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NO. COA13-24
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v.

Union County
No. 11 CRS 52696

DOUGLAS BERNARD WATTS

Review by *certiorari* from judgment entered 6 September 2012 by Judge Anna Mills Wagoner in Union County Superior Court. Heard in the Court of Appeals 23 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Bethany A. Burgon, for the State.

Richard J. Costanza for defendant-appellant.

ERVIN, Judge.

Defendant Douglas Bernard Watts seeks review of a judgment sentencing him to a term of 23 to 28 months imprisonment based upon his conviction for larceny of a motor vehicle. On appeal, Defendant contends that the trial court erred by sentencing him in the aggravated range. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that this case should be remanded to the Union County Superior Court for resentencing.

I. Factual Background

On 18 May 2011, a warrant for arrest charging Defendant with felonious larceny and financial transaction card theft was issued. On 6 September 2011, the Union County grand jury returned a bill of indictment charging Defendant with felonious larceny and financial transaction card theft. On 6 September 2012, Defendant entered a plea of no contest to felonious larceny pursuant to a plea arrangement with the State under which, in return for his guilty plea, other pending charges would be dismissed and Defendant would be sentenced "in the top of the presumptive range." After accepting Defendant's plea and determining that Defendant should be sentenced in the presumptive range as a Level VI offender, the trial court entered a judgment sentencing Defendant to a term of 23 to 28 months imprisonment. On 13 September 2012, Defendant filed a *pro se* notice of appeal which did not clearly specify the judgment from which Defendant's appeal purported to be taken and failed to name the Court to which the appeal was being taken as required by N.C.R. App. P. 4. As a result, Defendant filed an alternative petition for the issuance of a writ of *certiorari*, which we have elected, in the interest of justice, to allow.

II. Substantive Legal Analysis

On appeal, Defendant contends that he is entitled to a new sentencing hearing because the trial court erroneously sentenced

him in the aggravated range.¹ More specifically, Defendant argues that the aggravated-range sentence embodied in the trial court's judgment was imposed in error because (1) Defendant's plea, which the trial court accepted, was tendered pursuant to a plea agreement which specifically provided for the imposition of a sentence in the presumptive range; (2) the trial court specifically found that a sentence in the presumptive range would be appropriate; and (3) the trial court did not find the existence of any aggravating factor before sentencing Defendant in the aggravated, rather than the presumptive, range. As the State acknowledges, Defendant's contention has merit.

At the sentencing hearing, the trial court determined that Defendant had been convicted of a Class H felony and should be sentenced as a Level VI offender. According to the applicable version of N.C. Gen. Stat. § 15A-1340.17, the maximum presumptive sentence which the trial court had the authority to impose upon Defendant based upon his felonious larceny conviction was 20 to 24 months imprisonment. However, the 23 to 28 month sentence which the trial court actually imposed upon Defendant fell within the aggravated, rather than the presumptive, range. The trial court did not, however, have

¹Defendant has not challenged the validity of his conviction in any way before this Court, so his guilty plea and resulting conviction remain undisturbed.

authority to impose an aggravated-range sentence upon Defendant in this case.

As an initial matter, the trial court failed to comply with the statutory provisions governing the imposition of aggravated sentences prior to entering the judgment which is before us in this case. Pursuant to N.C. Gen. Stat. § 15A-1340.16(c), a trial court must make written findings in aggravation and mitigation if the sentence which he or she seeks to impose departs from the presumptive range of sentences specified in N.C. Gen. Stat. § 15A-1340.17(c)(2). In addition, before a factor in aggravation can be found, either a jury must determine that the aggravating factor in question exists or the defendant must admit to its existence. N.C. Gen. Stat. § 15A-1340.16(a1). Although the trial court imposed an aggravated-range sentence upon Defendant, a jury did not find, Defendant did not admit, and the trial court did not make findings of fact establishing that any aggravating factor existed. As a result, the trial court failed to comply with the statutory requirements delineating the circumstances under which an aggravated-range sentence could be properly imposed.

Secondly, the trial court does not appear to have intended to impose an aggravated-range sentence. The written judgment entered in this case reflects that the trial court checked a box stating that "[t]he Court . . . makes no written findings

because the prison term imposed is . . . within the presumptive range of sentences authorized under G.S. 15A-1340.17(c).” As a result, instead of intending to impose an aggravated-range sentence upon Defendant, the trial court appears to have erroneously believed that the sentence reflected in its judgment was drawn from the presumptive, rather than the aggravated, range.

Finally, the trial court failed to follow the statutory requirements for rejecting a plea arrangement, which would have been a necessary prerequisite to the imposition of an aggravated-range sentence in this case given the contents of Defendant’s plea agreement. According to N.C. Gen. Stat. § 15A-1023(b), “[i]f the judge rejects [a plea] arrangement, he must so inform the parties, refuse to accept the defendant’s plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement.” Defendant’s plea agreement specifically provided that “[d]efendant w[ould] receive a sentence in the top of the presumptive range.” Although the trial court accepted Defendant’s plea, it failed to impose a sentence consistent with the provisions of Defendant’s plea agreement. By imposing a sentence that was inconsistent with the sentence to which Defendant and the State had agreed, the trial court essentially rejected Defendant’s plea arrangement without complying with the

applicable statutory provisions governing such situations. As a result, the trial court's judgment was unlawful for this reason as well.

III. Conclusion

Thus, although we find no legal defect in Defendant's conviction, we conclude that the trial court erred by sentencing Defendant in the aggravated range. As a result, this case should be, and hereby is, remanded to the Union County Superior Court for resentencing.

REMANDED FOR RESENTENCING.

Judges GEER and DILLON concur.

Report per Rule 30(e).