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NO. COA10-1595
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 08 CRS 53375
08 CRS 53376

ANTHONY LASHAWN MCSWAIN

Appeal by defendant from judgments entered 10 June 2010 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 9 June 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

J. Edward Yeager, Jr., for defendant.

ELMORE, Judge.

Anthony Lashawn McSwain (defendant) appearing *pro se*, pled guilty to two counts of involuntary manslaughter as a habitual felon and reckless driving to endanger. The trial court sentenced defendant to consecutive sentences of 133 to 169 months' imprisonment in the North Carolina Department of

Correction. Defendant now appeals. After careful consideration, we affirm the decision of the trial court.

On 12 December 2007, defendant crossed the center line while driving, causing a head-on collision with another vehicle. The passengers of the other vehicle were killed. On 5 March 2008, arrest warrants were issued for defendant on two counts of involuntary manslaughter. A grand jury indicted defendant on: 1) two counts of involuntary manslaughter, 2) reckless driving, 3) driving left of center, and 4) and habitual felon. Defendant was granted pre-trial release until 4 May 2009.

On 4 May 2009, defendant appeared before the Honorable E. Lynn Johnson in the Superior Court of Cumberland County. In court, defendant claimed that his name was "Branch" and not Anthony McSwain. Defendant also exhibited other behavior that caused to the trial court to question the state of defendant's mental health. The trial court then ordered defendant to be taken into custody. Over the next three days, defendant's counsel visited him multiple times to determine the status of his mental health. On 7 May 2009, after a discussion with defendant's counsel and close relatives, the trial court ordered that defendant be examined by mental health professionals to determine whether he was competent to proceed to trial. On 7

August 2009, the court reviewed the results of the examination and found that defendant was competent to stand trial.

On 10 September 2009, defendant wrote a letter to the Honorable E. Lynn Johnson requesting the removal of his court-appointed counsel, Deborah Price. Defendant also requested an unsecured bond. On 13 September 2009, defendant filed a handwritten motion, again requesting the removal of his court-appointed counsel. After advising defendant of the risks of representing himself, the trial court removed Deborah Price as defendant's court-appointed counsel. However, the trial court directed Deborah Price to remain on standby status. At that time, the trial court took no action regarding defendant's request for unsecured bond. On 24 November 2009, defendant filed a motion again requesting an unsecured bond. Defendant also filed several other motions, requesting 1) subpoenas to be issued on his behalf, 2) jury instructions, 3) access to a law library, and 4) the depositions of several witnesses. The trial court denied those motions. Defendant also submitted a motion to be a pro se litigant. Defendant argued in his motion that he could adequately represent himself, and that there was no legitimate reason as to why the trial court should not grant him

the right to represent himself. The trial court granted this motion.

Defendant's case was tried on 23 February 2010. Defendant first attempted to raise the defense of automatism. The presiding judge explained to defendant that "automatism is not a defense to involuntary manslaughter because involuntary manslaughter deals with culpable negligence." Defendant then raised schizophrenia as a possible defense. The presiding judge explained in more detail that mental state, at the time of the collision, was not a defense to culpable negligence. Next, the presiding judge explained to defendant that he was in serious jeopardy of serving a very lengthy sentence. The presiding judge also explained that the trial court would be willing to submit defendant to a presentencing diagnostic, the results of which a judge may or may not consider in sentencing.

While the trial court took a brief recess, defendant was allowed to meet with his aunt, standby counsel, and an additional attorney recognized as a friend of the court. When the proceedings resumed, defendant pled guilty to two counts of involuntary manslaughter as a habitual felon, reckless driving, and driving left of center. Defendant stipulated to his prior record level at the time he entered his guilty plea. The case

came before the trial court for sentencing on 10 June 2010. After considering the presentence diagnostic evaluation, defendant was sentenced as a Level IV offender to 133 to 169 months for each conviction of involuntary manslaughter as a habitual felon with the sentences to be served consecutively. Defendant was also sentenced to sixty days for the reckless driving conviction. The driving left of center conviction was dismissed.

On 10 June 2010, after sentencing, defendant requested an appeal of his convictions and filed a motion to reconsider plea.

Defendant's first two arguments on appeal are that 1) the trial court committed reversible error by revoking his pre-trial appearance bond and 2) the trial court committed reversible error by denying defendant's pre-trial motions for an unsecured bond, for access to a law library, and for access to depositions. We decline to address these issues on appeal.

"The right to appeal in a criminal proceeding is purely statutory." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995) (citations omitted). "Under N.C.G.S. Section 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. Corbett*, 191 N.C. App. 1, 3, 661 S.E.2d 759, 761 (2008) (citations omitted).

Here, defendant entered a plea of guilty. Therefore, we conclude that defendant's first two arguments on appeal fall outside of defendant's statutory right for appellate review. We decline to address these issues.

Defendant next argues that the trial court committed reversible error by accepting a plea of guilty which was not voluntarily, knowingly, and intelligently entered. Specifically, defendant argues that he was under duress from the trial court at the time he entered the guilty plea. We disagree.

"A court may accept a guilty plea only if it is made knowingly and voluntarily." *State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002) (citations and quotations omitted). "A plea is voluntarily and knowingly made if the defendant is made fully aware of the direct consequences of his plea." *Id.* at 511, 570 S.E.2d at 248 (citations omitted). "In cases where there is evidence that a defendant signs a plea transcript and the trial court makes a careful inquiry of the defendant regarding the plea, this has been held to be

sufficient to demonstrate that the plea was entered into freely, understandingly, and voluntarily." *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (quotations and citations omitted).

Here, the trial court reviewed the transcript of the plea with defendant. The trial court also covered each of the points required when accepting a plea by N.C. Gen. Stat. § 15A-1022. Then, defendant signed the plea transcript. Furthermore, there is no evidence that duress was used to coerce the plea. The judge agreed to send defendant for a presentencing diagnostic if he pled guilty. Defendant was then permitted to meet with two attorneys and his aunt in private to determine whether he would accept the plea.

We conclude that defendant entered the plea voluntarily, knowingly, and intelligently. The trial court did not err in accepting defendant's guilty plea.

Defendant further argues that the trial court committed reversible error by denying his attempts to withdraw the guilty plea. We disagree.

"In a case where the defendant seeks to withdraw his guilty plea before sentencing, 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). However, after sentencing, a defendant is only entitled to withdraw his plea if the sentence is inconsistent with the plea arrangement or upon a showing of manifest injustice. *Russell*, 153 N.C. App. at 509, 570 S.E.2d at 247. "Factors to be considered in determining the existence of manifest injustice include whether: Defendant was represented by competent counsel; Defendant is asserting innocence; and Defendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion." *Id.* at 509, 570 S.E.2d at 247.

Here, defendant's motion to reconsider plea was entered after sentencing. The plea arrangement only provided that defendant would be sent for presentencing diagnostic evaluations, and the court ordered the presentence diagnostic as agreed. Therefore, the sentence was not inconsistent with the plea arrangement.

Furthermore, we conclude that defendant has also failed to show manifest injustice. Defendant asked to have his court-appointed counsel removed. Defendant also requested to be able to represent himself. This court has held that "the defendant waives counsel at his peril" and that, "[w]hatever else a defendant may raise on appeal, when he elects to represent

himself he cannot there after complain that the quality of his own defense amounted to a denial of effective assistance of counsel." *State v. Brincefield*, 43 N.C. App. 49, 52, 258 S.E.2d 81, 84 (1979) (citations omitted). Therefore, we conclude that defendant is precluded from arguing that he was not represented by competent counsel.

Also, defendant claimed innocence by reason of automatism. This court has held that "[t]he elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Davis*, 198 N.C. App. 443, 446, 680 S.E.2d 239, 242 (2009) (citations and quotations omitted). Ultimately, defendant's defense is that he was unaware of his actions while under the psychotic episode. However, awareness of one's actions is not required to support a conviction of involuntary manslaughter. Therefore, we conclude that defendant made no valid assertion of innocence to involuntary manslaughter.

Finally, as previously discussed, the guilty plea was entered voluntarily, knowingly, and intelligently. Therefore, defendant has failed to show manifest injustice.

We conclude that the trial court did not commit reversible error by denying defendant's attempts to withdraw his guilty plea. Here, the sentence was consistent with the guilty plea, and defendant has failed to show manifest injustice.

Defendant's final argument on appeal is that that the trial court committed reversible error by sentencing defendant as a habitual felon to two consecutive sentences of 133 to 169 months. Specifically, defendant argues that the court violated N.C. Gen. Stat. § 14-7.6 by using the same conviction to establish both habitual felon status and prior record level. We disagree.

N.C. Gen. Stat. § 14-7.6 states in part: "In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person under this section." N.C. Gen. Stat. § 14-7.6 (2009).

Here, the record shows that defendant had previously been convicted of six different cocaine trafficking offenses on a single occasion. A trafficking by sale conviction was used to establish the habitual felon status and a trafficking by

possession conviction from the same date was used to establish defendant's prior record level.

Furthermore, N.C. Gen. Stat. § 15A-1340.14(f)(1) provides that stipulation of the parties is proof of prior convictions. N.C. Gen. Stat. 15A-1340.14 (f)(1)(2009). Here, defendant stipulated to his prior record level at the time he entered his plea. This Court has held that stipulating to prior convictions disposes of a challenge to the integrity of the trial court's calculation of the defendant's prior record. *State v. Hinton*, 196 N.C. App. 750, 754, 675 S.E.2d 672, 675 (2009). Accordingly, we conclude that the trial court committed no error in sentencing defendant as a habitual felon.

In sum, we conclude that the trial court committed no error in accepting defendant's plea of guilty, or in denying defendant's attempt to withdraw the guilty plea after sentencing. Furthermore, the trial court made no error in applying defendant's prior convictions when determining defendant's status as a habitual felon and in establishing defendant's prior record level.

AFFIRMED.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).