NO. COA06-65

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v. Macon County
Nos. 04 CRS 851;
LOREN PATRICK GREEN 04 CRS 50948-52;
04 CRS 50955-56

Appeal by defendant from judgments entered 7 October 2004 by Judge Zoro J. Guice, Jr. in Macon County Superior Court. Heard in the Court of Appeals 25 September 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General William H. Borden, for the State.

Michael E. Casterline, for defendant-appellant.

JACKSON, Judge.

On 7 October 2004, Loren Patrick Green ("defendant") was found guilty of two counts of injury to personal property, fleeing with a motor vehicle to elude arrest, resisting a public officer, assault on a government official, assault with a deadly weapon with intent to kill, and five counts of assault with a deadly weapon on a government official. Defendant also was found guilty of attaining the status of a habitual felon.

The State presented evidence tending to show that on 21 April 2004, defendant engaged law enforcement officers in a vehicular

chase which temporarily halted when defendant's vehicle struck a cable stretched across a gravel road. As officers walked toward his vehicle, defendant backed up the vehicle and moved in reverse towards one of the officers. Defendant's vehicle struck one officer's vehicle, and then proceeded to move forward. As defendant's vehicle lurched forward, it moved in the direction of another officer, who then fired shots at defendant through defendant's vehicle's windshield. Defendant's vehicle struck another officer's vehicle, at which point an officer shot and deflated the right rear tire of defendant's vehicle, effectively ending the chase.

On appeal, defendant presents arguments as to only two of the eleven assignments of error listed in the record on appeal. Defendant's assignments of error listed in the record for which no argument is presented are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006); *see also State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976).

In his first assignment of error, defendant contends the trial court committed prejudicial error by denying his motion for a continuance when the habitual felon indictments were not served on him until one week prior to trial. In denying the motion, the trial court found that: defendant's attorney had been appointed to represent defendant on 28 June 2004; counsel had more than three months to prepare for the trial; the habitual felon charge related solely to sentencing; and the habitual felon indictment required no additional preparation for the trial of the charged offenses

occurring on 21 April 2004. Defendant argues the trial court's denial of the motion deprived him of his constitutional right to effective assistance of counsel.

A motion to continue ordinarily is reviewed for an abuse of discretion, but when the motion raises a constitutional issue, the trial court's ruling "is fully reviewable by an examination of the particular circumstances of each case." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). Even when the motion raises the potential for constitutional error, a new trial will not be awarded unless defendant shows both "that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). To show a violation of the right to effective assistance of counsel, "a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall,* 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993). Whether counsel has had sufficient time to prepare depends upon the facts of each case. *State v. Morgan*, 359 N.C. 131, 144, 604 S.E.2d 886, 894 (2004), *cert. denied*, __ U.S. __, 163 L. Ed. 2d 79 (2005).

Defendant does not contest the trial court's findings of fact in this case. Therefore, we are bound by those findings on appeal. *See State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004). In making the motion at the call of the case for trial, defense counsel gave no reason for continuing the trial other than the fact the habitual felon indictments were served on defendant in the past week. Counsel did not argue that he needed additional

time to prepare a defense to the substantive charges or to prepare a defense to the habitual felon charges. Notwithstanding the lack of argument in support of the motion in the court below, defendant now contends for the first time on appeal that he needed additional time so he could scrutinize the prior convictions. Our courts long have held that when a defendant argues a theory on appeal which was not raised before the trial court, he will not be permitted "'to swap horses between courts in order to get a better mount' in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (quoting *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996)). Moreover, defendant in the instant case fails to obtain a better mount on appeal, as a collateral attack upon the validity of prior convictions is not permitted in a habitual felon proceeding. *State v. Creason*, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). Thus, the only issue for the jury to determine was whether the defendant -- who had just been convicted of a felony -- was the same person alleged by the State to have three prior felony convictions. *See State v. Safrit*, 145 N.C. App. 541, 553, 551 S.E.2d 516, 524 (2001), *disc. review denied,* 357 N.C. 65, 579 S.E.2d 571 (2003). In these circumstances, we hold the trial court did not err by denying defendant's motion to continue.

Finally, defendant contends the trial court erred by denying his motion to sequester the State's witnesses. In making the motion, defendant argued that because a number of the witnesses witnessed the same events, "[t]heir impressions and such may be

colored by what each hears another one testify to during direct examination." The prosecutor disputed defendant's contention and pointed out to the court that each witness had given a statement which had been provided to defendant.

"Due process does not automatically require separation of witnesses who are to testify to the same set of facts." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984). Indeed, a motion to sequester witnesses is addressed to the discretion of the trial judge, whose decision will not be disturbed in the absence of a showing that the ruling was so arbitrary it could not have been reasoned. *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). We find no abuse of discretion in the instant case. In making the motion, defendant could only speculate that the witnesses "may" have their testimony influenced by hearing what others had stated. Defendant fails to cite any particular instance in the record when a witness conformed his testimony to that of another. Also, as the prosecutor noted, defendant had the statements of the witnesses and was free to cross examine them regarding any inconsistencies between their statements and trial testimony. *See State v. Jackson*, 309 N.C. 26, 31-32, 305 S.E.2d 703, 709 (1983). Defendant's assignment of error is therefore overruled.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).