NO. COA06-651

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v.

ROMAN PERDOMO,
Defendant.

Wake County
Nos. 02 CRS 14253
02 CRS 14256
02 CRS 14257
02 CRS 14263

Appeal by Defendant from judgments entered 23 May 2003 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 10 January 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Lisa G. Corbett, for the State.*

*Daniel F. Read for Defendant-Appellant.*

STEPHENS, Judge.

On 25 March 2002, Defendant was indicted on one count of robbery with a dangerous weapon (02 CRS 14253), one count of first-degree burglary (02 CRS 14263), and two counts of first-degree rape (02 CRS 14256 and 02 CRS 14257). On 23 May 2003, Defendant pled guilty to all charges.

At the plea and sentencing hearing, the State offered an uncontested factual basis to support the plea. The prosecutor stated that on 21 November 2001, Defendant and two other men, armed with firearms, entered a residence in Raleigh, North Carolina, and,

by a show of force, overcame the resistence offered by one of the inhabitants. The intruders then used telephone cords to tie up the inhabitants and demanded cash and illegal drugs that they suspected were located in the residence. As the intruders searched for the cash and drugs, they also separated the female and male inhabitants of the dwelling. During the home invasion, S.J., the prosecutrix under 02 CRS 14257, and J.H., the prosecutrix under 02 CRS 14256, were individually taken from the female group and raped. After the assailants left the residence, the police were contacted and conducted an investigation. Forensic evidence established that Defendant's DNA was recovered from J.H., but the evidence taken from S.J. was from a different assailant.

After accepting Defendant's plea, the trial court, for sentencing purposes, consolidated the charge of first-degree rape under 02 CRS 14257 with the charge of robbery with a dangerous weapon, and the charge of first-degree rape under 02 CRS 14256 with the charge of first-degree burglary. Based on Defendant's stipulated prior record level of III and the trial court's findings of fact in aggravation, Judge Evelyn W. Hill sentenced Defendant to two consecutive terms of 420 to 513 months of imprisonment. The factors found in aggravation for each judgment were that the "defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy" ("factor 2") and that the "defendant involved a person under the age of 16 in the commission of the crime" ("factor 13").

By a petition filed 15 November 2004, Defendant asked this Court to issue its writ of certiorari to review his case, having failed to enter notice of appeal from Judge Hill's 23 May 2003 judgments. On 6 December 2004, this Court allowed Defendant's petition, but limited appellate review "to those issues that could have been raised on direct appeal pursuant to G.S. 15A-1444(a)(1) and (a)(2)." Defendant brings forward five arguments on appeal. We affirm the trial court in part, reverse in part, and remand one judgment for resentencing.

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By his first argument, Defendant requests that this Court once again grant its writ of certiorari to review whether there was a sufficient factual basis to accept his plea of guilty to the charge of first-degree rape of S.J. We may not grant this request.

As noted above, Defendant's appeal is before this Court pursuant to an order entered 6 December 2004 granting his 15 November 2004 petition for our writ of certiorari. This order, however, limited appellate review "to those issues that could have been raised on direct appeal pursuant to G.S. 15A-1444(a1) and (a2)." That statute provides that

> (a1) [a] defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, 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.
> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a1)-(a2) (2003). Defendant's argument that there was not a sufficient factual basis to accept his plea may not be considered under these statutory provisions and, thus, may not be reviewed pursuant to this Court's previous order granting our writ of certiorari.

We next consider if we may grant Defendant's request for certiorari that he raises in his brief. In *State v. Winnex*, 66 N.C. App. 280, 282, 311 S.E.2d 594, 596 (1984) (citing *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983)), this Court determined that when a defendant's "petition for a writ of certiorari was rejected by another panel of this court . . . [the current panel is] bound by that decision." Similarly, as this Court has addressed Defendant's previous petition for a writ of certiorari, granted review, but

limited the scope of that review, we are bound by that order and may not overrule it. *See id.* Accordingly, Defendant's petition for a writ of certiorari to review his first argument is denied.

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Defendant next argues that the trial court violated his constitutional rights, as established by *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), by sentencing him to a term of imprisonment beyond the maximum presumptive range, based on factors in aggravation found solely by the trial court.

In *Blakely*, the United States Supreme Court held that other than the fact of a defendant's prior conviction, a trial court may not increase a defendant's sentence beyond the established statutory maximum unless the facts necessary to support the aggravated sentence are found by a jury or admitted by the defendant. *Id.* Last year, in *Washington v. Recuenco*, ___ U.S. ___, ___, 165 L. Ed. 2d 466, 477 (2006), the United States Supreme Court provided further guidance when it held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error" and that, therefore, *Blakely* errors should be reviewed using harmless error analysis. In *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), our Supreme Court applied *Recuenco* to the law of our state.

However, before proceeding to harmless error review, we must first determine whether Defendant is entitled to any review for *Blakely* error. Permitting a defendant's case to be reviewed for violations of constitutional rules that did not exist at the time

the conviction became final would seriously hinder the way in which the criminal justice system operates. *State v. Coleman*, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 6, 2007) (No. COA06-441). That is, allowing continual review, rehearing, and resentencing for actions that currently constitute error, but were not error at the time the judgment became final, would decrease judicial economy by creating a backlog of cases both in the trial and appellate divisions, and would not provide the victims of crimes or their families with any sense of finality. With that concern in mind, "this Court recently held, defendants entitled to *Blakely* review are only those whose cases were pending on direct review or were not yet final as of the date the *Blakely* opinion was issued." *Id.* at ___, ___ S.E.2d at ___ (citing *State v. Hasty*, ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 2, 2007) (No. COA06-532)). As the *Blakely* opinion was issued 24 June 2004, and Defendant's case was not then pending on direct appeal and was final, Defendant is not entitled to review for *Blakely* error. Accordingly, this assignment of error is overruled.

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Defendant also contends that the trial court erred by failing to find in mitigation that he had accepted responsibility for his conduct. Specifically, Defendant argues that because he pled guilty to the charges, asked for forgiveness, and told the trial court that he deserved to be punished, the uncontradicted evidence required a finding in mitigation, and the trial court's failure to make such a finding constitutes reversible error. We disagree.

At a sentencing hearing, a defendant has the burden of establishing factors in mitigation by the preponderance of the evidence. *State v. Marecek*, 152 N.C. App. 479, 568 S.E.2d 237 (2002). In order to demonstrate that the trial court erred, a defendant must show that "'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn' and that the credibility of the evidence 'is manifest as a matter of law.'" *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 455 (1983) (quoting *North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395-96 (1979)). A trial court must find a mitigating factor when the evidence that it exists is "uncontradicted, substantial, and there is no reason to doubt its credibility[.]" *Jones*, 309 N.C. at 218-19, 306 S.E.2d at 454. Additionally, "[a] defendant's apology at a sentencing hearing does not lead to the sole inference that the defendant has accepted responsibility for the defendant's criminal conduct." *State v. Meynardie*, 172 N.C. App. 127, 133, 616 S.E.2d 21, 25 (2005) (citing *State v. Norman*, 151 N.C. App. 100, 564 S.E.2d 630 (2002)), *disc. review allowed*, 361 N.C. 176, 640 S.E.2d 391 (2006).

In this case, during the sentencing phase of the hearing, Defendant addressed the court and began by telling Judge Hill, "When this happened, . . . I was unconsciously doing it." After making this statement, Defendant asked for forgiveness and stated that he knew he "deserve[d] to be punished[,]" but said that he wanted a "second chance" and a sentence that would enable him to put "my life back [together] whenever I get out." These statements

do not establish that Defendant genuinely accepted responsibility for his actions. Rather, the manner in which he addressed the court demonstrates that Defendant was attempting to deflect responsibility by blaming his actions on intoxication. Moreover, rather than focusing on his actions and the impact they had on S.J. and J.H., or attempting to take any responsibility for his behavior, Defendant was more concerned with how he would fare in his life after prison. Based on these statements, it was not error for the trial court to discount Defendant's alleged acceptance of responsibility and thus fail to make findings of fact in mitigation. Accordingly, we reject Defendant's argument.

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Next, Defendant argues that Judge Hill denied him the possibility of meaningful appellate review by failing to explain on the record why his sentences were to run consecutively. In particular, Defendant contends that allowing "a trial judge to double the sentence [without an on-the-record explanation], . . . simply because an accused had been present for a second crime like the one he committed himself . . . effectively negate[s] the careful balancing and procedural regularity supposedly built into the [Structured Sentencing] Act."

Defendant's argument that he was sentenced for the rape of S.J. "simply because . . . [he was] present" while the crime was committed is offensive to this Court. Defendant was not sentenced for this rape simply because he was present at the scene. Rather, he was sentenced because of his guilty plea to criminal

responsibility for actions that helped effectuate the commission of the crime. Defendant is criminally culpable for the rape of S.J. because, by entering the residence with a firearm, helping to overcome the resistance of the victims, tying up the inhabitants, and segregating the women from the men, he acted in a manner that enabled another of the intruders to rape S.J. Defendant's contention that he was merely present during the rape belittles his involvement in the crime and the impact of his actions.

Nevertheless, Defendant's argument that the trial court should be required to explain why the sentences should run consecutively has recently and repeatedly been rejected by this Court. *See, e.g., State v. Brown*, ___ N.C. App. ___, ___, 628 S.E.2d 787, 796 (2006) (holding that a similar argument "'is, at best, a question for the legislature to resolve, but for our purposes it is an argument without merit on appeal[]'" (quoting *State v. Love*, 131 N.C. App. 350, 359, 507 S.E.2d 577, 584 (1998), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 528 U.S. 944, 145 L. Ed. 2d 280 (1999))). Defendant's argument is without merit and is overruled.

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Finally, Defendant contends that, with regard to the rape of S.J., the trial court erred in finding factor 2 in aggravation because the evidence used to support the aggravating factor was the same evidence used to support an element of the substantive offense. Specifically, Defendant argues that it was reversible error "to aggravate his sentence for the rape of S.J. by finding

that he acted with another, as that was the same evidence that allowed the court to accept the plea of guilty in the first place." We agree, and therefore reverse and remand for resentencing the judgment that consolidated the convictions of first-degree rape under 02 CRS 14257 and robbery with a dangerous weapon under 02 CRS 14253.

Section 14-27.2 of the North Carolina General Statutes provides in pertinent part as follows:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> . . . .
>
> c. The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.2(a) (2001). "One who is present, aiding and abetting in a rape actually perpetrated by another is equally guilty with the actual perpetrator of the crime." *State v. Martin*, 17 N.C. App. 317, 318, 194 S.E.2d 60, 61 (citation omitted), *cert. denied*, 283 N.C. 259, 195 S.E.2d 691 (1973). Similarly, under the theory of acting in concert, Defendant is criminally responsible for the rape of S.J., as if he physically committed the crime. *See State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). However,

under North Carolina law, sentencing Defendant to an aggravated term requires a careful analysis in that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" N.C. Gen. Stat. § 15A-1340.16(d) (2003).

In this case, while the record does not establish the specific ground upon which Judge Hill relied to accept the factual basis for the plea of first-degree rape of S.J., it is clear that Defendant can only be guilty of raping S.J. by aiding and abetting or acting in concert with the actual perpetrator. Therefore, essential to Defendant's guilt and conviction is the participation of the actual perpetrator.

Judge Hill sentenced Defendant in the aggravated range for this crime based in part on her finding that Defendant "joined with more than one other person [the actual perpetrator and the third intruder] in committing the offense and was not charged with committing a conspiracy." *See* N.C. Gen. Stat. § 15A-1340.16(d)(2) (2003). It is thus clear that Defendant's plea was accepted and his sentence aggravated based on the same evidence necessary to establish an element of the offense, namely, that he acted with the perpetrator who actually raped S.J.

Although we acknowledge Judge Hill's desire to limit Defendant's ability to commit such a heinous crime again, we note that

> [i]t is evident that the Legislature . . . chose to include in the more serious first-degree categories those sexual offenses which involved aiders and abettors and to subject to a harsher penalty those who participated in gang assaults, regardless of

> the actual role of the participant. In so doing, the Legislature acknowledged the increased severity of rapes and other sexual offenses committed by persons acting in concert.

*State v. Polk*, 309 N.C. 559, 567, 308 S.E.2d 296, 300 (1983) (internal citation omitted). More specifically, because a defendant is sentenced to a longer term of imprisonment for a conviction of first-degree rape based on the participation of additional actors, it follows that a defendant's sentence for first-degree rape cannot be enhanced further by the participation of the same actor. Therefore, because the trial court accepted Defendant's guilty plea to first-degree rape based on the participation of the actual perpetrator, the trial court's finding in aggravation that re-counted the participation of the actual perpetrator constitutes error.

Eliminating this aggravating factor from consideration leaves only factor 13, that the "defendant involved a person under the age of 16 in the commission of the crime[,]" to support Defendant's aggravated sentence. Generally, "[t]he weighing of aggravating and mitigating factors is within the sound discretion of the trial court." *Norman*, 151 N.C. App. at 104, 564 S.E.2d at 633 (citing *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658, *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482 (1982)). This "discretion includes the power to find that one aggravating factor outweighs several mitigating factors, . . . [or] that each of several aggravating factors is in and of itself sufficient to outweigh all mitigating factors." *Norman*, 151 N.C. App. at 104, 564 S.E.2d at

633. However, when this Court cannot "determine the respective weights assigned by a trial court to each factor[,]" remand for resentencing is necessary. *Id.*

In this case, although the trial court found that the factors in aggravation outweigh the factors in mitigation, we cannot discern from the record or the transcript how much weight Judge Hill assigned to each factor in aggravation, or if she believed that either factor in aggravation, standing alone, would have outweighed the factors in mitigation. Therefore, the judgment regarding the rape of S.J. must be reversed and remanded for resentencing. *See State v. Yarborough*, 64 N.C. App. 500, 307 S.E.2d 794 (1983) (remanding a case for resentencing when the defendant was sentenced in the aggravated range based on two factors in aggravation and no factors in mitigation, and this Court held that the trial judge improperly found one aggravating factor).

For the reasons stated, Defendant's petition for a writ of certiorari regarding argument one is denied. The judgment of the trial court is affirmed in part and reversed and remanded in part.

CERTIORARI DENIED, AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges TYSON and STROUD concur.

Report per Rule 30(e).