IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-267

Filed: 4 October 2016

Buncombe County, Nos. 12 CRS 52274, 52276, 13 CRS 55149

STATE OF NORTH CAROLINA,

v.

GARY DEAN WEBB.

Appeal by Defendant from orders entered 9 October 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 8 Sept 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch for Defendant-appellant.

HUNTER, JR. Robert N., Judge.

On 8 May 2014, while on supervised probation, Gary Dean Webb ("Defendant") pled guilty to a single count of possession of stolen goods. As part of his plea agreement, Defendant admitted to violating the terms of his probation, and his four previously suspended sentences were activated. After prevailing on a motion for appropriate relief on an unrelated sentencing issue, Defendant was resentenced on 9 October 2015 for all charges pursuant to a second plea agreement with the State.

Defendant now petitions the court for a writ of certiorari, contending that the trial court erred by failing to clearly advise him of the maximum possible sentence under the second plea agreement. If so, his plea would be legally involuntary and merit relief. Although we grant the petition for writ of certiorari, we hold no error was committed by the sentencing judge.

I. Facts and Procedural History

On 15 January 2013, Defendant pled guilty to possession with intent to sell or deliver methamphetamine, possession with intent to sell or deliver a schedule II narcotic and two counts of maintaining a dwelling for keeping a controlled substance. He was sentenced to terms of 15–27 months for each of the possession charges, and terms of 9–20 months for each of the maintaining a dwelling charges. The sentences were suspended and Defendant was placed on 30 months supervised probation.

Defendant was subsequently indicted on 7 October 2013 for felony possession of stolen goods and was charged as a habitual felon. Prior to sentencing, Defendant reached a plea agreement with the State to plead guilty and admit to violating his parole in exchange for sentencing in the mitigated range and an agreement that his activated sentences would run concurrently to "any sentence under this plea and all other sentences he is serving." Judge Jeffrey P. Hunt of the Buncombe County Superior Court accepted the plea deal on 8 May 2014.

However, it was subsequently discovered that unbeknownst to either defense counsel or the State, Defendant was serving active time for a conviction in Madison County. Under N.C. Gen. Stat. § 15A-1415(b)(8), a conviction as a habitual felon must run consecutively to any other sentence the person is serving. Defendant filed an unopposed motion for appropriate relief ("MAR") on 28 July 2015, asking that the 8 May 2014 plea agreement and judgments be stricken.

Before the court granted his MAR, Defendant negotiated a new plea agreement with the State. The MAR was granted by the trial court on 9 October 2015 and at the same hearing, Defendant pled guilty to possession of stolen goods and admitted violating the conditions of his probation. In return, the State agreed to drop the habitual felon charge and consolidated his four activated sentences into two judgments. Defendant was to serve 20–33 months for the possession of stolen goods charge consecutive with 15–27 months for the possession of a controlled substance charges and 9–20 months for the maintaining a dwelling charges, for a total sentencing range of 44–80 months[1].

[1] The District Attorney stated at the hearing that the State was willing to drop the habitual felon charge in order to "get[] [Defendant] about to where he originally – what the original bargain was." Defendant had already served 21 months for the Madison County sentence, and so an additional 44 months under this agreement brought him roughly to the 67 months that he would have served under the 8 May 2014 plea agreement.

Defendant now contends the trial court violated N.C. Gen. Stat. § 15A-1022(a)(6) by failing to inform him of the total maximum sentence under his plea agreement, and alleges as a result, his second guilty plea is involuntary.

II. Standard of Review

Whether the trial court violated N.C. Gen. Stat. § 15A-1022(a)(6) is a question of law. *See State v. DeMaio*, 216 N.C. App. 558, 564, 716 S.E.2d 863, 867 (2011). Questions of law are reviewed *de novo* on appeal. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468 (2009).

III. Analysis

a. Petition for Writ of Certiorari and State's Motion to Dismiss

The State argues, and the Defendant does not deny, that there is no appeal of right in this case. "[A] defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Under N.C. Gen. Stat. § 15A-1444(e), a defendant who has pled guilty and not moved to withdraw the plea is entitled to appeal as a matter of right only under a few limited circumstances. Appeals of right are preserved only when the minimum term of imprisonment falls outside the presumptive range for the defendant's prior record level and class of offense; when the defendant challenges his prior record level, the type of sentence disposition he has received, or the duration of his term of imprisonment; or when a

motion to suppress evidence was denied prior to defendant's entry of a guilty plea. N.C. Gen. Stat. §§ 15A-1444(a)(1), 15A-1444(a)(2), 15A-979(b) (2015). Defendant raises none of these issues.

Defendant's ability to appeal is limited to a petition for writ of certiorari to this Court. The North Carolina Rules of Appellate Procedure provide that such writs should only issue in extremely narrow circumstances. Rule 21 states that the writ should issue for review of appellate courts only where:

> the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for a review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (2016).

Our Supreme Court has recently held with respect to Rule 21 that "the General Assembly has given [the Court of Appeals] broad powers 'to supervise and control the proceedings of any of the trial courts of the General Court of Justice.'" *State v. Stubbs*, 368 N.C. 40, 43, 770 S.E.2d 74, 76 (2015) (quoting N.C. Gen. Stat. § 7A-32(c)(2015)). As a result, the Rules of Appellate Procedure "cannot take away jurisdiction given to [the appellate courts] by the General Assembly in accordance with the North Carolina Constitution." *Stubbs*, 368 N.C. at 44, 770 S.E.2d at 76.

Moreover, both this Court and the Supreme Court have previously held that "when a trial court improperly accepts a guilty plea, the defendant 'may obtain

appellate review of this issue only upon grant of a writ of certiorari.'" *State v. DeMaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011) (quoting *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987)); *see also* N.C. Gen. Stat. § 15A-1444(e) (2015) (a defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court with certain exceptions, "but he may petition the appellate division for review by writ of certiorari."). As the issue at bar directly concerns whether the trial court followed proper procedure in accepting Defendant's guilty plea, we grant certiorari, and deny the State's motion to dismiss.

b. Violation of N.C. Gen. Stat. § 15A-1022(a)

Defendant claims that the trial court violated N.C. Gen. Stat. § 15A-1022(a)(6) by failing to inform him of the total possible maximum sentence under the plea agreement, and alleges as a result, his second guilty plea is involuntary. We disagree.

When entering a guilty plea in a criminal case, due process requires that the defendant do so "voluntarily and understandingly," with a "full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 244, 23 L. Ed. 2d 274, 280 (1969). *See also State v. McNeil,* 158 N.C. App. 96, 103, 580 S.E.2d 27, 31 (2003) ("A defendant's plea must be made voluntarily, intelligently, and understandingly."); *State v. Richardson*, 61 N.C. App. 284, 288-89, 300 S.E.2d 826, 829 (1983) ("The key to determining whether a plea is voluntary and intelligent

is the defendant's awareness of the direct consequences of his plea."). This standard is codified in state law at N.C. Gen. Stat. § 15A-1022(a), which requires, *inter alia*, that a superior court judge accepting a defendant's guilty plea "address[] him personally and . . . [i]nform[] him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced . . . and of the mandatory minimum sentence, if any, on the charge." N.C. Gen. Stat. § 15A-1022(a)(6) (2015).

We have previously held that section 15A-1022(a)(6) only requires the trial court to "inform a defendant of the maximum possible sentence . . . on the charge or charges for which the defendant is being sentenced." *State v. Russell*, 153 N.C. App. 508, 510-11, 570 S.E.2d 245, 248 (2002). Moreover, while section 15A-1022 applies to any proceeding in which the trial court "accepts a plea of guilty or no contest from the defendant," N.C. Gen. Stat. § 15A-1022(a) (2015), our Supreme Court has recognized that a probation revocation hearing "is not a criminal prosecution." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 479 (1967). As a result, not only are the dictates of due process relaxed for such hearings, but the trial court is under "no requirement" to conduct the plea colloquy required by section 15A-1022. *State v. Sellers*, 185 N.C. App. 726, 728, 649 S.E.2d 656, 657 (2007).

In the instant case, while the Defendant's plea deal included provisions relating to the activation of his previously suspended sentences, the only charge for

which he was actually being sentenced was possession of stolen property. The record shows that the trial court complied with section 15A-1022(a)(6) with respect to this charge. The plea transcript (Form AOC-CR-300) signed by Defendant containing the details of the plea agreement shows that Defendant was correctly informed that the maximum possible sentence under this charge was 39 months. The trial court also informed the Defendant of this maximum possible sentence during the plea colloquy.

> THE COURT: You understand that you're pleading guilty to the following charge with the following maximum sanction, possession of stolen property with a maximum sanction of 39 months in custody?
>
> THE DEFENDANT: Yes, sir.

The trial court subsequently accepted Defendant's plea and sentenced him accordingly, before moving on to a separate hearing on the probation violations.

> THE COURT: It's the Court's judgment in 13-CRS-55149 the Defendant be sentenced as a Class H, prior record Level Six to an active sentence of between 20 and 33 months in the custody of the Division of Adult Corrections, and be taxed these court costs and attorney's fee. All right. Now as to the probation?

After hearing from the prosecutor and the defense attorney, the trial court found consistent with the plea deal that Defendant had waived his probation hearing and admitted to probation violations. He subsequently activated Defendant's suspended sentences, consolidated the judgments, and sentenced Defendant to serve the two activated sentences consecutive with the prison term for possession of stolen

property. It was at this point that the trial court advised Defendant that he would serve a "total of 44 months as a minimum sentence," which Defendant claims is error.

While such a statement may have entitled Defendant to relief if made during the plea colloquy, *see State v. Reynolds*, 218 N.C. App. 433, 437, 721 S.E.2d 333, 335-36 (2012) (vacating the defendant's plea where the trial court misstated the maximum sentence by three months), the record and transcript clearly show that the trial court's statement was made after the plea colloquy had concluded and during the portion of the hearing in which the trial court revoked Defendant's probation. As section 15A-1022(a)(6) only requires the trial court to "inform a defendant of the maximum possible sentence . . . on the charge or charges for which the defendant is being sentenced," *Russell*, 153 N.C. App. at 510-11, 570 S.E.2d at 248, we find no error.

c. Prejudice

This Court has "declined to adopt a strict, mechanical standard of compliance with the requirements of section 15A-1022." *State v. Salvetti*, 202 N.C. App. 18, 26-27, 687 S.E.2d 698, 704 (2010). "Failure to strictly adhere to the requirements of the statute, without more, does not entitle the defendant to have the judgment vacated." *Id*. at 27, 687 S.E.2d at 704. To gain relief, Defendant must show that he was prejudiced by the error: that he would have otherwise rejected the plea agreement had he been informed of his maximum sentence. *See, e.g.*, *id.* at 27, 687 S.E.2d at

704; *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000); *State v. Williams*, 65 N.C. App. 472, 479-80, 310 S.E.2d 83, 87-88 (1983).

In assessing whether Defendant was prejudiced, the Court "'must look to a totality of the circumstances' surrounding the acceptance of the plea 'and determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity.'" *Salvetti*, 202 N.C. App. at 27, 687 S.E.2d at 704 (quoting *Hendricks*, 138 N.C. App. at 670-71, 531 S.E.2d at 899). The trial court's error must have prejudiced the defendant to such an extent that there exists a "'reasonable possibility that a different result could have or would have been reached' had the error not occurred". *Id.* at 27, 687 S.E.2d at 704 (quoting *Williams*, 65 N.C. App. at 481, 310 S.E.2d at 88).

Here, there is nothing in the record indicating that the Defendant would not have pled guilty had he been informed of the maximum sentence that he could have served under each of the charges covered in the plea deal. Defendant signed the transcript of plea, the trial court personally addressed Defendant and confirmed that he read, understood, and had signed the transcript of plea, and verbally asked the Defendant each of the questions on the standard form transcript of plea. At no time during the hearing did Defendant express any hesitancy as to his decision to plead guilty, the agreement with the State, or his resulting sentence. Moreover, while not

dispositive on its own, it cannot be overlooked that this was the second time Defendant had pled guilty and admitted parole violations associated with this charge.

As a result, even had the trial court committed error, Defendant could not show that he was prejudiced, and as a result would not be entitled to relief. Accordingly, the trial court's order is

AFFIRMED

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).