NO. COA09-1479

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Cumberland County
No. 03 CRS 55284

MARION ODELL MITCHELL

Appeal by Defendant from order entered 12 May 2009 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

N.C. Prisoner Legal Services, Inc., by Mary E. McNeill, for Defendant.

McGEE, Judge.

Marion Odell Mitchell (Defendant) appeals from an order denying his motion for appropriate relief. Defendant argues that the trial court erred by improperly entering judgment imposing a sentence for felony possession of stolen goods as an habitual felon, in that Defendant also received a sentence for larceny of the same property. For the reasons stated herein, we reverse the trial court's order denying Defendant's motion for appropriate relief.

Factual Background

Defendant was indicted on 17 November 2003 for felony breaking

and entering, felony larceny, felony possession of stolen goods, and being an habitual felon. The felony larceny and felony possession of stolen goods charges each involved the same property: two lug wrenches, one carrying case, one pair of boots, two boxes of steel wool pads, two books, one can of spray paint, one metal tin containing various coins, one pocket dictionary and one window cleaning tool.

Defendant pleaded guilty to all charges on 6 July 2004. The terms and conditions of Defendant's plea included an "intermediate punishment to include [a] 30 day split [sentence] pursuant to probation" for the breaking and entering and larceny convictions. The trial court entered a suspended sentence of fifteen to eighteen months in prison on the breaking and entering and larceny convictions, with a probation period of thirty-six months, and a prayer for judgment continued for the conviction of felony possession of stolen goods.

Defendant's probation was revoked on 6 October 2006 and his prison sentence for breaking and entering and larceny was activated. The trial court also entered judgment on the conviction of felony possession of stolen goods and sentenced Defendant as an habitual felon to a prison term of 94 to 122 months.

Defendant gave notice of appeal to this Court. Defendant argued that the trial court erred by entering judgment and sentencing him for felonious possession of stolen goods as an habitual felon where judgment and a suspended sentence for felonious larceny of the same property had previously been entered

and an active sentence subsequently imposed for a probation violation. In an order entered 11 June 2007, our Court granted the State's motion to dismiss Defendant's appeal "without prejudice to file a motion for appropriate relief with the trial court."

Defendant filed a motion for appropriate relief with the trial court on 6 February 2008. Following a hearing on Defendant's motion for appropriate relief, the trial court denied Defendant's motion in an order filed 12 May 2009. Defendant filed a petition for writ of certiorari with our Court on 13 July 2009, seeking review of the trial court's order denying Defendant's motion for appropriate relief. In an order entered 3 August 2009, our Court granted Defendant's petition for writ of certiorari to review the trial court's order.

Motion for Appropriate Relief

Defendant argues that the trial court erred in entering convictions for both larceny and possession of the same stolen property. Defendant relies on the decision of our Supreme Court in *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). The State, quoting *State v. Caldwell*, 269 N.C. 521, 153 S.E.2d 34 (1967), counters that Defendant, by knowingly and voluntarily pleading guilty, "'waive[d] all defenses other than that the indictment charges no offense.'" Id. at 526, 153 S.E.2d at 37-38 (citations omitted).

"'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a

showing of manifest abuse of discretion.'" *State v. Armstrong*, ___ N.C. App. ___, ___, 691 S.E.2d 433, 445 (2010) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)). In contrast, "[t]he trial court's conclusions of law are reviewed de novo." *Id.* Defendant does not challenge the trial court's findings of fact, and they are therefore binding on appeal. Thus, we conduct a *de novo* review of the trial court's conclusions of law.

Defendant argued in his motion for appropriate relief, as he does in his brief to our Court, that the Supreme Court's decision in *Perry* prohibits convictions for both larceny and possession of the same stolen goods. In *Perry*, our Supreme Court examined the conviction of a defendant for both felonious larceny and possession of stolen property. *Perry*, 305 N.C. at 227, 287 S.E.2d at 812. In both convictions, the property at issue was the same stolen property. *Id.* at 226, 287 S.E.2d at 811. The Supreme Court affirmed the decision of our Court in vacating the conviction for possession of stolen property. *Id.* at 237, 287 S.E.2d at 817.

In the case before us, the trial court relied on *Perry* in its order, concluding that Defendant's convictions for both larceny and possession of stolen goods for the same property did not violate the Defendant's double jeopardy rights. The *Perry* Court did state that "larceny and possession of the property stolen in the larceny are separate and distinct offenses and therefore double jeopardy considerations do not prohibit punishment of the same person for both offenses[.]" *Id.* at 231, 287 S.E.2d at 814. However, the

Supreme Court's discussion of any double jeopardy considerations was not the basis for the Court's holding, but was dicta only in its examination of our Court's underlying decision. *Id.* (stating that the Court of Appeals "reasoned, first, that the Legislature did not intend for there to be two separate and distinct offenses, and second, that double jeopardy considerations preclude conviction of both offenses. We cannot concur in the first reason expressed and, because of our disposition on other grounds, we do not reach the second.").

Instead, the Supreme Court's holding was based on its determination "that although it could have done so, the Legislature, by creation of the statutory offense of possession of stolen property, did not intend to punish an individual for both offenses." *Id.* The Supreme Court specifically held that, although "a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses." *Id.* at 236-37, 287 S.E.2d at 817 (citations omitted); *see also State v. Dow*, 70 N.C. App. 82, 87, 318 S.E.2d 883, 887 (1984). The Supreme Court "intended to provide a 'bright line' rule which [would] be readily understood and applied by law enforcement personnel, prosecutors, and defense counsel alike and [would] avoid much of the confusion now extant in this area of the law." *Perry*, 305 N.C. at 237, 287 S.E.2d at 817 n.9.

Based upon our Supreme Court's "bright line" rule in *Perry* that a defendant "may be convicted of only one of [the] offenses"

of "larceny, receiving, and possession of the same property," *id.*, we hold that the trial court's conclusion in the case before us was in error. *See also State v. Carter*, 167 N.C. App. 582, 583, 586, 605 S.E.2d 676, 677, 679 (2004) (applying *Perry* and "arrest[ing] judgment on the charge of possession of stolen goods or property" where the defendant pleaded guilty to "both felony larceny of property and possession of that stolen property").

The State contends that Defendant waived his arguments concerning larceny and possession of the same goods by pleading guilty to both charges and that Defendant has "received the benefit of his plea bargain and he is bound by the terms of his plea agreement." However, in *State v. Keller*, ___ N.C. App. ___, 680 S.E.2d 212 (2009), our Court recently granted certiorari to review the defendant's plea of guilty to second-degree murder, first-degree kidnapping, conspiracy to commit robbery with a dangerous weapon, and accessory after the fact to first-degree murder. *Id.* at ___, 680 S.E.2d at 213. The defendant in *Keller* challenged the factual basis for his plea agreement, arguing that "the offenses of second degree murder and accessory after the fact to first degree murder of the same victim are mutually exclusive offenses, and, consequently, [the defendant] could not be sentenced for both." *Id.* at ___, 680 S.E.2d at 214.

Reviewing the defendant's guilty plea, our Court noted that "'[a] participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen.'" *Id.* at ___, 680 S.E.2d at 215

(citations omitted). In *Keller*, we held that the "defendant could not be sentenced based on the mutually exclusive offenses of second degree murder and accessory after the fact to first degree murder." *Id.* We further concluded that "[t]he trial court, therefore, erred in accepting [the] defendant's guilty plea to both[.]" *Id.* In so holding, our Court noted that we granted certiorari to review the defendant's guilty pleas in part because of "the fundamental nature of the errors asserted by [the] defendant." *Id.* at ___, 680 S.E.2d at 214; *see also State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 167-68 (1990) (finding error with convictions for "both embezzlement and false pretenses based upon a single transaction").

For the foregoing reasons, we reverse the trial court's order denying Defendant's motion for appropriate relief.

Reversed.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).