NO. COA13-409
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Jackson County
Nos. 99 CRS 1121
99 CRS 4760

TIMOTHY WILEY, JR.,
Defendant.

On writ of certiorari to review order entered 29 May 2012 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 23 September 2013.

Roy Cooper, Attorney General, by Laura E. Parker, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

On 6 October 2000, defendant Timothy Wiley, Jr. was found guilty by a jury of the offenses of first-degree murder and felonious breaking or entering. Defendant was convicted under the felony-murder rule, where his conviction for felonious breaking or entering served as the underlying felony for first-

degree murder. *See State v. Wiley* (*Wiley I*), 182 N.C. App. 437, 441, 642 S.E.2d 717, 720 (2007). The court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, and arrested judgment on the felonious breaking or entering conviction. Defendant appealed from his convictions, which matter was heard by this Court in *Wiley I*.

Among the issues presented to this Court for consideration in *Wiley I* was defendant's contention that the trial court erred by failing to instruct the jury that the offense of felonious breaking or entering must have been committed with the use of a deadly weapon in order for that offense to support defendant's first-degree felony-murder conviction. *See id.* at 444–45, 642 S.E.2d at 722; *see also* N.C. Gen. Stat. § 14-17 (2011) (providing that a murder "which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree"). Although we recognized that "it was error by the trial court not to instruct the jury that the crime must have been committed with a deadly weapon," because the evidence presented to the jury by the State "was overwhelming," we held that such "error was harmless." *Wiley I*, 182 N.C. App. at 445, 642 S.E.2d at 722.

Defendant then filed a *pro se* motion for appropriate relief from his convictions, in which defendant alleged that his trial and appellate counsel rendered ineffective assistance. Defendant argued that his trial counsel violated his constitutional right to receive a fair trial, because counsel "conceded his guilt" to the offense of felonious breaking or entering during trial "without his consent" in contravention of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), and further argued that his appellate counsel erred by failing to bring forward argument in support of this error during defendant's direct appeal in *Wiley I*. In its response to defendant's motion, the State answered that defendant received a *Harbison* advisement during pretrial motions and alleged that the court "made sufficient inquiry into [d]efendant's knowing and voluntary consent to admission of guilt to criminal acts by his counsel before the jury."

Based on the record before us, it appears that the trial court did not conduct an evidentiary hearing on defendant's motion for appropriate relief. Instead, after considering defendant's motion, the State's response to his motion, defendant's subsequent reply to the State's response, as well as affidavits from defendant's former trial counsel and the court

file, on 29 May 2012, the trial court entered an order denying defendant's motion for appropriate relief. In its order, the trial court found as fact that the presiding judge "did discuss with the defendant prior to trial admissions of guilt to the jury and received express consent from [d]efendant allowing defense trial counsel to concede guilt to the jury on the charge of Felony Breaking and/or Entering." The court further found and concluded that defendant's motion was "without merit in that [d]efendant gave exclusive consent to the Court allowing [d]efense [c]ounsel to concede guilt as to Felony Breaking and/or Entering." In October 2012, defendant filed a *pro se* petition for writ of certiorari with this Court requesting review of the trial court's denial of his motion for appropriate relief, which petition was allowed.

Defendant contends his trial counsel violated the *per se* ineffective assistance of counsel standard recognized in *Harbison*, 315 N.C. at 178–81, 337 S.E.2d at 506–08, when his counsel conceded during closing arguments that defendant was guilty of the offense of felonious breaking or entering. Although defendant concedes in his brief, and the record reflects, that defendant "consented to his attorneys admitting his guilt to felony breaking [or] entering," defendant argues

that such consent was not given knowingly or voluntarily.

"A plea decision must be made exclusively by the defendant. A plea of guilty or no contest involves the waiver of various fundamental rights such as the privilege against self-incrimination, the right of confrontation and the right to trial by jury." *Id.* at 180, 337 S.E.2d at 507 (internal quotation marks omitted). Thus, "the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands," and that such a decision "must be made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Id.* Therefore, "[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away," *id.*, "[t]he practical effect is the same as if counsel had entered a plea of guilty without the client's consent." *Id.* Because "[c]ounsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury," *id.*, "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08. Accordingly, "before a defendant's counsel [is] allowed

to concede the guilt of his client at trial," *State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776, *supersedeas and disc. reviews denied and dismissed*, 364 N.C. 329, 701 S.E.2d 247 (2010), "the trial court must be satisfied that . . . the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *Id.*

A review of the transcript from the pretrial hearing reflects that the trial court questioned defendant at length about whether he understood that his trial counsel intended to argue to the jury that defendant should be convicted of the offense of felonious breaking or entering, as reflected in the following colloquy:

> THE COURT: Any further motions, Mr. Patton?
>
> MR. PATTON: The only thing else I would ask the court to do at this time, Your Honor, we have conferred with our client as I indicated to the court yesterday. He will be and we will be arguing to the jury that the commission of all the elements of the crime of breaking and entering are present and that the defendant should be convicted of that crime.
>
> We have discussed this issue with Mr. Wiley. He has agreed that we be allowed to make that argument to the jury, as well as indicating to the jury both in

his testimony, as well as in our arguments to the jury, that he will be admitting to the commission of other crimes, specifically dealing in controlled substances and conspiracy, neither of which he is charged with.

I would ask Your Honor to make an inquiry on the record of Mr. Wiley to ascertain the court's concurrence that he understands and agrees with that.

THE COURT: Mr. Wiley, can you hear me? I need to hear you say yes or no so that the lady can take it down.

MR. WILEY: Yes.

THE COURT: All right. Mr. Wiley, could you hear what your attorney just recited to the court?

MR. WILEY: Yes.

THE COURT: Do you understand what Mr. Patton just said?

MR. WILEY: Yes.

THE COURT: Do you understand that Mr. Patton has told the court that your attorneys have conferred with you and that you understand and agree that your attorneys will be arguing to the jury that you are guilty of breaking and entering?

MR. WILEY: Yes.

THE COURT: As to that, that you would also admit that in your testimony?

MR. WILEY: Yes.

THE COURT: Also that they will argue and that you admit to dealing in controlled substances for which you are not charged and to engaging in a conspiracy for which you are not charged?

MR. WILEY: Yes.

THE COURT: Now do you understand this, sir?

MR. WILEY: Yes.

THE COURT: And are you making this decision that the jury be told that you are guilty of breaking and entering and that you have engaged in dealing in controlled substances and a conspiracy?

MR. WILEY: Yes.

THE COURT: And you understand this and you are agreeable to this being done and you know what is being done and you understand and you agree to it?

MR. WILEY: Yes.

THE COURT: You know what's going on?

MR. WILEY: Yes.

THE COURT: You understand what's going on?

MR. WILEY: Yes.

THE COURT: Do you have any questions about what's going on?

MR. WILEY: No.

THE COURT: Are you in agreement with it?

MR. WILEY: Yes.

THE COURT: Mr. Patton, I'll request that if you and counsel, if there are any further questions you would desire me to ask this young man?

MR. PATTON: No, Your Honor, I think you covered everything.

THE COURT: The court is satisfied that he understands, knows and understands that which was presented to the court as to breaking and entering and as to the noncharged conspiracy and dealing in controlled substances.

Nonetheless, in defendant's reply to the State's response to his original motion for appropriate relief, defendant asserted that the consent evidenced by his colloquy with the court was not knowingly or voluntarily given, because he "had no prior knowledge of the application of North Carolina's felony murder rule" and was not "informed of the consequences" that felonious breaking or entering could serve as the underlying felony for first-degree murder. Defendant also alleged that his counsel misunderstood the law regarding the felony-murder rule, and that counsel erroneously believed the charge of felonious breaking or entering could not be used as the underlying felony for the first-degree murder charge under the facts of the present case. Thus, he argued that counsel could not have provided defendant

with a "full appraisal of the consequences" that would have allowed him to knowingly or voluntarily consent to an admission of guilt on this charge. *See Harbison*, 315 N.C. at 180, 337 S.E.2d at 507.

Yet, the record also includes evidence from the attorneys who represented defendant at trial indicating that: they are "certain" they discussed their defense with defendant; the arguments they made "were in hopes that the jury would only find [defendant] guilty of the breaking and entering and not tie [him to] the murder," even though, "due to the Felony Murder Rule the law was heavily weighed against [defendant]"; and they "were basically arguing jury nullification because the law of Felony Murder Rule was against [them]," because taking "[defendant's] statements and the fact that somebody was murdered and combin[ing] the two, [defendant] could be convicted just on that evidence." Defense counsel also attested that "the difficulty of [defendant's] defense" was that "there was no question about his involvement in the breaking and entering and that a murder was committed thereafter by his accomplice," and that counsel "made every effort to have [defendant] enter a plea to a lesser charge, . . . due to [counsel's] concerns regarding the Felony Murder Rule," but that defendant "would not agree and wanted a trial."

An evidentiary hearing is required to resolve questions of fact arising from a motion for appropriate relief "unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law, or the motion is made pursuant to N.C.G.S. § 15A-1414 within ten days after entry of judgment." *State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998), *cert. allowed and motion for relief denied*, 350 N.C. 825, 539 S.E.2d 642 (1999), *cert. denied*, 528 U.S. 1095, 145 L. Ed. 2d 702 (2000). In the present case, the record reflects that the trial court decided defendant's motion for appropriate relief without conducting an evidentiary hearing, even though the record before us——and, thus, the record before the trial court——contains factual disputes between defendant's and his trial counsel's accounts that must be resolved in order to determine whether defendant was fully apprised of the consequences of an admission of guilt on the charge of felonious breaking or entering before he gave his consent for his attorneys to make such an admission. In light of the questions of fact surrounding this issue, we must conclude that the trial court erred by failing to conduct an evidentiary hearing before denying defendant's 12 March 2012 motion for appropriate relief. Accordingly, we vacate the trial court's order denying

defendant's motion for appropriate relief, remand this case to the trial court for an evidentiary hearing to determine whether defendant knowingly and voluntarily consented to trial counsel's concession of defendant's guilt to the jury for the offense of felonious breaking or entering, and instruct the trial court to make findings of fact and conclusions of law upon which it shall enter its order either allowing or denying defendant's motion. *See State v. Thomas*, 327 N.C. 630, 631, 397 S.E.2d 79, 80 (1990), *appeal after remand*, 329 N.C. 423, 407 S.E.2d 141 (1991).

Finally, we note that defendant also asserts that his trial counsel erroneously advanced "a withdrawal defense" as a part of their trial strategy that defendant now argues "was not supported by the law or the trial court's instructions, and . . . could not be acted upon by the jury" based on the facts of this case. However, it is unclear whether defendant challenges the viability of a defense of withdrawal to support his *Harbison* violation claim, or whether defendant is attempting to raise a broader ineffective assistance of counsel claim against his trial counsel. If defendant intends to bring forward this argument with respect to a broader ineffective assistance claim, because "defendant's only arguments [in his brief] relate to his claim that defense counsel's statements violated the *per se*

ineffective assistance of counsel standard established by *Harbison*," we conclude that defendant "is deemed to have waived broader review under *Strickland* [*v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984),] and [*State v.*] *Braswell* [312 N.C. 553, 324 S.E.2d 241 (1985),] as to whether defense counsel's alleged concessions constituted ineffective assistance of counsel." *See State v. Thompson*, 359 N.C. 77, 121, 604 S.E.2d 850, 880 (2004) (citing N.C.R. App. P. 28(a)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). If defendant intends to bring forward this argument as support for his contention that his consent could not knowingly and voluntarily have been given to admit his guilt to the felonious breaking or entering offense, we conclude that, because we find no evidence in the record before us to indicate that defendant presented this argument to the trial court for consideration during the proceedings on his motion, or that such an argument was ruled upon by the court, it would be improper for us to consider this issue further at this time. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount . . . .'" (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934))), *cert.*

denied, 350 N.C. 848, 539 S.E.2d 647 (1999); *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) ("The courts have no jurisdiction to determine matters purely speculative, . . . give advisory opinions, answer moot questions, . . . provide for contingencies which may hereafter arise, or give abstract opinions.").

Vacated and remanded.

Judges GEER and STROUD concur.

Report per Rule 30(e).