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IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-15

No. COA22-184

Filed 17 January 2023

New Hanover County, Nos. 19 CRS 57521, 58143, 20 CRS 52616

STATE OF NORTH CAROLINA

v.

COREY LAMONT BRYAN

Appeal by Defendant from judgment entered 24 May 2021 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 September 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexandra M. Hightower, for the State.

Edward Eldred, for Defendant-Appellant.

WOOD, Judge.

¶ 1

Defendant Corey Lamont Bryan (“Defendant”) appeals from a judgment entered upon his *Alford* guilty plea. Defendant petitions this Court for issuance of a writ of *certiorari* to obtain review of the trial court’s award of restitution. In our discretion, we grant Defendant’s petition. On appeal, Defendant challenges the validity of the trial court’s restitution order, arguing the order was not supported by

the evidence. We agree, and therefore, vacate the restitution order and remand to the trial court for resentencing on the issue of restitution.

I. Factual and Procedural Background

¶ 2

On 27 January, 10 February, and 29 May 2020, Defendant was indicted on two counts of felony breaking or entering, one count of common law robbery, one count of identity theft, and two counts of obtaining property by false pretenses. At a plea hearing on 24 May 2021, Defendant submitted an *Alford* plea to one count of identity theft and two counts of breaking or entering. Pursuant to the plea arrangement, Defendant agreed to plead guilty to the above charges, which were to be “consolidated into one active sentence of 19 to 32 months with no probation.” In return, the State agreed to dismiss several charges including four counts of habitual felon, two counts of obtaining property by false pretense, one count of common law robbery, and one count of first-degree burglary.

¶ 3

The trial court examined Defendant during the plea hearing. Defendant agreed that there was a factual basis to support his pleas and consented to the court hearing a summary of the evidence in his case. The State then presented the following: on or about 24 June 2019, Defendant unlawfully obtained money from the joint checking account of Ms. Murtha and her estranged husband by transferring money into a co-defendant’s account. Defendant was acquainted with Ms. Murtha’s estranged husband and used the husband’s access to the joint account for the

unauthorized transactions. The State further requested restitution in the amount of \$9,292.86 as \$8,900 was owed to First Citizens Bank and \$392.86 to Ms. Murtha.

¶ 4 As to the two breaking or entering counts, the State recited that on 9 September 2019, Defendant, with others, broke into a residence, assaulted the occupant, and took his property and money. The State further provided that on 5 April 2020, Defendant broke into a Dollar General store. The State requested restitution only in relation to the identity theft charge.

¶ 5 After its recitation, the State presented a restitution worksheet to the trial court. The State did not present any evidence to support the restitution award. Defendant's trial counsel, when asked to comment, asked that the terms of the plea be accepted, and stated that there were no additions or corrections to the facts presented by the State. Restitution was discussed in the presence of Defendant and his trial attorney, and Defendant's counsel did not object or propose corrections to the plea arrangement. However, the checkbox on the Transcript of Plea, signed by Defendant, defense counsel, and prosecutor, indicating that "[t]he defendant stipulates to restitution to the party(ies) in the amounts set out on 'Restitution Worksheet, Notice and Order (Initial Sentencing)'" was not checked.

¶ 6 The trial court accepted Defendant's *Alford* plea and entered judgment against Defendant for a 19–32 months active sentence with credit for 233 days served. Defendant stipulated to a prior record level 4 for sentencing purposes. The trial

court's judgment further ordered Defendant to pay \$9,292.86 in restitution "as set out on the restitution worksheet." On 21 June 2021, the trial court entered an order giving Defendant an additional credit for 17 days served. More than a year after the judgment was entered, Defendant filed a *pro se* notice of appeal on 29 June 2021, contending that he had been "bamboosled [sic] and coerced into taking an invalid plea offer and their [sic] is several more details as to why after 10 days this is invalid." Defendant's notice of appeal made several allegations as to why the plea agreement was invalid but did not address the restitution award. Defendant filed a petition for writ of *certiorari*, together with his brief to this Court on 23 May 2022.

II. Appellate Jurisdiction

¶ 7

"A defendant entering an *Alford* plea has no statutory right to appeal the trial court's judgment." *State v. Williams*, 265 N.C. App. 657, 659, 829 S.E.2d 518, 521 (2019) (citing N.C. Gen. Stat. § 15A-1444(e) (2019)). We also note that Defendant filed a notice of appeal with numerous procedural defects. Under Rule 4(a) of the North Carolina Rules of Appellate Procedure, an appeal from a judgment in criminal court must be taken either by giving an oral notice of appeal at trial or filing the notice within fourteen days after entry of the judgment or order. N.C. R. App. P. 4(a). Defendant filed a notice of appeal on 29 June 2021, more than one year after judgment was entered on 24 May 2021. Thus, Defendant's notice of appeal is untimely. Additionally, Defendant's notice of appeal was not addressed to this court,

in further violation of Rule 4. Defendant now seeks our discretionary review by filing a petition for writ of *certiorari* with this Court. Rule 21 of our Rules of Appellate Procedure permits the issuance of a writ of *certiorari* “in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1). Additionally, N.C. Gen. Stat. § 15A-1444 permits a defendant to “petition the appellate division for review” to determine whether his guilty plea was supported by a sufficient factual basis by writ of *certiorari*. N.C. Gen. Stat. § 15A-1444(a1) (2021).

¶ 8

Our Supreme Court has held, “[t]he decision concerning whether to issue a writ of *certiorari* is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause.” *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (emphasis added) (citation omitted). Upon review of the record, Defendant’s brief, and the State’s concession that there was insufficient evidence to support the trial court’s restitution award, we determine Defendant’s challenge to the trial court’s judgment presents “good and sufficient cause” to warrant review. *Id.* In our discretion, we grant Defendant’s petition for writ of *certiorari* to review the trial court’s acceptance of his *Alford* plea and restitution order and to address the merits of Defendant’s appeal. *See Williams*, 265 N.C. App. at 660, 829

S.E.2d at 521 (citation omitted).

III. Analysis

¶ 9 Defendant brings a single issue on appeal. Defendant contends the trial court invalidly ordered him to pay \$9,292.86 in restitution to Ms. Murtha and First Citizens Bank because no evidence was presented to support this restitution award. We agree.

¶ 10 Notwithstanding Defense counsel’s failure to object to the restitution order, a challenge to this order is preserved for appellate review without an objection in the lower court. N.C. Gen. Stat. § 15A-1446(d)(18) (2021); *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citation omitted). “On appeal, we review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing.” *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (citation and quotation marks omitted).

¶ 11 Concerning a plea agreement, N.C. Gen. Stat. § 15A-1021 states, “The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant.” N.C. Gen. Stat. § 15A-1021(c) (2021). Pursuant to N.C. Gen. Stat. § 15A-1340.34, “[w]hen sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question.” § 15A-1340.34(a) (2021). The trial court shall “require that the defendant

make restitution to the victim or the victim’s estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” § 15A-1340.34(b). A judgment ordering restitution “must be supported by evidence adduced at trial or at sentencing.” *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (citation omitted). “In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution.” *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). If restitution is ordered, “[t]he amount of restitution must be limited to that supported by the record . . .” N.C. Gen. Stat. § 15A-1340.36(a) (2021); see *State v. Easter*, 101 N.C. App. 36, 47, 398 S.E.2d 619, 625 (1990).

¶ 12 Accordingly, “[a] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.” *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citations omitted). Additionally, “[u]nsworn statements of a prosecutor also cannot support an order of restitution.” *State v. Hunt*, 250 N.C. App. 238, 253, 792 S.E.2d 552, 563 (2016) (citation omitted). Hence, “when no evidence supports the award, the award of restitution will be vacated.” *Id.* (citation omitted). “When a restitution award is vacated, the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing.” *Id.* (citation omitted).

¶ 13 Based upon the record before us, there is no supporting or corroborating

evidence in the record substantiating the trial court's award of restitution in the amount of \$9,292.86. Additionally, there is no evidence that Defendant made a "definite and certain" stipulation as to the amount of restitution "in open court" during the hearing. The State prosecutor's unsworn statements concerning the identity theft charge served as the only information presented to support the restitution worksheet, and the State concedes there is no competent evidence in the record substantiating the trial court's award of restitution. The State further concedes that the restitution amount must be vacated, and the matter remanded to the trial court for a new hearing.

¶ 14 Because a plea agreement is contractual in nature, the parties are bound by its terms. *See State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993) (citation omitted). Here, Defendant's written plea agreement did not contain an express agreement by Defendant "to pay that particular restitution as a condition of the plea agreement." *State v. Murphy*, 261 N.C. App. 78, 87, 819 S.E.2d 604, 609 (2018). Because Defendant's written agreement was silent on the issue of restitution and there is no evidence that Defendant bargained for and agreed to pay restitution, the trial court's order of restitution was "not an essential or fundamental term of the deal." *Id.* (internal quotation marks omitted). Accordingly, we vacate and remand this restitution award to the trial court for a new hearing. *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 850 (2011).

IV. Conclusion

¶ 15 For the reasons above, we vacate the trial court’s restitution order and remand for resentencing solely on the issue of restitution. It is so ordered.

VACATED AND REMANDED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).