IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1182

Filed: 7 June 2016

Brunswick County, Nos. 15 CRS 50950-52

STATE OF NORTH CAROLINA

v.

BREWSTER EDWARD LEWIS, JR.

Appeal by Defendant by writ of *certiorari* from judgments entered 6 May 2015 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for Defendant.

STEPHENS, Judge.

In this case, we allow in part Defendant's petition for writ of *certiorari* to consider his argument regarding an alleged sentencing error following his guilty pleas to a number of offenses. Because our review of the transcript of the sentencing hearing reveals a discrepancy between the legally correct sentences announced in open court and those that appear in the written judgments subsequently entered, we remand for correction of this clerical error.

Factual and Procedural Background

The charges against Defendant Brewster Edward Lewis, Jr., arose from events which occurred in Supply, North Carolina on 25 March 2015. Deputy Colton Robinson of the Brunswick County Sheriff's Department ("BCSD") responded to a domestic violence call at a home on Vale Street where he encountered Lewis. Robinson asked for and received consent to search Lewis's person. That search revealed a box of cigarettes with some items inside the clear cellophane wrapping around the box. When Robinson asked Lewis about the items, Lewis struck Robinson with a closed fist and attempted to flee on foot. Robinson deployed his Taser, striking Lewis, but Lewis continued to run away. Once Robinson caught up with Lewis again, a struggle ensued, with Robinson spraying Lewis with pepper spray in an effort to subdue him. The spray initially had no apparent effect on Lewis, who was able to take the pepper spray away from Robinson and use it against him. Lewis also managed to put Robinson in a headlock, squeezing his neck.

BCSD Deputy Charles Melvin arrived on the scene at this point and attempted to stop Lewis's assault on Robinson by using his Taser. Lewis then shifted his assault to Melvin, before Melvin and Robinson together were able to subdue Lewis, and, along with a third BCSD deputy who had arrived at the scene, managed to place Lewis into a BCSD patrol car. Lewis somehow managed to get the patrol car door open in an effort to escape, but was restrained and taken into custody.

On the same date,[1] Lewis was indicted on a total of six offenses as follows: in file number 15 CRS 50950, one count of felony assault by strangulation, one count of assault on a State officer, and one count of resisting a public officer, all related to Lewis's interaction with Robinson; in file number 15 CRS 50951, one count of assault on a State officer and one count of resisting a public officer, each related to Lewis's interaction with Melvin; and in file number 15 CRS 50952, one count of resisting a public officer, related to Lewis's interaction with the third officer. On 6 May 2015, Lewis entered guilty pleas to all charges at the criminal session of Brunswick County Superior Court before the Honorable Ola M. Lewis, Judge presiding. The court announced sentencing as follows:

> THE COURT: All right. Stand up. Madam Clerk, in this case, on his plea of guilty, he is found guilty. The Court is going to enter the following judgment. I cannot give him more than 150 days on the misdemeanor assaults because, as I understand the law as it relates to misdemeanors, I can only consolidate or run consecutive [two] max . . . sentences, correct?
>
> [THE STATE]: And also, Judge, I believe that you're going to have to arrest sentence. You're not going to be able to sentence for both resisting and assault, so you have to do the—we have two A1s.
>
> THE COURT: So this is what I'm going to do. Madam Clerk, consolidate 15 CRS 50950 for purposes of sentencing, and then consolidate 50951 and 50952. Each

[1] The indictments in the record on appeal have handwritten dates of issuance that appear to read "March 2, 2015" –a date which is clearly in error since the events which gave rise to the indictments took place on 25 March 2015. No party raises this as an issue, and we conclude that this error is merely clerical in nature.

> is a Class A1. Each is a Level II, and he has 75 days each on those counts, for a consecutive total of 150 days. We'll give him credit for time served in that case.
>
> As to the assault by strangulation, it is a Class H, Level I. He is given a six-month minimum, 17-month maximum sentence on that case. It is consecutive to the misdemeanor sentences. . . .

The written judgments entered upon Lewis's convictions were: (1) 6-17 months in prison for the felony assault by strangulation conviction in file number 15 CRS 50950, (2) 75 days in the custody of the BCSD for the assault on a government official conviction in 15 CRS 50951, and (3) an additional 75 days in the custody of the BCSD, purportedly for the conviction for resisting a public officer in 15 CRS 50952.

Lewis's Petition for Writ of Certiorari

Lewis filed a written notice of appeal on 12 May 2015, but, as he concedes, the notice of appeal failed to correctly "designate the judgment . . . from which appeal is taken and the court to which appeal is taken . . . ." as required by North Carolina Rule of Appellate Procedure 4(b). N.C.R. App. P. 4(b). Recognizing this jurisdictional deficiency, *see State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011), on 8 February 2016, along with his appellate brief, Lewis filed a petition for writ of *certiorari* in this Court. In his petition, Lewis asks this Court to issue the writ in order to reach the merits of his arguments on two issues: that the trial court erred in (1) imposing a sentence not authorized by law and (2) failing to withdraw his guilty pleas *sua sponte* after Lewis disputed some details in the State's summary of the

factual bases for his guilty pleas. On 3 March 2016, the State filed its response, conceding that this Court has the discretion to allow Lewis's petition, but requesting that we decline to consider his argument of error in the plea procedures, which the State characterizes as wholly frivolous. On 7 March 2016, Lewis's petition was referred to the panel assigned to hear Lewis's appeal.

Rule of Appellate Procedure 21(a) provides that issuance of the writ of *certiorari* is appropriate, *inter alia*, "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1). However, "[a] petition for the writ [of *certiorari*] must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Rouson*, 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 538 (2013).

Here, we agree with the State that Lewis's contention of reversible error in the plea proceedings is wholly frivolous. During the plea colloquy, Lewis admitted that he was guilty of all of the offenses against him and that there was a factual basis for each charge. However, after the State presented a recitation of the factual basis for each charge, the following exchange took place:

> THE DEFENDANT: All those charges that they have said, the statement that the police wrote, those are false allegations. The allegations are false.

> THE COURT: Mr. Lewis, you have come in under oath and pled guilty.
>
> THE DEFENDANT: Yeah, I understand, but those allegations are also. I mean, me spraying Deputy—I mean, how did they manage to get me under control if I sprayed them? They would have been—all that should have been in my motion and discoveries. Now you're telling me in their statements that I did this and I did that, which is all false.
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> THE COURT: Mr. Lewis, if you would like to withdraw your guilty plea and plead not guilty, we will enter a not guilty plea on the record today, and you can pick a jury of your peers.
>
> THE DEFENDANT: I mean, it's like—it's like, what I'm seeing is I'm in a lose-lose situation regardless. I can't pay for a lawyer.[2]
>
> THE COURT: Let me tell you this—
>
> THE DEFENDANT: I'm in a lose-lose situation, but it is what it is.
>
> THE COURT: All right. Stand up.

The trial court then proceeded with entry of judgment and sentencing. In his appellate argument, Lewis argues that the court should have withdrawn his guilty pleas *sua sponte* and compelled him to go to trial against his will, but admits that he "cannot find any case in this jurisdiction where this issue has been discussed and ruled on by an appellate court of this [S]tate." Nor does Lewis cite authority from

[2] Lewis was represented by a public defender at the plea hearing.

any other jurisdiction in support of his position. Indeed, the only authorities cited by Lewis in his brief concern (1) the requirement that the trial court determine there is a factual basis before accepting a guilty plea and (2) motions to withdraw guilty pleas, neither of which is an issue in his case. Because Lewis's argument regarding the plea procedures does not "show merit[,]" *see id.*, we decline to exercise our discretion to grant his petition for writ of *certiorari* as to that issue. However, Lewis has shown, and the State concedes, that the written judgments entered by the trial court contain a clerical error regarding the offense for which one of Lewis's sentences was imposed, as described below. Accordingly, we grant Lewis's petition for writ of *certiorari* only as to his sentencing issue.

Discussion

Lewis argues that the trial court erred in imposing a 75-day sentence in file number 15 CRS 50952 because it exceeds the maximum punishment allowed under the Structured Sentencing Act for the Class 2 misdemeanor of resisting a public officer. We agree with the State that the sentences imposed are legally correct, but that the case must be remanded to the trial court for correction of a clerical error such that the written judgments reflect the sentences pronounced in open court.

As noted *supra*, in addition to his guilty plea to the Class H felony of assault by strangulation in file number 15 CRS 50950, *see* N.C. Gen. Stat. § 14-32.4(b) (2015), Lewis pled guilty to five misdemeanor offenses: one count of assault on a State officer,

a Class A1 misdemeanor, *see* N.C. Gen. Stat. § 14-33(c)(4) (2015), in each of file numbers 15 CRS 50950 and 50951; and one count of resisting a public officer, a Class 2 misdemeanor, *see* N.C. Gen. Stat. § 14-223 (2015), in each of file numbers 15 CRS 50950, 50951, and 50952. The trial court arrested judgment in two of the resisting a public officer charges, in file numbers 15 CRS 50950 and 50951, leaving four convictions remaining for sentencing: one count of felony assault by strangulation, one count of resisting a public officer, and two counts of assault on a State officer. The trial court found Lewis was a Prior Conviction Level II for misdemeanor sentencing purposes. Our General Statutes authorize a sentence of 1-75 days of active punishment for a defendant with a Prior Conviction Level II who is convicted of a Class A1 misdemeanor such as assault on a State officer. *See* N.C. Gen. Stat. § 15A-1340.23(c) (2015). As evidenced by the transcript of the sentencing hearing quoted *supra*, the trial court clearly intended to impose three sentences: a sentence of 6-17 months for the felony assault by strangulation in file number 15 CRS 50950, to be followed by two sentences of 75 days each in the assault on a State officer convictions in file numbers 15 CRS 50950 and 50951:

> THE COURT: All right. Stand up. Madam Clerk, in this case, on his plea of guilty, he is found guilty. The Court is going to enter the following judgment. *I cannot give him more than 150 days on the misdemeanor assaults* because, as I understand the law as it relates to misdemeanors, I can only consolidate or run consecutive [two] max . . . sentences, correct?

> [THE STATE]: And also, Judge, I believe that you're going to have to arrest sentence. You're not going to be able to sentence for both resisting and assault, so you have to do the—we have two A1s.
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> THE COURT: So this is what I'm going to do. Madam Clerk, consolidate 15 CRS 50950 for purposes of sentencing, and then *consolidate 50951 and 50952. Each is a Class A1.* Each is a Level II, and *he has 75 days each on those counts, for a consecutive total of 150 days*. We'll give him credit for time served in that case.
>
> As to the assault by strangulation, it is a Class H, Level I. He is given a six-month minimum, 17-month maximum sentence on that case. *It is consecutive to the misdemeanor sentences*. . . .

(Emphasis added). In sum, the trial court intended for one felony judgment and two misdemeanor judgments to be entered, to wit, one felony judgment entered on the assault by strangulation conviction, imposing a sentence of 6-17 months imprisonment with no misdemeanors consolidated therein; one misdemeanor judgment on the assault on a State officer conviction in file number 15 CRS 50950, imposing a sentence of 75 days in the custody of the BCSD; and a second misdemeanor judgment on the consolidated convictions of assault on a State officer in case file 15 CRS 50951 and resisting a public officer in case file 15 CRS 50952, imposing a second sentence of 75 days in the custody of the BCSD. Thus, the written judgments entered were not consistent with the trial court's pronouncement in open court.

Where a discrepancy exists between the trial court's actual ruling and its written judgments, the discrepancy constitutes clerical error. *See, e.g.*, *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000). "A court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, [and] correct the mistakes of its clerk or other officers of the court . . . ." *State v. Old*, 271 N.C. 341, 343, 156 S.E.2d 756, 757-58 (1967) (citations omitted). Thus, this case must be remanded to the trial court for the judgments to be corrected to accurately reflect the sentences imposed for the convictions to which Lewis pled guilty.

REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).