NO. COA14-692
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Henderson County
Nos. 12 CRS 51463-64

RYAN ALBERT COX

Appeal by defendant from amended judgment dated 16 December 2013 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

McCULLOUGH, Judge.

Ryan Albert Cox ("defendant") appeals from judgment entered upon his plea of guilty to charges of statutory rape that was amended to impose a sentence authorized by N.C. Gen. Stat. § 15A-1340.17 (2011). For the following reasons, we affirm.

I. Background

Defendant was indicted by a Henderson County Grand Jury on two counts of statutory rape of a person who is 13, 14, or 15 years of age on 14 May 2012. Each count was a Class B1 felony as defendant was at least six years older than the victims.

Defendant's case came on for hearing in Henderson County Superior Court before the Honorable Alan Z. Thornburg on 10 June 2013. At the hearing, defendant pled guilty to both counts pursuant to a plea arrangement that the offenses would be consolidated for judgment and defendant would be sentenced in the mitigated range. Upon hearing the State's summary of the evidence and defendant's argument in favor of mitigating factors, the trial court accepted defendant's plea, found as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage in the criminal process, consolidated the offenses for judgment, and entered judgment sentencing defendant in the mitigated range for a Class B1 felony at a prior record level II to a term of 221 to 278 months imprisonment. The trial court further found that defendant had been convicted of a reportable conviction, specifically a sexually violent offense involving the physical, mental, or sexual abuse of a minor, and ordered defendant to register as a

sex offender and enroll in satellite based monitoring for a period of 30 years upon his release from imprisonment.

Thereafter, by notice dated 22 August 2013, the Department of Public Safety informed the Clerk of Henderson County Superior Court that defendant's "[m]aximum sentence does not correspond to the minimum sentence imposed." On 16 December 2013, the issue came on for hearing in Henderson County Superior Court before the Honorable Mark E. Powell. Instead of vacating the original judgment and conducting a new sentencing hearing, the trial court merely modified the original judgment to correct the maximum sentence. In the modified judgment, defendant's maximum sentence was increased to 326 months imprisonment, the corresponding maximum sentence for a 221 month minimum sentence under the version of N.C. Gen. Stat. § 15A-1340.17(f) in effect at the time defendant committed the sex offenses. Defendant gave oral notice of appeal from the modified judgment.

II. Discussion

In the first issue on appeal, defendant contends the trial court erred in modifying the original judgment to correct the maximum sentence. Defendant argues instead of modifying the original judgment, the proper remedy under this Court's opinion in *State v. Branch*, 134 N.C. App. 637, 518 S.E.2d 213 (1999) was

to vacate the judgment and conduct a *de novo* sentencing hearing because the trial judge acted under a misapprehension of the law. We are not persuaded.

In *Branch*, the trial court originally consolidated breaking and entering offenses committed before and after the enactment of structured sentencing and sentenced the defendant to a single term under the Structured Sentencing Act. *Id.* at 639, 518 S.E.2d at 214. Upon being notified that offenses committed prior to the enactment of structured sentencing could not be consolidated with offenses committed after the enactment of structured sentencing, the trial court conducted a resentencing hearing, at which time defendant was sentenced for each offense separately under the laws in effect at the time each offense was committed. *Id.* at 639, 518 S.E.2d at 214-15. As a result, the defendant's sentence increased. *Id.* In response to defendant's argument on appeal that "the resentencing hearing was illegal because the trial court had no jurisdiction over the matter because the term of court had expired[,]" this Court held, "[i]f a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly, even if the term has ended." *Id.* at 641, 518 S.E.2d at 216.

We find the present case distinguishable from *Branch*. The issue before this Court in the present case is not whether a resentencing hearing was lawful, but whether a resentencing hearing was required.

As defendant acknowledges, the trial court "has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein[.]" *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quotation marks and citation omitted). Yet the trial court "cannot, under the guise of an amendment of its records, correct a judicial error[.]" *Id.* (quotation marks and citation omitted).

Here, defendant argues the imposition of an unlawful maximum sentence is not a clerical error, but a judicial error requiring a new sentencing hearing. Defendant contends that in imposing the unlawful maximum sentence, the trial judge "exercised his discretion under a misapprehension as to the proper maximum sentences applicable to [defendant]." Defendant reasons that a "determination of an appropriate minimum sentence is necessarily informed by its corresponding maximum sentence." We disagree.

In *State v. Parker*, 143 N.C. App. 680, 550 S.E.2d 174 (2001), this Court made clear that the trial judge had no discretion in choosing a maximum sentence under structured sentencing. This Court explained,

> The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range. However, the language of the Act provides for no such discretion in regard to maximum sentences. The legislature did not provide a range of possible maximum sentences nor did it create a vehicle to alter the maximum sentences based on the circumstances of the case as with minimum sentences. Rather, the Act dictates that once a minimum sentence is determined, the "corresponding" maximum sentence is "specified" in a table set forth in the statute. Thus, [the statute] does not provide for judicial discretion in the determination of maximum sentences.

Id. at 685-86, 550 S.E.2d at 177 (citations omitted). This Court then held the defendant's "sentence was properly corrected by the trial court to reflect the maximum sentence required by statute." *Id.* at 686, 550 S.E.2d at 177-78.

In the present case, it appears the trial judge properly exercised his discretion to sentence defendant to a minimum sentence at the top of the mitigated range. The trial judge then imposed the corresponding maximum sentence provided in N.C. Gen. Stat. § 15A-1340.17(e) without considering the additional time required for sex offenses. *See* N.C. Gen. Stat. § 15A-

1340.17(f) (2011). In correcting the judgment, the trial judge simply amended defendant's maximum sentence to reflect the required maximum sentence provided in N.C. Gen. Stat. § 15A-1340.17(f).

As we have held in *Parker* and other prior cases, *see State v. Caufman*, 184 N.C. App. 378, 646 S.E.2d 442 (2007) (unpublished), we hold the trial court's correction of the maximum sentence in this case did not involve an exercise of judicial discretion and was clerical in nature; thus, amendment of the judgment was proper.

In the second issue on appeal, defendant argues in the alternative that the trial court erred in failing to find that defendant accepted responsibility for his criminal conduct as a mitigating factor in the original judgment entered 10 June 2013.

At the outset, we note defendant gave notice of appeal from the original judgment, but there is nothing in the record indicating he perfected that appeal. Nevertheless, assuming the issue is properly before this Court, we hold the trial court did not err. The plea arrangement entered into by the defendant provided that the State "agrees to the presence of the mitigating factor[]" and defendant will be sentenced in the mitigated range. In accordance with the arrangement, the trial

court found mitigating factor 11.a., that the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process, and sentenced defendant in the mitigated range. We hold the failure of the trial court to find a second mitigating factor, which was similar and involved the same evidence as the first mitigating factor, was not an abuse of discretion and does not amount to prejudicial error.

III. Conclusion

For the reasons discussed above, he hold the trial court did not err in correcting defendant's maximum sentence or in finding the mitigating factor.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).