IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1147

Filed: 5 September 2017

Union County, No. 12 CRS 52763-64

STATE OF NORTH CAROLINA,

v.

JOHNATHAN SHELTON ALLEN, Defendant.

Appeal by Defendant from a sentence correction entered 9 June 2016 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Michael E. Casterline, for Defendant-Appellant.

MURPHY, Judge.

Johnathan Shelton Allen ("Defendant") appeals from a correction of his potential maximum sentences for statutory rape and statutory sex offense. On appeal, Defendant contends that the trial court erred in increasing his maximum sentence because (1) the Law of the Case Doctrine prohibited the correction, (2) he

was deprived of effective assistance of counsel when his attorney failed to object to the State's Motion to Modify his sentence, and (3) the trial court erred in failing to conduct a *sua sponte* competency hearing. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and applicable law, we conclude that the trial court's judgments should be affirmed.

Background

As this appeal involves the correction of Defendant's sentence and re-sentencing hearing, we need not address the underlying facts in this matter as they were discussed in detail in *State v. Allen*, ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 1007766 (2016) (unpublished) ("*Allen I*"). On 15 September 2014, a jury found Defendant guilty of one count of statutory rape and one count of statutory sex offense. The trial court sentenced Defendant as a prior record level II to two consecutive sentences of 276 months to 344 months. Defendant appealed his convictions to this Court.

Defendant's only argument in *Allen I* was that "the trial court erred in precluding his counsel from informing the jury of the maximum statutory punishments prescribed for the offenses charged against him." *Allen I*, ___ N.C. App. ___, ___, 784 S.E.2d 237, 2016 WL 1007766, *3 (2016) (unpublished). We held that Defendant could not establish prejudice from any error, and thus affirmed the conviction. *Allen I*, ___ N.C. App. ___, ___, 784 S.E.2d 237, 2016 WL 1007766, *6

(2016) (unpublished). On 25 April 2016, the Department of Public Safety filed a document with the trial court seeking clarification on Defendant's maximum sentence term, stating that "[i]t appears the term should have been taken from the Felony Sex Offender's chart. Please check and advise." On 10 May 2016, the State filed a Motion to Modify Defendant's sentence. The State contended that the two sentences of 276 to 344 months Defendant initially received were incorrect under the appropriate sentencing chart because the maximum sentence failed to account for the 60 months of post-release supervision applicable to sex offenders. Defendant does not dispute that the initial maximum sentence did not meet the statutory mandate.

After a hearing on 9 June 2016, Judge Bragg entered modified judgments, correcting the maximum sentence that Defendant received for each of his previous convictions from 344 months to 392 months. During the hearing, Defendant refused to respond verbally to Judge Bragg and his counsel informed the court that Defendant was "non-communicative during his day or two here in county custody." Defense counsel gave oral notice of appeal in open court.

Analysis

I. Law of the Case Doctrine

Defendant first argues that the trial court erred in correcting his sentence because, in this instance, the Law of the Case Doctrine prohibits further correction after a decision by the Court of Appeals. We disagree.

"The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *State v. Todd*, ___ N.C. App. ___, ___, 790 S.E.2d 349, 354 (2016), *rev'd on other grounds*, ___ N.C. ___, 799 S.E.2d 834 (2017) (internal citation and quotation omitted). "However, the law of the case applies *only* to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but *not* to questions which *might* have been decided but were not." *Freedman v. Payne*, ___ N.C. App. ___, ___, 800 S.E.2d 686, 690 (2017) (citation and quotation omitted) (emphasis added).

In *Allen I*, this Court decided the narrow issue of whether the trial court erred in prohibiting Defendant's trial counsel from presenting to the jury, as an example, the maximum sentence for the highest prior record level offender. *Allen I*, ___ N.C. App. ___, ___, 784 S.E.2d 237, 2016 WL 1007766 (2016) (unpublished). Specifically, his trial counsel attempted to present the maximum sentence for a Class B1 felony for a prior record level offender VI, though defense counsel stipulated that Defendant was only a prior record level offender II. Defendant now contends that such appeal necessarily implicated the maximum length of his sentence because "this Court would have had to determine what the potential maximum sentence was, and then what argument could be made to the jury at closing." Specifically, Defendant argues that

because the first appeal implicated this issue, the trial court was barred by the Law of the Case Doctrine from modifying Defendant's sentence.

Defendant's improperly calculated maximum sentences were not implicated in the first appeal and the Law of the Case Doctrine did not bar the trial court from correcting the its original mistake. Defendant's sole argument in his first appeal was "that the trial court erred in precluding his counsel from informing the jury of the maximum statutory punishments prescribed for the offenses charged against him." *Allen I*, ___ N.C. App. ___, ___, 784 S.E.2d 237, 2016 WL 1007766, *3 (2016) (unpublished). We did not address whether Defendant's actual sentence of 344 months was proper. Nowhere in the decision did we address Defendant's actual sentence, nor did we implicitly determine the appropriateness of his sentence in resolving the narrow issue presented in his original appeal. For the Law of the Case Doctrine to apply to Defendant's re-sentencing, we necessarily must have considered whether Defendant's original maximum sentence of 344 months was proper, and we did not.

II. Error in Initial Sentence Was Clerical, Not Judicial

The Defendant incorrectly contends that the error resulting from the trial court's initial sentencing was a judicial error, not a clerical error. A clerical error is an error that results from "a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *State v.*

Taylor, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (internal citation and quotations omitted). In contrast, a judicial error is one that involves an exercise of judicial discretion or judicial reasoning. *State v. Jarman*, 140 N.C. App. 198, 203, 535 S.E.2d 875, 879 (2000).

The Structured Sentencing Act provides for judicial discretion by allowing the court to choose a minimum sentence within a specified range. N.C.G.S. § 15A-1340.17(4) (2015). However, the Act provides no such discretion in regard to maximum sentences. "Rather, the Act dictates that once a minimum sentence is determined, the 'corresponding' maximum sentence is 'specified' in a table set forth in the statute. Thus, [the Act] does not provide for judicial discretion in the determination of maximum sentences." *State v. Parker*, 143 N.C. App. 680, 686, 550 S.E.2d 174, 177 (2001).

In *State v. Cox*, the defendant's initial sentence reflected proper judicial discretion in determining his minimum sentence, but failed to account for the additional time required for sex offenders pursuant to N.C.G.S. § 15A-1340.17(f) in calculating the maximum sentence. *State v. Cox*, 237 N.C. App. 400, 767 S.E.2d 151, 2014 WL 6434495 (2014) (unpublished). To correct Cox's sentence, the trial judge simply amended the defendant's maximum sentence to correspond to the statutory mandate. *Id*, 767 S.E.2d at ___, 2014 WL 6434495 at *3. There, this Court

determined that such an amendment was "clerical in nature." *Id*, 767 S.E.2d at ___, 2014 WL 6434495 at 3.

Similarly, here the trial court used proper judicial discretion to determine Defendant's minimum sentence, but failed to properly calculate the maximum sentence mandated for sex offenders by N.C.G.S. § 15A-1340.17(f). Judge Bragg merely corrected the clerical error appearing on the face of the original judgments.

III. Ineffective Assistance of Counsel

We next consider Defendant's argument that he received ineffective assistance of counsel when his attorney failed to object to the State's Motion to Modify his sentence. We disagree.

On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo. *See State v. Martin,* 64 N.C.App. 180, 181, 306 S.E.2d 851, 852 (1983). A criminal "defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 669, 80 L.Ed.2d 674, 682 (1984). Defendant has failed to meet both prongs because (1) Defendant's trial attorney cannot provide deficient performance where he has no legal basis to object to a Motion to Modify and

(2) Defendant was not prejudiced by the failure to object because he cannot be prejudiced by receiving the statutorily mandated maximum.

Defendant has failed to show that his trial attorney's performance was deficient. To prove counsel's performance was deficient, a Defendant must show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 80 L.Ed.2d at 692-93. Where an ineffective assistance of counsel claim is based on a "failure to adequately present a defense, the central question is whether a supportable defense could have been developed." *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) (citation omitted). "The burden of showing the probability that this defense existed is on the defendant." *Dockery*, 78 N.C. App. at 190, 336 S.E.2d at 721.

Here, Defendant asserts that his trial counsel "was demonstrably unaware of the law as it applied to the facts and procedural history of this case" because trial counsel did not object based on the Law of the Case doctrine. However, as noted above, the Law of the Case doctrine did not preclude the trial court from correcting Defendant's sentence. Defendant does not raise the probability of any other defense existing. No supportable defense could have been developed and the trial counsel's conduct was not deficient.

Assuming *arguendo* that Defendant *had* met his burden under the first prong, Defendant has still failed to prove that his trial counsel's lack of objection to the State's Motion to Modify prejudiced him. "To demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Al-Bayyinah*, 359 N.C. 741, 751, 616 S.E.2d 500, 509 (2005) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698) (internal quotation omitted). "That requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189, 179 L.Ed.2d 557, 575 (2011) (citation and quotations omitted). In making this determination, this Court "must consider the totality of the evidence before the judge or jury." *Strickland,* 466 U.S. at 695, 80 L.Ed.2d at 698.

Here, considering a totality of the evidence before Judge Bragg, there is no reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669, 80 L.Ed.2d at 682. The re-sentencing hearing simply imposed the statutorily mandated maximum which, as noted above, does not permit judicial discretion. There is not any likelihood that any objection defense counsel raised at the re-sentencing hearing would have produced a different result. Counsel was effective and Defendant's argument otherwise is without merit.

IV. Failure to Conduct Competency Hearing

Defendant further contends that the trial court erred by failing to conduct a *sua sponte* competency hearing as there "was some evidence that [Defendant] may have been incompetent" due to Defendant's failure to verbally respond during the re-sentencing hearing or in meeting with his attorney. We disagree.

The question of whether a court improperly failed to institute, *sua* sponte, a competency hearing is a question of law and is reviewed de novo. *State v. Chukwu*, 230 N.C. App., 553, 560, 749 S.E.2d 910, 916 (2013).

The criminal incapacity statute provides:

> (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or *to assist in his defense in a rational or reasonable manner*. This condition is hereinafter referred to as "incapacity to proceed."
> (b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant.

N.C.G.S. § 15A-1001 (2015) (emphasis added). "The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C.G.S. § 15A-1002(a) (2015).

The purpose of N.C.G.S. § 15A-1001(a) is, in part, to ensure the defendant has the capacity "to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed." *State v. Jackson*, 302 N.C.

101, 104, 273 S.E.2d 666, 669 (1981) (citation omitted). However, where there is no possible defense to be raised during the proceeding, N.C.G.S. § 15A-1001(b) creates an exception for those instances where defense counsel can handle the motion without the defendant's assistance in crafting a defense.

Here, the State's Motion to Modify Defendant's sentence could have been handled by Defendant's trial counsel without Defendant's assistance. The re-sentencing hearing was the correction of clerical error and there were no sentencing factors or discretionary rulings, nor any other matters that would require the Defendant's assistance in crafting a defense. Assuming *arguendo* that Defendant's behavior evidenced a lack of competency, the instant case falls under N.C.G.S. § 15A-1001(b) and the trial court did not err in failing to conduct a *sua sponte* competency hearing.

Conclusion

The Law of the Case Doctrine did not apply to prevent the correction of Defendant's maximum sentences, his counsel provided effective assistance, and the trial court did not err in failing to conduct a competency hearing.

NO ERROR.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).