

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1011

Filed: 7 April 2015

STATE OF NORTH CAROLINA

v.

Columbus County

Nos. 12 CRS 673-74

MARQUICE ALEXANDER ANTONE

Appeal by defendant from judgment entered 25 March 2014 by Judge Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 4 February 2015.

*Roy Cooper, Attorney General, by Peter Regulski, Assistant Attorney General, for the State.*

*Staples Hughes, Appellate Defender, and David W. Andrews, Assistant Appellate Defender, for defendant-appellant.*

STEELMAN, Judge.

Where the trial court failed to follow the statutory mandate to make findings on the absence or presence of any mitigating factors before sentencing a minor convicted of first degree murder not based upon the theory of felony murder, that sentence is vacated and this case is remanded for resentencing.

I. Factual and Procedural Background

In April 2012, Marquice Antone (defendant) was 16 years old and a ninth grade student at East Columbus High School in Columbus County. On 12 April 2012,

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defendant, with Kenneth Williams and Terrance Hazel, went to the home of defendant's uncle, Keith Gachett, in Hallsboro, to steal guns, jewelry, and pills. When defendant, Williams, and Hazel arrived at the home, defendant and Williams entered, while Hazel remained in the car. Gachett and his wife were both initially present, but Gachett's wife subsequently left. Defendant persuaded Gachett to let him shoot some of Gachett's guns. After spending some time with Gachett, defendant, Williams, and Hazel left, and planned to return and break into the house the following day.

On 13 April 2012, defendant, Williams, and Hazel returned to Gachett's house. Gachett answered the door and admitted them. Defendant pulled out a revolver and accidentally fired it. Gachett insisted that defendant, Williams, and Hazel leave. Williams testified that as they were leaving he heard a second shot. He then saw that defendant was holding the revolver and that Gachett was on the floor. In a police interview, defendant stated that he was outside when Gachett was shot, and that when he went back inside, Hazel was holding the gun.

Defendant, Williams, and Hazel took three rifles and two handguns from the house; Hazel also took a pink bag containing pills and jewelry. They later abandoned the handguns and two of the rifles.

Defendant was charged with robbery with a dangerous weapon and first degree murder. On 24 March 2014, a jury found defendant guilty of both offenses. The jury found defendant guilty of first degree murder based upon both felony murder and malice, premeditation and deliberation. Based upon the theory of malice,

premeditation and deliberation, the trial court was required to decide whether defendant was to be sentenced to life imprisonment without parole, or life imprisonment with parole pursuant to Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes. The trial court entered an order and subsequently a judgment sentencing defendant to life imprisonment without parole. Judgment was arrested on the robbery with a dangerous weapon conviction.

Defendant appeals.

## II. Sentence of Life Imprisonment Without Parole

In his first argument, defendant contends that the trial court erred by imposing a sentence of life imprisonment without the possibility of parole where it failed to identify any mitigating factors present in the case. We agree.

### A. Standard of Review

“The standard of review for application of mitigating factors is an abuse of discretion.” *State v. Hull*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 762 S.E.2d 915, 920 (2014).

### B. Analysis

When sentencing a minor who has been convicted of first degree murder that was not solely based on the theory of felony murder,

The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any

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mitigating factors and such other findings as the court deems appropriate to include in the order.

N.C. Gen. Stat. § 15A-1340.19C(a) (2013). This Court has held that “use of the language ‘shall’ is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.” *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citations omitted). Our Supreme Court has further held that mere recitations of evidence “cannot substitute for findings of fact resolving material conflicts.” *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983).

The mitigating circumstances a defendant may submit to the trial court pursuant to N.C. Gen. Stat. § 15A-1340.19B(c) are:

- (1) Age at the time of the offense.
- (2) Immaturity.
- (3) Ability to appreciate the risks and consequences of the conduct.
- (4) Intellectual capacity.
- (5) Prior record.
- (6) Mental health.
- (7) Familial or peer pressure exerted upon the defendant.
- (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
- (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2013).

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In the instant case, the trial court entered a one-page order containing the following findings of fact:

That at the time of the death of Keith Gachett, the defendant in this case had just turned 16 years old. That he was a ninth-grade student at East Columbus High School. That he was a good student, making As and Bs, and he participated in three sports at the high school. That his plans were to go to college and hopefully play sports. He attended church. That he had no prior record.

He lived with his mom. He was small in size. His father was in prison, and he didn't meet his dad until he was about ten years old. That his parents thought he was easily led by others. That he was not a member of a gang but that one of his friends was a gang member, and that was one of the three that went into the Gachett house. That he didn't have guns but his friends, at least one of the friends in this group, did have a gun. That he did play video games that involved guns. That he had started using marijuana when he was about age 15. That there were no mental health issues. That there was no question about his intellectual capacity. That he has shown today that he's shown remorse to the family of the deceased.

The Court finds there's insufficient mitigating factors to find life with parole, so the Court is giving the defendant life without parole. The order of my sentence is life without parole.

We hold that the trial court's findings of fact and order fail to comply with the mandate set forth in N.C. Gen. Stat. § 15A-1340.19C that requires the court to "include findings on the absence or presence of any mitigating factors[.]" The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not

address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.

We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.19B(c). *See Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951); *see also State v. Escobar*, 187 N.C. App. 267, 268, 652 S.E.2d 694, 696 (2007) (holding that “[a] trial court is not required to recite evidentiary facts in its findings of fact, but is required to make ‘specific findings on the ultimate facts established by the evidence’”). If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

We vacate the order and judgment of the trial court, and remand the case to the trial court for a new sentencing hearing on whether defendant should receive a sentence of life imprisonment without parole, or life imprisonment with parole.

### III. Evidence

In his second argument, defendant contends that the trial court abused its discretion by imposing a sentence of life imprisonment without parole, where the

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evidence supported a sentence of life with the possibility of parole. Because we have vacated the trial court's order and judgment, we do not reach this argument.

VACATED AND REMANDED.

Judges DIETZ and INMAN concur.