NO. COA14-572

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Craven County
No. 97 CRS 4489

FREDERICK DARNELL JARMAN,
Defendant.

Appeal by Defendant from judgment entered 4 November 2013 by Judge John E. Nobles, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 17 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Erin O. Scott, for the State.

North Carolina Prisoner Legal Services, by Mary E. McNeill, for Defendant—Appellant.

McGEE, Chief Judge.

Frederick Darnell Jarman ("Defendant") appeals from a judgment entered pursuant to a resentencing hearing that corrected his prior record level determination from a level IV to a level III offender, and sentenced him to a term of 93 months to 121 months' imprisonment, to begin at the expiration of two consecutive sentences imposed for prior convictions. We affirm.

Defendant was found guilty by a jury of possession with

intent to sell and deliver cocaine and entered a plea of no contest to having attained the status of an habitual felon on 15 April 1998. *See State v. Jarman* (*Jarman II*), 132 N.C. App. 398, 518 S.E.2d 579, slip op. at 1 (1999) (unpublished), *cert. denied*, 351 N.C. 644, 543 S.E.2d 879 (2000). After finding that the factors in aggravation outweighed the factors in mitigation, and based on the trial court's determination that Defendant was a prior record level IV offender, he was sentenced to a term of 133 to 169 months' imprisonment. *See id.* The trial court further ordered that Defendant's sentence begin at the expiration of two consecutive terms of 125 to 159 months' imprisonment that Defendant was then obligated to serve from December 1997 convictions for forgery, uttering a forged check, and being an habitual felon. *See State v. Jarman* (*Jarman I*), 131 N.C. App. 702, 515 S.E.2d 758, slip op. at 1, 3 (1998) (unpublished).

Defendant is said to have filed a motion for appropriate relief requesting a resentencing hearing to correct his prior record level determination from a designation as a level IV offender to a designation as a level III offender, and to reconsider his sentence for his 15 April 1998 convictions in light of the correction to his prior record level determination. Defendant's resentencing hearing ("the hearing") was held on

4 November 2013.

At the hearing, the State conceded an error in calculating Defendant's prior record level, and submitted to the trial court a corrected worksheet with Defendant's level III offender designation, along with the sentencing grid that was in effect at the time the offenses were committed. Defense counsel then asked the court to make findings as to mitigating factors because counsel opined, among other things, that: Defendant "only ha[d] 13 infractions since he'[d] been in prison;" Defendant's mother was present at the hearing; Defendant had a "handicapped brother at home;" and Defendant had a job as a janitor and had taken classes in prison. Counsel did not seek to present any testimonial or documentary evidence for the court to consider in support of counsel's declarations, and the trial court did not make any findings as to aggravating or mitigating factors. Defense counsel then requested that the trial court allow Defendant's sentence for the 15 April 1998 convictions to run consecutively with the first of Defendant's two consecutive terms of 125 to 159 months' imprisonment for his December 1997 convictions, so that Defendant's sentence for the present case would run concurrently with the second term of imprisonment for his 1997 convictions. The trial court declined counsel's request, and sentenced Defendant at the bottom of the

presumptive range to a term of 93 to 121 months' imprisonment for his 1998 convictions, to begin at the expiration of the two consecutive terms of imprisonment Defendant was serving for his 1997 convictions. Defendant appeals.

Defendant first contends the trial court erred when it ordered that Defendant serve the sentence imposed for his 1998 habitual felon conviction upon the expiration of both terms of imprisonment for his 1997 convictions, rather than concurrently with the second term of imprisonment arising from his 1997 convictions. Defendant asserts the trial court "misapprehend[ed]" the law "when it determined that it did not have the discretion to decide" to run Defendant's 1998 sentence concurrently with the second term of imprisonment arising from his 1997 convictions. We disagree.

N.C. Gen. Stat. § 14-7.6 has long provided that "[s]entences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." N.C. Gen. Stat. § 14-7.6 (2013); N.C. Gen. Stat. § 14-7.6 (1997). Our Courts have also long recognized that, when this language has been examined in other criminal statutory provisions, such language is "clear" and "unambiguous," *e.g.*, *State v. Wall*, 348 N.C. 671, 675, 502 S.E.2d 585, 588 (1998) (N.C. Gen. Stat.

§ 14-52); *State v. Warren*, 313 N.C. 254, 265, 328 S.E.2d 256, 264 (1985) (N.C. Gen. Stat. § 14-52); *State v. Woods*, 77 N.C. App. 622, 625–26, 336 S.E.2d 1, 2–3 (1985) (N.C. Gen. Stat. § 14-87(d)), *aff'd per curiam*, 317 N.C. 143, 343 S.E.2d 538 (1986); *see, e.g.*, *State v. Ellis*, 361 N.C. 200, 206, 639 S.E.2d 425, 429 (2007) (N.C. Gen. Stat. § 14-87(d)); *State v. Nunez*, 204 N.C. App. 164, 169, 693 S.E.2d 223, 227 (2010) (N.C. Gen. Stat. § 90-95(h)(6)), and its plain meaning is "that a term imposed for [such offenses] under the [respective] statute[s] is to run consecutively with *any other sentence* being served by the defendant." *See Warren*, 313 N.C. at 265, 328 S.E.2d at 264. We find no authority, and have been directed to none, that would require us to construe the substantively-similar language of N.C. Gen. Stat. § 14-7.6 any differently than our Courts have previously construed it for other statutory provisions in Chapter 14 of the North Carolina General Statutes. Thus, we conclude that the plain meaning of the last sentence of N.C. Gen. Stat. § 14-7.6 requires that a term of imprisonment imposed pursuant to a conviction as an habitual felon must "run consecutively with *any other sentence* [or sentences] being served by [a] defendant." *See id.*

Nevertheless, in the present case, Defendant directs our attention to an excerpt from N.C. Gen. Stat. § 15A-1354(a),

which provides as follows: "When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, . . . the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A-1354(a) (2013); N.C. Gen. Stat. § 15A-1354(a) (1997). Defendant relies on this language to insist that the trial court "ha[d] the discretion to determine which prior sentence to run the habitual felon sentence consecutive to." However, Defendant seems to have overlooked the last sentence of this statutory subsection, which further provides: "*If* not specified or *not required by statute to run consecutively*, sentences shall run concurrently." N.C. Gen. Stat. § 15A-1354(a) (emphases added). Since we have determined N.C. Gen. Stat. § 14-7.6 requires that sentences imposed pursuant to this provision must "run consecutively with *any other sentence*," *see Warren*, 313 N.C. at 265, 328 S.E.2d at 264, the discretion that would otherwise be afforded to the trial court with respect to sentencing pursuant to N.C. Gen. Stat. § 15A-1354(a) is inapposite to N.C. Gen. Stat. § 14-7.6. Accordingly, we conclude the trial court did not misapprehend the law or abuse its discretion when it ordered that Defendant's term of imprisonment for the sentence at issue in the present

case begin at the expiration of the two consecutive sentences imposed for Defendant's prior 1997 convictions.

Defendant next contends the trial court failed to conduct a *de novo* resentencing hearing. Specifically, Defendant asserts the trial court made statements "indicating that it was not conducting a *de novo* resentencing and did not understand that it should." We disagree.

"It has been established that each sentencing hearing in a particular case is a *de novo* proceeding." *State v. Abbott*, 90 N.C. App. 749, 751, 370 S.E.2d 68, 69 (1988). "The judge hears the evidence without a jury," *State v. Jones*, 314 N.C. 644, 648, 336 S.E.2d 385, 388 (1985), "and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." *State v. Brooks*, 136 N.C. App. 124, 133, 523 S.E.2d 704, 710 (1999) (internal quotation marks omitted), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). "Although [the judge] must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist." *Jones*, 314 N.C. at 648, 336 S.E.2d at 388. At each sentencing hearing, "the trial court must make a new and fresh determination of the sufficiency of the evidence

underlying each factor in aggravation and mitigation," *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986), and must find aggravating and mitigating factors "without regard to the findings in the prior sentencing hearings." *Jones*, 314 N.C. at 649, 336 S.E.2d at 388.

"[H]owever, the trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences." *State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363 (internal quotation marks omitted), *disc. review denied*, 361 N.C. 571, 651 S.E.2d 225 (2007). When a trial court "enter[s] a sentence within the presumptive range, the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible." *Id.* (citing *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 786 (2006) ("[The] notion that the court is obligated to formally find or act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected."), *appeal after remand*, 188 N.C. App. 799, 656 S.E.2d 704 (2008)).

In the present case, Defendant directs our attention to the

following comment from the trial court as support for its assertion that the court misapprehended its obligation to conduct *de novo* review: "I agree with you that two Class Is and Class H, you don't normally think in terms of 30 years, but those judges had the benefits of things I do not have in front of me." Defendant asserts that "[t]his statement indicates that the trial court felt that its discretion on how to sentence [him] was limited by the decision of the original sentencing court," and "indicates that the trial court did not understand that it could consider mitigating factors and had the discretion to sentence [Defendant] in the mitigated range." However, our review of the context of this remark shows that the trial court was responding to defense counsel's earlier entreaty that it consider evidence of mitigation presented during the sentencing phase for Defendant's two 1997 Class I convictions, which convictions were not subject to review by the trial court. Thus, the court properly recognized that it could not consider evidence of mitigation from, or consider modifying the sentences of, Defendant's prior convictions that were not before it for review. Therefore, after reviewing the transcript of the resentencing proceedings in its entirety, we are not persuaded that the trial court's arguably imprecisely worded remarks demonstrate that it "did not understand" its obligation to

conduct a *de novo* review of the evidence that was properly before it for consideration. Since the trial court sentenced Defendant at the bottom of the presumptive range based on Defendant's corrected prior record level determination, and since "the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible" when it sentences a defendant within the presumptive range, *see Dorton*, 182 N.C. App. at 43, 641 S.E.2d at 363, we conclude that this issue on appeal is without merit.

Affirmed.

Judges HUNTER, Robert C. and BELL concur.