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NO. COA07-1382

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 05 CRS 065231

ISHA NICOLE REED

Appeal by defendant from judgment entered 22 March 2007 by Judge Kenneth E. Brown in New Hanover County Superior Court. Heard in the Court of Appeals 30 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Michael D. Youth, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

JACKSON, Judge.

Isha Nicole Reed ("defendant") appeals the denial of her motion to withdraw plea and the restitution order rendered 22 March 2007. For the reasons stated below, we affirm in part and vacate in part.

On 4 July 2005, Maria Bonsignore ("Bonsignore") and Tasha Pearson ("Pearson") became involved in a physical altercation with Lekeshia Lesane ("Lesane") and several other females. At some point, Bonsignore heard a gunshot. The females who had been attacking Bonsignore and Pearson ran away, and Bonsignore saw defendant standing there holding a gun. Defendant admitted getting

the gun and firing it into the air. Defendant did not appear to have been part of the initial confrontation.

As Bonsignore and Pearson were attempting to start their car so that they could drive away, defendant fired another shot off to the side. When defendant was approximately ten to fifteen feet from Bonsignore, she fired a third bullet - this time in Bonsignore's direction. The bullet entered Bonsignore's breastbone and traveled diagonally towards her right kidney, finally lodging in her lower back. As a result of the gunshot wound, Bonsignore spent several days in the hospital, sustained permanent scarring, and had a number of medical bills.

On 27 February 2006, defendant was indicted on the charge of assault with a deadly weapon inflicting serious injury. On 6 March 2007, as jurors stood by to try defendant's case, defendant entered an *Alford* plea to assault with a deadly weapon inflicting serious injury. Pursuant to her plea, defendant was to receive a split sentence - in lieu of a 29 to 44 month active sentence, she was to serve a six month active term followed by probation. Defendant prayed for judgment continued in order to make living arrangements for her children during the time of her incarceration, and her sentencing hearing was scheduled for 12 March 2007.

On the evening of 6 March 2007, two witnesses to the 4 July 2005 incident visited defendant. On the morning of 7 March 2007, defendant contacted her attorney and asked to withdraw her plea. After conducting some research which resulted in the locating of

additional exculpatory witnesses, defense counsel submitted a motion to withdraw defendant's plea on 8 March 2007.

Defendant appeared for sentencing on 12 March 2007; however, because a different judge was holding court that day, the hearing on her motion was continued so that it could be heard before the same judge who accepted the plea. That hearing subsequently was held on 22 March 2007. The trial court denied defendant's motion and imposed the sentence agreed to in her transcript of plea. In addition, the trial court ordered defendant to pay restitution consistent with the restitution worksheet in the amount of \$39,791.10.

Defendant first argues that the trial court erred in denying her motion to withdraw her guilty plea. We disagree.

This Court does not use an abuse of discretion standard in reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea which was brought before sentencing. *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 254 (2006). It instead makes an "independent review of the record." *Id.* (quoting *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993)).

"In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason." *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (quoting *State v. Olish*, 266 S.E.2d 134, 136 (W. Va. 1980)). In *Handy*, our Supreme Court identified several factors to consider upon a motion to withdraw plea:

"[1] whether the defendant has asserted legal innocence, [2] the strength of the State's proffer of evidence, [3] the length of time between entry of the guilty plea and the desire to change it, [4] and whether the accused has had competent counsel at all relevant times. [5] Misunderstanding of the consequences of a guilty plea, [6] hasty entry, [7] confusion, and [8] coercion are also factors for consideration."

Robinson, 177 N.C. App. at 229, 628 S.E.2d at 255 (alterations in original) (quoting *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

In our independent review of the record, we believe these factors weigh against withdrawal of the plea. Admittedly, defendant sought to withdraw her guilty plea almost immediately after entering it. However, this is the only factor which is clearly in her favor. Although defendant has maintained her innocence as to the injurious gunshot, she admitted firing her gun on 4 July 2005. The State's proffer of evidence is compelling. Further, defendant admitted in her transcript of plea that she was satisfied with the efforts of her appointed counsel. Counsel admitted at the hearing on the matter that she made attempts to contact witnesses before trial but was unable to locate them. The fact that witnesses came forward subsequent to defendant's plea serves only to prejudice the State as these witnesses were not available at the time the plea was accepted and jurors were prepared to hear the case. In addition, defendant did not appear to have misunderstood the consequences of pleading guilty, did not enter her plea hastily, was not confused, and was not coerced.

Considering all the *Handy* factors, defendant failed to show any fair and just reason for the trial court to grant her motion to

withdraw her guilty plea. Therefore, this assignment of error is overruled.

Defendant next argues that the trial court erred by ordering restitution in the amount of \$39,791.10 because that amount was not supported by any evidence. We agree.

“‘The amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.’” *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). Such evidence cannot be based solely on the unsworn statements of the prosecutor. *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992).

In this case, the only references with respect to the amount of restitution were the prosecutor’s unsworn statements. Therefore, there is insufficient evidence in the record to support the trial court’s restitution award. The proper remedy in such circumstances is to vacate the portion of the judgment ordering the defendant to pay restitution. See, e.g., *State v. Wilson*, 340 N.C. 720, 727, 459 S.E.2d 192, 196 (1995); *Shelton*, 167 N.C. App. at 233, 605 S.E.2d at 233-34; *Buchanan*, 108 N.C. App. at 341-42, 423 S.E.2d at 821. For this reason, we vacate the portion of the judgment ordering defendant to pay restitution in the amount of \$39,791.10.

Affirmed in part, vacated in part.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).

