NO. COA01-278

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Durham County
Nos. 98 CRS 38137
FREDERICK DEWAYNE TUCKER 98 CRS 38138
99 CRS 16024

Appeal by defendant from judgment entered 13 September 2000 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 18 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Michaux and Michaux, P.A., by H.M. Michaux, Jr., for defendant appellant.

McCULLOUGH, Judge.

Defendant Frederick DeWayne Tucker was found guilty of possession of cocaine, possession of drug paraphernalia, felonious operation of a vehicle to elude arrest, and operation of a motor vehicle without a seat belt. The case was tried before a jury at the 11 September 2000 Criminal Session of Durham County Superior Court. Defendant was convicted of all counts. The convictions were consolidated, and defendant was sentenced as an habitual felon to a term of 93-121 months' imprisonment.

During defendant's trial, the State presented evidence tending

to show that on 11 December 1998, Officer Anthony Smith of the Durham Police Department turned on the blue light of his cruiser to make a stop of a vehicle defendant was operating. Defendant traveled several blocks before stopping his vehicle. Officer Smith approached defendant's vehicle, and when Officer Smith got within arm's length of the vehicle, defendant sped off. A high speed chase ensued which ended when defendant stopped his vehicle in a parking lot. Officer Smith arrested defendant and conducted a search of defendant's vehicle. The officer found two plastic bags situated in the door handle slot on the driver's side of the vehicle. The bags contained a tan rock substance which was subsequently chemically analyzed as less than one tenth of a gram of cocaine base, a Schedule II controlled substance.

Defendant did not present any evidence.

By his first assignment of error, defendant contends that the trial court abused its discretion by admitting the plastic bags and their contents into evidence. He argues a complete chain of custody was not established. We disagree. Before an item of real evidence may be received into evidence, it must be shown to be the same item involved in the incident and to have undergone no material change. *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). The establishment of a detailed chain of custody is required only when the proffered evidence is susceptible to alteration or is not readily identifiable, and reasonable belief exists that the item may have been altered. *Id.* at 389, 317 S.E.2d at 392. Weak links in the chain of custody affect the weight to be

given the evidence, but do not render the evidence inadmissible. *Id.* The decision to admit the evidence is within the sound discretion of the trial judge. *Id.* at 388-89, 317 S.E.2d at 392. A discretionary decision will not be disturbed unless it is shown that the ruling was arbitrary and not the product of a reasoned decision. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

The evidence shows that Officer Smith placed the items in a plastic bag, sealed it, and wrote his initials, defendant's name and the date on the bag. He then placed the bag in an evidence locker at the police station. Porcia Sidberry, the senior property custodian for the Durham Police Department, testified that she removed the package from the evidence locker on 14 December 1998 and placed it in the drug vault. Ruth Brown, property custodian for the Durham Police Department, testified that she removed the package, which did not have any sign of tampering, from the drug vault and that she delivered it to the State Bureau of Investigation for analysis on 25 March 1999. Roosevelt Riles, an employee of the State Bureau of Investigation, testified that he received the package on 25 March 1999. He delivered the package, which did not have any sign of tampering, to chemist Wendy Cook for analysis. Ms. Cook testified that she received the package in a completely sealed and untampered condition. Ms. Cook returned the package to Riles, who then returned it to the Durham Police Department. The foregoing evidence establishes an adequate chain of possession, safekeeping, and delivery to support the trial

court's decision to admit the evidence. *See State v. Detter*, 298 N.C. 604, 634, 260 S.E.2d 567, 588 (1979). Defendant has failed to show an abuse of discretion by the trial court, and his first assignment of error is overruled.

Defendant next contends that the trial court erred by excluding during the cross-examination by defendant of Officer Smith the following statement made by defendant to Officer Smith: "I ran because I know I have a warrant for driving while license revoked." Defendant argues that the evidence should have been admitted under the excited utterance exception to the hearsay rule. We disagree.

A statement is admissible under the excited utterance exception if it relates to a startling event and is made while the declarant was under the stress of excitement caused by the event or condition. N.C. Gen. Stat. § 8C-1, Rule 803(2) (1999). For a statement to qualify as an excited utterance, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). In the present case, the evidence shows that defendant made the statement at the police station after the officers searched his vehicle while waiting for the arrival of a tow truck, and after a four to five mile ride to the police station. Defendant did not appear upset when he made the statement. The foregoing evidence shows a lack of spontaneity and a sufficient lapse of time to permit reflection and fabrication. Thus,

defendant's second assignment of error is overruled.

Defendant next contends that the trial court erred in sentencing him as an habitual felon without a jury having found defendant guilty of, or defendant having pled guilty to, the charge of the status. We agree.

The record shows that at the close of the State's evidence, the trial court excused the jurors from the courtroom and inquired of defendant regarding the habitual felon indictment. The trial court read the indictment and asked, "How would the Defendant intend to reply to that habitual felon status?" Defendant's counsel responded that defendant had "to admit that status . . . based on the law." The trial court then heard and denied defendant's motions to dismiss the principal felony charges. Stating that defendant had admitted his status as an habitual felon, the trial court proceeded to the charge conference as to the principal felony charges. After the jury returned its verdicts as to the principal felony charges, the trial court immediately proceeded to sentence defendant for the convictions as an habitual felon.

Article 2A of Chapter 14 of the General Statutes defines the status of habitual felon and establishes procedures for indictment, conviction, and sentencing of one as an habitual felon. This Article establishes that the habitual felon proceeding is ancillary to a pending prosecution for a principal or substantive felony. *State v. Allen*, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977). The issue of whether defendant is an habitual felon is not

presented for decision by a jury until defendant is first convicted of the principal or substantive felony. N.C. Gen. Stat. § 14-7.5 (1999). Thereafter, if the jury finds defendant guilty of the status of habitual felon or if defendant pleads guilty to the status, the court sentences defendant for the principal or substantive felony conviction as a Class C felon unless a higher felony classification applies. N.C. Gen. Stat. § 14-7.6 (1999).

In *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001), this Court held that a stipulation or admission to status as an habitual felon is not tantamount to a guilty plea "in the absence of an inquiry by the trial court to establish a record of a guilty plea." This record is established when the trial court addresses defendant personally and conducts the inquiry required by N.C. Gen. Stat. § 15A-1022(a) (1999) in accepting guilty pleas. The record in the case at bar fails to show such inquiry. Because the trial court failed to follow proper procedure, the judgment must be reversed and the matter remanded for resentencing.

Case No. 98 CRS 38137 and Case No. 98 CRS 38138: No error.

Case No. 99 CRS 16024: Reversed and remanded.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).