NO. COA10-796

NORTH CAROLINA COURT OF APPEALS

Filed: 1 March 2011

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 08 CRS 54104
09 CRS 126

BRUCE LEE GRIFFIN

Appeal by Defendant from judgment entered 11 February 2010 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 21 February 2011.

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

William B. Gibson, for defendant-appellant.

ERVIN, Judge.

Defendant Bruce Lee Griffin appeals from a judgment sentencing him to a minimum term of 133 months and a maximum term of 169 months imprisonment in the custody of the North Carolina Department of Correction based upon jury verdicts convicting him of failing to appear on a felony and having attained the status of an habitual felon. On appeal, Defendant contends (1) that the trial court erred by denying his motion to dismiss the failing to appear charge for lack of sufficient evidence and (2) that his sentence, as enhanced by his habitual felon status, constitutes cruel and unusual punishment imposed in violation of his rights under the

Eighth and Fourteenth Amendments of the United States Constitution. After careful consideration of Defendant's challenges to his conviction and sentence in light of the record and the applicable law, we conclude that Defendant is not entitled to any relief on appeal.

I. Factual Background

A. Substantive Facts

Marcia Hipps, an administrative assistant in the Buncombe County District Attorney's Office, testified that her duties included setting calendars for criminal sessions of the Superior Court. The types of calendars that she generates include administrative setting calendars, motion and plea calendars, trial calendars, and addendum or add-on calendars. There is only one motion and plea calendar for each week that Superior Court is in session. At the first calendar setting after a defendant has been indicted by a grand jury, the assistant district attorney and defense counsel responsible for that defendant's case decide upon future court dates for the case, including the dates upon which the case will be placed on the motion and plea calendar. At that point, the assistant district attorney provides the court dates to Ms. Hipps, who enters them into the computer for the purpose of generating the relevant calendars.

Ms. Hipps places motion and plea calendars on the Internet one week in advance of the scheduled court date. In addition, she sends copies of the calendars to the Clerk of Superior Court's office. Printed copies of the calendars are kept in the offices of

the Clerk of Superior Court, the Public Defender, and the District Attorney. Ms. Hipps does not personally contact the defendants whose cases are listed on a calendar when they are represented by counsel; rather, she only contacts a defendant directly when he or she is not represented by counsel.

On occasion, Ms. Hipps attends the calendar call, at which the prosecutor calls out the names of the defendants as they appear on the calendar. If a defendant fails to appear when his or her name is called, the prosecutor will request the presiding judge to have the bailiff call that person out. In the event that such an event occurs, Ms. Hipps then marks a copy of the calendar to indicate that the defendant failed to appear.

On 4 April 2008, Defendant was released from custody after being charged with aiding and abetting armed robbery by executing an appearance bond in Case No. 08 CR 54104, which was then pending in the Buncombe County District Court. In order for Defendant to make the $10,000.00 bond that had been set in that case, a member of his family authorized the use of his or her home as collateral. The bond document advises defendants that they must appear in court or risk having the property used to secure their bond sold. Defendant appeared in court in connection with his aiding and abetting armed robbery case at least two times between the date upon which he was released on bond and December 2008.

Defendant's aiding and abetting armed robbery case appeared on a motion and plea calendar in the Buncombe County Superior Court for 8 December 2008. The calendar designated Defendant's case as

Case No. 08 CRS 54104, indicating that Defendant's case now had a Superior Court designation. This calendar, which was published a week in advance of the court date, listed Defendant's name, his case number, the date and time at which court would be held, the courtroom number, the name of the presiding judge, the name of the assistant district attorney assigned to that session of court, and the name of Defendant's attorney. Defendant appeared in court on 8 December 2008 with his attorney, Howard McGlohon.

Subsequently, Defendant's aiding and abetting an armed robbery case appeared on a motion and plea calendar in the Buncombe County Superior Court for 5 January 2009. The 5 January 2009 calendar was printed and published one week in advance of the court date and listed Defendant's name and case number and indicated that he had a pending felony charge.

Tracy Ballard, a courtroom clerk serving in the Buncombe County Superior Court, testified that, in the event that a defendant failed to appear and was "called and failed," she would make a notation and issue an order for the defendant's arrest. Ms. Ballard stated that Defendant did not appear in the Buncombe County Superior Court on 5 January 2009, so that notations were made beside his name reading "CF" for "called and failed;" "OF" for "order of forfeiture," meaning that, since Defendant had posted a bond and had failed to appear, his bond would be forfeited; and "OA" for "order for arrest." The order for Defendant's arrest was issued on 9 January 2009.

Deputy United States Marshal Forrest Howard arrested Defendant pursuant to the warrant for arrest issued as a result of Defendant's failure to appear on 9 January 2009. Defendant did not act as if he was surprised to have been taken into custody.

B. Procedural Facts

On 4 March 2009, the Buncombe County grand jury returned bills of indictment charging Defendant with failing to appear on a felony and having attained habitual felon status. The cases against Defendant came on for trial before the trial court and a jury at the 8 February 2010 session of the Buncombe County Superior Court. At the close of the State's evidence and again at the close of all of the evidence, Defendant unsuccessfully moved to dismiss the failure to appear charge for lack of sufficient evidence. On 10 February 2010, the jury returned a verdict of guilty on the failure to appear charge. After the trial court accepted the jury's verdict, the issue of Defendant's status as an habitual felon came on for hearing. At the conclusion of the State's evidence, Defendant unsuccessfully moved to dismiss the habitual felon charge. On 10 February 2010, the jury returned a verdict finding that Defendant had attained the status of an habitual felon. At the sentencing hearing, the trial court found that Defendant had accumulated twelve prior record points and should be sentenced as a Level IV offender. Based upon these determinations, the trial court sentenced Defendant to a minimum term of 133 months and a maximum term of 169 months imprisonment in the custody of the North

Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

First, Defendant argues that the trial court erred by denying his motions to dismiss the failure to appear charge on the grounds that the record did not contain sufficient evidence to support his conviction. We disagree.

In determining whether to grant a motion to dismiss for insufficiency of the evidence, "the trial court must decide 'whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.'" *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). Substantial evidence can be either direct or circumstantial and consists of "evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *Id.* (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). When considering such a dismissal motion, all evidence is viewed in the light most favorable to the State, including all reasonable inferences which may be drawn from that evidence. *Id.* at 679, 505 S.E.2d at 141 (citing *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993)). "'Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.'" *Id.* (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)).

N.C. Gen. Stat. § 15A-543 provides, in pertinent part, that:

> (a) In addition to forfeiture imposed under Part 2 of this Article, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.
>
> (b) A violation of this section is a Class I felony if:
>
> > (1) The violator was released in connection with a felony charge against him[.]

N.C. Gen. Stat. § 15A-543 (2009).

> Thus, to survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence: (1) the defendant was released on bail pursuant to Article 26 of the North Carolina General Statutes in connection with a felony charge against him or, pursuant to section 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful.

State v. Messer, 145 N.C. App. 43, 47, 550 S.E.2d 802, 805 (citing N.C. Gen. Stat. § 15A-543), *aff'd per curiam*, 354 N.C. 567, 556 S.E.2d 293 (2001). "'Wilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965).

In his brief, Defendant concedes that the State presented substantial evidence of each of the first three elements of the offense defined in N.C. Gen. Stat. § 15A-943(b)(1). Defendant does, however, contend that the record does not support a

reasonable inference that he wilfully failed to appear. In advancing this contention, Defendant argues that the evidence fails to show that he knew that he was supposed to appear in Buncombe County Superior Court on 5 January 2009, whether by knowledge of the published court calendar or by communication from his attorney, and that the State's evidence to the effect that he failed to protest or act surprised at his 9 January 2009 arrest does not cure this deficiency in the State's evidence. After reviewing the evidence presented at trial in the light most favorable to the State, we conclude that the record contains sufficient evidence to support a jury finding that Defendant wilfully failed to appear in court.

According to the record evidence, Defendant was released from custody on 4 April 2008 on a pending felony charge. Defendant was released under the terms of an appearance bond that required him to appear in court or risk forfeiting the property that a relative put up as collateral. Defendant appeared in court on at least two occasions between that date and 8 December 2008, when he appeared in court on the same pending felony charge for a third time accompanied by his attorney. At the 8 December 2008 session, the State's evidence reflects that the prosecutor and Defendant's counsel would have discussed future court dates. The case against Defendant was calendared for 5 January 2009, having been published one week earlier, on 29 December 2008. The calendar for the 5 January 2009 session listed Defendant's name and case number; was published on the Internet for viewing by defendants, defense

attorneys, and the general public; and was also made available in the offices of the Clerk of Superior Court, the District Attorney, and the Public Defender's office. Despite the availability of multiple sources of information indicating that he was required to appear in court on 5 January 2009, Defendant failed to appear on that date or at any time between 5 January 2009 and his arrest on 9 January 2009. We find that this evidence, taken in the light most favorable to the State, was sufficient for a jury to conclude that Defendant knew that he was required to appear in court in connection with his pending felony charge on 5 January 2009 and that his failure to appear on that date was wilful. As a result, we conclude that the trial court did not err by denying Defendant's dismissal motion.

B. Cruel and Unusual Punishment

Secondly, Defendant asserts that the sentence that he received in this case violates the prohibition on the imposition of cruel and unusual punishment set out in the Eighth and Fourteenth Amendments to the United States Constitution. According to Defendant, his sentence for failure to appear, as enhanced based on the jury's finding concerning his status as an habitual felon, is excessive and disproportionate to the offense for which he was convicted. Defendant did not object to his sentence on constitutional grounds in the trial court; for that reason, this issue was not properly preserved for appeal. *See State v. Cortes-Serrano*, 195 N.C. App. 644, 658, 673 S.E.2d 756, 765 (concluding that Eighth Amendment arguments not raised at trial are not

adequately preserved for appellate review), *disc. review denied*, 363 N.C. 376, 679 S.E.2d 138 (2009).[1] In addition, this Court has considered and rejected Defendant's position with respect to this exact issue in *State v. Dammons*, 159 N.C. App. 284, 298-99, 583 S.E.2d 606, 615, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382, 124 S. Ct. 1691 (2004). In *Dammons*, this Court addressed the issue of whether a Defendant sentenced for felonious failure to appear as an habitual felon had been subjected to cruel and unusual punishment and determined that such a sentence was not excessive or grossly disproportionate to the crime committed as a constitutional matter. *Id.*As in *Dammons*, Defendant's sentence in this case was properly imposed given that the jury convicted Defendant of the substantive offense with which he had been charged and found that he had attained habitual felon status. In light of the fact that binding precedent establishes that Defendant is not entitled to relief on this claim, we decline to review Defendant's challenge to the

---

[1] Defendant filed a *certiorari* petition for the purpose of attempting to obtain review of his cruel and unusual punishment claim on the merits. However, in attempting to utilize *certiorari* in this fashion, Defendant fails to recognize that *certiorari* is an alternative method for obtaining review of a trial court's judgment or decision, *State v. Coleman*, 181 N.C. App. 568, 572, 640 S.E.2d 784, 786, *disc. review denied*, 361 N.C. 571, 651 S.E.2d 223 (2007) (stating that "a 'writ of *certiorari* is used . . . as a substitute for an appeal'" and holding that "the granting of a petition for writ of certiorari does not alter the determination of when a case becomes final") (quoting *State v. Moore*, 210 N.C. 686, 690, 188 S.E. 421, 424 (1936) and citing *State v. Hasty*, 181 N.C. App. 144, 147, 639 S.E.2d 94, 96 (2007)), and not an alternative method for avoiding the usual effect of a failure to preserve an issue in the trial court. As a result, we conclude that Defendant's *certiorari* petition should be denied.

constitutionality of his sentence pursuant to N.C.R. App. P. 2. Therefore, we conclude that Defendant is not entitled to appellate relief on the grounds that his sentence violates the prohibition against cruel and unusual punishment set out in the Eighth and Fourteenth Amendments to the United States Constitution.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant received a fair trial and sentencing proceeding that was free from prejudicial error. As a result, Defendant is not entitled to appellate relief in this case.

NO ERROR.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).