NO. COA13-290
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Montgomery County
No. 11 CRS 321-22
No. 08 CRS 1694

JOSEPH DAVID BOWDEN

Appeal by defendant from judgment entered on 20 March 2012 by Judge John O. Craig in Montgomery County Superior Court. Heard in the Court of Appeals 26 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Andrew O. Furuseth, for the State.

Brendan O'Donnell, Assistant Public Defendant, New Hanover County, for defendant-appellant.

HUNTER, Robert C., Judge.

Joseph David Bowden ("defendant") appeals from judgment entered 20 March 2012 by Judge John O. Craig in Montgomery County Superior Court after defendant entered an *Alford* plea to three charges of obtaining property by false pretenses.

Defendant contends: (1) the trial court erred in accepting defendant's guilty plea without ensuring that it was voluntary,

and that it was not voluntary; (2) that he was denied his right to an impartial judge, a fair trial, and due process; (3) that the trial court lacked subject matter jurisdiction over two of the indictments; (4) that the trial court erred in accepting his guilty plea without a sufficient factual basis for the plea; and (5) that the trial court erred in sentencing defendant based on his prior record level where the State failed to submit proof of defendant's criminal history. After careful review, we affirm the trial court's acceptance of defendant's guilty plea, but vacate the sentence and remand for resentencing.

Background

Defendant was indicted on three counts of obtaining property by false pretenses. The first indictment (08 CRS 1694) alleged that defendant knowingly used a counterfeit moneygram on 7 February 2008 to obtain $950.00 from a Montgomery County Walmart store. The second and third indictments (11 CRS 321 and 322) alleged that defendant obtained services and cell phones on 15 September 2010 from Alltel Communications, Inc. ("Alltel") by fraudulently using social security numbers of Anthony V. Heafner (11 CRS 321) and Jonathan B. Archibald (11 CRS 322). Defendant was represented by counsel in the Walmart case, but represented himself in the Alltel cases.

The trial court learned of defendant's proposed defenses to the charges before trial began at a discussion of defendant's motion for dismissal. Defendant claimed to have two witnesses willing to testify that the social security numbers used to obtain cell phones from Alltel were attributable to them. Upon learning this information, the trial judge addressed defendant and one of the witnesses, advising them that if the witness testified as proposed then they would be "in effect" admitting to crimes and opening themselves up to more charges, including perjury or solicitation of perjury. The judge also informed the witness and defendant of the unlikelihood that defendant's evidence would be admissible, given that much of it was hearsay. Ultimately the trial judge cautioned the witnesses about the consequences of testifying and that defendant should seek a global plea agreement.

On the following day, defendant appeared with counsel and entered an *Alford* plea on all three counts of obtaining property by false pretenses. The trial judge made inquiries as to defendant's understanding of the plea and found that it was made voluntarily.

The trial court then moved to the issue of restitution. Defendant did not dispute that on 7 February 2008 he went to

Walmart and presented a counterfeit moneygram, receiving $950.00 in cash. However, defendant argued that the State had insufficient proof that he called Alltel to obtain cell phones, actually obtained cell phones, or used anyone's social security number to obtain cell phones. The State introduced an investigator from Alltel to testify regarding the value of the phone services and cost of Alltel's investigation, as well as the findings of the investigation, including delivery receipts signed by defendant. Following the Alltel investigator's testimony, the court called defendant to testify regarding his ability to pay the restitution. Defendant detailed his income from disability, Medicaid, and food stamps, his expenditures for car payments and healthcare, and stated that he had no other valuable personal property.

The court found that there was a factual basis for defendant's *Alford* pleas, that he made the pleas freely and voluntarily, and that he was satisfied with his counsel's services. The charges were consolidated for judgment, and the court imposed a sentence of 10 to 12 months imprisonment, suspended for 42 months of probation to give defendant an opportunity to pay restitution. The court ordered defendant to pay $300.00 in restitution for the Walmart case, reduced from

$950.00 requested by the State, and $600.00 for the Alltel case, reduced from $3849.00 requested by the State.

Writ of *Certiorari*

In his petition for writ of *certiorari,* defendant concedes that he failed to serve his *pro se* notice of appeal upon the State. This Court has previously used its discretion pursuant to North Carolina Rule of Appellate Procedure 21 in granting a writ of *certiorari* where a *pro se* defendant fails to give notice of appeal to the State, and we do so here. *State v. Crawford*, __ N.C. __, __, 737 S.E.2d 768, 769 (2013) ("In her petition for writ of *certiorari*, defendant concedes that she failed to serve her *pro se* notice of appeal upon the State. In our discretion, we grant defendant's petition for writ of *certiorari* pursuant to North Carolina Rule of Appellate Procedure 21.").

Discussion

I. Voluntariness of Guilty Plea

Defendant first argues that the trial court erred in accepting defendant's guilty plea because the trial judge's conversations with defendant and his witnesses improperly pressured defendant to give up his right to trial and to plead guilty. We find that defendant's *Alford* plea was entered voluntarily.

Whether the trial court violated the statutory mandates set forth in N.C. Gen. Stat. §§ 15A-1021 and -1022 is a question of law, which is reviewed *de novo* on appeal. *State v. Demaio*, __ N.C. App. __, __, 716 S.E.2d 863, 867 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted).

"No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1021(b) (2011). "The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice." N.C. Gen. Stat. § 15A-1022(b) (2011). "Very few cases in North Carolina hold that conduct of a trial judge rendered a defendant's plea involuntary." *State v. King*, 158 N.C. App. 60, 69, 580 S.E.2d 89, 96 (2003). Many of those that do render a defendant's plea involuntary involve visible agitation or threats of increased punishment at sentencing by the trial judge. *See State v. Benfield*, 264 N.C. 75, 76, 140 S.E.2d 706, 708 (1965) (reversing conviction after trial judge threatened an increased sentence if

defendant did not plead guilty); *State v. Cannon*, 326 N.C. 37, 38-40, 387 S.E.2d 450, 451-52 (1990) (reversing conviction after trial judge threatened a maximum sentence if defendant did not plead guilty); *State v. Pait*, 81 N.C. App. 286, 288-90, 343 S.E.2d 573, 575-76 (1986) (reversing conviction where the trial judge became visibly agitated and angrily told the defendant he was tired of frivolous pleas, causing the defendant to change his plea from not guilty to guilty).

Defendant here, in answering the trial judge, responded that: (1) he considered it to be in his best interest to make the *Alford* pleas; (2) no one made any promises or threats to him to cause him to enter the pleas against his wishes; (3) defendant understood what he was doing; and (4) he was doing it of his own free will. Though the trial judge advised defendant that it may have been in his best interest to work out a plea agreement, the majority of his colloquy was designed to keep the witness from offering perjured testimony. There is no dispute that the trial judge did not use an angry tone or become agitated. Defendant's attorney also prepared the plea transcript. While the trial judge voiced his opinion that it may have been in defendant's best interest to work out a plea agreement, the trial judge did not exert the type of pressure

put on the defendants in *Benfield*, *Cannon*, or *Pait* in order to elicit defendant's *Alford* plea.

A defendant is not permitted to represent himself *pro se* unless the judge makes a thorough inquiry and is satisfied that defendant understands and appreciates the consequences of his decision to represent himself and comprehends the nature of the charges, proceedings, and the range of permissible punishments. N.C. Gen. Stat. § 15A-1242(2)-(3) (2011). The judge's comments were designed to advise defendant and the witness of their Fifth Amendment rights, the nature of the proceedings with regard to admissibility of hearsay evidence, and the consequences of testimony if it was perjured. The trial judge did not threaten or coerce defendant into pleading guilty, and his comments were within the obligations required of the judge by section 15A-1242. *See* N.C. Gen. Stat. § 15A-1242 (2011) ("A defendant may be permitted . . . to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant . . . [u]nderstands and appreciates the consequences of this decision.")

Because the comments by the trial judge in this case merely advised defendant and the witness as to the consequences of

perjury and their Fifth Amendment rights, rather than unduly threatening defendant into an involuntary *Alford* plea, we hold that defendant's *Alford* plea was entered voluntarily.

II. Due Process

Defendant next argues that the trial court erred in accepting defendants' *Alford* plea because the trial judge's conversations with defendant and his witnesses denied defendant his rights to an impartial judge, a fair trial, and to due process of law. We find no such violations.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

In the absence of the jury, a trial judge has "some discretionary latitude in cautioning a witness to testify truthfully and in pointing out the possibility of a perjury prosecution." *State v. Melvin*, 326 N.C. 173, 185, 388 S.E.2d 72, 78 (1990). The Supreme Court in *State v. Rhodes*, 290 N.C. 16, 24-28, 224 S.E.2d 631, 633-36 (1976) cites four possible hazards that arise when a trial judge intimates that perjury is afoot: (1) that the court will invade the jury's responsibility, which is to assess the credibility of the witness and determine

the facts from the evidence presented; (2) that the witness will be caused to change his testimony to fit the court's interpretation of the facts or to refuse to testify at all; (3) that the court's admonition may intimidate or discourage the defendant's attorney from eliciting essential testimony from a witness; and (4) that the court's manner of warning a witness may adversely affect the defendant's due process right to trial before an impartial tribunal. "The principal questions are, of course, whether acts or reference regarding perjury, by whomsoever made, have the effect either of stifling the free presentation of all the legitimate testimony available, or of preventing the unprejudiced consideration of all the testimony given[.]" *Id.* at 28, 224 S.E.2d at 638 (internal quotation mark omitted). "[A] mere warning of the consequences of perjury does not constitute a violation of due process. Rather, for a due process violation to lie, the admonition must be threatening and coercive, indicating that the court expects perjury." *Melvin*, 326 N.C. at 186, 388 S.E.2d at 79 (citing *United States v. Harlin*, 539 F.2d 679, 681 (9th Cir. 1976)).

> In all these kinds of cases the reviewing court should examine the circumstances under which a perjury or other similar admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony. If the

> admonition likely precluded a witness from making a free and voluntary choice whether or not to testify, or changed the witness's testimony to coincide with the judge's or prosecutor's view of the facts, then a defendant's right to due process may have been violated. On the other hand, a warning to a witness made *judiciously* under the circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process. Defendants have no due process or other constitutional right to present perjured testimony.

Archer v. State, 859 A.2d 210, 228 (Md. 2004) (quoting *Melvin*, 326 N.C. at 187-88, 388 S.E.2d at 79-80 (internal quotation marks omitted)).

The issue of the judge's duty and discretion to seek truthful testimony and keep out perjured testimony, weighed against a defendant's right to free presentation of all the legitimate testimony available, is somewhat unsettled in North Carolina. *Rhodes*, 290 N.C. at 28, 224 S.E.2d at 638. North Carolina courts have typically looked to whether the judge's admonition of a witness has the effect of changing the witness's proposed testimony. *See generally Melvin*, 326 N.C. at 186, 388 S.E.2d at 79; *Rhodes*, 290 N.C. at 28-29, 224 S.E.2d at 639. Here, the trial judge's warnings of perjury occurred and defendant entered his *Alford* plea before trial began, thus the

witness did not testify. There is nothing in the record specifically indicating that the trial judge's comments caused the witness not to testify, only that the witness planned to testify before the comments and that after the comments were made, defendant entered an *Alford* plea.

Whether or not the trial judge's admonition affected the witness's testimony, the "tenor of the warning given" was not "threatening and coercive" and did not indicate that "the court expect[ed] perjury". *See Archer*, 859 A.2d at 228; *Melvin*, 326 N.C. at 186, 388 S.E.2d at 79. The trial judge made the following statements: "I can't tell [defendant] what to do and I can't tell you-all what to do" but "if those tax ID numbers turn out to be false or someone else's and you say that they were yours, then you're going to get charged with [perjury]." The trial judge further told the witness: "you will be testifying under oath that you committed a crime"; "if you've got a lawyer right now, I would be shocked if the lawyer told you, you should [testify]"; "I know you love [defendant], but I don't know if you love him enough to lie for him or to get yourself in trouble on him." There is no indication that the tenor of the trial judge's warnings threatened or coerced defendant or his witness, or that the trial judge expected perjury or intended to deter

the witness from testifying. Because the witness never testified, there is no way of determining the validity of the witness' testimony from the record. Alternatively, using the approach from *Archer*, if the witness's testimony was in fact perjured, then defendant had no due process right to present such testimony. *Archer*, 859 A.2d at 228.

Because the defendant entered an *Alford* plea prior to trial, it is unknown whether the trial judge's remarks to the witness actually affected the witness's willingness to testify, or whether such proposed testimony was ever truthful. Since proof of the effect of the judge's remarks cannot be ascertained, and since the tenor of the judge's warning does not indicate that the trial judge expected perjury or intended to deter the witness from testifying, we find that the trial judge's warnings did not give rise to a due process violation or chill the free testimony of the witness.

III. Subject Matter Jurisdiction

Defendant argues that the trial court lacked subject matter jurisdiction in the Alltel cases because the indictments in those cases omit an element of the crime of obtaining false pretenses — that value was obtained from a person within this state. We find the indictments in the Alltel cases contained

sufficient language to satisfy the "within this State" element and that the trial court had subject matter jurisdiction.

This Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

"[I]t is well-settled that the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *Marshall*, 188 N.C. App. at 747, 656 S.E.2d at 712 (citation and quotation marks omitted). Obtaining property by false pretenses is defined in North Carolina as:

> Knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain[ing] or attempt[ing] to obtain from any person *within this State* any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such . . . thing of value, such person shall be guilty of a felony[.]

N.C. Gen. Stat. § 14-100(a) (2011) (emphasis added). In some cases, courts have used a shorthand summary of the elements of false pretenses without specifically mentioning the "person within this State" language, setting out the elements of false pretenses as "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980); *see also State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) ("within this State" language omitted in its summary of the elements of obtaining property by false pretenses).

Defendant argues that the "within this State" language of Section 14-100(a) is an essential element of the crime of false pretenses, and the State's omission of the element makes the indictment fatally defective. We disagree. The indictments for the Alltel cases state "*in the county named above*, the defendant named above unlawfully, willfully, and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain services and cell phones." (emphasis added). The "county named above" was Montgomery County, North Carolina.

This court has previously held that failure to mention the location of the alleged false pretenses crimes in the indictment was not a fatal defect, and that the phrase "in the county named above" incorporated by reference that the activities took place within this State. *State v. Almond*, 112 N.C. App. 137, 147, 435 S.E.2d 91, 97 (1993). There is no dispute that Alltel operated in Montgomery County, North Carolina, and they are a "person within this State" for purposes of Section 14-100(a). Defendant does not dispute that the indictment sufficiently alleged each element of false pretenses other than "within this State." We need not address the issue of whether "within this State" is an essential element of false pretenses, because even if it is, the element has been satisfied here. We therefore find the indictments in the Alltel cases, like that in *Almond*, contained sufficient language to satisfy the "within this State" element of section 14-100(a), and that the trial court had subject matter jurisdiction.

IV. Factual Basis for *Alford* Plea

Defendant argues that the trial court erred by accepting defendant's *Alford* pleas to all three indictments without sufficient factual bases for the pleas. We find that there were

sufficient factual bases for the trial court to accept defendant's guilty pleas in all three cases.

Whether the record contains sufficient information to establish a factual basis for a defendant's guilty plea presents a question of law, which is reviewed *de novo*. *See State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468 (2009).

The judge may not accept a guilty plea without first determining that there is a factual basis for the plea, relying on, but not limited to:

> (1) A statement of the facts by the prosecutor.
> (2) A written statement of the defendant.
> (3) An examination of the presentence report.
> (4) Sworn testimony, which may include reliable hearsay.
> (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c) (2011). There must be an independent determination by the trial judge that some substantive material independent of the plea itself exists before a trial court can accept a guilty plea. *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 584 (2007) (citation omitted). "The trial judge may consider any information properly brought to his attention" in finding a factual basis for the plea. *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185-86 (1980).

The State contends that it sufficiently provided factual

bases for the guilty pleas to false pretenses through the Assistant District Attorney's summary of the facts for the charges and the testimony of the Alltel investigator by showing: (1) fraudulent social security numbers were a false act conveyed to Alltel; (2) the use of the social security numbers to obtain cell phones had deceptive intent; (3) Alltel in fact provided cell phones and services based on the conveyance of fraudulent social security numbers; and (4) the cell phones and services had value. The judge also considered the investigative reports of Alltel, showing the phones were mailed and services activated by defendant using stolen social security numbers. Alltel also provided a copy of a delivery confirmation signature appearing to belong to defendant. The exhibits also showed Alltel was a person within North Carolina for purposes of section 14-100(a). Between the Assistant District Attorney's summary of the facts, the Alltel investigator's testimony, and the Alltel documents presented to the court, we find the trial court had sufficient factual bases to accept defendant's *Alford* pleas as to the Alltel cases.

Likewise, in the Walmart case, the Assistant District Attorney stated in his summary of the facts that defendant: (1) knowingly presented a fraudulent moneygram; (2) had intent to

deceive to receive money and misrepresent how he received the fraudulent document; (3) in fact deceived Walmart when they issued him money; and (4) obtained $950.00 from Walmart. The summary also mentioned that the events took place in Biscoe, North Carolina. Based on the Assistant District Attorney's statement to the trial court, we find that there was a sufficient factual basis for the trial court to accept defendant's guilty plea as to the Walmart case.

V. Sentencing

Defendant argues that the trial court sentenced defendant based on an incorrect finding of his prior record level. We agree and remand for resentencing.

In reviewing whether the State met its burden of proving defendant's prior record level at sentencing, "our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Jeffery*, 167 N.C. App. 575, 578, 605 S.E.2d 672, 674 (2004) (citation omitted).

N.C. Gen. Stat. § 15A-1340.14(f) (2011) provides four methods of proving prior convictions: (1) stipulation of the parties; (2) an original or copy of the court record of the prior conviction; (3) a copy of records maintained by the

Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; (4) any other method found by the court to be reliable. This Court has previously held that the State's submission of a prior convictions worksheet, standing alone, is insufficient proof to meet the requirements of section 15A-1340.14(f), even if uncontested by defendant. *State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003) (citation omitted); *see also Jeffery*, 167 N.C. App. at 580, 605 S.E.2d at 675.

In this case, the State submitted an offered stipulation of prior conviction that was not signed by defendant or defendant's counsel. Similar to the worksheets submitted in *Riley* and *Jeffery*, the mere submission of a prior convictions worksheet here is not sufficient on its own to establish the defendant's prior record level. *See Riley*, 159 N.C. App. at 557, 583 S.E.2d at 387; *see also Jeffery*, 167 N.C. App. at 580, 605 S.E.2d at 675. The State is unable to distinguish the facts of this case from *Riley* and *Jeffery* and does not contest defendant's request for resentencing. As such, we vacate the sentence and remand for resentencing.

Conclusion

The trial judge's comments did not threaten or coerce

defendant into entering his *Alford* plea, nor did they stifle defendant's free presentation of evidence in violation of his right to due process of law. The indictment sufficiently established that the activity occurred "within this State," whether it is an element of false pretenses or not, and the trial court had a sufficient factual basis for defendant's guilty plea. Defendant's prior record stipulation was not signed by defendant or his counsel, and the State does not contest defendant's request for resentencing. We therefore affirm the trial court's acceptance of defendant's guilty plea, but vacate the sentence and remand for resentencing.

CONVICTIONS AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).