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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-152

Filed 07 March 2023

Catawba County, Nos. 17 CRS 51880-82, 17 CRS 51929, 21 CRS 2474

STATE OF NORTH CAROLINA, Plaintiff,

v.

DONTRAY TYRELL CUMBERLANDER, Defendant.

Appeal by Defendant from judgment entered 12 August 2021 by Judge W. Todd Pomeroy in Catawba County Superior Court. Heard in the Court of Appeals 23 August 2022.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

Joshua H. Stein, Attorney General, by Special Deputy Attorney General Daniel Snipes Johnson, for the State-Appellee.

CARPENTER, Judge.

Dontray Tyrell Cumberlander (“Defendant”) appeals from judgment entered after pleading guilty to: three counts of second-degree murder, a Level B1 felony; assault with a deadly weapon inflicting serious injury (“AWDWISI”), a Level E felony; and discharging a firearm into an occupied vehicle, a Level E felony. Appellate

counsel filed an *Anders* brief and a petition for writ of *certiorari* (“PWC”) on Defendant’s behalf. After careful review, we deny Defendant’s PWC and dismiss the appeal.

I. Factual and Procedural Background

Defendant stipulated to the factual basis for the plea agreement, which was summarized by the State without objection. On 7 April 2017, a silver Honda Accord with five occupants was parked in the lot outside McCroskey’s Irish Pub and Grill in Hickory (“McCroskey’s”), when a black Ford sedan, which had been circling the lot, pulled in behind the Accord. Defendant exited the black Ford, approached the Accord, pointed a handgun through the rear driver’s side window, and opened fire. The passenger in the black Ford sedan likewise opened fire on the Accord with a rifle. At approximately 2:16 a.m., officers from the Hickory Police Department responded to reports of shots fired at McCroskey’s.

Approximately fifteen minutes later, officers pulled over a black Ford Fusion which matched the description from the shooting. Officers spoke with the occupants, Defendant, and another man, who admitted they had been at McCroskey’s and that there were weapons in the vehicle. A 9mm handgun and a .22 caliber assault rifle were recovered from the Fusion, along with a receipt showing the rifle was purchased by Defendant. Investigators discovered numerous 9mm and .22 caliber shell casings inside the Accord and scattered across the crime scene. After a witness identified the shooters, they were arrested and transported to the Hickory Police Department.

During questioning, they each admitted to firing the weapons at the Accord. A witness came forward with cell phone video of the attack, which confirmed the sequence of events and identities of the assailants. Justin M. Aiken, Cody M. Bouphavong, and Quajuae A. Kennedy, all age 21, subsequently died from their wounds; Cole B. Ervin survived wounds to both arms and Pablo Castillo-Hernandez also survived.

On 17 April 2017, a Catawba County Grand Jury indicted Defendant of three counts of murder, one count of attempted first degree murder, and one count of assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWITKISI”). The State later added a charge of discharging a weapon into an occupied vehicle by prosecutor’s information. During the plea-adjudication phase of the Transcript of Plea, the trial court found: there was a factual basis for entry of the plea; Defendant was satisfied with his legal representation; Defendant was competent to stand trial; and the decision to accept the plea was Defendant’s informed choice, made freely, understandingly, and voluntarily. The trial court accepted the plea and ordered it recorded.

On 12 August 2021, Defendant pleaded guilty to: three counts of second-degree murder, a Level B1 felony; one count of AWDWISI,¹ a Level E felony; and one count

¹ The Class E felony of AWDWISI is a lesser included offense of the Class C felony, AWDWIKISI. *See State v. Cromartie*, 177 N.C. App. 73, 76, 627 S.E.2d 677, 680 (2006); *see also* N.C. Gen. Stat. § 14-32 (2021).

of discharging a firearm into an occupied vehicle, a Level E felony. After being duly sworn, Defendant admitted he was in fact guilty of each charge. The State voluntarily dismissed an additional charge of attempted first-degree murder as part of the plea agreement negotiated with defense counsel. Defendant signed a written stipulation that his prior record level was Level I. The trial court sentenced Defendant to consecutive sentences totaling 770-984 months' imprisonment: 240-300 months for each of the three second-degree murder charges; 25-42 months for AWDWISI; and 25-42 months for discharging a firearm into an occupied vehicle. During sentencing, the trial court noted that the sentences imposed were in the presumptive range due to the plea agreement. Defendant filed and served written notice of appeal on 18 August 2021.

II. Jurisdiction

After entry of a guilty plea, appellate review as a matter of right is only available in limited circumstances. *See* N.C. Gen. Stat. § 15A-1444 (2021). These circumstances include whether the: (1) sentence is supported by the evidence, *see* N.C. Gen. Stat. § 15A-1444(a1) (only appealable by right “if the minimum sentence of imprisonment does not fall within the presumptive range”); (2) sentence “[r]esults from an incorrect finding of the defendant’s prior record level . . . or prior conviction level[.]” *see* N.C. Gen. Stat. § 15A-1444(a2)(1); (3) sentence “[c]ontains a type of sentence disposition that is not authorized . . . for the defendant’s class of offense and prior record or conviction level[.]” *see* N.C. Gen. Stat. § 15A-1444(a2)(2); (4) sentence

“[c]ontains a term of imprisonment that is for a duration not authorized . . . for the defendant’s class of offense and prior record or conviction level[,]” *see* N.C. Gen. Stat. § 15A-1444(a2)(3); (5) trial court improperly denied defendant’s motion to suppress, *see* N.C. Gen. Stat. § 15A-979(b); (6) trial court improperly denied defendant’s motion to withdraw his guilty plea, *see* N.C. Gen. Stat. § 15A-1444(e).

After the State observed that none of these six circumstances apply in the instant case, Defendant filed a PWC on 2 June 2022, requesting discretionary review. *See* N.C. Gen. Stat. § 15A-1444(e) (“Except as [otherwise] provided . . . the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of *certiorari*.” (emphasis added)).

Our Legislature has empowered us with broad authority to issue writs of *certiorari* in appropriate cases. N.C. Gen. Stat. § 7A-32(c) (2021). Where a statutory right to seek discretionary review conflicts with the limitations of Appellate Rule 21, the “default rule” is that appellate courts possess jurisdiction to grant review by *certiorari* “unless a more specific statute restricts jurisdiction in the particular class of cases at issue.” *State v. Thomsen*, 369 N.C. 22, 25, 789 S.E.2d 639, 642 (2016); *see also* N.C. R. App. P. 21.

A writ of *certiorari* is an extraordinary remedial writ, to be issued in our discretion only upon good and sufficient cause shown. *State v. Ledbetter*, 261 N.C. App. 71, 72–73, 819 S.E.2d 591, 592 (2018) (citations and internal quotations

omitted). In other words, “a petition for the writ must show merit or that error was probably committed below.” *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)).

Defendant’s PWC requests discretionary *Anders* review of whether his sentence is supported by “evidence introduced at the trial and sentencing hearing[.]” *See* N.C. Gen. Stat. § 15A-1444(a1). Defendant’s petition, however, fails to advance any argument which may constitute “good and sufficient cause[.]” “merit[.]” or the probable occurrence of error below which would justify exercising our discretion to permit appellate review. *See Ledbetter*, 261 N.C. App. at 72–73, 819 S.E.2d at 592; *see also Bishop*, 255 N.C. App. at 769, 805 S.E.2d at 369. In fact, the substance of the PWC merely recites the consecutive sentences imposed on each charge, followed by the presumptive minimum and maximum ranges for each sentence imposed. The trial court imposed the maximum allowable sentence from the presumptive range on each charge.

Because the trial court properly identified and applied both Defendant’s prior record level and the classification of each felony, the trial court adhered to proper procedure in sentencing. *See* N.C. Gen. Stat. § 15A-1340.17 (2021). Furthermore, the Transcript of Plea for the plea agreement called for consecutive sentences on each charge, which the trial court is authorized to impose in its discretion. *See* N.C. Gen. Stat. § 15A-1354(a) (2021). In sum, the trial court lawfully sentenced Defendant in accordance with the plea agreement, and he received the benefit of the bargain.

III. Conclusion

Defendant has not established good or sufficient cause to justify issuing a writ of *certiorari* to conduct an independent review of the record. Defendant's PWC fails to assert any of the grounds contained in Appellate Rule 21. *See* N.C. R. App. P. 21(a)(1). The PWC similarly fails to demonstrate any grounds for this Court to invoke Appellate Rule 2. *See* N.C. R. App. P. 2. Because Defendant failed to establish an avenue to appeal by right and his PWC is without merit, we therefore dismiss the appeal.

DISMISSED.

Judges DILLON and GORE concur.

Report per Rule 30(e).