NO. COA05-646

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Caswell County
Nos. 03 CRS 51131
03 CRS 51132

DOYLE KENT TERRY,
Defendant.

Appeal by defendant from order entered 25 February 2005 by Judge W. Osmond Smith, III and judgment entered 1 March 2005 by Judge Donald Stephens in Caswell County Superior Court. Heard in the Court of Appeals 12 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

James M. Bell for defendant-appellant.

GEER, Judge.

Following the trial court's entry of an order finding defendant Doyle Kent Terry competent to stand trial, defendant pled guilty to two counts of second degree murder. On appeal, defendant argues that the trial court erred in its competency determination and in its calculation of defendant's prior record level. Since a defendant has only a limited right to appeal from a guilty plea, and we have been able to identify no basis for appellate jurisdiction with respect to the competency order, we dismiss that aspect of defendant's appeal. As for the prior record level, we

hold that the trial court properly determined that defendant's Virginia conviction for possession of a sawed-off shotgun should be classified as a Class F felony for sentencing purposes in our State. Accordingly, we uphold the decisions of the trial court.

Facts

On 16 November 2003, defendant attempted to elude arrest for a stop sign violation, which resulted in a high speed chase with defendant exceeding 100 miles per hour. The chase began in Virginia and proceeded south down a four-lane highway into North Carolina. During the chase, defendant's truck glanced off a car driven by Wallace Farthing. Mr. Farthing, who was elderly and suffered from heart disease, managed to pull off the road and exit his car, but collapsed and died as a result of the accident an hour and a half later. Defendant then had a head-on collision with a sport utility vehicle driven by James Villepigue. Mr. Villepigue's vehicle spun out of control, was struck by a patrol car pursuing defendant, and then overturned. Mr. Villepigue died at the scene from multiple traumatic wounds. Defendant's blood alcohol level shortly after his arrest was .13.

Defendant was charged with two counts of first degree murder based on the deaths of Mr. Farthing and Mr. Villepigue. On 13 December 2004, defendant's trial counsel filed a motion challenging defendant's capacity to proceed to trial on these charges. The motion was supported by a letter from psychologist Dr. Brad Fisher, which stated that Dr. Fisher believed defendant was not competent to stand trial as a result of psychosis, depression, retardation,

and/or substance abuse-related issues. In response to the motion, the trial court entered an order on 14 December 2004 committing defendant to Dorothea Dix Hospital for determination of defendant's capacity to proceed to trial. Defendant spent 15 days at Dorothea Dix, where he was evaluated by Dr. Amy Trivette and Dr. Karla deBeck.

On 18 February 2005, Judge W. Osmond Smith, III conducted a competency hearing at which Dr. Trivette, Dr. deBeck, Dr. Fisher, defendant's mother, and defendant testified. At that hearing, Dr. Trivette and Dr. deBeck expressed the opinion that defendant was malingering or feigning mental illness and that defendant was competent to stand trial. Dr. Fisher expressed a contrary opinion. Judge Smith entered an order on 25 February 2005, finding that "[d]uring the course of his stay at Dorothea Dix for the court-ordered evaluation, the defendant intentionally feigned his responses in an attempt to mislead his evaluators and to distort test results to such an extent to lead to a finding of malingering." Judge Smith further found that "[t]he defendant does not suffer from a mental disease or defect to such an extent to render him unable to (1) [u]nderstand the nature and object of the proceedings against him, (2) [t]o comprehend his own situation in reference to the proceedings, or (3)[t]o assist in his defense in a rational or reasonable manner." In accordance with these findings, Judge Smith concluded that defendant had the capacity to proceed within the meaning of N.C. Gen. Stat. § 15A-1001 (2005).

Subsequently, on 1 March 2005, defendant entered an *Alford* plea to two counts of second degree murder. The plea agreement provided that the charges would be consolidated into one judgment and sentencing would be left up to the trial court. Judge Donald Stephens sentenced defendant to a presumptive range sentence of 282 to 348 months imprisonment based on a prior record level of V.

I

Defendant first assigns error to the trial court's determination that he was competent to stand trial. As an initial matter, we must determine whether we have jurisdiction to review this issue. "[A] defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

In *State v. O'Neal*, 116 N.C. App. 390, 395, 448 S.E.2d 306, 310, *disc. review denied*, 338 N.C. 522, 452 S.E.2d 821 (1994), this Court determined that a defendant who pled guilty did not have a right to appeal the trial court's determination that no further evaluation was necessary and the defendant was competent to stand trial: "Hence, in the present case where defendant pled guilty, we may not consider this assignment of error unless we treat his appeal as a writ of certiorari with respect to this assignment of error." The Court then elected to treat the appeal as a petition

for a writ of certiorari, granted the writ, and proceeded to review the defendant's argument. *But see State v. Dickson*, 151 N.C. App. 136, 137–38, 564 S.E.2d 640, 640 (2002) (holding that the appellate court "is limited to issuing a writ of certiorari 'in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief'" (quoting N.C.R. App. P. 21(a)(1))).

As *O'Neal* explains, defendant has no appeal of right with respect to the competency determination because the appeal does not fall within any of the categories set out in N.C. Gen. Stat. §§ 15A-979(b) and -1444 (2005). Further, even if, as in *O'Neal*, we were to treat the appeal as a petition for writ of certiorari and allow the writ, defendant still would not be entitled to relief.

N.C. Gen. Stat. § 15A-1001(a) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

When the trial judge conducts the inquiry under N.C. Gen. Stat. § 15A-1001(a) without a jury, "the court's findings of fact, if supported by competent evidence, are conclusive on appeal." *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981). This is

true "even if there is evidence to the contrary." *O'Neal*, 116 N.C. App. at 395, 448 S.E.2d at 310-11.

Here, defendant has not specifically assigned error to any of the trial judge's findings of fact. Instead, defendant's assignment of error states: "The trial court committed reversible error by finding that the appellant had the capacity to proceed with his case dispite [sic] overwhelming evidence to the contrary." This assignment of error constitutes only a broadside challenge to the trial judge's findings of fact and is not sufficient to permit review of the sufficiency of the evidence to support the findings of fact. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965, 120 S. Ct. 2694 (2000). Nevertheless, those findings are supported by the testimony and report of Drs. Trivette and deBeck. Defendant's argument on appeal that Dr. Fisher's testimony and defendant's medical records are entitled to greater weight is not a proper basis on appeal for overturning the trial judge's findings.

We, therefore, elect not to proceed pursuant to a writ of certiorari. This aspect of defendant's appeal is dismissed.

II

With respect to his sentence, defendant argues that the trial court, in calculating his prior record level, improperly classified a prior Virginia conviction as a Class F felony rather than as a Class I felony. Defendant has a right to appeal this issue. *State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004).

The offense in question is a prior conviction for possession of a sawed-off shotgun in violation of Va. Code Ann. § 18.2-300(B) (2004).[1] N.C. Gen. Stat. § 15A-1340.14(e) (2005) gives instructions on how to classify felony convictions from other jurisdictions for purposes of North Carolina's structured sentencing:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . . If the State proves by a preponderance of the evidence that an offense classified as . . . a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

In short, the default classification for out-of-state felonies is I, the lowest class. A trial court may, however, alter this classification if the State proves that the felony conviction in question is "substantially similar" to a corresponding North Carolina felony that falls under a more serious classification than an I felony.

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[1]N.C. Gen. Stat. § 8-3(a) (2005) provides that a printed copy of a statute of another state is admissible as evidence of the statutory law of such state. *State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004), further provides that one aspect of the State's proof of substantial similarity for purposes of N.C. Gen. Stat. § 15A-1340.14(e) is a showing that the out-of-state statute presented to the trial court is unchanged from the version of the statute under which the defendant was convicted. The State, in this case, met this requirement. Accordingly, all citations in this opinion are to the most current printed version of the Virginia statutes.

In this case, the State contends that defendant's Virginia conviction for possession of a sawed-off shotgun is substantially similar to a conviction under North Carolina's N.C. Gen. Stat. § 14-288.8(c)(3) (2005). N.C. Gen. Stat. § 14-288.8 lists various weapons that are considered "weapon[s] of mass death and destruction," including sawed-off shotguns in subsection (c)(3). Possession of any of the listed weapons is a Class F felony. N.C. Gen. Stat. § 14-288.8(d). During the sentencing hearing, the State submitted to the trial judge copies of the relevant Virginia statutes and pointed out the similarities between the Virginia statutes and N.C. Gen. Stat. § 14-288.8. The trial court agreed with the State and classified the conviction as a Class F felony.

Defendant argues on appeal that the State failed to offer sufficient evidence to prove substantial similarity because defendant did not stipulate to substantial similarity, and the State did not present certified copies of the warrant, indictment, and judgment related to the Virginia conviction. An examination of the transcript of the sentencing hearing reveals that defendant's counsel did stipulate to the fact of the Virginia conviction and argued only that the felony should be classified as Class I rather than Class F:

> THE COURT: . . . [Y]our only dispute with the Court as to the Court's ruling with regard to the prior record level five, the determination is, my ruling, that the possession of a sawed-off shotgun is a Class F felony as opposed to a Class I felony.
>
> MS. PRESSLEY [defense counsel]: Yes.

> THE COURT: If I rule as you contend on each of these items [defendant's prior felonies], you don't challenge that they relate to your client? You only challenge the one felony classification?
>
> MS. PRESSLEY: Yes, sir . . . .
>
> THE COURT: . . . All right. I'm going to find the conviction — have you stipulated to them?
>
> MS. PRESSLEY: Yes.

With respect to the question of substantial similarity, this Court has recently held that "whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law that must be determined by the trial court, not the jury. . . . The comparison of the elements of an out-of-state criminal offense to those of a North Carolina criminal offense . . . involves statutory interpretation, which is a question of law." *State v. Hanton*, __ N.C. App. __, __, 623 S.E.2d 600, 604 (2006). Accordingly, we analyze the trial court's finding of substantial similarity *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999) ("We review questions of law *de novo*.").

Va. Code Ann. § 18.2-300(B) provides: "Possession or use of a 'sawed-off' shotgun or 'sawed-off' rifle for any other purpose [than violent crime] . . . is a Class 4 felony." The Virginia Code defines a "sawed-off shotgun" as:

> any weapon, loaded or unloaded, originally designed as a shoulder weapon, utilizing a self-contained cartridge from which a number of ball shot pellets or projectiles may be fired simultaneously from a smooth or rifled bore by a single function of the firing device and which has a barrel length of less than 18

> inches for smooth bore weapons and 16 inches for rifled weapons.

Va. Code Ann. § 18.2-299 (2004).

N.C. Gen. Stat. § 14-288.8 provides, in pertinent part:

> (a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction.
>
> . . . .
>
> (c) The term "weapon of mass death and destruction" includes:
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> . . . .
>
> (3) . . . any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches . . . .
>
> . . . .
>
> (d) Any person who violates any provision of this section is guilty of a Class F felony.

The plain language of the two statutes indicates that any weapon violating the Virginia statute would also violate the North Carolina statute.

We hold that the statutes are substantially similar for sentencing purposes under N.C. Gen. Stat. § 15A-1340.14(e). The trial court did not, therefore, err in classifying defendant's Virginia conviction as a Class F felony when calculating defendant's prior record level. Defendant's second assignment of error is, therefore, overruled.

Dismissed in part; affirmed in part.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).