IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-436

Filed: 1 November 2016

Forsyth County, Nos. 99 CRS 37337-40

STATE OF NORTH CAROLINA

v.

ROBERT WAYNE STANLEY

Appeal by defendant allowed by writ of certiorari to review order entered 23 February 2015 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 3 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

TYSON, Judge.

Robert Wayne Stanley ("Defendant") appeals from order denying his motion for appropriate relief ("MAR"). Defendant argues the trial court erred by summarily denying his MAR. We conclude the trial court's denial of the MAR was error, vacate the order, and remand for resentencing.

I. Background

On 18 November 1997, Defendant approached Cynthia Parker ("Parker") as she sat inside an automobile with Alfredo Arrendondo ("Arrendondo"), Fidel Mosqueda ("Mosqueda"), and Mosqueda's girlfriend. Defendant asked Arrendondo why he was sitting with Parker. Arrendondo responded that Parker was his girlfriend.

An argument ensued during which Defendant told Arrendondo that Parker was "his girlfriend" and to "watch his back." Later that day, Defendant saw the car Parker had been in with Arrendondo and said to his roommate "I'm going to get that b--ch," and "I'm going to blow her trailer up with her and that wetback in it."

On 19 November 1997, Defendant drove to the Bass Trailer Park, where Parker and Arrendondo lived, with Benjamin McClary ("McClary") and Dwight Evans ("Evans"). McClary testified that he and Evans knocked on the door of the trailer, but that no one came to the door. McClary further testified Defendant was angry and said he was going to "get their a--es," "blow their a--es up," and "make a bomb."

David Smart ("Smart") testified pursuant to a plea agreement with the State that he had accompanied Defendant and Evans on 19 November 1997. Smart admitted he had purchased gasoline for Defendant, and Defendant and Evans assembled a Molotov cocktail with the gasoline, an Olde English 800 Malt liquor bottle, rocks, and a rag. Smart also testified Defendant drove to the trailer park where Parker and Arrendondo lived. Smart and Defendant exited the car and walked

up to Parker and Arrendondo's trailer, while Evans remained inside the car. Defendant told Smart to throw the Molotov cocktail into the trailer. When Smart refused, Defendant lit the Molotov cocktail and threw it through the window into the trailer**.** Mosqueda and Francisco Lara ("Lara") were located inside the trailer when the Molotov cocktail exploded. Mosqueda received third-degree burns over seventy percent of his body and Lara received second-degree burns over three percent of his body.

On 19 January 2001, Defendant was convicted by a jury of attempted first-degree murder, first-degree arson, two counts of malicious injury by use of an explosive or incendiary device, and manufacturing a weapon of mass destruction. Defendant was sentenced in the aggravated range based upon the factor "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy," codified in N.C. Gen. Stat. § 15A-1340.16(d)(2).

Defendant did not admit to this aggravating factor nor was it submitted to a jury. Based in part on two prior misdemeanor convictions for communicating threats and damage to personal property in 84 CR 000484 and 89 CR 12300 respectively, the trial court found Defendant had six prior record points and a prior record level III for felony sentencing purposes.

Defendant was sentenced in the aggravated range to a minimum of 276 months and a maximum of 341 months for attempted first-degree murder to run

consecutively with a minimum of 129 months and a maximum of 164 months for first-degree arson. Defendant was also sentenced to a minimum of 26 months and a maximum of 32 months for manufacturing a weapon of mass destruction to run concurrently with the sentences for attempted murder and arson.

Defendant was further sentenced to a minimum of 129 months and a maximum of 164 months on each count of malicious injury by use of an explosive or incendiary device, to run consecutively with each other and the sentence received for manufacturing a weapon of mass destruction, but to run concurrently with the sentences imposed for attempted murder and arson.

Defendant appealed his convictions to this Court in 2001. We found no error in the trial court's judgments. *State v. Stanley*, 150 N.C. App. 717, 565 S.E.2d 112 (2002) (unpublished), *disc. review denied* 356 N.C. 174, 569 S.E.2d 277 (2002).

On 8 June 2011, Defendant filed a motion for appropriate relief ("2011 MAR") in the Forsyth County District Court. The 2011 MAR requested the court to set aside the two misdemeanor convictions in 84 CR 000484 and 89 CR 12300, which had been used in calculating his prior record level for his 2001 felony sentences. After this motion was denied, Defendant successfully petitioned this Court for a writ of certiorari. On 3 October 2013, this Court vacated the district court's denial of his motion for appropriate relief and remanded the matter to the superior court for further proceedings.

On 29 April 2014, Judge John O. Craig conducted a hearing on Defendant's motion for appropriate relief in the Forsyth County Superior Court. Judge Craig determined Defendant had been unconstitutionally denied counsel in both 84 CR 000484 and 89 CR 12300. Judge Craig also concluded those convictions could not be used to calculate Defendant's prior record level, and Defendant should be sentenced as a prior record level II, instead of a prior record level III offender. In that hearing, Defendant also orally asserted through counsel that he had been improperly sentenced in the aggravated range for his 2001 convictions, because the aggravating factor had not been stipulated to or submitted to the jury. Judge Craig concluded Defendant's contention regarding the aggravating factor was not properly before the court and imposed prior record level II aggravated sentences "in keeping with [the trial judge's] original intent."

On 15 February 2015, Defendant filed a motion for appropriate relief ("2015 MAR"), alleging, among other things, that the new sentences imposed for his 2001 convictions by Judge Craig in resentencing in 2014 are improper. Defendant alleges Judge Craig failed to make a *de novo* determination of aggravating and mitigating factors, and erroneously imposed sentences in the aggravated range, using an aggravating factor not stipulated to or found beyond a reasonable doubt by a jury in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004).

On 23 February 2015, Judge L. Todd Burke summarily denied Defendant's 2015 MAR on the basis that "*Blakely v. Washington* does not retroactively apply to a

conviction prior to June 24, 2004." On 27 April 2015, Defendant petitioned this Court for a writ of certiorari to review Judge Todd's order denying the 2015 MAR. This Court allowed the petition and issued the writ on 14 May 2015.

II. Issue

Defendant asserts the new sentences he received from Judge Craig in 2014 were improperly imposed in the aggravated range. He argues the aggravating factor neither was stipulated to nor proven to a jury beyond a reasonable doubt as required by *Blakely v. Washington,* 542 U.S. 296, 159 L. Ed. 2d 403. Defendant also argues Judge Burke erred by concluding *Blakely's* requirements did not retroactively apply to his post-*Blakely* resentencing of a pre-*Blakely* conviction prior to June 24, 2004, and the court should have granted his MAR.

III. 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) (quoting *State v. Stevens,* 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).

The trial court's findings of fact "are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal [*de novo*]." *State*

v. Lutz, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quotation marks and citations omitted).

IV. Analysis

A. Denial of MAR

To determine whether Defendant's 2015 MAR was appropriately denied, we must first determine whether *Blakely* applies to Defendant's case when Defendant was resentenced in the aggravated range in 2014, and if so, whether the resentencing court erred in not submitting the unstipulated aggravating factor to a jury.

Blakely explained the Supreme Court of the United States' holding in *Apprendi v. New Jersey* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490, 147 L. Ed. 2d 455 (2000). In *Blakely*, the Court held that, for *Apprendi* purposes, the definition of "prescribed statutory maximum" is not the high-end that a sentence may not exceed, but "the maximum sentence a judge may impose solely on the basis of the facts reflected in the verdict or as admitted by the defendant." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413 (emphasis omitted). In North Carolina, the "prescribed statutory maximum" for *Blakely* purposes is the highest sentence which may be imposed within the presumptive range. *See State v. Battle*, 182 N.C. App. 169, 170, 641 S.E.2d 352, 354 (2007).

In *State v. Hasty*, 181 N.C. App. 144, 147, 639 S.E.2d 94, 96 (2007), this Court held that *Blakely* was not retroactively applicable to all judgments, and only applied to cases pending on direct appeal or not yet final on 24 June 2004, the date of the *Blakely* decision. "A case is 'final' when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied." *State v. Wilson*, 154 N.C. App. 127, 130, 571 S.E.2d 631, 633 (2002), *aff'd*. 357 N.C. 498, 586 S.E.2d 89 (2003) (internal quotation marks and citations omitted).

To determine whether Defendant's case is "final" for *Blakely* purposes, we note this Court previously held where a defendant was convicted prior to *Blakely*, but an aggravating factor was not stipulated to or submitted to a jury to be found beyond a reasonable doubt in a resentencing hearing post-*Blakely*, *Blakely* still applies to the resentencing hearing. *State v. Harris*, 185 N.C. App. 285, 648 S.E.2d 218 (2007).

To also determine whether Defendant's case is "final," we review the *de novo* nature of resentencing hearings in general. As established in North Carolina, "[f]or all intents and purposes the resentencing hearing is de novo as to the appropriate sentence." *State v. Morston*, 221 N.C. App. 464, 469, 728 S.E.2d 400, 405 (2012) (citations omitted). Further, "[o]n resentencing the [court] makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors." *Id.*

Here, the State argues Defendant's 2014 resentencing hearing was not required to be *de novo,* but was limited based on this Court's 2013 order to remand for a new resentencing hearing. This argument is without merit.

This Court's 2013 order directed the trial court to take appropriate action on Defendant's writ for certiorari, which was filed in response to the trial court's denial of his first MAR. This Court's order contained no language limiting the trial court's ability to conduct a *de novo* resentencing hearing. The sentencing judge mistakenly limited the resentencing hearing only to the issue of Defendant's prior unrepresented misdemeanor convictions and consequent prior record level.

In light of our prior determination in *State v. Harris* that *Blakely* applies to convictions entered pre-*Blakely,* where resentencing is conducted post-*Blakely*, and the *de novo* nature of resentencing hearings, Defendant's resentencing is subject to the *Blakely* requirement of either stipulation or submission of aggravating factors to the jury. *Harris*, 185 N.C. App. 285, 648 S.E.2d 218.

The court during resentencing failed to obtain either Defendant's stipulation or to submit the aggravating factor of "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy" to a jury to so find beyond a reasonable doubt as required by *Blakely,* in order to resentence Defendant within the aggravated range. N.C. Gen. Stat. § 15A-1340.16(d)(2) (2015). *Blakely* error has occurred. *Blakely*, 542 U.S. 303, 159 L. Ed. 2d 403.

B. Harmless Error

1. Standard of Review

The failure to submit an aggravating sentencing factor to the jury is subject to harmless error review. *State v. Blackwell,* 361 N.C. 41, 42, 638 S.E.2d 452, 453 (2006). Under our standard of review, this Court is required to "determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458 *(*citation omitted).

A. Analysis

Reviewing the record, it is unclear whether the involvement of Smart and Evans constitutes "overwhelming" or "uncontroverted" evidence beyond a reasonable doubt, that they joined with Defendant in commission of the offenses of attempted murder, arson, malicious injury by use of an explosive device and manufacturing a weapon of mass destruction. *Id.* The trial record indicates Evans may have helped Defendant assemble the Molotov cocktail, but he remained inside the car when Defendant took the bomb from Smart, and lit the Molotov cocktail, and threw it into the occupied trailer.

Smart's testimony indicates that he did not join with Defendant in making the Molotov cocktail. Smart also testified after he refused to throw the Molotov cocktail into the trailer, Defendant grabbed the explosive from out of his hands and threw it.

Based upon the conflicting evidence at trial, we are unable to conclude the jury would have found "overwhelming" or "uncontroverted" evidence beyond a reasonable doubt to prove the aggravating factor that Defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2).

V. Conclusion

The superior court's summary denial of Defendant's 2015 MAR was improper. The *Blakely* requirement that an unstipulated aggravating factor be found by a jury beyond a reasonable doubt was applicable at the time Defendant was resentenced within the aggravated range in 2014. The court during resentencing failed to obtain a stipulation or to conduct a *de novo* hearing on the post-*Blakely* requirement for the jury to find the aggravating factor beyond a reasonable doubt. *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413.

The *Blakely* error committed by the court during resentencing is not harmless error beyond a reasonable doubt. *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458. Because of this error, the superior court should have granted Defendant's 2015 MAR. We vacate the order and remand to the superior court for entry of order granting Defendant's 2015 MAR, and for resentencing *de novo* in accordance with this opinion and controlling statutes and precedents. *It is so ordered*.

VACATED AND REMANDED FOR RESENTENCING HEARING.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).