IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-126

Filed: 15 September 2020

Mecklenburg County, Nos. 16CRS226716-17

STATE OF NORTH CAROLINA

v.

MARK PETER O'DELL, Defendant.

Appeal by defendant from judgment entered 27 June 2019 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the Defendant.

DILLON, Judge.

On 27 June 2019, Mark Peter O'Dell ("Defendant") pleaded guilty to second-degree murder and breaking and entering. Defendant received a consolidated sentence in the aggravated range to a term of 300 to 372 months. Defendant appeals, arguing that he is entitled to a new sentencing hearing. Specifically, Defendant

contends that the trial court erred by failing to find the statutory mitigating factor that Defendant has a positive employment history. We disagree.

I. Background

In this matter, Defendant entered a plea agreement whereby he pleaded guilty to second-degree murder and breaking and entering, based on an incident where he forced his way into the home of his former girlfriend, Lorene Simpson, and fatally shot her. As part of the agreement, he stipulated to two aggravating factors.

During the sentencing portion of the hearing, Defendant argued that six mitigating factors were present, including that he had a positive employment history. The trial court found the presence of the two aggravating factors to which Defendant stipulated and five mitigating factors, including that he had been honorably discharged from the military. The trial court, however, did not find that Defendant had a positive employment history. Defendant had argued that his positive employment history was supported by evidence that he obtained a medal for good conduct and soldier of the year and that he worked with autistic children in his capacity as a social worker.

The trial court sentenced Defendant in the aggravated range. Defendant timely appeals.

II. Analysis

A defendant who has entered a plea of guilty may appeal his sentence where "the minimum sentence of imprisonment [imposed] does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense." N.C. Gen. Stat. § 15A-1444(a1) (2019). Here, since the trial court imposed a sentence in the aggravated range, Defendant's appeal is properly before this Court. *See* N.C. Gen. Stat. § 15A-1444(a1).

On appeal, Defendant argues that the trial court erred in failing to find the mitigating factor that he had a positive employment history. For the reasoning below, we disagree.

During a sentencing hearing, "the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." N.C. Gen. Stat. § 15A-1340.16(a). And "[a] trial judge's failure to find a statutory mitigating factor is error *only* where evidence supporting the factor is uncontradicted, substantial, and manifestly credible." *State v. Maness*, 321 N.C. 454, 462, 364 S.E.2d 349, 353 (1988) (emphasis added) (citation omitted). Because

> [a] trial judge has wide latitude in determining the existence of aggravating and mitigating factors, . . . [t]o show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that the mitigating factor exists, i.e., that no other reasonable inferences can be drawn from the evidence.

State v. Canty, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988) (citations omitted).

A trial court's failure to find a statutory mitigating factor of positive employment history will not constitute error when a defendant merely presents self-serving testimony, evidence of what positions were held, or states the number of years employed, without more. *State v. Bacon*, 228 N.C. App. 432, 436-38, 745 S.E.2d 905, 909-10 (2013).

Here, Defendant presented evidence as follows regarding his military service: Defendant was honorably discharged from the United States Army National Guard in 1998. During his service Defendant received an army commendation medal and was selected to participate in the First United States Army's Noncommissioned Officer and Soldier of the Year Competition for 1988. We note that for his military service, the trial court found the statutory mitigating factor that he "has been honorably discharged from the United States Armed Services."

Defendant argues that *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013) compels this Court to conclude that the trial court erred in failing to find positive employment history based on his military service. Indeed, like in *Wilkes*, here, "Defendant introduced his military records, which included commendations and awards. This evidence was uncontradicted, and the credibility of the records was likewise not questioned." *Id.* at 241, 736 S.E.2d at 588. However, in *Wilkes* the defendant's service in the armed forces spanned from 1991 to 2009, with the defendant's service in the armed forces continuing up until the date he committed his

crime. By contrast, here, Defendant was honorably discharged from the military more than 18 years prior to his murdering Ms. Simpson.

We point to *State v. Mabry*, in which we held that a trial court did not err by failing to find a positive employment history based on the defendant's military service where the defendant was honorably discharged *ten (10) years prior* to committing his crime. 217 N.C. App. 465, 474, 720 S.E.2d 697, 704 (2011).

Regarding his employment as a social worker, Defendant offered a letter dated 1993 which evidenced his passing score on the State Social Work Boards clinical level examination, as well as a document evidencing his status as a licensed social worker, which was set to expire in 2008. This evidence, though, does not, in fact, show that he was gainfully employed during that period sufficient to warrant a finding of a positive employment history. *See generally Mabry*, 217 N.C. App. at 474, 720 S.E.2d at 704. Additionally, even if a licensure, on its own, were sufficient to establish employment, there was no evidence presented that such employment was positive.

III. Conclusion

Based on the evidence before the trial court, we conclude that the trial court did not err in failing to find the statutory mitigating factor that Defendant had a positive employment history.

AFFIRMED.

Chief Judge MCGEE and Judge MURPHY concur.

Report per Rule 30(e).