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NO. COA06-1010

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v.

Lee County
Nos. 92CRS 9886-87

THOMAS JOSEPH EDVIN

Appeal by defendant from judgments entered 15 March 2006 by Judge Franklin F. Lanier in Lee County Superior Court. Heard in the Court of Appeals 2 April 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brian C. Wilks, for the State.

Nora Henry Hargrove for defendant-appellant.

HUNTER, Judge.

On 2 September 1993, defendant pled guilty to attempted first degree sexual offense and attempted first degree rape of his four-year-old daughter. At sentencing, Judge Henry Barnette found no mitigating factors and two statutory aggravating factors: (1) taking advantage of trust or confidence to commit an offense; and (2) prior convictions for crimes punishable by more than sixty days.¹ Judge Barnette sentenced defendant to two consecutive

¹ Defendant was sentenced under the Fair Sentencing Act, the predecessor to the Structured Sentencing Act, which no longer includes prior convictions in the list of statutory aggravating

aggravated sentences of twenty years. Defendant's counsel gave timely notice of appeal, but died prior to perfecting the appeal. On 3 June 2003, this Court granted defendant's petition for writ of certiorari for the purposes of reviewing the trial court's judgment. On 5 April 2005, this Court remanded defendant's case for a new sentencing hearing due to the unavailability of a transcript of the sentencing hearing.

On 1 November 2005, the State gave notice to defendant that it intended to offer evidence at the resentencing hearing of the aggravating factor of defendant's prior convictions punishable by more than sixty days pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1993). Judge Lanier held a new sentencing hearing on 15 March 2006. At the hearing, defendant offered evidence and argument in support of two mitigating factors: (1) defendant's mental condition at the time of the crime was insufficient to constitute a defense nevertheless reduced his culpability for the offense; (2) defendant had attempted to better himself while incarcerated including obtaining his high school diploma equivalency, community college degrees, and other academic certificates. The trial court found the aggravating factor of defendant's prior convictions, found no mitigating factors, and sentenced defendant to the same sentence he had received in his initial sentencing of two consecutive twenty-year sentences.

factors. Compare N.C. Gen. Stat. § 15A-1340.4(a) (repealed 1993) (Fair Sentencing Act) with N.C. Gen. Stat. § 15A-1340.16(a) (2005) (Structured Sentencing Act).

Defendant now appeals these new sentences raising two assignments of error. After a careful review of the record and briefs, we affirm.

In his first assignment of error, defendant contends that the trial court erred in failing to find the two mitigating factors that he offered at the resentencing hearing. "A sentencing judge must find a statutory mitigating sentence factor if it is supported by a preponderance of the evidence." *State v. Crisp*, 126 N.C. App. 30, 41, 483 S.E.2d 462, 469 (1997). However, defendant bears the burden of proof in establishing his entitlement to statutory factors in mitigation. *Id.*

Defendant asserts he presented uncontroverted evidence that he suffered from severe depression at the time of his crimes as established by detailed mental health records. He contends that this evidence should have required the trial court to find the statutory mitigating factor provided in N.C. Gen. Stat. § 15A-1340.4(a)(2)(d) that defendant was "suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced [the defendant's] culpability for the offense." *Id.* We disagree.

Assuming, without deciding, that the medical records dated after his incarceration demonstrate that he suffered from severe depression at the time of his crimes, defendant failed to offer either evidence or argument as to how this mental condition reduced defendant's culpability for his crimes of attempted sexual offense and attempted rape of his four-year-old daughter. While a mental

condition may, in some circumstances, reduce defendant's culpability for an offense, "evidence that the condition exists, without more, does not mandate consideration as a mitigating factor." *State v. Jackson*, 119 N.C. App. 285, 291, 458 S.E.2d 235, 240 (1995); see also *State v. Jewell*, 104 N.C. App. 350, 359, 409 S.E.2d 757, 763 (1991), affirmed per curiam, 331 N.C. 379, 416 S.E.2d 3 (1992). Defendant also must establish a link between the condition and defendant's culpability. *State v. Salters*, 65 N.C. App. 31, 36, 308 S.E.2d 512, 516 (1983), disc. review denied, 310 N.C. 479, 312 S.E.2d 889 (1984). Given defendant's failure to meet his burden in proving a nexus between his alleged mental condition and his culpability, we conclude that the trial court's failure to find this mitigating factor was not an abuse of discretion. Consequently, defendant's assignment of error with respect to this mitigating factor is overruled.

Defendant next asserts that the trial court erroneously failed to find as a mitigating factor that he had significantly improved himself after his conviction and during his imprisonment. A trial court may consider a defendant's conduct in the period between his initial post-conviction incarceration and the resentencing hearing when setting a defendant's new term of imprisonment. *State v. Swimm*, 316 N.C. 24, 32-33, 340 S.E.2d 65, 71 (1986). In particular, good behavior during that time may constitute a non-statutory mitigating factor that would support the imposition of a shorter term of imprisonment. *Id.* Defendant again asserts that the trial court was required to find this mitigating factor in the

face of uncontroverted evidence of his good behavior and his significant academic and personal advancement.

While a failure to find a statutory mitigating factor supported by "uncontradicted, substantial and manifestly credible evidence is reversible error," our Supreme Court has held that a trial judge's failure to find a nonstatutory mitigating factor will not be disturbed without a showing of abuse of discretion even when that factor is "(1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect" *State v. Spears*, 314 N.C. 319, 322, 333 S.E.2d 242, 244 (1985). "A ruling committed to the trial court's discretion will be upset on appeal only when defendant shows that the ruling could not have been the result of a reasoned decision." *State v. Hayes*, 323 N.C. 306, 317, 372 S.E.2d 704, 710 (1988); see also *State v. Wampler*, 145 N.C. App. 127, 133, 549 S.E.2d 563, 568 (2001). Defendant neither argues, nor do we find, that the trial court abused its discretion in failing to find this mitigating factor.

In his second assignment of error, defendant asserts that the trial court erred in weighing the aggravating and mitigating factors and imposing sentence without hearing evidence regarding the actual crimes committed by defendant. Defendant's argument is without merit.

While N.C. Gen. Stat. § 15A-1340.16(a) requires the trial court to "consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated

sentence appropriate," it also places the burden of proving any mitigating factors on the defendant. *State v. Byrd*, 164 N.C. App. 522, 526, 596 S.E.2d 860, 863 (2004), *remanded for resentencing*, 175 N.C. App. 247, 623 S.E.2d 90 (2005). Here, the record reflects that the trial court received and considered the arguments and evidence offered by defendant in support of two mitigating factors. To the extent that defendant now asserts that there were additional facts and circumstances related to the crimes that would have supported mitigation of defendant's sentence, defendant had the obligation to bring such evidence forward. Moreover, defendant cites no authority for his contention that the trial court was required *ex mero motu* to elicit evidence related to the crimes that might be relevant to the sentencing decision. Consequently, defendant's second assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).