NO. COA08-440

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v. New Hanover County
No. 05 CRS 59997, 60003, 60006-7, 60010, 60302, 60305, 06 CRS 714

JOHNNY RAY POPE

Appeal by defendant from judgments entered 7 June 2007 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 22 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for the State.

Michael J. Reece, for the defendant-appellant.

STEELMAN, Judge.

Indictments for larceny that failed to denote a legal entity capable of owning property must be dismissed. The trial court erred in submitting a charge of breaking or entering a motor vehicle to the jury because the State failed to introduce substantial evidence that the vehicle contained any item of value. The trial court did not err in submitting two other charges of breaking or entering a motor vehicle where the State introduced substantial evidence tending to show that the vehicles had not lost their character of mobility and contained items of value. The trial court's failure to strictly comply with the provisions of

N.C. Gen. Stat. § 15A-1022 in taking defendant's guilty plea to habitual felon status was not prejudicial.

I. Factual and Procedural Background

Defendant was indicted in January and February 2007 on eighteen charges stemming from a series of break-ins and thefts at construction sites occurring in June 2005. Defendant was tried by a jury during the 4 June 2007 criminal session of New Hanover Superior Court. At the close of the evidence, the trial court dismissed six charges and submitted twelve charges to the jury. The jury found defendant guilty on ten charges[1] and found him not guilty on two charges.

Defendant pled guilty to habitual felon status and was sentenced as a Class C felon. The court consolidated the offenses into two judgments and imposed consecutive sentences of 110 to 141 and 101 to 131 months imprisonment. Each sentence was from the mitigated range. Defendant appeals.

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[1] The ten charges on which defendant was convicted are: Breaking or Entering a Motor Vehicle and Felony Larceny (05 CRS 59997); Breaking or Entering a Motor Vehicle (05 CRS 60003); Breaking or Entering a Trailer (05 CRS 60006); Misdemeanor Larceny (05 CRS 60007); Breaking or Entering a Motor Vehicle and Possession of Stolen Goods (05 CRS 60010); Possession of a Stolen Motor Vehicle and Misdemeanor Larceny (05 CRS 60302); and Misdemeanor Larceny (05 CRS 60305).

II. Analysis

A. Motions to Dismiss

In his first three arguments, defendant contends that the trial court erred in failing to grant his motions to dismiss

certain of the charges in cases 05 CRS 59997, 60003, and 60005. We consider each of those arguments in turn.

1. Breaking or Entering A Motor Vehicle

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss two Breaking or Entering of a Motor Vehicle charges because the State failed to prove that the motor vehicles contained items of value, a required element of the offense. We agree in part and disagree in part.

The charge of Breaking or Entering a Motor Vehicle requires the State to prove that "(1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein." *State v. Jackson*, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004); N.C. Gen. Stat. § 14-56 (2007). Although the fourth element may be met by items of trivial value, it may not be met by items that are inherently a part of the vehicle. *Id.* However, where the record is "devoid . . . of evidence that the victim's vehicle contained items of trivial value that belonged to the victim or to anyone else[,]" the charge may not be submitted to the jury. *State v. McLaughlin*, 321 N.C. 267, 270-71, 362 S.E.2d 280, 282 (1987).

a. The Dually Truck

In case 05 CRS 59997, defendant was convicted of Breaking or Entering a white 350 4-door Ford Super Duty truck owned by "d/b/a Double Run Farms" and the larceny of the truck. Defendant contends

that the State failed to prove that there was anything of value in the truck.

At trial, defendant's girlfriend, Tiffany Locklear, testified regarding the theft of the truck, which had an external fuel tank in its bed, from a trailer yard off of Route 421 near Wilmington. Locklear testified that defendant drove to the trailer yard where he planned to "yank the key hole . . . to get into" a dually. The truck he chose was hooked up to a camper. After unhooking the camper from the truck, defendant "snatched" the ignition out and the couple left the yard. Locklear testified that the unusual things about the truck were that it was "hooked up to a camper" and "had a fuel tank . . . in the bed of the truck." She further testified that defendant filled both the truck's tank and the external tank with fuel from a construction site.

In reviewing challenges to the sufficiency of the evidence, the court "must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Scott*, 356 N.C. 591, 596-97, 573 S.E.2d 866, 869 (2002) (internal quotations and citations omitted). The fuel tank described by Locklear was described in the indictment as a "90 Gallon Fuel Tank." Viewing the evidence in the light most favorable to the State, *id.*, we hold that Locklear's testimony provided substantial evidence from which a jury could reasonably infer that the fuel tank in the bed of the pickup constituted "goods, wares, freight, or anything of value[.]" *Jackson*, 162

N.C. App. at 698, 592 S.E.2d at 577. The trial court did not err in submitting this charge to the jury.

Regarding case 05 CRS 59997, this argument is without merit.

b. The Caterpillar Backhoe

In case 05 CRS 60003, defendant was convicted of Breaking or Entering a Caterpillar backhoe. Defendant contends that the State introduced no evidence that the backhoe contained anything of value and his motion to dismiss should have been granted. The State concedes that the record does not reveal anything of value that was not inherently a part of the backhoe itself.

We hold that, regarding the second count of the indictment in case 05 CRS 60003, the trial court erred in submitting the charge of Breaking or Entering a Motor Vehicle to the jury, *McLaughlin*, 321 N.C. at 270-71, 362 S.E.2d at 282, because the State failed to introduce substantial evidence that the backhoe contained any item of value.

2. The Felony Larceny Charges

In his second argument, defendant contends that the trial court erred in denying his motion to dismiss two felony larceny charges because the indictments failed to sufficiently allege the ownership of the property. We agree.

In both instances, the indictments named a business and its representative. In case 05 CRS 60305, defendant was indicted for stealing a fuel pump and 150 gallons of diesel fuel, "the personal property of d/b/a Morton Minerals (Representative Randy Hudson), such property having a value of $652.50." In case 05 CRS 59997,

defendant was indicted for stealing a Ford truck and 90 gallon fuel tank, "the personal property d/b/a/ Double Run Farm (Representative Monica Watson)." Defendant contends that the naming of the representative in either indictment is insufficient to cure the defect because "Morton Minerals" and "Double Run Farm" are not persons and do not denote a legal entity capable of owning property. The State concedes that the facts of the instant case are indistinguishable from those of other cases before this Court. *E.g., State v. Norman*, 149 N.C. App. 588, 593, 562 S.E.2d 453, 457 (2002) (vacating a felony larceny conviction because the indictment named "Quail Run Homes Ross Dotson, Agent").

A bill of indictment purporting to charge larceny is fatally defective if there is no allegation that the victim was either an individual or a legal entity capable of owning property. *State v. Thornton*, 251 N.C. 658, 661-62, 111 S.E.2d 901, 903-04 (1960).

> ". . . If the property alleged to have been stolen is that of an individual, the name of the individual, if known, should be stated; if it is the property of a partnership, or other *quasi* artificial person, the names of the persons composing the partnership, or *quasi* artificial person, should be given; if it is the property of a corporation, the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation."

Id. at 662, 111 S.E.2d at 903 (quoting *Nickles v. State*, 86 Ga. App. 290, 71 S.E.2d 578 (1952)). While indictments that import the business as a company or corporation are sufficient, those that fail to either name an individual owner or a legal entity capable of owning property have been held to be fatally defective.

The challenged bills of indictment do not allege that either "d/b/a Morton Minerals" or "d/b/a Double Run Farms" is a corporation or other legal entity capable of owning property. Nor does the name import that either is a corporation. Clearly neither is a natural person. Consequently, the indictments fail to sufficiently allege the name of the owner, *id.* at 661-62, 111 S.E.2d at 903-04, and we are compelled to agree with defendant that the indictments are fatally defective. The judgments in 05 CRS 59997 and 05 CRS 60305 must be vacated.

3. Breaking or Entering A Trailer

In his third argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of Breaking or Entering a Trailer because the State's evidence showed that the trailer was functioning as a building. We disagree.

At trial, the State called as a witness an employee for T&H Electrical, which owned the enclosed utility trailer from which a quick cut saw had been stolen. The trailer contained equipment for the construction job site where defendant stole diesel fuel and other miscellaneous property. The State asked whether the area was secured on 20 June 2005 when the employee left the job site, and how he knew that the trailer was secured. The employee testified:

> Because we always use our trucks to block our vehicles - - our trailers front and back, like, I put the crane to the back door [of the trailer] and I put the backhoe toward the front of the trailer where nobody can hook to it.

The employee further testified that he put a bucket over the hitch of the trailer when he placed the trucks and backhoes around it.

Defendant was charged under N.C. Gen. Stat. § 14-56, which states:

> If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value, . . . that person is guilty of a Class I felony.

N.C. Gen. Stat. § 14-56 (2007). In determining whether the evidence is sufficient to sustain a conviction under N.C. Gen. Stat. § 14-56, rather than N.C. Gen. Stat. § 14-54 (Breaking or Entering of a building), the key issue is whether the character of the vehicle tends towards mobility. *State v. Bost*, 55 N.C. App. 612, 615-16, 286 S.E.2d 632, 634-35 (1982).

> Whether . . . "trailers[]" . . . qualify as "buildings" under G.S. 14-54 depends upon the circumstances in each case. They may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence.

Id. at 616, 286 S.E.2d at 634-35.

Defendant contends that, because it was blocked in by other vehicles, the storage trailer had lost its mobility and was thus "functioning as a building." We find this argument disingenuous. The fact that the employees of the owner of the trailer blocked it in each night to prevent it from being stolen did not deprive the trailer of its fundamental mobility. Unlike *Bost*, where the trailer was "blocked up" and immobile, the trailer in the instant case was mobile, but not in a manner so that a thief could steal it. The jury could reasonably conclude that, under the

circumstances of this case, the trailer had not lost its character of mobility or attained a character of permanence. *Bost* at 616, 286 S.E.2d at 635.

This argument is without merit.

B. Habitual Felon Plea

In his final argument, defendant contends that the trial court's failure to comply with the requirements of N.C. Gen. Stat. § 15A-1022(a) is reversible error. We disagree.

On this issue, we are faced with two lines of cases that appear to point to different outcomes in the instant case. Defendant argues that this case is controlled by the case of *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001). In *Gilmore*, defendant stipulated, but did not plead guilty, to habitual felon status. Relying upon *State v. Williams*, 133 N.C. App. 326, 515 S.E.2d 80 (1999), this Court reversed the conviction for habitual felon status, stating that this status must either be established by jury verdict or by a guilty plea, and that a stipulation "is not tantamount to a guilty plea." *Gilmore* at 471, 542 S.E.2d at 699.

The State argues that this case is controlled by the cases of *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983), and *State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896 (2000). These cases hold that, when the trial court fails to strictly comply with the provisions of N.C. Gen. Stat. § 15A-1022 in taking a guilty plea, non-compliance is not reversible error *per se*, but must be evaluated upon a prejudice analysis. *Hendricks* states that "we must look to the totality of the circumstances and determine

whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity." 138 N.C. App. at 670, 531 S.E.2d at 898 (citing *Williams*, 65 N.C. App. at 481, 310 S.E.2d at 83).

In the instant case, there was no transcript of plea, and the trial court briefly addressed defendant as follows:

> THE COURT: All right. Mr. Pope, would you stand up, please. Now, Mr. Pope, what I'm going to do now is inquire of you to make sure that you understand what's going on and that the statements that Mr. David and Mr. Peregoy were made [sic] just acknowledging what was going on. Do you understand?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: First, are you able to hear and understand me?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that you are admitting or pleading guilty to being a habitual felon?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You have been shown or should have been shown by Mr. Peregoy the three convictions that the State is relying upon for the habitual felon; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. You accept Mr. Peregoy's statement as to your substance of those with the reservations that he has previously made?[2]
>
> THE DEFENDANT: Yes, sir.

[2] The referenced reservations are not at issue in this appeal.

> THE COURT: Okay. Now, has anybody promised you anything or threatened you in any way to make you do this?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: So you are doing this of your own free will on advise [sic] of counsel and you know what you're doing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. You understand what habitual felon status means?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Insofar as the sentence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Let's administer the oath to him, please.
>
> (The Defendant was sworn to his answers in open court.)

This colloquy did not comply with all of the requirements set forth in N.C. Gen. Stat. § 15A-1022. However, we hold this to be a case of defective compliance with § 15A-1022, as found in *Williams*, 65 N.C. App. 472, 310 S.E.2d 83, and *Hendricks*, rather than non-compliance, as found in *Williams*, 133 N.C. App. 326, 515 S.E.2d 80, and *Gilmore*. Defendant makes no argument that he was not the same person convicted in the three prior felonies that were the basis of the habitual felon indictment. Looking at the totality of the circumstances, it is clear that defendant voluntarily entered a plea of guilty to habitual felon status and that any defect in compliance with N.C. Gen. Stat. § 15A-1022 was harmless. *Hendricks*, 138 N.C. App. at 670, 531 S.E.2d at 898.

Clearly the proper practice for the trial court to follow in taking a guilty plea to habitual felon status is to have the defendant complete a plea transcript, and to personally go over with defendant, on the record, *each and every* item required by N.C. Gen. Stat. § 15A-1022. We hold that the trial court did not commit prejudicial error in taking defendant's plea to habitual felon status without strictly complying with § 15A-1022.

III. Conclusion

For the reasons stated herein, we vacate the convictions for felonious larceny in 05 CRS 59997 and 05 CRS 60305 and the Breaking or Entering of a motor vehicle in 05 CRS 60003. The remaining convictions are remanded for re-sentencing. *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987).

Defendant's adjudication as a habitual felon is affirmed.

VACATED AS TO 05 CRS 59997, 05 CRS 60305, 05 CRS 60003.

NO PREJUDICIAL ERROR AS TO HABITUAL FELON.

REMAINING CHARGES REMANDED FOR RE-SENTENCING.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).