IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-107

Filed: 1 October 2019

Iredell County, No. 57228

STATE OF NORTH CAROLINA

v.

AJANAKU EDWARD MURDOCK

Appeal by defendant from judgment entered 24 August 2018 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 4 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for defendant-appellant.

ZACHARY, Judge.

Defendant Ajanaku Edward Murdock appeals the sentence imposed upon resentencing following his convictions for assault inflicting serious bodily injury and attaining the status of an habitual felon. Defendant argues that he is entitled to a new sentencing hearing because (1) the Habitual Felon Act violates the Separation of Powers Clause of the North Carolina Constitution by delegating unconstrained

rulemaking power to the executive branch, and (2) the sentencing court erred by failing to make findings as to various mitigating factors submitted by Defendant, before sentencing him in the presumptive range. Defendant also argues, for preservation purposes only, that the Habitual Felon Act violates the Equal Protection Clause of the Fourteenth Amendment because it fails to treat similarly situated habitual felons alike. We affirm.

Background

On 4 January 2010, Defendant was indicted for assault inflicting serious bodily injury, a Class F felony, after he struck his domestic partner during a physical altercation, breaking her jaw. On 13 February 2012, the prosecutor exercised her discretion to indict Defendant as an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1, thereby enhancing the felony from a Class F to a Class C offense.

Defendant was convicted on 6 September 2013 following a jury trial. Thereafter, Defendant pleaded guilty to having attained the status of an habitual felon, which had the effect of increasing his sentencing classification to a prior record level V. The Honorable Gary M. Gavenus sentenced Defendant in the presumptive range to 144 to 182 months in the custody of the Division of Adult Correction. Defendant appealed to this Court on 18 November 2014, and we upheld his conviction and sentence.

On 11 October 2017, Defendant filed a Motion for Appropriate Relief in the trial court requesting a new trial, or alternatively, a resentencing hearing. On 20 July 2018, the trial court granted Defendant a resentencing hearing, finding that counsel had waived Defendant's right to "present mitigating factors without first obtaining [his] consent." Before the resentencing hearing, Defendant filed both a "Motion to Prohibit Sentence Enhanced by the Habitual Felon Act" and a "Motion to Comply with *State v. Lopez,* 363 N.C. 535 (2009)."

Defendant's resentencing hearing occurred on 24 August 2018 before the Honorable Julia Lynn Gullett. At the hearing, Defendant requested "either [a] sentence without the habitual felon enhancement, or if [the enhancement remains,] that it be at the lowest level of the mitigating range." Defendant, as well as his brother and mother, testified regarding his good character and the familial and community support for Defendant. Defendant also submitted twelve mitigating factors to the court in support of his request for a mitigated sentence. Defendant further argued that because he had submitted numerous mitigating factors, and no aggravating factors existed, the trial court should follow the "process described by the North Carolina Supreme Court" in *State v. Lopez* when deciding the sentencing range.

Judge Gullett denied both motions filed by Defendant and imposed the original sentence of 144 to 182 months' imprisonment. Regarding the mitigating factors

presented, Judge Gullett stated that "[t]he [c]ourt makes no written findings [of the factors] because the prison term [imposed] is within the presumptive range of sentences." After objecting "with respect to both of the motions [that were] submitted," Defendant gave oral notice of appeal.

On appeal, Defendant proffers three bases for his contention that his sentence should be vacated and his case remanded for resentencing. Defendant first argues that the Habitual Felon Act violates the Separation of Powers Clause of the North Carolina Constitution because it encroaches on the legislature's rulemaking power. Specifically, Defendant contends that N.C. Gen. Stat. § 14-7.3 unconstitutionally delegates to the executive branch the power to exercise prosecutorial discretion in deciding whom to charge as an habitual felon, without providing guiding principles or procedural safeguards. Second, Defendant argues that the trial court erred by failing to make findings concerning the mitigating factors that Defendant submitted to the court before it sentenced him in the presumptive range. Finally, Defendant contends that the Habitual Felon Act fails "to treat all persons alike, who are similarly situated with respect to eligibility for a sentence enhancement," in violation of the Fourteenth Amendment.

Discussion

I.

Defendant first argues that the application of the Habitual Felon Act in his sentencing constituted a violation of the Separation of Powers Clause of the North Carolina Constitution, and that the trial court therefore erred by imposing the habitual felon enhancement to his sentence in the instant case.

Our General Statutes provide that "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon and *may* be charged" as such. N.C. Gen. Stat. § 14-7.1(a) (2017) (emphasis added). Whether an individual will be charged as an habitual felon is the decision of "[t]he district attorney, in his or her discretion." *Id.* § 14-7.3. "Being an habitual felon is not a crime but rather a status which subjects the individual who is subsequently convicted of a crime to increased punishment for that crime." *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 710 (1996).

In the instant case, Defendant contends that "the delegation by the Legislature to the Executive branch to increase [his] possible sentence for Assault Inflicting Serious Bodily Injury, as a result of the prosecutor's 'discretion[,'] violates the Separation of Powers Clause of the North Carolina Constitution." For support, Defendant cites *Adams v. N.C. Dep't. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978), in which our Supreme Court held that the legislative branch may transfer its power to the other branches of government so long as it provides "adequate guiding standards to govern the exercise of the delegated powers," *id.* at 697, 249 S.E.2d at

410. Defendant maintains that "[g]iving a prosecutor the power to exercise discretion, to pick and choose whose sentence will be increased and whose sentence range will not be increased, is unconstrained by any adequate guiding standard." According to Defendant, because the Habitual Felon Act grants prosecutors the discretion to charge a particular individual as an habitual felon, but fails to provide guidelines as to when it would be appropriate to do so, the Act unconstitutionally delegates legislative power to the executive branch.

We rejected this same argument when Defendant's appellate counsel raised it before this Court in *State v. Wilson*, 139 N.C. App. 544, 549-50, 533 S.E.2d 865, 869-70 ("Our courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees."), *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000). *See also State v. McIlwaine*, 169 N.C. App. 397, 403, 610 S.E.2d 399, 403 (2005) ("[T]his Court has previously held the Habitual Felon Act is not violative of the Separation of Powers Clause." (citing *State v. Williams*, 149 N.C. App. 795, 802, 561 S.E.2d 925, 929, *disc. review denied*, 355 N.C. 757, 566 S.E.2d 481 (2002))). Because we rejected this argument then, we are bound to do so now. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

II.

Defendant next argues that the trial court erred by failing to make findings as to the existence of the mitigating factors submitted by Defendant before the court elected to sentence him in the presumptive range. We find no error.

N.C. Gen. Stat. § 15A-1340.16 states that "[t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a). Furthermore, after "consider[ing]" the evidence of any mitigating factors that a defendant has submitted, the sentencing court need only make findings as to those factors "if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." *Id.* § 15A-1340.16(c).

Despite its plain language, Defendant maintains that section 15A-1340.16 is ambiguous as to the scope of a sentencing court's discretionary power. Defendant cites our Supreme Court's decision in *State v. Lopez* for the proposition that where a defendant submits mitigating factors to the trial court, it is error for the court to sentence the defendant in the presumptive range without first making findings as to "how many of the submitted mitigators existed." *See* 363 N.C. 535, 539, 681 S.E.2d 271, 274 (2009) ("After a jury returns its verdict . . . it must then determine whether any submitted aggravating factors exist, thereby permitting a defendant's sentence

to be enhanced. In addition, the court independently determines whether any submitted mitigating factors also exist, and, if so, whether the factors in aggravation outweigh the factors in mitigation, or the factors in mitigation outweigh the factors in aggravation, or the factors are in equilibrium. After weighing aggravating factors found by the jury and mitigating factors found by the court, the court decides whether to impose an aggravated, presumptive, or mitigated sentence." (citations omitted)). Specifically, Defendant questions whether the General Assembly intended for sentencing judges to "have the discretion to decide not to engage in the process established by the legislature to determine the appropriate range from which to select a sentence, and simply impose a sentence in the Presumptive Range," notwithstanding the existence of mitigating factors.

Though logical, there are several issues with Defendant's argument. First, Defendant's argument disregards a basic tenet of statutory interpretation—that is, that courts must look at the plain language of a statute when determining legislative intent. *See State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997) ("In matters of statutory construction, the task of the courts is to ensure that the purpose of the Legislature, the legislative intent, is accomplished. The best indicia of that legislative purpose are the language of the act and what the act seeks to accomplish."). Here, the language of N.C. Gen. Stat. § 15A-1340.16(c) quite plainly evinces "that the legislature intended the trial court to take into account factors in

aggravation and mitigation *only* when deviating from the presumptive range in sentencing." *Id.*

Second, since *Caldwell*, this Court has repeatedly held that, so long as the sentencing court has indeed *considered* the mitigating factors that the defendant proposed, the court need not make formal written findings regarding those factors *unless* it elects to deviate from the presumptive sentencing range. *See, e.g.*, *State v. Kelly*, 221 N.C. App. 643, 648, 727 S.E.2d 912, 915 (2012) ("If the trial court sentences a defendant in the presumptive range, the trial court is not required to make findings of mitigating factors, even if evidence of mitigating factors is presented at sentencing."); *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 786 (2006) ("The fact [that] the trial court, without comment, imposed consecutive presumptive sentences does not mean the trial court failed to consider the mitigating factors presented. . . . The trial court did not abuse its discretion by failing to make formal findings or act on the proposed mitigating factors when sentences were imposed within the presumptive range for each conviction."); *see also State v. Garnett*, 209 N.C. App. 537, 549, 706 S.E.2d 280, 287 (holding that the trial court did not abuse its discretion "in refusing [the] [d]efendant's request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances"), *disc. review denied*, 365 N.C.

200, 710 S.E.2d 31 (2011). The language that Defendant cites from *State v. Lopez* does not contradict these holdings.[1]

At Defendant's resentencing hearing in the instant case, the sentencing judge stated:

> The Court has considered the proposed mitigating factors and the Court finds that the State has presented no aggravating factors. The Court makes no written findings because the prison term [imposed] is within the presumptive range of sentences. And the Court has considered the structured sentencing – the sentencing guidelines that are applicable to this particular case, with this particular offense date.

The process followed by the trial court was consistent with N.C. Gen. Stat. § 15A-1340.16, as well as with the caselaw interpreting the same. The sentencing court was not required to make findings explicating its election to sentence Defendant within the presumptive range rather than within the mitigated range. We find no error.

III.

Finally, Defendant contends that "the failure of the Habitual Felon Act to treat all persons alike, who are similarly situated with respect to eligibility for a sentence enhancement, violated [his] right to equal protection, secured by the Fourteenth

[1] Our Supreme Court's discussion in *State v. Lopez* concerning the various considerations that courts make in reaching a sentence was simply a reference to the difficulty of predicting a defendant's sentence, in light of the complex sentencing procedures following the adoption of the Structured Sentencing Act. *See Lopez*, 363 N.C. at 539, 681 S.E.2d at 274.

Amendment to the United States Constitution." We do not address this argument, however, as Defendant raises it for preservation purposes only.

AFFIRMED.

Chief Judge McGEE and Judge DILLON concur.

Report per Rule 30(e).