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NO. COA13-669

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Anson County  
No. 10 CRS 1780; 11 CRS 1262

JAMES CHRISTOPHER GATEWOOD

Appeal by the State from an order entered 14 January 2013 by Judge Tanya T. Wallace in Anson County Superior Court. Heard in the Court of Appeals 6 November 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State-appellant.*

*Hoang Lam for defendant-appellee.*

McCULLOUGH, Judge.

The State appeals the trial court's granting of defendant's motion for appropriate relief, moving the court to vacate his habitual felon conviction and sentence. Based on the reasoning set forth below, we affirm the order of the trial court.

I. Background

On 4 October 2010, defendant James Christopher Gatewood was indicted for attaining habitual felon status. On 15 November 2011, defendant was charged by a bill of information with obstruction of justice.

At the plea hearing held on 15 November 2011, defendant pled guilty to obstruction of justice and stipulated to having attained habitual felon status based on three or more previous felony convictions outside of North Carolina. Pursuant to the plea arrangement, the State agreed to dismiss numerous other charges and defendant agreed to a mitigated range sentence at a prior record level IV for a Class C Felony. Defendant was sentenced to a term of sixty-six (66) to eighty-nine (89) months.

On 18 October 2012, defendant filed a motion for appropriate relief ("MAR") moving the court to vacate his habitual felon conviction and sentence. Defendant argued that "two of the three predicate felonies used to establish his habitual felon status are New Jersey convictions that are not felonies under North Carolina habitual felon law." Because his New Jersey convictions were not felonies under North Carolina law, defendant argued that his fatally defective indictment failed to allege habitual felon status and failed to confer

jurisdiction upon the trial court. Defendant also argued that the State failed to provide a factual basis for defendant's guilty plea for attaining habitual felon status and argued that he was denied effective assistance of counsel.

On 14 January 2013, the trial court granted defendant's MAR and entered an order finding the following, in pertinent part:

6. Movant's plea to habitual felon status was based on three felony convictions, two of which were convictions from the State of New Jersey. . . .

. . . .

8. That to be sentenced as an habitual felon, a person must have been convicted or pled guilty to an offense which is a **felony** under the laws of the State . . . regardless of the sentence imposed.

. . . .

10. By the indictment, the last New Jersey conviction does not allege a felony conviction.

11. The indictment is facially flawed.

Thereafter, the trial court concluded that it lacked jurisdiction to accept a plea in defendant's matter, vacated defendant's habitual felon conviction, and reinstated the other charges.

On 12 March 2013, the State filed a petition for writ of certiorari with this Court to review the 14 January 2013 order. Our Court granted the State's petition on 26 March 2013.

## II. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted).

## III. Discussion

The State's sole argument on appeal is that the trial court erred by granting defendant's MAR. Specifically, the State argues that the trial court erred by entering findings of fact numbers 10 and 11. The State also contends that our present case is distinguishable from *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008), or in the alternative, that *Moncree* was wrongly decided.

First, we will address the State's challenges to finding of fact number 10 which states the following:

10. By the indictment, the last New Jersey conviction does not allege a felony

conviction.

Pursuant to section 14-7.1 of the North Carolina General Statutes, "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1 (2011). This section defines a felony as "an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed." *Id.*

An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (2011).

In the case *sub judice*, defendant's indictment provided the following:

[Defendant] is a habitual felon in that on or about March 27, 2001 [defendant] did commit the felony of possession (of the 3<sup>rd</sup> degree) of a controlled dangerous substance, cocaine, schedule II, with the intent to

distribute the same in violation of N.J.S., 2C:35-5a(1) and N.J.S. 2C:35-5b(3) and that on or about April 12, 2002 [defendant] was convicted of the felony of possession of a controlled dangerous substance, cocaine, schedule II (01-05-00569) with the intent to distribute the same in the Superior Court of Morris County, New Jersey.

and that on or about November 22, 2004 [defendant] did commit the felony of Forgery in the first degree in violation of O.C.G.A. (16-10-20) and that on or about March 2, 2006 [defendant] was convicted of the felony of forgery in the first degree (2005CR0056) in the Superior Court of Johnson County, Georgia.

And that on or about June 12, 2002, [defendant] did commit the felony of Theft in violation of N.J.S. 2C:20-3 and that on or about August 16, 2002 [defendant] was convicted of Theft (02-07-0871-A) in the Superior Court of Morris County, New Jersey.

After thorough review of defendant's habitual felon indictment, it is clear that the last New Jersey conviction does not allege a felony conviction. The indictment merely states that on 16 August 2002, defendant was convicted of theft in the Superior Court of Morris County, New Jersey. The indictment fails to allege that defendant was convicted of or pled guilty to a felony offense in violation of N.C.G.S. § 14-7.1. Therefore, we hold that the trial court's finding of fact number 10 is supported by competent evidence.

Next we address finding of fact number 11, which we deem as a conclusion of law. See *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (stating that findings of fact which are essentially conclusions of law will be treated as such on appeal). Here, the trial court concluded that “[t]he indictment is facially flawed.”

“[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time.” *State v. McGee*, 175 N.C. App. 586, 587-88, 623 S.E.2d 782, 784 (2006) (citation omitted). An indictment is fatally defective when it fails on the face of the record to charge an essential element of the offense. *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982).

We find *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008) to be controlling on this issue and reject the State’s contention that our present case is distinguishable. In *Moncree*, our Court held that although the defendant’s habitual felon indictment listed three predicate felony offenses, one of which occurred in New Jersey, the defendant’s New Jersey conviction was considered a high misdemeanor and not a felony. Therefore, “the [defendant’s] habitual felon indictment did not

set forth three predicate felony offenses as required pursuant to N.C. Gen. Stat. § 14-7.1, and defendant did not attain habitual felon status." *Id.* at 233, 655 S.E.2d at 472. Because our Court held that the *Moncree* defendant did not attain habitual felon status, it further held that "the indictment did not set forth the necessary requirements specified in N.C. Gen. Stat. § 14-7.3, and the indictment failed to confer jurisdiction upon the trial court." *Id.* Our Court concluded that it was error to sentence the defendant as an habitual offender and remanded for resentencing. *Id.* at 234, 655 S.E.2d at 472.

In the present case, as previously discussed, the last New Jersey offense listed in defendant's habitual felon indictment did not indicate that it was a felony. To the contrary, the New Jersey charging documents and judgments did not indicate that the two prior offenses were felonies but that they were offenses of the third degree. Further, the trial court made a finding and the record reflects that the trial court received an affidavit from Joseph M. Napurano, Esq., Assistant Prosecutor of Morris County, New Jersey. The affidavit stated that defendant was convicted of two crimes - Possession of a Controlled Dangerous Substance with the Intent to Distribute and Theft of



Movable Property - which were both classified as crimes of the third degree.

Based on our Court's reasoning in *Moncree*, we similarly hold that defendant's indictment failed to charge three predicate felony offenses, an essential element of habitual felon status as required under N.C.G.S. § 14-7.1. Because defendant did not attain habitual felon status, the indictment "did not set forth the necessary requirements specified in N.C. Gen. Stat. § 14-7.3, and the indictment failed to confer jurisdiction upon the trial court." *Moncree*, 188 N.C. App. at 233, 655 S.E.2d at 472.

Accordingly, we hold that the trial court did not err by granting defendant's MAR and affirm the order of the trial court.

Furthermore, we reject the State's argument that *Moncree* was wrongly decided as we are bound by prior decisions of this Court on the same issue of law. See *In the Matter of the Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

Affirmed.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).