NO. COA01-1586

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v. Wayne County
Nos. 01 CRS 1597
01 CRS 3379

FARONTA R. THOMPSON

Appeal by defendant from judgment entered 1 August 2001 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 19 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Tracy C. Curtner, for the State.

Jeffrey Evan Noecker for defendant appellant.

TIMMONS-GOODSON, Judge.

Faronta R. Thompson ("defendant") appeals from his felony conviction of operating a motor vehicle to elude arrest. Defendant subsequently tendered a plea of guilty to his habitual felon status. The trial court entered judgment and sentence against defendant pursuant to the Habitual Felon Act. For the reasons set forth herein, we uphold the judgment of the trial court.

The State's evidence at trial tended to show the following: On 26 February 2001, Officer Wayne Cannuci ("Officer Cannuci"), Officer Tammy Pipkin ("Officer Pipkin"), and Officer Jason Graham ("Officer Graham") of the Goldsboro Police Department were

conducting a traffic checkpoint for driver's licenses. Defendant approached the checkpoint in a white Dodge Neon and reduced his speed. Police officers directed defendant to stop his car, however, defendant accelerated through the checkpoint. Officer Cannuci and Officer Graham got in their patrol cars and pursued defendant.

As defendant fled from the officers, he drove approximately seventy miles per hour in a forty-five mile per hour speed zone. The officers followed defendant until the street ended and defendant exited the Neon. Defendant ran toward an apartment complex and Officers Canucci and Graham continued to pursue defendant. The officers were unable to apprehend defendant and returned to the location of the Neon.

Upon returning to the abandoned Neon, Officers Canucci and Graham found Tiffany Weeks ("Weeks") talking with other police officers. Weeks testified that she rented the Neon and did not know how it got from her apartment to where police found it. Weeks further testified that police officers were looking for written rental information for the car and she informed them that the information was inside her apartment. Weeks then offered to retrieve the information and police officers accompanied her to the apartment, which was in the direction that police pursued defendant. Upon arriving at the apartment, Weeks was unable to enter the apartment. She informed police officers that she had left her three children inside the unlocked unit. After several

attempts to enter the apartment, defendant unlocked the door from the inside of the apartment.

According to trial testimony, defendant and Weeks are the parents of two children and defendant informed Weeks that he was at the apartment to visit his children. Although defendant was wearing different clothing, Officers Graham and Pipkin identified him as the driver of the Neon. Officers Pipkin and Graham searched the apartment, but were unable to locate any of defendant's clothing. Defendant was arrested, and it was later determined that his driver's license was in a state of revocation on 26 February 2001.

At trial, the jury found defendant guilty of operating a motor vehicle to elude arrest. The trial court sentenced defendant as a habitual felon. Defendant was sentenced to imprisonment for a minimum term of ninety-two months' and the maximum term of 120 months'. Defendant appeals.

Defendant contends that the trial court erred in (1) denying his motion to dismiss the charge of felonious operation of a motor vehicle and (2) imposing judgment and sentence against him pursuant to the Habitual Felon Act. For the reasons set forth herein, we conclude that the trial court committed no error.

By his first assignment of error, defendant argues that the trial court erred by failing to grant his motion to dismiss. Defendant contends that there was insufficient evidence to support the charge of felonious operation of a motor vehicle. Defendant

specifically argues that the State failed to show that his driving was reckless. We disagree.

When ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). In considering a motion for dismissal, the trial court is to determine whether there is substantial evidence "(a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *Id.* at 65-66, 296 S.E.2d at 651-52. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). The trial court only needs to consider whether the evidence is sufficient to be presented to the jury and does not need to be concerned with the weight of the evidence. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652. "'If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.'" *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

As amended, North Carolina General Statutes section 20-141.5 provides in pertinent part that:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> (1) Speeding in excess of 15 miles per hour over the legal speed limit.
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> . . . .
>
> (3) Reckless driving as proscribed by G.S. 20-140.
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> . . . .
>
> (5) Driving when the person's drivers license is revoked.
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> . . . .

N.C. Gen. Stat. § 20-141.5 (2001). North Carolina General Statutes section 20-140 defines the offense of reckless driving as follows:

> (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.
>
> (b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140(a)(2001).

This Court interpreted for the first time the provision in N.C. Gen. Stat. § 20-141.5, which created the offense of felonious speeding to elude arrest in *State v. Funchess*, 141 N.C. App. 302, 540 S.E.2d 435 (2000). In upholding the trial court's instructions to the jury, the Court held

> N.C. Gen. Stat. § 20-141.5 seeks to punish a single wrong: attempting to flee in a motor vehicle from a law enforcement officer in the lawful performance of his duties. Violation of the statute is at least a Class 1 misdemeanor. Where at least two of the eight aggravating factors set out in the statute are present, however, the offense is a Class H felony. Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our General Statutes, they are not separate offenses . . ., but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.

Id. at 309, 540 S.E.2d at 439.

In the case at bar, defendant stipulated that his license was revoked at the time of the incident. Thus, one of the two aggravating factors set out in the statute is met. The only question remaining for the trial court to decide was whether substantial evidence was present of any other aggravating factor set forth in N.C. Gen. Stat. § 20-141.5(b).

Here, defendant contends that there is substantial evidence that he was speeding to elude arrest, but not to show that his driving was reckless. In support of his contention, defendant argues that his driving was not reckless because the incident occurred on a weekday; he reduced his speed at the checkpoint; the officers failed to testify that they felt endangered; defendant

was not intoxicated or otherwise impaired; defendant's actions did not lead to an accident; there were no skid marks from defendant's tires; and a "plate of food" in the car "did not spill" while he was driving. In essence, defendant submits that because his excessive speed did not result in any damage to property or personal injury, his driving was not careless or reckless. However, reckless driving does not rest on the factors argued by defendant.

In *State v. Floyd*, 15 N.C. App. 438, 190 S.E.2d 353, *disc. review denied*, 281 N.C. 760, 191 S.E.2d 363 (1972), the defendant made the precise argument presented in the present case. In *Floyd*, the defendant contended that the evidence showed he was driving sixty to seventy miles per hour in a forty-five mile per hour speed zone, and suddenly applied his brakes which resulted in the vehicle "fishtailing." Defendant argued that the evidence did not show that his driving was reckless. This Court rejected the argument presented in *Floyd* and held that "[t]he evidence was sufficient for jury determination as to whether defendant was exercising due caution and circumspection and whether his speed, or his manner of driving, endangered or was likely to endanger any person or property including himself, his passenger, his property, or the person or property of others . . . ." *Id.* at 440, 190 S.E.2d at 354. Evidence of defendant's recklessness is certainly as pronounced as *Floyd*. In the case *sub judice*, defendant accelerated to seventy miles per hour in a forty-five mile per hour zone in a residential area. Defendant drove at night, with law enforcement

officers in pursuit, and failed to reduce his speed at a sharp ninety-degree curve. The evidence was sufficient for a jury to determine whether defendant's driving was careless and reckless.

With defendant's stipulation that his license was revoked, the jury could properly find that at least two aggravating factors were present to support the charge of felonious operation of a motor vehicle. We reject defendant's first assignment of error.

In his second assignment of error, defendant argues that the trial court erred by imposing judgment and sentence against him pursuant to the Habitual Felon Act. Defendant contends that his right to be free from cruel and unusual punishment under the United States Constitution and the North Carolina Constitution was violated. Defendant, however, does not argue that he received a punishment outside of the statutory range. Defendant asserts that it was cruel and unusual punishment for the trial court to give him a lengthy sentence "considering the relatively minor nature of this offense that involved no injury to any person or destruction of property."

We first note that defendant "offered a plea of admitting habitual felon status." Thus, defendant has no right to appeal this issue because he failed to move to withdraw his plea of guilty to habitual felon status in the trial court. *State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995). We nevertheless treat the record and brief as a petition for a writ of *certiorari* and elect to grant review of the issue. *Id.*

"Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C. Gen. Stat. § 14-7.1 (2001). "[L]egislation which is designed to identify habitual criminals and which authorizes enhanced punishment has withstood eighth amendment challenges." *State v. Todd*, 313 N.C. 110, 119, 326 S.E.2d. 249, 254 (1985).

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate. Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.

State v. Ysaguire, 309 N.C. 780, 786, 309 S.E.2d 436, 440-41 (1983). The purpose of the habitual felon status is to insure lengthier sentences for those persons who have repeatedly violated the criminal laws of this State. *See State v. Hodge*, 112 N.C. App. 462, 469, 436 S.E.2d 251, 255 (1993).

In *State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985), the defendant was convicted of possession of stolen property and received thirty years' imprisonment based on his habitual felon status. This Court held that

> the primary purpose of a recidivist statute is "to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation *and its duration* are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."

Id. at 640, 334 S.E.2d at 108 (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 63 L. Ed. 2d 382, 397 (1980))(alteration in original).

In the instant case, the role of this Court is only to decide whether the sentence under review is within the constitutional limits and not to consider "the relatively minor nature" of the offense, as argued by defendant. At trial, the evidence tended to show that defendant was (1) convicted in October 1995 for possession of cocaine; (2) convicted in November 1999 for possession of cocaine; and (3) convicted in June 2000 for possession of cocaine with the intent to sell and deliver, thus providing the three felony offenses necessary to declare defendant an habitual felon. The trial court imposed a sentence which was within the statutory presumptive range, a minimum of ninety months' and maximum of 120 months' imprisonment. Therefore, the sentence was within the constitutional limits and adequately punished defendant for his continuing violation of the criminal laws of this State. We overrule defendant's final assignment of error.

No error.

Judges HUDSON and CAMPBELL concur.

Report per Rule 30(e).