An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-220

Filed: 15 September 2020

Pitt County, No. 19 CRS 57656

STATE OF NORTH CAROLINA

v.

JAMES KLAUS BARROW

Appeal by defendant from judgment entered 13 November 2019 by Judge Leonard L. Wiggins in Pitt County Superior Court. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna A. Hart, for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Defendant James Klaus Barrow pleaded guilty in superior court to the charge of robbery with a dangerous weapon. He argues on appeal that the trial court erred in denying his motion to withdraw his guilty plea. After careful review, we affirm.

Background

The State's summary of the factual basis for Defendant's plea, and the warrant for Defendant's arrest, tended to show that on the morning of 4 October 2019, Defendant approached an elderly couple at a McDonald's and asked if they would give him a ride. The couple agreed, and Defendant got into the back seat of their 2008 Ford Explorer. The husband was in the driver's seat and the wife was in the front passenger seat. As they were driving, "Defendant produced a box cutter, and said . . . 'Give me all your damn money.' " He began swinging the box cutter and cut the husband's ear. The husband and wife left their wallets and one of their watches, and escaped by getting out of the stopped vehicle in the middle left turn lane of a public highway. Defendant moved into the driver's seat and drove away.

Surveillance footage revealed that Defendant arrived at McDonald's in an Uber. Officers detected the Uber's license plate number from the surveillance footage, and contacted the Uber driver to learn where he picked up Defendant. The officers used this information to locate Defendant and determine his identity. On 25 October 2019, a magistrate issued a warrant for Defendant's arrest for robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, and larceny of a motor vehicle. Defendant was arrested shortly thereafter. On 13 November 2019, the State charged Defendant with robbery with a dangerous weapon pursuant to a bill of information.

That same day, the State and Defendant entered into a plea agreement, pursuant to the terms of which Defendant agreed to plead guilty to the charge of robbery with a dangerous weapon in exchange for the State's agreement to dismiss six other pending charges, and to "stipulate to a mitigating factor for purposes of sentencing." Defendant appeared for a plea hearing in Pitt County Superior Court before the Honorable Leonard L. Wiggins. Defendant pleaded guilty to robbery with a dangerous weapon, and the trial court conducted a plea colloquy in accordance with section 15A-1022 of our General Statutes, which included the following:

> THE COURT: You agree to plead guilty as part of a plea arrangement, and that is, in exchange for your plea of guilty, the State is going to dismiss other charges shown on the transcript that are now pending at the District Court level. Also the State will stipulate to a mitigating factor for purposes of sentencing. Is this correct [as] being your plea arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you now personally accept this arrangement?
>
> THE DEFENDANT: Yes, sir.

Following the plea colloquy, the trial court found that there was a factual basis for the entry of Defendant's guilty plea, and stated that "Defendant's plea is hereby accepted by the [c]ourt and is ordered recorded."

Defense counsel then addressed the trial court regarding sentencing. Counsel requested that the trial court sentence Defendant in the mitigated range or "mitigate

the matter for ASR [Advanced Supervised Release] sentencing range in regard[ ], if not – if the [c]ourt does not see fit for mitigated, I understand that." The trial court declined this request and informed Defendant that he would be sentenced in the presumptive range.

Upon hearing this, Defendant moved to withdraw his guilty plea. The trial court denied the motion, and sentenced Defendant to an active term of 67-93 months' in the custody of the North Carolina Division of Adult Correction.

Defendant gave timely notice of appeal in open court.

Discussion

I. Appellate Jurisdiction

It is firmly established that "where a defendant . . . move[s] to withdraw [a] guilty plea in the trial court, [the defendant] has an appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444(e)." *State v. Zubiena*, 251 N.C. App. 477, 484, 796 S.E.2d 40, 45-46 (2016) (citation omitted); *accord State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) ("[W]hen a motion to withdraw a plea of guilty or no contest has been denied, the defendant is 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.").

Here, because Defendant moved to withdraw his guilty plea before the trial court, he is entitled under section 15A-1444(e) to appellate review of the judgment

entered against him. Defendant timely noticed his appeal, and thus, this Court has jurisdiction to review his case.

II. Standard of Review

"Our standard of review for the right to withdraw a pre-sentence guilty plea is whether, after conducting an independent review of the record and considering the reasons given by the defendant and any prejudice to the State, it would be fair and just to allow the motion to withdraw," following consideration of the relevant statutory provisions. *State v. Wall*, 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2004).

III. Analysis

Defendant argues that where "the parties agreed to a mitigated-range sentence in return for [his] agreement to plead guilty to the felony charge of robbery with a dangerous weapon," the trial court violated section 15A-1024 "by rejecting [his] bargained-for plea arrangement, denying his motion to withdraw his guilty plea, and imposing a sentence other than the sentence he had bargained for."

Section 15A-1024 provides:

> If at the time of sentencing, the judge for any reason determines to impose a sentence *other than provided for in a plea arrangement* between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2019) (emphasis added).

Here, the plea arrangement provided that "[i]n exchange for Defendant's plea of guilty to the offense(s) of [robbery with a dangerous weapon]—[S]tate will stipulate to a mitigating factor for a judgment in the mitiga [sic] range[.]" Six offenses were listed on the back of the AOC form. Despite the State's stipulation, the trial court sentenced Defendant in the presumptive range.

The relevant facts of this case are analogous to those in *State v. Blount*, 209 N.C. App. 340, 703 S.E.2d 921 (2011). There, in exchange for the defendant's guilty plea, the State agreed, *inter alia*, that it "shall not object to punishment in the mitigated range of punishment." *Blount*, 209 N.C. App. at 346, 703 S.E.2d at 926 (emphasis omitted). The trial court accepted the plea and sentenced the defendant in the presumptive range. *Id.* at 343, 703 S.E.2d at 924. The defendant argued on appeal "that the trial court, by sentencing him in the presumptive range rather than the mitigated range, 'did not honor his plea bargain' with the State." *Id.* at 346, 703 S.E.2d at 925. However, this Court held that the statutory mandate in section 15A-1024 was not triggered, reasoning that the plea arrangement "d[id] not provide for a mitigated-range sentence—only that the State would 'not object' to such a sentence. There was thus no agreed-upon sentence for the trial court to reject." *Id.* at 346, 703 S.E.2d at 926.

Likewise, the plea arrangement in the case at bar provides for no sentence that the State was obligated to secure for Defendant. The plea transcript provides that "in exchange for Defendant's plea of guilty to the offense(s) of [robbery with a dangerous weapon] – [*S*]*tate will stipulate to a mitigating factor* for a judgment in the mitiga [sic] range." (Emphasis added). For our purposes, there is no functional distinction between the State's agreement in *Blount* that it would not object to a sentence in the mitigated range, *id.*, and the State's agreement in the present case that it would stipulate to a mitigating factor for sentencing. Neither agreement "provide[s] for" a sentence that the State was obligated to secure for Defendant. N.C. Gen. Stat. § 15A-1024.

To be sure, the trial court is free to approve of a plea and sentence, reject a plea and sentence, or approve a plea and impose some other sentence. *See* N.C. Gen. Stat. §§ 15A-1023 & 15A-1024; *State v. Wallace*, 345 N.C. 462, 465, 480 S.E.2d 673, 675 (1997). But the provisions of section 15A-1024 cannot be violated unless the State agreed to the imposition of a specific sentence in the plea agreement. Because Defendant's plea agreement did not provide for an agreed-upon sentence, "[t]here was . . . no agreed-upon sentence for the trial court to reject." *Blount*, 209 N.C. App. at 346, 703 S.E.2d at 926. The trial court did not violate the requirements of section

15A-1024 in sentencing Defendant in the presumptive range. Defendant's sole argument on appeal is therefore overruled.[1]

Conclusion

For the foregoing reasons, the trial court did not err in imposing a sentence in the presumptive range rather than in the mitigated range. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).

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[1] Having established that Defendant's plea agreement did not specify a sentence at all, we necessarily conclude that he is not entitled to relief under section 15A-1024. However, there is case law indicating that "we must next consider whether it was manifestly unjust for the trial court to deny [Defendant's] motion to withdraw [his] guilty plea." *Zubiena*, 251 N.C. App. at 487, 796 S.E.2d at 48 (citing *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002), for the principle that "[i]f the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea upon a showing of manifest injustice"); *but see Blount*, 209 N.C. App. at 346, 703 S.E.2d at 926 (ending our analysis after determining that the defendant's plea agreement contained no agreed-upon sentence). Nevertheless, Defendant makes no argument on appeal that he suffered manifest injustice. By rule, we deem this potential argument abandoned. *See* N.C.R. App. P. 28(b)(6).