NO. COA09-467-2

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 39545-47

DAMIEN SMITH

On remand from the North Carolina Supreme Court for reconsideration in light of *In re D.S.*, ___ N.C. ___, ___ S.E.2d ___, No. 273PA09 (N.C. 17 June 2010), we modify our prior published opinion *State v. Smith*, ___ N.C. App. ___, 688 S.E.2d 75 (2010). Appeal by defendant from judgment entered 17 October 2008 by Judge David S. Cayer in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 13 October 2009.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Defendant appeals from convictions entered pursuant to a plea agreement for robbery with a dangerous weapon, first-degree kidnapping, and second-degree sexual offense. For the reasons stated herein, we affirm.

The facts stated as a basis for defendant's plea agreement were as follows. On 18 June 2006, at approximately 5:30 a.m., in

Mecklenburg County, defendant approached the victim, who was walking to work along Lake Mist Drive, grabbed her hair, and pointed a gun at her head. Defendant took the victim's wallet, which contained approximately $5.00, then forced the victim into a grove of trees where he stated he would kill her. Defendant forced the victim to perform fellatio, ejaculated on her pants, and left. The incident was reported immediately. However, it wasn't until defendant was convicted of armed robbery in an unrelated incident that defendant's DNA was determined to match the DNA taken from the victim's pants.

On 26 February 2008, juvenile delinquency petitions were issued charging defendant with first-degree sexual offense, kidnapping, and robbery with a dangerous weapon. At the time he was charged with the above offenses, defendant had a pending charge for assault with a deadly weapon with intent to kill inflicting serious injury. All charges were transferred from juvenile to superior court.

In Mecklenburg County Superior Court, on 30 June 2008, defendant was indicted on charges of first-degree sexual offense, robbery with a dangerous weapon, and first-degree kidnapping. Defendant entered into the aforementioned plea agreement but retained the right to appeal the trial court's order that he enroll in satellite-based monitoring for sex offenders upon the completion of his sentence. Defendant appeals.

On appeal, defendant raises three issues: (I) whether the trial court lacked jurisdiction over defendant when it entered judgment; (II) whether defendant was denied effective assistance of counsel; and (III) whether the trial court erred by sentencing defendant as a level three (III) felon.

I

Defendant first argues that the trial court lacked jurisdiction to enter judgment and commitment where the original juvenile petitions were not filed within thirty days of the receipt of the complaint as required by N.C. Gen. Stat. § 7B-1703. We disagree.

Under, North Carolina General Statutes, section 7B-1703,

> (a) The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.
>
> (b) Except as provided in G.S. 7B-1706 [allowing diversion plans], if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor.

N.C. Gen. Stat. § 7B-1703(b) (2009).

In *In re D.S.*, ___ N.C. ___, ___ S.E.2d ___, No. 273PA09 (N.C. 17 June 2010), our Supreme Court held that the timing requirements under N.C.G.S. § 7B-1703 are not prerequisites for a district court

to obtain jurisdiction in a juvenile delinquency case. In reversing the Court of Appeals and concluding the juvenile delinquency petitions were timely filed in accordance with N.C.G.S. § 7B-1703, the Supreme Court went on to discuss why subject matter jurisdiction was not implicated in G.S. § 7B-1703. The Court observed that "section 7B-1703 does not mention jurisdiction, nor does it indicate that a [juvenile court counselor]'s failure to meet the timing requirements contained therein divests the district court of subject matter jurisdiction." *Id.* at ___, ___ S.E.2d at ___. Further, the Court acknowledged that the statute fails to reference section 7B-1601, "Jurisdiction over delinquent juveniles." *Id.* at ___, ___ S.E.2d at ___. Thus, the Court concluded that our legislature "did not intend for the section 7B-1703 timelines to function as prerequisites for district court jurisdiction over allegedly delinquent juveniles." *Id.* at ___, ___ S.E.2d at ___.

Here, on 26 February 2008, petitions charging defendant as a juvenile delinquent were received by the Mecklenburg County Department of Juvenile Justice and Delinquency Prevention. On 28 March 2008, the petitions were approved for filing. On 4 April 2008, the petitions charging defendant as a juvenile delinquent with first-degree sexual offense, in violation of N.C.G.S. § 14-27.4(a); kidnapping, in violation of N.C.G.S. § 14-39; and robbery with a dangerous weapon, in violation of N.C.G.S. § 14-87, were filed in Mecklenburg County District Court. On appeal, defendant cites this Court's holding in *In re J.B.*, 186 N.C. App. 301, 650

S.E.2d 457 (2007), for the proposition that a juvenile court counselor's failure to file a petition within thirty days of receiving a complaint has a jurisdictional consequence. However, as this argument has been specifically overruled by our Supreme Court, we in turn overrule defendant's argument.

II

Next, defendant argues that he was denied effective assistance of counsel. Defendant contends that his trial counsel failed to raise the specific argument that enrolling him in lifetime satellite-based monitoring for a crime committed prior to the enactment of satellite-based monitoring for sex offenders violated the *ex post facto* guarantees of both the Constitution of the United States and the Constitution of North Carolina. As a result of this failure, defendant asserts that he was prejudiced. We disagree.

> To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's "performance was deficient," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); accord *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Counsel's performance is defective when it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693. A defendant is prejudiced by deficient performance when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698; *see also Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

State v. Wilkerson, 363 N.C. 382, 413, 683 S.E.2d 174, 193 (2009). First, we note that defendant does not present any authority establishing that the North Carolina sex offender registration program violates constitutional prohibitions against *ex post facto* laws. To the contrary, in *Smith v. Doe*, 538 U.S. 84, 155 L. Ed. 2d 164 (2003), the Supreme Court of the United States considered whether the Alaska Sex Offender Registration Act, which required any "sex offender or child kidnapper who [was] physically present in the state [of Alaska]" to register and periodically verify his or her information with local police, violated the *ex post facto* Clause of Article 1, § 10, cl. 1 of the Constitution of the United States and the Due Process Clause of § 1 of the Fourteenth Amendment when applied retroactively. *Id.* at 92, 155 L. Ed. 2d at 176. The Court noted that the Alaska Act was a "Megan's Law," a law making registration for sex offenders mandatory along with community notification, which in some variation had been enacted by every state, the District of Columbia, and the federal government. *Id.* at 89, 155 L. Ed. 2d at 174-75. The Court determined that the Act established a civil regulatory scheme, was nonpunitive, and its retroactive application did not violate the *Ex Post Facto* Clause. *Id.* at 105-06, 155 L. Ed. 2d at 185. Citing *Smith*, this Court has held that North Carolina's sex offender registration programs as set out in Chapter 14, Article 27A also do not violate constitutional prohibitions against *ex post facto* laws. *See State v. Sakobie*, 165 N.C. App. 447, 598 S.E.2d 615 (2004); *State v. White*, 162 N.C. App. 183, 590 S.E.2d 448 (2004); *see also Wooten*,

194 N.C. App. 524, 669 S.E.2d 749 (holding that deficiencies in the performance of the trial counsel in raising an *ex post facto* defense with regard to the defendant's enrollment in lifetime satellite based monitoring did not rise to the level of ineffective assistance of counsel). Therefore, we hold defendant has failed to establish there exists a reasonable probability that, but for counsel's failure to raise the *ex post facto* argument, the result of the proceeding would have been different. Accordingly, we overrule defendant's argument.

III

Last, defendant argues that the trial court committed reversible error by sentencing him as a prior record level three (III). Defendant contends that the State failed to prove his prior convictions. We disagree.

Under North Carolina General Statutes, section 15A-1340.14, "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2009). "A prior conviction shall be proved by . . . (1) [s]tipulation of the parties." N.C.G.S. § 15A-1340.14(f).

In *State v. Eubanks*, 151 N.C. App. 499, 565 S.E.2d 738 (2002), the defendant argued that the trial court erred in determining the defendant had twelve prior record level points and was a prior record level four (IV). *Id.* at 504, 565 S.E.2d at 742. At the sentencing hearing, the State presented only a prior record level

worksheet listing five prior convictions between 1958 and 1990; however, prior to submitting the document, the trial court asked whether the defendant's counsel had seen the worksheet and if there were any objections to it. The defendant's counsel stated that he had seen the prior record level worksheet and that he had no objections. *Id.* at 505, 565 S.E.2d at 742. This Court held that the statements made by the defendant's counsel may reasonably be construed as a stipulation by the defendant that he had been convicted of the charges listed on the worksheet. *Id.* at 506, 565 S.E.2d at 743.

Here, the record contains a prior record level worksheet listing, under the heading "Stipulation," prior convictions for robbery with a dangerous weapon, a class D felony, and conspiracy to commit armed robbery of a business or person, a class E felony. Both convictions occurred on 26 April 2007. The worksheet is signed by defendant's trial counsel. Therefore, we hold that the stipulation by defendant's counsel may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet. It follows that the trial court properly determined, based on the stipulation to the charges on the worksheet, that defendant had a prior record level of three (III). *See* N.C.G.S. § 15A-1340.14. Accordingly, this argument is overruled.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).

Judge WYNN concurred in this opinion prior to 9 August 2010.