IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-444

No. COA20-609

Filed 17 August 2021

Richmond County, Nos. 17 CRS 52679–84, 18 CRS 1434

STATE OF NORTH CAROLINA

v.

MARVIN GAY LINDSEY

Appeal by defendant from judgment entered 7 January 2020 by Judge James M. Webb in Richmond County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas W. Yates, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant.

DIETZ, Judge.

¶ 1 Defendant Marvin Lindsey seeks to challenge the factual basis supporting his guilty pleas to a number of felony charges. As explained below, the State presented a sufficient factual basis to support the guilty pleas. Thus, because there is no merit to Lindsey's arguments, we decline to issue a writ of certiorari and dismiss this portion of the appeal for lack of jurisdiction.

¶ 2 Lindsey also contends that the trial court entered a money judgment for his court-appointed attorneys' fees without providing him a sufficient opportunity to be heard. We agree that under controlling precedent from this Court, the trial court did not conduct the required colloquy with Lindsey before entry of that money judgment. We therefore issue a writ of certiorari, vacate this portion of the judgment, and remand for further proceedings.

Facts and Procedural History

¶ 3 Defendant Marvin Lindsey has a criminal history that includes a number of felony convictions. He was convicted of maintaining a vehicle, dwelling, or place for a controlled substance on 4 April 2002; possession with the intent to sell or deliver cocaine on 9 December 2003; and sale of a Schedule III controlled substance on 31 January 2013. After attaining habitual felon status, Lindsey committed the felony of selling a controlled substance to a police informant on three separate occasions. Lindsey sold cocaine to the informant on 6 July 2017. In addition, Lindsey sold methamphetamine and oxycodone to the same informant on both 14 July 2017 and 18 July 2017.

¶ 4 On 8 January 2018, a grand jury indicted Lindsey for three counts of selling a controlled substance, four counts of delivering a controlled substance, three counts of possession with the intent to sell and/or deliver a controlled substance, and one count of felonious maintaining a dwelling for keeping and/or selling a controlled substance.

The District Attorney's Office offered Lindsey a non-jury disposition if he pleaded guilty to three counts of possession of a Schedule II substance, with judgment consolidated and enhanced due to Lindsey's habitual felon status.

¶ 5 Originally, law enforcement officers believed the pills recovered from Lindsey on July 14 were ecstasy. The indictment later alleged that the pills were MDMA. Then, a superseding indictment alleged that the pills were methamphetamine. Likewise, law enforcement originally believed the pills recovered from Lindsey on July 18 were ecstasy and oxycodone. Again, the indictment later alleged that the pills were MDMA and oxycodone. And, again, a later superseding alleged that the pills were methamphetamine and oxycodone. Put simply, law enforcement's initial identification of the alleged controlled substances did not match the allegations in the final indictments after a full investigation.

¶ 6 On 7 January 2020, Lindsey pleaded guilty to all charges. A state crime laboratory tested the controlled substances but, when the State presented the factual basis for Lindsey's guilty pleas, the State did not submit the lab reports from the tests into evidence. Instead, the State orally provided a summary of the evidence for the charged offenses, which we quote below:

> [I]n 17 CRS 52679 . . . on July 6, 2017 . . . a confidential informant . . . did make a controlled purchase of cocaine from the defendant at the defendant's residence. . . . The defendant and the confidential informant exchanged money, and then received the narcotics. Went back and met

at the Sheriff's Department, turned over that. That was tested and it did come back to be cocaine. . . . Your Honor, the lab report for that only measured .46 grams.

. . .

The 17 CRS 52680. . . . the defendant, between the dates of July 6 to July 18 of 2017 did maintain a dwelling house at 163 Hawkins Lane where he was keeping and selling cocaine and methamphetamine. And then the next case, 17 CRS 52681. In that case, the confidential informant . . . did purchase controlled substances of methamphetamine on July 14 of 2017 at that same residence. He met the defendant and purchased what was described as Ecstasy. The lab test reports that it is in fact methamphetamine.

. . .

And then going back for the habitual [felon status], Mr. Lindsey has previously been convicted:

That on November 1, 2012 he had been convicted of the felony of selling Schedule 3 controlled substance in violation of 90- 95(A)(1). And that on January 31, 2013, Mr. Lindsey was convicted of that selling Schedule 3 controlled substance in Superior Court for Richmond County. That file number is 12 CRS 53205.

Second, on February 14 of 2001, Mr. Lindsey did commit the offense of maintaining a dwelling or vehicle or place for controlled substance, in violation of 90-108.87. And on April 4, 2002 Mr. Lindsey was convicted of maintaining a vehicle, dwelling or place for controlled substance. That file number was 01 CRS 768.

And, finally, on or about July 7, 2003, Mr. Lindsey did commit the felony of possession with intent to sell and deliver marijuana, in violation of 90-95(A)(1). He was convicted on December 9, 2003 of possession with intent to

> sell and deliver marijuana in Richmond County. File number 03 CRS 4277.

¶ 7 Lindsey stipulated to the fact that the substances he possessed were illegal substances:

> [PROSECUTOR]: And in each one of those cases does your client stipulate that in the 17 CRS 52679 that the substance was in fact cocaine?
>
> [DEFENSE COUNSEL]: I believe there are lab reports in that case. But, yes, he will admit that.
>
> [PROSECUTOR]: And in 17 CRS 52681, does your client admit the substance was in fact methamphetamine?
>
> [DEFENSE COUNSEL]: That's correct.
>
> [PROSECUTOR]: And in 17 CRS 52683, does your client stipulate that that substance was in fact methamphetamine?
>
> [DEFENSE COUNSEL]: That's correct.
>
> [PROSECUTOR]: And finally in 17 CRS 52684, does your client stipulate that controlled substance was in fact oxycodone?
>
> [DEFENSE COUNSEL]: That's correct.

He also admitted his status of being a habitual felon:

> [PROSECUTOR]: Does your client admit the felony status of being a habitual felon?
>
> [DEFENSE COUNSEL]: Your Honor, after review of his worksheet, he has authorized me to admit the status of being a habitual felon.

Counsel signed the plea transcript certifying that the terms and conditions stated

within the transcript, if any, upon which the defendant's plea was entered were correct and that Lindsey agreed.

¶ 8 The trial court then inquired about court-appointed attorneys' fees. The trial court asked Lindsey's court-appointed counsel how many hours he had spent on the case. Counsel requested the opportunity to submit an affidavit, and the trial court declined, stating that fees would have to be awarded in Lindsey's presence so that he could have the opportunity to object. Counsel responded that he had spent approximately 35 hours defending Lindsey. The trial court awarded counsel $2,625 in fees. It then proceeded immediately to sentence Lindsey in the mitigated range to a term of 58 months to 82 months in prison. Lindsey filed a written notice of appeal and also petitioned for a writ of certiorari, acknowledging that the statute governing an appeal from a criminal judgment on a plea of guilty does not provide a right to appeal the issues he sought to raise. The State moved to dismiss the appeal for lack of jurisdiction.

Analysis

¶ 9 Lindsey's challenges to his criminal judgment, entered following a guilty plea, are not among the grounds for which there is a right to appeal and instead he may "petition the appellate division for review of this issue by writ of certiorari." N.C. Gen. Stat. § 15A-1444. A petition for a writ of certiorari is "not substitute for a notice of appeal" and should be allowed only when the petitioner has shown "merit or that

error probably was committed below." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017). To assess whether we will exercise our discretion to issue a writ in this case, we will therefore examine the underlying merits of Lindsey's arguments.

I. Factual basis supporting the guilty pleas

¶ 10 We first address Lindsey's argument concerning the sufficiency of the factual basis used to accept the guilty pleas for selling and delivering controlled substances. N.C. Gen. Stat. § 15A-1022(c) provides that a judge "may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea" and that this determination "may be based upon information including but not limited to" the following:

> (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).

¶ 11 Our Supreme Court has held that the statute "does not require the trial judge to elicit evidence from each, any or all of the enumerated sources." *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980). Instead, the trial court "may consider

any information properly brought to his attention in determining whether there is a factual basis for a plea of guilty or no contest." *Id.* at 79, 261 S.E.2d at 185–86. The evidence which is considered "must appear in the record." *Id.*

¶ 12 The factual basis must be sufficient to assure the trial court that "some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) (quoting *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421–22 (1980)). Accordingly, a recitation of the factual basis for a guilty plea may be brief, conclusory, and may include reasonable inferences. *See State v. Atkins*, 349 N.C. 62, 95–97, 505 S.E.2d 97, 118–19 (1998); *State v. Brooks*, 105 N.C. App. 413, 418, 413 S.E.2d 312, 315 (1992).

¶ 13 Here, although the record indicates that there was some initial confusion by law enforcement about what controlled substances Lindsey possessed, the prosecutor presented an on-the-record, oral recitation of the facts informing the trial court that the seized substances were tested by a state crime laboratory and that a report from that laboratory confirmed that the seized substances were in fact the controlled substances alleged in the superseding indictments.

¶ 14 Lindsey cites case authority requiring the identity of controlled substances in a criminal trial to be established by admission into evidence of laboratory reports and accompanying testimony. *See*, *e.g.*, *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738,

744 (2010). Thus, Lindsey argues, when "the State has failed to consistently identify" a controlled substance over the course of a criminal proceeding, "a prosecutor's identification of those controlled substances during his recitation of the facts is not sufficient to establish a factual basis." Instead, Lindsey contends that the State was required to introduce the laboratory reports into evidence as part of its factual basis.

¶ 15 We reject this argument. The purpose of the factual basis is to confirm that evidence "independent of the plea itself" tends to show the defendant is guilty. *Agnew*, 361 N.C. at 336, 643 S.E.2d at 583. The prosecutor's statement that a crime laboratory tested the seized substances and confirmed that they were the substances alleged in the superseding indictments was sufficient to satisfy this requirement. *Id.*; *Atkins*, 349 N.C. at 95–97, 505 S.E.2d at 118–19.

¶ 16 Lindsey next argues that the trial court erred by accepting his stipulation to habitual felon status. When a defendant is charged with having attained habitual felon status, a "prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C. Gen. Stat. § 14-7.4. The "preferred method" for establishing a prior conviction "includes the introduction of the judgment itself into evidence." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984). But the statute "does not exclude other methods of proof." *State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000). More importantly, these requirements are aimed at the State's burden of proof at trial. The

standard for a factual basis to accept a guilty plea to attaining habitual felon status is far more lenient. *Agnew*, 361 N.C. at 336, 643 S.E.2d at 583; *Atkins*, 349 N.C. at 95–97, 505 S.E.2d at 118–19.

¶ 17 Here, the State summarized its evidence of Lindsey's three prior felony convictions, describing the nature of the felony charge, the date on which it was committed, and the criminal case number for each of the three criminal judgments. Lindsey also stipulated that he had attained the status of a habitual felon:

> [PROSECUTOR]: Does your client admit the felony status of being a habitual felon?
>
> [DEFENSE COUNSEL]: Your Honor, after review of this worksheet, he has authorized me to admit the status of being a habitual felon.

This is a sufficient factual basis to accept Lindsey's guilty plea to attaining habitual felon status. *Id.*

¶ 18 Because we conclude there is no merit to Lindsey's arguments concerning the factual basis for his guilty plea, in our discretion we decline to issue a writ of certiorari on these issues, and we allow the State's motion to dismiss the appeal. *See Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369.

II. Attorneys' fees

¶ 19 This Court has held that, before imposing a money judgment for the attorneys' fees of a defendant's court-appointed counsel, "the trial court must afford the

defendant notice and an opportunity to be heard." *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018). To afford the necessary opportunity to be heard, "trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. "Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

¶ 20 Here, the trial court acknowledged that Lindsey had a right to be heard, instructing Lindsey's counsel not to submit an affidavit and instead to state his hours on the record "so that when I set the fee [Lindsey] will have the opportunity to lodge any objection." But the Court did not ask Lindsey if he wished to be heard concerning the monetary judgment for attorneys' fees. In *Friend*, we held that this direct colloquy with the defendant was not necessary if there was "other evidence in the record demonstrating that the defendant . . . was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* But here, the cold record suggests the opposite. Shortly after the trial court's announcement of the amount of attorneys' fees, the court inquired about whether Lindsey needed substance abuse evaluation and treatment and Lindsey responded "If I can speak freely?" before then answering. This suggests that, as we observed with respect to the defendant in *Friend*, Lindsey

may have believed that he was not permitted to address the court unless the court directed a question at him. In all other circumstances, Lindsey may have believed he could speak only through his counsel.

¶ 21 Accordingly, because we conclude that there is merit to Lindsey's argument regarding his opportunity to be heard on attorneys' fees, we exercise our discretion to issue a writ of certiorari, vacate the monetary judgment for attorneys' fees under *Friend*, and remand for further proceedings on that issue.

Conclusion

¶ 22 For the reasons set forth above, we allow the State's motion to dismiss and deny the petition for a writ of certiorari with respect to the adequacy of the factual basis for the guilty pleas. We issue a writ of certiorari with respect to the monetary judgment for attorneys' fees, vacate that portion of the judgment, and remand for further proceedings.

DISMISSED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and WOOD concur.

Report per Rule 30(e).