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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-299

Filed 31 December 2024

Burke County, Nos. 09 CRS 3910–12, 4222–23

STATE OF NORTH CAROLINA

v.

JAMES ALLEN MINYARD

Appeal by defendant from judgments entered 24 July 2023 by Judge Robert C. Ervin in Burke County Superior Court. Heard in the Court of Appeals 22 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

ZACHARY, Judge.

Defendant James Allen Minyard appeals from the trial court’s judgments entered on 24 July 2023 following a resentencing hearing. Defendant does not challenge his convictions; rather, he challenges whether the trial court conducted a proper de novo resentencing hearing. For the reasons that follow, we affirm.

PROCEDURAL BACKGROUND

On 14 September 2009, a Burke County grand jury indicted Defendant for six counts of taking indecent liberties with a child and one count of first-degree sexual offense. On 13 June 2011, the grand jury indicted Defendant for attaining habitual-felon status.

Defendant's case came on for jury trial in Burke County Superior Court on 13 August 2012, and "[a]t the close of the State's evidence, the trial court dismissed one count of taking indecent liberties with a minor and the charge of first[-]degree sexual offense[.]" *State v. Minyard (Minyard I)*, 231 N.C. App. 605, 606, 753 S.E.2d 176, 179, *appeal dismissed and disc. review denied*, 367 N.C. 495, 757 S.E.2d 914 (2014).

On 15 August 2012, the jury returned verdicts finding Defendant guilty of five counts of taking indecent liberties with a child and one count of attempted first-degree sexual offense. On 16 August 2012, the jury also found Defendant guilty of attaining habitual-felon status. That same day, the trial court sentenced Defendant as a prior record level V offender to a term of 225 to 279 months' imprisonment in the custody of the North Carolina Division of Adult Correction for his conviction of attempted first-degree sexual offense, and a concurrent term of 121 to 155 months' imprisonment for his consolidated convictions for taking indecent liberties. *Id.* at 607, 753 S.E.2d at 179.

Defendant subsequently appealed to this Court, arguing that "the trial court erred by (i) denying Defendant's motion to dismiss the charge of attempted first[-] degree sexual offense; (ii) denying Defendant's motion to dismiss the five counts of

taking indecent liberties with a minor; and (iii)” failing to conduct “a *sua sponte* inquiry into Defendant’s capacity to proceed.” *Id.* at 606, 753 S.E.2d at 179. After careful review, this Court discerned no error in Defendant’s trial. *Id.*

On 24 February 2018, Defendant filed a motion for appropriate relief in Burke County Superior Court alleging various constitutional and sentencing errors, which the court denied on 21 March 2018. *State v. Minyard (Minyard II)*, 289 N.C. App. 436, 440–41, 890 S.E.2d 182, 186 (2023). Defendant filed petitions for writ of certiorari with this Court and our Supreme Court, both of which were unsuccessful. *Id.* at 441, 890 S.E.2d at 186.

On 21 May 2021, Defendant filed his second motion for appropriate relief in Burke County Superior Court, asserting that he was entitled to a new trial based on our Supreme Court’s opinion in *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020). *Id.* at 441, 890 S.E.2d at 187. By order entered on 22 December 2021, this motion was granted in part and denied in part. *Id.* Defendant’s “cases [were] rescheduled for further proceedings concerning his alleged status as [a] habitual felon and for resentencing.” *See id.*

Defendant then filed another petition for writ of certiorari with this Court on 26 May 2022, arguing that the trial court erred in denying him a new trial. *Id.* This Court allowed the petition on 12 August 2022. *Id.* In an opinion filed on 20 June 2023, this Court affirmed the trial court’s 22 December 2021 order and remanded for further proceedings and for resentencing. *Id.* at 451, 890 S.E.2d at 193.

The resentencing hearing was held on 24 July 2023 in Burke County Superior Court. The trial court concluded that Defendant was a prior record level IV offender for sentencing purposes—in contrast to Defendant’s previous classification as a level V offender—and noted the State’s decision not to proceed on Defendant’s habitual-felon status. The court sentenced Defendant as a prior record level IV offender to a term of 201 to 251 months’ imprisonment for his conviction of attempted first-degree sexual offense, to run concurrently with consecutive terms of 20 to 24 months’ imprisonment for each of his five convictions for taking indecent liberties.

Defendant filed a timely notice of appeal on 4 August 2023 and a petition for writ of certiorari on 9 May 2024. On 12 August 2024, the State filed a motion to dismiss the appeal, and on 22 August 2024, Defendant filed a response to the State’s motion to dismiss.

APPELLATE JURISDICTION

The State argues that Defendant’s appeal should be dismissed for noncompliance with Rules 4 and 26(b) of the North Carolina Rules of Appellate Procedure. Specifically, the State asserts that “Defendant failed to enter proper notice of appeal by not designating this Court as the court to which the appeal is being taken and not providing proof of service of the notice of appeal on the State[.]” In response, Defendant contends that the defects in his appeal do not warrant dismissal. Nevertheless, out of an abundance of caution, Defendant filed a petition for writ of

certiorari with this Court. After careful review, we deny the State's motion to dismiss the appeal.

Rule 4(b) of the North Carolina Rules of Appellate Procedure requires, in relevant part, that a notice of appeal in a criminal case must "designate the . . . court to which appeal is taken[.]" N.C.R. App. P. 4(b). However, it is clear that this type of violation does not automatically warrant dismissal of an appeal. *See State v. Rankin*, 257 N.C. App. 354, 355–56, 809 S.E.2d 358, 360 (concluding that the defendant's failure to designate this Court in her notice of appeal was not a fatal error requiring dismissal where this information could be fairly inferred and the State was not misled by the omission), *aff'd*, 371 N.C. 885, 821 S.E.2d 787 (2018).

Here, "while the notice of appeal fails to designate the court to which his appeal is taken, as required by Rule 4(b), [D]efendant's intent to appeal is plain[.]" *State v. Rouse*, 234 N.C. App. 92, 94, 757 S.E.2d 690, 692 (2014) (cleaned up). Because "this Court is the only court with jurisdiction to hear [D]efendant's appeal, it can be fairly inferred [D]efendant intended to appeal to this Court." *Id.* (citation omitted). Moreover, the State does not contend that it was misled or prejudiced by the admitted defects in Defendant's notice of appeal, and upon notice of this deficiency, Defendant filed a petition for writ of certiorari with this Court to remedy the defect. As such, this violation does not warrant dismissal of Defendant's appeal.

Rule 4(c) incorporates Rule 26's provisions regarding service of the notice of appeal in criminal cases. N.C.R. App. P. 4(c). Rule 26(d) provides that "[i]tems

presented for filing shall contain . . . proof of service in the form of a statement of the date and manner of service and of the names of the persons served,” and “[p]roof of service shall appear on or be affixed to the items filed.” N.C.R. App. P. 26(d). In the present case, Defendant did not provide proof that he properly served his notice of appeal upon the State. “However, it is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal.” *State v. Jenkins*, 273 N.C. App. 145, 149, 848 S.E.2d 245, 248 (2020) (cleaned up). Accordingly, “Defendant’s failure to indicate service of notice of appeal on the State is a nonjurisdictional defect” and does not necessitate dismissal. *Id.* at 150, 848 S.E.2d at 249. In addition, as with Defendant’s failure to designate this Court in his notice of appeal, the State does not argue that it was misled or prejudiced by this violation of the appellate rules.

We therefore deny the State’s motion to dismiss the appeal, dismiss Defendant’s petition for writ of certiorari as moot, and proceed to address the merits of this matter.

ANALYSIS

Defendant raises one issue on appeal: that the trial court erred by “failing to conduct a de novo resentencing hearing.” Specifically, Defendant contends that the court “relied upon [the original judge’s] assessment of how [Defendant] should be sentenced, at least in part,” and therefore failed to conduct an independent review and de novo sentencing hearing. We disagree.

Defendant's argument is predicated on select statements made by the trial court at the resentencing hearing and on the similarity of his original sentences to those imposed by the resentencing court. Defendant contends the following underlined statements by the court "show that it did not fully rely on its own independent decision-making":

This coming back before the Court for resentencing, first on the attempted first-degree [sexual offense conviction]. Prior record Level 4 with 14 [points], be sentenced in the presumptive range. Defendant would be sentenced consistent with [the original judge's] sentence of a minimum of 201 to a maximum of 251 months in the custody [of the Division of Adult Correction. The Court, giving some deference to [the original judge's] assessment, plus the Court's own assessment is consistent with that, given the adjustment of the record level.

Then on the - - they'll be five Class F felony judgments for the indecent liberties [convictions], prior record Level 4, sentencing in the presumptive range. Each of those, [D]efendant will be sentenced to a minimum of 20, maximum of 24 months in the custody [of the Division of Adult Corrections. The indecent liberties judgments will run - - the first one would run followed by the second, third, fourth, fifth. But those, like [the original judge] structured them, would run concurrent with the [first-degree sexual offense conviction].

It is "established that each sentencing hearing in a particular case is a de novo proceeding." *State v. Abbott*, 90 N.C. App. 749, 751, 370 S.E.2d 68, 69 (1988) (italics omitted). "De novo means fresh or anew; for a second time; and a de novo hearing in a reviewing court is a new hearing, as if no action had been taken in the court below." *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 283 (2016) (cleaned up and

italics omitted). Accordingly, “when a trial court relies on a previous court’s sentence determination and fails to conduct its own independent review of the evidence, a defendant is deprived of a de novo sentencing hearing.” *Id.* at 732, 783 S.E.2d at 284 (italics omitted). Nonetheless, a “trial court’s resentencing of a defendant to the same sentence as a prior sentencing court is not ipso facto evidence of any failure to exercise independent decision-making or conduct a de novo review.” *Id.* (citation and italics omitted).

Defendant relies primarily on *Abbott*, in which this Court determined that a defendant did not receive a de novo resentencing hearing where, in addition to exacting the same sentence as that which the original trial court imposed, the resentencing court explained: “I’ve tried to be consistent with” the initial judge. *Abbott*, 90 N.C. App. at 751, 370 S.E.2d at 69–70 (original emphasis omitted). This Court concluded that “the apparent consideration of the trial court’s judgment upon resentencing violated the defendant’s right to a hearing de novo.” *Id.* at 752, 370 S.E.2d at 70 (italics omitted).

However, the facts of the case before us are more akin to those presented in *State v. Spence*, 248 N.C. App. 103, 787 S.E.2d 455 (2016). In *Spence*, the trial court heard from Defendant and defense counsel; the court then imposed sentences within the presumptive range, with “the net effect [being] the same as the sentences that [we]re already imposed.” 248 N.C. App. at 109, 787 S.E.2d at 459. This Court observed that “[t]he transcript shows that the trial court did consider [the] defendant’s

requests, and that is all that the trial court is required to do. The trial court is not required to change the sentences or make any particular findings about the defendant's evidence to demonstrate its consideration." *Id.*

In the instant case, the trial court's statement evinces its independent analysis: "The [c]ourt, giving some deference to [the original judge's] assessment, *plus the [c]ourt's own assessment* is consistent with that, given the adjustment of the record level." (Emphasis added).

The trial court's actions also manifest its independent assessment. The court properly adjusted Defendant's prior record level from V to IV, received testimony from Defendant and another defense witness, and heard arguments from defense counsel and the State. At the conclusion of the arguments, the trial court properly reviewed the applicable Structured Sentencing grid and analyzed Defendant's prior record level in conjunction with his convictions to determine Defendant's sentences.

To the extent that the court did not explain the reasoning behind its sentence, it is well settled that the sentencing court is not required to make findings explicating its decision to sentence Defendant within the presumptive range. *See State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 786 (2006) ("The trial court did not abuse its discretion by failing to make formal findings or act on the proposed mitigating factors when sentences were imposed within the presumptive range for each conviction."). Moreover, a "trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not ipso facto evidence of any failure to exercise independent

decision-making or conduct a de novo review.” *State v. Morston*, 221 N.C. App. 464, 470, 728 S.E.2d 400, 406 (2012) (italics omitted).

The trial court was well within its discretion to sentence Defendant to a term of 201 to 251 months’ imprisonment for his conviction of attempted first-degree sexual offense, to run concurrently with consecutive terms of 20 to 24 months’ imprisonment for each of his five convictions for taking indecent liberties—all sentences within the presumptive range for Defendant, a prior record level IV offender. Further, careful review reveals that the trial court considered the evidence anew and conducted an independent analysis before imposing Defendant’s sentence. An “independent review of the evidence” was required at Defendant’s resentencing hearing, *Watkins*, 246 N.C. App. at 732, 783 S.E.2d at 284, and the hearing transcript demonstrates that just such an independent review took place.

Therefore, we conclude that Defendant received a proper de novo resentencing hearing.

CONCLUSION

For the reasons stated herein, we conclude that Defendant has failed to show any error at his resentencing hearing.

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).