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NO. COA08-299

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA

v.

ANDREW WESLEY MORRISON

Catawba County
Nos. 06 CRS 050018
07 CRS 002041-002042
07 CRS 002620-002622

On a *writ of certiorari* from order entered 9 October 2007 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 31 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Meitz, for the State.
Mercedes O. Slut, for defendant-appellant.

TYSON, Judge.

Andrew Wesley Morrison ("defendant") appeals from trial court order denying his Motion for Appropriate Relief after he pleaded guilty to: (1) possession of cocaine pursuant to N.C. Gen. Stat. § 90-95(a)(3); (2) possession of a firearm by a convicted felon pursuant to N.C. Gen. Stat. § 14-415.1; and (3) attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. We affirm.

I. Background

On 12 July 2007 defendant pleaded guilty to: (1) two counts of possession of cocaine; (2) one count of possession of a firearm by a convicted felon; and (3) three counts of habitual felon status.

In accordance with the plea agreement, Judge Edgar B. Gregory consolidated all offenses into one judgment and sentenced defendant as an habitual felon to an active term of a minimum of 90 and a maximum of 117 months imprisonment.

On 12 September 2007, defendant filed a motion for appropriate relief contending: (1) the evidence was insufficient to support the habitual felon charge; (2) he was denied effective assistance of counsel; and (3) his right to due process was violated. Defendant argued the motion should be granted because the habitual felon indictments list as one of the three predicate convictions a dismissed charge. Defendant alleged that the habitual felon indictments charged that defendant was convicted of felonious larceny on 28 April 1982, when in fact that conviction was overturned by this Court and the charge was dismissed by the prosecutor on 24 August 1983.

In denying the motion, Judge Timothy S. Kincaid ("Judge Kincaid") found that defendant failed to produce court documents to prove his assertion. Judge Kincaid found that "[a]ccording to the file, the factual basis for the plea" was a conviction in 1991 of possession of cocaine, which was substituted for the challenged conviction by motion in open court. Judge Kincaid concluded that while an indictment may not be amended to alter a substantive element of the offense charged, this particular amendment was not a substantive one and the nature of the charge was not changed. Judge Kincaid also concluded that defendant could not claim he was surprised by the amendment, having executed and signed the

transcript of plea in open court and having received the benefit of the plea bargain. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it: (1) found the habitual felon indictment was amended by a motion in open court, (2) concluded the amendment to indictments was not substantive, and (3) concluded his motion for appropriate relief failed to meet the requirements of N.C. Gen. Stat. § 15A-1420(c)(6).

III. Sufficiency of Indictment

When a defendant knowingly and voluntarily pleads guilty to a charge, he waives all defenses other than a challenge to the sufficiency of the indictment. *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 66 (1999), *disc. rev. denied*, 351 N.C. 644, 543 S.E.2d 878 (2000), *superceded by statute on other grounds*, N.C. Gen. Stat. § 15A-1340.34 (1988). An exception to this rule is when a defendant claims that an indictment is facially invalid, thereby depriving the trial court of jurisdiction, in which case the indictment may be challenged at any time. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). An indictment that charges one with being an habitual felon is facially valid if it sets forth the date of commission of the prior felony offenses, the name of the state or sovereign where the offenses were committed, the dates of conviction of the offenses, and the identity of the court in which the convictions were returned. *State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d 782, 784, *disc. rev. denied*, 360 N.C. 489, 632

S.E.2d 768 (2006). A defendant who pleads guilty waives his right to challenge the habitual felon indictment when he does not dispute that the indictment included all of these elements but contends that the information contained in the indictment is incorrect. *Id.*

Defendant argues Judge Kincaid erred in finding that a motion was made in open court to amend the habitual felon indictments and in concluding that the change in the indictments was not a substantive amendment. He also argues Judge Kincaid erred in concluding the motion for appropriate relief lacked merit and failed to meet the requirements of N.C. Gen. Stat. § 15A-1420(c)(6).

The State concedes that Judge Kincaid erred in finding the indictment was amended in open court. The State argues defendant waived the error in the habitual felon indictments by pleading guilty to the charges. The State also argues defendant has failed to show prejudice because he stipulated that he is a prior record level V and he has not otherwise challenged his status as a habitual felon.

The facts of *McGee* are instructive. 175 N.C. App. at 586, 623 S.E.2d at 782. In *McGee*, the defendant challenged the habitual felon indictment on the grounds that the indictment incorrectly identified the court and case file number of one of the predicate felonies and the date of conviction of a predicate felony. 175 N.C. App. at 587, 623 S.E.2d at 784. This Court concluded such assertions did not constitute challenges to the validity of the indictment on its face. *Id.* at 588, 623 S.E.2d at 784. This Court

held the defendant had waived his right to challenge the indictment on these grounds by pleading guilty. *Id.*

Here, defendant is challenging the correctness of the allegations of the indictment, not whether the indictment sufficiently alleges the elements of the charge. By pleading guilty, he waived his right to challenge the correctness of the allegations. *Id.* The trial court did not err when it denied defendant's motion for appropriate relief. This assignment of error is overruled.

III. Conclusion

Defendant waived his right to challenge the validity of the habitual felon indictment when he pleaded guilty to attaining that status. The trial court did not err in denying defendant's motion for appropriate relief and its order is affirmed.

Affirmed.

Judge BRYANT concurs.

Judge ARROWOOD concurs in the result.

Report per Rule 30(e).