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NO. COA02-226

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v.

Alamance County  
No. 99CRS 57105

JAMES THOMAS SCOTT, III

Appeal by defendant from judgment entered 11 December 2001 by Judge Jack W. Jenkins in Alamance County Superior Court. Heard in the Court of Appeals 30 October 2002.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Hal F. Askins, for the State.*

*George E. Kelly, III for defendant-appellant.*

HUNTER, Judge.

James Thomas Scott, III ("defendant") appeals his resentencing for involuntary manslaughter based on the trial court's allegedly erroneous findings in aggravation. We affirm.

This is the second time issues regarding defendant's sentencing have appeared before this Court. During our review of defendant's original sentence, the facts were found to be as follows: Shortly before 1:00 p.m. on 2 October 1999, defendant approached a stop sign at an intersection about one-half mile from his home. Traveling at an estimated speed of seventy-five to eighty-five miles per hour, defendant hit a Ford Escort driven by

Sue Williams ("Williams"). A sergeant with the State Highway Patrol testified that defendant's speed was estimated based on there being twenty-nine feet of skid marks present before the time of impact. The impact knocked the Escort 174 feet, at which time it hit a tree. Williams survived the collision, but suffered significant injuries. The passenger in Williams' car, her four-year-old granddaughter, died shortly after the collision.

Edna Robbins ("Robbins"), a school bus driver, testified that she had known defendant for years and saw him drive through the same intersection without stopping at the stop sign in the month preceding the collision. Robbins estimated that the black truck driven by defendant was traveling at a speed between fifty and seventy miles per hour at that time. However, defendant presented several witnesses who testified that he had always stopped for the stop sign when they rode with him. In addition, defendant's stepfather testified that he had the only set of keys to the black truck and was the only driver of that vehicle.

On 14 June 2000, a jury found defendant guilty of involuntary manslaughter, assault with a deadly weapon inflicting serious injury, reckless driving, exceeding the posted speed limit, and failure to stop for a stop sign. The trial court imposed a sentence of twenty-four to twenty-nine months (which is in excess of the presumptive range) based *inter alia* on its finding as an aggravating factor that defendant's vehicle was used as a deadly weapon at the time of the crime. Defendant appealed.

Defendant's appeal was heard on 13 August 2001. In an unpublished opinion, this Court held that the trial court erred because defendant's operation of the vehicle was an element of the offense and therefore could not be considered an aggravating factor in determining his sentence for involuntary manslaughter. The case was remanded for resentencing.

Defendant's resentencing hearing was held on 11 December 2001. At the conclusion of the hearing, the trial court found two statutory aggravating factors: (1) the defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to more than one person, and (2) the victim was young. The court further found as a non-statutory aggravating factor that:

The defendant engaged in a pattern or course of conduct that violated the rules of the road and the duty of care imposed on him as a licensed driver in N.C. so egregiously as to be dangerous to society . . . . Record does show the defendant was sober. This took place in the middle of the day. Defendant knew what he was doing, very familiar with the area. He had driven in a similar manner before at this intersection[.] It's apparent that he had no care whatsoever of the outcome of his conduct.

Although the court also found three mitigating factors (defendant's good character and reputation, defendant's good employment history, and defendant's expression of sorrow and remorse for his actions), it found "each aggravating factor, in and of itself, outweigh[ed] all mitigating factors." Thus, defendant was sentenced in the aggravated range from twenty-four months to twenty-nine months. Defendant appeals again.

"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. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). The State has the burden of proving the existence of aggravating factors by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.16(a) (2001). Where aggravating and/or mitigating factors are used to determine a defendant's sentence, the "court shall consider evidence of [such] factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." *Id.* Nevertheless, the general rule is that if a sentence is imposed on defendant beyond the presumptive term based on a finding or findings in aggravation that are subsequently ruled to be error, the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983).

Furthermore, the weight given aggravating or mitigating factors is within the sound discretion of the sentencing judge and should not be re-evaluated by the appellate courts. *Id.* Thus, "[a] sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985). In the present case, we note that the trial court stated on the "Felony Judgment Findings of Aggravating

and Mitigating Factors" sheet that "each aggravating factor, in and of itself, outweigh[s] mitigating factors." Because the trial court "specifically noted its weight distribution . . . , it eliminated the need for remand if this Court were to determine that the trial court had erred in finding an aggravating factor." *State v. Norman*, 151 N.C. App. 100, 104, 564 S.E.2d 630, 633 (2002). In light of this exception to the general rule, "we must only determine whether the evidence supported one of the aggravating factors found by the trial court." *Id.*

By his first assignment of error, defendant argues the trial court erred by finding, as a factor in aggravation of punishment, that the vehicle constituted a device knowingly used by him to create a great risk of death to more than one person. Defendant specifically contends that his operation of the vehicle cannot be used to find this aggravating factor because it was an element of the offense of involuntary manslaughter. However, this Court has held on at least two occasions that the *manner* in which a defendant operates a vehicle, i.e. reckless operation, can be an appropriate basis for finding this aggravating factor when it results in a vehicular-related death. See *State v. McBride*, 118 N.C. App. 316, 454 S.E.2d 840 (1995); *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993).

Here, the court found that defendant drove his vehicle through a stop sign at a high rate of speed at 1:00 p.m. in the afternoon. Defendant was sober and fully understood what he was doing. His reckless actions and the operation of the vehicle caused an

accident that resulted in substantial injuries to Williams, as well as the death of her granddaughter. Thus, the trial court did not err in finding, as an aggravating factor, that defendant knowingly created a great risk of death to more than one person by the use of a vehicle.

Additionally, in *Garcia-Lorenzo*, this Court held that a "[d]efendant's reckless driving of his automobile in a neighborhood where he was likely to injure a number of people is not an element of the involuntary manslaughter charge." *Id.* at 336, 430 S.E.2d at 300. "[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). Since *Garcia-Lorenzo* addresses the same question presented in this case and has not been overturned, we are bound by its decision.

Having concluded the evidence supported at least one of the aggravating factors found by the trial court, it is unnecessary for this Court to address the remaining two aggravating factors brought forth by defendant as his second and third assignments of error. Accordingly, defendant's resentencing was free of error.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

Report per Rule 30(e).