IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1081

Filed: 6 August 2019

Guilford County, No. 16 CRS 31493

STATE OF NORTH CAROLINA

v.

ABACHE IBRAHIM, Defendant.

Appeal by defendant from judgment entered 5 April 2018 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 22 July 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

BERGER, Judge.

Abache Ibrahim ("Defendant") appeals from a judgment entered upon his conviction of driving while impaired ("DWI"). We find no error.

Factual and Procedural Background

Greensboro Police Officers M.L. Hukill and A.J. Muldowney cited Defendant for DWI on the morning of September 22, 2016. Defendant was tried and convicted in district court on May 31, 2017 and received an Aggravated Level One punishment of 36 months in the Misdemeanant Confinement Program, suspended, and 24 months of supervised probation with 120 days confinement as a condition of special probation. Defendant gave timely notice of appeal to superior court for a trial *de novo* pursuant to N.C. Gen. Stat. § 15A-1431(b)-(c) (2017).

In accordance with N.C. Gen Stat. § 20-179(a1)(1) (2017), the prosecution served Defendant with notice of aggravating and grossly aggravating factors on February 26, 2018. A jury found Defendant guilty of DWI on April 3, 2018.

At sentencing, the trial court found as grossly aggravating factors that Defendant had two prior DWI convictions within the seven years immediately preceding his current offense. The jury found as a third grossly aggravating factor that, at the time of the current offense, Defendant's driver's license was revoked for a prior DWI conviction pursuant to N.C. Gen. Stat. § 20-28(a)(1) (2017). Finding no mitigating factors, the trial court imposed an Aggravated Level One punishment of 36 months' active confinement in the Misdemeanant Confinement Program and a $5,000.00 fine. *See* N.C. Gen. Stat. § 20-179(c), (f3) (2017).

Analysis

In his lone argument on appeal, Defendant claims the sentence imposed by the

trial court resulted from the court's misapprehension of the applicable law. Based on a remark made by the court at the conclusion of the sentencing hearing, Defendant contends the court mistakenly believed that a 36-month active sentence is "what the law requires" for an Aggravated Level One punishment for DWI. We disagree.

Generally, the trial court has broad discretion when fashioning a sentence within the range of options authorized by statute for a criminal offense. *See State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001). However, "[w]hen a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) (concluding "[t]he trial court erred in ruling as a matter of law that it had no authority to give the jury written instructions" when the court "ha[d] inherent authority, in its discretion, to submit its instructions on the law to the jury in writing"); *see also State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) ("When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion."). "We review *de novo* allegations that a trial court has failed to recognize its discretion to act." *State v. Whitted*, 209 N.C. App. 522, 534-35, 705 S.E.2d 787, 795 (2011).

Defendant cites cases in which the sentencing court's statements evinced a mistaken belief that the court was required by statute to enter consecutive sentences, when in fact the court had discretion to run the defendant's sentences concurrently

or consecutively. *State v. Duffie*, 241 N.C. App. 88, 97, 772 S.E.2d 100, 107 (2015) ("remand[ing] for resentencing so the trial court may properly exercise its discretion in determining whether Defendant's sentences should run consecutively or concurrently"); *Nunez*, 204 N.C. App. at 170, 693 S.E.2d at 227 ("The trial court has the discretion to determine whether to impose concurrent or consecutive sentences. In the instant case, the trial court erroneously believed that it was mandated by law to impose consecutive sentences."). In the case *sub judice*, however, the trial court's statements do not indicate misunderstanding of its discretion with regard to Defendant's sentence.

The DWI sentencing statute provides the following requirements for an Aggravated Level One punishment:

> A defendant subject to Aggravated Level One punishment may be fined up to ten thousand dollars ($10,000) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 12 months and a maximum term of not more than 36 months. Notwithstanding G.S. 15A-1371, a defendant sentenced to a term of imprisonment pursuant to this subsection shall not be eligible for parole. However, the defendant shall be released from the Statewide Misdemeanant Confinement Program on the date equivalent to the defendant's maximum imposed term of imprisonment less four months and shall be supervised by the Section of Community Supervision of the Division of Adult Correction and Juvenile Justice under and subject to the provisions of Article 84A of Chapter 15A of the General Statutes . . . .
>
> The term of imprisonment may be suspended only if a condition of special probation is imposed to require the

> defendant to serve a term of imprisonment of at least 120 days. . . .

N.C. Gen. Stat. § 20-179(f3).

At sentencing, the trial court first heard from the prosecutor, who noted that

> defendant has continued to drive while his li[c]ense has been revoked. [H]e just was convicted of [DWI] a few months before the case before this Court; and . . . there is a 2017 [conviction] of him driving with his license revoked for the impaired revocation. And then this being his third [DWI] conviction.

Though acknowledging Defendant "has had some problems understanding the severity of driving after his conviction," defense counsel informed the court that Defendant "has tried to get treatment for some of his addictive issues. And he went to the Rigger (phonetic) Center and paid a lot of money to get himself dried out, . . . [and] has been trying to better himself, as far as abiding by our laws since [this incident]."

Defendant also chose to address the court. He complained he "had spent a huge amount of money" to pay his "tickets" and "get [his] license back" but "still ha[d] problems because there are things in the system" that he found "very confusing." The court responded as follows:

> THE COURT: Well, sir, why do you keep drinking and driving on the road? And why do you keep drinking alcohol and driving? And what is confusing about that?
>
> THE DEFENDANT: This time, this last time I had not been drinking.

THE COURT: And sir, I don't believe you. Based upon the evidence in this case, I don't believe you. Well, I was expecting to hear remorse and I did not. In any event, the Court, at this stage, based upon the previous findings, I will find that [there are] three grossly aggravating factors. . . .

And therefore based upon those findings, the Court is going to enter an aggravated Level 1 punishment. And because of those three grossly aggravating factors that apply to this defendant, Mr. Ibrahim, whatever you have done and whatever hard work you have done, nothing is an excuse for drunk driving over and over and over.

And . . . I believe in leniency in an appropriate circumstances. But on January 17, 2014, according to State's Exhibit Number 7, you were found guilty by the Court of drunk driving, and the Court put you on probation. And well that didn't work; and because just a few months later, on April 7, 2014, you were found guilty by the Court, and in that case that is set forth on State's Exhibit number 9 of a second count of impaired driving. But the Court worked with you and put you on probation, again.

And well, that didn't work, and because on September 22, 2016, you were caught drunk driving again. And sir, if we don't learn from history, we're doomed to repeat it and you have shown that probation does not work for you. And everybody knows three strikes and you are out. And this is the third. And not the first, and not the second, but the third driving while impaired conviction you have had in the span of two and-a-half years.

And from the record, from what turned out to be the uncontradicted record and evidence in this case, you continued to drive repeatedly when you knew that your Driver's License was revoked. *And the maximum sentence in this case is 36 months, and I will order you to serve 36 months*. And the Court will impose a $5,000 fine.

(Emphasis added). *See* N.C. Gen. Stat. § 20-179(f3). The court thus expressed its intention to impose "the maximum sentence" for Defendant's offense and explained its reasons for doing so.

After pronouncing defendant's sentence, the trial court turned to the issue of his court-appointed attorney's fee. Defense counsel advised the court that her hours representing defendant in district and superior court resulted in total fees of $1,046.00. The court then addressed defendant again as follows:

> THE COURT: . . . Okay. And Mr. Ibrahim, I will assess an attorney's fee of $1,046. And do you find that fee to be fair and reasonable for the services of your attorney?
>
> THE DEFENDANT: Please repeat?
>
> THE COURT: Yes.
>
> THE DEFENDANT: If I can work?
>
> THE COURT: No, my question is do you find it to be fair and reasonable?
>
> THE DEFENDANT: It depends on the law.
>
> THE COURT: All right. And sir, stop being evasive with the Court. And I am asking you, and I am not allowing you to go out and work. *And you are going to serve 36 months, and pursuant to what the law requires*. And nevertheless, do you find $1,046 a fair and reasonable attorney fee for what your attorney did in this case?
>
> THE DEFENDANT: Is this lady here my lawyer? Yes. Yes.

> THE COURT: All right. I will assess $1,046 for an attorney's fee, plus court cost, all of which to be assessed against the defendant.

(Emphasis added).

Viewed in context, the trial court's statement was a response to Defendant's conditioning of his approval of his counsel's fee on being allowed to work. The trial court replied that, rather than working, Defendant was "going to serve 36 months, and pursuant to what the law requires." Among the law's requirements, for example, are the provisions in Section 20-179(f3) that Defendant would not be eligible for parole but would be released from confinement and onto post-release supervision four months before the expiration of his sentence. Defendant's attempt to isolate a single phrase uttered by the court during evasive responses from Defendant to show the court incorrectly believed it was required to impose a 36-month sentence is belied by the court's earlier statements about its sentencing decision. *See State v. Hardy*, 250 N.C. App. 225, 231, 792 S.E.2d 564, 567-68 (2016) (rejecting the defendant's claim that the trial court failed to conduct a de novo resentencing hearing where "a broader reading of the re-sentencing hearing transcript" showed otherwise).

This Court will "presume that the trial court knows and follows the applicable law unless an appellant shows otherwise." *State v. Jones*, ___ N.C. App. ___, ___, 816 S.E.2d 921, 924 (2018). As defendant has failed to rebut this presumption, we hold he received a fair trial free from prejudicial error.

NO ERROR.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).