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NO. COA01-675

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

Chatham County
No. 96CRS565

KENNETH EUGENE ALSTON

On writ of certiorari to review judgment entered 11 July 1996 by Judge F. Gordon Battle in Chatham County Superior Court. Heard in the Court of Appeals 18 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Michael C. Warren, for the State.

Mary March Exum for defendant appellant.

McCULLOUGH, Judge.

Defendant was charged with robbery with a dangerous weapon. The State's evidence showed that on 5 November 1995, defendant, Elmond Burgess, and Kelly Wiley were riding around together when defendant brought up the idea of robbing the Byrd's Food Store in Siler City, North Carolina. The three then drove to the store to conduct surveillance. Defendant provided military camouflage clothing, which the three conspirators put on in preparation for the robbery. Wiley, however, backed out of the enterprise because he was concerned he would be recognized by employees of the store. As a result, Derrick Headen was recruited to replace Wiley, and was

given the camouflage clothing originally given to Wiley. Defendant obtained firearms to be used in the commission of the robbery.

Around 8:00 p.m. on 5 November 1995, the three conspirators robbed the Byrd's Food Store at gunpoint. Burgess acted as the lead gunman and collected some \$7,266.50 in cash from store personnel. Headen stood at the store entrance and acted as the armed lookout, and defendant acted as the driver of the getaway car. After the robbery, the three divided the robbery proceeds, and gave some of the money to defendant's relatives.

On or about 8 November 1995, at the request of Pittsboro Police Chief Larry Hipp, defendant was taken into custody in Siler City for questioning about other robberies that had occurred in Pittsboro, North Carolina. During questioning, defendant told Chief Hipp that he knew something about the Byrd's Food Store robbery in Siler City. Chief Hipp then contacted Siler City Police Detective Doug Stewart by telephone, whereupon defendant gave the detective information about the robbery, including the sequence of events leading up to and following the robbery. Defendant told Detective Stewart the identities of those involved, and stated that he provided the guns used in the robbery. At the conclusion of the telephone interview, defendant said the reason he divulged this information to Detective Stewart was that he never set foot on Byrd's Food Store property. Therefore, defendant believed no charges could be brought against him.

Defendant presented evidence through the testimony of relatives that tended to refute his co-conspirator Burgess'

testimony. Colon Alston, defendant's grandfather, denied being paid for the use of any guns, in direct conflict with Burgess' testimony. Further, defendant's mother and aunt testified that, contrary to Burgess' testimony, no one left any masks or guns at her house on the evening of 5 November 1995. Defendant's mother also testified defendant never gave her any money on that evening.

At the conclusion of the trial, the jury found defendant guilty of robbery with a firearm. After finding one aggravating and one mitigating factor, the trial court found the aggravating factor outweighed the mitigating factor, and sentenced defendant to an aggravated term of 75-99 months' imprisonment. By order entered 28 September 2000, this Court allowed defendant's petition for writ of certiorari to review the judgment of the trial court.

The sole issue before this Court is whether the trial court erred in sentencing defendant to an aggravated term of imprisonment. N.C. Gen. Stat. § 15A-1340.16(a) (1999) provides that the State bears the burden of proving, by a preponderance of the evidence, the existence of an aggravating factor. The defendant bears a similar burden to prove the existence of a particular mitigating factor. *Id.* The trial court need only consider a mitigating or aggravating factor if the evidence in support of that factor is uncontradicted, substantial, and manifestly credible. *State v. Daniel*, 319 N.C. 308, 312, 354 S.E.2d 216, 218 (1987). The trial court is given great latitude in making its decision regarding the existence of a mitigating or aggravating factor. *State v. Barton*, 335 N.C. 741, 750, 441 S.E.2d 306, 311 (1994).

It is well settled that the balance struck in weighing the aggravating against the mitigating factors is a matter within the sound discretion of the trial judge and will not be disturbed unless it is "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision."

State v. Howard, 99 N.C. App. 347, 348-49, 393 S.E.2d 139, 141 (1990) (quoting *State v. Parker*, 315 N.C. 249, 258-59, 337 S.E.2d 497, 503 (1985) (citations omitted)).

Defendant first contends the trial court erred in finding, as a factor in aggravation, that he induced others to participate in the commission of the offense under N.C. Gen. Stat. § 15A-1340.16(d)(1) (1999). Defendant further asserts that such a finding was not supported by the evidence. We disagree.

The testimony of defendant's co-conspirator Kelly Wiley was corroborated by Detective Stewart's testimony regarding Wiley's statement to him. Wiley testified that defendant introduced the idea of robbing Byrd's Food Store while he, defendant, and Burgess were all riding around on 5 November 1995, and that defendant provided everyone involved with military camouflage for the robbery. Co-conspirator Elmond Burgess testified that defendant provided the camouflage clothing and guns used in the robbery, and delegated duties for each participant. Defendant, in his statement to Detective Stewart, admitted that he had the guns stashed. In light of this "uncontradicted, substantial and manifestly credible" evidence, the trial court did not err in finding that defendant induced others to participate in the 5 November 1995 robbery of the

Siler City Byrd's Food Store.

Defendant also contends that the trial court erred in not finding as a factor in mitigation that he voluntarily acknowledged wrongdoing to a law enforcement officer under N.C. Gen. Stat. § 15A-1340.16(e)(11) (1999). Defendant asserts that there was evidence to support such a finding. Again, we disagree.

To be entitled to a finding under N.C. Gen. Stat. § 15A-1340.16(e)(11), there must be an affirmative acknowledgment, not only of the fact, but also of wrongdoing. In *State v. Smith*, 321 N.C. 290, 362 S.E.2d 159 (1987), our Supreme Court held that a defendant who moves to suppress a confession thereby repudiates that confession and is not entitled to use evidence of that confession to prove a mitigating factor under N.C. Gen. Stat. § 15A-1340.16(e)(11). See also *State v. Cummings*, 353 N.C. 281, 543 S.E.2d 849 (2001) (holding that the defendant could not use a confession to prove a mitigating factor after he had repudiated that confession).

In the present case, defendant made a statement to Detective Stewart based upon his mistaken belief that he was not criminally culpable because he never set foot on Byrd's Food Store property. Defendant, however, subsequently repudiated that statement by moving to suppress it. Accordingly, there was not "uncontradicted, substantial and manifestly credible" evidence before the trial court to support a mitigating factor under N.C. Gen. Stat. § 15A-1340.16(e)(11). Thus, the trial court did not err in failing to find that defendant voluntarily acknowledged wrongdoing to a law

enforcement officer at an early stage in the process. Significantly, the trial court did find as a mitigating factor that defendant aided in the apprehension of another felon under N.C. Gen. Stat. § 15A-1340.16(e) (7) (1999).

We further conclude that the trial court did not abuse its discretion in determining that the subject aggravating factor outweighed the mitigating factor, and in sentencing defendant to an aggravated term of imprisonment. Having so concluded, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).