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NO. COA01-1353

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.  KENDRICK LAMONT SCOTT, Defendant.	Durham County Nos. 00 CRS 56097 and 00 CRS 16692
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Appeal by defendant from judgment entered 13 March 2001 by Judge A. Leon Stanback in Durham County Superior Court. Heard in the Court of Appeals 16 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.*

*Miles & Montgomery, by Lisa Miles, for defendant-appellant.*

HUDSON, Judge.

A jury found defendant guilty of felonious breaking and entering, felonious larceny, and possession of stolen goods. Defendant was convicted as a habitual felon, and was sentenced to a minimum term of 90 months and a maximum term of 117 months imprisonment. Defendant appeals.

The State presented evidence that on 6 May 2000 at approximately 4:30 a.m., Mr. Ronnie Sturdivant heard glass break and an alarm go off at Janet's Hair Salon at 122 West Parrish Street in Durham. Mr. Sturdivant owned the building and leased the space to the hair salon; he and his wife lived in the apartment

upstairs. Mr. Sturdivant got out of bed, dressed and ran down the back stairs that exited directly beside the hair salon. Mr. Sturdivant saw a person step out of the broken picture window of the store holding a boombox and a telephone or answering machine. The person swung the boombox at Mr. Sturdivant, threw down the items and ran.

Mr. Sturdivant testified that he drove around in his car to try to find the person and saw him at the Marriott Hotel, just around the corner from the hair salon. Although the person had removed his shirt, Mr. Sturdivant was certain that it was the same person he had seen outside the hair salon. Mr. Sturdivant had a lead pipe in his hands and told the suspect, later identified as defendant, that they were going to wait until the police arrived. Defendant did not try to flee and told Mr. Sturdivant that he had just gotten out of jail and was trying to get something to eat.

The police arrived approximately two minutes later. One of the officers on the scene, Officer Scott J. Pennica, noticed some "bulges" in defendant's pockets and for his own safety patted down the defendant. Officer Pennica removed what he described as more than a handful of large and small white rocks from defendant's pockets. Officers later discovered white rocks similar to those found on defendant inside of the hair salon.

The defendant testified that he had been at a friend's house, then went downtown, and eventually ended up at the loading dock of the Marriott Hotel. He denied ever being on Parrish Street or seeing Mr. Sturdivant before Mr. Sturdivant pulled up to the

Marriott in his car. He further denied having broken into Janet's Hair Salon or taking any items from the store. He claimed that the rocks found in his pockets were to be used as part of his daily prayer or "salott." Defendant also claimed that Mr. Sturdivant hit him with the lead pipe, which Mr. Sturdivant denied. The officers testified that they saw no signs that defendant had been hit.

Prior to trial, defendant moved to dismiss the habitual felon count. Judge Orlando F. Hudson heard defendant's motion in the Superior Court in Durham County on 5 March 2001. Defendant alleged that a grant from the City of Durham to fund the prosecution of habitual felons violates the Separation of Powers provisions in the North Carolina and United States Constitutions. After hearing arguments from counsel and taking evidence, Judge Hudson denied defendant's motion. The State proceeded to trial.

The jury convicted defendant on all counts. In the habitual felon phase of the trial, the State called Myrtle Weaver, assistant clerk of Superior Court for Durham County. Ms. Weaver identified State's exhibits eight through sixteen as indictments, transcripts of guilty pleas and judgments against defendant in case numbers 88 CRS 1106, 96 CRS 13532, and 98 CRS 5224, each involving a felony offense. The jury convicted defendant of the status of habitual felon.

Appellate review is confined to those assignments of error which pertain to the arguments presented. *State. v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997). North Carolina Rule of Appellate Procedure 28(a) provides that "[q]uestions raised

by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C. R. App. P. 28(a). In his brief, defendant has not brought forward assignments of error 2, 3, 4, and 6, which are, therefore, abandoned.

As for defendant's remaining assignments of error, our Supreme Court has held that the "scope of appellate review is limited to those issues presented by assignment of error set out in the record on appeal." *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 71 (1992). The defendant argued in his brief that the combined use of the Structured Sentencing Act and the Habitual Felon Act violates defendant's right to due process and constitutes cruel and unusual punishment under the United States Constitution. These issues, however, were not contained in any assignment of error brought forth by defendant and are beyond the scope of appellate review. Therefore, we decline to address them.

The first issue properly before us is defendant's contention that the trial court erred in denying defendant's motion to dismiss the habitual felon indictment. Defendant contends that a grant awarded to the Durham County District Attorney's office for prosecution of habitual felons gave the prosecutor a financial incentive to indict defendant and that this grant violates the Separation of Powers Clause of both the North Carolina and United States Constitutions. Here, the defendant's own evidence showed that the grant was in no way connected to the indictment or prosecution of a certain number of habitual felons. Further,

defendant's evidence showed that the number of persons indicted or convicted as habitual felons is not used to evaluate the continuation of the grant. Thus, the record reveals no financial incentive for this prosecutor to have prosecuted this defendant as a habitual felon.

Next, defendant argues that the combined use of the Habitual Felon Act and Structured Sentencing constitutes double jeopardy in violation of the United States Constitution. In *State v. Brown*, we rejected this argument and we are bound to follow the decision in that case. *State v. Brown*, 146 N.C. App. 299, 552 S.E.2d 234 (2001), *disc. review denied*, 354 N.C. 576, 559 S.E.2d 186 (2001), *cert. denied*, 122 S.Ct. 2305, 152 L.Ed.2d 1061 (2002); *Cf. In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). This assignment of error is overruled.

No error.

Judges McGEE and BIGGS concur.

Report per Rule 30(e).