NO. COA06-891

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v.

CALVIN LAMONT BROWN

Stokes County
Nos. 03 CRS 1379, 50233
03 CRS 50234, 50276
03 CRS 50284

Appeal by defendant from judgments entered 22 February 2006 by Judge Henry E. Frye, Jr., in Stokes County Superior Court. Heard in the Court of Appeals 22 January 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, for the State.

Russell J. Hollers, III, for defendant-appellant.

MARTIN, Chief Judge.

On 21 May 2003, defendant entered an *Alford* plea to charges of first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), assault inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury ("AWDWISI"), and conspiracy to commit assault with a deadly weapon inflicting serious injury. Judge John O. Craig sentenced defendant to the following aggravated prison terms:

(1) 03 CRS 50233: 109 to 140 months for AWDWIKISI;

> (2) 03 CRS 50234: 77 to 102 months for first-degree burglary, consecutive to the sentence in 03 CRS 50233;
>
> (3) 03 CRS 50284: 24 to 29 months for conspiracy, consecutive to the sentence in 03 CRS 50234;
>
> (4) 03 CRS 1379: 19 to 36 months for assault inflicting serious bodily injury, concurrent; and
>
> (5) 03 CRS 50276: 29 to 44 months for AWDWISI, concurrent.

State v. Brown, 165 N.C. App. 270, 271, 598 S.E.2d 263, 264 (2004).

Defendant filed an appeal pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). *Id.* Upon a review of the record, we found no error as to the judgments entered in 03 CRS 50233 and 50284. *Id.* at 272, 598 S.E.2d at 265. Because the record lacked copies of the judgments in 03 CRS 1379, 50234 and 50276, however, we remanded the case for appointment of new counsel to perfect defendant's appeal from these judgments. *Id.* (citing *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498).

In his appeal from the judgments in 03 CRS 1379, 50234, and 50276, defendant challenged his aggravated sentences under the then-recent holding in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *State v. Brown*, __ N.C. App. __, 624 S.E.2d 433 (2006) (unpublished) ("*Brown II*"). Because the aggravating factors used to enhance his sentences were not admitted by defendant or found by a jury beyond a reasonable doubt, we held that "all *three judgments* must be remanded for resentencing in accordance with *Blakely*" and our Supreme Court's decision in *State v. Allen*, 359

N.C. 425, 615 S.E.2d 256 (2005), *opinion withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006). *Id.* (emphasis added).

At his resentencing hearing on remand from *Brown II*, defendant stipulated to his prior record level II and was sentenced to presumptive prison terms, as follows:

> (1) 03 CRS 50233: 100 to 129 months for AWDWIKISI;
>
> (2) 03 CRS 50234: 77 to 102 months for first-degree burglary, consecutive to the sentence in 03 CRS 50233;
>
> (3) 03 CRS 50284: 19 to 23 months for felony conspiracy, consecutive to the sentence in 03 CRS 50234;
>
> (4) 03 CRS 1379: 19 to 23 months for assault inflicting serious bodily injury, concurrent; and
>
> (5) 03 CRS 50276: 29 to 44 months for AWDWISI, concurrent.

We note that the trial court exceeded the scope of its mandate on remand by resentencing defendant in 03 CRS 50233 and 50284. However, the State raised no objection below and has not appealed from the judgments. In light of the trial court's statutory authority to provide post-conviction relief on its own motion under N.C. Gen. Stat. § 15A-1420(d) (2006), we cannot say the court's judgments are void for lack of jurisdiction. Accordingly, we decline to disturb them *ex mero motu*.

In his lone argument on appeal, defendant claims the trial court erred by altering the sentence rendered in open court in 03 50234 outside of his presence. *See State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 9 (2005) ("A defendant has a right to be

present at the time the sentence was imposed.") (citing *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999)). He asserts that the court did not announce that the sentence in 03 CRS 50234 was to run consecutively to the sentence imposed in 03 CRS 50233, as reflected on the written judgment.

Because he entered an *Alford* plea, defendant's right of direct appeal is confined to the following issues:

> (1) whether the sentence is supported by the evidence (if the minimum term of imprisonment does not fall within the presumptive range); (2) whether the sentence results from an incorrect finding of the defendant's prior record level under N.C. Gen. Stat. § 15A-1340.14 . . .; (3) whether the sentence constitutes a type of sentence not authorized by N.C. Gen. Stat. § 15A-1340.17 . . . for the defendant's class of offense and prior record or conviction level; (4) whether the trial court improperly denied the defendant's motion to suppress; and (5) whether the trial court improperly denied the defendant's motion to withdraw his guilty plea.

State v. Carter, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004) (citing *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003); *see also* N.C. Gen. Stat. §§ 15A-1444(a1), (a2), (e) (2006)). Where a defendant's assignment of error falls outside this limited appeal of right, it is not properly before this Court for review. *See State v. Absher*, 329 N.C. 264, 264, 404 S.E.2d 848, 849 (1991). "Furthermore, if during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised [within his limited appeal of right] . . . his appeal should be dismissed." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998) (citation omitted).

Defendant's sentence of 77-102 months in 03 CRS 50234 lies at the top of the presumptive range for the Class D felony of first-degree burglary and his Prior Record Level II, to which he stipulated at re-sentencing. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2006). The re-imposition of a consecutive sentence on remand neither "increase[d] the penalty for a crime beyond the prescribed statutory maximum" nor required the court to find any fact beyond the admitted elements of the offense. *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). Therefore, defendant's assignment of error does not concern the evidentiary support for his sentence or any other issue within the purview of N.C. Gen. Stat. § 15A-1444(a1) or (a2). Because defendant has failed to present an assignment of error that is cognizable on direct appeal, we dismiss his appeal. *See Hamby*, 129 N.C. App. at 370, 499 S.E.2d at 197.

We note that the transcript of the resentencing hearing reflects the court's intention to impose a consecutive sentence in 03 CRS 50234. Before announcing defendant's sentences, the court acknowledged that he originally received a sentence in 03 CRS 50234 that ran consecutively to his sentence in 03 CRS 50233:

> THE COURT: . . . [T]he Judge sentenced him on the first-degree burglary in [03 CRS] 50234 to run at [the] expiration of [03 CRS] 50233.

The court confirmed its understanding of defendant's consecutive and concurrent sentences with defense counsel:

> THE COURT: . . . Just so I'm correct, do you recall at sentencing that he had three

> consecutive sentences and two were run concurrent? Is that your recollection on that?
>
> [DEFENSE COUNSEL]: I think so, Judge. . . .
>
> THE COURT: . . . I have five judgments. And *three were consecutive* and two [Judge Craig] gave a sentence, but did not run [it] at [the] expiration of anything. So based on that I assumed that, therefore, they're concurrent.

(Emphasis added). Finally, after announcing defendant's five sentences, the judge expressly stated as follows:

> For the record, [the] *only deviation* the Court did was just change [the sentences] from aggravated to presumptive, *but gave the same sentence structure* that the Honorable Judge Joe Craig g[a]ve at [the] previous hearing.

(Emphasis added). Based on the court's statements, we believe the judgment rendered in open court included a consecutive sentence in 03 CRS 50234 and was thus consistent with the written judgment.

Dismissed.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).