NO. COA08-16

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 224125
07 CRS 10510

CHRISTOPHER BROWN

Appeal by defendant from judgment entered 26 September 2007 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 18 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer M. Jones, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant. (Brief was filed by Robert W. Ewing, who was allowed to withdraw as counsel of record by order filed 14 April 2008.)

WYNN, Judge.

Defendant Christopher Brown appeals the sentence he received for convictions for felony possession of cocaine and attaining habitual felon status. We find no error in the sentence imposed.

The evidence presented at trial tended to show that on 21 May 2006, Officers Christopher Chipman and Christopher Goodwin of the Mecklenburg Police Department responded to a service call in the Lockwood community of Charlotte. Upon arrival at the location, both officers approached Defendant and requested identification.

After calling to see if there were any warrants on Defendant, Officer Chipman learned there was a warrant on file and placed Defendant under arrest. Officer Goodwin conducted a search and found a rock of crack cocaine in Defendant's back left pocket. The substance was tested and identified as .12 grams of cocaine. Subsequently, Defendant was charged with felony possession of cocaine and the status of being an habitual felon.

At the conclusion of his trial, the jury found Defendant guilty of felonious possession of cocaine. The State then presented evidence to show that Defendant was an habitual felon, and the jury again returned a verdict of guilty. The trial court determined that Defendant had seventeen prior record points, making him a prior record level V offender. After entering judgment against Defendant, the trial court sentenced him within the presumptive range to an active prison term of a minimum of 121 months and a maximum of 155 months in prison.

Defendant now appeals his sentence, arguing that the trial court erred by: (I) assigning eight prior record level points for prior convictions for robbery in Florida and New York; and (II) enhancing Defendant's punishment for conviction of .12 grams of cocaine, such that the sentence was grossly disproportionate to the severity of the crime.

I.

First, Defendant contends the trial court erred by assigning him eight prior record level points for prior convictions for robbery in Florida and New York. He argues the State failed to

prove by the preponderance of the evidence that these robbery offenses were substantially similar to North Carolina's offense of common law robbery. We disagree.

Section 15A-1340.14(f) of the North Carolina General Statutes provides that "[t]he State bears the burden of proving, by a preponderance of the evidence, the existence of a prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2007). A prior conviction may be proven by any of the following methods: (1) stipulation of the parties; (2) an original or copy of the court record of the prior conviction; (3) a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; and (4) any other method found by the court to be reliable. *Id.*

The statute that governs the assignment of prior record level points for out-of-state convictions provides in pertinent part:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction

> is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e). We have held that the production of copies of criminal statutes from foreign jurisdictions so as to permit comparison of their provisions to the criminal laws of North Carolina is "sufficient to prove by a preponderance of the evidence that the crimes of which defendant was convicted in those states were substantially similar to classified crimes in North Carolina for purposes of G.S. § 15A-1340.14(e)." *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52, *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998).

Here, the State presented a report showing Defendant was convicted on 19 March 1991 in New York of the offense of first-degree robbery with use of a dangerous weapon and was also convicted on 13 June 1990 in Florida of the offense of armed robbery. The State submitted to the trial court copies of the pertinent statutes defining the offenses in those states and a prior record level worksheet listing those two convictions, among others. The State argued to the trial court that the offenses in Florida and New York were substantially similar to North Carolina's offense of common law robbery, and thus should be classified as Class G offenses for the purpose of determining Defendant's prior record level points. Defendant's counsel affirmatively stated that he did not object to the prior record level worksheet and stipulated that Defendant was a prior record level V offender for sentencing purposes.

In *State v. Hanton*, we stated that "the question of whether a

conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006). Thus, a stipulation that an out-of-state offense is substantially similar to a North Carolina offense is ineffective and not binding on this Court. *State v. Palmateer*, 179 N.C. App. 579, 581, 634 S.E.2d 592, 593-94 (2006); *see also State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate."), *disc. review denied and appeal dismissed*, 297 N.C. 179, 254 S.E.2d 38 (1979).

Therefore, we conduct our own comparison of the elements of common law robbery and those of the two offenses in the foreign jurisdictions to determine whether they are substantially similar. Common law robbery in this State is defined as (1) the felonious non-consensual taking of (2) money or personal property (3) from the person of presence of another (4) by means of violence or fear. *State v. Hedgecoe*, 106 N.C. App. 157, 161, 415 S.E.2d 777, 780 (1992). A person is guilty of the offense of first-degree robbery as defined by the New York Penal Code if he "forcibly steals property and when, in the course of the commission of the crime . . . [he] (2) [i]s armed with a deadly weapon; or (3) [u]ses or threatens the immediate use of a dangerous weapon . . . ." N.Y. Penal Law § 160.15 (Consol. 2007). The Florida Penal Code defines the offense of robbery as "the taking of money or other personal

property which may be the subject of larceny from the person or custody of another . . . when in the course of the taking there is the use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13(1) (2006).

Defendant argues the Florida offense is not substantially similar to common law robbery because it does not require that a person commit a larceny in order to be convicted of the offense. Further, Defendant asserts the New York offense is not substantially similar because the statute does not define "robbery." We must disagree. Larceny is defined as "the unlawful *taking and carrying* away of someone else's personal property, with intent to deprive the possessor of it permanently." Black's Law Dictionary 896 (8th ed. 2005) (emphasis added). Although the Florida statute uses the term "taking" and the New York statute uses the term "steals," they both describe a larceny by the use of force or violence, similar to common law robbery in this State.

The State's production of copies of the out-of-state statutes, allowing a comparison of their provisions to the law of North Carolina, were sufficient to prove by a preponderance of the evidence that the out-of-state crimes were substantially similar to the offense of common law robbery in North Carolina. Accordingly, we find no error in the trial court's classification of the prior out-of-state convictions as Class G offenses for the purposes of determining Defendant's prior record level.

II.

Defendant also asserts that the enhancement of his sentence

for conviction of possession of a mere .12 grams of cocaine led to a sentence that was grossly disproportionate and thus constitutes cruel and unusual punishment in violation of his Eighth Amendment rights. Defendant's argument is without merit.

To determine whether a sentence is grossly disproportionate to an offense for purposes of Eighth Amendment analysis, we look for "a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play." *State v. Todd*, 313 N.C. 110, 119, 326 S.E.2d 249, 254 (1985) (quotation and citation omitted). Here, Defendant's sentence as an habitual felon was neither an abuse of discretion nor prejudicial error, as statutory law requires a trial court to sentence an habitual felon who commits any felony as a Class C felon. N.C. Gen. Stat. § 14-7.6. Defendant had seventeen prior record level points, was found guilty of habitual felon status, and was sentenced within the presumptive range for a Class C habitual felon. Moreover, a review of Defendant's prior criminal record and worksheet shows that Defendant has no fewer than thirty convictions for criminal offenses. We find no error.

Further, although Defendant argues that the sentence violates his Eighth Amendment guarantee against cruel and unusual punishment, he has failed to present any facts or arguments as to why his case is exceedingly rare or unusual, beyond merely contrasting the amount of crack he possessed with the sentence he received. This Court must continue to apply the "grossly

disproportionate" principle that "only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Ewing v. California*, 538 U.S. 11, 36, 155 L. Ed. 2d 108, 123 (2003); *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983); *see also State v. Garcia*, 174 N.C. App. 498, 507, 621 S.E.2d 292, 298 (2005) (holding that sentence of a term of 133 to 167 months imposed on a defendant based on his status as a habitual felon was not cruel and unusual punishment). This is not such a case. Accordingly, we reject this assignment of error.

No error.

Judges ELMORE and GEER concur.

Report per Rule 30(e).