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NO. COA09-1378

NORTH CAROLINA COURT OF APPEALS

Filed: 1 February 2011

STATE OF NORTH CAROLINA

v. Sampson County
Nos. 08 CRS 52960-63
08 IFS 1760

DALLIS DAVIS,
Defendant.

Appeal by defendant from judgment entered 14 July 2009 by Judge Russell J. Lanier, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for the State.

Kevin P. Bradley for defendant-appellant.

GEER, Judge.

Defendant Dallis Davis was convicted of habitual driving while impaired after pleading guilty to several other charges arising out of the same incident. Defendant primarily argues that the trial court erred in accepting his guilty pleas to the charges of driving while license revoked, driving without insurance, speeding, and driving with fictitious registration because the trial court failed to conduct the colloquy mandated by N.C. Gen. Stat. § 15A-1022(a) (2009). Defendant has no right to appeal this issue, but asks us to review the issue pursuant to his petition for writ of

certiorari. Because defendant has failed to demonstrate that his petition has merit, we deny that petition.

We agree, however, with defendant's argument that the trial court erred in imposing a sentence as to two charges – improper passing and driving with expired inspection – because the record contains no indication that defendant either pled guilty to or was convicted of those charges. We must, therefore, vacate defendant's sentence and remand for resentencing.

Facts

The State's evidence tended to show the following facts. On the evening of 21 August 2008, Trooper Donald Kevin Pearson of the Sampson County Highway Patrol was patrolling Highway 24 when he observed defendant driving an Oldsmobile at an estimated speed of 80 to 90 miles per hour in a 55 miles per hour zone. Trooper Pearson then clocked defendant with his radar at 84 miles per hour. When Trooper Pearson turned his vehicle around to pursue defendant, he saw defendant pass another vehicle in a no passing zone.

After Trooper Pearson stopped defendant, defendant was unable to produce a driver's license because his license had been suspended. Trooper Pearson noticed that defendant's eyes "were red and glassy," he "looked very tired," and his clothes "were dirty looking." Trooper Pearson could smell "the strong odor of alcohol coming from the vehicle before [he] got to the window just coming from the car." When Trooper Pearson asked defendant to perform several standard field sobriety tests, defendant refused, saying "'Man, I fucked up. It's my fault and I know I'm going back to

prison.'" Defendant also "repeat[ed] things several times" while talking with Trooper Pearson.

After observing defendant for approximately 45 minutes, Trooper Pearson concluded that defendant had consumed enough alcohol "to impair his ability to drive a motor vehicle safely on the highway." He placed defendant under arrest and took him to the Breathalyzer room at the Sampson County Jail. Defendant refused, however, to submit to the chemical analysis test.

Defendant was subsequently indicted for unsafe passing, driving while license revoked, driving with fictitious registration, driving with no insurance, driving with expired inspection, speeding, driving while impaired, and habitual impaired driving. Following the opening arguments at defendant's trial on these charges, defense counsel informed the court that defendant "would plead guilty to driving while license revoked, fictitious registration, no insurance, and speeding. [Defendant] would also stipulate he has three prior DWI convictions from the past ten years." The court accepted the plea.

After the close of the evidence, the trial court instructed the jury on the single charge of driving while impaired. The jury found defendant guilty of that charge. Defendant's stipulation regarding his prior DWI convictions resulted in a conviction of habitual impaired driving. During sentencing, the trial court stated that "the jury has found the defendant guilty of habitual impaired driving. He's pled guilty to all of the other charges." The trial court entered a judgment consolidating the charges of

habitual driving while impaired, driving while license revoked, driving with fictitious registration, speeding, driving without insurance, driving with expired inspection, and improper passing. Defendant was then sentenced to a single presumptive-range term of 20 to 24 months imprisonment. Defendant timely appealed to this Court.

I

On appeal, defendant contends that the trial court erred in accepting his guilty pleas to the charges of driving while license revoked, driving without insurance, speeding, and driving with fictitious registration. Defendant argues that the court failed to conduct the colloquy required by N.C. Gen. Stat. § 15A-1022(a) and that the court failed to determine whether defendant's plea was made voluntarily and with an understanding of the consequences.

As a threshold matter, we must address whether defendant is entitled to appellate review of this issue. In *State v. Bolinger*, 320 N.C. 596, 601-602, 359 S.E.2d 459, 462 (1987), our Supreme Court held that a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of permissible appeals from guilty pleas. See N.C. Gen. Stat. § 15A-1444(a1), (a2), (e) (2009) (specifying issues that may be appealed as matter of right following guilty plea). Accordingly, "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462. The Court further held that "[d]efendant may obtain appellate review of this issue only upon

grant of a writ of certiorari." *Id.* See also *State v. Rhodes*, 163 N.C. App. 191, 193-94, 592 S.E.2d 731, 732-33 (2004) (explaining that defendant was not entitled to challenge procedures employed in accepting guilty plea, but "under *Bolinger* and consistent with N.C. Gen. Stat. § 15A-1027, it is permissible for this Court to review pursuant to a petition for writ of certiorari during the appeal period a claim that the procedural requirements of Article 58 were violated").

Consequently, under *Bolinger* and *Rhodes*, defendant in this case is not entitled to challenge on appeal the procedures followed in accepting his guilty plea, but his arguments may be reviewed pursuant to a petition for writ of certiorari as defendant has requested. The writ of certiorari is "an extraordinary remedial writ." *Pue v. Hood*, 222 N.C. 310, 312, 22 S.E.2d 896, 898 (1942). A party moving for the issuance of a writ of certiorari bears the burden of "demonstrat[ing]: (1) no appeal is provided at law; (2) a *prima facie* case of error below; and (3) *merit* to its petition." *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 284, 408 S.E.2d 885, 888 (1991) (emphasis added) (internal citations omitted).

We believe that defendant has failed to show that his petition asserts a meritorious argument. In *State v. Williams*, 65 N.C. App. 472, 479, 310 S.E.2d 83, 87 (1983), the defendant contended that the trial court violated his constitutional rights "by failing to affirmatively find on the record that his plea was voluntarily and intelligently made." Upon reviewing the record, the Court observed

that it was "obvious" that the trial court did not follow the requirements of § 15A-1022(a), but found it "more than interesting to note that nowhere in his brief, his statement of the facts, or in his petition for writ of certiorari, [did] the defendant ever make any allegation that the negotiated plea of guilty was unauthorized by him, or that his counsel did not inform him of all the plea arrangements prior to the entry of same in open court, or that the pleas of guilty as entered deviated in any way whatsoever from the sentences he had been led to believe he would receive. . . . He [did] not allege or cite any prejudice to him flowing from the results of the court's failure to follow the statute." *Williams*, 65 N.C. App. at 480, 310 S.E.2d at 87-88.

Ultimately, the Court in *Williams* concluded that the defendant "fail[ed] to allege any facts to show that the pleas of guilty were involuntary, only that the judge did not ask him personally if they were voluntary." *Id.* at 480-81, 310 S.E.2d at 88. The Court, therefore, concluded that "under the total facts and circumstances of this case the error [was] harmless beyond a reasonable doubt. There [was] no showing of a reasonable possibility that a different result could have or would have been reached at the trial level had the error not been committed at the trial and sentencing stage." *Id.* at 481, 310 S.E.2d at 88 (internal citation omitted).

This Court in *State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896 (2000), reached a similar conclusion. The Court first noted: "[J]ust because the trial court failed to comply with the strict statutory requirements does not entitle defendant to have

his plea vacated. Defendant must still show that he was prejudiced as a result." *Id.* at 670, 531 S.E.2d at 898. In concluding that the defendant had not met his burden, the Court pointed out that "[h]e ha[d] not argued that he would have changed his plea had the judge complied strictly with the procedural requirements, nor ha[d] he asserted that his plea was not in fact knowingly, voluntarily, and with understanding, made. In sum, defendant simply points out the court's non-compliance and contends that he is entitled to replead as a result." *Id.*

Defendant, in this case, has made no greater showing than the defendants in *Williams* and *Hendricks*. Defendant points to the bare fact that the trial court failed to comply with the requirements of N.C. Gen. Stat. § 15A-1022(a) in accepting his guilty plea to the charges of driving while license revoked, driving without insurance, speeding, and driving with fictitious registration. He has made no attempt to explain in what way he was prejudiced by that failure – he does not suggest that he would have changed his plea on those charges if the trial court had complied with the statute, he does not argue that his plea was in fact not knowing or voluntary, and he does not suggest that a different result would have been reached at trial in the absence of the error.

Defendant has failed to demonstrate that his petition for writ of certiorari has merit and has failed to show that the circumstances of this case are extraordinary such that review is necessary. We, therefore, deny defendant's petition for writ of certiorari.

II

Defendant next argues that he was denied effective assistance of counsel at trial. "In order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy a two-prong test. 'First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, . . . he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.'" *State v. Stroud*, 147 N.C. App. 549, 555, 557 S.E.2d 544, 547-48 (2001) (quoting *State v. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780, 121 S. Ct. 868 (2001)), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

"The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (internal citation omitted).

Defendant points to two failures of his counsel. First, at the beginning of the trial, when the trial court was instructing the jury, the court mistakenly explained, "If I overrule an objection, that means the evidence does not come in." Defendant contends that his counsel should have pointed out the misstatement.

Second, after Trooper Pearson testified, "I think [defendant] had been through this before," his counsel objected, and the court sustained the objection. Defendant insists that his counsel erred by not moving to strike that testimony.

More specifically, defendant argues that although his objection to Trooper Pearson's testimony was sustained, the jury was never informed that it should disregard the testimony since the court previously erred in explaining rulings on objections. The trial court's full instruction, containing the misstatement, was as follows:

If I overrule an objection, that means the evidence does not come in. Do not speculate on what the witness would have said because had it been proper for you to consider, I would have let it in to begin with. Overruled; that means the evidence comes in. Don't give that particular evidence any more weight or credibility than you do other believable evidence just because an objection was made to it.

Even though the court mistakenly used the word "overrule" instead of "sustain" in the first sentence, we believe that the jury would have reasonably understood what the court intended to express – that if the trial court agreed with an objection, the evidence could not be considered.

In any event, defendant has not demonstrated that if Trooper Pearson's testimony had been struck, there is a reasonable probability that the jury would have found him not guilty of driving while impaired. When defendant was pulled over, he said, "'Man, I fucked up. It's my fault and I know I'm going back to prison.'" Later, when Trooper Pearson asked defendant whether he

"needed some help for the drinking," defendant did not refute the suggestion that he was impaired, but instead responded that he "didn't have enough money for that."

In addition to these admissions, the State presented Trooper Pearson's testimony regarding defendant's driving, the strong odor of alcohol emanating from the car and defendant, defendant's appearance, the trooper's opinion regarding defendant's impairment, and defendant's refusal to perform the field sobriety tests or allow the intoxilyzer test. In light of the ample evidence of defendant's impairment, we do not believe that defendant has shown sufficient prejudice from his counsel's failure to object to the trial court's slip of the tongue and failure to move to strike testimony that the trial court had already ruled inadmissible.

We, therefore, hold that defendant was not denied effective assistance of counsel. *See State v. Wilkerson*, 363 N.C. 382, 413, 683 S.E.2d 174, 193 (2009) ("Because defendant was not prejudiced, his counsel was not ineffective in failing to strike [witness'] inadmissible testimony."), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 734, 130 S. Ct. 2104 (2010); *State v. Fraley*, ___ N.C. App. ___, ___, 688 S.E.2d 778, 786 (overruling defendant's ineffective assistance of counsel argument when evidence of guilt was overwhelming and "[e]ven if defendant's counsel . . . had moved to strike [witness'] lay opinion testimony, there was no reasonable probability that a different outcome would have resulted"), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

III

Finally, defendant contends that the trial court erred in imposing judgment for improper passing and driving with expired inspection absent a guilty verdict or a guilty plea. At the start of the trial, defendant pled not guilty to all the charges brought against him, including improper passing and driving with expired inspection. After opening arguments, however, his counsel informed the court that defendant "would plead guilty to driving while license revoked, fictitious registration, no insurance, and speeding. Mr. Davis would also stipulate he has three prior DWI convictions from the past ten years." The court accepted this plea.

Subsequently, during sentencing, the State asserted that defendant "already admitted to . . . the other charges of driving while license revoked, fictitious registration, no insurance, and inspection sticker, and unsafe passing." Defense counsel then asked the court to "consolidate the misdemeanors" and sentence defendant in the bottom of the presumptive range. Afterward, when rendering its decision from the bench, the court noted that defendant had been convicted of the habitual impaired driving charge and "pled guilty to all of the other charges."

Despite the State's and the trial court's assertions, however, nothing in the record indicates that defendant ever pled guilty to improper passing and driving with expired inspection. N.C. Gen. Stat. § 15A-1331(b) (2009) provides that "[f]or the purpose of imposing sentence, a person has been convicted when he has been

adjudged guilty or has entered a plea of guilty or no contest." Neither an appellate court nor a trial court "has authority to impose upon any defendant charged with any crime, to which charge he has entered a plea of not guilty, any sentence not supported by a verdict of guilty rendered by a jury properly selected and constituted." *State v. Ruth*, 276 N.C. 36, 42, 170 S.E.2d 897, 901 (1969). Here, because there is no indication in the record that defendant was ever convicted of improper passing or driving with expired inspection, the trial court improperly included those charges in the judgment and resulting sentence. Because all of the charges were consolidated into one sentence, we must vacate that sentence and remand for resentencing.

No error in part; vacated and remanded in part.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).