NO. COA06-652

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v. Orange County
No. 03 CRS 51981

BILLY LEE APPLE

Appeal by Defendant from judgment entered 13 December 2005 by Judge Henry V. Barnette, Jr., in Superior Court, Orange County. Heard in the Court of Appeals 23 January 2007.

Attorney General Roy Cooper, by Assistant Attorney General Heather H. Freeman, for the State.

Amos Granger Tyndall, for the defendant-appellant.

WYNN, Judge.

When charges with terms in the presumptive range have been consolidated for the purpose of sentencing, the aggregate total will be considered to be equally attributable across each individual term.[1] Here, the defendant argues that the trial court violated the statutory prohibition against more severe sentences in resentencing by increasing the fine on one of his charges. Because we conclude that the fine imposed on resentencing was an aggregate total that was equally attributable across all charges, in the same

[1] *State v. Hemby*, 333 N.C. 331, 336, 426 S.E.2d 77, 79-80 (1993).

amount as at the original sentencing, we affirm the trial court.

Defendant Billy Lee Apple pled guilty in May 2004 to seven counts of indecent liberties with a minor, seven counts of contributing to the delinquency of a minor, one count of indecent liberties with a student, and multiple counts of secret peeping. The underlying facts tended to show that Defendant placed video cameras inside the air purifiers of rooms with tanning booths, at a tanning salon business owned and operated by Defendant and his wife. Authorities confiscated videotapes and identified forty-eight women undressing in the tanning salon, although there were more women on the videotapes who could not be identified; the majority ranged in age from thirteen to fifty. On 26 May 2004, the trial court imposed an aggravated sentence of eight consecutive judgments of twenty to twenty-four months in prison. The sentence was suspended, and Defendant was placed on probation with special conditions that included intensive probation, sex offender treatment, and fines totaling $64,000.

In light of the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403 (2003), this Court granted Defendant's motion for a resentencing hearing, on 1 November 2005. Defendant appeared for resentencing on 13 December 2005, where a different trial judge imposed sentences in the presumptive range, namely, seven consecutive sentences of sixteen to twenty months in prison and one sentence of six to eight months, to run at the expiration of the other sentences. The sentences were again suspended, and Defendant was placed on probation with

special conditions including intensive probation and sex offender treatment. Rather than imposing separate fines on each charge, as had been done by the first trial judge in the original sentencing, the 2005 trial court consolidated all the fines across all charges and imposed the same total fine of $64,000, on the individual charge 03-CRS-51981.

Defendant now appeals the portion of his sentence assessing a fine of $64,000, arguing that the trial court erred by (I) increasing the fine imposed in 03-CRS-51981 from the original $2,000 to $64,000, and (II) by sentencing him to pay a fine in violation of statutory and constitutional prohibitions against excessive fines.

I.

Defendant first argues that the trial court committed reversible error by imposing a fine of $64,000 for charge 03-CRS-51981 during resentencing, when the original fine for that charge was only $2,000. He contends that this larger fine was a violation of a statutory prohibition against imposing a more severe sentence for the same offense after an original sentence is set aside on direct review. N.C. Gen. Stat. § 15A-1335 (2005). We disagree.

From the outset, we note that Defendant waived appellate review of this issue, as he has failed to establish an appeal as a matter of right or as a matter of law. Because Defendant pled guilty to the charges in question, he is only "entitled to appeal as a matter of right the issue of whether his . . . 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 . . .." N.C. Gen. Stat. § 15A-1444(a1) (2005). Here, Defendant pled guilty, and the imprisonment terms imposed at resentencing fall within the presumptive range for Defendant's prior record or conviction level and class of offense. The proper method of obtaining review of the fines or sentence imposed would therefore be to petition this Court for review of the issue by writ of certoriari. N.C. Gen. Stat. § 15A-1444(a1).

Nonetheless, even assuming *arguendo* that Defendant is entitled to appeal the sentence as a matter of right because the fine allegedly violated another statutory provision, namely N.C. Gen. Stat. § 15A-1335, and was therefore an abuse of discretion,[2] we conclude that the trial court committed no error.

Our State Supreme Court has held that,

> [W]hen indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence, nothing else appearing in the record, the sentence, for purposes of appellate review . . . will be deemed to be equally attributable to each indictment or conviction.

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[2] A defendant who has pled guilty to a felony or misdemeanor "is entitled to appeal as a matter of right the issue of whether the sentence imposed 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." N.C. Gen. Stat. § 15A-1444(a2)(2) (2005). North Carolina General Statute § 15A-1340.23 allows for the imposition of a fine with any judgment that includes a sentence of imprisonment and also states that "[t]he amount of the fine for a Class 1 misdemeanor . . . is in the discretion of the court." All of Defendant's convictions were for either felonies or Class 1 misdemeanors.

State v. Hemby, 333 N.C. 331, 336, 426 S.E.2d 77, 79-80 (1993); *see also State v. Nixon*, 119 N.C. App. 571, 573-74, 459 S.E.2d 49, 50-51 (1995) (applying the rule set forth in *Hemby*). Here, as distinguished from *Hemby* and *Nixon*, Defendant was sentenced on the same number of charges and indictments as in the original sentencing; thus, unlike in *Hemby* and *Nixon*, the proportion between the $64,000 total amount of fines imposed and the number of offenses remained the same. When "equally attribut[ing]" the $64,000 total across all of the charges to which Defendant pled guilty, the individual amount per charge remains the same for both sentences. Accordingly, we find no merit to this assignment of error.

II.

Defendant next argues that the trial court committed clear, plain, and reversible error by sentencing him to pay a fine in the amount of $64,000 for charge 03-CRS-51981, as such fine violates statutory and constitutional prohibitions against excessive fines. We disagree.

Again, we note that Defendant failed to preserve his constitutional objections to his resentencing, as "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Likewise, Defendant has failed to present an argument as to plain error in his brief to this Court. *See* N.C. R. App. P. 10(c)(4) (allowing a defendant to preserve an issue for appellate review if "the judicial action questioned is

specifically and distinctly contended to amount to plain error."); *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000) (holding that the "bare assertion" of plain error in an assignment of error, without accompanying explanation, analysis, or specific contentions in a defendant's brief, is insufficient to show plain error), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

Nonetheless, even if this matter was properly before us, we would find no error was committed by the trial court on this issue. North Carolina General Statute § 15-1340.23 states that the amount of any fines imposed with a judgment that includes a sentence of imprisonment lies in the discretion of the trial judge. Here, Defendant pled guilty to charges that amounted to a serious breach of the trust of his tanning booth customers, as well as his position in the community as a high school coach and former police officer. Morever, the trial court heard extensive statements from victims as to how the secret videotaping had negatively impacted their lives. Under such circumstances, as well as the fact that Defendant also profited from the victims while videotaping them, we would decline to find that the amount of the fine imposed was an abuse of discretion. *See State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (holding that a trial court will be held to have abused its discretion only "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.").

Affirmed.

Judges HUNTER and STEELMAN concur.

Report per rule 30(e).