NO. COA08-1446

NORTH CAROLINA COURT OF APPEALS

Filed: 3 November 2009

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 01 CRS 008952
01 CRS 055646
01 CRS 007516
01 CRS 055649

JOSE M. G. HERNANDEZ,
Defendant.

Appeal by defendant from judgments entered 17 September 2002 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 31 August 2009.

*Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.*

*Jarvis John Edgerton, IV, for defendant-appellant.*

MARTIN, Chief Judge.

Defendant appeals from judgments entered on his convictions of common law attempted murder in the first degree, assault on a law enforcement officer, assault with a deadly weapon with intent to kill, carrying a concealed weapon, driving with a revoked license, driving while impaired, and resisting a public officer. We affirm.

The evidence at trial tended to show that sometime during 2000, defendant was arrested by Trooper William Brown ("Trooper

Brown") of the North Carolina Highway Patrol for driving while impaired. In May 2000, defendant failed to appear in court on this charge, and a warrant was issued for his arrest.

On 9 May 2001, Trooper Brown observed defendant in a white Honda Prelude automobile on Stantonsburg Road in Pitt County. Knowing that the order for arrest was outstanding, Trooper Brown followed defendant's vehicle into the parking lot of the Hustle Mart convenience store. As defendant got out of his vehicle, Trooper Brown called out for him to stop, but defendant started to run. Trooper Brown chased defendant, and when he caught up with him, defendant turned around and raised his fists in a fighting stance. Responding to defendant's behavior, Trooper Brown pulled his can of mace from his service belt. As Trooper Brown raised his mace, defendant reached behind his back and pulled out a gun. At this point, Trooper Brown pulled his weapon as he ran behind a car to shield himself. Gunfire was exchanged between defendant and Trooper Brown. Eventually, defendant fell and dropped his gun. Seeing that defendant was wounded, Trooper Brown went over to him, picked up his gun, and called for assistance. As Trooper Brown was calling for assistance, defendant got up and took off running into a nearby field. Trooper Brown attempted to go after defendant, but he lost sight of him in the field. A deputy sheriff arrived with a canine, and Trooper Brown asked for assistance in tracking defendant. With the help of the canine unit, Trooper Brown was able to apprehend and arrest defendant.

Defendant's case came to trial on 16 September 2002. After the trial began, however, defendant entered pleas of guilty to common law attempted murder in the first degree, assault on a law enforcement officer pursuant to N.C.G.S. § 14-34.5, assault with a deadly weapon with intent to kill pursuant to N.C.G.S. § 14-32(c), carrying a concealed weapon pursuant to N.C.G.S. § 14-269(a1), driving with a revoked license pursuant to N.C.G.S. § 20-28(a), driving while impaired pursuant to N.C.G.S. § 20-138.1(a), and resisting a public officer pursuant to N.C.G.S. § 14-223. The trial court consolidated the offenses, made findings in aggravation, and entered judgment on 17 September 2002 sentencing defendant to imprisonment for a minimum of 220 months and a maximum of 273 months.

On 12 August 2003, defendant filed a petition for writ of certiorari seeking a belated appeal. This Court allowed the petition on 3 September 2003, specifically limiting the appeal to issues within defendant's appeal of right. The order also directed the superior court to appoint counsel and order preparation of a transcript. However, for reasons that are not apparent, appellate entries were not made until 7 February 2008. The record was filed in this Court on 19 November 2008.

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In the sole issue raised by his appeal, defendant contends that the trial court erred in finding as an aggravating factor that he was on pretrial release when he committed the charged offenses. We disagree.

Before the ruling in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), the "State b[ore] the burden of proving by a preponderance of the evidence that [an] aggravating factor exist[ed]." *State v. Distance*, 163 N.C. App. 711, 718, 594 S.E.2d 221, 226 (2004) (citing N.C. Gen. Stat. § 15A-1340.16(a) (2003)). Because defendant was sentenced before *Blakely* became applicable, we must determine whether there was "sufficient evidence to allow a reasonable judge to find [the aggravating factor's] existence by a preponderance of the evidence." *Id.* (internal quotation marks omitted) (citing *State v. Hayes*, 102 N.C. App. 777, 781, 404 S.E.2d 12, 15 (1991)). Defendant argues the trial court's finding that he committed the charged offenses while on pretrial release is not supported by the evidence. Defendant contends that because his bond had been revoked on the prior charge of driving while impaired, he was not on pretrial release but was instead a fugitive. Therefore, defendant argues, the trial court erroneously found this factor. We disagree.

It is undisputed that at the time defendant committed the crimes which are the subject of this appeal, there was an outstanding warrant for his arrest by reason of his failure to appear on a previous driving while impaired charge. Cases decided by our Supreme Court and this Court indicate that, as long as a pending criminal charge has not been finally dismissed or otherwise resulted in a final disposition, any crime committed by a defendant while the prior charge is still pending may be considered to have

been committed while on pretrial release. *See State v. Blackwell*, 361 N.C. 41, 50-51, 638 S.E.2d 452, 458-59 (2006) (stating that the absence of a final judgment of conviction or dismissal of a pending charge supported finding as factor in aggravation that defendant was on pretrial release at the time of commission of the crime for which he was being sentenced); *see also State v. Beck*, 163 N.C. App. 469, 477, 594 S.E.2d 94, 99 (2004) (finding that evidence that there was a warrant for defendant's arrest for failure to appear in court for a burglary charge in Florida was sufficient evidence to support a finding that defendant committed the crime while on pretrial release), *aff'd in part and rev'd in part on other grounds*, 359 N.C. 611, 614 S.E.2d 274 (2005); *State v. Mark*, 154 N.C. App. 341, 347, 571 S.E.2d 867, 871 (2002) (dismissing with leave due to defendant's failure to appear for trial on a pending charge was not a final disposition of the pending charge, and thus finding that defendant committed the subsequent charges while on pretrial release was properly made), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). The undisputed evidence in this case shows that defendant's previous driving while impaired charge was still pending when he committed the crimes on 9 May 2001. Therefore, there was sufficient evidence to support the existence of this aggravating factor by a preponderance of the evidence. *See Distance*, 163 N.C. App. at 718, 594 S.E.2d at 226. (citing N.C. Gen. Stat. § 15A-1340.16(a) (2003)). Accordingly, this assignment of error is overruled.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).