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NO. COA10-62

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Sampson County
Nos. 06 CRS 3715-17

ANTAVIO DERRELL BEST

Appeal by defendant from judgment entered 27 July 2009 by Judge Phyllis M. Gorham in Sampson County Superior Court. Heard in the Court of Appeals 23 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, for the State.

James R. Parish, for defendant-appellant.

Bryant, Judge.

Defendant was charged by indictments with three counts each of first-degree murder, first-degree kidnapping, accessory after the fact to first-degree murder, accessory after the fact to first-degree kidnapping, one count of burglary, and one count of accessory after the fact to burglary. All charges were joined for trial commencing on 8 June 2006. Defendant was acquitted of the first-degree murder charges but the jury was unable to reach unanimous verdicts as to the other charges and a mistrial was declared.

At a second trial on the remaining charges, commencing on 27 September 2007, the jury found defendant not guilty of the counts of kidnapping, the count of first-degree burglary, and the count of accessory after the fact to burglary, but found defendant guilty of three counts each of accessory after the fact to first-degree murder and accessory after the fact to first-degree kidnapping. At the sentencing hearing on 3 October 2007, defendant stipulated that he was at prior Criminal Record Level II for sentencing purposes. The court sentenced defendant to three consecutive terms of 100 to 129 months and ordered defendant to pay restitution to the families of the three murder victims. Defendant appealed to this Court. In an opinion filed 7 April 2009, we vacated the three convictions to accessory after the fact to first-degree kidnapping and the order to pay restitution and remanded the matter for resentencing on the three remaining convictions of accessory after the fact to murder. *State v. Best*, ___ N.C. App. ___, 674 S.E.2d 467 (2009). Defendant, at his resentencing hearing on 27 July 2009, presented evidence as to possible mitigating factors. Not finding any mitigating factors, the court sentenced defendant to three consecutive terms of 100 to 129 months. The court again ordered defendant to pay restitution to the families of the three murder victims. From these judgments, defendant appeals.

Defendant contends by two assignments of error (I) that the trial court abused its discretion by failing to find any mitigating factors; and (II) that the trial court erred in ordering him to pay restitution to the families of the victims.

I

With regard to his first contention, we hold defendant has not demonstrated that he is entitled to appeal this issue as a matter of right. N.C. Gen. Stat. § 15A-1444(a1) provides:

A defendant who has been found guilty . . . is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense.

N.C. Gen. Stat. § 15A-1444(a1) (2009). Pursuant to this statute, a defendant who is sentenced within the presumptive range does not have a statutory right to appeal the sentence and challenge the court's failure to find mitigating factors. *State v. Hill*, 179 N.C. App. 1, 26, 632 S.E.2d 777, 792 (2006). Accessory after the fact to first-degree murder is classified as a Class C felony. See N.C. Gen. Stat. §§ 14-7, 14-17 (2009). The sentence imposed for each offense in the case at bar is within the presumptive range for defendant's prior record level and the class of offense. See N.C. Gen. Stat. § 15A-1340.17 (2009). The court also expressly found that it did not find any factors in aggravation or mitigation because the sentence imposed is within the presumptive range. Defendant thus has no statutory right to appeal the issue of whether his sentence is supported by the evidence.

To obtain appellate review of this issue in the absence of a statutory right to appeal, N.C. Gen. Stat. § 15A-1444(a1) provides that a defendant "may petition the appellate division for review of

[the] issue by writ of certiorari." N.C.G.S. § 15A-1444(a1) (2009). Whether or not a petition for a writ of certiorari is filed is a factor this Court considers in determining whether or not to review the issue in its discretion. *See, e.g., Hill*, 179 N.C. App. at 26, 632 S.E.2d at 792; *State v. Knight*, 87 N.C. App. 125, 131, 360 S.E.2d 125, 129 (1987). Defendant has not filed a petition for writ of certiorari or otherwise sought this Court's discretionary review of this issue. We decline to treat the brief as a petition for writ of certiorari and to consider the issue. We therefore dismiss defendant's first assignment of error.

II

In his second assignment of error, defendant contends that the trial court erred in ordering defendant to pay restitution to the families of the victims. In the prior appeal in this matter, we vacated the order of restitution, finding no direct causal link between the defendant's role as an accessory after the fact and any harm incurred by the victims. *State v. Best*, ___ N.C. App. at ___, 674 S.E.2d at 477. No new evidence was offered in the resentencing hearing regarding this issue. The State concedes that in the absence of any new evidence, the trial court was bound by this Court's previous decision and it was error by the trial court to order defendant to pay restitution. We, therefore, again vacate the order of restitution.

Dismissed in part; vacated in part.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).