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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-517

No. COA20-686

Filed 21 September 2021

Davidson County, No. 18 CRS 56920, 56922, 19 CRS 303

STATE OF NORTH CAROLINA

v.

LLOYD LEO LEWIS ROBERTS

Appeal by defendant from judgment entered 24 March 2020 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Helms, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant

TYSON, Judge.

¶ 1 Defendant appeals from the judgment entered and argues the trial court imposed a sentence that is different from what was agreed upon in a plea agreement without informing him. The State concedes the error. We vacate and remand.

I. Background

¶ 2 Lloyd Leo Lewis Roberts ("Defendant") and Susan Francisco were involved in an altercation with Teresa Stiltner and others at an Economy Inn located at 420 National Boulevard in Lexington on 4 December 2018. During the altercation, firearms were brandished and discharged into the air. Defendant left the hotel in a car after the altercation. Defendant hit Ms. Stiltner with the car while he was driving away. She fell and hit her head on a curb. Ms. Stiltner suffered a head injury and died later at Wake Forest Baptist Medical Center.

¶ 3 Defendant was indicted for hit and run causing physical injury, possession of firearm by felon, and having attained habitual felon status. Defendant and the State entered into a plea arrangement on 23 March 2020, whereby Defendant agreed to plead guilty to all three charges.

¶ 4 The trial court entered judgment for a consolidated term of 67-93 months of imprisonment and imposed a $250.00 fine. Defendant gave oral notice of appeal in open court.

II. Petition for Writ of Certiorari

¶ 5 Defendant filed a petition for writ of certiorari ("PWC") and asserts three procedural issues to grant his petition. Defendant argues this Court has previously held a violation of N.C. Gen. Stat. § 15A-1024 is reviewable by certiorari. *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011). Defendant also argues violations of the procedural requirements in Article 58 are reviewable by certiorari

while the case is on direct review. *State v. Rhodes*, 163 N.C. App. 191, 194, 592 S.E.2d 731, 733 (2004). Finally, Defendant contends the writ is appropriate because a judgment was entered against him on 24 March 2020. Defendant failed to file a written notice of appeal and instead appeared in court on 30 March 2020, giving oral notice of appeal resulting in the creation of appellate entries and the appointment of appellate counsel. Defendant asserts certiorari is necessary to address his failure to comply with the statutory requirements of N.C. R. App. P. 4. We grant Defendant's PWC.

III. Issue

¶ 6 Whether the trial court violated N.C. Gen. Stat. § 15A-1024 by imposing a sentence different from that which the parties had agreed upon without first informing Defendant of his right to withdraw his plea.

IV. Standard of Review

¶ 7 Issues regarding statutory interpretation are questions of law reviewed *de novo*. *State v. Coakley*, 238 N.C. App. 480, 492, 767 S.E.2d 418, 426 (2014). In a *de novo* review, "the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.*

V. Analysis

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant

> that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2019).

¶ 8 The State and Defendant agreed to a plea arrangement. The arrangement consisted of Defendant's agreement to plead guilty to hit and run causing physical injury, possession of a firearm as a felon, and having attained habitual felon status.

¶ 9 The State and Defendant agreed Defendant would be punished as a habitual felon for the hit and run charge and possession of a firearm by a felon and to consolidate both charges into one class D felony. The State stipulated to the presence of two mitigating factors, and the sentence imposed would be a "minimum mitigated 67-93 months active."

¶ 10 During the sentencing hearing, after asking Defendant the questions required by N.C. Gen. Stat. § 15A-1022(a) and hearing the factual basis proffered by the State to support the plea, the trial court found there was a factual basis for the plea and Defendant's plea was freely, voluntarily, and understandingly made. The trial court stated that "[t]he defendant's plea is hereby accepted by the Court and is ordered recorded." The trial court accepted the plea arrangement which provided only for a mitigated sentence of 67-93 months imprisonment but also imposed a $250 fine.

¶ 11 N.C. Gen. Stat. § 15A-1024 "applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at

the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed." *State v. Williams*, 291 N.C. 442, 446, 230 S.E.2d 515, 517-18 (1976). "Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *Id.* at 446-47, 230 S.E.2d at 518 (emphasis omitted).

¶ 12 It is well-settled that once the trial court decides to impose a sentence different from the one agreed to in the plea agreement, "the court must: (1) inform the defendant of its decision; (2) inform the defendant that he or she may withdraw his or her plea; and, (3) if the defendant chooses to withdraw his or her plea, grant a continuance until the next session of court." *Blount*, 209 N.C. App. at 346, 703 S.E.2d at 925 (citation omitted).

¶ 13 This Court has held "*any* change by the trial judge in the sentence that was agreed upon by the defendant and the State, even a change benefitting the defendant, requires the judge to give the defendant an opportunity to withdraw his guilty plea." *State v. Marsh*, 265 N.C. App. 652, 655, 829 S.E.2d 245, 247 (2019) (emphasis supplied).

VI. Preservation

¶ 14 Sentencing errors and violations of statutory mandates are preserved without objection. While a party must normally object to preserve an issue for appellate review, a defendant need not voice a contemporaneous objection to preserve a non-

constitutional sentencing issue for appellate review. *State v. Meadows*, 371 N.C. 742, 747, 821 S.E.2d 402, 406 (2018). This exception exists because the trial courts know a defendant is seeking "the minimum or least punitive sentence possible." *Id.* Although Defendant failed to object to the trial court's imposition of a different sentence than that which the parties agreed upon in the plea arrangement, the issue is preserved for appellate review. *Id.*

¶ 15 The State's brief concedes: "Defendant-Appellant is correct on the merits of his Brief. The State consents to the judgment being corrected to the precise language of the plea agreement, which does not include a $250.00 fine. The State agrees that the judgment should be vacated and remanded to the trial court."

VII. Conclusion

¶ 16 Defendant's petition for writ of certiorari is granted. The trial court did not sentence Defendant in accordance with the precise terms of the plea arrangement. The State concedes Defendant's error as asserted.

¶ 17 The trial court failed to first inform Defendant of his right to withdraw the plea in accordance with N.C. Gen. Stat. § 15A-1024. We vacate and remand for sentencing in accordance with Defendant's withdrawal of the plea or pursuant to the statute. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge STROUD and Judge DILLON concur.

Report per Rule 30(e).