NO. COA09-159

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Forsyth County
No. 07 CRS 5031; 07 CRS 54078

WILFREDO JAMAL RIVERA III

Appeal by defendant from judgment entered 26 February 2008 by Judge A. Moses Massey in the Forsyth County Superior Court. Heard in the Court of Appeals 20 August 2009.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

John T. Hall for defendant.

BRYANT, Judge.

On 2 July 2007, defendant Wilfredo Jamal Rivera III was indicted on charges of possession of a firearm by a felon and attaining the status of habitual felon. On 26 February 2008, a jury convicted defendant on the former charge and he pled guilty to the latter, reserving his right to appeal the jury's verdict. The trial court sentenced defendant to 115 to 147 months imprisonment and defendant appeals. We find no error.

On 24 April 2007, a resident of the Haywood Street Apartments public housing complex in Winston-Salem called police to report a man on the premises carrying a gun and acting "disturbed."

Officers Brian Tolliver and Caroline Robinson responded and announced themselves at defendant's door but received no response. They went to the back of the building to check the apartment's fire escape. In the meantime, Thaddeus Cook, community safety manager for the city's public housing authority, arrived at the apartment in response to a complaint about a disturbance. After knocking loudly on the front door, he used his master key and attempted to enter the apartment. Defendant, who was inside, then pushed back on the door. Cook grabbed defendant's arm and held on until the officers were able to assist him. Officer Robinson handcuffed defendant and searched him for weapons, while Officer Tolliver searched the immediate area of the apartment. The apartment was small enough that one could stand in the door and touch the bed. Noticing that the mattress appeared to have been disturbed, Officer Tolliver flipped it over and found a revolver. Defendant was arrested.

Prior to trial, the court conducted a hearing on defendant's motion to suppress the weapon he was alleged to have possessed. Following the hearing, the trial court denied the motion in open court and requested the State prepare a written order. Thereafter, the trial court signed and filed the order out of term on 12 June 2008.

Defendant presents three issues on appeal: (I) the trial court erred in entering a written order denying defendant's motion to dismiss out of session and out of term; (II) the trial court lacked

jurisdiction to enter judgment against him; and (III) the trial court erred in making unsupported findings of fact and erroneous conclusions of law in denying his motion to suppress. As discussed below, we find no error.

I

Defendant first argues that the trial court erred in entering a written order denying defendant's motion to dismiss out of session and out of term. We disagree.

Generally,

> judgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or by reason of some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested.

State v. Humphrey, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923); *see also State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984) ("an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held.") However, the Court in *Boone* noted that in cases where it "appears that the trial judge announced his ruling on the motion to suppress during the [proper] session . . ., although the findings of fact and conclusions of law supporting the decision were made and the orders signed at a later time[,]" the proper consideration on appeal is to determine "whether this delay in dictating the findings of fact and

conclusions of law was prejudicial." *Id.* at 289, 311 S.E.2d at 556 (citations omitted). In *State v. Horner*, 310 N.C. 274, 278-79, 311 S.E.2d 281, 285 (1984), our Supreme Court "held that the trial court's order denying defendant's motion to suppress items of physical evidence was not improperly entered 'out of session and out of district' where the court passed on each part of the motion to suppress in open court as it was argued and later reduced its ruling to writing, signed the order, and filed it with the clerk." *State v. Smith*, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987) (holding an order denying a motion to suppress was not void because it was "simply a revised written version of the verbal order entered in open court.")

Here, defendant acknowledges that the trial court denied his motion in open court and further specified that the search of "the area within his immediate control . . . . within which [defendant] might have gained possession of a weapon" was permissible and incident to defendant's arrest. Although defendant captions his argument "[t]he trial court erred to the unfair prejudice of [defendant] by entering the written order, out of session . . . [,]" he fails to argue or explain any alleged prejudice. Further, defendant's assignment of error 6, the basis of this argument in his brief to this Court, does not mention prejudice and merely asserts that the entry of the written order out of session "render[ed] it a legal nullity." We overrule this assignment of error.

II

Defendant next argues that the trial court committed prejudicial error and lacked jurisdiction when it entered judgment against him because the clerk misread the case number aloud. This argument is without merit.

After the jury returned its verdict, the transcript indicates that the clerk read the case number as "06-CRS-54078" rather than the correct case number, 07-CRS-54078. The verdict sheet, however, shows the correct case number. Defendant made no objection at trial to this alleged error. Further,

> [a] verdict is a substantial right and is not complete until accepted by the court. The trial judge's power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict. Such action should not be taken except by reason of necessity. If the verdict as returned substantially finds the question so as to permit the court to pass judgment according to the manifest intention of the jury, it should be received and recorded.

State v. Hampton, 294 N.C. 242, 247-48, 239 S.E.2d 835, 839 (1978) (internal citations omitted). Defendant contends that, because of the clerk's misstatement, the trial court should have sent the jury back to "return a 'proper' verdict, consistent with the terms of the indictment."

Here, the verdict sheet returned by the jury showed the correct case number, defendant's name, and the proper charge, and had been duly dated and signed by the foreperson. The jury having returned a "proper" verdict, nothing would have been gained had the

jury been forced to retire again. If the clerk misread the case number aloud, it was harmless error and did not deprive the trial court of subject matter jurisdiction. We overrule this assignment of error.

III

In his final argument, defendant contends the trial court erred in making unsupported findings of fact and erroneous conclusions of law in denying his motion to suppress. We disagree.

Defendant contends that no evidence supported finding of fact 8, that the resident who called police told them defendant had a gun and was threatening people. At the motion hearing, Officer Robinson testified to these specific facts. Defendant also takes issue with denominated finding of fact 26, that "[w]hile Officer Robinson was arresting and searching the Defendant's person, Officer Tolliver conducted a search incident to arrest of the area of the apartment where defendant was found[,]" which he contends is actually a mixed finding of fact and conclusion of law. Even if defendant were correct in this assertion, he does not explain how this was error or prejudicial to him. Likewise, defendant contends that "[w]hile Finding of Fact number 25 is a correct statement of some of the evidence offered during the hearing, it ignores" the maximum distance between defendant and the weapon found. Again, defendant does not explain any alleged error or argue that the finding itself was unsupported by evidence; rather, he merely states that he would have preferred a different or additional

finding from the trial court. Finally, defendant takes issue with the conclusion that

> [u]nder the 4th Amendment, the Defendant having been placed under arrest, officers had the right to conduct a Search Incident to Arrest to any area within which Mr. Rivera might gain entry and access to a weapon or evidence, including the area between the mattress and the box spring of the bed located within an arm's reach of the Defendant when he was arrested.

Defendant contends that the bed being "within an arm's reach of the Defendant when he was arrested" was not supported by the findings of fact. However, finding of fact 25 states "[t]he bed was close enough to the Defendant for him to touch the bed from where he was standing when he was placed under arrest." Defendant also contends that the phrasing "any area within which Mr. Rivera might gain entry and access to a weapon or evidence" indicates that the court applied the wrong standard of law because a search incident to arrest is limited to the area within a defendant's immediate control. However, *Chimel v. California*, the case relied on by defendant in his brief, states:

> it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"-construing that phrase to mean the *area from within which he might gain*

> *possession of a weapon* or destructible evidence.

395 U.S. 752, 763, 23 L.Ed.2d 685, 694 (1969) (emphasis added). We see no meaningful difference in the language used here by the trial court in its conclusion. These assignments of error are overruled.

No error.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).