

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1078

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v.

Pitt County
No. 03 CRS 54863

WADDY NATHAN AGNEW

Appeal by defendant from judgment entered 9 March 2005 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 18 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

Kevin P. Bradley for defendant.

LEVINSON, Judge.

Waddy Nathan Agnew (defendant) appeals from judgment entered upon his guilty plea to trafficking in cocaine by possession. We affirm.

The pertinent facts may be summarized as follows: On or about 23 April 2003, Detective McLawhorn of the Farmville Police Department and other officers had contact with a confidential informant who provided information that a male from Ayden, North Carolina had called him and expressed a desire to purchase cocaine. After several phone calls and conversations were recorded, law enforcement determined that the male, later identified as the

defendant, arrived in Farmville and met with the confidential informant and an undercover officer. Defendant gave the undercover officer \$5,750 in cash and the officer handed defendant 347.5 grams of cocaine. Defendant was taken into custody while he still had his right hand inside the bag of cocaine.

Defendant was indicted on 8 March 2004 for trafficking in cocaine by possession in excess of 200 grams but less than 400 grams in violation of N.C. Gen. Stat. § 90-95 (2005). On 9 June 2004, defendant pled guilty to the subject charge and signed the AOC-CR-300 (Rev. 2/2000) Transcript of Plea. Additionally, on the same day, the defendant pled guilty in open court. In doing so, Judge Duke addressed the defendant and asked him each question contained in the Transcript of Plea. Defendant responded in the affirmative to the following questions: (1) Do you understand that you are pleading guilty to the charges shown on the attached sheet, which carry the total punishments listed?; (2) Do you now personally plead guilty?; and (3) Are you in fact guilty? Judge Duke and defense counsel then had the following colloquy in which defense counsel stipulated that there was a factual basis for entry of the guilty plea:

THE COURT: Do you stipulate that there is a factual basis to support this plea and waive a formal presentation of the evidence?

MR. DUPREE: Yes, sir.

THE COURT: Based upon that stipulation, the Court finds that there is a factual basis for the entry of the plea, that the defendant is satisfied with [h]is lawyer, that the defendant is competent to stand trial, that the plea is the informed choice of the

defendant, and that the plea is made freely, voluntarily, and understandingly. . . .

The trial court then continued sentencing until the State prayed judgment.

On 10 March 2005, Judge Everett began sentencing proceedings based upon the defendant's guilty plea of 9 June 2004. However, prior to sentencing, defendant requested that he be heard by the court in order to "explain [h]is case." Defendant made a motion to withdraw his guilty plea and argued, *inter alia*, that he did not possess drugs when he met the police informant; did not possess the entirety of his mental faculties when he came to court on 9 June 2004 because he was smoking marijuana; and did not understand how he could be charged with trafficking by possession. Defendant then asked that he be given "a fair trial." Defendant's attorney stated that he had previously discussed the case with defendant as well as the plea agreement and mandatory minimum sentences.

The trial court denied defendant's motion to withdraw his plea, and the prosecutor proceeded to read a statement of pertinent facts summarizing what would have been the State's evidence in the case. When the trial court permitted the defendant to speak, the defendant suggested that unknown audio tapes - not presented to the trial court or otherwise made a part of the record - would prove the subject charge unfounded. In attempting to further explain his actions, defendant stated, "I never possessed it. When he showed that to me, I didn't take that whole bag. I was looking at it because it didn't look right. I picked up a little piece." The

trial court imposed a presumptive sentence of 70 to 84 months imprisonment.

From the judgment entered 9 March 2005, defendant now appeals, contending that the trial court erred by (1) accepting his guilty plea without the factual basis required by N.C. Gen. Stat. § 15A-1022(c), and (2) denying his motion to withdraw his guilty plea because fair and just reasons existed to justify its withdrawal.

In defendant's first argument on appeal, he contends that the trial court failed to comply with the requirements set forth in N.C. Gen. Stat. § 15A-1022(c) (2005) because no factual basis existed for the trial court to accept defendant's plea of guilty. We disagree.

G.S. § 15A-1022(c) provides, in pertinent part, that:

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

- (1) A statement of the facts by the prosecutor.
- (2) A written statement of the defendant.
- (3) An examination of the presentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

The trial court need not find a factual basis for the plea from any particular source identified in the statute. Instead, "[t]he trial court may consider any information properly brought to its attention, and the trial record must reflect the information and evidence relied upon in reaching the decision that an adequate factual basis does exist." *State v. Atkins*, 349 N.C. 62, 96, 505 S.E.2d 97, 118 (1998) (citing *State v. Sinclair*, 301 N.C. 193, 270

S.E.2d 418 (1980), and *State v. Dickens*, 299 N.C. 76, 261 S.E.2d 183 (1980)).

In *Dickens*, defendant was charged with eight counts of issuing worthless checks and subsequently entered a plea of guilty to each of the charges. In documenting the prior actions of the trial court, our Supreme Court noted that:

Before accepting defendant's pleas of guilty, the trial court personally addressed defendant to ascertain if the guilty pleas were freely, voluntarily and understandingly made. From the answers provided by defendant to the questions enumerated on the "Transcript of Plea. . ." the court made findings of fact (1) that there was a factual basis for the entry of the pleas; (2) that defendant was satisfied with his counsel; and (3) that defendant's pleas were the informed choice of defendant and made freely, voluntarily and understandingly. Upon these findings the court concluded that defendant's pleas of guilty should be accepted by the court and ordered that the record so indicate.

Dickens, 299 N.C. at 76-77, 261 S.E.2d at 184.

The Supreme Court further articulated that sufficient information existed to support a factual basis for the trial court to accept the guilty plea. Such information included defendant's answer to a question in the Transcript of Plea that he was "in fact guilty" of the charges, and the defendant's conviction on the subject charges after trial in district court upon his pleas of not guilty. *Dickens*, 299 N.C. at 82, 261 S.E.2d at 187.

In the instant case, we are guided, in part, by the principles articulated in *Dickens*. Defendant signed a Transcript of Plea wherein he answered affirmatively to the question, "Are you in fact guilty?" Additionally, in open court, defendant confirmed his

prior written request to plead guilty contained in the Transcript of Plea. The following colloquy between defendant and Judge Duke occurred:

THE COURT: Do you now personally plead guilty to this charge?

[DEFENDANT]: Yes, sir.

THE COURT: Are you in fact guilty of this charge?

[DEFENDANT]: Yes, sir.

The defendant, through counsel, also stipulated that there was a factual basis for the guilty plea:

THE COURT: Do you stipulate that there is a factual basis to support this plea and waive a formal presentation of the evidence?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Based upon that stipulation, the Court finds that there is a factual basis for the entry of the plea, that the defendant is satisfied with [h]is lawyer, that the defendant is competent to stand trial, that the plea is the informed choice of the defendant, and that the plea is made freely, voluntarily, and understandingly. . . .

We conclude that the trial court complied with the requirements set forth in G.S. § 15A-1022(c), as there existed a factual basis for defendant's plea of guilty.

We also observe that defendant has failed to assign error to the trial court's finding in the Transcript of Plea "[t]hat there is a factual basis for the entry of the plea." Consequently, this finding is "deemed to be supported by competent evidence and [is] binding on appeal." See *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (citing *State v. Baker*, 312 N.C. 34, 37, 320

S.E.2d 670, 673 (1984)), *disc review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). Hence, for the reasons set forth herein, defendant's first assignment of error is overruled.

In defendant's second argument on appeal, he contends that the trial court erred in denying his motion to withdraw his guilty plea because fair and just reasons existed to justify its withdrawal. We disagree.

This Court recently summarized our standard of review for this issue:

In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record. There is no absolute right to withdraw a plea of guilty, however, a criminal defendant seeking to withdraw such a plea before sentencing is generally accorded that right if he can show any fair and just reason. The defendant has the burden of showing his motion to withdraw his guilty plea is supported by some fair and just reason. Our Supreme Court has set out the following factors for consideration of plea withdrawals:

[1] whether the defendant has asserted legal innocence, [2] the strength of the State's proffer of evidence, [3] the length of time between entry of the guilty plea and the desire to change it, [4] and whether the accused has had competent counsel at all relevant times, [5] misunderstanding of the consequences of a guilty plea, [6] hasty entry, [7] confusion, and [8] coercion are also factors for consideration.

This Court has placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea. (denying the defendant's motion to withdraw guilty plea made more than one month after its entry); (denying the defendant's

motion to withdraw guilty plea made at least eight months after entry of the guilty plea). In *Marshburn*, this Court elaborated [:] This context [referring to the eight month period between entry of the plea and the motion to withdraw] requires that the reasons given by a defendant must have considerably more force than would be the case if the motion comes only a day or so after the plea was entered or if the defendant did not have competent counsel at the time he entered the plea.

State v. Robinson, __ N.C. App. __, __, 628 S.E.2d 252, 254-55 (2006) (internal quotation marks and citations omitted).

In the instant case, defendant does not argue that he was coerced or confused. Nor does he argue that he misunderstood the consequences of his guilty plea. Additionally, the defendant does not contend that he entered the plea hastily or was represented by incompetent counsel. In evaluating the remaining considerations, we first recognize that there was a significant length of time between the defendant's guilty plea and his motion to withdraw the same - 9 months. *See, e.g., State v. Marshburn*, 109 N.C. App. 105, 109, 425 S.E.2d 715, 718 (1993) (affirming denial of the motion to withdraw guilty plea made at least eight months after entry of the guilty plea). Moreover, the State's forecast of the evidence shows that the subject charge had merit. Here, the forecast of evidence showed that defendant came to Farmville, North Carolina and met with the confidential informant and an undercover officer. The defendant then gave the undercover officer \$5,750 and was then handed approximately 347.5 grams of cocaine. At the time law enforcement officers arrived to apprehend the defendant, he was actually caught with his right hand inside one of the bags of

cocaine and was subsequently arrested. While defendant's assertion of legal innocence - that he "didn't have . . . drugs" was seriously undermined by his statement that, "[w]hen he showed that to me, I didn't take the whole bag. I was looking at it because it didn't look right. I picked up a little piece."

We conclude the trial court did not err in denying the defendant's motion to withdraw his plea of guilty. This assignment of error is overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).