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NO. COA07-499

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2007

STATE OF NORTH CAROLINA

v.

Davidson County
Nos. 05 CRS 4855
05 CRS 51939

JERMAINE LARROD BURTON

Appeal by defendant from judgment entered 10 January 2007 by Judge Susan Taylor in Davidson County Superior Court. Heard in the Court of Appeals 30 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.
Don Willey, for defendant-appellant.

TYSON, Judge.

Jermaine Larrod Burton ("defendant") appeals from judgment entered sentencing him as an habitual felon under N.C. Gen. Stat. § 15A-646. We affirm in part and remand in part for resentencing.

I. Background

On 11 April 2005, defendant was indicted for possession of cocaine with intent to sell or deliver pursuant to N.C. Gen. Stat. § 90-95(a) (1) and for maintaining a place for sale of a controlled substance pursuant to N.C. Gen. Stat. § 90-108(a) (7). By a separate bill of indictment, defendant was charged with attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. On 18

August 2006, defendant entered into a plea agreement, which provided that in exchange for pleading no contest to maintaining a dwelling for controlled substances and admitting his habitual felon status, the State would dismiss pending charges against him. The trial court found, as a mitigating factor, defendant had accepted responsibility for his criminal conduct. The trial court sentenced defendant to eighty to 105 months imprisonment.

On 22 August 2006, defendant filed a motion challenging his habitual felon indictment. Defendant alleged his habitual felon indictment relied upon two felonies committed before he reached eighteen years of age, which is a violation of N.C. Gen. Stat. § 14-7.1. The trial court vacated defendant's plea, judgment and commitment order, and sentence. On 11 September 2006, a superseding habitual felon indictment was issued and contained underlying felonies defendant had committed after attaining eighteen years of age.

Defendant pled no contest to the charge of maintaining a dwelling for sale of controlled substances and admitted his habitual felon status. In exchange, the State again dismissed pending charges against defendant. This plea agreement did not contain a sentencing recommendation. The trial court sentenced defendant as an habitual felon to 120 to 153 months imprisonment, a term within the presumptive range for a prior record level IV. Defendant appeals.

II. Issues

_____Defendant argues the trial court erred by: (1) sentencing him as an habitual felon and (2) imposing an improper sentence.

III. Superseding Habitual Felon Indictment

Defendant argues the trial court erred in sentencing him as an habitual felon because the State filed a superseding indictment charging defendant as an habitual felon after entry of defendant's guilty plea in violation of N.C. Gen. Stat. § 15A-646 (2005). Defendant argues the superseding indictment was fatally defective. We disagree.

N.C. Gen. Stat. § 15A-646 (2005) provides:

If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge. The first instrument is not, however, superseded with respect to any count contained therein which charged an offense not charged in the second indictment or information.

Here, the trial court granted defendant's motion and vacated his original habitual felon indictment and no contest plea. A second habitual felon indictment was issued containing all underlying felonies defendant committed as an adult. Defendant entered a subsequent no contest plea to the charge of maintaining a dwelling for sale of controlled substances and to attaining

habitual felon status. N.C. Gen. Stat. § 15A-646 is inapplicable under these facts.

Our Supreme Court has held:

It has long been the law in North Carolina that the existence of former bills of indictment for an offense constitute no legal impediment to the putting the defendant on trial upon the last and more perfect bill, at the election of the Solicitor. This is the recognized practice, and is convenient and necessary in the administration of the criminal law for the removal of all grounds of exception to the form of the bills previously sent, or for any irregularity in the manner of acting upon them.

State v. Carson, 320 N.C. 328, 333, 357 S.E.2d 662, 665 (1987) (quoting *State v. Hastings*, 86 N.C. 596, 597 (1882)). Defendant was properly sentenced as an habitual felon. This assignment of error is overruled.

IV. Resentencing

Defendant also contends the trial court improperly sentenced him to 120 to 153 months imprisonment in violation of N.C. Gen. Stat. § 15A-1335. We agree.

N.C. Gen. Stat. § 15A-1335 (2005) provides:

When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

A "defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or

conduct on remand.” *State v. Wagner*, 356 N.C. 599, 602, 572 S.E.2d 777, 779 (2002).

Defendant was originally sentenced in the mitigated range to a term of 80 to 105 months imprisonment. After defendant’s plea and sentence were vacated, a second habitual felon indictment was issued. Defendant again pled no contest to maintaining a dwelling for sale of controlled substances and attaining habitual felon status. Defendant was sentenced to 120 to 153 months imprisonment.

The subsequent sentence violated N.C. Gen. Stat. § 15A-1335. Defendant’s original sentence was 80 to 105 months imprisonment for the same offense and status. The trial court erred by imposing a more severe sentence for the same offense or conduct for which defendant was originally sentenced. *Id.* We affirm defendant’s convictions and remand this case to the trial court for resentencing in accordance with this opinion.

V. Conclusion

The trial court did not err when it sentenced defendant as an habitual felon. The trial court erred when it imposed a more severe sentence for the same offense for which defendant was originally sentenced. N.C. Gen. Stat. § 15A-1335. We vacate the judgment and remand for resentencing in accordance with this opinion.

Affirmed in Part; Vacated in Part and Remanded for Resentencing.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).