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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-120

Filed: 20 October 2020

Franklin County, No. 17CRS050297

STATE OF NORTH CAROLINA

v.

HARLEY AARON GONZALEZ

Appeal by Defendant from judgment entered 14 August 2019 by Judge Alma Hinton in Franklin County Superior Court. Heard in the Court of Appeals 26 August 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for State-Appellee.*

*Sigler Law PLLC, by Kerri L. Sigler, for Defendant-Appellant.*

COLLINS, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty of indecent liberties with a child. Defendant argues that he received ineffective assistance of counsel where his trial counsel failed to offer evidence of any mitigating factors, including that of limited mental capacity, during sentencing. We dismiss

Defendant's argument without prejudice to its being asserted in a motion for appropriate relief.

### **I. Factual Background**

In April 2017, Defendant Harley Aaron Gonzalez was indicted for committing (1) indecent liberties with a child under the age of 16 years, in violation of N.C. Gen. Stat. § 14-202.1, and (2) sexual battery, in violation of N.C. Gen. Stat. § 14-27.33.

Defendant's trial counsel ("Counsel") referred him to Dr. Kristy Matala, Ph.D., for a psychological evaluation, mental health diagnoses, and treatment recommendations. Matala interviewed and examined Defendant for a total of 15.75 hours between 14 June 2017 and 6 September 2017. Matala determined that Defendant's cognitive abilities were "within the Extremely Low range of functioning" and that his Full Scale IQ was 69, which interfered with Defendant's ability to care for himself independently. Matala then diagnosed Defendant with a mild intellectual disability and concluded that Defendant should be evaluated to determine whether he had the legal capacity to proceed to trial.

In April 2018, Counsel filed a motion to commit Defendant to Central Regional Hospital to determine his capacity to proceed to trial. The Franklin County Superior Court ordered Defendant committed to Central Regional Hospital for a period not to exceed 60 days for observation and treatment.

Dr. Susan Hurt, Ph.D., conducted a forensic evaluation of Defendant. On 28 June 2018, Hurt issued her report, in which she determined that Defendant “did not demonstrate mental health symptoms of a type or severity that would . . . interfere in his rational decision-making,” and that Defendant’s “lack of motivation is . . . volitional and within his control.” Hurt ultimately concluded that Defendant was capable to proceed to trial.

In January 2019, the trial court held a hearing to determine Defendant’s capacity to proceed to trial. The trial court determined that Defendant was capable to proceed to trial, but noted that Defendant had a limited ability “to understand the nature of the proceedings and to communicate his positions and desires to the Court[.]”

On 12 August 2019, Defendant’s case came on for trial in Franklin County Superior Court before the Honorable Alma Hinton. On 14 August 2019, the jury returned unanimous verdicts of (1) guilty of indecent liberties with a child and (2) guilty of sexual battery. The trial court arrested judgment on the conviction for sexual battery.

During sentencing, Counsel did not offer any mitigating factors for the Court’s consideration and asked for a sentence in the presumptive range of 13-16 months. The trial court sentenced Defendant to 16-29 months’ imprisonment, suspended the sentence, and placed Defendant on supervised probation for 36 months. The trial

court also required Defendant to register as a sex offender for 30 years, pay \$802.50 in court costs and fees, and placed Defendant on electronic-based monitoring for the first nine months of his probation.

Defendant filed a hand-written notice of appeal on 27 August 2019.

## **II. Discussion**

Defendant argues that he was denied effective assistance of counsel where Counsel failed to argue the mitigating factor of limited mental capacity.

To prevail on an ineffective assistance of counsel claim, a defendant “must show that his counsel’s conduct fell below an objective standard of reasonableness.” *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (citation omitted). In order to meet this burden, the defendant must satisfy a two-part test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Claims of ineffective assistance of counsel generally should be considered through motions for appropriate relief and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). Ineffective assistance of counsel claims brought on direct appeal will only be decided on the merits “when the cold

record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). Therefore, we must first determine if an ineffective assistance of counsel claim has been prematurely asserted on direct appeal. *Id.* at 167, 557 S.E.2d at 525.

At trial, Counsel presented evidence of Defendant’s limited mental capacity and of the various psychological examinations conducted on Defendant. However, at Defendant’s sentencing hearing, Counsel did not argue as a mitigating factor Defendant’s limited mental capacity or call attention to the evidence presented of Defendant’s cognitive deficiencies. Instead, Counsel stated, “I’d ask in this case that the range here would be 13 to 16 months in the presumptive range. I wouldn’t go as far as to ask for any mitigating factors.” On appeal, relying upon *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), Defendant asks this Court to hold that this failure “falls far short of the requirement that reasonably adequate assistance in fact be rendered[,]” because the “probability that effective counsel could have convinced the court to issue a lesser sentence is sufficient to undermine our confidence in the outcome.” *Id.* at 546, 547, 335 S.E.2d at 522 (quotation marks and citations omitted).

The record on appeal is too minimal for us to determine the extent, if any, to which Counsel’s decision to ask for a sentence in the low presumptive range instead of asserting any mitigating factors had any grounding in appropriate strategic or

tactical considerations. We therefore dismiss this claim without prejudice to Defendant's right to assert it in a motion for appropriate relief. *See State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985) ("We cannot properly determine this issue on this direct appeal because a [hearing] on this question has not been held. Our decision on this appeal is without prejudice to defendant's right to file a motion for appropriate relief[.]").

### **III. Conclusion**

We dismiss Defendant's claim of ineffective assistance of counsel without prejudice to its being asserted in a motion for appropriate relief.

DISMISSED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).