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NO. COA08-298

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Moore County
Nos. 06 CRS 2474,
07 CRS 2211

ANTHONY HAROLD STONE

Appeal by defendant from judgments entered 2 October 2007 by Judge Thomas H. Lock in Moore County Superior Court. Heard in the Court of Appeals 10 September 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Donald W. Mason for the State.
Paul F. Herzog, for defendant-appellant.

JACKSON, Judge.

Anthony Harold Stone ("defendant") appeals his conviction of possession of a firearm by a felon and attaining the status of an habitual felon. For the reasons stated below, we hold no error in part and reverse and remand for resentencing in part.

Defendant was released from prison on 21 July 2005. As a condition of his release, he was required to spend three months on electronic house arrest, followed by six months of intensive probation. Officer Connie Burns ("Officer Burns") was defendant's probation officer. She explained to defendant that one of the

conditions of probation was that he was not to possess a firearm or have one in his residence.

Defendant lived with his mother while on probation. Shortly after the period of electronic house arrest ended, Officer Burns became concerned about defendant's compliance with the terms of probation and conducted a warrantless search of his residence on 15 November 2005. Police searched the bedroom in which defendant had been staying. It was full of defendant's mother's clothing. Pursuant to the search, police recovered a loaded handgun from a dresser drawer and an unloaded shotgun, which was propped up in the corner with defendant's work shirt hanging on it.

Defendant was tried on two counts of possession of a firearm by a felon, as well as one count of being an habitual felon. He was acquitted of the charge of possessing a handgun, but found guilty of possessing a shotgun. Defendant admitted his habitual felon status. The trial court sentenced defendant as a prior record level IV and imposed a presumptive range sentence of 108 to 139 months in the custody of the North Carolina Department of Correction. Defendant appeals.

Defendant first argues that it was plain error for several items of evidence to be admitted. We disagree.

Defendant contends the following evidence was admitted improperly: (1) Officer Burns' testimony with respect to defendant's probation compliance, (2) Officer Burns' testimony with respect to defendant's possession of a gun magazine entitled "Bargain Bonanza Magazine from Dixie Gun Works", (3) Officer Darin

Ritter's ("Officer Ritter") testimony with respect to the same magazine, (4) the gun magazine itself, (5) testimony by Officers Ritter and Burns with respect to defendant's statement that he "enjoyed reading about guns," and (6) Officer Ritter's testimony with respect to the results of a search of defendant's truck by another officer. With the exception of the gun magazine itself, no objections were made at trial to the admission of this evidence.

Ordinarily, "a party must have presented to the trial court a timely request, objection or motion" to preserve a question for appellate review. N.C. R. App. P. 10(b)(1) (2007). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." *Id.* However, "[i]n criminal cases, a question which was not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2007). "To establish plain error, a defendant must demonstrate '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. Barksdale*, 181 N.C. App. 302, 309, 638 S.E.2d 579, 583 (2007) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

Assuming *arguendo* that admission of the challenged evidence was error, we cannot discern how its admission was prejudicial to defendant. Absent this evidence, the jury was presented with facts

and circumstances from which it could conclude that defendant was guilty of possessing a firearm, *i.e.*, a shotgun. To establish that offense, the State was required to prove that: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. rev. denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). Defendant stipulated that he previously was convicted of a felony. The shotgun was located in the bedroom occupied by defendant, only three feet from the bed. Defendant knew it was there - he informed the police of its location. Defendant exercised dominion and control over the shotgun when he used it to hang his work shirts.

The fact that the jury returned a split verdict - guilty of possessing the shotgun but not guilty of possessing the handgun - gives further credence that defendant was not prejudiced by the admission of the now-challenged evidence. Clearly the jury was able to distinguish between the level of defendant's control over the shotgun in the corner versus the handgun in his mother's underwear drawer.

Because defendant has failed to show that the jury likely would have returned a different verdict absent the evidence, or that its admission resulted in a miscarriage of justice or unfair trial, this argument is overruled.

Finally, defendant argues that the trial court erred in accepting defendant's admission to being an habitual felon. We agree.

Although a defendant may stipulate to the existence of underlying felonies pursuant to North Carolina General Statutes, section 14-7.4 ("[a] prior conviction may be proved by stipulation of the parties"), pursuant to section 14-7.5, the issue of whether a defendant has attained the status of an habitual felon must be submitted to the jury. See N.C. Gen. Stat. §§ 14-7.4, 14-7.5 (2007). In the alternative, he may enter a guilty plea to the charge of being an habitual felon. See *State v. Williams*, 133 N.C. App. 326, 330, 515 S.E.2d 80, 83 (1999). If he pleads guilty, the judge may not accept the plea

without first addressing him personally and:

- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
- (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
- (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including [the maximum] possible [duration resulting] from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
- (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to

this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2007). Here, the judge had no such discussion with defendant.

In *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001), this Court held that although the defendant had stipulated to his habitual felon status, "such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea." *Id.* at 471, 542 S.E.2d at 699 (citing *Williams*, 133 N.C. App. at 330, 515 S.E.2d at 83 (stipulation to habitual felon status tantamount to guilty plea when, subsequent to defendant's stipulation, the trial court asked defendant "questions to establish a record of her plea of guilty" and defendant "informed the court that she understood that her stipulations would give up her right to have a jury determine her status as an habitual felon"); N.C. Gen. Stat. § 15A-1022(a) (2007) (trial court may not accept guilty plea without first addressing defendant personally and making inquiries of defendant as required by this statute)).

Because defendant's habitual felon status was neither determined by a jury nor the product of a valid guilty plea, his conviction in this respect is reversed and the underlying conviction is remanded for resentencing.

No Error in part; Reversed in part and Remanded for Resentencing.

Judge BRYANT and ARROWOOD concur.

Report per Rule 30 (e).