

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-1454

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

Craven County  
No. 03 CRS 52717

BYRON SHAWNTELE GEORGE,  
Defendant.

Appeal by defendant from judgment entered 21 July 2005 by Judge Paul L. Jones in the Superior Court in Craven County. Heard in the Court of Appeals 26 June 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky and Assistant Attorney General Thomas M. Woodward, for the State.*

*The Kelly Law Firm, by George E. Kelly, III, for defendant-appellant.*

HUDSON, Judge.

Defendant Byron S. George was charged with felonious possession with intent to sell and deliver cocaine and possession of less than one-half ounce of marijuana. By a separate bill of indictment, defendant was charged with having attained habitual felon status. In 2004, a jury found defendant guilty of the drug charges, and after the parties "stipulated" that defendant was an habitual felon, the trial court sentenced defendant as an habitual felon to 95 to 123 months imprisonment. Defendant appealed to this

Court alleging that the trial court erred in allowing him to stipulate to habitual felon status as it "should have been tried by a jury or pled to with a transcript of plea." In an unpublished opinion, this Court agreed that the trial court erred in not establishing that defendant was knowingly and voluntarily entering a plea of guilty to being an habitual felon. We reversed the defendant's conviction for being an habitual felon, and remanded for a new hearing on that matter and for resentencing. *State v. George*, \_\_\_ N.C. App. \_\_\_, 615 S.E.2d 96 (2005) (unpublished).

On remand, defendant moved to dismiss the habitual felon charge, arguing double jeopardy and that the habitual felon statute is unconstitutional. Defendant specifically argued that he would be subject to double jeopardy because his first jury was impaneled but there was no jury verdict and no guilty plea. The trial court denied defendant's motion to dismiss. Defendant pled not guilty and a jury subsequently convicted defendant of attaining habitual felon status. Defendant appeals. We conclude that there was no error.

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss on double jeopardy grounds. The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, protects individuals against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Cameron*, 283 N.C. 191, 198, 195 S.E.2d 481,

485-86 (1973). "Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977). Habitual felon indictments are governed by N.C. Gen. Stat. § 14-7.3 (2006), and are addressed in a separate proceeding following a defendant's conviction for the substantive felony. *State v. Cheek*, 339 N.C. 725, 728-29, 453 S.E.2d 862, 864 (1995) (noting that "only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury").

Defendant argues that the habitual felon hearing upon remand subjected him to jeopardy a second time. Defendant asserts that jeopardy attached when the jury was impaneled for his original trial. However, it is undisputed that the jury from defendant's original trial was discharged without considering the habitual felon issue. Furthermore, as this Court determined in defendant's first appeal, defendant did not enter a guilty plea to his habitual felon status when the jury was impaneled the first time. Because defendant was neither tried on, nor pled guilty to, the original habitual felon charge, jeopardy never attached so that defendant's right to be free from double jeopardy under the Fifth Amendment was not violated. Moreover, an habitual felon charge need not be presented to the same jury that heard the underlying charges. This assignment of error is overruled.

No error.

Judges MCCULLOUGH and STEELMAN concur.

Report per Rule 30(e).