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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-244

Filed: 20 September 2016

Durham County, No. 07 CRS 44293

STATE OF NORTH CAROLINA

v.

SEYMOUR MARLON WINT

Appeal by defendant from judgment entered 9 September 2015 by Judge Paul G. Gessner in Durham County Superior Court. Heard in the Court of Appeals 24 August 2016.

Roy Cooper, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Daniel L. Spiegel, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Seymour Marlon Wint (“Defendant”) appeals by writ of *certiorari* from the judgment entered on his guilty plea to the offense of possession with intent to sell or deliver marijuana. On appeal, Defendant argues that the trial court erred in accepting his guilty plea because the State did not present a sufficient factual basis to support the plea. After careful review, we dismiss Defendant’s appeal and deny his petition for *certiorari*.

Factual Background

On 6 April 2007, Durham Police Officer Gaddy was stationed in a construction zone at Interstate 85 and East Club Boulevard. The posted speed limit was 55 miles per hour. Officer Gaddy noticed Defendant's vehicle — a rental car — speeding through the construction zone at around 65 miles per hour, and he conducted a traffic stop of the vehicle. Officer Gaddy directed Defendant to step out of the car and asked him the identities of the other occupants of the vehicle.

While requesting identification from the other passengers, Officer Gaddy was told by one of the passengers that he had left his identification in the trunk of the vehicle. Upon opening the trunk, Officer Gaddy noticed a strong odor of marijuana. Officer Gaddy asked Defendant and the other occupants of the vehicle if they “had anything in the car[,]” and none of them responded. Officer Gaddy then searched the vehicle and discovered 3.8 pounds of a brick-like substance later determined to be marijuana.

On 22 January 2008, Defendant was indicted by a grand jury for (1) possession with intent to sell or deliver a Schedule VI controlled substance, (2) possession of drug paraphernalia, and (3) maintaining a vehicle for the purpose of keeping or selling a controlled substance. On 9 September 2015, Defendant entered a plea of guilty to the charge of possession with intent to sell or deliver marijuana. During his colloquy with the trial court at the plea hearing, Defendant agreed that there were sufficient

facts to support his guilty plea. Defendant was sentenced to four to five months imprisonment. The sentence was suspended, and Defendant was placed on supervised probation for 18 months.

On 23 September 2015, Defendant filed a written notice of appeal, and he subsequently filed a petition for *certiorari* on 14 April 2016. On 25 April 2016, the State filed a motion to dismiss the appeal, and on 29 April 2016, the State filed a response to the petition for *certiorari* requesting that the petition be denied.

Analysis

Defendant's sole argument on appeal is that the trial court erred in accepting his guilty plea because the factual basis asserted by the State for the plea did not include the essential element that Defendant was aware the marijuana was present in the vehicle. However, because we conclude that the State's motion to dismiss this appeal has merit and we decline to grant Defendant's petition for *certiorari*, we do not reach the substance of Defendant's argument.

N.C. Gen. Stat. § 15A-1022(c) states, in pertinent part, as follows:

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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N.C. Gen. Stat. § 15A-1022(c) (2015).

However, the right of appeal available to a defendant who enters a guilty plea is limited.

A defendant who has . . . entered a plea of guilty . . . is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2015).

Thus, a “defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea. Defendant may obtain appellate review of this issue only upon grant of a writ of certiorari.” *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987). Therefore, we grant the State's motion to dismiss the appeal.

The State further argues that Defendant's petition for *certiorari* should be denied because he failed to properly preserve the issue he now seeks to raise on appeal. Specifically, the State asserts that Defendant never objected in the trial court to the factual basis for the plea and that his failure to do so precludes him from making such an argument for the first time on appeal.

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We find instructive our prior decision in *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), *disc. review denied*, 353 N.C. 391, 548 S.E.2d 150 (2001). In *Kimble*, the defendant pled guilty to second-degree murder, conspiracy to commit first-degree murder, and first-degree arson. At the time of his plea, the defendant stipulated to the existence of a factual basis for the guilty plea and did not object to the State's summary of the factual basis during the plea hearing. *Id.* at 145, 539 S.E.2d at 343. On appeal, the defendant nevertheless argued that the trial court had erroneously entered judgment against him due to the lack of a sufficient factual basis for the plea. *Id.* at 147, 539 S.E.2d at 344. We held that this issue was not properly before this Court. *Id.* at 147, 539 S.E.2d at 344-45. In so holding, we stated as follows:

Defendant . . . did not object during the plea hearing to the State's summary of the factual basis for the entry of judgment against Defendant for these charges. Additionally, Defendant did not argue before the trial court that the factual basis for the entry of judgment against Defendant supported only one count of solicitation to commit first-degree murder. Further, although Defendant brought a motion to withdraw his pleas subsequent to the entry of judgment, the basis of this motion was not that there was an insufficient factual basis to support Defendant's pleas. This issue, which was not raised before the trial court, is therefore not properly before this Court. *See* N.C.R. App. P. 10(b)(1). Accordingly, we do not address this issue.

Id.; *see also State v. Canady*, 153 N.C. App. 455, 458, 570 S.E.2d 262, 265 (2002) (holding that because defendant never objected to trial court's finding that sufficient

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factual basis existed for plea or sought to withdraw his plea, defendant's challenge to factual basis for plea was not properly presented for appellate review).

Defendant contends that our Supreme Court's decision in *State v. Agnew*, 361 N.C. 333, 643 S.E.2d 581 (2007), supersedes our holding in *Kimble*. We disagree. In *Agnew*, after pleading guilty but before sentencing, the defendant told the trial court that "he had never seen any evidence in his case[.]" *Id.* at 334-35, 643 S.E.2d at 582. The trial court treated the defendant's objection as a motion to withdraw his guilty plea due to the absence of a factual basis to support the plea but denied the motion. Our Supreme Court proceeded to analyze the merits of the defendant's argument regarding the sufficiency of the basis for the plea. *Id.* at 335, 643 S.E.2d at 582-83.

However, *Agnew* is distinguishable. No preservation issue existed in that case because — as noted above — the defendant raised an objection to the plea prior to the entry of judgment, which the trial court construed as a challenge to the factual basis for the plea. *Id.* at 334-35, 643 S.E.2d at 582. For this reason, we conclude that *Agnew* does not affect the precedential value of *Kimble* and its progeny on this issue.

In the present case, Defendant stipulated in the trial court that there was, in fact, a factual basis for his guilty plea. At no point did he later object to the sufficiency of the factual basis for his plea. Nor did he ever seek to withdraw his plea.

During the plea hearing, the following exchange occurred:

THE COURT: All right. If you'll have a seat, I'll hear from the State.

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[THE PROSECUTOR]: Thank you, Your Honor.

Had this matter gone to trial, the State's evidence would have shown that on the morning of Friday, April 6, 2007, Officer Gaddy, G-A-D-D-Y, with the Durham Police Department was stationary, performing traffic patrol at Interstate 85 and East Club Boulevard here in Durham -- at that time, that was a construction area -- where he noticed a vehicle traveling approximately 65 miles per hour, which was in excess of the speed of -- 55-mile-per-hour speed in the construction zone.

The officer took attempts to pace that vehicle and eventually conducted a traffic stop. The vehicle was a rental car and the defendant would be identified as the driver of that vehicle.

Officer Gaddy had some conversation with the defendant, Mr. Wint, had him step out of the car, was telling him the reason for the traffic stop, asked who was with him. They had some conversation and eventually Mr. Wint was placed in the passenger's side of the patrol car due to the chilly weather.

During his conversation with one of the passengers of the vehicle, Officer Gaddy was trying to determine their identities, requested identification. One of the individuals said that he had his ID in the trunk of the vehicle. When he opened the trunk, the officer noticed what he knew to be a strong odor of raw marijuana.

He asked all the individuals whether or not they had anything in the car. No one said anything. All three were placed in investigative detention based on the odor of the marijuana.

Pursuant to a search of the vehicle, Officer Gaddy discovered inside of a plastic bag a brick-like object of a green leafy substance that weighed approximately 3.8 pounds of marijuana, Schedule VI, according to the SBI lab results in this case.

That would have been some of the evidence had these matters gone to trial.

THE COURT: All right. Do you want to be heard on the

facts?

[DEFENDANT'S COUNSEL]: *Nothing as to the facts*, Your Honor.

(Emphasis added).

After this colloquy, the court asked Defendant's counsel, "What can you tell me about your client in light of his plea?" Defendant's trial counsel then proceeded to explain that Defendant was employed and stated that Defendant had not come into contact with law enforcement since his indictment. He also discussed Defendant's family and living arrangements. In addition, during the course of these remarks he sought to minimize Defendant's level of involvement in the 6 April 2007 offense.

On appeal, Defendant attempts to characterize these latter statements by his trial counsel as an objection to the factual basis for the plea. However, when read contextually, it is clear that these statements were made *not* for the purpose of objecting to the sufficiency of the factual basis for the plea but rather in the hope of obtaining leniency in sentencing. Therefore, we conclude that this appeal must be dismissed, and we deny Defendant's petition for *certiorari*.

Conclusion

For the reasons stated above, we grant the State's motion to dismiss the appeal and deny Defendant's petition for *certiorari*.

DISMISSED.

Judges CALABRIA and TYSON concur.

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Report per Rule 30(e).