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NO. COA06-360

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 04 CRS 20227; 63809-10;
63832; 63855; 64178-79

RONALD LEE PEAK

Appeal by defendant from judgment entered 8 April 2005 by Judge C. Philip Ginn in Buncombe County Superior Court. Heard in the Court of Appeals 15 November 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STEELMAN, Judge.

Ronald Lee Peak ("defendant") appeals from a judgment entered 8 April 2005, following a jury verdict finding him guilty of carrying a concealed weapon, possession of a firearm by a felon and misdemeanor breaking and entering. Defendant subsequently pled guilty to assault with a firearm upon a law enforcement officer and was sentenced as an habitual felon. On appeal, defendant contends that the trial court erred by denying defendant's motion for substitute counsel, and that the indictment for assault with a firearm upon a law enforcement officer was facially invalid. We disagree, and hold that defendant received a fair trial, free from

error.

The court appointed Assistant Public Defender M. LeAnn Melton ("Melton") to represent defendant in these matters. The record reflects her representation as early as 9 November 2004. On 14 February 2005, Melton moved to withdraw as counsel at defendant's request. This motion was allowed, and Stanford K. Clontz ("counsel") was appointed to represent defendant.

On 5 April 2005, defendant sought replacement of Mr. Clontz as his counsel. This request was denied, and these cases proceeded to trial. The trial court *ex mero motu* declared a mistrial when defense counsel conceded a prior conviction of defendant during the jury *voir dire*. On 6 April 2006, defendant indicated to the court that he was seeking to obtain other counsel. The other counsel failed to appear, and the court proceeded with a second trial before a different jury venire.

Defendant was found guilty of carrying a concealed weapon, possession of a firearm by a felon, and misdemeanor breaking and entering. The jury was unable to reach a verdict on the charges of assault with a firearm upon a law enforcement officer and assault on a female. Defendant then pled guilty to the assault with a firearm upon a law enforcement officer and to habitual felon status. The State dismissed the assault on a female charge. Pursuant to the plea arrangement, the charges were consolidated into one judgment, and defendant received an active sentence from the presumptive range of 116 to 149 months. From this judgment, defendant appeals.

I: Right to Counsel

In his first argument, defendant contends that the trial court erred by denying defendant's request for new counsel and for a continuance to secure private counsel. We disagree.

The Sixth Amendment to the Constitution guarantees that in all criminal prosecutions, "an accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *United States v. Morrison*, 449 U.S. 361, 364, 66 L. Ed. 2d 564, 567 (1981) (quotation omitted). A defendant who retains private counsel has a Sixth Amendment right to counsel of his choosing. See *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). "[T]he right to *counsel of choice*," however, "does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. __, __, 165 L. Ed. 2d 409, 421 (2006) (emphasis added); see also *Wheat v. United States*, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 148 (1988) (reasoning that it was not the "essential aim of the [Sixth] Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers").

Our Supreme Court has held that the right to counsel does not include the right to "insist that competent counsel . . . be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services." *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976). Rather, to be granted substitute counsel, "the defendant must show good cause, such as a conflict of interest, a complete breakdown in

communication, or an irreconcilable conflict which leads to an apparently unjust verdict." *State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62 (1998) (quotation omitted). The court's denial of the defendant's request to appoint substitute counsel is appropriate when it appears to the trial court that counsel is "reasonably competent to present defendant's case[,] and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent that defendant[.]" *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980) (emphasis in original).

Without a showing of a Sixth Amendment violation, "the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court." *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) (citation omitted). The standard of review of the denial of a defendant's request to substitute counsel is whether the decision was an abuse of discretion. *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524, 529 (1976).

In the instant case, defendant relies on *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), to argue that counsel's concession of defendant's prior felony conviction constituted *per se* ineffective assistance of counsel, such that the court erred by denying defendant's motion for substitute counsel or for a continuance to retain private counsel.

Initially, we observe that counsel's concession that defendant had a prior felony conviction occurred during the first trial of

these matters, which ended in mistrial. We find the argument untenable that defendant was somehow prejudiced by this conduct in the second proceeding, which was heard by a different jury. The second jury did not witness counsel's concession. Therefore, defendant could not have been prejudiced.

Further, we believe that counsel's conduct during the first trial was "tactical" and not *per se* prejudicial. Our Supreme Court extrapolated the meaning of *Harbison's per se* rule in *State v. Al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500 (2005), in which the Court held that an admission by counsel of defendant's prior convictions without defendant's consent did not constitute ineffective assistance of counsel. The Court reasoned:

Although defense counsel made statements against defendant's wishes that appear to concede that defendant committed the crimes for which he was previously convicted, defendant has failed to show that such arguments prejudiced his defense. Defense counsel made the tactical decision to try to lessen the negative impact of those convictions and to gain credibility with the jury by discussing the convictions openly. As defendant himself acknowledged, the State had the necessary proof of these convictions to support the aggravating circumstances; thus, no prejudice could result from admitting that the aggravators existed. The United States Supreme Court has found that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance.

Id. at 757, 616 S.E.2d at 512 (citing *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565, 581 (2004)).

Here, counsel for defendant admitted to the jury during *voir dire* that defendant "was convicted of a felony," which was an

element the State was required to prove to establish the crime of possession of a firearm by a felon. See N.C. Gen. Stat. § 14-415.1 (2005); see also *State v. Cromartie*, __ N.C. App. __, __, 627 S.E.2d 677, 682 (2006). The State certainly had the necessary proof of the conviction. The trial court stated, "it would be pretty easy for the State to produce [defendant's] record showing a prior conviction of a felony[.]" Defendant's admission "would lend some credibility to [defendant's] position[,]" and simultaneously "prohibit the State from putting in the details of that conviction." As in *Al-Bayyinah*, we believe counsel strategically sought to "lessen the negative impact of th[e] conviction" and "gain credibility with the jury by [openly] discussing the conviction[.]" *Al-Bayyinah* at 757, 616 S.E.2d at 512. We are unconvinced that counsel's concession at the first trial constituted ineffective assistance of counsel.

There appears to have been some hostility between defendant and counsel in the proceedings before and after the mistrial. However, defendant failed to show "a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which [led] to an apparently unjust verdict." *Gary* at 516, 501 S.E.2d at 62 (1998). Defendant failed to show that the nature of the conflict rendered counsel incompetent or ineffective to represent him. To the contrary, counsel's effectiveness was such that, in the face of strong evidence, the jury could not reach a verdict on the assault with a firearm upon a law enforcement officer and assault on a female charges.

We conclude that the trial court did not abuse its discretion in refusing to substitute defendant's appointed counsel.

With regard to defendant's argument that the trial court erred by denying defendant's motion for continuance, we observe that defendant did not actually make such a motion at trial. Counsel merely stated, "[defendant] says now he wants to hire his own lawyer[.]" Since defendant did not move for a continuance, defendant's argument that the trial court erred by denying such a motion is not properly before this court.

This assignment of error is overruled.

II: Facial Invalidity of Indictment

Defendant next argues that the trial court did not have jurisdiction to accept a plea for the offense of assault with a firearm upon a law enforcement officer, because the indictment was facially invalid. We disagree.

"[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time." *State v. McGee*, __ N.C. App. __, __, 623 S.E.2d 782, 784 (2006) (citing *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003)). "[A]n indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense." *Bartley* at 499, 577 S.E.2d at 324; see also *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147 (2002) (citing *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002)). "If the charge is a statutory offense, the indictment is sufficient when it charges

the offense in the language of the statute." *Floyd* at 295, 558 S.E.2d at 241 (quotation omitted); see also *State v. Youngs*, 141 N.C. App. 220, 230, 540 S.E.2d 794, 800-01 (2000).

The elements required for conviction of the crime of assault with a firearm on a law enforcement officer are "(1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his or her duties." *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001); N.C. Gen. Stat. § 14-34.5 (2005).

In the instant case, the indictment stated the following:

[T]he defendant named above unlawfully, willfully and feloniously did assault Cpl. Tim Bradley, a law enforcement officer of the Buncombe County Sheriff's Department, with a firearm, a Smith & Wesson .9 mm semi-automatic handgun, by taking the handgun out of his pocket during a struggle with the officer. At the time of this offense the officer was performing a duty of his office: attempting to arrest the defendant for attempting to break and enter a motor vehicle.

The foregoing indictment charges the offense in the language of N.C. Gen. Stat. § 14-34.5(a). Similar indictments have been upheld by this Court in *State v. Pelham*, 164 N.C. App. 70, 595 S.E.2d 197 (2004), and *State v. Thomas*, 153 N.C. App. 326, 570 S.E.2d 142 (2002). We overrule this assignment of error.

For the foregoing reasons, we hold defendant received a fair trial, free from error.

NO ERROR.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).