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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-545

Filed: 18 February 2020

Rowan County, Nos. 17 CRS 50447, 17 CRS 50450

STATE OF NORTH CAROLINA

v.

GERARDO JUAREZ

Appeal by defendant from judgments entered 3 October 2018 by Judge David L. Hall in Rowan County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Franklin E. Wells, Jr. for defendant.

ARROWOOD, Judge.

Gerardo Juarez (“defendant”) appeals from judgments entered on his convictions for trafficking in heroin by possession. Defendant argues the trial court erred in imposing consecutive active sentences because the sentences were motivated by facts not in evidence and were based on matters outside the record. For the following reasons, we affirm the judgment of the trial court.

I. Background

On 15 May 2017, a Rowan County Grand Jury indicted defendant on four counts of trafficking in opium or heroin and one count of conspiring to traffic in opium or heroin. Defendant was tried before a jury on 1 October 2018. The evidence at trial tended to show the following.

On 18 November 2016, Cindy Dixon (“Dixon”) was arrested for delivering 27 grams of heroin and offered to cooperate with the Rowan County Sheriff’s Office in hopes of getting a reduced sentence. The Rowan County Sherriff’s Office subsequently set up a sting operation in which it used Dixon to arrange two drug transactions with defendant. On 18 January 2017, Dixon called defendant, whom she knew as “Edgar,” to discuss a possible drug sale for \$2,500.00. On 20 January 2017, Dixon again called defendant and defendant’s girlfriend, whom Dixon knew as “Dasha,” answered. Dixon and Dasha arranged for Dixon to purchase 42 grams of heroin from defendant for \$2,500.00 outside a local Walmart.

Prior to the drug transaction, Chief Deputy David Ramsey attached a recording device to Dixon and supplied her with \$2,500.00 in cash. Detective Teresa Haupt then accompanied Dixon to the garden center at the local Walmart, where they waited for defendant to arrive. When defendant arrived, Dixon got into his car while Detective Haupt remained inside Walmart. While in the car, Dixon gave defendant the \$2,500.00 and received what she believed to be a balloon of heroin in exchange.

Dixon then exited the car and turned the balloon of heroin over to Chief Deputy Ramsey shortly thereafter. A surveillance team followed defendant after he left Walmart and trailed him to an apartment in Matthews, North Carolina. There, the team observed defendant staying with Dasha, whom they knew as Darya Borovskya.

On 30 January 2017, Dixon again called Dasha, this time arranging to purchase 52 grams of heroin from defendant for \$3,500.00 on 31 January 2017. When defendant again arrived at Walmart to meet Dixon, he was immediately apprehended by deputies on a warrant for the 20 January 2017 drug transaction. During the arrest, deputies seized a baseball-sized balloon of heroin from defendant's left coat pocket. In an interview with Chief Deputy Ramsey, defendant confessed he had picked up the heroin in Gaffney, South Carolina, and had gotten a call from an unknown individual in Mexico about the pickup location. Forensic reports on the balloons of the suspected heroin revealed that the first balloon contained 41.47 grams of heroin and the second balloon contained 51.27 grams. The first drug transaction and the phone conversations between Dixon, Dasha, and defendant were all audio recorded and used as evidence against defendant.

At the close of the State's evidence, defendant made a motion to dismiss the charges against him. The trial court denied the motion. Defendant was convicted of all five charges against him. The trial court consolidated counts one and two of 17 CRS 50447 and imposed an active sentence of 225 months to 282 months

imprisonment. The trial court also consolidated counts one and three into count two of 17 CRS 50450 and imposed a consecutive active sentence of 225 months to 282 months imprisonment. Defendant timely gave written notice of appeal on 9 October 2018.

II. Discussion

Defendant's sole argument on appeal is that the trial court erred in imposing consecutive active sentences because the sentences were motivated by facts not in evidence and were based on matters outside of the record. Defendant essentially contends the trial court improperly considered the impact of heroin in the community, namely concerning the negative costs associated with its sale and use. We disagree.

"The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *State v. Pinkerton*, 205 N.C. App. 490, 494, 697 S.E.2d 1, 4 (2010) (citing *State v. Swinney*, 271 N.C. 130, 133, 155 S.E.2d 545, 548 (1967)), *rev'd on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011).

Whether to impose a concurrent or consecutive sentence is within the discretion of the trial court. N.C. Gen. Stat. § 15A-1354(a) (2019). Moreover, "[a] sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "That presumption, however, is not conclusive, and if the judge by his own pronouncement shows clearly that he imposed this sentence for a cause not embraced within the indictment and the plea,

then the presumption of regularity is overcome, and his sentence is in violation of the defendant's rights." *Swinney*, 271 N.C. at 133, 155 S.E.2d at 548.

In *Swinney*, our Supreme Court held the trial court imposed a sentence based on improper considerations where the trial judge stated he was imposing the sentence in part because of other misconduct by defendant that she had not been tried for. *Id.* at 133-34, 155 S.E.2d at 548. Though the sentence was within the applicable statutory range, the *Swinney* court vacated the sentence because it was "for a cause not embraced within the indictment and the plea." *Id.* at 133, 155 S.E.2d at 548. This Court has also vacated sentences imposed by the trial court where there was a clear inference the sentences were motivated by the defendant's decision not to plead guilty. See, e.g., *State v. Hueto*, 195 N.C. App. 67, 671 S.E.2d 62 (2009); *State v. Peterson*, 154 N.C. App. 515, 571 S.E.2d 883 (2002).

In *State v. Butler*, this Court was asked to consider whether the impact of drugs was an improper consideration for the trial court during sentencing. 147 N.C. App. 1, 14, 556 S.E.2d 304, 312 (2001). There, the trial court imposed consecutive sentences upon the defendant's convictions for trafficking cocaine by possession and by transportation. *Id.* at 5, 566 S.E.2d at 307. In issuing the sentence, the trial court explained it does not consolidate drug charges because "drugs in the community impact a lot of people, not just individuals who take the drugs It impacts everybody around you because they're trying to get money to get the drugs." *Id.* at

14, 566 S.E.2d at 312. It further noted that innocent people are often robbed and assaulted by individuals seeking money to pay for drugs, and that this broad impact prompted the legislature's tough stance on drugs. *Id.* This Court held that it was not improper for the trial court to consider generally the impact of drugs in the community. *Id.* at 14, 566 S.E.2d at 313. Compare *State v. Johnson*, __ N.C. App. __, __, 827 S.E.2d 139, 142 (2019) (vacating the defendant's sentence where "the trial judge did not just consider the impact of [the] defendant's drug offenses on the community, but clearly indicated in her remarks that she was considering a specific offense in her community for which [the] defendant was not charged.").

The present case is similar to *Butler*. Here, defendant was convicted of trafficking opium or heroin stemming from two drug transactions for amounts of approximately 42 grams and 52 grams of heroin, respectively. N.C. Gen. Stat. § 90-95(h)(4) (2019) sets out the punishment for "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium . . . including heroin[.]" The statute provides three levels of punishment, depending on the quantity of the drug involved, with 4 to 14 grams carrying the lightest sentence, and 28 grams or more carrying the heaviest sentence. N.C. Gen. Stat. § 90-95(h)(4)(a)-(c). Because defendant conducted drug transactions involving more than 28 grams of heroin, he was therefore subject to a mandatory sentence of 225 months to 282 months imprisonment for each trafficking violation. *Id.* Whether defendant served those

terms of imprisonment concurrently or consecutively was left to the discretion of the trial court. N.C. Gen. Stat. § 15A-1354(a).

The trial court, noting the devastating impact of heroin in the community, sentenced defendant to two consecutive terms of imprisonment consisting of 225 months to 282 months each. The trial court explained its reasoning for imposing a consecutive sentence as follows:

THE COURT: I never presume anything. I've had no idea what the jury's verdict would be, but I -- I have thought about these allegations, and now they are convictions. Conscientiously, I do accept these verdicts and order them recorded.

There will be two consecutive sentences and that is simply because I have sympathy. I have compassion. I have compassion for you, and -- and I feel for you and the circumstances you were in. At the same time, I'm exposed on a daily basis to the devastation that heroin is reeking.

There are a trail of deaths everywhere I go because of heroin, and often the Fentanyl that sometimes is mixed with the heroin. But I don't say this because I want you to feel worse or for you to blame yourself more. Because you should actually forgive yourself and go about living your life as best -- best you can. But there may -- there may well be bodies associated with the heroin that you distributed, sir, and it -- it weighs heavily on me. And I do not enter these judgments lightly.

In 17 CRS 50447 as to count one, a jury of his peers having found [defendant] guilty of trafficking in heroin, that is pursuant to G.S. 90-95(h)(6), 28 grams or more. The statutory punishment is he shall be imprisoned for a minimum of 225 months with a maximum of 279 months in the North Carolina Division of Adult Correction.

This is to be an active sentence. And I'll ask about his needs in a moment, because I certainly am going to order anything and everything that I can that will help

[defendant] while he is in custody. Consolidate count two.

In 17 50450, as to count two, a jury of his peers having found [defendant] guilty of trafficking in heroin, 28 grams or more by possession, it will be the same sentence. He shall be imprisoned for a minimum of 225 and a maximum of 279 months in the Division Of Adult Correction.

This is an active sentence and this sentence shall begin at the expiration of the sentence imposed in 17 50447. Consolidate counts one and three. No additional punishment. So there's punishment for two of the five convictions essentially, because we have two dates. And in my mind, two courses of conduct with a devastating amount. Even though it fits within the palm of your hand, it's a devastating amount of the substances heroin.

As we held in *Butler*, it was not improper for the trial court to consider the impact of drugs when deciding the appropriate sentence for defendant. A trial court may take into account the seriousness of an offense when exercising its discretion at sentencing. *State v. Oakes*, 219 N.C. App. 490, 497-98, 724 S.E.2d 132, 137-38 (2012). In addition, we have previously recognized the trial court may make general references to the impact of drugs in the community when addressing the severity of the offense, as the trial court did here. *See Johnson*, __ N.C. App. at __, 827 S.E.2d at 142. Moreover, unlike the defendants in *Swinney* and *Hueto*, it is clear defendant here was not sentenced for reasons unrelated to his convictions. On the contrary, it is evident from the trial court's statements that the decision to impose consecutive sentences was motivated purely by reasons associated with the crimes defendant was actually convicted of – trafficking heroin. As the trial court explained, it believed that

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the significant amount of heroin defendant was trafficking, coupled with the reality of its harmful effects, warranted consecutive sentences. We therefore hold these were not improper considerations and reject defendant's assignment of error.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).