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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1295

Filed: 21 November 2017

Brunswick County, No. 13 CRS 2034

STATE OF NORTH CAROLINA

v.

CHRISTOPHER MOSBY

Appeal by Defendant from judgment entered 18 June 2015 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 26 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

McGEE, Chief Judge.

Christopher Mosby (“Defendant”) appeals from judgment entered after he pleaded no contest to possession with intent to manufacture, sell or deliver heroin. Defendant has filed a contemporaneous petition seeking issuance of a writ of *certiorari* to obtain review of his plea agreement, and we exercise our discretion to

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grant his petition. Defendant contends the plea agreement was unlawful and unenforceable because it purported to reserve a right of appeal that does not exist. For the reasons discussed below, we vacate the trial court's judgment and remand for further proceedings consistent with this opinion.

I. Background

Defendant was arrested on 16 August 2012 on charges of trafficking in heroin, possession of heroin with intent to manufacture, sell or deliver, and possession of drug paraphernalia. Defendant filed a *pro se* motion on 11 October 2012, pursuant to N.C. Gen. Stat. § 15A-711(c), requesting that the prosecutor proceed on those charges.¹ Defendant filed a *pro se* motion on 30 April 2013 to dismiss the pending charges on the basis that the State had failed to proceed within six months of his request as required by N.C.G.S. § 15A-711(c).

Defendant was indicted on 1 July 2013 on three counts of trafficking in heroin, one count of possession of heroin with intent to manufacture, sell or deliver, and one count of possession of drug paraphernalia. The State voluntarily dismissed the charges on 22 July 2013. On each "Dismissal/Notice of Reinstatement" form (Form AOC-CR-307), the prosecutor checked a box indicating the dismissal was made

¹ N.C. Gen. Stat. § 15A-711(c) (2015) provides in pertinent part: "A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. . . . If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed."

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“[p]ursuant to [D]efendant’s N.C.G.S. § 15A-711([c]) motion[,]” and further stating: “State will resubmit to [a grand jury] at a later date.” A grand jury returned new indictments against Defendant, on identical charges, on 5 August 2013.

Defendant filed a motion to dismiss the charges on 17 June 2015. Defendant argued that the State’s voluntary dismissal of the charges on 22 July 2013 “[was] not a ‘dismissal with leave’ and such dismissal pursuant to [N.C.G.S. §] 15A-711([c]) bar[red] [subsequent] prosecution of [] [D]efendant . . . for the same events.” Following a hearing, the trial court denied Defendant’s motion to dismiss, based on its findings that Defendant was afforded due relief under N.C.G.S. § 15A-711(c), *i.e.*, dismissal of the case, and that the State was “free to re-indict” Defendant on the same charges. The trial court stated Defendant was “welcome . . . to give notice to the North Carolina Court of Appeals . . . [regarding the trial court’s] analysis of [N.C.G.S. § 15A-711(c)][.]”

Defendant entered a plea of no contest to possession of heroin with intent to manufacture, sell or deliver on 18 June 2015. Pursuant to the terms of the plea agreement, the State dismissed the remaining charges. The plea agreement explicitly provided: “Defendant may appeal the denial of his motion [to dismiss filed] pursuant to [N.C.G.S. §] 15A[-]711([c)][.]” Defendant appeals.

II. Defendant’s Petition for Writ of *Certiorari*

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Defendant argues his plea agreement was invalid because it purportedly reserved Defendant's right to appeal the denial of his N.C.G.S. § 15A-711(c) motion to dismiss – an issue that, as Defendant recognizes, is not appealable as a matter of right. Our General Statutes confer a right of appeal from a guilty plea only in limited circumstances, none of which apply in the present case. *See* N.C. Gen. Stat. §§ 15A-1444(a1)-(a2) (2015); N.C. Gen. Stat. § 15A-979 (2015). N.C. Gen. Stat. § 15A-1444(e) (2015) provides that, other than as set forth in N.C.G.S. §§ 15A-1444(a1)-(a2) and N.C. Gen. Stat. § 15A-979, and except when “a motion to withdraw a plea of guilty or no contest has been denied,” a defendant “is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, *but he may petition the appellate division for review by writ of certiorari.*” (emphasis added). *See also* N.C. Gen. Stat. § 15A-1444(g) (2015) (providing that “[r]eview by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.”). Thus, N.C.G.S. § 15A-1444(e) explicitly grants Defendant the right to “petition the appellate division for review by writ of certiorari[.]”

In *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987), our Supreme Court held that “according to N.C.G.S. § 15A-1444 [a] defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea[.]” but “may obtain appellate review of this issue

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only upon grant of a writ of certiorari.” This Court has applied *Bolinger* to grant *certiorari* in cases in which a plea agreement was conditioned on the preservation of an issue for which no appellate jurisdiction exists. *See, e.g., State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011) (granting *certiorari* review upon concluding that, although defendant had no appeal as of right from his guilty plea, “his challenge that his plea was improperly accepted because it was not the product of [an] informed choice and did not provide him the benefit of his bargain is a procedural challenge to the guilty plea for which he may petition this Court for writ of certiorari under *Bolinger*.”); *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004) (granting *certiorari* review of guilty plea, where no right of appeal existed, in reliance on *Bolinger*). In *Demaio*, we noted that the issue of whether a plea agreement was improperly accepted because it was not the product of a defendant’s informed choice “falls squarely within whether the trial judge followed proper procedure in accepting [the d]efendant’s guilty plea[.]” 216 N.C. App. at 564, 716 S.E.2d at 867; *see also* N.C. Gen. Stat. § 7A-32(c) (2015) (“The Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . in aid of its own jurisdiction, *or to supervise and control the proceedings of any of the trial courts*[.]” (emphasis added)).

In the present case, Defendant filed a petition for writ of *certiorari* on 1 May 2017 and, in response, the State moved to dismiss Defendant’s appeal. Because Defendant has no right of appeal from the judgment entered upon his guilty plea, *see*

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State v. Jamerson, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 547 (2003), his appeal is subject to dismissal. We nevertheless exercise our discretion to issue the writ of *certiorari* and reach the merits of Defendant's appeal.² See, e.g., *State v. Jones*, ___ N.C. App ___, 802 S.E.2d 518 (2017) (concluding that, although defendant's appeal did not raise any of the issues for which an appeal of right is afforded, or meet the criteria set forth in Appellate Rule 21, this Court had jurisdiction to grant defendant's petition for writ of *certiorari* in order to review sentencing hearing conducted upon defendant's guilty plea).

III. Validity of Defendant's Plea Agreement

A. *Standard of Review*

[A] defendant is entitled to relief from a trial court's judgment in the event that his decision to enter a guilty plea did not result from an informed choice. The extent to which a criminal defendant who entered a negotiated plea of guilty failed to make an informed choice by virtue of the fact that he did not get the benefit of his bargain is a question of law subject to *de novo* review.

State v. Tinney, 229 N.C. App. 616, 621, 748 S.E.2d 730, 734 (2013) (citations omitted).

B. *Analysis*

² As the State observes, Defendant's brief offers no argument that the trial court erred by denying his motion to dismiss pursuant to N.C.G.S. § 15A-711(c). Defendant challenges the validity of his plea agreement only, and our review is limited to that issue. See N.C.R. App. P. 28(b)(6).

In the present case, Defendant pleaded guilty on the condition that he could appeal the denial of his motion to dismiss filed pursuant to N.C.G.S. § 7B-711. Thus, “Defendant’s plea of guilty was given *in consideration for* the [State’s] promise.” *See State v. Smith*, 193 N.C. App. 739, 743, 668 S.E.2d 612, 614 (2008) (emphasis added). However, “Defendant cannot receive the benefit of his bargain based on the laws of this State or our Appellate Rules.” *Id.* “If a defendant does not have an appeal as of right and we are not permitted . . . to [review] issues the defendant was promised would be preserved for appeal, then the plea agreement violates the law.” *Demaio*, 216 N.C. App. at 565, 716 S.E.2d at 867 (citation omitted); *see also Tinney*, 229 N.C. App. at 624, 748 S.E.2d at 736 (“[A] guilty plea . . . which purports to reserve the right to seek appellate review of a particular legal issue which is not subject to such review following the entry of a guilty plea does not result in the entry of a plea which is a product of [an] informed choice.” (citation and internal quotation marks omitted)).³ Because Defendant cannot receive “the benefit of his bargain,” his plea agreement violated the law. We must therefore “place Defendant back in the position he was before he struck his bargain.” *Demaio*, 216 N.C. App. at 565, 716 S.E.2d at 868.

IV. Conclusion

In light of the foregoing, we vacate the judgment and remand this matter to the trial court.

³ The State “does not oppose [D]efendant’s contention that [D]efendant’s [plea agreement] was not a product of his informed choice, and that the judgment entered upon such plea should be vacated.”

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VACATED AND REMANDED.

Judges STROUD and DILLON concur.

Report per Rule 30(e).