IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-572

Filed: 19 April 2016

Forsyth County, No. 14 CRS 55466

STATE OF NORTH CAROLINA

v.

DONALD RAY JONES, Defendant.

Appeal by defendant from judgment entered 9 January 2015 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Christina E. Simpson, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant.

GEER, Judge.

Defendant Donald Ray Jones appeals with respect to the sentence imposed after he entered an *Alford* plea on three counts of indecent liberties with a child. On appeal, defendant argues that the State, as to one of the counts, failed to present an adequate factual basis to justify the offense date used by the trial court in deciding which sentencing table applied. Because defendant's plea agreement, signed by defendant and his counsel, specified the offense date for that count and the trial court

sentenced defendant based on that date, we hold that the trial court acted in accordance with the plea agreement and, therefore, affirm.

Facts

On 9 January 2015, defendant pled guilty to three counts of indecent liberties with a child. At the hearing, the State summarized the following factual basis for the charges. In March 2013, Wiley[1] Ellis, the father of the minor victims, ALJ and AMJ,[2] reported to law enforcement that his daughters had told him that defendant, who is their grandfather, made each of them fondle his penis while he babysat them. Mr. Ellis indicated to officers that he was initially informed of the allegations by a "Ms. Allison" after his daughters had played with her daughter.

Ms. Allison's daughter told Ms. Allison that ALJ said her grandfather made her touch his private area. After hearing about this disclosure, Mr. Ellis asked his daughters what had happened, and ALJ, the older daughter, said, "my granddaddy made me play with his pee pee" and began to cry. Initially, AMJ did not acknowledge that anything had happened to her. When reporting what had happened to law enforcement, Mr. Ellis explained that defendant babysat the children while their mother, Mr. Ellis' girlfriend, attended classes at Forsyth Tech.

[1]Mr. Ellis' first name was spelled both "Wiley" and "Wylie" throughout the transcript.

[2]To protect the identity of the minor victims, we use initials rather than their full names throughout this opinion.

The children were then interviewed at Vantage Point, where ALJ, who was eight at the time of the interview, indicated that the allegations "would have occurred during the time she was about seven years of age" and that defendant made her "squeeze his wee wee" on two separate occasions. AMJ, who was six at the time she was interviewed, indicated that her grandfather made her touch him while he was babysitting. AMJ explained that she was lying with defendant on the living room floor and "he made her touch his pee pee" and that defendant "pulled what she described as his thing out of his pants."

AMJ, due to her young age "wasn't able to give an exact time frame for it," but she knew that the incident with defendant had occurred after her brother was born. The State explained that based on this information, they were able to "go back and get a time frame for that incident" and determined that "both incidences would have happened during the time fame [sic] that [defendant] was babysitting while the mother was taking classes at Forsyth Tech."

After hearing this factual basis, the trial judge accepted defendant's plea, which provided that defendant would be sentenced in the mitigated range. The trial judge gave defendant's trial counsel an opportunity to present anything he wished to present that was relevant to the trial judge's exercise of discretion in sentencing defendant in accordance with the plea arrangement. Defense counsel noted defendant's age, poor health, and employment history as reasons for a mitigated

sentence. The trial judge also heard from Mr. Ellis, who spoke of the impact defendant's actions have had on his children and his family. Finally, the trial judge asked defendant whether he had anything to say, and he replied simply, "No."

With respect to sentencing, the plea agreement provided that the State would agree to mitigated-range sentences, but that the three sentences for the three counts would run consecutively. The sentences were otherwise left to the discretion of the trial judge. In determining what sentence to impose for the count involving the offense against AMJ, the trial judge used the sentencing table applicable to crimes occurring on 6 July 2009 -- the offense date specified in the negotiated plea agreement. Defendant's trial counsel, however, argued that the offense date time range specified in the indictment was "July of '09 through March 2013" and that defendant should be sentenced using the date within that range that resulted in the lowest sentence. Defense counsel also argued that "the wrong range was put in the indictment."

The trial judge pointed out that "[t]he date of offense on the plea chart says July 6, 2009."[3] Defendant's trial counsel reiterated that "the date of the offense is July 2009 through March 2013" and argued that "the Lenity rule would require it to be the lower chart." The trial judge replied that he was going to "leave it as it is" and sentenced defendant to a mitigated-range term of 27 to 33 months imprisonment

[3]The plea agreement specified an offense date of 12 October 2013 for the other two counts.

based on the offense date specified in defendant's plea agreement with the State. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred by sentencing him based on an incorrect sentencing table and that this error resulted in him receiving a longer sentence than he should have received. Defendant claims that the "offense date" of the offense at issue is 6 July 2009 through 12 March 2013, which is how it was listed in the indictment, and argues that if the appropriate sentencing table had been applied, he would have been sentenced to a minimum of 23 months, rather than 27 months.

Defendant points out that the 6 July 2009 through 12 March 2013 date range spans three versions of the statutory sentencing table. The "1995 table" covers crimes committed between 1 December 1995 and 1 December 2009. The "2009 table" covers crimes committed between 1 December 2009 and 1 December 2011. And, the "2011 table" covers crimes committed between 1 December 2011 and 1 October 2013.

After careful review, we find that this Court's decision in *State v. Hamby*, 129 N.C. App. 366, 499 S.E.2d 195 (1998), and later decisions discussing it control our analysis here. In *Hamby*, the defendant pled guilty to assault with a deadly weapon inflicting serious injury and was sentenced to a minimum sentence within the presumptive range for her prior record level and class of offense. *Id.* at 368, 499

S.E.2d at 196. This Court noted that "[i]n her plea agreement, defendant admitted that her prior record level was II, that punishment for the offense could be either intermediate or active in the trial court's discretion and that the trial court was authorized to sentence her to a maximum of forty-four months in prison." *Id.* at 369, 499 S.E.2d at 197. The trial court in *Hamby* relied on the terms set out in the plea agreement and sentenced the defendant to between 29 and 44 months imprisonment. *Id.* at 367, 499 S.E.2d at 195.

This Court ultimately concluded in *Hamby* that "[b]y these admissions [in the plea agreement], defendant mooted the issues of whether her prior record level was correctly determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized." *Id.* at 369-70, 499 S.E.2d at 197. In *State v. Gardner*, 225 N.C. App. 161, 166, 736 S.E.2d 826, 830 (2013), this Court further clarified the holding in *Hamby*:

> The trial court in *Hamby* simply instituted the provisions of the defendant's plea agreement, sentencing her to between 29 and 44 months in jail pursuant to that agreement. Because *Hamby* had agreed that the trial court could sentence her in accordance with her agreement with the State, she mooted any issues that could have been raised on appeal as to her sentence.

Under *Hamby* and *Gardner*, therefore, since defendant entered into a plea agreement specifying his offense date as 6 July 2009, the trial court properly relied on that agreement when it sentenced defendant based on that offense date. And, any

arguments defendant may have had with respect to the offense date were mooted by his plea.

Similarly, in *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918-19 (2005), our Supreme Court reversed this Court, finding that the trial court had properly sentenced a defendant who "entered into a plea arrangement with the State to plead guilty in exchange for a sentence of 80 to 105 months imprisonment, which constituted the minimum and maximum term of imprisonment in the presumptive range for a defendant with a prior record level of II being sentenced for a Class C felony." The Court, in explaining its reasoning for concluding that the defendant in *Alexander* was properly sentenced, stated:

> Before accepting defendant's plea of guilty, the trial judge asked defendant whether he understood that he was "pleading guilty to the felony offense of assault with a deadly weapon with intent to kill inflicting serious injury for which [he] could be imprisoned up to 261 months with the exception of limitation to that sentence required by our law and any plea bargain?" to which defendant replied, "Yes, sir." *Thus, the trial court was aware that defendant had "bargained" for the State's recommendation of a lesser term of imprisonment* . . . as opposed to an aggravated term of imprisonment.

Id. at 831-32, 616 S.E.2d at 919 (emphasis added).

Similarly, here, the trial court was aware that defendant had bargained for the State's accepting a mitigated range sentence, substantially lessening defendant's sentence. In exchange, defendant agreed to an offense date of 6 July 2009. When the

trial court sentenced him in accordance with the agreement, defendant, like the defendant in *Alexander*, received the benefit of his bargain and was properly sentenced in accordance with his plea agreement.

Defendant, however, argues that the State had the burden of offering evidence and proving which sentencing table applied to the offense at issue, citing *State v. Poston*, 162 N.C. App. 642, 651, 591 S.E.2d 898, 904 (2004). *Poston*, however, involved a trial court sentencing a defendant after a jury found him guilty and did not involve, as here, enforcement of a plea agreement. *Id.* at 645-46, 591 S.E.2d at 901. When a defendant pleads guilty, he waives his right to have the State present evidence against him. *See State v. Caldwell*, 269 N.C. 521, 526, 153 S.E.2d 34, 37-38 (1967) (" 'An accused by pleading guilty waives all defenses other than that the indictment charges no offense. He also waives the right to trial and the incidents thereof and the constitutional guarantees with respect to the conduct of criminal prosecutions.' " (quoting *Brisson v. Warden of Conn. State. Prison*, 25 Conn. Supp. 202, 205, 200 A.2d 250, 251 (1964))).

Here, the trial judge asked defendant whether he understood his plea of guilty and the plea arrangement -- under which defendant would get three consecutive sentences in the mitigated range -- and defendant indicated he did, accepting that arrangement. The plea agreement that defendant signed plainly stated the offense date of 6 July 2009 and left no ambiguity. Accordingly, we find that the trial court

did not err in using the agreed-upon date from the plea agreement to sentence defendant. We, therefore, hold that defendant was properly sentenced by the trial court in accordance with his plea bargain.

AFFIRM.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).