IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1287

Filed: 2 July 2019

Lincoln County, No. 16 CRS 52376, 17 CRS 161

STATE OF NORTH CAROLINA

v.

JAMES WHITE BUNCH

Appeal by defendant from judgment entered 26 June 2018 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Juliane L. Bradshaw, for the State.

Michael E. Casterline for defendant-appellant.

TYSON, Judge.

James White Bunch ("Defendant") appeals from judgment entered after a jury returned a verdict convicting him of possession of a firearm by a felon. We find no error.

I. Background

At approximately 6:00 a.m. on 19 July 2016, Lincoln County Sheriff's Deputy Travis Williams responded to a call about a vehicle parked on the side of U.S. Highway 321 in Lincoln County. Deputy Williams pulled behind the vehicle and observed Defendant walking behind the car, holding a flashlight and a duffel bag. Defendant told Deputy Williams he was on the way to Charlotte when the front tire of the car had fallen off. Defendant stated his phone's battery was dead, and he was unable to call for assistance. Deputy Williams offered to take Defendant to a nearby gas station. Defendant requested to bring his duffel bag with him.

Deputy Williams patted down Defendant to check for weapons prior to Defendant getting into the patrol vehicle. Deputy Williams asked Defendant to open his duffel bag. Defendant pulled out a black 9-millimeter handgun. Deputy Williams knocked the gun out of Defendant's hand. Defendant purportedly said, "Man, it's just a BB gun." Another deputy on the scene unloaded 9-millimeter ammunition from the weapon. Deputy Williams detained Defendant. Further investigation revealed Defendant was a convicted felon. The handgun had not been reported as being stolen or involved in criminal activity.

Defendant was indicted by a grand jury for possession of a firearm by a felon and having attained habitual felon status. The case proceeded to trial. At the conclusion of the State's case, Defendant made a motion to dismiss, which was denied.

Defendant conferred with his attorney whether to present evidence, and a bench conference was held. The trial court conducted a colloquy with Defendant to ascertain whether he understood the implications of offering testimony. During this colloquy, the trial court told Defendant:

> THE COURT: All right. Additionally, [the State] and [defense counsel] requested at the bench that if -- which happens in every case -- okay? This isn't unique to yours -- that if you chose to plead guilty at this stage in the process, what would I do to you, what would my sentence be. And I indicated to [defense counsel] that should you choose to do that, I would sentence you at the very bottom of the mitigated range, the lowest you can get. That sentence would run consecutive to the active sentence that you're serving now. And that's how that would be handled.
>
> Now, does that mean that you'd get a different sentence if you exercised your right to have a trial? No. It just means that sentencing [is] in my discretion and I can do basically what I think is appropriate at that time. That means you could get more time. It means you could get the same or you may get something in between, if you're found guilty. But, again, if you're found not guilty, you don't have to worry about the sentence. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. What questions do you have for me?
>
> THE DEFENDANT: I have no questions. I fully understand everything you said.
>
> THE COURT: Okay. And is it your decision that you wish to testify in this case?
>
> THE DEFENDANT: Yes.

Following the trial court's inquiry, Defendant took the stand and testified he had started walking toward an exit where a gas station was located after his car had broken down. He stated the vehicle did not belong to him; he had borrowed it from his sister's girlfriend. When Defendant began walking toward the exit, he only took his phone, phone charger, the car keys, his wallet, and a flashlight. When he saw Deputy Williams pull over, Defendant returned to the disabled vehicle.

Defendant described a verbal altercation between him and Deputy Williams concerning the vehicle remaining on the side of the road. Defendant stated the deputies grabbed his arm, walked him toward a patrol vehicle, and searched him. Defendant was then put in handcuffs and placed into the back of a patrol vehicle.

While Defendant was inside the patrol vehicle, the deputies took the car keys and searched the disabled car. They took the duffel bag out of the back seat, took it to the back of another patrol vehicle, and then placed it inside the disabled car's trunk. Defendant asserted the gun was not his, he never saw or possessed the gun at the scene, and the first he knew about the gun was when he was brought before the magistrate. Defendant offered no other witness testimony or evidence.

The jury found Defendant to be guilty of possession of a firearm by a felon. Defendant gave oral notice of appeal. He then pled guilty to having attained habitual felon status. Defendant was sentenced in the presumptive range to an active term of 101 to 134 months imprisonment.

II. Jurisdiction

An appeal of right from a final judgment in the superior court lies to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issue

Defendant argues the trial court improperly based its sentencing determination on Defendant's decision to reject a guilty plea and testify.

IV. Standard of Review

"A sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "The imposition of the minimum sentence under the sentencing guidelines is within the discretion of the trial court." *State v. Oakes*, 219 N.C. App. 490, 498, 724 S.E.2d 132, 137 (2012).

However, if the trial "court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Boone*, 293 N.C. at 712, 239 S.E.2d at 465. "The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *State v. Pinkerton*, 205 N.C. App. 490, 498, 697 S.E.2d 1, 6 (2010), *rev'd per curiam for the reasons stated in the dissenting opinion*, 365 N.C. 6, 708 S.E.2d 72 (2011). We review this issue *de novo*. *See id.*

V. Analysis

A "criminal defendant may not be punished at sentencing for exercising [his] constitutional right to a trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). However, the record in this case does not indicate Defendant was punished for not accepting or agreeing to plead guilty. As such, this case is easily distinguished from those cited by Defendant where our appellate courts have found error to award a new trial.

During pretrial motions, the trial court in *State v. Young* indicated it would sentence the defendant in the mitigated range if he pled guilty before trial. *State v. Young*, 166 N.C. App. 401, 411, 602 S.E.2d 374, 380 (2004). The trial court continued and stated: "[the defendant] would definitely get a sentence in the presumptive range. I probably wouldn't go back to the mitigated range since I'm offering this now prior to trial, but I'll let you think about it, unless you already know that he's not interested in it." *Id.* at 412, 602 S.E.2d at 380.

The defendant chose to go to trial, and the jury found him to be guilty. *Id.* At the sentencing hearing, the trial court told defense counsel: "I believe I previously indicated what the Court's position would be at sentencing, but I'll still consider whatever you have to say." *Id.* This Court concluded it could be "'reasonably inferred' on this record that defendant's sentence was based, at least in part, on his refusal to plead guilty and to instead pursue a jury trial, defendant [was] entitled to a new sentencing hearing." *Id.* at 412, 602 S.E.2d at 381 (citation omitted).

In *Boone*, the trial court "indicated in chambers to the defendant's counsel [its] intentions to give to the defendant an active prison sentence if he persisted in his plea of not guilty and did not accept a lesser plea proffered by the Assistant District Attorney." *Boone*, 293 N.C. at 712, 239 S.E.2d at 465. Our Supreme Court affirmed this Court's decision and remanded the matter for a new sentencing hearing, finding: "The trial judge may have sentenced defendant quite fairly in the case at bar, but there is a clear inference that a greater sentence was imposed because defendant did not accept a lesser plea proffered by the State." *Id.*

Unlike in both *Young* and *Boone*, nothing in the record leads to a "reasonable inference" the trial court punished Defendant for not accepting a plea. Instead, the colloquy with Defendant occurred after the State had rested and Defendant's motion to dismiss had been denied, and prior to Defendant presenting evidence. This conversation is best characterized as the trial court ensuring Defendant "fully understood the possible ramifications of his" options moving forward. *See State v. Tice*, 191 N.C. App. 506, 513, 664 S.E.2d 368, 373 (2008). It is well established that "a trial judge does not err by simply engaging in a colloquy with a criminal defendant for the purpose of ensuring that the defendant understands and fully appreciates the nature and scope of the available options[.]" *Pinkerton*, 205 N.C. App. at 504, 697 S.E.2d at 10 (Hunter, J., dissenting).

VI. Conclusion

Nothing in the record indicates the trial court had predetermined how Defendant would be sentenced or sought to punish him for exercising his right to a jury trial. The only colloquy related to sentencing is best characterized as providing Defendant with the full scope of his available options. *See id.*

Defendant's sentence was supported by the evidence and was imposed within the presumptive range. We find no error in the jury's verdict or in the trial court's judgment and sentence entered thereon. *It is so ordered.*

NO ERROR.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).