IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1220

Filed: 18 July 2017

Forsyth County, Nos. 14CRS59279, 59281-82, 59284

STATE OF NORTH CAROLINA,

v.

LISA FAYE ELLIS, Defendant.

Appeal by defendant from judgments entered 17 March 2016 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 10 July 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

Mary E. McNeill for defendant-appellant.

BERGER, Judge.

On March 17, 2016, a Forsyth County jury found Lisa Faye Ellis ("Defendant") guilty of felony larceny, attempted misdemeanor larceny, and two counts of contributing to the delinquency of a juvenile. Evidence presented at trial tended to show that on September 12, 2014 Defendant used two of her children to assist her in stealing several dozen jugs of motor oil from a Wal-Mart store in Kernersville, North

Carolina. Defendant and her children made a similar attempt to steal motor oil from the same Wal-Mart store, but she was apprehended by authorities in an adjacent parking lot.

The trial court sentenced Defendant to consecutive thirty-day jail sentences for the two counts of contributing to the delinquency of a juvenile. The trial court consolidated the larceny convictions for judgment, and sentenced Defendant to eight to nineteen months in prison. This sentence was suspended and she was placed on supervised probation for a period of thirty months. Defendant filed timely notice of appeal.

In her argument on appeal, Defendant claims the trial court amended her felony larceny sentence outside of her presence and without her knowledge. At sentencing, the court informed Defendant of the following condition of her supervised probation:

> THE COURT: I am entering an order that will permanently ban you from going on *all Wal[-M]art premises*, not just the one in Kernersville but any Wal[-M]art.
>
> DEFENDANT: Okay.
>
> THE COURT: *And that will also be a condition of your 30-month probation.* You're permanently banned from it. But if, while you are on probation, it is discovered that you are on the premises of a Wal[-M]art, the probation officer is instructed to make a violation report. And you're to be placed under a [$]15,000 . . . secured bond if you do go back on the Wal[-M]art and are discovered *on Wal[-M]art*

premises.

DEFENDANT: Okay.

(Emphasis added). The court's written judgment imposes the following special condition of probation pursuant to N.C. Gen. Stat. § 15A-1343(b1) (2016): "[Defendant is] permanently banned from Wal[-M]art *and Sam's Club* stores. If found in Wal[-M]art *or Sam's Club* stores, issue probation violation with $15,000 secured bond." (Emphasis added).

Noting that "Sam's Club stores and Wal[-M]art[stores] are two different stores," Defendant asserts that the trial court's written judgment "substantially altered [her] sentence and the terms of her probation" as announced in open court at her sentencing hearing. Because this change was made outside of her presence, Defendant claims she is entitled to a new sentencing hearing.

"It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." *State v. Leaks*, 240 N.C. App. 573, 578, 771 S.E.2d 795, 799 (2015) (citing *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999)), *disc. review denied*, 368 N.C. 285, 775 S.E.2d 870 (2015). It is equally settled that "[t]he written judgment entered by a trial court constitutes the actual sentence imposed on a criminal defendant; the announcement of judgment in open court is merely the rendering of judgment." *State v. Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244, 250 (2006) (citing *Crumbley*, 135 N.C. App. at 66, 519 S.E.2d at 99). Therefore, if the trial

court enters a written judgment effecting a "substantive change" to the sentence rendered in defendant's presence at the sentencing hearing, the defendant is entitled to resentencing. *Crumbley*, 135 N.C. App. at 67, 519 S.E.2d at 99 (vacating prison sentences that were rendered as concurrent but made consecutive on the written judgment); *see also Leaks*, 240 N.C. App. at 579, 771 S.E.2d at 799-800 (vacating sentence where the defendant's maximum prison term was announced as 146 months at sentencing but recorded as 149 months on the written judgment).

We find the facts of this case substantially similar to the circumstance addressed by this Court in *State v. Willis*, 199 N.C. App. 309, 680 S.E.2d 772 (2009):

> In open court, the judge ordered as a special condition of probation that defendant "is not to have in his possession more than one dog at any time. Let him have a pet." However, when the judge issued his written sentence later that day, the special condition had been modified to: "Defendant is not to have in his possession more than one animal."

Id. at 310, 680 S.E.2d at 773. Overruling defendant's challenge to the modification of his probation outside of his presence, we held the trial court had merely made a permissible clerical correction to its oral judgment announced at sentencing. *Id.* at 311, 680 S.E.2d at 774.

> The . . . modification, which changed the trial court's order from prohibiting defendant from possessing more than one dog to prohibiting him from possessing more than one animal, merely reflected the judge's comments in open court that defendant was allowed only "a pet." As such, [this] modification is properly classified as a clerical change

> that brought the written statement in line with the judge's statements in open court.

Id.

By contrast, the *Willis* Court found that a "second modification, which changed defendant's sentence from allowing only one animal in his *possession* to allowing only one animal on his *premises*, [was] not properly classified as a clerical correction[,]" and was a substantive change to defendant's probation, which could not be made without a hearing. *Id.* at 311-12, 680 S.E.2d at 774 (emphasis added). We explained our conclusion as follows:

> First, such a condition was never discussed in open court, and there is no evidence in the record that the court was merely making its records "speak the truth." Second, given that a neighbor testified that defendant and his wife were keeping approximately seventeen animals on their property, the second modification in the trial court's order substantively impacted defendant's life in a way that was very different than the court's first modification.

Id.

In the case *sub judice*, the trial court announced its intention to bar Defendant from "all Wal[-M]art premises" as a condition of her probation. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 201 (2016), we take judicial notice that Sam's Club is a division of Wal-Mart Stores, Inc.[1] *See Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 645, 531 S.E.2d 883, 885 (2000) (noting that "Sam's Club[is] a division of Wal-Mart"), *disc.*

[1] Sam's Club, http://corporate.samsclub.com/our-story/company-facts (last visited Jun. 26, 2017).

review denied, 353 N.C. 266, 546 S.E.2d 104 (2000). While the court's reference to "all Wal[-M]art premises" may have been ambiguous, we hold the inclusion of both Wal-Mart and Sam's Club stores in the written judgment amounts to a clarification or clerical correction of the special condition of probation announced at sentencing. Because the probation condition recorded on the judgment does not represent a substantive change to the sentence rendered in Defendant's presence, we find Defendant's argument without merit.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).