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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1023

Filed: 26 March 2019

Onslow County, Nos. 12 CRS 55548, 55550; 13 CRS 52523; 14 CRS 54860, 54862-63, 54866-67

STATE OF NORTH CAROLINA

v.

MICHAEL JAWAN HOLMES

Appeal by defendant from judgments entered 29 May 2018 by Judge Andrew Taube Heath in Onslow County Superior Court. Heard in the Court of Appeals 26 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Gwenda L. Laws, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant.

DIETZ, Judge.

Defendant Michael Jawan Holmes appeals the trial court's revocation of his probation and activation of six consecutive suspended sentences. As explained below, during the revocation hearing an unusual issue arose in which the State and Holmes presented conflicting copies of the original court judgments. This, in turn, led to a

lengthy exchange between the parties and the trial court, and some confusion concerning whether the trial court understood it had discretion to depart from the original sentencing court's decision. In the interests of justice, we vacate and remand this matter to ensure that the trial court has an opportunity to exercise its sound discretion in entering the appropriate judgments in these cases.

Facts and Procedural History

On 23 January 2015, Michael Jawan Holmes pleaded guilty to multiple drug charges and the trial court sentenced him to six consecutive sentences of 13 to 25 months in prison. The trial court suspended Holmes's sentences and placed Holmes on supervised probation for 48 months.

On 20 February 2018, the State alleged that Holmes violated the conditions of his probation by committing two criminal offenses: assault with a deadly weapon and attempt to discharge a weapon into a moving vehicle.

At the revocation hearing, the State recommended that the trial court revoke Holmes's probation and activate his sentences to run consecutively, consistent with the sentences originally imposed by the trial court in the court's written judgments. Holmes's counsel opposed the State's recommendation, explaining that "we have documents that were provided to us by [Holmes's] probation officer, Judge, that I guess contradict the judgments that are being used in this case . . . we have documents that indicate that they weren't [to] run consecutive."

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The prosecutor then explained to the trial court that the transcript of the revocation proceeding showed that the trial court had imposed consecutive sentences and “the clerks, I believe after receiving information, modified the judgments to reflect what [the sentencing court] actually said in open court, that they’re to run at the conclusion, one sentence at the conclusion of the other. . . . At some point, the judgments were generated that did not show that they ran at the expiration, then a copy of the transcript of the actual plea hearing was done, and then the judgments were modified to reflect what [the sentencing court] said in open court.” As a result, there apparently were two different copies of the judgments, with the State’s copies reflecting the judgments actually on file with the trial court. During this argument, the prosecutor asserted that the original sentencing judge’s “words control.”

After hearing from the parties, the trial court stated that the sentencing court “on January 23, 2015, gave judgment and ordered consecutive sentences. The basis for those findings is the court reporter’s certified transcript. Therefore, the underlying sentences are concurrent – I’m sorry consecutive.” Holmes’s counsel then asked “based on your ruling that they are consecutive, would the Court consider not revoking all these sentences?” The court provided Holmes’s counsel with an opportunity to argue for activation of less than all six sentences, and permitted Holmes to personally address the court.

The trial court then announced that “probation is revoked and the sentences are activated,” without stating whether the sentences were to run consecutively or concurrently. The court’s written judgments indicated that the sentences run consecutively. The court also permitted Holmes to introduce his copies of the original judgments, which indicated the sentences would run concurrently, into the record as exhibits. Holmes and his counsel returned to the trial court several hours after the revocation hearing and stated that Holmes intended to appeal.¹

Analysis

Holmes argues that the trial court’s judgments should be vacated because the court failed to exercise its discretion when activating Holmes’s sentences.

Under N.C. Gen. Stat. § 15A-1344(d), a trial court that properly revokes a defendant’s probation and activates the defendant’s sentence has discretion to reduce the length of the original sentence or restructure the sentence in a manner authorized by the statute. This discretionary authority includes the option, when activating multiple sentences, to order that the “sentences run concurrently rather than consecutively.” *State v. Partridge*, 110 N.C. App. 786, 788, 431 S.E.2d 550, 551 (1993).

¹ Holmes acknowledges that his oral notice of appeal, made several hours after the revocation hearing concluded, “did not comply with Rule 4 of the North Carolina Rules of Appellate Procedure” and petitions this Court for a writ of certiorari to review the merits of his appeal. Because Holmes’s actions indicate an unmistakable intent to appeal that was lost solely because of the failure to timely act, we exercise our discretion to allow the petition. N.C. R. App. P. 21(a)(1).

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In general, a trial court need not expressly state that it is exercising its discretion in order to do so. “When the trial court gives no reason for a ruling that must be discretionary, we presume on appeal that the court exercised its discretion.” *State v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 365 (2011). But when the trial court’s statements or other circumstances suggest that the court did not understand it had discretion, that presumption is overcome and the reviewing court will vacate and remand to ensure the trial court exercises its discretion. *State v. Barrow*, 350 N.C. 640, 647–48, 517 S.E.2d 374, 378–79 (1999).

Here, there is enough uncertainty to warrant remand. As Holmes points out, during the parties’ discussion of the original judgments, the prosecutor asserted that the sentencing judge’s “words control.” Holmes contends that this statement by the prosecutor could be interpreted as an incorrect argument that the trial court had no discretion to alter the original sentencing court’s decision. Of course, that statement also could be interpreted simply as an assertion that the sentencing transcript controls the analysis of the original sentence—not that it controls the trial court’s determination of the new sentence upon activation. The trial court, both in its discussion with counsel and in pronouncing judgment, did not indicate how it interpreted the prosecutor’s statement or whether it believed it had discretion to impose concurrent sentences.

In reviewing a trial court's discretionary decision, our role as an appellate court is to ensure that a trial court did not abuse its discretion. To engage in meaningful review of that question, we must be confident that the trial court in fact exercised discretion. In light of the unusual circumstances that arose at this revocation hearing, we cannot say that with confidence here. Accordingly, we vacate and remand this case to ensure that the trial court has the opportunity, in the exercise of its sound discretion, to impose judgments that the court finds serve the interests of justice.

Conclusion

We vacate the trial court's judgments and remand for further proceedings.

VACATED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

Judge Davis concurred in this opinion prior to 25 March 2019.

Report per Rule 30(e).