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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-256

Filed: 15 December 2015

Craven County, No. 11CRS055226, 12CRS053355, 12CRS054749-50, 12CRS054753-4, 13CRS050824-52, 13CRS050884-90, 13CRS050905-12, 13CRS050915-6.

STATE OF NORTH CAROLINA

v.

GREGORY DUSTIN HAMILTON, Defendant.

Appeal by Defendant from judgments entered 21 August 2014 and order entered 11 September 2014 by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 10 September 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Derrick C. Mertz, for the State.

Ryan McKaig for the Defendant.

DILLON, Judge.

Gregory Dustin Hamilton (“Defendant”) seeks review of judgments entered against him upon his pleas of guilty to a number of charges on the ground that the factual basis for his guilty pleas was insufficient, in violation of N.C. Gen. Stat. § 15A-1022(c) which states that a judge may not accept a plea of guilty of no contest “without first determining that there is a factual basis for the plea.” *Id.* We hold that the trial court properly determined that the factual basis for his guilty pleas was, indeed,

sufficient. However, as pointed out by the State, there is a clerical error in the written judgments; and we remand the case to the trial court to correct this error.

I. Procedural Background

Defendant was arrested for a rash of break-ins and was indicted on a litany of charges.

Defendant entered an *Alford* plea to 149 charges.¹

The trial court announced in open court a sentence of twenty-four (24) consecutive terms of eight to nineteen (19) months in prison and an additional sentence of eighteen (18) to nineteen (19) months to run concurrently therewith.

Within ten days of the judgments, Defendant filed a motion for appropriate relief (the “MAR”), arguing that the sentences were grossly disproportionate in violation of the Eighth and Fourteenth Amendments of the United States Constitution. He did *not* make any argument in his MAR regarding the sufficiency of the factual basis of his guilty pleas. The trial court denied the MAR.

II. Basis for Review

Defendant has noticed a direct appeal *and*, in the alternative, has filed a petition for writ of certiorari.

A. Defendant’s Direct Appeal

¹ Specifically, these charges consisted of fifty (50) counts of breaking or entering, forty-seven (47) counts of larceny after breaking or entering, forty-seven (47) counts of felony larceny, two counts of obtaining property by false pretenses, two counts of possessing stolen property, and one count of assault.

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Defendant's direct appeal is from *both* the judgments entered upon his guilty pleas *and* from the order denying his MAR. His petition for writ of certiorari seeks review of the judgments on the issue of whether the factual basis for his guilty pleas was sufficient.

The State has moved to dismiss the direct appeal. The State argues that Defendant has no statutory to right to appeal the judgments entered upon his guilty pleas. Further, the State argues that Defendant has not made any argument on appeal concerning the constitutional issue he raised in his MAR, but rather has limited his argument on appeal to whether there was a sufficient factual basis for his guilty pleas, an argument not raised in his MAR.

Under North Carolina law, "except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest[.]" N.C. Gen. Stat. § 15A-1444(e) (2014). Our Supreme Court, however, has held that a defendant does have a right of direct appeal when he has filed a motion to withdraw his plea and that motion has been denied. *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980). The Supreme Court has recognized this right to a direct appeal even where a defendant's motion to withdraw is, in fact, in the form of a motion for appropriate relief filed by the defendant after the judgment has been rendered. *Id.* See also *State v. Rankin*, 225 N.C. App. 532, 737 S.E.2d 191 (2013) (unpublished). Here, though,

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Defendant did not make any argument in his MAR regarding the only issue he has raised in his direct appeal, namely whether the factual basis of his guilty pleas was sufficient. Rather, he only raised constitutional arguments in his MAR, arguments he does not raise in his direct appeal to this Court. Therefore, Defendant failed to preserve in the trial court his sole argument on appeal. N.C. R. App. P. 10(a)(1). We decline to invoke Rule 2 of our Rules of Appellate Procedure to waive this requirement. Accordingly, we grant the State's motion to dismiss Defendant's direct appeal.

B. Defendant's Petition for Writ of Certiorari

Defendant, however, has also filed a petition for writ of certiorari asking this Court to address his argument concerning whether the factual basis of his guilty pleas was sufficient. The State has filed a response in opposition to Defendant's petition. We grant Defendant's petition for writ of certiorari pursuant to our authority granted by the General Assembly under N.C. Gen. Stat. § 7A-32(c). *See State v. Stubbs*, 368 N.C. 40, 42-43, 770 S.E.2d 74, 75-76 (2015).

III. Analysis

A. Sufficiency of Factual Basis for Pleas

We hold Defendant's argument – that the factual basis for his guilty pleas was insufficient – to be without merit. N.C. Gen. Stat. § 15A-1022(c) provides that a judge “may not accept a plea of guilty or no contest without first determining that there is

a factual basis for the plea” and that “[t]his determination may be based upon information including but not limited to” the following:

- (1) A statement of the facts by the prosecutor.
- (2) A written statement of the defendant.
- (3) An examination of the presentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c) (2014). Our Supreme Court has held that the statute “does not require the trial judge to elicit evidence from each, any or all of the enumerated sources.” *Dickens*, 299 N.C. at 79, 261 S.E.2d at 185. Instead, “[t]he trial judge may consider any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest.” *Id.* at 79, 261 S.E.2d at 185-86.

In the present case, there was a lengthy factual statement by the prosecutor as well as the facts alleged in each of the indictments before the trial court in support of Defendant’s guilty pleas. The prosecutor specifically referenced the transcript of plea and the indictments as part of his recitation of the facts, explaining Defendant’s modus operandi, the manner in which police came to learn about Defendant’s involvement in the break-ins from Defendant’s non-testifying co-defendant, Defendant’s motive in committing the offenses, and the value of the items stolen. A

representative testified on behalf of the victims, detailing the devastating impact of the crimes. We believe that this evidence constitutes a sufficient factual basis for Defendant's guilty pleas. *See State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421-22 (1980) (holding that the statute requires only that "some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty").

Defendant cites *State v. Flint*, 199 N.C. App. 709, 682 S.E.2d 443 (2009), in support of his argument. We find *Flint* easily distinguishable. In *Flint*, we held that the factual basis for the defendant's pleas was insufficient where it consisted entirely of the State's factual basis document, which addressed only forty-seven (47) of the sixty-eight (68) felony charges to which the defendant pleaded guilty. *Id.* at 725, 682 S.E.2d at 452. However, unlike in *Flint*, in the present case there was substantial evidence to support an independent judicial determination that an adequate factual basis existed to support *all* of Defendants' pleas. Specifically, the prosecutor referenced *all* of the events from which *all* of the charges arose, explaining how the police came to suspect Defendant, and detailing the commonalities shared by the break-ins as well as the corroborating information shared by Defendant's non-testifying co-defendant in demonstrating Defendant's modus operandi and motive for committing the crimes. Accordingly, this argument is overruled.

B. Clerical Error

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In its response opposing Defendant's petition for writ of certiorari, the State has asked that the matter be remanded so that a clerical error in the written judgment can be corrected. The trial court *announced* in open court that Defendant serve twenty-four (24) consecutive terms of imprisonment (and an additional prison term to run concurrently with the other twenty-four (24) terms). However, as the State points out, the sentence reflected in the *written* judgment and commitment forms in the record represents that the trial court ordered Defendant to serve only twelve (12) consecutive terms, rather than twenty-four (24) consecutive terms. Specifically, the forms consist of a set of judgments sentencing Defendant to twelve (12) consecutive terms and another set of judgments sentencing Defendant to eleven (11) consecutive terms, which would run *concurrently* with the other twelve (12) terms. Accordingly, we remand the case, instructing the trial court to correct this clerical error to reflect the sentence imposed by the trial court upon acceptance of Defendant's guilty pleas. *See State v. Dixon*, 139 N.C. App. 332, 338, 533 S.E.2d 297, 302 (2000) (stating that "a motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court").

IV. Conclusion

We grant the State's motion to dismiss Defendant's direct appeal. However, we grant Defendant's petition for writ of certiorari. On the merits, we conclude that

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an adequate factual basis existed to support Defendant's pleas. We, therefore, hold that there was no error in the trial court's acceptance of these pleas. We remand the matter, however, to correct the clerical error in the judgment forms.

AFFIRMED IN PART; AND REMANDED.

Judges HUNTER, JR., and DIETZ concur.

Report per Rule 30(e).