime. Because of our disposition as to the first-degree kidnapping issue, we need not address defendant's double jeopardy concerns. As to defendant's final assignment of error, we conclude that, while the trial court erred, such error was harmless beyond a reasonable doubt. The trial court's judgment is vacated, and the matter is remanded for resentencing consistent with this opinion.

Vacated and remanded for resentencing.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).