

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-224

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v.

Gaston County
Nos. 04 CRS 8611

MILTON SWIFT III

Appeal by defendant from judgment entered 13 October 2005 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 24 July 2006.

Attorney General Roy Cooper, by Assistant Attorney General Scott T. Slusser, for the State.

M. Victoria Jayne for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted on charges of fleeing to elude arrest, possession of drug paraphernalia, expired registration card/tag, failure to wear a seat belt, expired inspection sticker, and being a habitual felon. On 18 January 2005, defendant pled guilty to all charges except to the charge of being a habitual felon. Accordingly, the trial court entered a prayer for judgment continued until trial and verdict on the habitual felon charge.

The case was called for trial on 19 January 2005. Prior to trial, the State moved to amend the habitual felon indictment to

correct one of the dates of a crime alleged in the indictment. The motion was allowed and a jury was empaneled. During trial, the State moved to amend another error in the habitual felon indictment, where in paragraph two it was alleged that defendant had previously been convicted of possession of a stolen motor vehicle. Over defendant's objection, the motion was allowed. Defendant then asked the Court for twenty days in order to prepare his defense. The court agreed to allow defendant time to prepare further due to the amendment to the indictment and declared a mistrial on 28 January 2005.

The case was called again for trial on 24 February 2005. Prior to trial, defendant moved to dismiss the charge, arguing that jeopardy had attached when the jury was empaneled and the State could not amend the indictment. The motion was denied. Defendant was found guilty of being a habitual felon. Defendant appeals from the judgment entered following his convictions.

Defendant argues the trial court erred by denying his motion to dismiss the amended indictment. Defendant contends that once the trial began on an indictment alleging an inaccurate conviction, the State should not have been allowed to amend the defective indictment. Defendant asserts that the amendment was a substantial alteration and should not have been allowed pursuant to N.C.G.S. § 15A-923(e) (2005).

After careful review of the record, briefs, and contentions of the parties, we find no error. N.C.G.S. § 15A-923(e) states that "[a] bill of indictment may not be amended." However, this statute

"has been construed to mean only that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.'" *State v. May*, 159 N.C. App. 159, 162, 583 S.E.2d 302, 304 (2003) (quoting *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475 (1978)). Thus, allowing amendment of an indictment would not constitute reversible error unless the item amended was an essential element of the offense. *Id.*; see also *State v. Brady*, 147 N.C. App. 755, 759, 557 S.E.2d 148, 151 (2001) (no error where after the jury was empaneled, the indictment was amended, changing the controlled substance named from "Xanax" to "Percocet," because the change did not substantially alter the charge against the defendant).

Furthermore, this Court has stated that "[t]he purpose of an habitual felon indictment is to provide a defendant 'with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge,' and not to provide the defendant with an opportunity to defend himself against the underlying felonies." *State v. Briggs*, 137 N.C. App. 125, 130, 526 S.E.2d 678, 681 (2000) (quoting *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995)).

N.C.G.S. § 14-7.3 provides that:

An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C.G.S. § 14-7.3 does not require "a specific reference to the predicate substantive felony in the habitual felon indictment." *State v. Patton*, 342 N.C. 633, 636, 466 S.E.2d 708, 710 (1996). The defendant charged is not defending himself against the predicate substantive felony, but instead against the charge that he has at least three prior felony convictions. *Id.* Here, the original indictment properly stated: (1) that defendant was charged as a habitual felon; (2) that the prior felony offense was committed on 8 October 1994; (3) that the offense was committed against the State of North Carolina; (4) that he was convicted on 25 May 1995; and (5) that he was convicted in Mecklenburg County Superior Court. Additionally, the indictment identified the file number for the offense. Thus, the indictment alleged the essential elements of a habitual felon indictment. We conclude, therefore, that any change in the name of the underlying felony was not a substantial alteration because the indictment was sufficient to give defendant notice of the prior felony conviction which would be used against him to convict him as a habitual felon. Accordingly, we find no error.

No error.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).