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NO. COA06-522

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v.

Beaufort County
No. 05 CRS 52783

ARCHIE MAURICE SMITH
Defendant.

Appeal by defendant from a judgment entered 12 October 2005 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 16 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Anne Bleyman for defendant-appellant.

BRYANT, Judge.

On 12 October 2005, Archie Maurice Smith (defendant) pled no contest to malicious conduct by a prisoner and possession of drug paraphernalia. On the same date, Judge William C. Griffin, Jr. accepted defendant's plea and sentenced him to a mitigated sentence of twelve to fifteen months imprisonment. Defendant appeals from a judgment entered 12 October 2005.

On 26 May 2006, defendant filed a petition for writ of certiorari with this Court in the alternative to his appeal in the event this Court determined he was not entitled to an appeal as of right. For the reasons set out below, we allow the petition for

writ of certiorari and find no prejudicial error.

We must first address the State's contention that defendant is not entitled to appellate review in this case. "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Our Supreme Court has held that because a defendant's challenge to the procedures followed in accepting a guilty plea does not fall within any of the grounds giving rise to an appeal as of right under N.C. Gen. Stat. § 15A-1444, a "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987). Thus, defendant is not entitled to appeal from his guilty plea as a matter of right.

While we cannot hear defendant's direct appeal, we have the discretion to consider the matter by granting a writ of certiorari. The State contends this Court, under Rule 21 of the Rules of Appellate Procedure, does not have authority to review defendant's arguments pursuant to a grant of certiorari. *See Pimental*, 153 N.C. App. at 77, 568 S.E.2d at 872 (when a defendant has not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review of a denial of a motion for appropriate relief, "this Court does not have the authority to issue a writ of certiorari"). This Court, however, held in *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731,

732 (2004), following *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462, that a defendant may during the appeal period petition for writ of certiorari when he is challenging the procedures employed in accepting a guilty plea. Defendant is, therefore, entitled to petition for writ of certiorari for review of this assignment of error. In our discretion, we allow defendant's petition for writ of certiorari.

On appeal, defendant contends the trial court's failure to specifically inform him of the maximum possible sentence and the mandatory minimum sentence, as required by N.C. Gen. Stat. § 15A-1022(a)(6), constitutes grounds for invalidating his no contest plea. We disagree.

The acceptance of guilty pleas in the superior courts of North Carolina is governed by N.C. Gen. Stat. § 15A-1022. This statute specifies seven areas of information and inquiry that the trial court must review with the defendant prior to accepting a guilty plea:

- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
- (5) Determining that the defendant, if represented by counsel, is satisfied with his

representation;

(6) *Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and*

(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2005) (emphasis added).

Here, defendant contends the trial court failed to comply with this statute because the trial court did not specifically inform him of the maximum possible sentence and the mandatory minimum sentence before accepting his guilty plea. At the hearing conducted pursuant to defendant's plea, the following colloquy occurred between the trial court and defendant:

THE COURT: Mr. Smith, are you able to hear and understand me?

THE DEFENDANT: Yes.

THE COURT: Do you understand you have the right to remain silent, and if you make any statement it could be used against you?

THE DEFENDANT: Yes

THE COURT: You have a BA; is that correct?

THE DEFENDANT: Yes

THE COURT: A college degree?

THE DEFENDANT: Yes.

THE COURT: Today are you under the influence of any alcohol, drugs, narcotics, medicines,

pills, or any intoxicants?

THE DEFENDANT: No.

THE COURT: And has Mr. Lilly explained these charges to you?

Do you understand the charges, the nature of the charges, and the elements of the charges?

THE DEFENDANT: Yes, sir

THE COURT: Have you and Mr. Lilly had a chance to discuss these cases fully, and are you satisfied with his legal services?

THE DEFENDANT: Yes, sir

THE COURT: And you understand, of course, you don't have to enter a plea of guilty. You can enter a plea of not guilty. Regardless of the nature of the plea -- that -- as a consequence confront the witnesses, cross-examine them in a trial by jury, and when you plead guilty, even under an Alford Plea, you give up those and other rights related to a trial by jury; do you understand that?

THE DEFENDANT: Yes, sir

THE COURT: And my understanding is you're pleading guilty without admitting your guilt --

MR. LILLY: I believe it's no contest, Your Honor.

THE COURT: Oh, I'm sorry. I thought it was an Alford Plea.

You're pleading no contest. I'm sorry.

THE DEFENDANT: Yes, sir.

THE COURT: No contest to the charge of malicious conduct by a prisoner and possession of drug paraphernalia.

THE DEFENDANT: Yes, sir

THE COURT: And you understand that on a no

contest plea you're going to be treated as guilty whether or not you admit your guilt?

THE DEFENDANT: Yes, sir.

THE COURT: You don't have any plea bargain with the State.

Nobody's promised you anything or threatened you to get you to enter this plea against your wishes; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: You enter the plea of your own free will, fully understanding what you're doing?

THE DEFENDANT: Yes, sir.

THE COURT: Have you any questions about what I've said to you or anything else --

THE DEFENDANT: No, sir.

THE COURT: -- connected with your case up to this point?

THE DEFENDANT: Pardon me, sir?

THE COURT: Do you have any questions about what I've said to you or anything else about your case at this point?

THE DEFENDANT: No, sir.

Because the trial court did not advise defendant of the mandatory minimum sentence or the maximum possible sentence during this colloquy, defendant asserts his constitutional rights. Defendant further argues the trial court's failure to comply with N.C. Gen. Stat. § 15A-1022(a)(6) rendered his plea ineffective and, thus, established his plea was not voluntarily, intelligently, and understandingly made.

For a defendant's plea to be made voluntarily, intelligently and understandingly, the defendant must be made aware of all

"direct consequences" of his plea. *State v. McNeill*, 158 N.C. App. 96, 103, 580 S.E.2d 27, 31 (2003). "Direct consequences" are those having a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *State v. Williams*, 133 N.C. App. 326, 331, 515 S.E.2d 80, 83 (1999) (citation omitted). "This definition, however, should not be applied in a technical, ritualistic manner." *Id.* Further, "[e]ven when a violation occurs, there must be prejudice before a plea will be set aside." *McNeill*, 158 N.C. App. at 103, 580 S.E.2d at 31. In examining prejudicial error, courts must "look to the totality of the circumstances and determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity." *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000). "In this regard, the transcript of plea signed by defendant, along with what questions the trial court did ask of him, are particularly relevant." *Id.*

Here, we conclude defendant was not prejudiced as a result of the trial court's failure to strictly comply with Section 15A-1022. The transcript of the guilty plea hearing and the signed transcript of plea shows defendant affirmed that the charges against him were explained to him by his attorney, he understood the nature of the charges and every element of each charge, his attorney had discussed possible defenses to the charges, he was satisfied with his attorney's legal services, and he understood he was pleading no contest to the charges against him. Although the trial court did not personally advise defendant of the mandatory minimum sentence

during its colloquy with him, after the State summarized the factual basis for the plea and before the trial court sentenced defendant, the trial court stated the following:

For the nature of the conduct that [defendant has] entered a plea of guilty to, the Prior Record Level II sentence, you know, the minimum would be 15 months which I think is a little bit steep for spitting on somebody. . .

Accordingly, defendant was made aware of the minimum sentence for the offense of malicious conduct by a prisoner committed by someone, like him, having a prior record level of II.

Further, the second page of the transcript of plea, which was signed by defendant, listed the maximum punishment for malicious conduct by a prisoner as fifty-nine months and the maximum punishment for possession of drug paraphernalia as 120 days. This page also listed the total maximum punishment for both of these offenses as sixty-three months. This Court has previously held that the trial court's failure to strictly follow Section 15A-1022 resulted in no prejudice to defendant where a worksheet attached to the transcript of plea listed the maximum possible punishment for each offense. *Hendricks*, 138 N.C. App. at 670-71, 531 S.E.2d at 899.

Finally, after finding one mitigating factor, the trial court sentenced defendant to a mitigated prison sentence of twelve to fifteen months. Accordingly, defendant's maximum prison term is far less than the maximum possible punishment for the offenses at issue. Indeed, defendant's *maximum* prison term is the same as the *minimum* presumptive range term for the offense of malicious conduct

by a prisoner committed by a prior record level II offender. See N.C. Gen. Stat. § 15A-1340.17 (2005).

We are unpersuaded, considering the totality of circumstances, that any noncompliance with N.C. Gen. Stat. § 15A-1022 (a)(6) either affected defendant's decision to plead no contest or undermined the plea's validity. *Hendricks*, 138 N.C. App. at 670, 531 S.E.2d at 898; see also *Williams*, 133 N.C. App. at 331, 515 S.E.2d at 83 (holding the trial court's failure to inform the defendant of the minimum and maximum sentence for a Class C offender did not invalidate the guilty plea). We conclude the record indicates evidence sufficient to show that defendant was aware of the direct consequences of his plea. This assignment of error¹ is overruled.

No prejudicial error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).

¹Defendant's remaining assignments of error are not addressed in his brief to this Court and, thus, are deemed abandoned. See N.C. R. App. P. 28(b)(6).