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NO. COA02-294

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Wilson County
No. 00 CRS 58015
No. 00 CRS 58016

DONNIE J. BEST

Appeal by defendant from judgments entered 11 July 2001 by Judge Thomas D. Haigwood in Wilson County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Gwendolyn W. Burrell, for the State.

Russell J. Hollers, III, for defendant-appellant.

CAMPBELL, Judge.

Defendant was found guilty of assault with a deadly weapon on a law enforcement officer, assault upon a law enforcement officer, and resisting, delaying or obstructing public officers. He was also found guilty of habitual felon status. He was sentenced as a habitual felon to an active term of 73-97 months. He was sentenced to active terms of 75 days for assault on a law enforcement officer and 45 days for resisting a public officer. All sentences were ordered to run consecutively.

The State presented evidence tending to show that at approximately 11:30 p.m. on 29 December 2000, Keith Pendergrass,

Steve Hayden and Jason Derk, all officers of the Wilson Police Department, were patrolling North Vick Street in the city. Sergeant Pendergrass observed a man within a group of four young men engaged in the suspected consumption of marijuana. Sergeant Pendergrass notified the other officers. As the uniformed officers walked toward them, the group attempted to disperse. One of the men, defendant, started to walk away. Officer Hayden asked defendant for his name and purpose for being at that location. Defendant mumbled a reply, prompting Officer Derk to remark, "it's in his mouth," meaning suspected contraband. Defendant ran but was caught by Officers Hayden and Derk. As Officer Derk restrained defendant on the ground, Officer Hayden attempted to place handcuffs on defendant. Officer Hayden succeeded in placing handcuffs on defendant's right wrist, but before he could cuff the other wrist, another person in defendant's group struck Officer Derk and knocked him off of defendant. Officer Derk sprayed pepper spray at the man but some of the spray also affected Officer Hayden, causing him to loosen his grip on defendant. Defendant freed himself from Officer Hayden's grasp and swung at Officer Hayden with the handcuffs. Defendant resumed his flight. Sergeant Pendergrass chased him and caught up with defendant. Defendant swung the handcuffs at Sergeant Pendergrass. Ultimately, Sergeant Pendergrass subdued defendant by striking him with his collapsible baton. Sergeant Pendergrass and Officer Hayden completed the arrest by handcuffing both wrists of defendant.

Defendant first contends the court erred in sentencing him as

a habitual felon because two of the three prior felony convictions named in the indictment occurred before he attained the age of eighteen. The evidence at the hearing showed that defendant was born on 20 February 1974 and that two of the three prior convictions occurred on 20 May 1991 and 16 January 1992, prior to his eighteenth birthday. The Habitual Felon Act defines a habitual felon as one who has been convicted of three prior felony offenses and provides that felonies committed before a person attains the age of eighteen "shall not constitute more than one felony." N.C. Gen. Stat. § 14-7.1 (2001). Because the two convictions before defendant reached the age of eighteen may be counted only as one, the indictment does not charge the minimum three felony convictions. As the State concedes, defendant's conviction of habitual felon status must be vacated and defendant must be re-sentenced for the conviction of assault with a deadly weapon on a law enforcement officer, a class F felony. See N.C. Gen. Stat. § 14-34.2 (2001).

Defendant next contends that the court erred by denying his motion to dismiss the charge of assault with a deadly weapon on a law enforcement officer. In ruling upon a motion to dismiss, the court considers the evidence in the light most favorable to the State and determines whether the State has presented substantial evidence of each element of the offense. *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 415-16 (1991). A person is guilty of the crime of assault with a firearm or other deadly weapon upon a governmental officer or employee if he commits an assault with a

firearm or any other deadly weapon upon an officer of a political subdivision of the state who is engaged in the performance of his duties. N.C. Gen. Stat. § 14-34.2 (2001). Defendant argues the evidence is insufficient to establish that the handcuffs constituted a deadly weapon.

"A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). Our Supreme Court has stated that the determination of whether handcuffs constitute a deadly weapon is for the jury to decide, taking into consideration the size, weight and composition of the handcuffs, the manner in which the handcuffs were used, the area of the body targeted by the assailant, and the relative size and strengths of the assailant and the assailed. *State v. Watkins*, 200 N.C. 692, 693-94, 158 S.E. 393, 394 (1931). The evidence shows that the handcuffs were made of metal and spanned eight to ten inches. The unclasped end was opened. Officer Hayden was under the effects of pepper spray at the time defendant swung the handcuffs at him. Officer Hayden also testified that defendant was "a big man, swinging these handcuffs pretty hard. [He] was afraid of getting hit in the head with them." Based upon the foregoing evidence, a jury could find that the handcuffs constituted a deadly weapon under the circumstances.

Lastly, defendant contends that the court erred by imposing an active term of imprisonment for the conviction of resisting a public officer. The offense of resisting a public officer is

classified as a Class 2 misdemeanor. N.C. Gen. Stat. § 14-223 (2001). The record shows that defendant's prior conviction level is level II. Punishment for a class 2 misdemeanor, prior record level II, is community or intermediate punishment. N.C. Gen. Stat. § 15A-1340.23(c) (2001). We note that a court is permitted by N.C. Gen. Stat. § 15A-1340.20(c1) to impose an active sentence for "a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement . . . as a result of the charge that culminated in the sentence." The preprinted judgment form contains a box stating, "3. The Court imposes the sentence pursuant to G.S. 15A-1340.20(c1). (Active Punishment Exception)." The court did not mark this box and the court did not allow defendant any credit for any time spent in confinement prior to the date of the judgment as a result of this charge. The judgment, therefore, as entered contains an incorrect sentence disposition. Consequently, defendant must be re-sentenced for this offense.

For the foregoing reasons, this matter is remanded for re-sentencing on the convictions of assault with a deadly weapon upon a government official and of resisting a public officer.

Vacated in part, remanded for re-sentencing in part.

Judges WYNN and McGEE concur.

Report per Rule 30(e).