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NO. COA01-1221

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

WILLIE J. SCURLOCK

Harnett County
Nos. 00 CRS 4153,
00 CRS 10294

Appeal by defendant from judgment entered 2 July 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 15 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Richard E. Jester for defendant-appellant.

WALKER, Judge.

Defendant was indicted with felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. By a separate bill of indictment, defendant was also charged with attaining the status of habitual felon. The evidence tended to show that, during the early morning hours of 3 May 2000, Lillington Police Officer Edward Fleming discovered that a brick cinder block had been thrown through the front glass window of the CVS Pharmacy in Lillington, North Carolina. Loose cartons of cigarettes were scattered on a shelf behind the shattered window and packs of

cigarettes were lying on the sidewalk in front of the store. The store manager subsequently confirmed that cartons of cigarettes were missing from the display case.

Meanwhile, William Brewer was approached by defendant, who was riding a bicycle in the parking lot of a Quick Stop store located approximately a mile and one half from the CVS Pharmacy. Defendant tried to sell Brewer several packs of cigarettes contained inside a folded bed sheet, which was tied to the bicycle handlebars. Brewer, who was suspicious of defendant, called the police and tried to stall defendant until the police arrived. Defendant eventually sold Brewer a CVS Pharmacy bag containing loose packs of cigarettes for \$10. Brewer testified that before he bought the cigarettes, defendant told him the cigarettes were stolen.

Afterwards defendant rode his bicycle to the Food Lion shopping center across the street and returned to the Quick Stop parking lot. Defendant then rode his bicycle behind the Quick Stop and back to Brewer's truck. When defendant returned, he did not have the bundle of cigarettes on his bicycle.

Law enforcement officers from the Lillington Police Department and the Harnett County Sheriff's Department responded to the scene and took defendant into custody. Officers located a bicycle track in a path running behind the Quick Stop and a sheet wrapped around packs of cigarettes beside the path. The cigarette packs were later identified as part of CVS Pharmacy inventory. The officers also took custody of the CVS Pharmacy bag containing cigarettes which Brewer had purchased from defendant.

A jury found defendant guilty of felonious possession of stolen goods and of attaining the status of habitual felon. Defendant's habitual felon status was established by virtue of the following prior convictions: (1) 12 August 1993 conviction for felony breaking and entering in Harnett County Case No. 93 CRS 2730, occurring on or about 23 March 1993; (2) 9 September 1998 conviction for felony common law robbery in Harnett County Case No. 97 CRS 13229, occurring on or about 22 October 1997; and (3) 18 May 1999 conviction for felony possession of stolen property in Harnett County Case No. 99 CRS 0007, occurring on or about 31 December 1998.

The trial court calculated that defendant had eight prior record level points based on eight prior Class 1 misdemeanor convictions and one prior record level point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), because "all of the elements of the present offense are included in the prior offense," for a total of nine prior record level points. The trial court determined defendant was a Class C felon with a prior record level IV and imposed a minimum sentence of 133 months and a maximum sentence of 169 months in prison. Defendant appeals.

Defendant first contends the trial court erred by determining he had a prior record level IV, based on nine prior record level points. Defendant argues the trial court should not have awarded him an additional prior record level point when it considered that all the elements of the present offense are included in a prior offense because the conviction was also used to establish his

habitual felon status. He argues that N.C. Gen. Stat. § 14-7.6 requires "that these prior felonies not be used in any way."

We addressed this same issue in *State v. Bethea*, 122 N.C. App. 623, 471 S.E.2d 430 (1996). In *Bethea*, the defendant argued that the trial court erred in determining his prior record level when it considered that all the elements of the present offense are included in a prior offense, which had been used to establish defendant's habitual felon status. Defendant specifically argued that "calculating the prior record level in this manner is contrary to [N.C. Gen. Stat. §] 14-7.6." *Id.* at 625, 471 S.E.2d at 431. After construing N.C. Gen. Stat. §§ 15A-1340.14 and 14-7.6, this Court held that the trial court did not err in determining defendant's prior record level under the Structured Sentencing Act when it assigned defendant one point because the offense for which he was being sentenced contained the same elements as the prior offense, which had been used in establishing his status as an habitual felon. *Id.* at 627-28, 471 S.E.2d at 432-33.

Defendant concedes that he had been convicted of felonious possession of stolen property on 18 May 1999 and that this conviction can be used to access the one point under *Bethea*. He, nevertheless, asks this Court to reconsider its holding in *Bethea*. We are bound by the holding of *Bethea*. "[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d

30, 37 (1989). Accordingly, we hold that the trial court did not err in determining that all of the elements of the present offense were present in a prior offense and added one point pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6) to defendant's structured sentencing calculation.

Defendant next contends the trial court erred in entering a judgment in file number 00 CRS 10294, "in which no crime was alleged." Specifically, defendant argues he was improperly sentenced for the crime of being an habitual felon and received no sentence for the underlying felony of possession of stolen goods because the case number in the upper right-hand corner of his judgment and commitment form corresponds with the habitual felon case number.

We are not persuaded by defendant's argument. The record clearly shows defendant was sentenced for being an habitual felon, while committing the crime of felonious possession of stolen goods. Defendant's judgment and commitment form signed 2 July 2001 shows that defendant "was found guilty by a jury of" being an habitual felon in file number 00 CRS 010294 and possession of stolen goods in file number 00 CRS 004153. The judgment and commitment form also shows defendant was sentenced as a Class C felon due to his habitual felon status. Defendant's assignment of error is overruled.

Defendant finally contends the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. The standard for ruling on a motion to dismiss "is whether there is

substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). Defendant was charged with possession of stolen property pursuant to a breaking and entering in violation of N.C. Gen. Stat. § 14-72(c). To sustain the conviction of felonious possession under section 14-72(c), the State must establish the following elements: (1) possession of personal property; (2) which has been stolen pursuant to a burglary; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a burglary; and (4) the possessor acting with a dishonest purpose. N.C. Gen. Stat. § 14-72(c) (2001); see also *State v. Brown*, 81 N.C. App. 622, 627, 344 S.E.2d 817, 820, *disc. rev. denied*, 318 N.C. 509, 349 S.E.2d 867 (1986).

Here, the evidence showed that defendant had a sheet filled with packs of cigarettes. Brewer bought a CVS Pharmacy bag

containing loose cigarettes from defendant, who stated at that time that the cigarettes were stolen. The store manager confirmed the packs of cigarettes were from CVS's inventory. In the light most favorable to the State, this constitutes sufficient evidence to adequately support the conclusion that defendant possessed stolen goods. Accordingly, the trial court properly denied defendant's motion to dismiss.

We note that the judgment entered in this case states that defendant was convicted of possession of stolen goods under N.C. Gen. Stat. § 14-71.1 and not under N.C. Gen. Stat. § 14-72(c) as he was charged. We remand the case to the Harnett County Superior Court for a correction of the judgment even though both offenses are Class H felonies.

No error in the trial.

Remand for correction of judgment.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).