NO. COA09-8

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

STATE OF NORTH CAROLINA

v. Union County
Nos. 04 CRS 56730-31
05 CRS 12254

SHELLY DEANNE LOVE MCCLURE,

Defendant.

On writ of certiorari to review the judgment entered 16 May 2007 by Judge Charles P. Ginn and amended by Judge Robert Bell 22 August 2007 in Union County Superior Court. Heard in the Court of Appeals 27 July 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

Winifred H. Dillon for defendant-appellant.

ELMORE, Judge.

On 28 February 2005, defendant was indicted for one count of forgery, one count of uttering a forged paper, one count of misdemeanor larceny, and one count of attempting to obtain property by false pretenses. On 19 September 2005, defendant was indicted for having attained the status of an habitual felon. Defendant was tried on all charges except the habitual felon charge during the 14 May 2007 Criminal Session of Union County Superior Court. At the close of all evidence, the trial court dismissed the larceny

charge, but denied defendant's motion as to the remaining charges. On 15 May 2007, a jury found defendant guilty of the three remaining charges. Thereafter, defendant entered a plea of guilty to having attained habitual felon status. Defendant's plea was made pursuant to a plea arrangement, whereby the parties agreed that defendant's convictions would be consolidated into one judgment for sentencing and that defendant would be sentenced at the bottom of the presumptive range. The State also agreed to dismiss eight other charges pending against defendant.

At sentencing, the trial court found the existence of two mitigating factors and no aggravating factors and concluded that the mitigating factors outweighed the aggravating factors. Thereafter, the trial court imposed a sentence of 70 to 93 months active imprisonment, the lowest possible mitigated sentence for defendant's Class C felony and prior record level of III. Defendant was resentenced on 22 August 2007, because, at the original sentencing, the trial court had erroneously ordered that the habitual felon sentence run concurrently with an unrelated probationary sentence. At resentencing, the trial court imposed a sentence of 70 to 93 months, but corrected the error and ordered the habitual felon sentence to run consecutive to the unrelated probationary sentence. Defendant did not seek immediate appeal from either judgment, but this Court allowed defendant's petition for writ of certiorari on 24 July 2008.

Evidence from trial establishes the following factual background. Defendant's grandmother, Audrey Helms, testified that

defendant visited Ms. Helms on the morning of 23 November 2004. Ms. Helms expected to have her air conditioner repaired that day, so she placed her checkbook in a kitchen cabinet. Ms. Helms maintained a checking account with BB&T. Ms. Helms was ill when defendant visited, so she was lying down on her couch in the living room. Ms. Helms testified that she paid for defendant's car insurance, and defendant visited that day to pick up a check for payment of the insurance. Ms. Helms testified she gave defendant permission to make out a check payable to defendant and to sign the check for Ms. Helms. Ms. Helms explained that she was unable to write the check herself because she was ill.

That same day, Detective David Linto responded to a 911 call at a BB&T branch in Indian Trail regarding an attempt to pass a forged check. Detective Linto spoke with a teller and attempted to call Ms. Helms, the account holder, but was unsuccessful. Detective Linto then called the Matthews branch and spoke to a teller. The Matthews teller confirmed that she had spoken to Ms. Helms and that Ms. Helms had not given defendant authorization to sign or pass the check. Detective Linto went outside, where his partner, Detective Brian Helms, was speaking to defendant. Detective Linto asked defendant about the check, and she admitted that she took the check and signed it without her grandmother's knowledge.

Detective Lori Pierce arrived after the others, and, when she arrived, the other two detectives were speaking to defendant. After the officers arrested defendant, defendant gave a statement

to Detective Pierce, in which defendant stated the following:

> Around 9:30 a.m. I was over at my grandmother's house while on break from my job at Hardee's. While my grandmother, Audrey Helms, was sitting on the couch I went into her cabinet where I knew she kept her checks and I took one. I placed the check into my pocket and then returned to work at Hardee's. Around noon I got off work and drove to the BB&T in Indian Trail. While sitting in the parking lot I wrote the check out to me for $135.75. I then walked into the bank and cashed the check I had just gotten at my grandmother's. While I was waiting at the counter the officers came inside the bank. I understand what I did was wrong and I am sorry for what I did.

Trudy Wynn, a bank teller manager, was working at the BB&T Matthews branch on 23 November 2004. According to Ms. Wynn, defendant came into the bank and tried to cash a check made payable to defendant and written on the account of Audrey Helms. Ms. Wynn observed that the signature on the check did not match the signature on Ms. Helms' signature card, so she contacted Ms. Helms by telephone to make sure Ms. Helms authorized the check. After verifying that she was speaking to Ms. Helms, Ms. Wynn asked if Ms. Helms had written the check. Ms. Wynn testified that Ms. Helms denied writing the check and instructed Ms. Wynn not to cash the check. Ms. Wynn then gave the check back to defendant. After defendant left, Ms. Wynn contacted other BB&T branches in the area to alert them. However, Ms. Helms did not recall speaking with the teller. Ms. Helms testified that she did not recall receiving a telephone call from anyone at the bank when defendant attempted to cash the check.

On appeal, defendant argues only one of her assignments of

error. Defendant contends that the sentence in her case violates the prohibition on cruel and unusual punishment under the Eighth Amendment to the United States Constitution. Defendant argues that, given the facts of her case, the sentence she received pursuant to the Habitual Felon Act, N.C. Gen. Stat. § 14-7.1 *et seq.*, was excessive and grossly disproportionate to the severity of the crime of which defendant was convicted.

As an initial matter, we note that defendant failed to object to her sentence at trial on constitutional grounds and thus has waived appellate review of this argument. In a recent statutory rape case involving an Eighth Amendment challenge, we stated that "[i]t is well-established that appellate courts ordinarily will not pass upon a constitutional question unless it was raised and passed upon in the court below." *State v. Cortes-Serrano*, ___ N.C. App. ___, ___, 673 S.E.2d 756, 765 (2009) (citing *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982); *State v. Dorsett*, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967)). Here, defendant did not object to her sentence on Eighth Amendment grounds, and the trial court therefore did not have an opportunity to pass upon this issue. Thus, defendant did not preserve this issue for appellate review.

However, even assuming *arguendo* that defendant had preserved this issue for appellate review, we do not find that it violates the constitutional ban on cruel and unusual punishment. Our Supreme Court has held that "[o]nly 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." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). Furthermore, we have previously rejected Eighth Amendment challenges to the sentencing scheme under the Habitual Felon Act. *See State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (holding that an active sentence of 90 to 117 months based on a defendant's habitual felon status and the commission of one nonviolent substantive offense did not violate the Eighth Amendment), *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003); *State v. Cates*, 154 N.C. App. 737, 741, 573 S.E.2d 208, 210 (2002) ("Habitual felon laws have withstood scrutiny under the Eighth Amendment to the United States Constitution in our Supreme Court and in the United States Supreme Court."), *disc. review denied*, 356 N.C. 682, 577 S.E.2d 897 (2003). Here, defendant was not sentenced to 70 to 93 months imprisonment solely for forging her grandmother's check. She was sentenced to this term based on her criminal history, including previous convictions for forgery and a conviction for breaking and entering, and her sentence was further increased based on her prior record level. Accordingly, we find that defendant's sentence as an habitual felon is constitutional.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).