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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-261

Filed: 1 November 2016

Greene County, Nos. 13 CRS 323-24

STATE OF NORTH CAROLINA

v.

TIMOTHY DEVON KING

Appeal by defendant from judgment entered 21 July 2015 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 24 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.*

*Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.*

TYSON, Judge.

Timothy Devon King (“Defendant”) appeals from a judgment entered upon a return of a jury’s verdict finding him guilty of assault on a detention employee inflicting serious injury and his plea of guilty to attaining habitual felon status. We find no error.

I. Background

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On 5 August 2013, Defendant was an inmate in the Greene County Jail. Detention Officer Lonnie Bruce Meadows (“Officer Meadows”) of the Greene County Sheriff’s Department was making his rounds when Defendant approached and handed Officer Meadows a note. Defendant grabbed a probe from Officer Meadows’ hand. In response, Officer Meadows pulled out his can of mace. Defendant swung his fist at Officer Meadows, who responded by spraying Defendant with the mace. Defendant punched Officer Meadows, knocking him to the floor. Defendant continued to attack Officer Meadows, struck him in the face and head several times and knocked him unconscious. Officer Meadows suffered a broken orbital bone, a broken knee, a concussion, and a back injury as a result of the assault. The orbital bone and back injury required surgery to repair the damage.

Defendant was arrested and indicted for two counts of assault inflicting serious injury on a detention facility employee, and attaining habitual felon status. Defendant was tried before a jury, who returned verdicts convicting Defendant as guilty of one count of assault inflicting serious injury on a detention facility employee and not guilty of the other count. Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant in the presumptive range to a term of 110 to 144 months of imprisonment. Defendant appeals.

II. Anders Brief

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Counsel appointed to represent Defendant asserts he is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. He requests this Court to conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

III. Issues

Defendant filed a *pro se* brief presenting the following issues: (1) whether the court should have considered his mental health issues during sentencing, (2) whether his habitual felon conviction was based upon the improper use of prior convictions that had previously been used to sentence him as an habitual felon, and (3) whether his conviction violated his rights under the First, Eighth, and Fourteenth Amendments to the United States Constitution. We briefly address each argument.

IV. Analysis

At sentencing, Defendant's trial counsel specifically offered Defendant's mental illness as a mitigating factor. While N.C. Gen. Stat. § 15A-1340.16 requires the trial court to "consider evidence of aggravating or mitigating factors, . . . the decision to depart from the presumptive range is in the discretion of the court." N.C.

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Gen. Stat. § 15A-1340.16(a) (2015). We find no abuse of discretion in the trial court's decision to sentence Defendant within the presumptive range.

Defendant's remaining issues were not preserved for appellate review. By knowingly and voluntarily pleading guilty to attaining habitual felon status, Defendant "waives all defenses other than the sufficiency of the indictment." *State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784, *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768 (2006). Defendant's argument attacks the propriety of the offenses used to establish Defendant's habitual felon status, but he does not attack or argue the sufficiency of the habitual felon indictment. This issue is not properly before us.

None of Defendant's constitutional arguments were raised before the trial court, and "[i]t is well settled that constitutional issues cannot be raised for the first time on appeal." *State v. Wright*, 200 N.C. App. 578, 584, 685 S.E.2d 109, 114 (2009), *appeal dismissed* 363 N.C. 812, 693 S.E.2d 142 (2010). We do not consider the merits of these arguments which are not properly before us.

V. Conclusion

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom or whether the appeal is wholly frivolous. We have reviewed the record for possible prejudicial errors and have found none. Defendant's issues are either meritless or not preserved for appellate

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review. Defendant received a fair trial, free from prejudicial errors preserved or argued. We find no error in the jury's verdicts, Defendant's habitual felon plea, or the judgments entered thereon.

NO ERROR.

Judges STROUD and INMAN concur.

Report per Rule 30(e).