NO. COA10-70

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v. Buncombe County
No. 09-CRS-51028

WALLACE FRANKLIN HAZELTON, JR.

Appeal by defendant from judgment entered 14 October 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Tenisha S. Jacobs, for the State.

Carol Ann Bauer for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Wallace Franklin Hazelton, Jr., ("defendant") appeals from a judgment entered pursuant to a jury verdict finding him guilty of failing to appear in court on a felony charge. On appeal, defendant contends that the trial court erred by denying defendant's motions to dismiss the charge at the close of the State's evidence and at the close of all the evidence. Defendant also contends that the trial court erred by denying defense counsel's motion to withdraw at the commencement of the trial and at the sentencing hearing. After careful review, we find no error.

I. Jurisdiction and Standard of Review

As the judgment from which defendant appeals is a final judgment, this Court has jurisdiction to hear the appeal under N.C. Gen. Stat. § 7A-27(b) (2009). We review the two issues to which defendant assigns error under different standards of review. The trial court's denial of a defendant's motion to dismiss for insufficient evidence in a criminal proceeding is a question of law, which we review *de novo*. *See State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Absent a constitutional violation, we review the trial court's denial of defense counsel's motion to withdraw for abuse of discretion. *State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981).

II. Factual Background

On 22 September 2009, defendant was tried before a jury in Buncombe County Superior Court, Judge Alan Z. Thornburg presiding, for violating N.C. Gen. Stat. § 15A-543, failure to appear on a felony. On the day of the trial and prior to commencement of the proceedings, defendant's appointed counsel made a motion to withdraw prompted by a handwritten note from defendant requesting that he withdraw. Defendant also filed a *pro se* motion to have his attorney removed, claiming his attorney had insisted defendant sign a plea agreement, refused to discuss a defense, was "loud and hostile" on several occasions, and failed to provide defendant with a complete packet of evidence obtained during discovery. The trial court denied defense counsel's motion to withdraw.

During the course of his trial, defendant made motions to dismiss for insufficient evidence at (1) the close of State's

evidence and (2) the close of all evidence. The trial court denied both motions. The jury returned a unanimous verdict finding defendant guilty of failure to appear on a felony.

The evidence presented at trial tended to show the following: defendant was arrested for the felony of possession of a firearm by a felon on 20 January 2009. Defendant was released on 3 March 2009 on a cash bond posted by relatives in Charleston, South Carolina. As a condition of his release, defendant signed a Supervised Pretrial Release Agreement in which defendant agreed to call and speak with the Supervised Pretrial Release Coordinator every Tuesday until all of his cases were disposed; to "continue to come to court until all of [his] cases [were] disposed"; and to inform the Supervised Pretrial Release Office if he changed his address, phone number, or left town for any reason.

Defendant's relatives also provided defendant money for a bus ticket and an offer to live with them in Charleston pending the conclusion of his trial. Defendant accepted the offer and traveled to Charleston on 4 March 2009. Defendant was subsequently indicted by a Buncombe County Grand Jury on 9 March 2009 for possession of a firearm by a felon.

On 16 March 2009, defendant returned to Buncombe County for a hearing on a misdemeanor charge unrelated to the charge of possession of a firearm by a felon. An attorney at the Buncombe County Public Defender's Office, Ms. Courtney Booth, represented defendant on both charges. Following his hearing on the misdemeanor charge, defendant spoke with Ms. Booth about his

pending court date for the felony charge. Ms. Booth asked defendant to schedule a telephone interview with her through the Public Defender's Office, which defendant scheduled for "the following Tuesday at two o'clock." He then returned to South Carolina. When defendant called at the scheduled time, Ms. Booth was not in her office. During the call, however, defendant inquired as to when he was scheduled to appear in court; he was told to call back on Friday. According to defendant, he called his attorney's office on Friday, as instructed, but the record lacks any evidence of what may have taken place during the phone call.

The State's evidence tended to show that the Buncombe County District Attorney's Office produced and published a hearings calendar for the 30 March 2009 Session of the Buncombe County Superior Court. The calendar listed defendant's name, the name of his attorney, defendant's court date of 30 March 2009, and courtroom 710. The State also presented evidence that defendant's name was "called out" in courtroom 710 on the morning of his hearing and that he failed to appear. As a result, an order for defendant's arrest was issued on 3 April 2009.

At the close of the State's evidence, defendant moved to dismiss for lack of evidence that his failure to appear was willful. The trial court denied defendant's motion. Defendant then presented evidence, including his own testimony, alleging that his failure to appear in court on 30 March 2009 was not willful.

An employee of the Public Defender's Office, Ms. Angie Cook, testified for defendant that she attempted to reach him by phone on

20 March 2009 to inform him of his court date. Ms. Cook testified that she called the number defendant left with her office and spoke with defendant's cousin. Ms. Cook asked the cousin to tell defendant of his 30 March 2009 court date; the cousin replied that she would give him the information.

Defendant testified that he did not receive the message about the 30 March 2009 court date until the day of or the day after the hearing. Defendant explained that, after moving to Charleston on 4 March 2009, he had a disagreement with his cousin, and he moved out of his cousin's home and into a shelter in downtown Charleston. The record is unclear as to the date defendant moved into the shelter. Defendant admitted, however, that when he moved he did not call his attorney to provide her with a phone number where he could be reached.

Defendant's cousin did reach defendant by phone on either 30 or 31 March 2009 to relay the message about his 30 March 2009 court date. When defendant realized he missed his hearing, he assumed the court had issued a warrant for his arrest. Defendant did not, however, call his attorney or turn himself over to the police, and "figured eventually [he]'d be arrested for it." On 22 June 2009, defendant was arrested for failure to appear at his 30 March 2009 hearing when he was stopped at a police checkpoint in South Carolina.

At the close of all the evidence, defendant renewed his motion to dismiss for lack of evidence that his failure to appear was willful. The motion was again denied. The jury returned a unanimous

verdict finding defendant guilty of failure to appear on a felony.

On 14 October 2009, at the commencement of the sentencing hearing, defendant's attorney renewed his motion to withdraw citing defendant's intention to file a grievance against him with the North Carolina State Bar. The motion was again denied. After both parties presented arguments, defendant was sentenced to an active sentence of seven to nine months, within the presumptive range, and with credit for time served. Defendant gave timely notice of appeal.

III. Analysis

A. Motion to Dismiss for Insufficient Evidence

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (citation omitted). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994). "'[I]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.'"

State v. Abshire, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation omitted).

N.C. Gen. Stat. § 15A-543(b)(1) (2009) makes a willful failure to appear before any court as required a felony offense when a defendant was released in connection with a felony charge. To support a violation, the State must prove four elements: "(1) the defendant was released on bail . . . in connection with a felony charge against him . . . ; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful." *State v. Messer*, 145 N.C. App. 43, 47, 550 S.E.2d 802, 805 (2001). Defendant agrees with this statement of the law. Furthermore, defendant does not contest that the State offered substantial evidence as to the first three elements of the offense. Defendant's sole assignment of error is that the State failed to offer substantial evidence of "willfulness."

"'Willful' as used in criminal statutes means the wrongful doing of an act without justification or excuse . . . . 'Willfulness' is a state of mind which is seldom capable of direct proof, but which must be inferred from the circumstances of the particular case." *State v. Davis*, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987) (citation omitted).

In this case, defendant was arrested for the felony of possession of a firearm by a felon on 20 January 2009 and subsequently indicted by a Buncombe County Grand Jury. Prior to being released on bond on 3 March 2009, defendant signed the

Supervised Pretrial Release Agreement which in part reads: "I will come to court on 3-4-09 in courtroom #2 and will continue to come to court until all of my cases are disposed."

The State produced evidence that an administrative calendar was timely published showing that defendant was to be present in Buncombe County Superior Court on 30 March 2009. The State also produced evidence that defendant was not present in court on that date; defendant was called but failed to appear. The State rested. Defendant then made a motion to dismiss at the close of the State's evidence. This motion was denied.

Defendant has appealed the denial of this motion to dismiss. Defendant chose, however, to put on evidence in support of his case and thereby waived any objection he may have had to the denial of this motion. N.C. R. App. P. 10(a)(3) (2010). Therefore, we do not consider the denial of his first motion to dismiss and consider only the motion to dismiss made at the close of all evidence. *See State v. Worley*, __ N.C. App. __, __ n.6, 679 S.E.2d 857, 860 n.6, *disc. review withdrawn*, 363 N.C. 589, 684 S.E.2d 159 (2009).

Defendant's evidence tended to show that his pretrial release was obtained by cash bond provided by defendant's family in Charleston, South Carolina, where defendant went to live pending his trial. Defendant did attend a hearing in Buncombe County on 16 March 2009 for misdemeanor charges unrelated to the felony charges pending in superior court. While in North Carolina, defendant inquired of his counsel what date he was due to return for superior court and arrangements were made for future scheduled telephone

conferences. These specific attorney-client communications were not revealed.

An employee of the public defender's office called the number she was given for defendant and left word with his cousin that defendant was due in court on 30 March 2009. Unfortunately, defendant was no longer a resident at that home, and the cousin who answered the phone did not provide the public defender's office with this information or another number where defendant could be reached.

Defendant contends that these actions provide evidence that the failure to appear was not willful in nature but accidental and the product of miscommunication between counsel and client. While we agree that these actions, if believed, are some evidence of lack of willfulness, this evidence is not sufficient evidence to sustain a motion to dismiss. Pursuant to defendant's motion to dismiss, the trial court's duty was to determine whether the State produced relevant evidence that a reasonable mind might accept as adequate to support the conclusion that defendant's failure to appear was willful.

By the terms of his pretrial release agreement, defendant had a duty to maintain contact with the Supervised Pretrial Release Office and inform the staff of any change in his address or phone number during his release. Defendant further agreed to appear in court until all of his cases were disposed, and he acknowledged that failure to meet these conditions could result in his arrest.

Defendant testified that after moving out of his cousin's home he failed to call his attorney to provide her with a phone number where he could be reached. Although defendant was living in a shelter, his testimony shows he had access to a phone as his cousin was able to reach him by phone to relay the message regarding his trial date.

Considering this evidence in the light most favorable to the State, we conclude the evidence was sufficient to support the conclusion that defendant's failure to appear for his trial was willful. Thus, the trial court did not err by denying defendant's motion to dismiss for insufficient evidence. Defendant's argument is without merit.

B. Defense Counsel's Motion To Withdraw

The second issue on appeal is whether the trial court abused its discretion in failing to allow defense counsel to withdraw. The decision as to whether counsel should be allowed to withdraw is within the discretion of the trial court and may only be overruled for abuse of discretion. *State v. Skipper*, 146 N.C. App. 532, 537, 553 S.E.2d 690, 693 (2001).

In the present case, defendant filed a *pro se* motion arguing that his court-appointed attorney should be removed because of the attorney's insistence that defendant sign a plea agreement, his refusal to discuss a defense, his demeanor, and his failure to submit to defendant evidence obtained during discovery. Defendant's attorney also moved the court to withdraw as counsel immediately before the start of the trial, in accordance with the

"General Rules of Practice," based upon a note handed him by defendant requesting him to make such a motion. At that time, defendant addressed the court and reiterated that his attorney would not "pursue any kind of defense" and was "hot headed" when asked questions. Defendant told the court that he did not "feel comfortable" with his attorney.

While an indigent defendant has a right to be represented by competent court appointed counsel in a criminal trial, this right does not include "the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976). While the court may remove counsel for conduct which is so grievous as to amount to "ineffective" assistance of counsel, we see no facts, argument, nor case forwarded on appeal which would convince us that the trial court abused its discretion in denying this motion. Accordingly, we hold that defendant's assignments of error are without merit.

IV. Conclusion

We conclude the trial court did not err in dismissing defendant's motions to dismiss for insufficient evidence, nor in refusing to permit counsel to withdraw.

No error.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).