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NO. COA06-953

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v.

FRANK JAMALL RUSH

Guilford County
Nos. 05 CRS 80144-45
05 CRS 24520

Appeal by defendant from judgment entered 8 September 2005 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 26 March 2007.

Attorney General Roy Cooper, by Assistant Attorney General Richard A. Graham, for the State.

Daniel F. Read for defendant appellant.

McCULLOUGH, Judge.

On 29 August 2005, Frank Jamall Rush ("defendant") pled guilty to conspiracy to possess cocaine, possession with intent to sell or deliver cocaine, sale of cocaine, loitering for the purpose of drug activity and second-degree trespass. The plea agreement provided that the cases would be consolidated into one Class G felony, with sentencing and restitution in the court's discretion. After Judge Frye accepted the plea, defense counsel noted that defendant had a drug problem and prayed for a probationary sentence which would allow defendant to learn a trade. Judge Frye allowed defendant until 1 September 2005 to interview with the Malachi House, a

residential drug program, before making his sentencing decision. On 1 September 2005, court reconvened and defendant's mother informed Judge Frye that the Malachi House had accepted defendant "on a trial basis." Judge Frye entered a prayer for judgment until 10 October 2005 to allow defendant to enroll in the Malachi House.

On 7 September 2005, six days after judgment was continued, defendant was arrested on the premises of Greensboro Housing Authority property and charged with trespassing, possession of marijuana and possession of cocaine. Defendant was brought before Judge Frye the next day as "an emergency add-on." At the beginning of the hearing, defense counsel moved to withdraw defendant's 29 August 2005 guilty plea. The State opposed the motion and presented to the court the arresting officer. Upon the conclusion of the officer's testimony regarding defendant's 7 September 2005 arrest, the State prayed for judgment on the guilty plea. Judge Frye asked defendant if he had enrolled in the Malachi House and defendant responded, "Yes sir. I was supposed to be going up there today, but[.]" The Court subsequently informed defendant and counsel that an independent inquiry of the Malachi House revealed that defendant "had called[, but] had never actually been on the premises. That he appeared to be nonchalant in his attitude toward [them] - that they were waiting on him to come[.]"

Judge Frye reviewed the 29 August 2005 transcript of plea for the record and then denied defendant's request to withdraw his plea, finding no basis for the withdrawal. Judge Frye imposed an

active sentence of 19 to 23 months in accordance with the plea agreement. Defendant appeals.

We first note that, because defendant entered a plea of guilty, defendant's appeal of right is limited under N.C. Gen. Stat. § 15A-1444(e) (2005). See *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). Specifically, "under N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). See N.C. Gen. Stat. § 15A-1444(e).

Defendant first argues the trial court erred in allowing the State to pray for judgment on 8 September 2005 on an "emergency" basis. Assuming this issue is reviewable, we find no error in the actions of the trial court. We next address defendant's second argument regarding his motion to withdraw his guilty plea, which is appropriately before this Court pursuant to N.C. Gen. Stat. § 15A-1444(e).

Defendant contends the trial court erred in failing to grant defendant's motion to withdraw his guilty plea prior to sentencing because fair and just reasons existed for his withdrawal request. Defendant argues he had a "swift change of heart" and that the State would not have been prejudiced by the withdrawal.

In reviewing a motion to withdraw a guilty plea, "the appellate court does not apply an abuse of discretion standard, but instead makes an 'independent review of the record.'" *State v Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (quoting *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990)). Our Court "must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow [a] motion to withdraw." *Id.* In general, a "presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *Handy*, 326 N.C. at 539, 391 S.E.2d at 162. The defendant has the burden of showing his motion to withdraw his guilty plea is supported by some "fair and just reason." *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992). In reviewing such a motion, this Court may consider whether the defendant has asserted 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. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163.

Here, defendant moved to withdraw his guilty plea ten days after he entered the plea. Although there was not a showing of any considerable prejudice to the State, defendant did not testify at the hearing or give any reason to allow the motion to withdraw. Defendant did not assert his legal innocence or lack of

representation by counsel at any relevant time. Nor has defendant argued misunderstanding of the consequences of a guilty plea, hasty entry of the plea, or coercion. See *id.* We note defendant's attorney was present with defendant when defendant appeared before the trial court and entered his plea. The record reveals no evidence of haste or coercion in entering defendant's plea. Finally, the record reveals defendant understood his right to plead not guilty and understood he was pleading guilty to all charges.

Having considered all the *Handy* factors, we conclude defendant has failed to present a fair and just reason for withdrawal of his plea, and the trial court properly denied defendant's motion to withdraw his plea. We overrule this assignment of error.

Affirmed.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).