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NO. COA06-50

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v.

Lenoir County
No. 02 CRS 51000

ANTHONY RICKIE BELTON

Appeal by defendant from judgment entered 3 October 2005 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 21 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

CALABRIA, Judge.

Anthony Rickie Belton ("defendant") appeals from the trial court's denial of his motion to withdraw his guilty plea and its award of restitution. We find no error as to the denial of the motion to withdraw the guilty plea, and we vacate and remand the award of restitution.

The prosecutor's statement of facts, serving as a factual basis for defendant's plea, stated the following. In late February or early March 2002, defendant, Deshawn Jones ("the victim"), and several of their acquaintances, were at a nightclub. That evening, defendant "was drugged up and drunk," and the victim became upset

with defendant when he would not share his cocaine. Later that evening, defendant and the victim visited a friend's house, and the victim robbed and assaulted defendant.

A few days later defendant, the victim, and acquaintances, including Curtis Davis ("Davis"), returned to the nightclub. At first, defendant and the victim "acted like everything was [alright]"; however, later that night the two men were "fussing." Defendant then stated to Davis that the victim wanted to fight him. Davis confronted the victim, asked if he wanted to fight, and began fighting with him in a bank parking lot. The group subsequently traveled to an nearby apartment complex, and the victim and Davis continued to fight. During the fight, defendant approached the victim and shot him, inflicting fatal injuries.

On 21 January 2003, the Lenior County grand jury indicted defendant for first degree murder of the victim. Defendant subsequently entered an *Alford* plea on 3 February 2005 to second degree murder. The plea agreement provided that defendant would be sentenced in a later term and that defendant would be placed in "Craven DOC for safekeeping." Judge Paul L. Jones determined there was a factual basis for the entry of the plea, accepted defendant's plea, and entered a prayer for judgment.

On 31 August 2005, Judge Jones presided for defendant's sentencing hearing. During the proceeding, defendant stated that he wanted to "take back his plea" because: (1) "they do not have [any] evidence against me;" (2) he was "extradited [from New York] illegally;" and (3) his counsel was ineffective since he had "not

filed one motion in two years." Judge Jones denied defendant's request and continued defendant's sentencing hearing until 3 October 2005.

At the beginning of the sentencing hearing, defense counsel informed the trial court that defendant had written a letter to the State Bar expressing concerns about his representation, but that defendant wanted defense counsel "to represent him today at this hearing for sentencing." After hearing arguments from defense counsel and the State, Judge Jones sentenced defendant to 174 to 218 months in the North Carolina Department of Correction. The trial court also ordered defendant to "make restitution in this case in the amount of \$10,000 for funeral expenses" to the victim's mother. Defendant appeals.

Defendant first contends the trial court should have allowed his pre-sentencing motion to withdraw his guilty plea. We disagree.

Our Supreme Court stated in *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990), that as a general rule, a motion to withdraw a guilty plea made before sentencing should be granted with liberality. The trial court should allow a defendant to withdraw his guilty plea upon his showing that "any fair and just reason" exists for such relief. *Id.*, 326 N.C. at 538, 391 S.E.2d at 162. Factors for the trial court to consider in ruling on the motion are:

whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change

it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Id., 326 N.C. at 539, 391 S.E.2d at 163 (citations omitted). In reviewing a motion to withdraw a guilty plea, this Court makes an "independent review of the record." *Id.*

Applying the factors cited in *Handy* to the present case, we conclude defendant was not entitled to withdraw his plea. Unlike the defendant in *Handy*, defendant here did not assert his legal innocence; rather, defendant asserted that the State's case was weak. To the contrary, the State's forecast of the evidence in defendant's case is quite strong. Three witnesses gave police eyewitness accounts of defendant shooting the victim and police recovered the gun used in the shooting.

About seven months elapsed between entry of defendant's guilty plea and his motion to withdraw his plea at the status hearing. Although defendant referred to being extradited "illegally" and his counsel's failure to file motions, the record contains no indication of any specific concerns that defendant had with the plea. Defense counsel noted at the October 3rd sentencing hearing that counsel had "prepared a draft motion to file if we went to trial regarding the extradition, but again, the plea sort of muted [sic] that effort[.]" Defense counsel also explained that defendant's first attorney had filed motions on defendant's behalf and that those motions "did not need to [be pursued] once . . . the plea was entered and negotiated. I thought it was in his best

interest to go ahead with the plea that he entered and I still feel that way." Furthermore, defendant had been appointed counsel at the time of entry of his guilty plea on 3 February 2005, at the status hearing on 31 August 2005, and at the time of entry of the judgment on 3 October 2005. His assertions of dissatisfaction with his counsel are contrary to his sworn responses found in the transcript of plea. In the transcript of plea, defendant stated that he was satisfied with his counsel's services and denied that anyone had caused him to enter his plea against his wishes. Finally, despite sending a letter to the State Bar complaining about his defense counsel, defendant informed his counsel that he wanted his defense counsel to represent him at his sentencing hearing. We hold defendant has not proffered a "fair and just reason" why he should be allowed to withdraw his guilty plea. *Handy*, 326 N.C. at 538, 391 S.E.2d at 162. Accordingly, the trial court properly denied defendant's motion to withdraw his plea.

Defendant also contends the trial court erred in ordering him to pay \$10,000.00 in restitution to the victim's mother for funeral expenses. The State concedes that the trial court's determination of restitution is not supported by competent evidence in the record. See *State v. Wilson*, 340 N.C. 720, 726-27, 459 S.E.2d 192, 196 (1995) (amount of restitution ordered by trial court must be supported by evidence introduced at trial or at sentencing; unsworn statements of prosecutor insufficient to support restitution award). As the trial court's determination of restitution is not supported by evidence in the record, we reverse that part of the

judgment requiring defendant to pay restitution in the amount of \$10,000.00. See *id.*, 340 N.C. at 727, 459 S.E.2d at 196 (vacating portion of judgment recommending restitution unsupported by evidence); *State v. Buchanan*, 108 N.C. App. 338, 341-42, 423 S.E.2d 819, 821 (1992). However, defendant concedes there is evidence in the record that the Victim Compensation Services Division paid the victim's mother \$3,500.00 for funeral costs. Accordingly, we vacate the restitution award and remand this issue to the trial court for an appropriate restitution award based on the evidence presented.

Defendant has failed to argue his remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

No error in part; vacate and remand restitution award.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).