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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-7

Filed 19 September 2023

New Hanover County, Nos. 19CRS2698, 19CRS51951-54

STATE OF NORTH CAROLINA

v.

CLARENCE DALEY

Appeal by defendant from judgment entered 3 May 2022 by Judge Joshua W. Willey Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 6 September 2023.

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

Michelle A. Liguori, for the defendant-appellant.

TYSON, Judge.

Clarence Daley (“Defendant”) appeals from the jury’s verdict and the judgments entered thereon for: two counts of possession with intent to sell and deliver cocaine; two counts of sale, delivery, or possession with intent to sell or deliver cocaine within one-thousand feet of a school or childcare center; and, two counts of knowingly

maintaining a dwelling for unlawful keeping or selling of cocaine. Our review discloses no error.

I. Background

Defendant is a fifty-two-year-old man who resided in Wilmington. Defendant admitted to law enforcement he was addicted to drugs and sold cocaine to support his addiction.

Tabitha Curie (“Curie”) also struggles with drug addiction. Curie began working as an undercover informant for law enforcement officers and participating in undercover drug buys in 2015. Curie received either reduced sentences on pending charges or financial compensation for her undercover work.

Curie reported to law enforcement that Defendant was purportedly a drug dealer. Curie testified she had purchased drugs from Defendant more than twenty times and several of her friends had also purchased drugs from Defendant.

Law enforcement officers scheduled for Curie to purchase two controlled buys of drugs from Defendant on 25 and 27 February 2019. Officers conducted a strip search of Curie at the station, provided her with cameras and funds to purchase the drugs, and dropped her off down the street from Defendant’s residence. Curie purchased approximately a quarter of a gram of cocaine during one of the undercover buys and approximately half of a gram of cocaine during the other buy from Defendant. A subsequent “trash pull” of trash and debris left outside of Defendant’s

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residence included bags with white residue that tested positive for cocaine and mail addressed to Defendant.

Arrest warrants for Defendant were issued and executed on 8 March 2019. Defendant waived his Miranda rights and voluntarily spoke with law enforcement. Defendant identified himself in still shot photographs extracted from the video footage recorded on Curie's body camera during the controlled buys. Defendant also admitted he had sold and used cocaine. Law enforcement officers did not ask whether he had sold cocaine to Curie on 25 and 27 February.

Defendant voluntarily met with law enforcement, in the presence of his attorney, about a month after he was arrested. Defendant answered law enforcement's questions regarding two deaths which had occurred near his residence. He also provided information about who he purchased cocaine from. He agreed to testify in court regarding any of the information he had provided to law enforcement.

On 10 June 2019, a grand jury indicted Defendant for duplicate offenses related to the controlled buys conducted on 25 and 27 February by Curie, including two counts each of: sale, delivery, or possession with intent to sell or deliver cocaine within one-thousand feet of a school or childcare center in violation of N.C. Gen. Stat. § 90-95(e)(8); possession with intent to sell and deliver cocaine in violation of § 90-95(a)(1); sale of cocaine pursuant to § 90-95(a)(1); delivery of cocaine pursuant to § 90-95(a)(1); and, knowingly or intentionally maintaining a dwelling for the unlawful keeping or selling of cocaine in violation of § 90-108(a)(7). Defendant was also

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charged with one count of possession of drug paraphernalia in violation of § 90-113.22 and attaining habitual felon status pursuant to § 14-7.1.

Before trial, the prosecution offered Defendant a plea deal. If Defendant would plead guilty to two counts of sale of cocaine, he would receive a sentence of 50 to 78 months of imprisonment and dismissal of his ten remaining charges. Defendant rejected the plea bargain, entered a plea of not guilty, and proceeded to trial.

Defendant's charge for possession of drug paraphernalia was dismissed before trial. On 5 May 2022, the jury convicted Defendant on all remaining charges. The court arrested judgment for two counts each of sale of cocaine and delivery of cocaine, as those elements were contained in some of the other charges of which Defendant was convicted. Defendant pleaded guilty to attaining habitual felon status after the jury returned its verdicts.

The trial court consolidated Defendant's charges into two separate sentences. Defendant was sentenced as a prior record level VI offender to an active term of 146 to 188 months for the following four felonies: two counts of possession with intent to sell and deliver cocaine and two counts of sale, delivery, or possession with intent to sell or deliver cocaine within one-thousand feet of a school or childcare center. Defendant also received a consecutive sentence of 120 days as a prior record level III offender for the two misdemeanor counts of knowingly maintaining a dwelling for the unlawful keeping or selling of cocaine. Defendant entered oral notice of appeal in open court at the end of trial.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021).

III. Trial Penalty

Defendant argues the trial court imposed an unconstitutional penalty for him going to trial by imposing a sentence three times longer than the sentence the State offered him in the plea deal before trial began. He asserts the State determined the level of punishment needed to address his conduct when deciding the terms of his plea deal.

He also argues the trial court abused its discretion by failing to mitigate his sentence pursuant to N.C. Gen. Stat. § 15A-1340.16 (2021).

A. Issue Preservation for Appeal

Our State's rules of appellate procedure require a defendant to make a timely request, objection, or motion to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1).

On appeal, “[p]reserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted).

This Court will only review an issue on appeal for plain error when a defendant has “specifically and distinctly contended” the contested action amounted to plain

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error. N.C. R. App. P. 10(a)(4). Additionally, plain error review is limited to instructional and evidentiary error. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (“Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.”).

“Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.” *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004) (citation omitted); *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010). “This is true even when a sentencing issue is intertwined with a constitutional issue.” *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018) (citations omitted).

“Statutory violations, however, are reviewable regardless of objections at the trial court.” *Tirado*, 358 N.C. at 571, 599 S.E.2d at 529 (citation omitted); *Davis*, 364 N.C. at 301, 698 S.E.2d at 67 (“It is well established that ‘when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.’” (citations omitted)).

Our General Assembly has designated certain asserted errors that “may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.” N.C. Gen. Stat. § 15A-1446(d) (2021). One issue statutorily preserved for criminal defendants without objection on appeal is whether “the sentence imposed was unauthorized at the time imposed, exceeded the maximum

authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.” N.C. Gen. Stat. § 15A-1446(d)(18); *Meadows*, 371 N.C. at 747, 821 S.E.2d at 406 (“Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court, subdivision (18) is not one of them.”).

B. Constitutional Argument

Defendant’s argument asserting the trial court imposed an unconstitutional penalty for his decision to proceed to trial was not preserved for appeal. *Tirado*, 358 N.C. at 571, 599 S.E.2d at 529; *Davis*, 364 N.C. at 301, 698 S.E.2d at 67; *Meadows*, 371 N.C. at 749, 821 S.E.2d at 407 (“Because defendant failed to argue to the sentencing court that the sentence imposed violates the Eighth Amendment, she may not raise that argument on appeal.”). Defendant failed to raise or argue before the sentencing court his sentence was an unconstitutional penalty for his decision to proceed to trial instead of pleading guilty. Defendant’s constitutional argument is not properly before us and is waived. *Id.*

C. Mitigating Factors

Defendant also argues the trial court abused its discretion by imposing a sentence within the presumptive range and failing to mitigate his sentence pursuant to N.C. Gen. Stat. § 15A-1340.16.

In the absence of Defendant’s failure to object at trial, this issue is preserved for appeal pursuant to N.C. Gen. Stat. § 15A-1446(d)(18). *See also Meadows*, 371 N.C.

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at 747, 821 S.E.2d at 406 (“[T]he sentencing court knew or should have known defendant sought the minimum possible sentence. Accordingly, defendant need not have voiced a contemporaneous objection to preserve her nonconstitutional [sic] sentencing issues for appellate review.” (internal quotation marks omitted)).

The sentencing court is required to make written findings of the aggravating and mitigating factors “only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2).” N.C. Gen. Stat. § 15A-1340.16(c). N.C. Gen. Stat. § 15A-1340.16(a) requires the sentencing court to “consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate,” but also provides “the decision to depart from the presumptive range is in the discretion of the court.” N.C. Gen. Stat. § 15A-1340.16(a).

Our Supreme Court addressed a similar argument, citing several of the cases Defendant relies upon in his brief:

Defendant’s argument that Judge Gavenus abused his discretion in sentencing her is similarly meritless. A sentence “within the statutory limit will be presumed regular and valid,” unless “the record discloses that the court considered irrelevant and improper matter[s] in determining the severity of the sentence.” *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citing and quoting *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)). Defendant here states that Judge Gavenus must have been influenced by defendant’s decision to take her case to trial because there is no other explanation for the harshness of the imposed sentence. Defendant’s conclusory accusation lacks any support in the record. Because there is no reason to believe Judge Gavenus was influenced by irrelevant or improper

considerations, the within-limits sentence imposed here is presumed proper.

Meadows, 371 N.C. at 748, 821 S.E.2d at 407.

The facts before us are similar to those in *Meadows*. The trial court sentenced Defendant within the presumptive range. Defendant may have received a shorter sentence, if he had accepted the State's plea bargain offer, but that fact alone does not establish the trial court punished Defendant for his decision to plead not guilty and proceed to trial. Defendant's imposed sentence is within statutory the presumptive range given his prior record level and habitual felon status, and any decision to depart from the presumptive range is within the trial court's discretion. N.C. Gen. Stat. § 15A-1340.16(a). Defendant has failed to show any abuse of discretion by the trial court, and his argument is without merit. *Meadows*, 371 N.C. at 748, 821 S.E.2d at 407.

IV. Conclusion

Defendant failed to preserve his argument regarding whether the trial court imposed an unconstitutional trial penalty after he rejected the State's plea bargain for review on appeal. *Tirado*, 358 N.C. at 571, 599 S.E.2d at 529; *Davis*, 364 N.C. at 301, 698 S.E.2d at 67; *Meadows*, 371 N.C. at 749, 821 S.E.2d at 407. Defendant's argument is waived.

Defendant's argument the trial court abused its discretion when sentencing him within the presumptive range is without merit. Any decision to depart from the

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presumptive range rests within the trial court's discretion. The record does not contain any evidence or inference the trial judge considered Defendant's decision to proceed to trial when sentencing him within the presumptive range. N.C. Gen. Stat. § 15A-1340.16(a); *Meadows*, 371 N.C. at 748, 821 S.E.2d at 407.

The disparity alone, between the State's pre-trial plea offer and recommendation and the presumptive sentence imposed on the jury's verdicts, does not show an abuse of discretion. The trial court retains the discretion to reject the State's plea agreement even with Defendant's agreement thereto. *See* N.C. Gen. Stat. § 15A-1023 (2021); *State v. Collins*, 300 N.C. 142, 149-50, 265 S.E.2d 172, 176-77 (1980) (explaining a "prosecutor had no authority to bind the State to the dispensation of a particular sentence in defendant's case until the trial judge had approved of the proposed sentence").

Defendant's charge for possession of drug paraphernalia was dismissed prior to trial. The trial court arrested judgment for the jury's convictions of two counts each of sale of cocaine and delivery of cocaine, as those elements overlapped with some of the other charges of which Defendant was convicted. Defendant pleaded guilty to attaining habitual felon status after the jury returned its verdicts. Defendant does not assert he was unaware of the potential sentences, if he was found guilty on all charges, particularly in light of his extensive prior record level and habitual felon status.

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Defendant's sentences are imposed within the presumptive ranges for crimes the jury convicted him of committing, less the four convictions for which the trial court arrested judgment, given his prior record level and status. Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. Defendant demonstrates no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).