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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-60

Filed 5 December 2023

Richmond County, Nos. 21 CRS 50262-63

STATE OF NORTH CAROLINA

v.

MARION TAVARES ELLERBE

Appeal by defendant from judgments entered 24 February 2022 by Judge Stephan R. Futrell in Richmond County Superior Court. Heard in the Court of Appeals 5 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa B. Finkelstein, for the State.

Shawn R. Evans for defendant-appellant.

ZACHARY, Judge.

Where Defendant cannot show merit or that error was probably committed below, we deny Defendant's petition for writ of certiorari seeking review of the judgments entered upon his guilty pleas and dismiss Defendant's appeal.

BACKGROUND

In August 2020, Defendant twice sold narcotics to a confidential informant in controlled buys, and on 15 March 2021 he was indicted for, among other offenses, two counts of selling a schedule II controlled substance and two counts of possession with intent to manufacture or sell a schedule II controlled substance.

In January 2022, Defendant appeared in court with court-appointed counsel. The presiding judge announced that “no matter the circumstance that [Defendant’s] case would be disposed of in this [coming February] trial term”—“we’re setting it Number 1 for trial” in February 2022.

On 21 February 2022, the night before jury selection was to begin in Defendant’s case, Defendant retained private counsel. Defendant’s new counsel appeared in court the next morning, moved to continue the trial, and requested copies of the State’s discovery. The prosecutor informed the trial court that there was “not that much” discovery; the State added that Defendant “had 18 months to hire a lawyer[,]” and the trial court noted that the charges against Defendant presented “a fairly straightforward case.” Accordingly, the trial court denied Defendant’s motion to continue “except insofar as” the court scheduled the trial for 24 February 2022, thus allowing defense counsel additional time within which to prepare. The State provided its discovery to defense counsel on 22 February 2022.

When Defendant’s case was called for trial on 24 February 2022, defense counsel did not move to continue the case; rather, counsel informed the trial court that Defendant intended to plead guilty to the four charges against him. The

prosecutor indicated that there was no plea arrangement—this was “a completely open plea” in which the trial court would determine the sentence. Defense counsel prepared the plea transcript, which Defendant signed, and counsel provided the State with a copy.

The trial court examined Defendant in accordance with the plea transcript. During this colloquy, Defendant stated that he was satisfied with the services of his attorney and that he understood that he was facing a total maximum punishment of 172 months’ imprisonment. The State then recited the factual basis of Defendant’s charges. In addition, the prosecutor indicated that he “told [defense counsel] there was some restitution but [he] failed to hand those up[,]” and then proceeded to present the restitution worksheet to the trial court.

The trial court then asked Defendant:

[A]re the terms and conditions of that plea arrangement that . . . you’ll plead guilty to the four charges that I just described, that the sentencing will be left to me, and there will be restitution to the Richmond County Sheriff’s Office Drug Task Force in the amount of \$[180.00]?

Defendant responded, “Yes, sir.”

Defendant pleaded guilty to two counts of selling a schedule II controlled substance and two counts of possession with intent to manufacture or sell a schedule II controlled substance.¹ The trial court sentenced Defendant to two terms of 15 to 27

¹ The State dismissed two additional counts because of fatal defects in the indictments.

months in the custody of the North Carolina Division of Adult Correction for the two counts of selling a schedule II controlled substance and two terms of 9 to 20 months for the two counts of possession with intent to manufacture or sell a schedule II controlled substance, with all terms to run consecutively. The trial court further ordered Defendant to pay \$120.00 in restitution.²

Shortly after the court accepted Defendant's guilty plea, Defendant filed a signed *pro se* statement: "I Marion Ellerbe wish to appeal my case on 2-24-22." Defendant did not file a certificate of service, indicate the file number or judgment he was appealing, designate that he was appealing to this Court, or otherwise indicate that he served this document on the State.

Recognizing the various deficiencies of his notice of appeal, on 20 March 2023, Defendant petitioned this Court to issue its petition for writ of certiorari, seeking this Court's review and vacatur of the judgments entered upon his guilty pleas.

DISCUSSION

Defendant argues that the judgments entered upon his guilty pleas should be vacated and remanded for trial because (1) the State did not provide a sufficient factual basis to support Defendant's guilty pleas; (2) the trial court committed reversible error when it denied Defendant's 22 February 2022 motion to continue; and (3) the trial court added sentencing terms to the parties' plea arrangement by

² The judgment entered in 21 CRS 50262 for selling a schedule II controlled substance provides for restitution of \$120.00 rather than \$180.00 as stated in open court.

ordering restitution without informing Defendant of his right to withdraw his plea. These arguments lack merit; therefore, we deny Defendant's petition for writ of certiorari and dismiss this appeal.

Appellate Jurisdiction

Rule 4 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, that a "party entitled by law to appeal from a judgment or order . . . in a criminal action may take appeal by . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C.R. App. P. 4(a)(2). Rule 4(b) specifies the requisite contents of a notice of appeal:

The notice of appeal required to be filed and served . . . shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C.R. App. P. 4(b). It is well settled that "when a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

Nonetheless, this Court may exercise "the discretion to consider the matter by granting a petition for writ of certiorari." *Id.* (emphasis omitted); *see also* N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances . . . 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 . . .”). “Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown[,]” where the petition “show[s] merit or that error was probably committed below.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

Here, it is undisputed that Defendant’s notice of appeal did not comply with the mandates of Rule 4, and therefore this Court is without jurisdiction to hear Defendant’s appeal unless we elect in our discretion to allow Defendant’s petition for writ of certiorari. *See McCoy*, 171 N.C. App. at 638, 615 S.E.2d at 320. Because Defendant fails to show “good and sufficient cause[,]” we decline to issue our writ of certiorari. *Grunder*, 251 N.C. at 189, 111 S.E.2d at 9.

The Factual Basis of the Guilty Pleas

Defendant first petitions for certiorari in order to challenge the 24 February 2022 judgments on the ground that the State failed to provide the trial court with a sufficient factual basis to support each of his guilty pleas. More particularly, Defendant complains that the factual basis indicated that Defendant sold the narcotics to a “confidential informant” without providing the name of the confidential informant.

“If the evidence contained in the record does not support [the] defendant’s guilty plea, then the judgment based thereon must be vacated.” *State v. Brooks*, 105

N.C. App. 413, 417, 413 S.E.2d 312, 314 (1992). “[G]uilty pleas must be substantiated in fact as prescribed by” N.C. Gen. Stat. § 15A-1022. *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007).

N.C. Gen. Stat. § 15A-1022 provides:

[A] judge may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

- (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) (2021).

“[I]n enumerating these . . . sources, the statute contemplates that some substantive material independent of the plea itself appears of record which tends to show that [the] defendant is, in fact, guilty.” *Agnew*, 361 N.C. at 336, 643 S.E.2d at 583 (cleaned up). Indeed, the list of sources is not exclusive: “[t]he trial judge may consider any information properly brought to his attention[.]” *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185–86 (1980). This includes the “defendant’s written answers to the questions contained in a document entitled ‘Transcript of Plea.’ ” *Id.* at 79, 261 S.E.2d at 186.

In the instant case, the trial court received a sufficient statement of factual basis to support Defendant’s guilty pleas. First, the indictments identified the

confidential informant with whom officers worked to purchase the controlled substances from Defendant. The indictments state in pertinent part that Defendant did “sell to Nathan McDonald, Cocaine, a controlled substance, which is included in Schedule II of the North Carolina Controlled Substances Act[.]” and that Defendant did “possess with intent to sell and deliver a controlled substance, namely, Cocaine[.]” And despite Defendant’s assertion to the contrary, the prosecutor’s reference to McDonald as the “confidential informant” rather than by name at the plea hearing did not render the factual basis insufficient. As our Supreme Court concluded in *State v. Atkins*, an essential element of the crime may be inferred from the factual basis provided. 349 N.C. 62, 96, 505 S.E.2d 97, 118–19 (1998) (“This evidence provided a sufficient basis from which premeditation and deliberation could be inferred.”), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999); *see also State v. Barts*, 321 N.C. 170, 177, 362 S.E.2d 235, 239 (1987).

In addition to the information contained in the indictments, the State provided ample other facts supporting the pleas. This included the facts that “Detective Brian Ingram with the . . . Richmond County Sheriff’s Office conducted some undercover buys . . . using a confidential informant . . .”; that during the first buy on 20 August 2020, the detective “met with the informant[.]” searched the informant, “searched the vehicle, [and] gave him some audiovisual recording equipment”; that “[t]he target that day” was Defendant; and that the informant “was given \$40 in buy money and sent to” Defendant’s residence “to buy that amount of crack cocaine from

[Defendant].” The prosecutor further stated that the confidential informant “did go to [Defendant’s] house” where he “bought \$30 worth of crack cocaine” from Defendant, and that “[t]here was video” of this transaction. The State described another controlled buy that law enforcement officers conducted on 27 August 2020, in which the informant purchased \$60.00 of crack cocaine from Defendant at a laundromat.

Moreover, defense counsel also prepared the plea transcript in which Defendant admitted his guilt, and which Defendant did not disavow when the trial court offered an opportunity to correct or add any facts after the State presented the factual basis of the plea. *See Dickens*, 299 N.C. at 82, 261 S.E.2d at 187 (“Additionally, the Transcript of Plea reveals that [the] defendant, by his answer to Question 9, said he was actually guilty of the charges. Thus there was an abundance of information before the trial judge to constitute a factual basis for the pleas of guilty and to support their acceptance.”).

Accordingly, Defendant’s contention that the prosecutor’s failure to provide the name of the confidential informant is dispositive of the sufficiency of the factual basis supporting the plea is without merit, and we conclude that the State’s factual basis was sufficient. Because Defendant has failed to show that error was probably committed by the trial court in finding a sufficient factual basis to accept Defendant’s guilty pleas, we deny Defendant’s petition for certiorari to review this issue.

Denial of Defendant’s Motion to Continue

Defendant next petitions for certiorari to challenge the trial court's denial of his 22 February 2022 motion to continue. Defendant argues that the denial of his motion to continue "was a denial of his constitutional right and denied him the opportunity to be represented by [effective] counsel and to adequately prepare for trial"; he therefore entered into "a hasty plea, one that resulted in him receiving a lengthy active sentence[.]"

Yet Defendant did not raise this constitutional argument before the trial court. *See State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). This argument is therefore not preserved for appellate review, and we decline to review it. *See In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 ("Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal."), *reh'g denied*, 382 N.C. 327, ___ S.E.2d ___ (2022). Moreover, Defendant stated that he was satisfied with his counsel's performance during his plea colloquy with the trial court.

Thus, we deny Defendant's petition for writ of certiorari to review this unpreserved issue.

Restitution

Finally, Defendant petitions for certiorari seeking appellate review of the trial court's imposition of restitution without first informing Defendant that he had a right to withdraw his guilty plea.

In support of this argument, Defendant relies on N.C. Gen. Stat. § 15A-1024, which provides that “[i]f 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.” N.C. Gen. Stat. § 15A-1024.

Defendant’s contention that the trial court’s restitution order altered the plea arrangement between the parties in contravention of N.C. Gen. Stat. § 15A-1024 is misguided. Defendant initially announced on the morning of the first day of trial that he intended to plead guilty, and the parties informed the trial court of “the substance of” that arrangement. *Id.* § 15A-1023(c). The record reveals that the plea arrangement provided that Defendant would plead guilty to the four charges and that the trial court would determine Defendant’s sentence, including restitution in the amount of \$180.00. The plea transcript, which Defendant signed, states: “Defendant will plead guilty to the charges in Box 12. Judgment is left with the Court in regards to sentencing[,]” and that Defendant “stipulates to restitution to the [parties] in the amounts set out on” the restitution worksheet provided.

The trial court did not “impose a sentence other than provided for in a plea arrangement between the parties” when it imposed restitution. *Id.* § 15A-1024. Accordingly, Defendant cannot show that error was probably committed below. Having failed to show good and sufficient cause for this Court to issue its writ of

certiorari to review the trial court's imposition of restitution, we deny Defendant's petition for certiorari to review this issue.

CONCLUSION

“Failing to present a meritorious claim or reveal error in the proceeding below, [D]efendant has failed to present good cause for the issuance of a writ of certiorari.” *State v. Rouson*, 226 N.C. App. 562, 567, 741 S.E.2d 470, 473, *disc. review denied*, 367 N.C. 220, 747 S.E.2d 538 (2013). We therefore deny Defendant's petition for writ of certiorari and dismiss his appeal for lack of jurisdiction.

DISMISSED.

Judges HAMPSON and FLOOD concur.

Report per Rule 30(e).