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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-541

Filed: 21 January 2020

Forsyth County, No. 01 CRS 59970

STATE OF NORTH CAROLINA

v.

JERRY LEON PHIFER

Appeal by defendant from judgment entered 17 December 2018 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.

Michael E. Casterline for defendant-appellant.

TYSON, Judge.

Jerry Leon Phifer (“Defendant”) appeals from a judgment entered upon resentencing for prior jury convictions for assault with a deadly weapon inflicting serious injury, attempted rape, and kidnapping. We affirm.

I. Background

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Defendant was convicted by a jury of attempted first-degree rape, first-degree kidnapping, and assault with a deadly weapon inflicting serious injury on 15 May 2002. The trial court sentenced him to three consecutive active terms: 34 to 50 months for assault with a deadly weapon inflicting serious injury, 116 to 149 months for attempted rape, and 116 to 149 months for kidnapping. Defendant gave oral notice of appeal. While his appeal was pending, the trial court resentenced Defendant on 18 July 2002 for the conviction of attempted rape to 176 to 221 months. A prior panel of this Court found no error, on appeal. *State v. Phifer*, 159 N.C. App. 230, 582 S.E.2d 725 (2003) (unpublished).

Defendant filed a motion for appropriate relief (“MAR”) in superior court on 30 January 2012 which the trial court denied on 24 September 2012. On 22 April 2014, Defendant filed a petition for writ of certiorari in this Court, which was also denied.

On 19 June 2017, Defendant filed another MAR in the trial court, arguing the trial court lacked jurisdiction to enter the 18 July 2002 amended judgment increasing his sentence for the attempted rape. This motion lingered for nearly a year until the trial court denied the 2017 MAR on 3 May 2018.

Defendant filed another petition for writ of certiorari on 12 October 2018. This Court allowed the petition and issued the writ “for the limited purpose of remanding the case for resentencing.”

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The trial court resentenced Defendant for attempted rape to 150 to 189 months on 17 December 2018 and ordered the new sentence to run consecutively to the 15 May 2002 assault with a deadly weapon inflicting serious injury sentence. Defendant filed written notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court on appeal from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issue

Defendant contends the trial court erred in resentencing him to a longer prison term than he had received at his May 2002 sentencing.

IV. Defendant's Sentence

A. Standard of Review

We review alleged sentencing errors for “whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted).

B. Analysis

N.C. Gen. Stat. § 15A-1335 provides, in pertinent part: “[w]hen a conviction or sentence imposed in superior court *has been set aside* on direct review or collateral attack, the court may not impose a new sentence for the same offense . . . which is

more severe than the prior sentence less the portion of the prior sentence previously served.” N.C. Gen. Stat. § 15A-1335 (2017) (emphasis supplied).

In *State v. Wagner*, our Supreme Court interpreted, N.C. Gen. Stat. § 15A-1335 and held: “[p]ursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense . . . on remand.” *State v. Wagner*, 356 N.C. 599, 602, 572 S.E.2d 777, 779 (2002).

“Because the legislature has the exclusive authority to prescribe the punishments for crimes, any sentence ordered by the judicial branch and enforced by the executive branch must be within the parameters established by the legislature.” *State v. Whitehead*, 365 N.C. 444, 446, 722 S.E.2d 492, 494 (2012). “The sole exception to N.C. Gen. Stat. § 15A-1335, and the only circumstance in which a higher sentence will be allowed on resentencing, is when a statutorily mandated sentence is required by the General Assembly.” *State v. Holt*, 144 N.C. App. 112, 116-117, 547 S.E.2d 148, 152 (2001).

Defendant was convicted by the jury of attempted first-degree rape, a Class B2 felony, in May 2002, but was initially sentenced to 116 to 149 months, the sentence for a Class C felony. While the initial appeal was pending, the trial court attempted to correct this improper sentence by resentencing Defendant for the Class B2 felony to 176 to 221 months in July 2002. Defendant successfully challenged this July 2002 judgment in his 2018 petition for writ of certiorari, because the trial court lacked

jurisdiction to alter the sentences after Defendant's oral notice of appeal to this Court.

Upon remand, Defendant was resentenced to a lesser term of 150 to 189 months.

Defendant asserts the trial court erred when it resentenced him to a longer prison term than he had received at the May 2002 sentencing. Our Supreme Court examined an analogous issue in *State v. Roberts*. The trial court modified a sentence after the Department of Corrections had notified the trial court that the prior sentence imposed was too short. *State v. Roberts*, 351 N.C. 325, 326, 523 S.E.2d 417, 417 (2000). The Supreme Court concluded that the defendant's resentencing after notification of the improper sentence did not violate N.C. Gen. Stat. § 15A-1335 and held the "General Statutes clearly provide that a sentence of unauthorized duration can be modified." *Id.*

Defendant successfully challenged his July 2002 judgment and sentence of 176 to 221 months with his 2018 petition for writ of certiorari. Upon remand, the trial court resentenced Defendant to 150 to 189 months. This sentence is less than the 176 to 221 months imposed in the unlawful July 2002 judgment that Defendant had successfully challenged. *Roberts* is instructive and binding on this Court. The unappealed judgment can be modified because the sentence imposed was for an "unauthorized duration." *Id.* On remand, the trial court entered a "statutorily mandated sentence." *Holt*, 144 N.C. App. at 116-117, 547 S.E.2d at 152.

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Defendant never successfully challenged his May 2002 judgment, only his July 2002 resentencing judgment improperly entered after the trial court was divested of jurisdiction. Defendant's May 2002 judgment was statutorily too short in duration for a Class B2 Felony. N.C. Gen. Stat. § 15A-1335 does not bar the December 2018 judgment, imposed within the statutory range and being less in duration than his July 2002 judgment. See *id.* Defendant's argument is overruled.

V. Conclusion

Defendant successfully challenged his July 2002 sentence imposed without jurisdiction after his appeal was taken and was resentenced to a lesser statutorily-allowed sentencing range for his conviction for attempted first-degree rape. See N.C. Gen. Stat. § 15A-1335. The 17 December 2018 judgment appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).