NO. COA05-1530

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v. Forsyth County
No. 04 CRS 60269

SAMUEL HENRY CROSBY,
Defendant.

Appeal by defendant from judgment entered 1 June 2005 by Judge Michael E. Helms in the Superior Court in Forsyth County. Heard in the Court of Appeals 26 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Carol Ann Bauer, for defendant-appellant.

HUDSON, Judge.

A jury found Samuel Henry Crosby ("defendant") guilty of robbery with a firearm. Judgment was entered on the verdict sentencing defendant within the presumptive range to an active prison term of 64 to 86 months. Defendant appeals. Defendant also filed a petition for writ of certiorari with this Court on 20 January 2006. For the reasons discussed below, we find no error and deny defendant's writ of certiorari.

The State's evidence at trial tended to show the following: On 19 August 2004, defendant and another man approached the

driver's side of the victim's vehicle as the victim left a recreation center in Winston-Salem, North Carolina. Defendant asked the victim for a cigarette and the victim replied that he did not smoke. The other man then entered the backseat of the vehicle and defendant got in the front seat and told the victim to drive. The victim testified that he noticed defendant "was holding . . . one of his hands under his shirt" and it "[l]ooked like he might have had something on him."

Defendant pulled out a gun and pointed it toward the back of the victim's neck. Defendant told the victim that if he said anything, he would be shot. Defendant then took the victim's necklace, gold nugget earrings, and a jersey. While defendant was taking these items, the man in the backseat took the victim's wallet. Defendant instructed the victim to "make a complete stop" in front of a convenience store and defendant and the other man got out and ran toward the back of the store.

Thereafter, the victim ran into the convenience store and asked the person working at the store to call the police because he had just been robbed. A detective with the Winston-Salem police department interviewed defendant for approximately thirty to forty minutes and defendant denied any involvement in the robbery. After defendant was arrested, he waived his *Miranda* rights and provided a statement in which he partially confessed. Defendant, however, minimized his role in the crime and reversed roles with the other man who was in the victim's car with him.

Defendant first argues that he received ineffective assistance

of counsel at sentencing. We do not agree.

A meritorious ineffective assistance of counsel claim requires satisfaction of the familiar two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984), and adopted by this State's Supreme Court in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). First, a defendant must establish that his counsel's performance was deficient in that it fell below an "objective standard of reasonableness." *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. Second, a defendant must establish that a reasonable probability exists that but for the error, the result of the defendant's trial would have been different. *Id.* at 563, 324 S.E.2d at 248. "Because of the difficulties inherent in determining if counsel's conduct was within reasonable standards, a court must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance." *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986)(citation omitted).

Here, defendant argues his counsel was ineffective at sentencing because he failed to present evidence of any mitigating factors. The following exchange occurred between the trial court and defense counsel at sentencing:

> THE COURT: Anything for sentencing purposes from the Defense?
>
> MR. LEONARD: Your Honor, we'd offer as a mitigator his family support. His family is in court today.

In particular, defendant argues his trial counsel's failure to call

his family members as witnesses to support the above statement constituted ineffective assistance.

"Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics." *State v. Taylor*, 79 N.C. App. 635, 638, 339 S.E.2d 859, 861, *disc. rev. denied*, 317 N.C. 340, 346 S.E.2d 146 (1986) (quoting *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984)). Indeed, this Court has previously rejected a trial counsel's failure to call any witnesses at the sentencing hearing as a basis for establishing ineffective assistance of counsel. *See Taylor*, 79 N.C. App. at 637, 339 S.E.2d at 861. Accordingly, we conclude defense counsel's actions here do not fall below an objective standard of reasonableness.

Moreover, defendant presents no argument that counsel's alleged deficient performance prejudiced the outcome of the proceeding. We note that in certain circumstances, the deficiency of a counsel's performance is so great that prejudice need not be argued. *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984). For example, in *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986), this Court found that a defendant received ineffective assistance at sentencing where the defense counsel implied that defendant had provided false information, informed the trial court of the defendant's prior conviction, and disparaged the defendant for refusing a plea bargain. Upon review, this Court found the counsel's statement was

> altogether lacking in positive advocacy. Counsel offered no argument in defendant's favor, made no plea for findings of mitigating factors, . . . failed to suggest any favorable or mitigating aspects of defendant's background, and failed even to advocate leniency. More significant, the representation consisted almost exclusively of commentary entirely negative to defendant.

Id. at 545, 335 S.E.2d at 521.

Unlike the facts of *Davidson*, defense counsel's performance here is not "altogether lacking in positive advocacy." *Id.* Defendant's counsel offered as a mitigator defendant's family support and noted the presence of defendant's family in court. This performance by defense counsel was not so deficient that prejudice need not be argued. With no allegation of prejudice, defendant has failed to meet his burden under the second prong of the test to establish ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. We overrule this assignment of error.

Next, defendant contends the trial court erred in sentencing him in the top of the presumptive range. We disagree.

Section 15A-1444(a1) of the North Carolina General Statutes provides:

> A defendant who has been found guilty . . . is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing **only if the minimum sentence of imprisonment does not fall within the presumptive range** for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division

> for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1)(2003) (emphasis added). Because defendant's minimum sentence of imprisonment falls within the presumptive range for his prior record level and class of offense, he is not entitled to appeal this issue as a matter of right. Accordingly, this assignment of error is without merit.

Where a defendant is not entitled to appeal as a matter of right the issue of whether his sentence is supported by the evidence, Section 15A-1444(a1) of the North Carolina General Statutes provides for a defendant to seek appellate review by a petition for writ of certiorari. Recognizing that his right to appeal his sentence was limited, defendant also filed a petition for writ of certiorari requesting this Court permit appellate review of this issue. The North Carolina Rules of Appellate Procedure, however, limit this Court's ability to grant petitions for writ of certiorari to the following situations: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate relief. N.C.R. App. P. 21(a)(1). In considering Appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that because the appellate rules prevail over conflicting statutes, this Court is without authority to issue a writ of certiorari except as provided in Appellate Rule 21. *State v. Nance*, 155 N.C. App. 773, 775, 574 S.E.2d 692, 693-94 (2003) (considering Appellate Rule 21 and N.C. Gen. Stat. § 15A-1444(e)).

Here, defendant's petition does not fall within any of the

"appropriate circumstances" set forth in Appellate Rule 21 and, thus, this Court does not have the authority to issue a writ of certiorari. *Id.* at 774-75, 574 S.E.2d at 693-94. Moreover, we find defendant's argument that the trial court erred in sentencing him without merit. Accordingly, we deny defendant's petition for writ of certiorari.

No error; petition for writ of certiorari denied.

Judges MCCULLOUGH and STEELMAN concur.

Report per Rule 30(e).