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NO. COA09-269

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v.

Catawba County
No. 04 CRS 50346

KENNETH EDWARD WORLEY

Appeal by defendant from judgment entered 11 September 2008 by Judge W. Robert Bell in Superior Court, Catawba County. Heard in the Court of Appeals 7 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Don Willey, for defendant-appellant.

WYNN, Judge.

"Where it appears the court believed consecutive sentences were required when in fact such sentencing was merely discretionary, the imposition of consecutive sentences is erroneous."¹ Defendant Kenneth Edward Worley argues the trial court erred in ordering the sentence for his statutory rape conviction to run consecutive to an habitual felon sentence he was already serving. Because the record shows the trial court erroneously believed it lacked discretion to impose the sentences concurrently, we remand for re-sentencing.

¹ *State v. Brooks*, 105 N.C. App. 413, 416-17, 413 S.E.2d 312, 314 (1992) (citations omitted).

Only a brief statement of facts is necessary to understand Defendant's sole issue on appeal. As a result of alleged sexual conduct with a thirteen-year-old girl in 2003, Defendant was indicted and tried by a jury for first-degree kidnapping, statutory rape, and statutory sex offense. At Defendant's trial on 8 September 2008, the trial judge dismissed the statutory sex offense charge at the close of the State's evidence. Defendant did not present any evidence. The jury found Defendant guilty of statutory rape, and not guilty of first-degree kidnapping.

At sentencing, Defendant stipulated to being a prior record level VI offender based on twenty prior record level points. The judge sentenced Defendant in the presumptive range to an active term of 420 to 513 months imprisonment. The judge noted that Defendant was already serving a sentence on an habitual felon conviction, and stated: "I believe, if I'm not mistaken, that this sentence will begin running at the expiration of the habitual felon charge." Defense counsel agreed, and the judge said, "That's according to statute." Accordingly, the judgment in the record reflects that Defendant's sentence for the statutory rape conviction runs consecutively to the habitual felon sentence he was already serving.

In his sole argument on appeal, Defendant contends, and the State concedes, that the trial court erred by ordering his sentence for statutory rape to run consecutively to his habitual felon sentence because the judge mistakenly believed that he lacked discretion to impose the sentences concurrently. We agree.

Section 15A-1354(a) provides:

When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

N.C. Gen. Stat. § 15A-1354(a) (2007). "It is undisputed that the trial court has express authority under N.C.G.S. §15A-1354(a) to impose consecutive sentences." *State v. LaPlanche*, 349 N.C. 279, 284, 507 S.E.2d 34, 37 (1998). However, it is not required to do so. "Where it appears the court believed consecutive sentences were required when in fact such sentencing was merely discretionary, the imposition of consecutive sentences is erroneous." *State v. Brooks*, 105 N.C. App. 413, 416-17, 413 S.E.2d 312, 314 (1992) (citations omitted).

Here, the trial court had discretion to order either concurrent or consecutive sentences pursuant to N.C. Gen. Stat. § 15A-1354(a). However, the trial court's comments indicate a belief that, according to statute, the sentences must run consecutively. Therefore, the trial court did not exercise its discretion in determining whether Defendant's sentence for statutory rape should run concurrently or consecutively to his habitual felon sentence. Accordingly, we must vacate Defendant's sentence for statutory rape and remand for the trial court to determine whether that sentence

should run concurrently or consecutively to Defendant's habitual felon sentence.

Remanded for re-sentencing.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).