NO. COA01-184

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 96 CRS 52437, 52437A, 2980, 99 CRS 7249

PAUL WILLIAM HOWELL

Appeal by defendant, by writ of certiorari granted by this Court on 4 October 2000, from judgment dated 14 October 1999 by Judge Loto G. Caviness in Superior Court, Buncombe County. Heard in the Court of Appeals 6 December 2001.

*Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.*

*Michael E. Casterline for defendant.*

McGEE, Judge.

Paul William Howell (defendant) was charged with feloniously possessing a Schedule II controlled substance on 15 February 1996. The Office of the Public Defender was appointed to represent defendant on 15 February 1996. Defendant appeared at the 20 May 1996 session of Superior Court in Buncombe County and entered a plea of not guilty. The case was continued for trial until 3 June 1996. The court calender and the court minutes for the 3 June 1996 court session indicate that all cases not called for trial during the 3 June 1996 session would be continued until 10 June 1996.

Defendant's case was not called during the 3 June 1996 session and was continued until 10 June 1996.

When defendant's case was called for trial on 10 June 1996, defendant failed to appear. Defendant was indicted for failure to appear on 8 July 1996. The district attorney entered a dismissal with leave of the felonious drug possession charge and the failure to appear charge dated 26 July 1996. Defendant was arrested on an unrelated charge on 14 June 1999. At that time, the charges of failing to appear and possession of a controlled substance were reinstated. Additionally, defendant was indicted with being an habitual felon on 13 September 1999.

At trial, a deputy clerk in the criminal section of the Buncombe County Clerk's Office testified for the State, referring to documents maintained by the Clerk's Office in its regular course of business. A release order was entered in the defendant's case directing him to appear in Buncombe County District Court on 7 March 1996. The deputy clerk testified the following language appeared on the release order:

> To the defendant named above. You are ordered to appear before the Court as provided above and at all subsequent continued dates. If you [fail] to appear, you will be arrested and may be [imprisoned] for as many as three years and fined as much as $3,000.

The case was continued on that date to 23 April 1996, when it was transferred to Superior Court after defendant was indicted for felonious possession of a Schedule II controlled substance.

Defendant appeared in Superior Court on 20 May 1996 and entered a plea of not guilty to charges of possession of a Schedule

II controlled substance and to the status of being an habitual felon. His case was continued until the week of 3 June 1996 and again continued to the week of 10 June 1996. Defendant's counsel had issued subpoenas for eleven witnesses to be called for the defense during the week of 10 June 1996.

Defendant failed to appear at the time the charges against him were called for trial on 10 June 1996. An order for arrest was issued. An indictment for failure to appear against defendant was returned by the grand jury on 8 July 1996. The district attorney entered a dismissal with leave on 26 July 1996 for both charges against defendant.

Defendant was arrested on the failure to appear warrant on or about 14 June 1999. The charges of possession of a Schedule II controlled substance and the failure to appear were reinstated 15 June 1999. Another indictment charging defendant with being an habitual felon was returned by the grand jury on 13 September 1999. The assistant public defender originally assigned to represent defendant was allowed to withdraw as counsel of record, and Tony Rollman was appointed to represent defendant on 4 August 1999.

Defendant moved to dismiss the failure to appear charge at the close of the State's evidence arguing the State failed to prove defendant's failure to appear was willful. The motion was denied.

Defendant testified that he had not been given a new court date following his court appearance on 20 May 1996. He stated his attorney told him that he would notify defendant of his next court date; however, although defendant tried to contact his attorney by

telephone, defendant never spoke with his attorney again. Defendant testified he did not know he had a court date in June 1996, and, as a result, he did not willfully fail to appear on his 10 June 1996 court date.

A jury found defendant guilty on 14 October 1999 of failure to appear. Defendant then pled guilty to possession of a Schedule II controlled substance and to being an habitual felon. Defendant appeals.

I.

Defendant first argues the trial court erred because there is insufficient evidence to support his willful failure to appear. Defendant contends the State did not properly provide him with notice of his court date pursuant to N.C. Gen. Stat. §7A-49.3 (repealed). We disagree.

The State presented evidence that defendant was present in court on 20 May 1996. At that time, defendant entered a plea of not guilty to a charge of possession of a Schedule II controlled substance. The case was continued until 3 June 1996. The court minutes from 3 June 1996, when defendant's case was calendered, contained the statement, "All cases not otherwise disposed of during the week of June 3rd, 1996, will be continued to June 10th, 1996." The State also entered into evidence the court calender for 3 June 1996, which listed defendant's case and which contained the same statement that cases not disposed of during the week of 3 June 1996 would be continued until the week of 10 June 1996.

Our Court held in *State v. Messer*, 145 N.C. App. 43, 550

S.E.2d 802, *aff'd*, 354 N.C. 567, 556 S.E.2d 293 (2001), that a district attorney violated the provisions of N.C.G.S. § 7A-49.3 by placing a case on the court addendum calendar on 25 September 1998 which was to be called for trial on 28 September 1998. We stated that the "district attorney, therefore, did not file a calender containing Defendant's case with the clerk of court '[a]t least one week before' the superior court session." *Messer*, 145 N.C. App. at 46, 550 S.E.2d at 804 (quoting N.C.G.S. § 7A-49-3(a) (1995)). However, in the case before us, the district attorney did not violate the provisions of N.C.G.S. § 7A-49.3(a). Defendant was advised of his court date on 20 May 1996 when the case was continued until 3 June 1996. Defendant's case was properly scheduled on the 3 June 1996 calendar, and notice was given on that day that any cases not reached would be held over for hearing until 10 June 1996.

Defendant testified the last time he was in court was 20 May 1996, and that his attorney never informed him of his next court date. However, as to a willful failure to appear in court, it is defendant's obligation, as directed in his release order, "to appear before the Court as provided above and at all subsequent continued dates." *See State v. Eure*, 172 N.C. 874, 89 S.E. 788 (1916). The record indicates defendant's attorney had kept track of defendant's case, as eleven subpoenas had been issued for 10 June 1996. Once defendant has notice to appear in court and a trial date has been properly calendered, it is defendant's responsibility to stay informed of his court date, whether through

contacting the office of the clerk of court or through counsel. We overrule this assignment of error.

II.

Defendant next argues the trial court erred in not properly advising defendant pursuant to N.C. Gen. Stat. § 15A-1022 of the maximum sentence defendant faced. Defendant contends this error invalidates his guilty plea. N.C.G.S. § 15A-1022 states a superior court judge "may not accept a plea of guilty or no contest from the defendant without first addressing him personally and: . . . (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced[.]" N.C. Gen. Stat. § 15A-1022 (a)(6) (1999). In the case before us, the trial court informed defendant he faced up to 227 months of imprisonment for each of the habitual felony convictions, plus fifteen months for the possession of a Schedule II controlled substance conviction. The correct maximum amount of imprisonment defendant faced was in fact 261 months for each of the habitual felony convictions. While the trial court incorrectly told defendant the maximum sentence, defendant has not assigned this error as constitutional error. Therefore, our standard of review is pursuant to N.C. Gen. Stat. § 15A-1443(a)(1999), which states

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this

subsection is upon the defendant.

In order to strike defendant's guilty plea and seek a new trial, defendant must show "that a reasonable possibility exists that the outcome of the trial would have been different if" the error had not been committed. *State v. Wilson*, 354 N.C. 493, 513, 556 S.E.2d 272, 285-86 (2001) (citing N.C. Gen. Stat. § 15A-1443(a) (1999)). Defendant has not shown such a reasonable possibility; we therefore overrule this assignment of error.

III.

Defendant next argues the trial court erred in denying defendant's motion for a transcript of his bond hearing, which may have corroborated his testimony at trial. However, defendant has failed to point to any citations of authority to support his argument. Our appellate rules require that appellant's arguments "contain citations of the authorities upon which the appellant relies." N.C.R. App. P. 28(b)(5). Defendant has failed to include any supporting citations of authority in his argument and this assignment of error is deemed abandoned. *See State v. Thompson*, 110 N.C. App. 217, 222, 429 S.E.2d 590, 592 (1993).

IV.

Defendant next argues his plea and sentence as a habitual felon is void because the underlying conviction for failure to appear is in error. However, as discussed above in section I, defendant's conviction for failure to appear is not in error. As the present argument relies on this mistaken assumption, we dismiss this assignment of error.

Defendant received a fair trial free of prejudicial error.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).