NO. COA11-417
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 06 CRS 077149,76209,
77340, 24464, 77153

CARLTON LASHAUN WHITE

Appeal by Defendant from judgment entered 2 April 2009 by Judge Shannon R. Joseph in Guilford County Superior Court. Heard in the Court of Appeals 13 October 2011.

Attorney General Roy A. Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.

Bryan Gates, for Defendant.

BEASLEY, Judge.

Carlton LaShaun White (Defendant) appeals an order denying his motion to withdraw his guilty plea pursuant to N.C. Gen. Stat. § 15A-1444. This Court granted a writ of certiorari to review Defendant's conviction on 8 September 2010. For the following reasons, we reverse and remand for further proceedings not inconsistent with this opinion.

On 21 August 2006, Defendant was indicted for conspiracy to commit robbery with a dangerous weapon, three counts of robbery with a dangerous weapon and possession of cocaine.

On 16 March 2009, a superseding indictment was issued against Defendant for two counts of robbery with a dangerous weapon. The superseding indictment added an additional count of robbery with a dangerous weapon stemming from the same occurrence. On 1 April 2009, Defendant entered a plea agreement and pled guilty to four counts of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon and possession of cocaine. On 2 April 2009, the following day, Defendant made a motion to withdraw his guilty plea. After a hearing on this motion, the trial court denied Defendant's motion and entered judgment. Defendant was sentenced to 60-81 months imprisonment and 50-69 months imprisonment, consecutively.

The sole issue on appeal is whether Defendant's timely motion to withdraw his guilty plea on grounds of actual innocence and confusion should have been granted.

"Our standard of review for the right to withdraw a pre-sentence guilty plea is whether, after conducting an independent review of the record and considering the reasons given by the defendant and any prejudice to the State, it would be fair and

just to allow the motion to withdraw." *State v. Wall*, 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2004).

"Although there is no absolute right to withdraw a plea of guilty, a criminal defendant seeking to withdraw such a plea, prior to sentencing, is generally accorded that right if he can show any fair and just reason." *State v. Marshburn,* 109 N.C. App. 105, 107-08, 425 S.E.2d 715, 717 (1993) (internal quotation marks and citations omitted). There are several factors to consider when determining whether Defendant's reasons are fair and just. In *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), our Supreme Court outlined factors to consider when ruling on a motion to withdraw a guilty plea:

> Some of the factors which favor withdrawal include 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. The State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. Prejudice to the State is a germane factor against granting a motion to withdraw.

Id. at 539, 391 S.E.2d at 163 (internal citations omitted).

Defendant argues that the trial court erred by not granting Defendant's motion to withdraw his guilty plea where (1)

Defendant made such request within twenty four hours of entering the plea agreement; and (2) Defendant filed an affidavit professing his legal innocence and stating that he had "serious misgivings" about entering the plea. While we do not find these factors alone required the trial court to grant Defendant's motion to withdraw the plea, our independent review of the record coupled with Defendant's assertions support granting Defendant's motion to withdraw his plea. For the following reasons, we reverse and remand for further proceedings.

> [A] trial court may not accept a guilty plea from a defendant without first addressing the defendant personally and . . . ascertaining whether [defendant] understands the nature of the charge to which [defendant] is pleading guilty, as well as [defendant's] maximum possible sentence under the plea; . . . and determining if the defendant was improperly pressured regarding the plea and that the plea is a product of informed choice.

State v. Glover, 156 N.C. App. 139, 145, 575 S.E.2d 835, 839 (2003); *see* also N.C. Gen. Stat. § 15A-1022 (2009).

A review of the transcript shows that Defendant and Defendant's counsel expressed confusion regarding the four counts of robbery with a dangerous weapon. When the trial court explained that Defendant was pleading guilty to four counts of robbery with a dangerous weapon, Defendant responded, "I never knew I had four robberies." After Defendant's comment, the State and Defendant conferred off the record and the State

clarified,

> [PROSECUTION]: Your Honor, for the record, I will explain what happened. I indicated I was going to do superseding additional indictments for each individual. One of those has already come back from the grand jury even at this date, and that's why -- there were three robberies, but when I did a superseding, I did one count for each individual in the second robbery -- or the first robbery -- excuse me -- and that's why there's more language in the plea saying that I won't seek any additional indictments for whatever additional charges might arise. This was something that was discussed in open court way back when, when prior counsel was present. It does not affect our plea. It all arises out of the same series of events. But that explains why he's up to *three -- or four* charges now. (emphasis added)

The State attempted to clarify the number of counts of robbery with a dangerous weapon, but failed to do so where the State gave an indefinite number of counts ("three – or four"). Also, the plea agreement states four counts of robbery with dangerous weapon, but the record reveals that the first plea agreement, offered to Defendant and rejected, only listed three counts of robbery with a dangerous weapon. The superseding indictment referred to by the State was not filed until 16 March 2009, after Defendant rejected the first plea offer and less than a month before the entry of the plea on 1 April 2009. Moreover, the State seems to suggest that the number of counts would not affect the plea agreement. This is a misstatement. The number of counts of robbery with a dangerous weapon would in

fact affect his total maximum punishment calculation.

After the State attempted to explain the "three or four" counts of robbery with a dangerous weapon, the trial court again asked if Defendant understood that he was pleading guilty to all of the charges against him, including four counts of robbery with a dangerous weapon, and Defendant answered in the affirmative.

Following the State's presentation of its factual basis for the offenses, defense counsel expressed some confusion concerning the four counts of robbery with dangerous weapon,

> [DEFENSE COUNSEL]: Just a few things, Your Honor, and I'll be very brief just with respect to the factual... It's interesting that he's charged with two robberies for one event because of the number of people in the place. With that same logic, you would think he would be charged with four robberies from the pawn shop, and I don't know if that's where Madame DA was taking this --
>
> THE COURT: Do you want to withdraw the plea or what --
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> [DEFENSE COUNSEL]: No, no, no, Your Honor. I do not say that to impugn Madame DA, but just to add to the factual basis that -- making it clear that this wasn't, you know, he walked out of the store, saw another person and did it, but this was just in that particular place, Your Honor. With respect to the pawn shop, there were three folks who could not ID Mr. White, and the fourth person, counsel has suggested that there was a suggestive ID, at best, on Mr. White because of the things that he was wearing. And with respect to the video surveillance, Your Honor, it's very subjective as to how

> clear it is --
>
> THE COURT: You're either going to try it to me or you're going to try it -- I mean, you're either going to try it to a jury or –
>
> [DEFENSE COUNSEL]: No, Your Honor. Do not attempt to try it. Just clearing up the factual basis.
>
> THE COURT: So do you dispute there's a factual basis?
>
> [DEFENSE COUNSEL]: No, Your Honor; do not.
>
> THE COURT: Okay.
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> [DEFENSE COUNSEL]: I just wanted to put those things in the factual record, Your Honor.
>
> THE COURT: Okay. Thank you, sir.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: Anything else as to the factual basis?
>
> [DEFENSE COUNSEL]: No, ma'am, Your Honor.

Here, defense counsel was perplexed as to the number of counts of robbery with dangerous weapon. Most concerning, is the trial court's response to defense counsel's queries regarding these charges.

"The right to plead not guilty is absolute and neither the court nor the State should interfere with the free, unfettered exercise of that right; its surrender by a plea of guilty must be voluntary and with full knowledge and understanding of the consequences." *State v. Pait*, 81 N.C. App. 286, 289, 343 S.E.2d

573, 576 (1986) (citing *Brady v. U.S.*, 397 U.S. 742, 25 L. Ed. 2d 747 (1970); *State v. Ford*, 281 N.C. 62, 187 S.E.2d 741 (1972)). In *Pait*, our Supreme Court held,

> [w]hile G.S. 15A-1021(a) specifically allows the trial judge to participate in plea bargain discussions, G.S. 15A-1021(b) specifically forbids any representative of the State from improperly pressuring a defendant into a plea of guilty. . . . A guilty plea that is procured through threats or intimidation is constitutionally invalid.

Pait, 81 N.C. App. at 289, 343 S.E.2d at 576.

Here, as Defendant's counsel sought clarification on the manner by which the State arrived at proceeding on four counts against Defendant, the trial court curtailed Defendant's counsel's inquiry and argument and asserted that Defendant could either accept the plea arrangement or proceed to trial. The trial court failed to make sure that Defendant's pleas were voluntary, knowing and understood. Defendant's plea to four counts of robbery with a dangerous weapon, instead of three counts, exposed him to a greater sentence. The State erroneously informed Defendant's counsel, Defendant and the trial court that the additional count of robbery with a dangerous weapon "d[id] not affect our plea." Defendant had no opportunity to contemplate the direct or collateral consequences of his pleas. The trial court's statements could have reasonably induced Defendant's acceptance of the plea.

Moreover, the trial court's statements and counsel's unanswered questions likely infringed upon Defendant's right to enter his plea voluntarily and with full knowledge and understanding of the plea agreement and the consequences.

After our review, we hold that the trial court erred by not granting Defendant's motion to withdraw his guilty plea where (1) Defendant attempted to withdraw his plea less than twenty four hours after entering the plea; (2) Defendant expressed justified confusion during the plea hearing as to the number of charges against him; and (3) the trial court placed improper pressure on Defendant to take the plea agreement by refusing to entertain counsel's reasonable inquiry into the additional counts against Defendant. Additionally, the State does not argue, and we do not find, that the State would be prejudiced by the withdrawal of Defendant's guilty plea. Based on the foregoing, it would be fair and just to grant Defendant's motion to withdraw his plea and therefore, we remand for proceeding consistent with this opinion.

Reversed and Remanded.

Judges Hunter Jr. and Thigpen concur.

Report per Rule 30(e).