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NO. COA02-1706-2

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 01 CRS 60165
ROY EUGENE BRYANT, 02 CRS 1454
Defendant.

Appeal by defendant from judgment entered 21 February 2002 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Janet Moore, for defendant-appellant.

GEER, Judge.

In *State v. Bryant*, 163 N.C. App. 478, 478-79, 594 S.E.2d 202, 203 (2004), we reversed defendant's conviction for failing to register as a convicted sex offender under N.C. Gen. Stat. § 14-208.11 (2005) on the grounds that the statute was unconstitutional as applied to defendant, because defendant lacked notice that he was required to register in North Carolina when he moved from South Carolina. Due to this holding, we did not reach defendant's other assignments of error. Our Supreme Court reversed and remanded to us for consideration of the remaining issues raised by defendant.

State v. Bryant, 359 N.C. 554, 569-70, 614 S.E.2d 479, 489 (2005). We address those issues here.

The facts in this case have been set forth in the earlier opinions of this Court and the North Carolina Supreme Court. We do not repeat them in detail here. The State's evidence tended to show that defendant pled guilty in 1991 to third degree criminal sexual conduct in South Carolina. As a result of this conviction, defendant was required to register as a sex offender. When defendant was released from prison in 2000, he registered in South Carolina.

In late 2000, defendant found work with a traveling fair that passed through Winston-Salem, North Carolina. Defendant was hospitalized there as a result of a workplace injury. When he was released from the hospital, defendant chose to remain in Winston-Salem. In March 2001, the local police learned that defendant had not registered in North Carolina. Defendant was arrested and indicted for failing to register as a sex offender in violation of N.C. Gen. Stat. § 14-208.11 and for having attained the status of a habitual felon. A jury found him guilty of failing to register and of being a habitual felon, and the trial court sentenced him to 133 to 169 months imprisonment.

Discussion

Defendant first argues that the trial court erred by failing to instruct the jury that it was required to find that defendant's failure to register was knowing and intentional. It is, however, established that knowledge and intent are not elements of the

offense of failing to register as a convicted sex offender under N.C. Gen. Stat. § 14-208.11:

"[§ 14-208.11] has no requirement of knowledge or intent, so as to require that the State prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address." *State v. Young*, 140 N.C. App. 1, 8, 535 S.E.2d 380, 384 (2000), *disc. review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001). See also *State v. Holmes*, 149 N.C. App. 572, 577, 562 S.E.2d 26, 30 (2002) ("To meet its burden under § 14-208.11(a)(2), the State must prove that: 1) the defendant is a sex offender who is required to register; and 2) that defendant failed to notify the last registering sheriff of a change of address.").

State v. White, 162 N.C. App. 183, 188, 590 S.E.2d 448, 452 (2004). We, therefore, overrule this assignment of error.

Defendant next argues that the trial court erred by admitting evidence of defendant's prior sex offense convictions. Defendant argues, relying upon *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997), that the trial court should have, under Rule 403 of the Rules of Evidence, allowed defendant to stipulate to his prior convictions rather than permitting the State to present direct evidence of them. Defendant concedes that he did not request such a stipulation at trial, but argues that the admission of the prior convictions constituted plain error.

"Under plain error review, reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done," *State v. Miller*, 357 N.C. 583, 592, 588 S.E.2d 857, 864 (2003) (internal quotation marks omitted), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819, 124 S. Ct. 2914 (2004),

and "absent the [claimed] error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). We hold that no such error occurred in the present case.

Defendant's failure to make an offer of a stipulation distinguishes his case from *Old Chief*, in which the Government, with the approval of the trial court, declined defendant's offer to stipulate to his prior offenses and instead chose to present direct evidence of those offenses. *Old Chief*, 519 U.S. at 177, 136 L. Ed. 2d at 585, 117 S. Ct. at 648. This Court has held that, without an offer of stipulation by defendant, "[t]he State . . ., unlike the Government in *Old Chief*, had no alternative but to introduce evidence of Defendant's prior convictions in order to meet its burden of showing an element of the crime charged." *State v. Faison*, 128 N.C. App. 745, 747, 497 S.E.2d 111, 113 (1998). Therefore, "[a]bsent an offer of a stipulation or admission to the prior convictions by Defendant, the reasoning of *Old Chief* does not apply." *Id.* (holding that no error, "plain or otherwise," occurred under *Old Chief* when defendant failed to offer to stipulate).

The reasoning in *Faison* applies here. Since defendant did not offer to stipulate to his prior convictions, the State had no alternative but to present witnesses who could testify that defendant had been convicted of sex offenses in another jurisdiction and was, therefore, required to register in North Carolina. *Old Chief* is, therefore, inapposite, and this assignment of error is overruled.

In the alternative, defendant argues that his trial counsel's failure to make an offer of stipulation and object properly to the admission of the prior convictions constitutes ineffective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984), a defendant must show not only that his counsel made errors, but that the deficient performance prejudiced his defense. Defendant has failed to make an adequate showing of prejudice. In his appellate brief, defendant argues only generally that "[p]rejudice from such failure [regarding the prior convictions] is established if this Court decides this Issue against defendant based on trial waiver." Given that the only significant issue at trial was defendant's knowledge of the need to register – a fact not material to defendant's guilt – defendant has failed to demonstrate that the admission of the convictions, relevant to prove an element of the charged offense, affected the jury's verdict. Without such a showing, defendant has failed to establish ineffective assistance of counsel.

Defendant's final argument on appeal is that the trial court erred by denying his motion to dismiss his habitual felon charge because (1) no factual basis existed for his 1996 sex offense conviction in South Carolina, and (2) that 1996 conviction was used both to establish defendant's guilt on the failure-to-register charge and to establish defendant's status as a habitual felon. We disagree.

With respect to the legitimacy of the 1996 conviction – which resulted from a guilty plea – defendant argues that because he was incarcerated during the time period when the crime occurred, he could not have committed the crime. This argument constitutes an improper collateral attack on the 1996 conviction that may not properly be considered in connection with the habitual felon charge. *State v. Flemming*, 171 N.C. App. 413, 417, 615 S.E.2d 310, 313 (2005) ("Questioning the validity of the original conviction is an impermissible collateral attack. A defendant may not collaterally attack a prior conviction which is the basis of an habitual felon charge." (internal citation omitted)).

Defendant further contends that his double jeopardy rights were violated when the State relied upon the 1996 conviction as a basis for establishing that defendant had unlawfully failed to register and also as one of the predicate felonies underlying the habitual felon charge. This Court has repeatedly held that no double jeopardy concerns arise in this context. See *State v. Crump*, No. COA05-902, __ N.C. App. __, __, __ S.E.2d __, __ (August 1, 2006) (holding that use of a prior felony conviction as the basis both for a conviction for possession of a firearm by a felon and for the habitual felon charge did not violate double jeopardy); *State v. Glasco*, 160 N.C. App. 150, 160, 585 S.E.2d 257, 264 ("[E]lements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon."), *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003); *State v. Misenheimer*, 123 N.C. App. 156, 158, 472 S.E.2d 191, 192 (holding

that prior impaired driving convictions could be used both to establish the offense of habitual impaired driving and that defendant was a habitual felon), *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996).

Having overruled all of defendant's remaining assignments of error upon remand, we hold that there was no error in defendant's trial.

No error.

Judges MCGEE and HUNTER concur.

Report per Rule 30(e).