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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-338

Filed: 3 October 2017

Cumberland County, Nos. 15 CRS 55180, 55672-73

STATE OF NORTH CAROLINA

v.

TYRONE ELLIOTT, Defendant.

Appeal by Defendant from judgment entered 28 June 2016 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 25 September 2017.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

MURPHY, Judge.

Tyrone Elliott (“Defendant”) appeals from a judgment entered upon his guilty plea to felony larceny, felony conspiracy to commit larceny, two counts of obtaining property by false pretenses, and attaining habitual felon status. Defendant’s counsel filed an *Anders* brief, and Defendant filed a *pro se* brief. Defendant argues: (1) he was

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never indicted on attaining habitual felon status; (2) he suffered from ineffective assistance of counsel; and (3) his plea agreement was not intelligently and knowingly entered. After review, we find no error in part and dismiss, without prejudice, Defendant's ineffective assistance of counsel claim.

Background

On 12 March 2015, Defendant and his girlfriend stole computers, a sound system, and diapers from Sam's Wholesale Club. On 7 April 2015, Defendant pawned one of the computers, and on 15 April 2015, Defendant pawned the sound system. A Grand Jury issued six indictments under three file numbers. In 15 CRS 55180, Defendant was charged with felony larceny, felony possession of stolen goods, and felony conspiracy to commit larceny. In 15 CRS 55672, Defendant was charged with obtaining property by false pretenses related to his 7 April 2015 pawn of one of the computers. Finally, in 15 CRS 55673, Defendant was charged with another count of obtaining property by false pretenses related to his 15 April 2015 pawn of the sound system. In all three file numbers, the Grand Jury returned identical indictments charging Defendant with attaining habitual felon status.

On 28 June 2016, Defendant pled guilty in Cumberland County Superior Court to felony larceny, felony conspiracy to commit larceny, two counts of obtaining property by false pretenses, and attaining habitual felon status. The State dismissed the possession of stolen property charge in 15 CRS 55180 and the habitual felon

charge in 15 CRS 55673. The trial court consolidated the convictions for judgment and sentenced Defendant to 108 to 142 months imprisonment. Defendant filed written notice of appeal.

Analysis

I. Counsel's Argument

On appeal, counsel appointed to represent Defendant states he is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal. Counsel asks this Court to conduct its own review of the record for possible prejudicial error. Counsel has shown to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so.

II. Defendant's Arguments

Defendant has filed *pro se* arguments with this Court and contends: (1) he was never indicted on attaining habitual felon status; (2) his trial counsel provided ineffective assistance by refusing Defendant's demand to proceed to trial and by lying to defendant as to the terms of the plea to which he was agreeing; and (3) his plea agreement was not intelligently and knowingly entered. We address these arguments in turn.

i. Sufficiency of the Indictment

N.C.G.S. § 15A-1444 limits when a defendant may appeal following a plea of guilty or not contest:

A defendant who pleads guilty has a right of appeal limited to the following:

1. Whether the sentence “is supported by the evidence.” This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) ([2015]);

2. Whether the sentence “[r]esults from an incorrect finding of the defendant’s prior record level under G.S. 15A-1340.14 or the defendant’s prior conviction level under G.S. 15A-1340.21.” N.C. Gen. Stat. § 15A-1444(a2)(1) ([2015]);

3. Whether the sentence “[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(2) ([2015]);

4. Whether the sentence “[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(3) ([2015]);

5. Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)([2015]), 15A-1444(e) ([2015]);

6. Whether the trial court improperly denied defendant’s motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

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State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

Nonetheless, an accused does not waive the defense of insufficiency of the indictment by pleading guilty. *State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784 (2006) (citing *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 69 (1999)). Furthermore, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. *Id.* at 587-88, 623 S.E.2d at 784 (citing *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003)). “Challenges to the sufficiency of an indictment are reviewed *de novo*.” *State v. Brice*, ___ N.C. App ___, ___, 786 S.E.2d 812, 814 (2016) (citing *State v. Pendergraft*, 238 N.C. App. 516, 521, 767 S.E.2d 674, 679 (2014)).

N.C.G.S. § 14-7.3 governs indictments for the charge of habitual felon. A habitual felon indictment must:

set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

Id.

Here, the indictments charging Defendant as a habitual felon meet the requirements of section 14-7.3. Both indictments allege the dates that the prior felony offenses were committed, the name of the State against whom said felonies

were committed, the dates that Defendant pled guilty to the felonies, and the identity of the court where the pleas took place. Accordingly, we find no error in the habitual felon indictments.

ii. Ineffective Assistance of Counsel

We note Defendant raises claims involving facts outside the record on appeal, including his allegation of ineffective assistance of counsel (“IAC”). Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001). Such claims may be reviewed on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *Id.* at 166, 557 S.E.2d at 524-25 (citation omitted). Because the record here is insufficient to address the ineffective assistance claim, we dismiss Defendant’s claim without prejudice to Defendant’s right to file a motion for appropriate relief. *See id.* at 167, 557 S.E.2d at 525 (“[S]hould the reviewing court determine the IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s rights to reassert them during a subsequent MAR proceeding.”), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

iii. Plea Agreement

Defendant’s final issue on appeal, that his plea agreement was not intelligently and knowingly entered, does not pertain to an issue permitted for review under

N.C.G.S. § 15A-1444 or an issue regarding the trial court's jurisdiction. Therefore, Defendant's claim is not cognizable by this Court on direct appeal, and we dismiss this issue with prejudice.

Conclusion

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom and we find no error in the indictment.¹ We dismiss Defendant's ineffective assistance of counsel claim without prejudice. Lastly, we dismiss Defendant's issue on appeal regarding his plea.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART;
DISMISSED WITH PREJUDICE IN PART.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).

¹ The State moved to dismiss Defendant's appeal on the basis that, because defendant pled guilty, he only has a limited right to appeal. We note, however, that in *Anders* cases, a defendant is entitled to this Court's review for error related to any appealable issue. *See e.g., State v. Dayberry*, 131 N.C. App. 406, 507 S.E.2d 587 (1998) (reviewing a defendant's appeal pursuant to *Anders* even though defendant plead guilty); *State v. Mayfield*, 115 N.C. App. 725, 446 S.E.2d 150 (1994) (same). Accordingly, we deny the State's motion.