NO. COA03-1712-2

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

STATE OF NORTH CAROLINA

v.

Ashe County
No. 02 CRS 50661

ROBERT CHRISTOPHER LONG

On remand by order of the Supreme Court of North Carolina filed 21 December 2006 vacating in part and remanding the decision of the Court of Appeals, *State v. Long*, 173 N.C. App. 758, 620 S.E.2d 320 (2005), for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). Defendant initially appealed from judgment entered 17 March 2003 by Judge Douglas Albright in Ashe County Superior Court. Originally heard in the Court of Appeals 23 August 2004, reconsidered by the Court of Appeals on 27 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

CALABRIA, Judge.

This case comes before us on remand from the North Carolina Supreme Court. We hold that the trial court's error was harmless beyond a reasonable doubt and preserve defendant's sentence as determined by the trial court.

On 19 March 2003, defendant was found guilty by a jury of second-degree murder and driving while impaired. Defendant was sentenced in the aggravated range to a term of imprisonment with the North Carolina Department of Correction. Defendant appealed the judgment. This Court initially upheld defendant's conviction but remanded to the trial court for resentencing. *See State v. Long*, No. COA03-1712, 173 N.C. App. 758, 620 S.E.2d 320 (filed Oct. 18, 2005).

In an order filed 21 December 2006, our Supreme Court upheld this Court's opinion with the exception of the portion remanding for resentencing. *State v. Long*, 361 N.C. 175, 641 S.E.2d 309 (2006). The Supreme Court vacated that portion of our opinion and remanded the case to this Court for reexamination in light of its decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, __ U.S. __, 167 L. Ed. 2d 1114 (2007).

The pertinent facts are as follows: On 11 June 2002, defendant's vehicle collided with a stopped pickup truck at an intersection in East Jefferson, North Carolina. The passenger in defendant's vehicle sustained fatal injuries in the accident, and subsequent blood tests revealed defendant was intoxicated. Following defendant's conviction, the trial judge found as an aggravating factor that defendant had knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. Based on this finding, defendant was sentenced within the aggravated range of N.C. Gen. Stat. § 15A-1340.17 to a minimum

term of 264 months and a maximum term of 326 months in the North Carolina Department of Correction.

In a motion for appropriate relief filed on 25 June 2004, defendant argued that the trial court erred by sentencing him in the aggravated range for second-degree murder. Defendant asserted that the trial court was prohibited from sentencing him in the aggravated range because the aggravating factor was not submitted to the jury in violation of the Sixth Amendment and the United States Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004). Upon reconsideration, we disagree.

In *Blakely v. Washington*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). Following the *Blakely* decision, there was some confusion as to whether a violation of the *Blakely* rule was subject to harmless error review or constituted so called "structural error" resulting in automatic reversals of cases. *See State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn by*, 360 N.C. 569, 635 S.E.2d 899 (2006). Then, in *Washington v. Recuenco*, 548 U.S. __, __, 165 L. Ed. 2d 466, 477 (2006), the Supreme Court provided clarification. In reviewing a conceded *Blakely* violation, the Supreme Court held that the "[f]ailure to submit a sentencing factor to the jury, like

failure to submit an element to the jury, is not structural error." *Washington*, 548 U.S. at __, 165 L.Ed.2d at 477. In accord with *Recuenco*, the North Carolina Supreme Court recently held that error under *Blakely* is subject to federal harmless error analysis. *Blackwell*, 361 N.C. at 44-45, 638 S.E.2d at 455-56.

In the case *sub judice*, defendant was found guilty by a jury of second-degree murder. Thereafter, the trial judge found as an aggravating factor pursuant to N.C. Gen. Stat. § 15A-1340.16 (2005) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person. Based upon this finding, the trial judge sentenced defendant to a term of imprisonment within the aggravated range of N.C. Gen. Stat. § 15A-1340.17 (2005). The issue was not submitted to the jury for proof beyond a reasonable doubt. We, therefore, conclude that the trial court erred in violation of the rule set forth in *Blakely*.

Pursuant to *Blackwell*, we conduct harmless error analysis to determine whether the trial court's violation constitutes reversible error. "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)). "The defendant may not avoid a conclusion that evidence of an aggravating factor is 'uncontroverted' by

merely raising an objection at trial. Instead, the defendant must 'bring forth facts contesting the omitted element,' and must have 'raised evidence sufficient to support a contrary finding.'" *Id.*, 361 N.C. at 50, 638 S.E.2d at 458 (quoting *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53) (internal citations omitted).

In the instant case, the aggravating factor at issue is codified at N.C. Gen. Stat. § 15A-1340.16(d)(8) (2005). The North Carolina Supreme Court has indicated that the trial court must focus on two considerations when deciding to impose this aggravating factor: "(1) whether the weapon [or device] in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created." *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990).

With respect to the first consideration, "[i]t is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citation omitted). Further, "[i]t is well-settled that the use of the challenged aggravating factor within the context of motor vehicle collisions caused by legally intoxicated drivers is proper." *State v. Fuller*, 138 N.C. App. 481, 488, 531 S.E.2d 861, 866-67, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000) (citations omitted).

In *State v. McBride*, 118 N.C. App. 316, 318, 454 S.E.2d 840, 841 (1995), this Court addressed the application of N.C. Gen. Stat. § 15A-1340.16(d)(8) within the context of the operation of an automobile by an intoxicated driver. Similar to the instant case,

a passenger was killed when the vehicle operated by the defendant was involved in a collision. *Id.*, 118 N.C. App. at 317, 454 S.E.2d at 841. The evidence in *McBride* showed that the defendant was intoxicated and operated his vehicle in a reckless manner at the time of the accident. *Id.* Under these circumstances, the Court concluded that the trial court did not err in finding that the defendant's automobile "constituted a device which in its normal use is hazardous to the lives of more than one person." *Id.*, 118 N.C. App. at 319, 454 S.E.2d at 842.

Here, as in *McBride*, the evidence at trial indicates that defendant was intoxicated and operated his vehicle in a reckless manner by driving at an excessive speed. As such, we conclude that the first consideration was satisfactorily established.

The remaining question is whether defendant knowingly created a great risk of death. *Id.*, 118 N.C. App. at 319, 454 S.E.2d at 842. "[A]ny reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path." *McBride*, 118 N.C. App. at 319-20, 454 S.E.2d at 842.

The evidence presented at defendant's trial supports a finding that defendant knowingly created a great risk of death. Following the accident, blood tests revealed that defendant had a blood alcohol concentration of .16, and witnesses testified that defendant was traveling at an excessive rate of speed. Further, defendant was driving despite the fact that his license was

suspended as a consequence of a prior conviction for driving while impaired. Because of the magnitude of this evidence, we conclude that a rational jury would have found that defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to more than one person.

For the foregoing reasons, we hold that the trial court's error in sentencing was harmless beyond a reasonable doubt. Accordingly, the sentence imposed by the trial court should remain undisturbed.

No error.

Judges STEPHENS and ARROWOOD concur.

Report per Rule 30(e).