NO. COA01-850

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 99 CRS 073560

WARREN ANTWAN HOLMES

Appeal by defendant from judgment entered 26 January 2001 by Judge Wiley F. Bowen in Cumberland County Superior Court. Heard in the Court of Appeals 4 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General John F. Maddrey, for the State.

James R. Parish for defendant appellant.

TIMMONS-GOODSON, Judge.

On 26 January 2001, a jury found Warren Antwan Holmes ("defendant") guilty of assault with a deadly weapon inflicting serious injury. The trial court subsequently sentenced defendant to a term of thirty-four to fifty months' imprisonment, from which conviction and sentence defendant now appeals.

Counsel appointed to represent defendant has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that he has

complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so. On 19 November 2001, defendant filed written arguments with this Court. Pursuant to *Anders* and *Kinch*, we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.

Defendant presents the following two issues for review: (1) whether the State failed to prove the essential element of possession of a deadly weapon; and (2) whether the trial court correctly calculated defendant's prior record level. Defendant also asserts that he was denied effective assistance of counsel. For the reasons stated herein, we find no error by the trial court.

Defendant first contends that the State failed to prove the essential element of possession of a deadly weapon. Defendant notes that on 30 November 2000, an order for joinder was entered allowing the State to try defendant on three charges: (1) possession of a firearm by a felon; (2) discharge of a firearm into occupied property; and (3) assault with a deadly weapon inflicting serious injury. Defendant asserts that the State violated the order by not trying him on the possession of a firearm charge, which was later dismissed. Defendant contends that, because the possession of a firearm charge was dismissed, the State failed to

prove he possessed a deadly weapon. Defendant's argument has no merit.

Defendant appears to argue that because the State did not try him on charges of possession of a firearm, he could not be convicted of assault with a deadly weapon inflicting serious injury. We disagree. The order of joinder merely required the State to pursue all related charges in one trial. The State chose not to pursue charges of possession of a firearm by a felon at defendant's trial. Accordingly, the possession charge was dismissed by the State six months after the trial. The mere fact, however, that the State did not pursue the possession charge against defendant did not preclude the State from presenting evidence of defendant's possession of the firearm, nor did it negate the State's proof of the essential element of possession of a deadly weapon for the assault charge. The State presented substantial evidence at trial placing defendant in possession of a pistol that he fired several times, a bullet from which struck and seriously injured the victim. Thus, there was sufficient evidence of defendant's possession of a deadly weapon to sustain his conviction for assault with a deadly weapon inflicting serious injury. We therefore overrule defendant's first assignment of error.

By his second assignment of error, defendant argues that his prior record level was incorrectly calculated. Defendant contends that he had only two prior record level points, not six, and should have been classified as a Level II felon. Defendant also argues

that he was sentenced in the aggravated range of punishment, and that he should have been sentenced in the presumptive range. Again, we find no merit to defendant's argument.

Defendant's prior conviction worksheet shows that defendant had previously committed two Class H felonies and two misdemeanors. Each felony was worth two points, and each misdemeanor was worth one point. Thus, defendant had six prior record level points for a prior record level of III. The trial court then correctly sentenced defendant in the presumptive range as a Class E, Level III felon to thirty-four to fifty months' imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17 (1999). We therefore overrule defendant's second assignment of error.

Finally, defendant has filed a *pro se* motion for appropriate relief with the Court alleging that his constitutional right to effective assistance of counsel at trial was violated. We cannot properly determine this issue on direct appeal because an evidentiary hearing on this issue has not been held in the trial court. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) (stating that "[t]he accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal"). Accordingly, defendant's motion is dismissed without prejudice to his right to file a motion for appropriate relief in the superior court based upon an allegation of ineffective assistance of counsel. *See* N.C. Gen. Stat. § 15A-1415(b)(3) (1999).

In addition to defendant's arguments, the Court has reviewed

the record for other possible prejudicial error and has found none. Accordingly, we conclude that the appeal is wholly frivolous.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).