NO. COA01-1213

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

ANTHONY ANTWON MOORE

Rockingham County
Nos. 99CRS013609
00CRS011249
01CRS000296

Appeal by defendant from judgments entered 3 April 2001 by Judge Peter M. McHugh in Rockingham County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General LaShawn L. Strange, for the State.

Mark E. Hayes for defendant-appellant.

HUNTER, Judge.

The Rockingham County grand jury indicted defendant on 6 November 2000 on a charge of common law robbery and indicted him on 8 January 2001 on charges of robbery with a dangerous weapon and possession of a weapon of mass destruction. On 3 April 2001, defendant pled guilty pursuant to a plea arrangement to two counts of common law robbery and possession of a weapon of mass destruction. In accordance with the plea arrangement, the State dismissed a charge of second degree kidnapping.

After entering his pleas of guilty, defendant stipulated to a factual basis for the pleas. The State summarized the factual

basis for defendant's pleas and asserted in closing that "defendant was on pretrial release on the other offenses and the other aggravating factors." Defense counsel then argued as follows:

> If Honor please, my client is 20 years old. He has one child that is on the way. He has been in custody from early last year . . . . At some point he got placed on house arrest and he violated that. With the new charge he was on electronic house arrest for the common law robbery case and was released for violating. He got charged with the armed robbery case and he has been in custody since November. . . .
>
> He has pretty much told me exactly what the District Attorney related to the Court almost word for word. I don't know if there's any real reason or excuse for it. There was a group of guys and they -- they just decided to jump on somebody.
>
> The armed robbery case, he and another person had been together. I think the evidence, if we go to trial on that, would have tended to show that my client was not as active as physical a person as one of the co-defendants was who actually had the weapon. He was sitting in the back seat of the vehicle and apparently they were riding around for some time in a friendly manner before, apparently, this person got some drugs of some sort and it turned into a situation.
>
> As you can see, he basically has no record except the one conviction. For his age he has done pretty right this time and he's been very, very cooperative with me, even when he was in custody, very cooperative. He had been working and there was some part-time work, and that's the situation.

The trial court found that a factual basis existed for defendant's plea and that defendant's plea was freely, voluntarily and understandingly made. After imposing a presumptive range sentence of twelve to fifteen months for the first common law robbery, the

trial court imposed consecutive aggravated range sentences having a combined minimum term of forty-three months and a combined maximum term of fifty-two months. The trial court found one factor in aggravation, that defendant had "committed the offense while on pretrial release on another felony charge," and no factors in mitigation. From the trial court's judgments, defendant appeals. We find no error.

Defendant contends his trial counsel failed to provide effective assistance of counsel during his sentencing hearing. He asserts that his trial counsel failed to submit available mitigating factors to the trial court and also made statements to the trial court which were detrimental to him. We disagree.

To make a showing of ineffective assistance of counsel, a defendant must satisfy a two-prong test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). However, "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on

questions of strategy and trial tactics." *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984).

Trial counsel's decision not to call witnesses at the sentencing hearing in support of his argument to the trial court does not rise to the level of ineffective assistance. This Court has previously rejected a trial counsel's failure to call any witnesses at the sentencing hearing as a ground for ineffective assistance. *See State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861, *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986). The record shows the State closed its sentencing argument by arguing defendant had committed two of the offenses while on pretrial release. Trial counsel then responded by conceding defendant was on electronic house arrest when he was charged with the latter two offenses. While trial counsel did not explicitly request lenient sentencing in his argument, he did point out defendant's young age, his impending fatherhood, his employment and his one prior conviction to the trial court. Trial counsel mentioned defendant's candor in describing the offenses and his cooperativeness with trial counsel even while in custody. He also argued defendant had a less active role than a co-defendant in the armed robbery case.

Unlike defense counsel in *State v. Davidson*, 77 N.C. App. 540, 545-47, 335 S.E.2d 518, 521-22 (1985), trial counsel did not berate, disparage or present his client in a negative light to the trial court. The record does not support defendant's assertion that trial counsel "stated that the second incident was related to

a drug deal." It is clear that trial counsel was referring to someone other than defendant when he asserted that "this person got some drugs of some sort and it turned into a situation." As for trial counsel's statement that he did not "know if there's any real reason or excuse for" the first common law robbery, it appears trial counsel's concession was "'strategy and trial tactics'" properly left within trial counsel's control. *See Taylor*, 79 N.C. App. at 638, 339 S.E.2d at 861. We find defendant's contention that he was denied effective assistance of counsel at the sentencing hearing to be without merit.

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).