NO. COA01-235

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Randolph County
No. 97 CRS 3847

RAYMOND FREDRICK GILLEY

Appeal by defendant from judgment entered 27 September 2000 by Judge James M. Webb in Randolph County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III and Assistant Attorney General Patricia A. Duffy, for the State.

Ottway Burton, P.A., by Ottway Burton, for defendant-appellant.

CAMPBELL, Judge.

Defendant, Raymond Gilley, appeals from a judgment finding him guilty of driving while impaired ("DWI"). We find no error.

On 9 September 1995, Lieutenant Johnny Hussey ("Lieutenant Hussey") of the Randolph County Sheriff's Department noticed defendant's vehicle swerving across the lanes on Highway 49 South. Lieutenant Hussey stopped defendant and asked to see his driver's license, which defendant was unable to produce. As Lieutenant Hussey observed defendant's demeanor and speech, he formed the opinion that defendant was under the influence of some impairing

substance. Lieutenant Hussey then contacted the State Highway Patrol, as is policy in Randolph County when there is someone suspected of DWI. Approximately fifteen minutes later, State Highway Patrol Trooper D. E. Altman ("Trooper Altman") arrived at the scene and spoke with Lieutenant Hussey and defendant. Based on these conversations and his own observations of defendant, Trooper Altman placed defendant under arrest for DWI.

Thereafter, Trooper Altman transported defendant to the Randolph County Jail to administer DWI-related tests. Trooper Altman gave defendant several standard psycho-physical tests, all of which defendant failed to perform satisfactorily. An intoxilyzer test was also given to defendant, which reflected an alcohol concentration of .09. Upon completion of the intoxilyzer test, Trooper Altman read defendant his *Miranda* rights and then proceeded to ask him additional questions. However, after being informed of his test results, defendant refused to answer any further questions. Defendant was subsequently charged with DWI in violation of section 20-138.1 of our statutes and for driving while his license was revoked ("DWLR") in violation of section 20-28(b) of our statutes.

Defendant, represented by counsel, appeared in Randolph County District Court on 26 November 1996. Prior to the call of the case for trial, defendant's counsel and the assistant district attorney ("ADA") had agreed that the stopping officer, Lieutenant Hussey, would not be a necessary witness. Thus, Trooper Altman was called to the stand as the ADA's first witness. Trooper Altman was sworn

in and took his seat at the witness stand. However, before Trooper Altman gave any testimony, defendant communicated to the ADA in open court that the stopping officer would be a necessary witness. Since Lieutenant Hussey was not available in court, the presiding judge, Judge Michael A. Sabiston, declared a mistrial. The matter was continued until 26 February 1997.

Defendant's case actually came on for trial again on 19 March 1997. On this occasion, the ADA had mistakenly subpoenaed Lieutenant Hussey's brother, who was also employed by the Randolph County Sheriff's Department, instead of Lieutenant Hussey. The ADA took a voluntary dismissal of the case. Trooper Altman then took defendant into custody, presented him before a magistrate and another warrant was issued for defendant's arrest for DWI and DWLR.

Defendant filed a formal request on 27 January 2000 to be brought before the court for disposition of all charges pending against him. This request was made pursuant to section 15A-711(c) of our statutes and was properly filed with the clerk of court and served upon the district attorney's office.

On 28 March 2000, defendant appeared *pro se* before Judge Jayrene R. Maness in Randolph County District Court. He was found guilty of DWI, but not guilty of DWLR. Defendant gave notice of appeal for trial *de novo* in superior court.

On 14 June 2000, defendant appeared before Judge Russell G. Walker, Jr. during the Administrative Term of the Randolph County Superior Court. Defendant informed the court of his desire to

represent himself. Defendant signed the appropriate form acknowledging his waiver of counsel.

Judge James M. Webb presided over defendant's new trial at the 26 September 2000 Criminal Session of Randolph County Superior Court. Defendant, still appearing *pro se*, filed two motions to dismiss, one based on double jeopardy and the other based on the statute of limitations. The court denied both of these motions at the close of the State's evidence. Defendant then orally moved for a mistrial on the grounds that testimony elicited by the State violated his constitutional rights and prejudiced the jury against him. This motion was also denied. Thereafter, on 27 September 2000, the jury found defendant guilty of DWI and he was sentenced to an active term of sixty days to run concurrently with the term he was already serving on a kidnapping charge. Defendant gave notice of appeal, and Ottway Burton was appointed as his appellate counsel on this appeal.

Defendant brings forth three assignments of error. For the following reasons, we find no error in the trial court's judgment.

I.

By his first assignment of error defendant argues the trial court erred in denying his motion to dismiss for failure to grant him a speedy trial pursuant to section 15A-711(c). We disagree.

Section 15A-711 addresses securing the attendance of a criminal defendant confined to a state institution. It states, in pertinent part, that:

> (a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.
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> . . .
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> (c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

N.C. Gen. Stat. § 15A-711 (1999). In other words, section 15A-711 requires that the request for a speedy trial be served on the State, which then has six months to proceed with the trial. *See State v. Turner*, 34 N.C. App. 78, 237 S.E.2d 318 (1977).

Due to the actions of both parties in the present case, there was unquestionably a lengthy delay between defendant being arrested by Trooper Altman and being found guilty of DWI in district court. However, upon defendant's proper filing of his request for a speedy trial pursuant to section 15A-711(c), his case was heard and a decision was rendered by the district court within sixty-five days.

Since sixty-five days falls well within the six-month time frame authorized under the statute, we conclude that the trial court did not err in denying defendant's motion to dismiss for failure to grant him a speedy trial.

II.

By his second assignment of error defendant argues the trial court erred in denying his motion to dismiss on the basis of double jeopardy. We disagree.

The Fifth Amendment to the United States Constitution guarantees the right of criminal defendants to be free from double jeopardy. U.S. Const. amend. V. Double jeopardy protects an individual from being prosecuted "'for the same offense after acquittal[;] . . . against a second prosecution for the same offense after conviction[;] . . . [and] against multiple punishments for the same offense.'" *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969)). This right is applicable to the states through the Fourteenth Amendment. *See Pearce*.

Our courts have established different rules with respect to when double jeopardy attaches depending on whether the defendant is being tried in a jury or nonjury trial. "In a jury trial, a defendant participates actively in the selection of the trier of fact, the jury, and has an interest, not only in its selection, but also in maintaining that jury once it has been selected." *State*

v. Brunson, 327 N.C. 244, 249, 393 S.E.2d 860, 864 (1990). Thus, double jeopardy attaches upon the swearing in of the jury to "reflect[] the judicial recognition of this interest. No such interest is involved in a nonjury trial because the defendant does not play an active part in the selection of the trier of fact, the particular judge involved." *Id.* at 250, 393 S.E.2d at 865. Therefore, the rule in our state is that "in nonjury trials, jeopardy attaches when the court begins to hear evidence or testimony." *Id.* "This rule is premised upon the proposition that the potential for conviction exists when evidence or testimony against a defendant is presented to and accepted by the court." *State v. Ward*, 127 N.C. App. 115, 121, 487 S.E.2d 798, 802 (1997). Furthermore, this bright-line rule is "consistent with the trend, if not the majority rule, of our sister states and is in accordance with the federal rule." *Brunson*, 327 N.C. at 250, 393 S.E.2d at 865.

Here, defendant argues that double jeopardy attached during his appearance in district court on 26 November 1996 after the ADA called Trooper Altman as its first witness and began asking him questions. However, defendant's court appearance on that date was not before a jury. Also, despite Trooper Altman being sworn in, taking his seat at the witness stand and the ADA asking him a question, Trooper Altman never responded to the question because defendant objected to his testifying. Since the stopping officer was a necessary witness and not available to testify, a mistrial was declared. Thus, no testimony against defendant was presented

to and accepted by the court during defendant's nonjury trial. Accordingly, the trial court did not err in denying defendant's motion to dismiss on the basis of double jeopardy.

III.

By defendant's final assignment of error he argues the trial court erred in denying his motion for a mistrial because the State's improper questioning of Trooper Altman elicited testimony regarding defendant's *Miranda* rights. Specifically, defendant takes issue with the following colloquy:

> Q: [Trooper Altman] did you read [defendant] his Miranda Rights at all during that evening?
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> A: Yes, I did. After we got done with the intoxilyzer test I read him his Miranda Rights, and I was going to ask him some questions that are on the back of the AIR Form, and Mr. Gilley acted like he was a little mad because of the results of the intoxilyzer test, and he refused to answer my questions.

We find that although the State's questioning was improper, it was harmless beyond a reasonable doubt.

A "defendant's exercise of his right to remain silent [is] guaranteed by Article 1, Section 23, of the North Carolina Constitution and the fifth as incorporated by the fourteenth amendment of the United States Constitution." *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980). Thus, the use for impeachment purposes of a defendant's silence at the time of arrest and after having received his *Miranda* warnings is a violation of his rights under the Due Process Clause. *See Doyle v. Ohio*, 426

U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976). Nevertheless, "[e]very violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E.2d 677, 682 (1972) (citations omitted). In cases where the mention of a defendant's post-*Miranda* silence is being reviewed, our courts have determined that this error can be harmless beyond a reasonable doubt by looking at factors such as whether: (1) reference to defendant's silence was made by a witness or the prosecutor; (2) the State made additional references or comments to defendant's exercise of his right to remain silent during the remainder of the trial; (3) the State intended to capitalize on defendant's silence; (4) the evidence against defendant was overwhelming; and (5) defendant timely objected and made a motion to strike. *See State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994); *State v. Elmore*, 337 N.C. 789, 448 S.E.2d 501 (1994); *State v. Freeland*, 316 N.C. 13, 19, 340 S.E.2d 35, 38 (1986); *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986).

In the case *sub judice*, after being asked three times by the State on direct examination whether he had read defendant his *Miranda* rights, Trooper Altman eventually made reference to defendant's refusal to answer his questions. Outside the presence of the jury, the trial judge reprimanded the prosecutor, stating that he believed repeatedly asking this question was an unlawful

attempt by the State to elicit incriminating testimony before the jury. Nevertheless, the trial was allowed to continue apparently because the court believed this error was harmless. Based on the factors mentioned previously, we agree.

Despite the State's possible attempt to improperly capitalize on defendant's silence, the facts in this case do not rise to the level of reversible error. First, reference to defendant's silence was only mentioned once during the trial through the testimony of Trooper Altman. This testimony was in response to the State's questions establishing a chronology of the events surrounding defendant's arrest and processing. Second, Trooper Altman's response was not followed by further emphasis through additional questions or comments by the State. Third, the evidence of defendant's guilt was overwhelmingly established by the testimony of Trooper Altman and Lieutenant Hussey, as well as the results of the intoxilyzer test and the standard psycho-physical tests. Finally, defendant, acting *pro se*, did not timely object and make a motion to strike the trooper's testimony. Therefore, defendant's last assignment of error is also overruled because the State's impropriety was not sufficient to warrant a new trial.

In conclusion, we hold that the trial court did not err in its judgment finding defendant guilty of DWI.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).