IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-442

Filed: 6 December 2016

Wake County, No. 15 CR 220383

STATE OF NORTH CAROLINA

v.

CHRISTIAN REED MANNING

Appeal by Defendant from judgment entered 20 October 2015 by Judge Eric C. Chasse in Wake County District Court. Heard in the Court of Appeals 4 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tracy Nayer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, and Robinson Bradshaw & Hinson, P.A., by Andrew A. Kasper, for Defendant.[1]

STEPHENS, Judge.

This appeal by writ of *certiorari* presents the issue of whether the trial court complied with certain statutory requirements in accepting Defendant's guilty plea.

[1] The record on appeal, petition for writ of *certiorari*, and Defendant's primary brief in this appeal were filed by Kasper. On 11 July 2016, Kasper filed a motion to withdraw as counsel. On 13 July 2016, this Court allowed that motion. Katz, on behalf of the Appellate Defender, filed a reply brief for Defendant on 4 August 2016.

We agree that the trial court's colloquy failed to comply with the requirements, but conclude that those errors did not prejudice Manning.

Factual and Procedural Background

On 9 August 2015, in Wake County District Court,[2] Defendant Christian Reed Manning pled guilty pursuant to a plea agreement to two counts of obtaining property by false pretenses.[3] The Honorable Eric C. Chasse, Judge presiding, accepted Manning's plea following a colloquy regarding Manning's understanding of his constitutional and statutory rights:

> THE COURT: Thank you, Mr. Manning. Are you able to hear and understand me?
>
> MR. MANNING: Yes, sir.
>
> THE COURT: Do you understand that you have the right to remain silent, and anything you say can and will be used against you?
>
> MR. MANNING: Yes, sir.
>
> THE COURT: At what grade level can you read and write?
>
> MR. MANNING: 12th, sir.

[2] Under our General Statutes, a "district court has jurisdiction to accept a defendant's plea of guilty . . . to a Class H or I felony" in certain circumstances. N.C. Gen. Stat. § 7A-272(c) (2015). Obtaining property by false pretenses is a Class H felony. N.C. Gen. Stat. § 14-100(a) (2015).

[3] The charges against Manning arose from his alleged use of stolen credit and debit cards to purchase $400.00 in gift cards from a Walmart. Pursuant to the plea agreement, the State dismissed a related felony charge of unlawfully obtaining credit card information.

THE COURT: Are you now under the influence of alcohol, drugs, narcotics, medicines, pills or any other intoxicating substance?

MR. MANNING: No, sir.

THE COURT: When is the last time you used or consumed any such substance?

MR. MANNING: Probably [inaudible].

THE COURT: So, sometime in September of this year?

MR. MANNING: Yes, sir.

THE COURT: I'm going to make an amendment to the—to what's written on the brief. Have the charges been explained to you, sir, by your lawyer? Do you understand the nature of the charges and every element of each charge?

MR. MANNING: Yes, sir.

THE COURT: Have you and your attorney discussed the possible defenses, if there are any, to those charges?

MR. MANNING: Yes, sir.

THE COURT: *Are you satisfied with Ms. Visser*[4] *and her legal services?*

MS. VISSER: [inaudible]

THE COURT: Do you understand, Mr. Manning, that you have the right to plead not guilty and be tried by a jury? If you don't answer, if you'd speak up, so the—

[4] Celia V. Visser of the Wake County Public Defender's Office represented Manning at the plea hearing.

MR. MANNING: Yes.

THE COURT: —recording equipment can catch your voice. Thank you. I can see what you're doing; the tape recorder cannot. Do you understand that at a jury trial, you have the right to confront and cross-examine any witnesses against you?

MR. MANNING: Yes, sir.

THE COURT: At such a trial—strike that. Do you understand that by your plea today, you're [unintelligible] Constitutional rights relating to trial by jury, including rights related to sentencing and limitations on your right to appeal?

MR. MANNING: Yes, sir.

THE COURT: Do you understand that your plea of guilty may have had [unintelligible] biological evidence related to your case, if there is any, will be preserved?

MR. MANNING: Yes, sir.

THE COURT: Are you an American citizen, Mr. Manning?

MR. MANNING: Yes, sir.

THE COURT: Do you understand that upon conviction of a felony, you may forfeit any state licensing privileges that you have, in the event you're given a probationary judgment and that your probation is ultimately revoked?

MR. MANNING: Yes, sir.

THE COURT: *Do you understand that you're pleading guilty to two counts of obtaining property by false pretenses,*

> *those are class H felonies, punishable by up to 49 months in the Division of Adult Corrections each?*
>
> MR. MANNING: Yes, sir.
>
> THE COURT: Do you now personally plead guilty to those two charges?
>
> MR. MANNING: Yes, sir.
>
> THE COURT: And you are in fact guilty?
>
> MR. MANNING: Yes, sir.
>
> THE COURT: Do you agree to plead as part of a plea arrangement?
>
> MR. MANNING: [inaudible]?
>
> THE COURT: And you agree to plead as part of a plea arrangement? You have a deal with the State?
>
> MR. MANNING: Yes, sir.

(Emphasis added). The court determined Manning was a Prior Record Level II offender, consolidated the two offenses for judgment, and sentenced him to a term of 6 to 17 months imprisonment. Manning filed a written notice of appeal on 27 October 2015.

Petition for Writ of Certiorari

On 27 June 2016, Manning filed in this Court a petition for a writ of *certiorari*, seeking review of alleged errors in the trial court's acceptance of his guilty plea. As Manning acknowledges, by pleading guilty, he lost his statutory appeal of right. *See*

N.C. Gen. Stat. § 15A-1444(e) (2015) ("Except as provided in subsections (a1) and (a2) of this section and [section] 15A-979 [pertaining to appeals from motions to suppress], and except when a motion to withdraw a plea of guilty or no contest has been denied, the 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 . . ., but he may petition the appellate division for review by writ of *certiorari*. . . .") (italics added). The practice and procedure of *certiorari* review is governed by Rule of Appellate Procedure 21 which provides that the writ may be issued in this Court's discretion in three circumstances: (1) "when the right to prosecute an appeal has been lost by failure to take timely action"; (2) "when no right of appeal from an interlocutory order exists"; or (3) in order to "review . . . an order of the trial court ruling on a motion for appropriate relief." N.C.R. App. P. 21(a)(1).

Manning cites our Supreme Court's opinion in *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987), as establishing the propriety of issuing a writ of *certiorari* to obtain review of his arguments of error in the acceptance of his guilty plea. We find Manning's reliance on *Bolinger* unavailing. In that case, the Court first reviewed each of the three circumstances listed in section 15A-1444(e) and explained that none applied to the defendant's situation, before observing:

> Thus, according to [section] 15A-1444[, the] defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea. [A d]efendant may obtain appellate review of

> this issue only upon grant of a writ of *certiorari*. Because [the] defendant in the instant case failed to petition this Court for a writ of *certiorari*, he is therefore not entitled to review of the issue.
>
> Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of [the] defendant's contention.

Id. at 601-02, 359 S.E.2d at 462. We find this language ambiguous on the question of whether this Court has authority under Appellate Rule 21 to issue a writ of *certiorari* to review the arguments regarding the acceptance of a guilty plea.

In its response to Manning's petition, the State observes that the basis for Manning's petition does not fall into any of the circumstances enumerated in Appellate Rule 21 and cites this Court's recent opinion in *State v. Biddix*, __ N.C. App. __, 780 S.E.2d 863 (2015),[5] for the proposition that, notwithstanding the express language of section 15A-1444(e), a defendant may not seek *certiorari* review pursuant to Appellate Rule 21 following entry of a guilty plea.

As noted in *Biddix*, the apparent tension between Appellate Rule 21 and section 15A-1444(e) has resulted in two conflicting lines of precedent in this Court, with a number of cases holding that we lack authority to issue the writ:

> ". . . . In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without

[5] On the basis of a dissent by Geer, J., *Biddix* is under review by our Supreme Court. The Court heard oral argument in the case in August 2016, but, as of the date this opinion is filed, no opinion has been issued.

> authority to issue a writ of *certiorari* except as provided in Rule 21." *State v. Jones*, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003) (citations omitted); *see also State v. Nance*, 155 N.C. App. 773, 775, 574 S.E.2d 692, 693-94 (2003) (citations omitted) ("[The d]efendant does not have a right to appeal the issue presented here under G.S. § 15A-1444(a)(a1) or (a)(a2), and this Court is without authority under N.C. R. App. P. 21(a)(1) to issue a writ of *certiorari*."); *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (holding where [the] defendant entered a guilty plea, this Court is "without authority to review either by right or by *certiorari* the trial court's denial of [the] defendant's motion to dismiss the habitual felon indictment or [the] defendant's assertion the judgment violates his constitutional rights"); *State v. Dickson*, 151 N.C. App. 136, 138, 564 S.E.2d 640, 641 (2002) ("[T]his Court is without authority to issue a writ of *certiorari*" where the defendant had no statutory right to appeal from his guilty plea, and "had not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3)."); *accord State v. Ledbetter*, __ N.C. App. __, __, 779 S.E.2d 164, 2015 N.C. App. LEXIS 906, *10, 2015 WL 7003394, at *5-6 (N.C. Ct. App. Nov. 3, 2015), *State v. Miller*, __ N.C. App. __, __, 777 S.E.2d 337, 341 (2015); *State v. Sale*, 232 N.C. App. 662, 665-66, 754 S.E.2d 474, 477-78 (2014); *State v. Mungo*, 213 N.C. App. 400, 404, 713 S.E.2d 542, 545 (2011); *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008); *State v. Hadden*, 175 N.C. App. 492, 497, 624 S.E.2d 417, 420, *cert. denied*, 360 N.C. 486, 631 S.E.2d 141 (2006).

Id. at __, 780 S.E.2d at 866-67. Likewise, there are numerous

> cases in which prior panels of this Court issued a writ of *certiorari* to review issues pertaining to entry of the defendant's guilty plea, even though the defendant had no statutory right to appeal under N.C. Gen. Stat. § 15A-1444([e]). *See, e.g.*, *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004) (holding this Court could issue the writ

> of *certiorari* to review the defendant's challenge to the trial court's procedures employed in accepting his guilty plea); *State v. Demaio*, 216 N.C. App. 558, 563-64, 716 S.E.2d 863, 866-67 (2011) (holding this Court could issue the writ of *certiorari* to review the defendant's argument that his plea was not the product of informed choice); *see also State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011); *State v. Keller*, 198 N.C. App. 639, 641, 680 S.E.2d 212, 213 (2009); *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004); *State v. O'Neal*, 116 N.C. App. 390, 394-95, 448 S.E.2d 306, 310, *disc. review denied*, 338 N.C. 522, 452 S.E.2d 821 (1994).

Id. at __, 780 S.E.2d at 867. Fortunately, we need not resolve this conflict, because as this Court recognized in *Biddix*, Rule of Appellate Procedure 2 provides an alternative basis for review of the arguments raised by Manning:

> Appellate Rule 2 provides: To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions. . . . Under Appellate Rule 2, this Court has discretion to suspend the appellate rules either upon application of a party or upon its own initiative.
>
> Appellate Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances. This Court's discretionary exercise to invoke Appellate Rule 2 is intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions.

> . . . .
>
> This Court has previously recognized the Court may implement Appellate Rule 2 to suspend Rule 21 and grant *certiorari*, where the three grounds listed in Appellate Rule 21 to issue the writ do not apply.

Id. at __, 780 S.E.2d at 868 (citations and internal quotation marks omitted). In light of the conflicting case law regarding appellate review by writ of *certiorari* in the circumstances presented here, and mindful that our Supreme Court will shortly clarify the issue, we elect to invoke our discretion under Rule 2 to suspend the requirements of Rule 21, allow Manning's petition, and address the merits of his arguments.

Discussion

Manning argues that the trial court did not comply with certain statutory requirements in accepting his guilty plea. Specifically, Manning contends that the court failed to make the necessary inquiries under N.C. Gen. Stat. § 15A-1022 (a)(5) and (a)(6), and, further, that those errors prejudiced him. We agree that the trial court's colloquy failed to comply with both subsections. We conclude, however, that those errors did not prejudice Manning. Accordingly, we affirm the trial court's judgment.

Article 58 of our State's Criminal Procedure Act includes section 15A-1022, which provides, *inter alia*, that

> a [trial] court judge may not accept a plea of guilty . . . from the defendant without first addressing him personally and:
>
> . . . .
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation; [and]
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge . . . .

N.C. Gen. Stat. § 15A-1022(a) (2015). As reflected by the transcript quoted *supra*, the trial court here inquired about Manning's satisfaction with his trial counsel and informed Manning of the purported maximum sentence he faced. However,

> [o]ur Courts have rejected a ritualistic or strict approach in applying these standards and determining remedies associated with violations of [section] 15A-1022. Even when a violation occurs, there must be prejudice before a plea will be set aside. Moreover, in examining prejudicial error, courts must look to the totality of the circumstances and determine whether non-compliance with the statute either affected [a] defendant's decision to plead or undermine[d] the plea's validity.

State v. McNeill, 158 N.C. App. 96, 103-04, 580 S.E.2d 27, 31 (2003) (citations and internal quotation marks omitted). Thus, "the omission of this inquiry has been held to be harmless error if the record demonstrates that the defendant's plea was knowingly and voluntarily entered." *State v. Santos*, 210 N.C. App. 448, 451, 708 S.E.2d 208, 211 (2011) (citation omitted).

Regarding Manning's argument on appeal pursuant to subsection (a)(5)—that the trial court did not determine whether he was satisfied with his representation—we agree. The transcript of the plea hearing indicates that the trial court engaged in the inquiry required by section 15A-1022(a), but also reflects that the only person who responded to the inquiry regarding Manning's satisfaction with representation was not Manning, but rather *Manning's trial counsel*.

The State correctly notes that the hearing transcript as a whole shows that Manning stated that the charges he faced had been adequately explained to him, that he understood the nature of those charges, and that he and his trial counsel had discussed his possible defenses to those charges. Those inquiries may be relevant to the matters noted in subsections 15A-1022(a)(1)-(4), but they cannot serve as a substitute to compliance with the topic stated in subsection 15A-1022(a)(5). In matters of statutory construction, "[w]e are obligated to interpret all acts of the legislature so as to give meaning to *all* language used." *Yates v. New S. Pizza, Ltd.*, 330 N.C. 790, 804, 412 S.E.2d 666, 675 (citation omitted; emphasis in original), *reh'g denied*, 331 N.C. 292, 417 S.E.2d 73 (1992). Plainly, we cannot rely on a defendant's trial counsel to respond to this question in particular—whether the defendant is satisfied with his *counsel's performance*—on the defendant's behalf. Further, we cannot excuse the failure of the trial court to receive an answer to this inquiry simply because the written transcript of plea includes the written answer "yes" to the

question, "Are you satisfied with your lawyer's legal services?" The plain language of 15A-1022(a) provides that the superior court must make the inquiries to the defendant "personally[.]" N.C. Gen. Stat. § 15A-1022(a). Because the transcript shows that Manning gave no response whatsoever to the court's question about his satisfaction with his trial counsel, we hold that the trial court failed to comply with the requirements of section 15A-1022(a)(5). However, in light of the points noted by the State—to wit, that Manning's other answers reflected his understanding of the plea agreement, the charges against him, and the possible consequences of both, as well as his answers and signature on the written plea agreement—we conclude that he was not prejudiced by this error.

Regarding compliance with subsection 15A-1022(a)(6), Manning argues that he was prejudiced when the trial court erroneously informed him regarding the maximum punishment for each charge of obtaining property by false pretenses by *overstating* the maximum term as 49 months, rather than the accurate maximum term of 39 months. *See* N.C. Gen. Stat. § 15A-1340.17(c), (d) (2015) (setting forth statutory sentences by offense class); N.C. Gen. Stat. § 14-100(a) (providing that the offense of obtaining property valued at less than $100,000.00 by false pretenses is a Class H felony). The State correctly notes that, in the published cases in which this Court has found prejudice in an erroneous statement by the trial court regarding the maximum possible sentence, the error involved an *understatement* by the trial court.

See, e.g., *State v. Reynolds*, 218 N.C. App. 433, 434, 721 S.E.2d 333, 334 (vacating a guilty plea where the defendant "was misinformed, in that the trial court told him the maximum possible sentence would be 168 months[] imprisonment when, in fact, the maximum sentence was 171 months"), *disc. review denied*, 366 N.C. 219, 727 S.E.2d 285 (2012). The State further cites our unpublished decision in *State v. Vaughn*, 237 N.C. App. 100, 766 S.E.2d 699 (2014) (unpublished), *available at* 2014 N.C. App. LEXIS 1092, wherein we declined to vacate the defendant's guilty plea where he

> essentially argue[d] that because he got a better deal than he bargained for—267 to 330 months in prison, rather than a life sentence—we should stretch our holding in *Reynolds* to apply under the opposite circumstances[, to wit, the trial court's overstatement of the maximum possible sentence] and vacate his plea.

Id. at *10. We find *Vaughn* inapposite given that, in that case, we did not reach the issue of prejudice. Instead, we concluded "that the trial court did not err at all[,]" given that the maximum sentence stated by the court at the plea hearing, while not the maximum sentence that the defendant could have received in light of his Prior Record Level, was in fact "the theoretical maximum sentence that *any* defendant [i.e., with the highest possible Prior Record Level] could receive." *Id.* at *10-11 (emphasis added). Here, in contrast, the maximum purported sentence stated by the trial court was ten months longer than "the theoretical maximum sentence that any defendant

could receive" for a conviction on the charge of obtaining property by false pretenses. *See id.* at *11.

Manning cites another recent unpublished opinion in which this Court considered the issue of prejudice where the trial court erred by *overstating* the possible total maximum sentences for the charges included in the written transcript of the defendant's guilty plea. *See State v. Joe*, __ N.C. App. __, 787 S.E.2d 464 (2016) (unpublished), *available at* 2016 N.C. App. LEXIS 518. The defendant in *Joe* faced thirteen charges for a variety of drug and driving offenses, in addition to two habitual felon counts, *see id.* at *1-3, and therefore the sentencing possibilities were quite complicated. After noting that "the actual total maximum possible sentence of 727 months plus 220 days [was] considerably less than the 1,116 months plus 300 days [the] defendant was informed was possible[,]" the Court rejected the State's contention that the "error [did] not invalidate [the] defendant's plea and [the] defendant [could not] show how the error reasonably affected his decision to plead guilty." *Id.* at *21-22. As a result, the Court vacated the defendant's plea. *Id.* at *23. While unpublished opinions are not binding precedent, *see* N.C.R. App. P. 30(e)(3), Manning urges this Court to adopt the reasoning of *Joe* and vacate his plea.

We decline to do so because we find the reasoning regarding prejudice in *Joe* inapplicable to Manning's case in light of significant factual differences between what happened at each defendant's plea hearing. The Court in *Joe* concluded that the

defendant was prejudiced, not simply by the trial court's error in stating the maximum possible sentence, but rather because of the totality of multiple errors in the acceptance of his guilty plea:

> Given the substantial errors by the trial court in accepting [the] defendant's guilty plea in this case, including the trial judge's *failure to explain all of the charges* to [the] defendant due to the *omission of some charges from the written transcript of the plea* and the *failure to inform* [*the*] *defendant of the correct maximum possible sentences for many of the offenses* that were included in the written transcript of the plea, there is a reasonable possibility that [the] defendant did not understand the consequences of his plea and may have made a different decision if he was properly informed.

Id. (emphasis added).

Here, in contrast, the trial court correctly explained the charges against Manning and the transcript of plea which Manning signed was free of error. In informing Manning that he was subject to a maximum sentence of 49 months for each of the two charges to which he was pleading guilty—while the actual maximum sentence he faced for each offense was 39 months—the court overstated Manning's total maximum possible sentence by only 20 months or about 25%. This error was smaller both in absolute and percentage terms than that in *Joe*. In addition, Manning faced only two counts of the same offense, rendering his sentencing possibilities much less complex than those before the defendant in *Joe*. Finally, the written transcript of plea, which Manning signed, reflected the correct maximum sentences for the

offenses to which he was pleading guilty. Accordingly, we cannot say that Manning was prejudiced by the trial court's error in stating Manning's maximum possible sentence.

NO PREJUDICIAL ERROR.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).