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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-509

Filed: 5 January 2016

Wake County, Nos. 13 CRS 215612, 215619, 14 CRS 219189

STATE OF NORTH CAROLINA

v.

MARQUINO ARDELISS ANDERSON

Appeal by defendant from judgments entered 10 October 2014 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 17 December 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Creecy C. Johnson, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.*

TYSON, Judge.

Defendant appeals from judgments entered consistent with his guilty plea. We vacate Defendant's plea and the judgments entered thereon.

I. Background

On 10 October 2014, Defendant appeared before the superior court and pled guilty to four felony offenses: assault with a deadly weapon on a government officer; speeding to elude arrest; breaking and entering; and, larceny after breaking and

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entering. Defendant was sentenced as a Prior Record Level I offender, and in accordance with the plea arrangement.

The charges of assault with a deadly weapon on a government officer and speeding to elude arrest were consolidated for judgment. Defendant was sentenced to a prison term of 25 to 42 months on those charges. The breaking and entering and larceny charges were also consolidated for judgment. Defendant was sentenced to a concurrent prison term of 5 to 15 months on those charges. Both sentences were suspended and Defendant was placed on supervised probation for a period of 24 months.

II. Issue

Defendant argues the judgments entered on his guilty plea must be vacated because the plea transcript and judgments erroneously classified the offense of assault with a deadly weapon on a law enforcement officer as a Class E felony rather than a Class F felony offense.

III. Improper Classification of the Class F Offense

The State agrees the plea transcript improperly states the offense of assault with a deadly weapon on a law enforcement officer is a Class E felony, when the offense is actually a Class F felony. N.C. Gen. Stat. § 14-34.2 (2013). According to the plea arrangement, the offense of assault with a deadly weapon on a government officer was consolidated for judgment with the offense of speeding to elude arrest.

Defendant received a 25 to 42 month suspended sentence on those charges, consistent with sentencing for a Class E felony. The maximum presumptive range sentence Defendant could have received as a Prior Record Level I offender for a Class F felony is 16 to 29 months, not 25 to 42 months. N.C. Gen. Stat. § 15A-1340.17(c) and (d) (sentencing chart applicable to offenses committed between 1 December 2011 and 30 September 2013).

#### IV. Disposition

The parties disagree on the appropriate remedy to correct the acknowledged error contained in the plea transcript and judgments. Defendant argues the judgments entered in accordance with the plea arrangement, which contained an unauthorized sentence, must be vacated. The State argues the appropriate remedy is for this Court to remand to the trial court for resentencing, and to otherwise uphold the terms of the plea arrangement. We agree with Defendant.

In support of his argument to vacate the judgments, Defendant cites *State v. Rico*, 218 N.C. App. 109, 720 S.E.2d 801 (Steelman, J., dissenting), *rev'd for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). In *Rico*, the defendant pled guilty to voluntary manslaughter in exchange for the State's dismissal of his murder charge. As part of the plea, the defendant agreed to receive a sentence of 84 to 110 months, and agreed for the sentence to be imposed within the aggravated range. *Id.*

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at 120, 720 S.E.2d at 807-08. Defendant attacked the judgment in a subsequent MAR, which was reviewed by this Court on certiorari.

The majority and dissenting opinions of this Court agreed the trial court's acceptance of the plea bargain and entry of judgment was erroneous. The trial court had accepted the aggravating factor as part of the plea bargain, failed to make any findings as to aggravating factors, and failed to exercise its discretion in determining whether an aggravated sentence was appropriate. *Id.* at 121, 720 S.E.2d at 808.

Judge Steelman's dissenting opinion was adopted by our Supreme Court *per curiam* and explained the plea agreement allowed the defendant to plead guilty to the lesser offense of voluntary manslaughter. In return for the plea to a lesser offense, the defendant had admitted to an aggravated factor and agreed to a sentence to be imposed within the aggravated range. *Id.* at 122, 720 S.E.2d at 809.

Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied*, 479 U.S. 835, 107 S. Ct. 131, 93 L. Ed. 2d 75 (1986). A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain. *See Dixon v. State*, 8 N.C. App. 408, 416, 174 S.E.2d 683, 689 (1970) (a plea of guilty will stand unless induced by misrepresentation, including unfulfilled or unfulfillable promises); *State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) (if defendant elects not to stand by his portion of the plea arrangement, the State is not bound by its agreement).

*Id.* (quoting *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993)).

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Judge Steelman’s opinion in *Rico* held it was necessary to vacate the entire plea agreement because the defendant could not “disavow the portions of the plea arrangement that were unfavorable (aggravated ranged sentence) but yet retain the portion that is favorable (plea to a reduced offense).” *Id.* “[E]ssential and fundamental terms of the plea agreement were unfulfillable,” requiring the entire plea agreement to be set aside. *Id.*

Here, Defendant agreed to a harsher sentence than allowed under the statute. Although logic may suggest he would have agreed to the lesser sentence, a plea agreement is a unilateral contract. *Id.* Defendant agreed to, and the court imposed, a sentence of 25 to 42 months on the charge of assault with a deadly weapon on a government officer, a Class F felony. This sentence is not within the range permitted by the statute. Where this “essential element” of the plea bargain is “unfulfillable” by law, the plea agreement and judgments entered thereon must be vacated. *Id.*

VACATED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).