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NO. COA04-294-2

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 02 CRS 209, 51220, 51222 & 51225

ALEJANDRO HERNANDEZ-MADRID,
Defendant.

Court of Appeals

Appeal by Defendant from judgment entered 2 July 2003 by Judge W. Osmond Smith in the Superior Court, Wake County. Heard in the Court of Appeals 16 November 2004.

Slip Opinion

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Irving Joyner, for defendant-appellant.

WYNN, Judge.

This case is before us on remand from the North Carolina Supreme Court to reexamine Defendant Alejandro Hernandez-Madrid's sentencing in light of *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007), and *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, ___ U.S. ___, 167 L. Ed. 2d 1114 (2007). At Defendant's sentencing hearing, the trial court found as an aggravating factor that Defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." Because we find that Defendant admitted

the facts necessary to support imposition of this aggravating factor, we conclude that the trial court did not err.

By agreement with the State, Defendant pled guilty to two counts of second-degree rape, one count of first-degree burglary, and one count of first-degree robbery with a dangerous weapon. The prosecutor presented a detailed statement of the facts supporting Defendant's guilty pleas, including the following particularly relevant scenario:

> This defendant told Detective Frattini, through the interpreter, that he was under the impression and had agreed to travel from Johnston County to this apartment in Raleigh for what he thought was going to be a burglary/robbery. He did not believe there was any planned out sexual intent. This defendant told Detective Frattini when they got to the house that Cute, C-u-t-e, was the first one in; that this defendant was the second one in; and that Ishmial was the third one in; that as they entered the residence that Cute and Ishmial were the ones that had the two firearms. Ishmial later, once inside the residence, handed a firearm to this defendant, and this defendant would brandish and hold that firearm throughout the course of the home invasion, robbery, and rapes.

Following the prosecutor's monologue of the facts supporting Defendant's guilty plea, the trial judge asked defense counsel: "Does the defendant stipulate to the factual basis for entry of the plea of guilty in each case and for a finding or adjudication of guilt in each case?" Without objection or exception, defense counsel answered affirmatively. Defense counsel then made a statement of the factual basis for the requested mitigating factors, which also included references to Defendant's "codefendants." The trial judge accepted Defendant's plea, and

found as an aggravating factor that Defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." Therefore, the trial judge imposed consecutive sentences of 92 to 120 months' imprisonment on the first rape count, 92 to 120 months' imprisonment on the second rape count, 72 to 96 months' imprisonment on the burglary count, and 72 to 96 months' imprisonment on the robbery with a dangerous weapon count.

Defendant filed a Motion for Appropriate Relief (MAR) after the United States Supreme Court decided *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). Accordingly, our previous decision in this case was guided by *Blakely's* implications on North Carolina's Structured Sentencing Act as announced in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), and *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005). Subsequently, the North Carolina Supreme Court decided *Hurt* and *Blackwell*, which now guide our reconsideration of Defendant's sentencing.

After the Defendant's guilty plea in *Hurt*, the trial court found three aggravating factors, two statutory and one nonstatutory, without submitting them to a jury. *Hurt*, 361 N.C. at 327-28, 643 S.E.2d at 916. Although defense counsel argued against the aggravating factors, the State contended on appeal that the Defendant had admitted the facts supporting the aggravating factors because defense counsel "failed to challenge the facts presented by the prosecutor during the sentencing hearing," and

merely argued that the Defendant's role in the crime was minimal. *Hurt*, 361 N.C. at 329, 643 S.E.2d at 917. Thus, our Supreme Court held "that a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable." *Hurt*, 361 N.C. at 330, 643 S.E.2d at 918. Furthermore, in *Blackwell*, 361 N.C. at 42, 638 S.E.2d at 453, our Supreme Court approved the use of federal harmless error analysis to review *Blakely* errors occurring in North Carolina courts.

Turning to Defendant's sentencing hearing, we hold that no *Blakely* error occurred. Defendant, through his counsel, admitted the prosecutor's entire rendition of the factual basis for his guilty plea without objection, opposition, or exception. As quoted above, the prosecutor's monologue of the facts outlined in detail Defendant's participation with "Cute" and Ishmial. Moreover, defense counsel referred to Defendant's "codefendants" several times as he was arguing in favor of mitigating factors.

Therefore, this case differs significantly from *Hurt,* where defense counsel disputed the prosecutor's characterization of the defendant's role in the charged offense and generally opposed imposition of the aggravating factors at issue. *Hurt*, 361 N.C. at 330, 643 S.E.2d at 918. In this case, by contrast, Defendant's counsel stipulated to the prosecutor's factual basis, and did not argue against the aggravating factor. Thus, Defendant "through counsel admit[ted] the necessary facts" to support the aggravating

factor imposed by the trial court. *Id.* (citing *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413). Accordingly, we vacate that part of our previous opinion in this case, 173 N.C. App. 234, 617 S.E.2d 724 (2005), that remanded for resentencing, and reinstate Defendant's sentence as originally imposed by the trial court.

No error.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).