NO. COA14-582
NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v. Wake County
No. 11 CRS 012449

JEAN ARTHUR DARCELIEN

Appeal by defendant from judgment entered 25 April 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Ellen A. Newby, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

BRYANT, Judge.

Where the State presented sufficient evidence of defendant's willful failure to appear before the court for trial upon notice of his court date, after being released from pretrial custody pursuant to Article 26, Chapter 15A of our General Statutes, the trial court properly denied defendant's motion to dismiss the charge of felonious failure to appear.

On 15 May 2009, an arrest warrant was issued for defendant Jean Arthur Darcelien on the charge of felony worthless check. The warrant was based on the accusation that defendant issued a check in the amount of $9,200.00 payable to Friendship Used Clothing knowing that he did not have sufficient funds to satisfy the check upon request. Defendant was arrested on 23 October 2009. A magistrate set defendant's conditions for release as a secured bond in the amount $20,000.00, and the release order stated that defendant was "ORDERED to appear before the Court as provided above [27 October 2009] and at all subsequent continued dates." The release order further indicated that if defendant failed to appear, he would be arrested and "charged with the crime of willful failure to appear." According to an Assistant Clerk of Wake County Superior Court, the original release order was changed to allow defendant to participate in a pretrial release program that would allow a person without a criminal record to be released without having to post a bond. However, there were no other changes to the release order. Defendant was released from jail without having to post a bond.

On 25 January 2010, defense counsel filed a motion to continue defendant's trial for the reason that "[defendant] and

his family are from Haiti. Several family members were killed in the recent earth quake [and] [defendant] needs to travel there to tend to their affairs." The motion was allowed and the matter continued until 8 March 2010. On 8 March 2010, defendant did not appear for trial. Defense counsel informed the court that defendant was still in Haiti attending to his family and business; his stay was extended beyond his original expectations; and defendant would return within ten days and be available to attend court. On 8 June 2010, defendant was indicted on the charge of felony worthless check and waived his arraignment on the felony charge.

On 7 February 2011, after defendant failed to appear that day for trial on the felony worthless check charge, an order for arrest was issued against defendant for failure to appear. Defendant was arrested on 7 September 2011 and held under a $40,000.00 secured bond.

On 15 March 2011, the State dismissed the felony worthless check charge against defendant with leave to refile because defendant had failed to appear and because "[defendant] was out of the country per [defendant's] attorney." The felony worthless check charge was reinstated 31 October 2011. On 24

January 2012, defendant was indicted on the charge of felonious failure to appear for trial on 7 February 2011.

Defendant's trial on the charge of felonious failure to appear was held in April 2013 in Wake County Superior Court. Defendant was found guilty by a jury, and the trial court entered judgment in accordance with the jury verdict. Defendant was sentenced to a term of 6 to 8 months, but the trial court suspended the sentence and placed defendant on supervised probation for a period of 18 months. Defendant appeals.[1]

On appeal, defendant contends that the trial court erred by denying his motion to dismiss the charge of felonious failure to appear because the State failed to establish that (A) defendant was released from jail pursuant to Article 26 of our General Statutes, (B) he was required to appear for trial on 7 February 2011, and (C) his absence was willful. We disagree.

> In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. "Substantial evidence" is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In reviewing

[1] On 30 August 2013, the charge of felony worthless check was dismissed with the notation that defendant had paid restitution in full.

> challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.

State v. Goble, 205 N.C. App. 310, 312, 695 S.E.2d 152, 154 (2010) (citations and quotation omitted).

> [T]o survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence [that]: (1) the defendant was released on bail pursuant to Article 26 [of Chapter 15A] of the North Carolina General Statutes in connection with a felony charge against him or, pursuant to section 15A-536, after conviction in the superior court; (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) (citation omitted).

A

We first consider whether defendant was released from custody pursuant to Chapter 15A, Article 26 of the General Statutes in connection with a felony charge. Article 26 is entitled "Bail" and comprises sections 15A-531 to -544.

> [Pursuant to 15A-534,] [i]n determining conditions of pretrial release a judicial official must impose at least one of the following conditions:
>
> (1) Release the defendant on his written promise to appear.

> (2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
>
> (3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
>
> (4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.
>
> (5) House arrest with electronic monitoring.

N.C. Gen. Stat. § 15A-534(a) (2013).

Here, defendant was initially required to execute a secure bond in the amount of $20,000.00 pursuant to N.C. Gen. Stat. § 15A-534(a)(4). Defendant's original release order was changed from a $20,000.00 secured bond to either pretrial release, if qualified, or a $20,000.00 secured bond according to an Assistant Clerk of Wake County Superior Court.

> Q. Do you know if at that time that the defendant ever posted bond?
>
> A. He did not post the bond. It appears that he was released on a pretrial release program.

The Assistant Clerk testified to the operation of the pretrial release program as follows:

> A. Pretrial release program is usually for someone that doesn't have a record, or

> they have a record, it's not -- maybe something that's traffic or something related. It's not a bad criminal record, but they were released pretty much to this program and kind of supervised through this program in the county.
>
> They don't have to post their original bond that was ordered. It's just kind of a different type of supervision to make sure the defendant comes to court.
>
> Q. But a person who is on pretrial release would be out of custody?
>
> A. They would be out of custody.
>
> Q. So the defendant at that time, whatever point he joined the pretrial release program, would have been released from jail?
>
> A. Yes.

See N.C. Gen. Stat. § 15A-535(b) (Issuance of polices on pretrial release) ("In any county in which there is a pretrial release program, the senior resident superior court judge may, after consultation with the chief district court judge, order that defendants accepted by such program for supervision shall, with their consent, be released by judicial officials to supervision of such programs, and subject to its rules and regulations, in lieu of releasing the defendants on conditions (1), (2), or (3) of G.S. 15A-534(a)."). Defendant argues that he was not released in accordance with any of the conditions

enumerated under General Statutes, section 15A-534(a) and, therefore, could not have been released pursuant to Article 26. However, as testified to by the Assistant Clerk of Court, Wake County has a pretrial release program that appears to be administered pursuant to 15A-535(b). Defendant's bond was first set as a secured bond, then changed to an optional bond which allowed "pretrial release, if [defendant] qualified." It appears defendant qualified and was released without having to post bond pursuant to the pretrial release program under 15A-535(b), Article 26.

Viewed in the light most favorable to the State, this evidence supports a finding that defendant was released from custody pursuant to the Wake County pretrial release program pending trial in accordance with N.C. Gen. Stat. § 15A-534(a) and -535(b), within Article 26 of Chapter 15A. *See Goble*, 205 N.C. App. at 312, 695 S.E.2d at 154.

B

Next, defendant argues that the State failed to establish he was required to appear before the trial court on 7 February 2011. Specifically, defendant contends that the transfer of his case from district to superior court (wherein he was indicted on the charge of felony worthless check) was insufficient as the

indictment in superior court was fatally defective. Defendant contends that the indictment fails to allege he had insufficient funds on deposit to cover the check and knew he had insufficient funds.

On appeal, defendant does not contest that he was provided notice of the 7 February 2011 trial date. Instead, defendant shifts his argument to assert that he cannot be found guilty of felonious failure to appear because the trial court lacked jurisdiction to conduct a trial against him on the charge of felony worthless check; defendant's new assertion amounts to a collateral attack. "[A] jurisdictional challenge may only be raised when an appeal is otherwise proper . . . ." *State v. Pennell*, 367 N.C. App. 466, 471—72, 758 S.E.2d 383, 387 (2014) (citation omitted). Defendant did not appeal from any order regarding the felony worthless check charge, and in fact the charge was dismissed upon defendant's payment of restitution. Therefore, defendant's argument regarding the felony worthless check indictment is overruled as an improper challenge to his conviction for felonious failure to appear.

Further, we note that the record does establish defendant was required to appear before the trial court. In the pretrial conditions for release, dated 27 October 2009, the order states

"you are ORDERED to appear before the Court as provided above and at all subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear."

C

Lastly, defendant argues that the State failed to prove defendant's absence was willful. Defendant contends the State showed defendant's case was listed on the calendar but presented no evidence anyone communicated directly with defendant about his court date. Defendant's argument is without merit.

"A person once in court by service of summons or subpœna, or by giving bond for his appearance in a criminal action, must continue to appear, according to the precept of the court, until discharged[.]" *State v. Eure*, 172 N.C. 874, 876, 89 S.E. 788, 789 (1916). "Once [a] defendant has notice to appear in court and a trial date has been properly calendered [sic], it is [the] defendant's responsibility to stay informed of his court date, whether through contacting the office of the clerk of court or through counsel." *State v. Howell*, No. COA01-184, 2002 N.C. App. LEXIS 2108, *7 (N.C. App. July 2, 2002) (unpublished). Accordingly, we overrule defendant's argument.

No error.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).