IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-306

Filed 12 September 2023

Wake County, Nos. 19 CRS 209856, 19 CRS 209858-61, 19 CRS 209863, 19 CRS 221220-23

STATE OF NORTH CAROLINA,

v.

KIRK WALTER NUNEZ-SERRAIOS, Defendant.

Appeal by Defendant from judgments entered 7 November 2022 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 29 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Hyrum J. Hemingway, for the State.

Richard Croutharmel, for defendant-appellant.

PER CURIAM.

Defendant Kirk Walter Nunez-Serraios appeals from a first-degree rape of child judgment by the trial court from a 30 August 2010 offense. Defendant argues that the trial court erred by imposing a maximum sentence higher than statutorily applicable for his crime when it was committed. While a trial court may exercise its

discretion to impose a lesser sentence in the presence of mitigating factors, it has no such discretion to impose a sentence more severe than allowed for felony offenses committed in 2010 under the Structured Sentencing Act. Accordingly, we vacate the trial court's judgment and remand for resentencing.

BACKGROUND

Defendant was a father figure present in the lives of both Iselle[1] and Marie "for nine to ten years." Defendant sexually abused the minors over a period of years; Iselle from the time she was 12 until she was approximately 21 years of age, and Marie from when she was 10 years old. On 28 May 2019, Defendant was charged with three counts of first-degree rape of a child, three counts of first-degree sex offense with a child, eight counts of indecent liberties with a child, first-degree statutory rape, first-degree statutory sex offense with a child, two counts of statutory sex offense with a child 15 years old or younger, and two counts of statutory rape of a child 15 years old or younger. On 30 July 2019, Defendant was indicted on all the charges.

On 16 November 2019, Defendant was additionally charged—and, later, indicted—with first-degree rape of a child, two counts of indecent liberties with a child, three counts of statutory rape of a child six years younger than the defendant, and sexual activity by a substitute parent. On 1 November 2022, the State dismissed

[1] We use pseudonyms to protect the juveniles' identity and for ease of reading.

two counts of first-degree rape of a child, two counts of first-degree sex offense with a child, one count of statutory sex offense with a child 15 years old or younger, and one count of statutory rape with a child 15 years old or younger "so as not to confuse the jury." Defendant pled guilty to the remaining charges.

The trial court "[found] for purposes of sentencing [that] [Defendant] [was] a prior record level II based on two prior record points" and entered "three judgments . . . each of which [was] in the presumptive range." The first judgement, which consolidated three counts with offenses dated from 2012, related to Marie's case 19 CRS 209856 and was noted to carry a minimum incarceration term of 300 months with a maximum of 420 months. The second judgment, which was the first-degree rape of child offense[2] dated 30 August 2010, related to Iselle's case 19 CRS 221220 and was noted to carry a minimum incarceration term of 300 months with a maximum of 420 months. The third judgment consolidated "the remaining offense[s] . . . for a single judgment of 300 months minimum, 420 months maximum." Following the trial court's announcement of the judgments, Defendant appealed.

ANALYSIS

On appeal, Defendant argues that he is entitled to a new sentencing hearing. He contends the trial court erred in sentencing him to "420 months maximum . . . in

[2] A first-degree rape of child offense was a "Class B1 felony" under N.C.G.S. § 14-27.2A(b). N.C.G.S. § 14-27.2A(b) (2010). N.C.G.S. § 14-27.2A(b) was recodified in 2015 as N.C.G.S. § 14-27.23 by S.L. 2015-181.

file number 19 CRS 221220 because the offense date in that judgment is given as [30 August 2010]," during which time the maximum prison sentence for a Class B1 felony was 369 months when the minimum was 300 months. The State concedes the "trial court erred when it imposed a maximum sentence of 420 months for Defendant" in file number 19 CRS 221220. "Sentencing errors are preserved for appellate review even if the defendant fails to object at the sentencing hearing." *State v. Patterson*, 269 N.C. App. 640, 645 (2020). We review alleged sentencing errors de novo. *State v. Reynolds*, 161 N.C. App. 144, 149 (2003). Upon review, we find reversible error by the trial court.

Under North Carolina law, trial courts are required to enter criminal judgements in compliance with the sentencing provisions in effect at the time of the offense. *State v. Powell*, 231 N.C. App. 129, 132 (2013). If the time of offense is in 2010, a trial court must apply sentencing provisions effective in 2010.

Pursuant to N.C.G.S. § 15A-1340.17(e), after a trial court determines the minimum duration of a defendant's sentence, in order to calculate the maximum sentence for a Class B1 through Class C felony that is not otherwise provided by statute should select, "for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, [] as specified in the table [in subsection (e)]," in which "[t]he first figure in each cell in the table is the minimum term and the second is the maximum term." N.C.G.S. § 15A-1340.17(e) (2022).

Further, N.C.G.S. § 15A-1340.13 (2010) requires trial courts to sentence a Defendant with the "class of offense and prior record level" and to the maximum term of imprisonment applicable to each minimum term for that offense "as specified in [N.C.G.S. §] 15A-1340.17." N.C.G.S. § 15A-1340.13(b), (c) (2010). Thus, the appropriate maximum term must "be specified in the judgment of the [sentencing] court." N.C.G.S. § 15A-1340.13(c).

The trial court's judgment in file number 19 CRS 221220, to which Defendant pled guilty, was for an offense which occurred on 30 August 2010 and should have reflected the maximum sentence of 369 months. Here, the trial court appropriately imposed Defendant's 300-month minimum sentence based on his prior record level of II. However, the trial court's imposition of a 420-month maximum sentence when the minimum sentence is 300 months violates the sentencing mandate for an offense committed in 2010.

CONCLUSION

For the foregoing reasons, we find reversible error. We vacate Defendant's sentence in file number 19 CRS 221220 and remand to the trial court for resentencing consistent with the statutes in effect for the 2010 offense.

VACATED AND REMANDED.

Panel consisting of Judges DILLON, MURPHY, and RIGGS.

Report per Rule 30(e).