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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-373

Filed: 31 December 2020

Alamance County, Nos. 17 CRS 809, 50074

STATE OF NORTH CAROLINA

v.

MISTY DAWN AMORE

Appeal by Defendant from Judgments entered 23 July 2019 by Judge James P. Hill, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 17 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Zach Padget, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Misty Dawn Amore (Defendant) appeals from Judgments entered upon a guilty plea to four counts of Taking Indecent Liberties with a Minor and sentencing her

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under the statutory regime in effect for offenses committed prior to 1 December 2009.

The Record before us tends to show the following:

On 27 March 2017, an Alamance County Grand Jury indicted Defendant on: one count each of Rape of a Child by an Adult, Incest with a Person Under Thirteen and at Least Four Years Younger, Taking Indecent Liberties with a Child (collectively, 17 CRS 50074); and one count each of Sexual Offense with a Child by an Adult, and Taking Indecent Liberties with a Child (collectively, 17 CRS 809). The Indictments list the date range for the offenses as 1 September 2008 through 31 October 2009 for all charges. On 22 July 2019, Defendant was charged by information on two more counts of Indecent Liberties with a Child during the same date range.

The alleged victim and witness in this case was Defendant's biological son Adam.¹ During a 23 July 2019 session of Alamance County Superior Court, Defendant entered an Alford plea to four counts of Taking Indecent Liberties with a Child, and the State dropped the remaining charges. Defendant also stipulated the aggravating factor of Adam's very young age at the time of the offenses had been supported by the evidence beyond a reasonable doubt. Defendant's plea agreement stated Defendant would be sentenced at the "top of the aggravated range for Prior Record Level 2" for four consecutive active sentences. Defendant agreed there were

¹ We use a pseudonym to protect the minor child's identity.

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facts to support the plea agreement. She then consented to “the Court hearing a summary of the evidence” in the case.

The State recited the following as its factual basis:

The events leading to these indictments and bills of information became to, I guess began to be discovered around the end of 2016 when the defendant’s biological son, [Adam], whose date of birth is May 24, 2004 was [seen] by his cousin to be engaged in cunnilingus with his biological half-sister. At the time that this was discovered, the victim in this case, [Adam], was about 12 year[s] old and his sister I believe was 9. When confronted about the behavior, [Adam] admitted that he did that, and informed his father and stepmother that he had learned to do this from the defendant.

He disclosed upon further examination during a Child Medical Examination as well as the forensic interview that the defendant had taught him to engage in that behavior on her and upon his little sister. He disclosed that the defendant had engaged in fellatio with him on multiple occasions, and in sexual intercourse with him. She also encouraged him to perform similar acts upon his younger sister. Your Honor, these events would have occurred over an extended period of time. As indicated in the indictments and bills of information, they occurred when he was very young, as young as four or five years old, while the defendant would have been 37 years of age, approximately, while they were living in Alamance County.

My understanding is that he has not lived with his mother since 2014. We’ve chosen the four offenses based on a history given by [Adam], specifically for the act [of] fellatio that she performed upon him, the act of cunnilingus she made him to perform upon her, the sexual acts she made him perform upon his sister, and the act of sexual intercourse she engaged in with him. Realizing that the majority of these acts all satisfy a higher level of offenses, as well as satisfying the elements of indecent liberties.

We ask the Court to accept this plea in light of the victim’s fragile condition at this time and with the agreement of victim’s father and stepmother.

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When asked by the trial court, Defendant offered nothing as to the factual basis.

The trial court accepted Defendant's plea and her stipulation to the aggravating factor. The trial court then sentenced Defendant to four consecutive, active terms of 24 to 29 months imprisonment. These ranges reflect the sentencing chart for offenses committed between 1 December 1995 and 30 November 2009. N.C. Gen. Stat. §§ 15A-1340.17(c), (d) (2008) (Class F felony with a prior record level II in the aggravated range).

Issue

The dispositive issue in this case is whether the State's factual basis established that the offenses occurred during the time period alleged, for the purpose of sentencing Defendant in the statutory range for offenses committed prior to 1 December 2009.

Analysis

Defendant challenges her sentences of 24 to 29 months because she claims the State's factual basis did not establish the offenses occurred during the date range alleged in the Indictments. The General Assembly changed the sentencing regime applicable to Defendant's offenses and prior record level effective 1 December 2009 reducing the aggravated range from 24 to 29 months to 23 to 28 months. N.C. Gen. Stat. §§ 15A-1340.17(c), (d) (2009) (Class F felony with a prior record level II in the

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aggravated range). Thus, Defendant argues the trial court should have sentenced her under the more lenient regime. N.C. Gen. Stat. § 15A-1444(a2)(3) allows a defendant who has entered a guilty plea to appeal, as a matter of right, the issue of whether the sentence “[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17[.]” N.C. Gen. Stat. 15A-1444(a2)(3) (2019). Our standard of review for alleged sentencing errors is whether the evidence supports the sentence imposed. *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997).

Defendant contends there was sufficient ambiguity regarding the dates the offenses occurred, as alleged by the State, such that the trial court could not have found the offenses occurred on those dates. According to Defendant, her plea only established that the offenses occurred over a broader range of dates extending into the sentencing regime enacted by the General Assembly in 2009; therefore, the trial court should have sentenced Defendant under that more lenient regime.

When determining whether the factual basis for a plea supports a sentence, “[t]he trial judge may consider any information properly brought to [the judge’s] attention, but that which [the judge] does consider must appear in the record.” *State v. Barts*, 321 N.C. 170, 177, 362 S.E.2d 235, 239 (1987). N.C. Gen. Stat. § 15A-1022(c) states a judge may only accept a guilty plea if the judge determines there is a factual basis for the plea—the judge may base his or her determination on a number of sources including a “statement of facts by the prosecutor.” N.C. Gen. Stat. § 15A-

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1022(c)(1) (2019). “[H]owever, . . . where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment” *State v. Thompson*, 314 N.C. 618, 624, 336 S.E.2d 78, 81-82 (1985). Moreover, an indictment, plea transcript, and a defendant’s stipulation to a factual basis—taken alone—do not support a sufficient factual basis for sentencing when the trial court has “no actual description of the conduct giving rise to the charge[.]” *State v. Agnew*, 361 N.C. 333, 336-37, 643 S.E.2d 581, 583 (2007).

Here, at the plea hearing, the trial court considered more than just the Indictments, the transcript of Defendant’s plea agreement, and Defendant’s stipulation to the aggravating factor Adam was very young at the time the offenses occurred. The State also made a statement of its factual bases, including that the events “occurred when [Adam] was very young, as young as four or five years old” and that the State chose “the four offenses based on a history given by [Adam]” for certain specific acts. When given the opportunity to object to, add upon, or rebut any of the State’s factual bases, Defendant declined. Thus, the trial court heard actual descriptions of the conduct and timeline giving rise to the charges rendering the State’s factual bases sufficient. *See id.* (holding the trial court inappropriately accepted the guilty plea when the trial court heard no such description).

However, Defendant makes the nuanced argument that where the date of an offense is uncertain, and the evidence shows it may have fallen under more than one

sentencing regime, the trial court should sentence the defendant under the most lenient regime. Defendant cites our decision in *State v. Poston* to support her argument. *See generally State v. Poston*, 162 N.C. App. 642, 591 S.E.2d 898 (2004). In *Poston*, the defendant was charged with sex crimes against a minor for offenses in a date range of 1 June 1994 to 31 July 1994. *Id.* at 645-46, 591 S.E.2d at 901. The General Assembly replaced a previous sentencing regime with a new one effective 1 October 1994. *Id.* at 646, 591 S.E.2d at 901. The testimony at trial established that the offenses occurred when the victim was “around seven” years old. The victim turned seven on 8 October 1994. *Id.* at 651, 591 S.E.2d at 904. As such, we held the testimony conflicted with the date range in the indictment, and the testimony only supported “suspicion or conjecture” that the offenses occurred prior to 1 October 1994. *Id.* at 651, 591 S.E.2d at 904. Therefore, we held the factual basis did not support a sentence under the previous sentencing regime and remanded for resentencing under the more lenient regime. *Id.*

However, *Poston* is inapposite here. The State explained that the events upon which Defendant’s guilty pleas were predicated—based on a timeline of specific acts as related by Adam—occurred when Adam was four or five years old. Adam was born on 24 May 2004. Thus, when Adam was four years old, the 2008 sentencing regime was always in effect. Moreover, Adam did not turn five years old until May 2009, over six months prior to the more lenient 2009 sentencing regime taking effect.

Therefore, unlike in *Poston* where the victim did not turn seven years old until *after* the new sentencing regime went into effect, the factual basis for the plea in this case showed Adam was four and five years old *well before* the new sentencing regime took effect. Therefore, there was not ambiguity as to the dates of the offenses such that the evidence only supported “suspicion or conjecture” that the crimes occurred before the 1 December 2009 sentencing changes. The trial court had a sufficient factual basis to sentence Defendant under the 2008 regime. Therefore, the trial court did not err in sentencing Defendant under that regime.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court’s Judgments, including the sentences imposed upon Defendant.

AFFIRMED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).