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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-151

Filed: 2 October 2018

Iredell County, No. 16 CRS 52772

STATE OF NORTH CAROLINA

v.

WENDELL CURTIS OWENBY

Appeal by defendant from judgment entered 6 June 2017 by Judge Lori Hamilton in Iredell County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

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

ZACHARY, Judge.

Wendell Curtis Owenby (“Defendant”) appeals from a judgment entered upon his guilty plea to one count of second-degree arson. Defendant has also filed a petition for issuance of a writ of *certiorari* to obtain review of his guilty plea arguing that the trial court erred in finding that a sufficient factual basis existed for accepting his guilty plea, and we elect to grant his petition. After review, we conclude that the trial

court was presented with a sufficient factual basis to properly accept Defendant's guilty plea, and we therefore find no error.

Background

On 25 May 2016, two warrants were issued for the arrest of Defendant on two separate charges of second-degree arson that occurred at the same residence on 3 April 2016 and 25 May 2016. On 11 July 2016, Defendant was indicted on two counts of second degree arson. The trial court held a plea hearing on 6 June 2017. As part of a plea agreement with the State, Defendant pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970),¹ to one count of arson while the other count was dismissed. At the plea hearing, the trial court reviewed with the Defendant a Transcript of Plea signed by Defendant and his attorney. Defendant agreed that facts existed to support his plea, and agreed that the trial court could hear a summary of the evidence.

The prosecutor gave the following factual basis:

Your Honor, this offense occurred on April 3, 2016. This was Investigator Sharon Watts with the Statesville Police Department, found the defendant did maliciously burn a dwelling house inhabited by Jolynette Imes, located at 832 Opal Street in Statesville, North Carolina.

Your Honor, the fire department was dispatched to the fire on Opal Street on April 3rd. For whatever reason, the police were not initially contacted until a couple of days later on April 5th of 2016. And the fire marshal then

¹ An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt.

reported to investigators that he had spoken to the resident of the house, Miss Imes, who had advised the [D]efendant had been at her house that night prior to the fire and became upset with her for some unknown reason. The [D]efendant then left her residence, and shortly thereafter she noticed her porch was on fire and called the fire department. The resident was able to point out to law enforcement what house the [D]efendant was staying at with a cousin, I believe it was, in the area. And officers went to that house and spoke to a person named William Bullin, who immediately said what did [Defendant] do now. And he was advised that the fire, by law enforcement, Mr. Bullin advised that the [D]efendant had said he was going to burn down the victim's house earlier that day.

Mooresville Police Department was investigating an unrelated fire of some type that occurred in their jurisdiction, I don't have any details about that, but during the course of that investigation they interviewed [Defendant], and that was recorded on a body camera. During that interview, I understand he admitted to setting a fire in Statesville during Rabbit Town on Opal Street, which coincided to the location of this fire. A month or so goes by, on May 25th, the same house belonging to Miss Imes was set on fire again, and apparently it burned down completely on that second occasion. The initial responding officer spoke to the [D]efendant who was on scene, and the victim. The victim apparently wanted him arrested for an assault that occurred prior that night, but then ceased cooperating with law enforcement and not much else took place there. However, investigators from Statesville Police Department obtained a couple of warrants for arson for both incidents and the defendant was arrested.

When he was arrested, the officer in charge of this case attempted to interview [Defendant] and he declined. However, he did on his own say that he did not understand why it took 51 days to give him a ticket for the fire, which apparently was a reference to the first one that occurred on April 3rd that he's pleading guilty to.

The trial court accepted Defendant's *Alford* plea. In a *pro se* motion dated 10 June 2017 and filed 22 June 2017, sixteen days after judgment, Defendant asked the trial court to set aside his plea, or in the alternative to permit appeal of his judgment. On 7 July 2017, the trial court made appellate entries without ruling on Defendant's motion to withdraw his plea. On 9 March 2018, Defendant filed a Petition for Writ of *Certiorari* requesting that this Court review whether the trial court erred by accepting Defendant's guilty plea without a sufficient factual basis. Defendant asserted the right to file this petition because his "right to prosecute an appeal ha[d] been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). The State maintained that Defendant had no right to appeal his guilty plea under N.C. Gen. Stat § 15A-1444, and in the alternative moved to dismiss Defendant's appeal because of Defendant's failure to timely file his appeal. *See* N.C.R. App. P. 4(a)(1), (2) (requiring a party entitled by law to an appeal from a judgment of the superior court to take that appeal by either giving oral notice of appeal at trial or filing notice of appeal within fourteen days after entry of judgment).

In that Defendant's appeal does not assert one of the permitted grounds for appeal of a guilty plea pursuant to N.C. Gen. Stat. § 15A-1444(a1), (a2), Defendant does not have an appeal as of right to this Court; therefore, we grant the State's motion to dismiss Defendant's appeal. However, for the reasons stated below, we grant Defendant's petition for writ of *certiorari*.

I. Defendant's Right to Seek Review by Writ of *Certiorari*

In a recent line of cases, our Supreme Court has clarified that this Court has broad discretion to issue writs of *certiorari*, unless limited by statute. *State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018); *State v. Thomsen*, 369 N.C. 22, 789 S.E.2d 639 (2016); *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015). Our state constitution declares that “[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.” N.C. Const. art. IV, § 12(2).

The General Assembly exercised that authority by granting the Court of Appeals

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 of the General Court of Justice. . . . The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

N.C. Gen. Stat. § 7A-32(c) (2017). “This statute empowers [this Court] to review trial court rulings . . . by writ of certiorari unless some other statute restricts the jurisdiction that [section] 7A-32(c) grants.” *Ledbetter*, ___ N.C. at ___, 814 S.E.2d at 41 (quoting *Thomsen*, 369 N.C. at 25, 789 S.E.2d at 641 (citing *Stubbs*, 368 N.C. at 42-43, 770 S.E.2d at 76)). Thus section 7A-32(c) “creates a default rule that [this Court] has jurisdiction to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts jurisdiction in the

particular class of cases at issue.” *Id.* (quoting *Thomsen*, 369 N.C. at 25, 789 S.E.2d at 642).

Regarding writs of *certiorari*, our Appellate Rules provide:

The writ of *certiorari* may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C.R. App. P. 21(a)(1). While Rule 21 appears to limit this Court’s jurisdiction to grant writs of *certiorari*, “the Rules cannot take away jurisdiction given to [this] Court by the General Assembly.” *State v. Jones*, ___ N.C. App. ___, ___, 802 S.E.2d 518, 522 (2017) (quoting *Stubbs*, 368 N.C. at 44, 770 S.E.2d at 76).

A criminal defendant’s right to an appeal following a guilty plea is limited by N.C. Gen. Stat. § 15A-1444, which provides in relevant part that:

(a1) A defendant who has . . . entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the . . . sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of *certiorari*.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is

entitled to appeal as a matter of right the issue of whether the sentence imposed:

- (1) Results from an incorrect finding of the defendant's prior record level . . . ;
- (2) Contains a type of sentence disposition that is not authorized . . . ; or
- (3) Contains a term of imprisonment that is for a duration not authorized

. . . .

(e) Except as provided in subsections (a1) and (a2) of this section . . . the 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.

. . . .

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

N.C. Gen. Stat. § 15A-1444 (2017). Defendant's appeal does not arise under any of the issues for which an appeal as of right is granted upon a guilty plea; however, N.C. Gen. Stat. § 15A-1444(e) allows Defendant to seek review by petitioning for a writ of *certiorari*. Given that the General Assembly has placed no limiting language in section 15A-1444(e), this Court has jurisdiction to grant Defendant's petition for writ of *certiorari*. See *Jones*, ___ N.C. App. at ___, 802 S.E.2d at 521. We elect to grant *certiorari* in this case.

II. Trial Court's Acceptance of Guilty Plea

Defendant's only argument on appeal is that the trial court erred in accepting his guilty plea because there was not a sufficient factual basis on which to support the guilty plea. We disagree.

Guilty pleas waive certain fundamental constitutional rights such as the right to trial by jury, and as a result, our legislature has enacted laws to ensure guilty pleas are informed and voluntary. *See State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980) (citing N.C. Gen. Stat. § 15A-1022(a),(b)). Concerning a trial court's acceptance of a guilty plea:

- (c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
 - (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) (2017). "The five sources listed in the statute are not exclusive, and therefore the trial judge may consider any information properly brought to [its] attention." *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) (citation, quotation marks, and brackets omitted). Whatever information the trial court does consider, however, "must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Sinclair*, 301 N.C. at 198, 270 S.E.2d at 421. The information appearing in the record must provide

“some substantive material independent of the plea itself . . . which tends to show that defendant is, in fact, guilty.” *Id.* at 199, 270 S.E.2d at 421-22.

In this case, the prosecutor provided a lengthy fact statement that asserted, *inter alia*, that Defendant maliciously burned the victim’s house on 3 April 2016; that defendant was present at the house that day, and upon leaving the house, it caught fire; and that a resident of Defendant’s house asked police officers “what did [Defendant] do now,” then said Defendant “had said he was going to burn down the victim’s house earlier that day.” In a recorded interview, Defendant admitted to setting another fire in Statesville on Opal Street, “which coincided to the location of this fire.” The victim’s house was burned down completely on 25 May 2016, and the victim told responding officers that she wanted Defendant arrested for a prior assault he committed on her that occurred earlier in the evening. Finally, when Defendant was arrested on 25 May 2016, he told officers that “he did not understand why it took 51 days to give him a ticket for the fire.”

The prosecutor’s statement easily satisfies the requirement of “some substantive material independent of the plea itself” appearing in the record that tends to show defendant is guilty. *Id.* Defendant, quoting *Agnew*, incorrectly states the law in his brief when he posits that there must be an “actual description of the conduct giving rise to the charge before accepting defendant’s guilty plea.” 361 N.C. at 337, 643 S.E.2d at 584. Such a rule would lead to absurd results. If there were no

witnesses to the crime in question, then no actual description of the conduct would exist, absent a confession from the Defendant. Such a standard would make the proper acceptance of guilty pleas in cases in which there are no eyewitnesses nearly impossible. All our case law requires of a factual basis for a guilty plea is that some substantive material independent of the plea itself exist on the record. That requirement has been met in this case.

Conclusion

We grant the State's motion to dismiss Defendant's appeal. However, we grant Defendant's petition for writ of *certiorari*. On the merits, we find that the trial court did not err when it accepted Defendant's guilty plea where there was an adequate factual basis for the plea. Therefore, we find no error.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

Report per Rule 30(e).

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MURPHY, Judge, concurring in the result in part, but dissenting from issuance of writ of *certiorari*.

I do not disagree with the Majority’s analysis of the substantive issue in Part II. However, “Defendant has not demonstrated any ‘good and sufficient cause’ to justify exercising our discretion to grant [his] petition and issue a writ of certiorari to allow [him] to challenge . . . [the] conviction to which [he] voluntarily pled guilty.” *State v. Ledbetter*, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____, 2018 N.C. App. LEXIS 802, *11, 2018 WL 3977702, *4 (2018) (COA15-414-3). In the exercise of my independent discretion and due to the lack of merit in Defendant’s appeal, I would deny Defendant’s *Petition for Writ of Certiorari* in this matter.