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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-728

No. COA 20-776

Filed 21 December 2021

Craven County, No. 18 CRS 53396; 19 CRS 53231; 20 CRS 46

STATE OF NORTH CAROLINA,

v.

DONNIE CURTIS SAWYER, III, DEFENDANT

Appeal by defendant from judgment entered 20 February 2020 by Judge John Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 20 October 2021.

Kimberly P. Hoppin, for Defendant-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Dylan Sugar, for the State.

CARPENTER, Judge.

¶ 1 Donnie Curtis Sawyer, III (“Defendant”) appeals pursuant to N.C. Gen. Stat. § 15A-1444(e) from judgment entered after a guilty plea to charges of obtaining property by false pretenses, felony larceny, and possession of heroin. On appeal, Defendant argues the trial court erred by: 1) failing to give notice to Defendant of an opportunity to be heard on attorney’s fees, and 2) considering improper matters

during sentencing. After careful review, we agree with Defendant as to the issue of failure to provide notice of an opportunity to be heard on attorney's fees and disagree with Defendant as to the issue of improper considerations during sentencing.

I. Factual & Procedural Background

¶ 2

This case involves three separate incidents and subsequent charges. The first occurred between 30 September 2018 and 5 November 2018, when Defendant was hired by a veterinary hospital for a repair job, was paid \$4,405 for the job, and subsequently never completed any work, did not provide a refund, and did not communicate with the hospital. The second incident, on 2 July 2019, involved the theft of multiple items from Walmart totaling \$2,993.50. The third incident, which took place on 1 October 2019, involved Defendant's possession of heroin confiscated when officers lawfully stopped and arrested Defendant. In exchange for dismissing all related misdemeanor charges, Defendant agreed to plead guilty to three felony charges: obtaining property by false pretenses, felony larceny, and possession of heroin.

¶ 3

At sentencing, in response to defense counsel's request for the trial court to consider substance abuse treatment through Triangle Residential Options for Substance Abusers ("TROSAs"), the trial court made the following remarks:

I'm going to give him as much time as I can, because he's chosen to be a burden on society to both his mother, his wife, sister, or whoever else is here, along with everybody

around him in life. All right. He doesn't intend to succeed at TROSA anymore than he intended to do anything else. His—right now these charges are so serious that he's looking for any way he can get out and stay out.

....

And I think it's time. I think it's time. You just can't—you have been a terrible burden on society in every area that you have lived in, and you cost the people a lot of money and a lot of problems. So there's no way that you can expect this Court to help you.

¶ 4 Defendant was found to be a prior record level VI felon based, *inter alia*, on one class E felony conviction, two class H felony convictions, one class I felony conviction, and twelve class one misdemeanor convictions dating back 26 years. As such, the trial court sentenced Defendant to a term of 20 to 33 months on the obtaining property by false pretenses offense, a consecutive term of 20 to 33 months on the larceny offense, and a consecutive term of 10 to 21 months on the possession of heroin offense. At the end of sentencing, defense counsel noted five hours accounting for attorney's fees, and the transcript indicates no further discussion on the subject. Defendant filed his petition for writ of certiorari on 16 February 2021.

II. Jurisdiction

¶ 5 This Court has discretionary jurisdiction to address Defendant's petition pursuant to N.C. Gen. Stat. § 15A-1444(e) (2019). *See also State v. Posner*, 857 S.E.2d 870, 872; 2021-NCCOA-147, ¶ 7 (“The General Assembly has given this Court jurisdiction to issue a writ of certiorari in aid of its own jurisdiction.”).

Notwithstanding our broad grant of jurisdiction, “[a] petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Rouson*, 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (2013).

¶ 6

Here, Defendant has shown merit and sufficient cause to warrant granting his petition, particularly regarding the imposition of attorney’s fees without an opportunity for Defendant to be heard or the trial court providing notice of such opportunity. In addition, Defendant argues North Carolina requires judges to provide defendants with an opportunity to be heard personally on attorney’s fees. The State concedes the trial court erred with regard to Defendant’s right to be heard on attorney’s fees. As such, and for reasons further set forth in the analysis below, we hold Defendant has shown sufficient cause that errors have occurred, and therefore, Defendant’s petition has merit. *See Rouson*, 226 N.C. App. at 563-64, 741 S.E.2d at 471. We grant Defendant’s petition for certiorari.

III. Issues

¶ 7

The issues on appeal are whether the trial court erred by: (1) failing to provide Defendant notice of his opportunity to be heard with respect to attorney’s fees, and (2) considering improper matters during sentencing.

IV. Standard of Review

¶ 8

“Whether the trial court gave a defendant adequate notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney is a question of law we review *de novo*.” *State v. Patterson*, 269 N.C. App. 640, 646, 839 S.E.2d 68, 73 (2020) (internal quotations and citations omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted). Likewise, we review *de novo* arguments claiming the trial court based its sentencing on improper considerations. *State v. Pinkerton*, 205 N.C. App. 490, 498, 697 S.E.2d 1, 6 (2010), *rev’d on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011).

V. Analysis

A. Attorney’s Fees

¶ 9

Defendant argues the court erred by failing to provide Defendant notice of his opportunity to be heard during sentencing on attorney’s fees. Prior to the entry of a judgment for fees for court-appointed counsel,

trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

State v. Mayo, 263 N.C. App. 546, 549, 823 S.E.2d 656, 659 (2019) (quoting *State v. Friend*, 257 N.C. App. 516, 809 S.E.2d 902 (2018)).

¶ 10 Here, as the State concedes, there is no evidence in the transcript to support any argument Defendant was provided notice, was provided an opportunity to be heard, or waived any such opportunity. As such, this matter should be remanded for further proceedings to allow Defendant the opportunity to be heard as to the issue of attorney's fees in accordance with precedent. See *Mayo*, 263 N.C. App. at 549, 823 S.E.2d at 659.

B. Improper Consideration During Sentencing

¶ 11 Defendant next argues the trial court erred by considering improper matters during sentencing. Defendant, however, concedes his sentence falls within the presumptive range.

¶ 12 “A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). The presumption is overcome where “the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence” *Id.* at 712, 239 S.E.2d at 465. However, “in determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant.” *State v. Morris*, 60 N.C. App. 750, 754-55, 300 S.E.2d 46, 49

(1983). In fact, “to a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage.” *State v. Johnson*, 265 N.C. App. 85, 89, 827 S.E.2d 139, 142 (2019) (quoting *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991)).

¶ 13 We begin with Defendant’s concession the sentence falls within the presumptive range. A sentence within the presumptive range creates a presumption of validity, though the presumption is not conclusive. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465.

¶ 14 Next, we must determine if the trial court considered irrelevant and improper matters during sentencing. *See Morris*, 60 N.C. App. at 754-55, 300 S.E.2d at 49. Here, the record reflects the trial court considered Defendant’s character, propensities, habits, and criminal record when formulating his sentence. The trial court, per the transcript, discusses Defendant’s extensive criminal record and the burden placed on society as well as those around Defendant. The transcript reflects the trial court refrains from referring to anything outside of the scope of Defendant’s sentencing hearing, character, propensities, habit, record, or history. As *Morris* clearly states, such considerations are proper and within the purview of the trial court during sentencing. *See Morris*, 60 N.C. App. at 754-55, 300 S.E.2d at 49.

¶ 15 Defendant cites *State v. Swinney*, which is distinguishable from the present case. *State v. Swinney*, 271 N.C. 130, 155 S.E.2d 545 (1967). Defendant contends the trial court sentenced him based on matters outside the indictment, as in *Swinney*,

where a sentence was reversed based on the trial court's commentary during sentencing. *Id.* at 133, 155 S.E.2d at 548. *Swinney* focused on comments indicating that the trial judge, at least in part, based their sentence on the legal, but personally objectionable, decision to participate in a party where liquor was served. *Id.* at 133-34, 155 S.E.2d at 548. In the case at bar, the trial court makes no such deviation from Defendant's character, criminal record, or propensities. The trial court verbalized the impact of Defendant's past behavior and convictions on its sentencing decision after reviewing the evidence before it both in the case file and discussed at sentencing. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465. *See Also Morris*, 60 N.C. App. at 754-55, 300 S.E.2d at 49.

¶ 16 Defendant's reliance on *State v. Bozeman* is equally misplaced. *State v. Bozeman*, 115 N.C. App. 658, 446 S.E.2d 140 (1994). Defendant contends the trial court factored matters outside the record into the sentence, as in *Bozeman*, where a sentence was reversed based on the trial court's improper calculations. In *Bozeman*, the trial court explicitly referred to the involvement of the defendant's son, who was seventeen years old at the time, as an aggravating factor although the statute explicitly limited consideration to individuals under the age of sixteen. *Id.* at 665, 446 S.E.2d at 144-145. As a result, the defendant's sentence was longer than allowed by law and improper. *See Id.*, 446 S.E.2d at 145. Here, as Defendant concedes, the

sentence is within the presumptive range, and Defendant has made no showing that a different outcome would result absent the trial court's commentary.

¶ 17 Per the precedent set in *Morris*, the trial court is allowed to consider the character, propensities, and criminal record of Defendant, all of which was available to the trial court at sentencing. *See Morris*, 60 N.C. App. at 754-55, 300 S.E.2d at 49. Defendant cannot provide evidence he was improperly sentenced outside the statutory guidelines, or, absent the comments of the trial court, a change in sentencing would be warranted. Further, Defendant provides no evidence the trial court explicitly considered matters outside the scope of the sentencing hearing. Rather, the sentence—as Defendant concedes—is within the presumptive range and was limited to the longstanding, permissible factors a trial court may consider when determining the appropriate sentence for a criminal defendant. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465. *See also Morris*, 60 N.C. App. at 754-55, 300 S.E.2d at 49. As such, we find no error in the trial court's sentence.

VI. Conclusion

¶ 18 The State concedes, and we agree, the trial court committed error when it failed to provide Defendant with notice of his opportunity to be directly heard on the issue of attorney's fees. However, no evidence in the record establishes the trial court improperly considered matters outside of the evidence, as the trial court's statements

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reflect only a consideration of the character, propensities, habits, and criminal record of Defendant.

VACATED AND REMANDED IN PART, AFFIRMED IN PART.

Judges GRIFFIN and JACKSON concur.

Report per Rule 30(e).