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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-550

Filed 02 May 2023

Pitt County, Nos. 20CRS52164; 20CRS52627-28; 20CRS53062; 20CRS53085;
20CRS53268; 20CRS53273; 20CRS53288; 21CRS50346; 21CRS50348; 21CRS50350;
21CRS50920; 21CRS51597; 21CRS52093; 21CRS53517; 21CRS53519; 21CRS53569

STATE OF NORTH CAROLINA

v.

JUSTIN TYLER MIZELL

Appeal by Defendant from Judgments entered 9 December 2021 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Justin Tyler Mizell (Defendant) appeals from Judgments entered 9 December 2021 following his entry of multiple guilty pleas and sentencing Defendant to

fourteen consecutive 10 to 21 month sentences along with two 6 to 17 month sentences, which were suspended in favor of 36 months of probation to begin upon Defendant's release from his active sentence. The Record before us tends to reflect the following:

On 9 December 2021, pursuant to a plea arrangement, Defendant entered guilty pleas to eight counts of Domestic Violence Protection Order (DVPO) violations, two counts of attempted DVPO violations, two counts of stalking, and four counts of obstruction of justice.¹ In exchange for these sixteen guilty pleas, the State agreed to dismiss fifty-six related felonies and one misdemeanor. Defendant stipulated to being a prior record level III, based on one Class H felony and three misdemeanors. The trial court accepted the plea arrangement. During sentencing, the prosecutor noted:

[THE STATE:] Although the charges I read out to you, the offense dates started May the 8th, that's when we started charging him again. He actually – officers came back to me that afternoon, on May the 5th of 2020, and told me that he had already started making phone calls and making contact the day of court that we did that plea.

THE COURT: The day I sentenced him?

[THE STATE:] The day you sentenced him. You told me that when we were in court that day, that you didn't believe he understood, that you didn't think he got it. And because he didn't have much of a record before that, we decided to give him a chance, but you did give him an active sentence on the one count.

Your Honor, he started that day and he hasn't stopped. Even

¹ Defendant committed each of these offenses while incarcerated based on a 5 May 2020 guilty plea to stalking and misdemeanor violation of a DVPO.

though he – there have been periods of time where there have been some that we may not have been able to get, he has continued to have charges. And although there are sixteen counts and sixteen offense dates that he has been charged on, there are others. And there are actually three new offense dates since I made that plea offer. So there were additional charges after that.

Further, the prosecutor also expressed belief Victim is still in danger, stating:

Your Honor, our concern and the concern of law enforcement, as they have contacted me, is that [Defendant] will get out, the first place he is going to go is to [Victim]'s house. We do believe her life is in danger. She believes that. And she is going to speak to the Court. . . . And so we are asking for consecutive active sentences, as many as you can give, Judge, because we believe that there's not going to be anything that's going to stop him, that we have tried everything. We gave him an opportunity.

Victim also gave a victim impact statement, describing Defendant's conduct and the impact it had on her and her family. Following the victim impact statement, the prosecutor made his final remarks regarding sentencing, stating in relevant part:

Your Honor, I have heard phone calls. I get all of the phone calls from the jail and officers bring me ones that they specifically want me to hear. [Defendant] also put himself in a situation when he went to prison the last time, where he became part of a white supremacist gang within the prison system. And I heard him on the phone bragging about that and bragging about things that happen during his time in prison. Your Honor, he has put himself in that situation and I am sorry he has put himself in that situation, but what we need to balance is not just what [Defendant] needs in the situation but what the community needs and what the victim in this case needs. And we're asking that the only way we're going to keep her safe and others safe is to keep him locked behind bars, unfortunately.

Following the arguments of counsel and the victim impact statement, Defendant was sentenced to fourteen consecutive 10 to 21 month sentences along

with two 6 to 17 month sentences, which were suspended in favor of 36 months of probation to begin upon Defendant's release. The trial court imposed special conditions of probation in 21 CRS 53085, requiring, in part, Defendant:

Report to probation within 48 hours upon release from NCDAC.
12 months electronic monitoring. Not possess any weapons. Any violations of probation arrest and held without bond. If Defendant has had no contact with probation officer or leaves jurisdiction for 14 days then Defendant shall be declared an absconder.

On 17 December 2021, Defendant timely filed written Notice of Appeal.

Appellate Jurisdiction

Defendant filed a Petition for Writ of Certiorari to this Court on 7 September 2022 seeking review of the Judgments entered upon his guilty plea pursuant to N.C. Gen. Stat. § 15A-1444(e) and N.C.R. App. 21. Defendant acknowledges it is unclear whether, in light of his guilty pleas, he has a direct right of appeal on the sentencing issues he seeks to raise but points out N.C. Gen. Stat. §§ 15A-1444(a1) and 15A-1444(a2) do provide for a direct right of appeal from similar sentencing issues following a guilty plea. For its part, the State agrees there is at least some merit to Defendant's arguments on appeal and that it is in our discretion to issue the Writ of Certiorari. In our discretion, we grant Defendant's Petition for Writ of Certiorari. *See State v. Ledbetter*, 371 N.C. 192, 195, 814 S.E.2d 39, 42 (2018); N.C. Gen. Stat. § 15A-1444(e) (2021) ("Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest

has been denied, 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)).

Issues

The dispositive issues on appeal are whether: (I) the trial court erred in considering statements made by the prosecutor during sentencing; and (II) the trial court erred in imposing two special conditions of probation.

Analysis

I. Prosecutor’s Statements During Sentencing

Defendant contends the trial court erred in considering three “unsupported assertions” by the prosecutor during sentencing: (1) that law enforcement believed Victim’s “life is in danger” and that if released, Defendant would go “straight to [Victim]’s house”; (2) that Defendant began trying to contact Victim on 5 May 2020, the day he was previously sentenced; and (3) that Defendant was a member of a white supremacist gang in prison and made jail calls bragging about his gang membership and activities. Specifically, Defendant contends the trial court’s consideration of these statements violated N.C. Gen. Stat. § 15A-1334(b). We disagree.

N.C. Gen. Stat. § 15A-1334(b) provides:

The defendant at the hearing may make a statement in his own behalf. The defendant and the prosecutor may present witnesses and arguments on facts relevant to the sentencing decision and

may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court. Formal rules of evidence do not apply at the hearing.

N.C. Gen. Stat. § 15A-1334(b) (2021). “When this Court is confronted with statutory errors regarding sentencing issues, such errors are questions of law, and as such, are reviewed *de novo*.” *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (quotation marks and citation omitted). “When a sentence is within the statutory limit it will be presumed regular and valid unless ‘the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.’” *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). “If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant’s rights.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) (citation omitted). However, where “the record reveals no such express indication of improper motivation,” the defendant is not entitled to a new sentencing hearing. *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681.

On the Record before us, we cannot conclude the trial court considered irrelevant and improper matter in determining the severity of Defendant’s sentence. Indeed, in his briefing to this Court, Defendant concedes his “sentences are properly calculated and our sentencing statutes permit a court to run an unlimited number of

felonies consecutively.” See N.C. Gen. Stat. § 15A-1354 (2021). Thus, Defendant has not met his burden of demonstrating his sentence is based on irrelevant or improper matter. Therefore, the trial court did not err in considering the statements made by the prosecutor during sentencing. Consequently, with regard to this issue, Defendant’s sentence is left undisturbed.

II. Special Conditions of Probation

Defendant also challenges two special conditions of probation ordered by the trial court. The State concedes the trial court erred in ordering the two challenged special conditions of probation.

“In addition to the regular conditions of probation . . . , the court may, as a condition of probation, require that during the probation the defendant . . . [s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation.” N.C. Gen. Stat. § 15A-1343(b1)(10) (2021). Further, “[t]he failure of a defendant to object to a condition of probation imposed pursuant to G.S. 15A-1343(b1) at the time such a condition is imposed does not constitute a waiver of the right to object at a later time to the condition.” N.C. Gen. Stat. § 15A-1342(g) (2021). “A challenge to a trial court’s decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard of review[.] *State v. Allah*, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013) (citing *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985)). However, “statutory errors regarding sentencing issues . . . are questions of law, and as such, are reviewed *de novo*.” *Allen*, 249 N.C.

App. at 379, 790 S.E.2d at 591 (quotation marks and citation omitted).

A. Absconding

First, Defendant challenges the special condition requiring Defendant to be considered an absconder if he has no contact with the probation officer or leaves jurisdiction for fourteen days. As both parties note, “not absconding” is one of the regular conditions of probation. *See* N.C. Gen. Stat. § 15A-1343(b)(3a) (2021). This Court has held that a defendant only absconds under Section 1344(b)(3a) if he “*willfully* avoids supervision or *willfully* makes his whereabouts unknown to his supervising probation officer.” *State v. Melton*, 258 N.C. App. 134, 137-38, 811 S.E.2d 678, 681 (2018) (citing N.C. Gen. Stat. § 15A-1343(b)(3a) (emphasis added)). Further, absconding is one of the three conditions under which a trial court may revoke probation and activate a previously suspended sentence. *See* N.C. Gen. Stat. § 15A-1344(a) (2021). Thus, the special condition imposed in 21 CRS 53085 is contrary to our statutes and case law. Therefore, the special condition regarding absconding must be vacated.

B. Requiring Arrest and Eliminating Bond

Next, Defendant challenges the special condition: if Defendant is found to be in violation of any of the conditions of probation, Defendant is to be immediately arrested and held under recommendation without bond. As both parties note, such a condition would require Defendant to be arrested and held without bond for any probation violation, including those for which revocation of probation is not

statutorily permissible. Allowing this special condition of probation would render portions of N.C. Gen. Stat. § 15A-1343(b)(1), N.C. Gen. Stat. § 15A-1343(b)(3a), and N.C. Gen. Stat. § 15A-1344(d2) superfluous. *See State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (“[A] statute should not be interpreted in a manner which would render any of its words superfluous.” (citations omitted)). Thus, this special condition is invalid. Therefore, the special condition requiring arrest and prohibiting bond upon any probation violation should be vacated. Consequently, we remand this matter to the trial court for resentencing.²

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court’s Judgments in part and remand this matter for resentencing in accordance with this opinion.

AFFIRMED IN PART; REMANDED IN PART FOR RESENTENCING.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).

² We note Defendant does not challenge the other special conditions of probation ordered by the trial court, and as such, those conditions should remain undisturbed.