NO. COA02-170

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

IN THE MATTER OF

JOSHUA DAVID ANDERSON

Alamance County
No. 99 J 50

Appeal by respondent from adjudication and disposition order entered 23 October 2001 by Judge James K. Roberson in District Court, Alamance County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General John R. Corne, for the State.

Gilda C. Rodriguez for juvenile-respondent.

McGEE, Judge.

In July 2001, a juvenile petition was filed against respondent Joshua David Anderson (age 14) charging him with felonious breaking and entering and felonious larceny. The petition alleged respondent "did unlawfully, willfully and feloniously break and enter a building occupied by James Hayes used as a house located at 5678 Preacher Hayes Road[,] Mebane, NC 27302 with the intent to commit a felony or larceny" and "take and carry away two JVC stereos, $40 cash, two jackets, two t-shirts the personal property of James Hayes having a value of $720.00 pursuant to the commission of the felonious breaking and entering described in Count I[.]"

The "Incident/Investigation Report" upon which the petition was based, however, showed that someone had broken into a mobile home at 5632 Preacher Hayes Road where Chrisanto Lopez was living and had taken some of Lopez's personal belongings. After holding a hearing on the petition, the trial court entered an order on 9 August 2001 dismissing the petition. The trial court found the petition was incorrect in that "[b]ased on the evidence presented . . . the petition regarding Mr. Hayes is the wrong address and the wrong owner of the personal property. Everything described was as something else than what was proved."

The same day the trial court entered its order, a new petition was filed alleging respondent "did unlawfully, willfully and feloniously break and enter a building occupied by Chrisanto Lopez and owned by William Henry Hayes used as a house for temporary farm workers located at or across from 5632 Preacher Hayes Rd.[,] Mebane, NC 27302 with the intent to commit a felony or larceny" and "take and carry away two JVC stereos, $40 in change, two jackets, two t-shirts the personal property of Chrisanto Lopez having a value of $720.00 pursuant to the commission of the felonious breaking and entering described in Count I[.]" The new petition also charged respondent with felonious possession of stolen goods. Respondent moved to dismiss the new petition on the grounds of double jeopardy.

A hearing on the new petition was held on 13 September 2001. The State offered testimony from James Hayes, Lopez, and Deputy Sheriff Michael Williams of the Alamance County Sheriff's

Department. Respondent testified on his own behalf. On 23 October 2001, the trial court entered an order finding:

> 3. At the close of the State's evidence the Court denied the respondent's motion to dismiss.
>
> 4. Based on the evidence presented, the Court dismissed the petition alleging [felonious] possession of stolen property and does find the allegations of the remaining petition[] . . . to be true beyond a reasonable doubt.

The trial court concluded respondent was a delinquent juvenile and ordered "respondent be committed to the Department of Juvenile Justice and Delinquency Prevention for placement in one of its Youth Academies for an indefinite commitment of at least 6 months and not to exceed his eighteenth birthday." Respondent appeals.

Respondent juvenile argues the subsequent petition twice put him in jeopardy for the same offense. We disagree.

"The test of former jeopardy is not whether respondent has been tried for the same *act*, but whether he has been put in jeopardy for the same *offense*." *In re Drakeford*, 32 N.C. App. 113, 118, 230 S.E.2d 779, 782 (1977). "The offenses must be the same both in fact and in law." *Id.*

> "If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained."

State v. Cameron, 283 N.C. 191, 198, 195 S.E.2d 481, 486 (1973)

(quoting 2 Strong, N.C. Index 2d, Criminal Law § 26, pp. 517-18).

In the case before us, the State indicted respondent in two separate indictments, each charging him with breaking and entering. While the first indictment alleged respondent entered a building occupied by James Hayes and took the personal property of James Hayes, the second indictment alleged respondent entered a building occupied by Lopez and took the personal property of Lopez. Respondent concedes that "[t]he petitions [] are not the same in fact[,]" but asserts that "the prosecution's neglect in not discovering the obvious defect in the first petition and allowing the matter to proceed to an adjudicatory hearing warrants a closer examination of the application of double jeopardy to this case." While we believe the better practice would have been for the State to have amended its original petition to correspond with the facts set out in the "Incident/Investigation Report," the trial court in this instance committed no prejudicial error in adjudicating respondent delinquent under the 9 August 2001 petition. We conclude that respondent was not twice put in jeopardy for the same offense and that the trial court properly denied dismissal of the petition.

Respondent juvenile also contends that the trial court erred in adjudicating him delinquent because "there was insufficient evidence to show beyond a reasonable doubt that the juvenile was responsible for the felonious breaking and entering of Chrisanto Lopez's home." The State counters that respondent juvenile is precluded from raising this issue on appeal since he did not move

to dismiss the petition at the close of the evidence during the adjudicatory hearing.

N.C.R. App. P. 10(b)(3) states that a motion to dismiss made at the close of the State's evidence is waived if the defendant presents evidence, and a defendant must renew his motion to dismiss at the close of all the evidence in order to challenge the sufficiency of the evidence on appeal. N.C.R. App. P. 10(b)(3). Our Court held in *In re Davis*, 126 N.C. App. 64, 483 S.E.2d 440 (1997), that the respondent juveniles were precluded from challenging the sufficiency of the evidence presented during a juvenile delinquency proceeding since they failed to move for a dismissal of the petitions at trial pursuant to N.C.R. App. P. 10(b)(3). *See also State v. Spaugh*, 321 N.C. 550, 364 S.E.2d 368 (1988). Because respondent presented evidence and failed to move for a dismissal at the close of the evidence, he is precluded from raising this issue on appeal.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).