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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-733

Filed: 2 February 2016

Forsyth County, Nos. 13 CRS 50254 - 5; 13 CRS 50262 - 67; 13 CRS 50269 - 70; and
13 CRS 50559 - 63

STATE OF NORTH CAROLINA, Plaintiff,

v.

ERIC NOLAN SELLERS, Defendant.

Appeal by defendant from judgments entered 6 November 2014 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 18 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Ryan C. Zellar, for the State.

William D. Spence for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from judgments entered upon defendant's pleas of guilty to thirty charges of various property crimes. On appeal defendant argues that the trial court erred by accepting his pleas of guilty, on the grounds that the State failed to present a factual basis for some of these charges. Defendant's argument has merit.

I. Background

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On 2 December 2013, the Grand Jury for Forsyth County indicted defendant on seven counts of felony breaking and entering, six counts of felony larceny after breaking and entering, four counts of larceny of a chose in action, nine counts of possession of stolen goods, one count of safecracking, three counts of obtaining property by false pretenses, two counts of uttering a forged instrument, one count of breaking and entering a motor vehicle, one count of financial credit card theft, and one count of misdemeanor larceny. These offenses were alleged to have been committed against different victims on various dates between 30 November 2012 and 8 January 2013.

On 6 November 2014, defendant appeared before the trial court to enter pleas of guilty to thirty of the charged offenses, pursuant to a plea bargain. The terms of the plea arrangement provided that defendant would plead guilty to thirty of the thirty-five offenses for which defendant had been indicted, that the charges would be consolidated for sentencing into six Class H felonies, and that defendant would be sentenced in the presumptive range. After hearing from the State and defendant's counsel, the trial court accepted defendant's plea. The trial court sentenced defendant to five consecutive terms of imprisonment of eight to nineteen months each, followed by a sixth consecutive term of imprisonment of eight to nine months, for a total sentence of 48 to 104 months.

On 7 November 2014, the day after these judgments were entered, defendant submitted a handwritten notice of appeal, and on 17 November 2014, appellate counsel was appointed. On 8 July 2015, defendant's counsel filed a petition for a writ of *certiorari*, seeking review in the event that defendant's *pro se* handwritten notice of appeal was determined to be inadequate. On 31 July 2015, defendant filed a second petition for writ of *certiorari*, raising the issue that the State failed to present a factual basis for defendant's guilty plea. On 26 August 2015, the State filed a motion seeking dismissal of defendant's appeal. On 17 November 2015, we denied the State's motion for dismissal and granted defendant's petitions for writ of *certiorari* in order to reach the merits of his appeal.

II. Factual Basis for Acceptance of Defendant's Guilty Pleas

Defendant's sole argument on appeal is that the trial court erred by accepting his guilty plea where the State failed to offer a factual basis for entry of the plea. We agree.

N.C. Gen. Stat. § 15A-1022(c) provides that:

The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

- (1) A statement of the facts by the prosecutor.
- (2) A written statement of the defendant.
- (3) An examination of the presentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

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“The quoted statute does not require the trial judge to elicit evidence from each, any or all of the enumerated sources[,]” and the “trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest.” *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185-86 (1980). Nonetheless, “[N.C. Gen. Stat. §] 15A-1022(c) requires an independent judicial determination that a sufficient factual basis exists before a trial court accepts a guilty plea.” *State v. Agnew*, 361 N.C. 333, 333-34, 643 S.E.2d 581, 582 (2007). “[D]efense counsel’s stipulation to the existence of a factual basis [is] insufficient because the stipulation [gives] the trial court no additional substantive information about the case as required by statute.” *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584.

Defendant pleaded guilty to thirty offenses comprising a variety of different types of property crimes occurring on different dates and involving different victims. At the hearing on defendant’s guilty pleas, the prosecutor offered a factual summary of some of the thirty charges to which defendant was pleading guilty. Following are several of the factual summaries proffered by the prosecutor, with the remainder of the prosecutor’s comments having a similar level of detail and specificity:

PROSECUTOR: Officers responded on October 20th of 2012 to a residence to a call saying that some items were missing from the house. They believed it was a granddaughter’s friend. Then after a search warrant is executed on January 8th, 2013 at this defendant’s house,

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they end up finding at his house a J.C. Penney's credit card with the victim's name on it.

On October 31st of 2012 officers responded to 5801 British Square Drive, Apartment C, in Winston-Salem. . . . There was a book of checks taken from - they were BB&T checks. They had a fingerprint hit to . . . a stepson for this defendant. Then in the search warrant done on the defendant's address on January 8th, 2013, there is a check found for the victim in the defendant's residence.

On November 30th of 2012, officers responded to 2259 West Clemmons Road. They responded to a call of a reported breaking and entering. . . . There were TV, change, jewelry boxes and jewelry, another TV, laptop [and other] things that had been taken. . . . On January 10th of 2013, the officers discovered that some of the jewelry taken in this breaking and entering had been . . . sold by the defendant . . . on the same day as the breaking and entering.

. . .

PROSECUTOR: On December 4th of 2012, officers responded to [180 Oak Shadows Court] . . . to a report of a breaking and entering. . . . There were two checkbooks stolen, tool box taken, and a . . . laptop. . . . They are contacted by the victim on the 28th of December that says some of the stolen checks were used. . . . There was a video of the defendant using the stolen checks.

The trial court interrupted the prosecutor before she completed the narrative of factual summaries:

THE COURT: I don't mean to interrupt you, Ms. Spencer. But I think counsel stipulated there's a factual basis for entry of the plea. And it's clear the factual basis in this matter is that the defendant just broke and entered and stole at will. Is there anything particular or unique about it beyond that?

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PROSECUTOR: Every case is the same basic layout from what you've heard so far, your Honor. It looks like the things being targeted were jewelry and checks[.] . . . And then with the search warrant, they found multiple checks [that] they . . . hadn't connected to the defendant yet[.] . . . [E]very case is going to be the same after that.

THE COURT: Same *modus operandi*. . . . The court finds a factual basis for entry of the plea[.] . . .

On appeal defendant argues that the prosecutor's "presentation of the facts was incomplete, vague, and insufficient," and notes that as to the cases for which a factual basis was offered, the prosecutor did not match her description of events to any particular case number. We agree with defendant that the proffered summaries were confusing, but by cross-referencing the language of the indictments to the prosecutor's comments, it appears that the prosecutor attempted to provide a factual basis for defendant's pleas in cases Nos. 13 CRS 50254, 50255, 50262-63, 50269, 50559, and 50561.¹ Assuming, *arguendo*, that the prosecutor presented an adequate factual basis for defendant's pleas to these charges, the trial court stopped the prosecutor before she had offered any factual basis for defendant's pleas in cases Nos. 13 CRS 50265, 50266, 50267, 50270, or 50560.

In *State v. Flint*, 199 N.C. App. 709, 725, 682 S.E.2d 443, 452 (2009), the defendant entered pleas of guilty to sixty-eight felony charges and an habitual felon indictment, but a factual basis was presented for only forty-seven felony charges. We

¹ As part of the plea bargain, the State dismissed the charges in 13 CRS 50264, 50563, and three charges of possession of stolen goods.

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held that the judgments against the defendant had to be vacated and the case remanded:

Despite the fact that forty-seven of the felonies that defendant pled guilty to are supported by an independent factual basis, we must, nevertheless, remand this matter to the trial court. In *State v. Stonestreet*, 243 N.C. 28, [31,] 89 S.E.2d 734[, 737,] (1955), our Supreme Court stated: “Where two or more indictments or counts are consolidated for the purpose of judgment, and a single judgment is pronounced thereon, even though the plea of guilty or conviction on one is sufficient to support the judgment and the trial thereon is free from error, the award of a new trial on the other indictment(s) or count(s) requires that the cause be remanded for proper judgment on the valid count.”

Flint, 199 N.C. App. at 726-27, 682 S.E.2d at 453. In this case, following the acceptance of defendant’s pleas of guilty, the trial court instructed the assistant clerk of court as follows:

THE COURT: The Court finds a factual basis for the entry of the plea. The Court will sentence the defendant pursuant to the plea arrangement. *Consolidate these matters into six Class H felonies as you may see fit, Madam Clerk. Choose the six most convenient for preparing a judgment.* And the Court will sentence the defendant to six consecutive sentences, a minimum of eight and a maximum of nineteen months. He’s in your custody, Sheriff. (Emphasis added.)

The trial court thus treated the plea arrangement as a single plea, finding a basis for “entry of the plea” and delegating to an assistant clerk the ministerial task of dividing the separate charges into six separate sentences. On the facts of this case, we hold

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that this procedure was tantamount to entry of a single consolidated judgment, given that the trial court had no input into which charges were grouped together.

Accordingly, as in *Flint*:

we vacate the trial court’s judgment and remand to the trial court. Because defendant has requested that he be relieved of his plea agreement, we also set aside defendant’s plea agreement due to failure of the State to provide a factual foundation. This case is remanded to the trial court where defendant may “withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] attempt to negotiate another plea agreement[.]”

Flint at 727, 682 S.E.2d at 483 (quoting *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998)).

VACATED AND REMANDED.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).