NO. COA06-3

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 03CRS038551-52, 03CRS047587

LENWOOD LEE PAIGE

Appeal by defendant from judgment entered 28 January 2005 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Belinda A. Smith, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.

HUNTER, Judge.

Lenwood Lee Paige ("defendant") appeals from a guilty plea to two counts of statutory rape and one count of indecent liberties with a minor. For the reasons stated herein, we affirm the judgment of the trial court.

Defendant was indicted for two counts of statutory rape and one count of indecent liberties with a child on 24 June 2003. Defendant was appointed counsel and his trial began on 12 October 2004. At trial, the State's evidence tended to show that defendant, age twenty-three at the time of the offense, entered the bedroom of a fourteen-year-old female acquaintance on the night of

11 May 2003 and engaged in sexual intercourse with her. Defendant left, then returned through the window a few minutes later, and after telling the victim he had a gun, engaged in intercourse with her a second time.

Prior to trial, defendant requested new counsel. A hearing was held on 11 October 2004. The trial court found that defendant's appointed counsel was competent and refused the request, informing defendant he could represent himself if he chose. The trial court questioned defendant regarding his understanding of events and whether he was under the influence of drugs or alcohol. Defendant informed the trial court that he was on two prescription medications, Gabitril and Remeron, for "[s]leep, anxiety, [and] depression." The trial court inquired as to whether the medications made it difficult for defendant to understand what was "going on" and what he was doing. Defendant stated that the medications affected "vision and stuff like that a little bit[,]" and that he didn't really feel as though he was "functioning in a right mind to talk about these issues." After further questioning regarding the length of time defendant had been taking the medications and their effects, the trial court confirmed that defendant understood and had no questions about "what we're doing here, who we are, [and] what we're talking about[,]" and understood the consequences of representing himself in the matter. Defendant elected to represent himself, and the trial court found that defendant "has answered all my questions, and that he

knowingly and intelligently, voluntarily and as his informed choice had waived any right to a lawyer."

On the following morning of 12 October 2004, prior to the start of the trial, defendant withdrew his waiver of counsel and informed the trial court that he wanted his previously appointed counsel to represent him at trial. The request was granted.

On the third day of trial, prior to the close of the State's evidence, defendant withdrew his plea of not guilty and entered a plea of guilty pursuant to a plea bargain. The trial court discussed this change with defendant, and asked if he was under the influence of alcohol, drugs, narcotics, or medication. Defendant informed the trial court that he had taken one dose each of Remeron and Gabitril for "[s]leep, depression and anxiety and just like mental" that morning, and had been taking those medications since February 2004.

The trial court examined defendant's understanding of the situation and the plea in a lengthy exchange:

> THE COURT: Do you feel like you are in your right mind this morning with respect to entering this plea of guilty as to these charges?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand why you are here and what we're doing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any questions about why you're here and what we're doing?
>
> THE DEFENDANT: No, sir.

> THE COURT: Just one more question about that. Do those medications make it difficult for you to understand what goes on around you, make your thought process muddy or anything like that?
>
> THE DEFENDANT: Just a little bit.
>
> THE COURT: Okay. Do they make it muddy or make your thought process cloudy in any way to such a degree that you feel like it impairs your judgment where you can't decide how you want to deal with things?
>
> THE DEFENDANT: In between, I can't really -- no, no.
>
> THE COURT: Have you and your lawyer talked about this plea bargain before you came in here today?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you feel like this plea bargain is in your best interest and it's what you want to do?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. Do you have any more questions you want to ask me about that?
>
> THE DEFENDANT: No, sir.

After ascertaining that defendant understood the nature of the charges, that he was satisfied with the services of his appointed counsel, and that he understood the ramifications of his guilty plea, the trial court then asked defendant if he was guilty of the charges, to which defendant answered, "[y]es, sir." When the trial court asked defendant what he did, defendant replied, "I had sex with [the victim] on May the 27, 2003, against her will twice. I'm sorry." Defendant agreed that no one had threatened him or coerced his plea. The trial court found:

> Defendant's competent to stand trial; that the Defendant's medications, [when he had] last taken them, while they have had some affect [sic] on his, shall we say disposition, that they do not affect the fact that the plea is the informed choice of the Defendant and was made freely and voluntarily and knowingly and understandingly.

Defendant was ordered to be evaluated prior to sentencing as part of the sexually violent predator registration program under N.C. Gen. Stat. § 14-208.20. At the sentencing hearing held on 28 January 2005, the trial court denied defendant's *pro se* motion, made 15 November 2004, to withdraw his plea, dismiss his counsel, and appoint a new lawyer, and denied appointed counsel's own motion to withdraw as counsel. The State had previously stipulated there were no aggravating factors. Defendant suggested as mitigating factors defendant's difficult family life, and academic and social challenges. The trial court found no aggravating or mitigating factors and consolidated the charges, sentencing defendant within the presumptive range to 348 to 427 months in prison.

Defendant appeals from this judgment.

I.

Defendant first contends the trial court erred by denying his motion to withdraw his guilty plea. We disagree.

A defendant is entitled to appellate review as a matter of right if his motion to withdraw a guilty plea is denied. N.C. Gen. Stat. § 15A-1444(e) (2005). "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."'" *State v. Robinson*, ___ N.C. App. ___, ___, 628 S.E.2d 252, 254 (2006) (citations omitted).

In *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990), our Supreme Court held that a "presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *Id.* at 539, 391 S.E.2d at 162.

> "Some of the factors which favor withdrawal include whether the defendant has asserted his legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration."

State v. Meyer, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992) (citation omitted). "After a defendant has come forward with a 'fair and just reason' in support of his motion to withdraw, the State 'may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea.'" *Id.* (citation omitted).

Following a careful consideration of the factors favoring withdrawal and an independent review of the record in this case, we conclude that the trial court did not err in denying defendant's motion to withdraw his guilty plea.

First, defendant never asserted his legal innocence to the trial court. *See State v. Graham*, 122 N.C. App. 635, 637-38, 471 S.E.2d 100, 102 (1996) (upholding the denial of a motion to withdraw a guilty plea when the defendant made no concrete assertion of innocence, and answered yes to the trial court's

inquiry as to whether the defendant was in fact guilty, among other considerations). Here, defendant stated to the trial court regarding his motion to withdraw his guilty plea that "due to the fact of the case of this girl, you know -- you know, something happened, but I didn't have intercourse with this girl. It's a fact that she's still a virgin, but I'm -- you know, I don't understand a lot of this." However, during the plea colloquy, defendant stated he was in fact guilty, and that he had sex with the victim twice.

Next, we conclude that the State proffered strong evidence in support of the charges. *See Graham*, 122 N.C. App. at 637-38, 471 S.E.2d at 102 (upholding denial of a motion to withdraw a guilty plea when the State's evidence against the defendant was strong, among other considerations). Prior to defendant's entry of a guilty plea, the State presented testimony by the minor victim, who positively identified defendant and testified that he engaged in intercourse with her twice. The State further planned to present DNA evidence showing that defendant had engaged in sexual activity with the victim. Such testimonial and physical evidence tended to prove that defendant committed each of the crimes charged.

Next, we find that approximately a month passed before defendant moved to withdraw his guilty plea. In *Handy*, 326 N.C. 532, 391 S.E.2d 159, our Supreme Court noted that:

> "A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed

> his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force."

Id. at 539, 391 S.E.2d at 163 (citation omitted). Defendant's motion to withdraw made several weeks after his entry of the guilty plea is not indicative of a "swift change of heart," and fails to provide a fair and just reason for withdrawal of defendant's plea. *See Graham*, 122 N.C. App. at 637-38, 471 S.E.2d at 101-02 (upholding the denial of a motion to withdraw a guilty plea made nearly five weeks after its entry, among other considerations).

Next, defendant had competent representation throughout the proceedings. *See State v. Ager*, 152 N.C. App. 577, 582-83, 568 S.E.2d 328, 332 (2002) (upholding the denial of a motion to withdraw a guilty plea when evidence tended to show that the defendant's counsel was competent, among other considerations). Although defendant indicated to the trial court prior to the start of trial that he wished to have other counsel appointed or to represent himself, and determined to represent himself on the day prior to trial, defendant asked for appointed counsel to represent him at trial the following day and indicated to the trial court that he was satisfied with his counsel at the time of the entry of the plea agreement. Further, the trial court found on multiple occasions that defendant's appointed counsel was competent despite their disagreements. The record supports the trial court's findings that defendant had competent counsel at all relevant times.

Finally, defendant contends that his confusion due to medications he was taking at the time of trial provide a fair and just reason for the withdrawal of the plea. The trial court's acceptance of a defendant's guilty plea will not be disturbed on appeal "[w]here it appears that the trial judge made careful inquiry of the accused as to the voluntariness of his pleas, and there is ample evidence to support the judge's finding that defendant freely, understandingly and voluntarily pleaded guilty to the charges[.]" *State v. Ellis*, 13 N.C. App. 163, 165, 185 S.E.2d 40, 42 (1971) (affirming trial court's acceptance of guilty plea from defendant taking a tranquilizer at time of plea colloquy).

Here, the trial court thoroughly questioned defendant about his ability to understand his situation and the guilty plea, and ultimately determined defendant was able to knowingly and voluntarily plead guilty. Defendant's statements during the plea colloquy sufficiently demonstrated his comprehension of the setting, his statements, and the consequences of the plea, and the trial court properly accepted defendant's plea of guilt.

As defendant had failed to establish a fair and just reason for withdrawal of his guilty plea, we conclude, after an independent review of the record, that the trial court did not err in denying defendant's motion to withdraw his guilty plea. *See Ager*, 152 N.C. App. at 585, 568 S.E.2d at 333. The assignment of error is overruled.

II.

Defendant next contends the trial court erred in its failure to find mitigating facts at the sentencing hearing. We disagree.

N.C. Gen. Stat. § 15A-1340.16(c) (2005), subtitled, "Written Findings; When Required[,]" requires that, "[t]he court shall make findings of the aggravating and mitigating factors present in the offense *only if*, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." *Id.* (emphasis added). In *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001), this Court held that when a defendant is sentenced in the presumptive range, the trial court is not required to find aggravating or mitigating factors even when evidence is presented, as "'the decision to depart from the presumptive range is in the discretion of the court.'" *Id.* at 598, 553 S.E.2d at 242 (quoting N.C. Gen. Stat. § 15A-1340.16(a)). We are bound by the decisions of prior panels of this Court. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) (citation omitted) (holding that "'[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court'").

Defendant contends, however, that the United States Supreme Court's holding in the case of *Blakely v. Washington,* 542 U.S. 296, 159 L. Ed. 2d 403, *rehearing denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), requiring that aggravating sentencing factors must be found by a jury, requires the trial court to make written findings of mitigating factors if any exist. We find no support for this

contention in *Blakely v. Washington*, and note that the United States Supreme Court addressed only factors which increase, rather than decrease, the penalty for a crime in their holding. *Id.* at 301, 159 L. Ed. 2d at 412.

Our statutes and case law clearly state that written findings as to mitigating factors are required only if the trial court departs from the presumptive range. Here, defendant was sentenced within the presumptive range, and the trial court was therefore not required to make findings as to mitigating factors. This assignment of error is overruled.

As defendant's motion to withdraw his guilty plea was properly denied, and the trial court did not err in its failure to find mitigating facts at defendant's sentencing, the judgment is affirmed.

Affirmed.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).