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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-96

Filed 17 December 2024

Cabarrus County, No. 19 CRS 53171

STATE OF NORTH CAROLINA

v.

IMAJAE JAKIS RUTHERFORD

Appeal by defendant by writ of certiorari from judgments entered 14 May 2021 by Judge Lora Christine Cabbage in Cabarrus County Superior Court. Heard in the Court of Appeals 22 October 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher R. McLennan, for the State.*

*Anne Bleyman for defendant-appellant.*

ZACHARY, Judge.

Defendant Imajae Jakis Rutherford appeals from the trial court's judgments entered upon a jury's verdicts finding him guilty of one count each of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. Defendant does not challenge his convictions; rather, he challenges the trial court's sentencing upon those convictions. After careful review,

we conclude that the trial court did not err in imposing Defendant's sentences.

### **BACKGROUND**

In 2018, Defendant stole four firearms from a gun store in Lancaster County, South Carolina, and subsequently sold the stolen firearms. In September 2018, Defendant sold one of those firearms to David Fennell, a marijuana dealer he had known in high school. During a routine traffic stop that same month, Fennell disclosed to the officer who pulled him over that he was in possession of a firearm. The officer entered the firearm's serial number into a national database and determined that it had been stolen from Lancaster County, South Carolina. Fennell identified Defendant as having sold him the firearm. Officers arrested Defendant, and he ultimately pleaded guilty to second-degree burglary.

Defendant later discovered that Fennell had "ratted [him] out[.]" After Defendant's release from incarceration in December 2018, Defendant and Fennell had multiple arguments via Snapchat messaging.

On 21 July 2019, Defendant contacted Fennell about buying some marijuana. However, Fennell suspected that Defendant actually intended to rob him because Defendant had not previously purchased marijuana from him. That afternoon, while Fennell was at his neighbors' house rolling up a marijuana cigarette, he heard a gun cock. Fennell saw a man wearing a black hoodie, with his face covered, standing about ten feet away from him. Fennell described the man as "a 6-foot tall, athletic build, black male with brown skin wearing a black mask, black hoodie, and black shorts[.]"

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The man told Fennell to “[r]un that s[\*\*\*,]” which Fennell understood to mean “give me everything you got.” The men engaged in a struggle and three shots rang out. Fennell “was hit twice in the chest.” He “started to black out” but was able to “regain[ his] bearings”; he then realized that “all [his] things were gone . . . . [including] a book bag with marijuana in it and a fanny pack with money in it.”

Meanwhile, David Fennell, Sr., Fennell’s father, was nearby at his home. Fennell, Sr., “heard gunshots ring out, pop, pop, pop.” One of the neighbors told Fennell, Sr., that his son had been shot. As Fennell, Sr., drove to the scene, he “saw a white car come out of the [neighbors’] cul-de-sac[.]” He saw Alex and Dominic Afflick in the car along with “another figure in the back seat.” Fennell, Sr., “could see part of [the individual’s] hands” and observed that the figure was “dark complected”, but “[h]e ducked down” so Fennell, Sr., was unable to “make out more there.” Alex and Dominic Afflick—who had a white, two-door Toyota Corolla—were neighbors and friends of Defendant.

Additionally, “Defendant told [his friend, Jeremiah Medley] that they were setting . . . Fennell up by acting like they were going to buy weed[.]” which Dominic Afflick corroborated. Defendant further told Medley that Fennell “got shot, [Defendant] shot [Fennell], it was a set-up to buy drugs, and it went wrong[.]” In a message from 21 July 2019 found on Defendant’s phone, Defendant stated that he was “bout to jug,” with “jug” being “a common term . . . to reference a robbery.”

Officer Garron Lawing of the Concord Police Department interviewed Fennell

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three times immediately following the incident. Fennell told Officer Lawing that he was “80 percent sure” that the voice he heard was Defendant’s, “as other people . . . didn’t have a deeper tone voice.” Fennell also told Officer Lawing that “the only person that [Fennell] could think of that would want to hurt him that he had talked to that day was [Defendant].”

On 9 September 2019, a Cabarrus County grand jury indicted Defendant for one count each of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. Defendant’s case came on for trial on 10 May 2021, and on 14 May 2021, the jury returned its verdict finding Defendant guilty of both counts.

The State requested that the trial court impose consecutive sentences:

THE COURT: Would the State like to be heard on sentencing?

[THE STATE]: Yes, Your Honor.

. . . .

Your Honor, due to the gravity of . . . this case, the gravity of the charges and now the convictions, Your Honor, I would ask that he receive two sentences to run at the expiration of one another.

In response, Defendant “ask[ed] the [c]ourt to consolidate the two felonies together” so that he would “receive one sentence instead of two consecutive sentences”; Defendant also stipulated to his prior record level.

After considering the parties’ requests, the trial court imposed a term of 72 to

99 months’ imprisonment in the custody of the North Carolina Division of Adult Correction for Defendant’s conviction for assault with a deadly weapon with intent to kill inflicting serious injury and a consecutive term of 66 to 92 months’ imprisonment for Defendant’s conviction for robbery with a dangerous weapon. The court explained that “even after [Defendant’s] conviction in South Carolina[,] there’s still felony activity, still admitting about marijuana, still carrying guns, still doing the things . . . that he did in the first place. . . . [T]hat was the reason for the sentence” given.

Defendant filed a petition for writ of certiorari on 22 March 2023, which this Court allowed on 10 April 2023.

### **DISCUSSION**

Defendant raises a single issue on appeal: that the trial court erred by sentencing him “in a manner that violated his constitutional and statutory rights.” Specifically, Defendant contends that the trial court “failed to consider either [Defendant] or his case in the constitutionally and statutorily mandated individualized manner.”

#### ***A. Standard of Review***

“Generally, when a defendant assigns error to the sentence imposed by the trial court our standard of review is whether the sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (cleaned up). However, “when this Court is confronted with a statutory error regarding a sentencing issue, such error is reviewed de novo

as a question of law.” *State v. Essick*, 282 N.C. App. 150, 153, 869 S.E.2d 787, 789 (2022).

***B. Sentencing by the Trial Court***

Defendant first argues that he has “the right to be free of cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution, and under Article [I], Sections 19 and 27 of the Constitution of North Carolina[,]” maintaining that the trial court’s imposition of two consecutive sentences—rather than “consolidat[ing] the two felonies” and imposing one sentence, as he requested—“was constitutional error.”

“Constitutional claims not raised and passed on at trial will not ordinarily be considered on appeal.” *State v. Tirado*, 358 N.C. 551, 592, 599 S.E.2d 515, 542 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Accordingly, “[o]ur Supreme Court has made clear that the North Carolina Rules of Appellate Procedure require constitutional sentencing errors be raised before the trial court in order to be preserved for appellate review.” *State v. Kelliher*, 273 N.C. App. 616, 623, 849 S.E.2d 333, 338 (2020) (citing *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018)), *aff’d as modified*, 381 N.C. 558, 873 S.E.2d 366 (2022).

In the instant case, Defendant admits that “there was no subsequent objection to [his] sentence when it was imposed[,]” and a review of the transcript shows that Defendant neglected to advance any constitutional argument regarding any alleged sentencing error. Hence, Defendant has waived appellate review of his constitutional

sentencing argument. *See id.*

But even assuming, *arguendo*, that Defendant had preserved his constitutional sentencing claim, he would not have prevailed on appeal. “It is only in exceedingly unusual non-capital cases that a sentence imposed by a trial court will be so disproportionate as to violate the Eighth Amendment’s proscription of cruel and unusual punishment.” *State v. Harris*, 111 N.C. App. 58, 70, 431 S.E.2d 792, 800 (1993). “The sentencing [court] . . . retains the discretion to impose multiple sentences to run consecutively or concurrently.” *Id.* at 71, 431 S.E.2d at 800. Here, the trial court properly sentenced Defendant within the statutory guidelines, and in its discretion, imposed multiple sentences to run consecutively. There is no indication of constitutional error and thus, Defendant’s argument is meritless.

While Defendant was required to raise an objection at sentencing to preserve his constitutional sentencing challenge, the same is not true for his statutory sentencing issue. As our Supreme Court explained in *Meadows*, “[D]efendant need not have voiced a contemporaneous objection to preserve [his] nonconstitutional sentencing issues for appellate review.” 371 N.C. at 747, 821 S.E.2d at 406. As such, Defendant’s statutory argument was preserved for appeal; nonetheless, it also lacks merit.

Defendant asserts that the trial court erred by failing to consider his case in the “statutorily mandated individualized manner.” Defendant cites the Structured Sentencing Act, which provides in relevant part: “The primary purposes of sentencing

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a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability . . . ." N.C. Gen. Stat. § 15A-1340.12 (2023).

"[A] sentence within the statutory limit will be presumed regular and valid" absent the trial court's consideration of "irrelevant and improper matter." *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003) (citation omitted), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). Therefore, as our Supreme Court has held, where "the record reveal[s] no such express indication of improper motivation," the defendant is not entitled to a new sentencing hearing. *Id.* at 272, 588 S.E.2d at 898 (citation omitted).

Defendant's argument is predicated on the trial court's statement: "I hear your attorney asking for a consolidated sentence. I don't do that, not for these type[s] of charges." Defendant posits that the trial court's apparent rejection of "any individualized consideration outright" violated his "statutory rights." In response, the State notes that "the trial court properly acknowledged numerous facts and circumstances specific to Defendant and his crimes[.]" These included "the serious nature of the crimes committed, the risk Defendant posed to the public, [the fact] that Defendant was already on probation for a prior conviction involving a firearm, Defendant's previous and continued participation in criminal conduct, and the need for the imposed sentence to hopefully change Defendant's behavior."

At sentencing, the trial court clearly articulated its reasoning for the sentence



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imposed:

[I]t's my job to make sure that the community is protected because there's been a verdict of guilt.

. . . .

[Y]ou're still riding around with guns, marijuana. You go to South Carolina and rob a gun store . . . . You got to make different decisions.

. . . .

[E]very child up here testified to still committing felonies.

. . . .

[Y]ou're headed the same way if you don't change your mind and make different choices.

. . . .

I hear your attorney asking for a consolidated sentence. I don't do that, not for these type[s] of charges. I do not do that. And so, I can only hope that you spend the time and make some different decisions.

Defendant contends that the trial court's statement "for these type[s] of charges"—considered in conjunction with the decision to impose consecutive sentences—shows a failure of the court to make an individualized consideration. We are not persuaded. Taken in context, the trial court's phrasing reflects a thoughtful consideration of Defendant's prior history, the danger he posed to the community, and the seriousness of his criminal conduct. Further, careful review of the transcript does not reveal that the court considered any "irrelevant and improper matter." *Id.*

(citation omitted). Thus, Defendant is not entitled to a new sentencing hearing.

In sum, Defendant waived his constitutional argument by failing to raise it during sentencing; Defendant preserved his statutory argument for appellate review, but it is without merit.

**CONCLUSION**

For the reasons stated herein, we conclude that Defendant has failed to show any error in his sentences.

NO ERROR.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).