NO. COA01-974

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 99 CRS 23769
00 CRS 83048

JOHN THOMAS HOBSON

Appeal by defendant from judgment entered 10 January 2001 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathryn Jones Cooper, for the State.

Miles and Montgomery, by Lisa Miles, for the defendant-appellant.

WYNN, Judge.

John Thomas Hobson argues the following issues on appeal from his convictions for felonious possession of marijuana and being an habitual felon: (I) Did the trial court erroneously fail to submit the question of defendant's habitual felon status to the jury? (II) Did the trial court improperly instruct the jury on the charge of felonious possession of marijuana? and (III) Did the trial court err in ordering the forfeiture of $709 seized from his person at the time of his arrest on drug charges? We find no error in the habitual felon conviction, vacate the felonious possession charge and remand for resentencing on simple possession, and reverse the

order of forfeiture.

(I) Did the trial court erroneously fail to submit the question of defendant's habitual felon status to the jury?

We answer: No, because defendant established his habitual felon status by entering a guilty plea to the habitual felon charge.

In August 2000, the State indicted defendant for (a) possession with intent to sell and deliver marijuana and felonious possession of marijuana (00 CRS 83048), and (b) possession with intent to sell and deliver cocaine; defendant was also indicted for being an habitual felon, with the marijuana and cocaine charges serving as the predicate underlying substantive offenses. These drug charges arose from events occurring on 14 March 2000. Defendant had previously been indicted on 18 October 1999 for being an habitual felon (99 CRS 23769) in connection with predicate substantive offenses occurring on 16 March 1999.

On 10 January 2001, defendant was tried on the underlying felony marijuana and cocaine charges. Before the jury returned verdicts on these charges, defendant stated that, if the jury returned a guilty verdict on either predicate felony, he would stipulate to his three prior felony convictions for purposes of the habitual felon indictment. Following the jury's guilty verdicts for felonious possession of marijuana and felonious cocaine possession under N.C. Gen. Stat. § 90-95 (2001), defendant entered a plea agreement whereby he pled guilty to various additional

charges, including the habitual felon charge in 99 CRS 23769. The trial court entered judgment and sentenced defendant according to the plea agreement.

Defendant relies on this Court's decision in *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001), wherein the defendant stipulated to the three prior convictions underlying the habitual felon charge, *see* N.C. Gen. Stat. § 14-7.4 (2001); however, the issue of the defendant's habitual felon status was not submitted to the jury, nor did the defendant plead guilty to being an habitual felon. *Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 699. This Court reversed the defendant's habitual felon conviction, concluding that the defendant's stipulation to his habitual felon status, "in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea." *Id.* (citing *State v. Williams*, 133 N.C. App. 326, 330, 515 S.E.2d 80, 83 (1999)). *See* N.C. Gen. Stat. § 14-7.5 (2001) (the question of a defendant's habitual felon status must be submitted to a jury); *see also Williams*, 133 N.C. App. 326, 515 S.E.2d 80 (holding that alternatively, a defendant may establish his habitual felon status by entering a guilty plea to the habitual felon charge).

In this case, defendant contends that this Court's holding in *Gilmore* requires that his habitual felon conviction be reversed. We disagree because unlike *Gilmore*, defendant in this case entered a guilty plea to the habitual felon charge, and the trial court properly asked defendant questions to establish a record of his

guilty plea. Defendant's first argument is without merit.

(II) Did the trial court improperly instruct the jury on the charge of felonious possession of marijuana?

We answer: Yes, because the State concedes and the evidence shows that the trial court failed to instruct the jury that to convict defendant of this offense, defendant must have possessed more than the requisite one and one-half ounces of marijuana.

Preliminarily, we observe that defendant failed to properly preserve this issue at trial by raising a timely objection. *See* N.C.R. App. P. 10(b)(2) (2002). However, N.C.R. App. P. 10(c)(4) (2002) provides for "plain error" review of certain questions that were not properly preserved at trial and are not otherwise deemed preserved by rule of law. Our courts have applied plain error analysis to errors in jury instructions, *see State v. Odom*, 307 N.C. 655, 300 S.E.2d 575 (1983); however, before granting a new trial under the plain error rule, "the appellate court must be convinced that absent the alleged error, the jury probably would have reached a different verdict." *State v. Robinson*, 330 N.C. 1, 27, 409 S.E.2d 288, 303 (1991).

Defendant properly contended in his assignment of error that the trial court's erroneous jury instruction on the charge of felonious marijuana possession amounted to plain error; defendant also argued "plain error" in his brief. We therefore consider defendant's argument and apply "plain error" analysis to the trial court's jury instruction on this charge. *See* N.C.R. App. P. 10(c)(4); *see also Odom*.

Felonious possession of marijuana under G.S. § 90-95(d)(4) requires a jury to find that the defendant possessed more than the requisite one and one-half ounces of marijuana. *See* G.S. § 90-95(d)(4); *see also State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982); *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994). The trial court must give proper jury instructions with respect to the elements of (1) possession, and (2) amount. *See Gooch*, 307 N.C. at 256, 297 S.E.2d at 601. The State concedes that here, as in *Gooch*, the trial court failed to instruct the jury with respect to the element of amount. Accordingly, defendant's conviction and sentence for felonious possession of marijuana must be vacated. *See Gooch*.

However, defendant is not entitled to a new trial on this charge; rather, we consider the jury's verdict a verdict of guilty of simple marijuana possession under G.S. § 90-95(a)(3). *Id.* Accordingly, we must vacate the trial court's judgment on the charge of felonious marijuana possession under G.S. § 90-95(d)(4), and remand to the trial court for resentencing upon a verdict of guilty of simple possession of marijuana under G.S. § 90-95(a)(3). *See Gooch*, 307 N.C. at 258, 297 S.E.2d at 602.

(III) Did the trial court err in ordering the forfeiture of $709 seized from his person at the time of his arrest on drug charges?

We answer: Yes, because currency is not subject to forfeiture "solely by virtue of being found in 'close proximity' to the controlled substance which the defendant was convicted of

possessing." *State v. McKinney*, 36 N.C. App. 614, 617, 244 S.E.2d 455, 457 (1978).

G.S. § 90-112(a)(2) subjects to forfeiture:

> All money . . . acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of [the Controlled Substances Act].

In *State v. Teasley*, 82 N.C. App. 150, 346 S.E.2d 227 (1986), *disc. review denied and appeal dismissed*, 318 N.C. 701, 351 S.E.2d 759 (1987), this Court concluded that the trial court erred in ordering the forfeiture of $5,900 found on the defendant's person "at the time that he possessed a large quantity of narcotics . . . ." *Teasley*, 82 N.C. App. at 167, 346 S.E.2d at 237. In *Teasley*, the State conceded that there was no evidence supporting the forfeiture under G.S. § 90-112(a)(2) other than the defendant's simultaneous possession of a large quantity of cash and narcotics. *See id.*

In *State v. Johnson*, 124 N.C. App. 462, 478 S.E.2d 16 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997), the defendant was acquitted at trial of the offense of possessing cocaine with the intent to sell or deliver; however, the defendant was convicted of cocaine possession. The trial court ordered the forfeiture of $460 seized from the defendant's person. The defendant appealed, arguing that "his acquittal of the crime of possession with intent to sell or deliver cocaine created an insurmountable obstacle to judicial determination that the seized money was acquired through selling or delivering cocaine and thus subject to forfeiture." *Johnson*, 124 N.C. App. at 475-76, 478 S.E.2d at 25. This Court

agreed, stating that the trial court was precluded from declaring the $460 seized from the defendant subject to criminal forfeiture under G.S. § 90-112(a)(2) where the "defendant was found not guilty of possessing" the drugs "with the intent to sell or deliver [them.]" *Id.* at 476, 478 S.E.2d at 25.

Similarly, in the instant case defendant was not convicted on the charges of possession with intent to sell and deliver marijuana or cocaine under G.S. § 90-95(a)(1); rather, he was convicted of felonious marijuana possession under G.S. § 90-95(d)(4), and felonious cocaine possession under G.S. § 90-95(d)(2). As detailed above, however, defendant's felonious marijuana conviction is vacated and he is to be resentenced upon remand for simple marijuana possession under G.S. § 90-95(a)(3); defendant does not appeal from his cocaine possession conviction. Accordingly, we conclude that the trial court erred in ordering the forfeiture of the $709 seized from defendant's person at the time of his arrest, where he was not convicted under G.S. § 90-95(a)(1) of possessing the marijuana or the cocaine with the intent to sell and deliver it. *See Johnson*.

In summary, we find no error in the trial court's entry of judgment on the habitual felon charge (99 CRS 23769) based on defendant's plea of guilty thereto. We vacate the trial court's judgment on the felonious marijuana possession conviction (00 CRS 83048), and remand to the trial court for resentencing as upon a verdict of guilty of simple possession of marijuana under G.S. § 90-95(a)(3). Furthermore, we vacate the trial court's order

directing forfeiture of the $709 seized from defendant.

No error in part, vacated in part, and remanded in part for resentencing.

Judges HUNTER and THOMAS concur.

Report per Rule 30(e).