NO. COA05-1294

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Durham County
No. 02 CRS 51899

CHRISTOPHER BEST

Appeal by defendant from judgment entered 8 September 2004 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 29 May 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for defendant appellant.

McCULLOUGH, Judge.

On 7 April 2003, defendant was indicted for robbery with a dangerous weapon. A superseding indictment charging him with robbery with a dangerous weapon was entered on 25 August 2003. On 21 July 2004, defendant entered into a plea agreement with the State. Prayer for judgment was continued until 7 September 2004 for the purposes of sentencing.

On 8 September 2004, defendant appeared in court for sentencing. At the hearing, defendant requested that the court consider extraordinary mitigation pursuant to N.C. Gen. Stat.

§ 15A-1340.13(g) (2005). The trial court responded as follows:

> All right. I'm going to be very specific in this because the request has been made for me to find extraordinary mitigation. For that to happen, under 1340.13(g), I have to find first that the extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
>
> That is true in this case, because he provided additional information that led to the arrest of individuals for selling controlled substances.
>
> Two, that the factors substantially outweigh any factors in aggravation.
>
> There's also no question here, because there are mitigat[ing] factors involved in the case to substantially outweigh aggravating factors.
>
> And three, that it would be a manifest injustice to impose an active sentence in this case.
>
> That's not present at all. This is an armed robbery. And you can provide assistance all you like. And you did. You provided assistance. And that makes me find a sentence to be in the mitigated range and that's appropriate in this case. However, it will not change what the law mandates as an active sentence to an intermediate sentence requiring punishment knocking off 32 months of prison because of that. The maximum I could impose under an intermediate sentence would be six months in jail.
>
> I can tell you, and I can tell the world, if there's an armed robbery in front of me, I'm never going to find mitigating circumstances that would justify only six months in jail for sticking a gun in somebody's face and demanding controlled substances or cash, or anything else. It will not happen in my court unless a whole lot more than this has happened.
>
> Do I find it unusual that someone who is charged with drug offenses or serious offenses

> rolls on their friends or on their acquaintances? Heck, no. Happens every day, because it's self-interest. It's not for the community good. It's self interest. If I can get them, can I get off on this? Well, it happens every day. Turning in the next person up [sic] and hope that that goes away for you. It doesn't go away with an armed robbery.
>
> Regardless of whether you were under the influence of Percocet, or any other pain killer, that is a deliberate act of intention. You knew what you were doing. You may have done it for the wrong reasons to get more pain killer, but you knew what you were doing. When you stick a gun in somebody's face and demand something, you know it. You know what you're doing, and that's not something for which the Court can say our statutes which mandate an active sentence of no less than, no less than, 38 months, that I should suddenly give you six months because you provide the names of and made some buys for some folks that you were acquainted with who ran into the drug world with you.
>
> That's assistance, yes. Is it the extraordinary assistance that this Court would require to change it to an intermediate sentence? And the answer to that is no. Because the third factor, it would be a manifest injustice to impose an active punishment in the case, is not here.

The trial court sentenced defendant to a term of thirty-eight to fifty-five months' imprisonment. Defendant appeals.

Defendant argues that the trial court erred when it refused to exercise its discretion under N.C. Gen. Stat. § 15A-1340.13(g) and consider his request for extraordinary mitigation. Defendant insists that he is entitled to a new sentencing hearing. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1340.13(g), the trial court

> may impose an intermediate punishment for a class of offense and prior record level that requires the

> imposition of an active punishment if it finds in writing all of the following:
>
> (1) That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
>
> (2) Those factors substantially outweigh any factors in aggravation.
>
> (3) It would be a manifest injustice to impose an active punishment in the case.
>
> The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court. The extraordinary mitigating factors which the court finds shall be specified in its judgment.

Id. As defendant properly notes, a trial court must exercise its discretion where requested to do so pursuant to Section 15A-1340.13(g). *See State v. Barrow*, 350 N.C. 640, 517 S.E.2d 374 (1999)).

Defendant argues that the trial court failed to exercise its discretion; however, the record indicates that the court was aware that it had discretion and exercised that discretion when refusing defendant's request for extraordinary mitigation. The court carefully analyzed two of the factors it was required to consider pursuant to N.C. Gen. Stat. § 15A-1340.13(g)(1) and (2) and found those factors to be in defendant's favor. However, when considering the third and final factor, the trial court then explained that despite the fact that defendant had provided substantial assistance, it concluded that it would not be a manifest injustice to impose an active sentence. Although the trial court stated that it would not consider extraordinary

mitigation in any armed robbery case, it also stated that "[i]t will not happen in my court unless a whole lot more than this has happened." Thus, the record clearly demonstrates that the trial court was aware of its discretion to find extraordinary mitigation, but declined to do so on the facts of the case. Accordingly, we find no error.

Affirmed.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).