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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-608

No. COA20-833

Filed 2 November 2021

Wake County, No. 19 CRS 218

STATE OF NORTH CAROLINA

v.

BRANDON KENDELL MASON

Appeal by defendant from judgment entered 3 June 2020 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 22 September 2021.

Joshua H. Stein, Attorney General, by Special Deputy Attorney General Christopher W. Brooks, for the State-Appellee.

Glenn Gerding, Appellate Defender, by Assistant Appellate Defender Anne Bleyman for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Brandon Kendall Mason (“Defendant”) appeals from judgment entered following a plea agreement in which he pled guilty to felony death by motor vehicle. We vacate Defendant’s plea agreement in its entirety and remand for a new

disposition.

I. Background

¶ 2 On 20 April 2019 at around 6:25 p.m., Eric Sims and his wife Sheron Sims, a forty-six-year-old mother of three, entered the intersection of Spring Forest and Fox Roads in Raleigh. At the same time, Defendant drove through a red light and collided with the Sims' vehicle. Mrs. Sims, who was the passenger, suffered severe head trauma as a result of the collision and was transported to Wake Medical hospital.

¶ 3 Officer Mele of the Raleigh Police Department conducted an investigation at the scene. Officer Mele observed a strong odor of alcohol from Defendant and conducted a driving while impaired ("DWI") investigation. Defendant admitted he had been at a friend's house and consumed six stout beers. Officer Mele conducted the Horizontal Gaze Nystagmus test on Defendant, and Defendant displayed all six of the six possible clues on the test. Defendant refused to perform any other field sobriety tests. Defendant was remorseful at the scene and displayed heightened emotions "beyond just that of being involved in a crash." Defendant was transported to the Raleigh Police Department district office, and he agreed to submit to chemical analysis of his breath. Testing determined Defendant had a blood-alcohol concentration of 0.22. This was not Defendant's first instance of DWI. While serving in the military in 2017, Defendant was charged with DWI and child endangerment.

¶ 4 At the hospital, it was determined Mrs. Sims was suffering from a trauma to

the brain and a serious brain bleed. Mrs. Sims was hospitalized and passed away 32 days later.

¶ 5

On 24 June 2019, a Wake County grand jury issued three separate indictments charging Defendant with felony death by motor vehicle, DWI, failure to stop at a steady red light, and careless and reckless driving. On 3 June 2020, the case was heard before the Honorable Keith O. Gregory, Superior Court Judge. Defendant entered a guilty plea to felony death by motor vehicle and DWI. The plea arrangement provided Defendant “[m]ay plead open and stipulate to [two aggravating factors, and the] State will stipulate to the existence of factors in mitigation.” The first aggravating factor was Defendant “knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.” The second was Defendant “was armed with a deadly weapon at the time of the crime.” The deadly weapon in this case was Defendant’s vehicle. At the plea hearing, the trial court found one mitigating factor: that Defendant accepted responsibility for his criminal conduct. Judgment on the DWI was arrested, and Defendant was sentenced to a term in the aggravated range of 80 to 108 months of imprisonment for felony death by motor vehicle. On the same date, Defendant entered notice of appeal in open court.

II. Jurisdiction

¶ 6

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(4) (2019)

and N.C. Gen. Stat. § 15A-1444(a1) (2019).

III. Issues

¶ 7

The issues on appeal are whether: (1) the trial court erred when it found as an aggravating factor Defendant was armed with a deadly weapon at the time of the crime; and (2) this Court should remand for a new sentencing hearing or new proceedings entirely.

IV. Analysis

A. Aggravating Factor

¶ 8

Defendant argues the trial court erred in finding as an aggravating factor he was armed with a deadly weapon at the time of the crime, because evidence necessary to prove an element of his crime was also used to prove the existence of the aggravating factor. We Agree.

¶ 9

“When a defendant assigns error to the sentence imposed by the trial court, our standard of review is ‘whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.’” *State v. Deese*, 491 S.E.2d 682, 685, 127 N.C. App. 536, 540 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1)).

¶ 10

“The 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) (2019). The trial court can find an aggravating factor

when “[t]he defendant was armed with or used a deadly weapon at the time of the crime.” N.C. Gen. Stat. § 15A-1340.16(d)(10) (2019). “A deadly weapon is generally defined as any article, instrument[,] or substance which is likely to produce death or great bodily harm.” *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). Additionally, “[i]t is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner.” *State v. Jones*, 538 S.E.2d 917, 922–23, 353 N.C. 159, 164–65 (2000).

¶ 11 “Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.” N.C. Gen. Stat. § 15A-1340.16(d) (2019). The pertinent question in applying this provision of N.C. Gen. Stat. § 15A-1340.16(d) is whether the use of the deadly weapon is “necessary to prove an element of the offense, not whether it is an actual element.” *State v. Smith*, 481 S.E.2d 425, 427–28, 125 N.C. App. 562, 567 (1997) (internal quotations omitted).

A person commits the offense of felony death by vehicle if:
(1) The person unintentionally causes the death of another person, (2) The person was engaged in the *offense of impaired driving* under G.S. 20-138.1 or G.S. 20-138.2, and
(3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

N.C. Gen. Stat. § 20-141.4(a1) (2019) (emphasis added).

A person commits the offense of impaired driving if he *drives any vehicle* upon any highway, any street, or any

public vehicular area within this State: (1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C. Gen. Stat. § 20-138.1 (2019) (emphasis added).

¶ 12 Here, the trial court identified Defendant’s vehicle as the deadly weapon Defendant was armed with at the time of the crime. For Defendant to be convicted of felony death by vehicle, the State was required to prove Defendant was “engaged in the offense of impaired driving.” *See* N.C. Gen. Stat. § 20-141.4(a1)(2). Additionally, proving Defendant was engaged in impaired driving requires proving the element he “[drove] any vehicle.” *See* N.C. Gen. Stat. § 20-138.1.

¶ 13 In this instance, the necessary evidence used to prove Defendant drove any vehicle at the time of the collision would also be used to prove that he was “armed” with the vehicle at the time of the crime. *See* N.C. Gen. Stat. § 15A-1340.16(d)(10). Thus, finding as an aggravating factor Defendant was armed with a deadly weapon at the time of the crime, because he was driving his vehicle when he collided with the Sims’ vehicle, violates N.C. Gen. Stat. § 15A-1340.16(d), and should not have been included for sentencing. We reverse for this error.

B. Remedy

¶ 14 Defendant argues the case should be remanded for a new sentencing hearing because the plea was “open,” and the terms of the plea can still be fulfilled. The State

argues the plea should be vacated in its entirety, and the case should be remanded for further proceedings because Defendant should not be able to repudiate a part of the plea without repudiating the whole. We agree with the State.

¶ 15 “If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range.” N.C. Gen. Stat. § 15A-1340.16(b). The weighing of aggravating and mitigating factors is within the sound discretion of the trial court. *State v. Norman*, 151 N.C. App. 100, 104, 564 S.E.2d 630, 633 (2002). Generally, appellate courts are unable “to determine the respective weights assigned by a trial court to each factor when such weight distributions are normally not specified in the record on appeal.” *Id.* at 104, S.E.2d 630, 633. Thus, the Court’s usual remedy “[w]hen the trial court erroneously finds any aggravating factor to exist, [is] a new sentencing hearing.” *State v. Green*, 309 N.C. 623, 625, 308 S.E.2d 326, 327 (1983) (citing *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983)).

¶ 16 Plea agreements, however, are only “valid if both sides voluntarily and knowingly fulfill every aspect of the bargain.” *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). Therefore, a plea agreement must be set aside in its entirety when “essential and fundamental terms of a plea agreement [become] unfulfillable.” *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J. dissenting in part), *rev’d in part per curiam for the reasons stated in the dissent*,

366 N.C. 327, 734 S.E.2d 571 (2012). In sum, a “defendant cannot repudiate [a plea agreement] in part without repudiating the whole.” *Id.* at 122, 720 S.E.2d at 809.

¶ 17 In *Rico*, the defendant pled guilty to voluntary manslaughter after being charged with first degree murder. *Id.* at 121, 720 S.E.2d at 808. The plea required the defendant to stipulate to an aggravating factor, that he used a deadly weapon at the time of the crime, and stated “[t]he defendant shall receive an active sentence of not less than 84 months nor more than 110 months.” *Id.* at 121, 720 S.E.2d at 808. At sentencing, the trial court treated the plea as a plea bargain as to sentencing rather than sentencing open to the court’s discretion pursuant to N.C. Gen. Stat. § 15A–1340.16. *Id.* at 121, 720 S.E.2d at 808. The defendant then appealed to this Court, challenging the aggravating factor as well as his aggravated sentence. *Id.* at 115, 720 S.E.2d at 805. We found both the aggravating factor and the trial court’s approach to sentencing improper. *Id.* at 121, 720 S.E.2d at 808. With respect to the remedy, however, we held it was improper for the defendant “to disavow the portions of the plea arrangement that were unfavorable (aggravated range sentence) but yet retain the portion that is favorable (plea to a reduced offense).” *Id.* at 122, 720 S.E.2d at 809.

¶ 18 Similar to *Rico*, Defendant wishes to repudiate the portion of his plea in which he stipulated to the existence of the aggravating factor while retaining the favorable portion. If a plea agreement was not at issue, the Court would likely remand for re-

sentencing so the trial court could weigh the remaining aggravating factor against Defendant's mitigating factor. However, Defendant stipulated to the existence of two aggravating factors in the plea agreement. Thus, "essential and fundamental terms of a plea agreement" have become unfulfillable as in *Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809. We therefore vacate Defendant's plea agreement in its entirety and remand for a new disposition.

V. Conclusion

¶ 19 We hold the aggravating factor Defendant was armed with a deadly weapon at the time of the crime was found in error as a matter of law. As a result, we vacate the plea agreement and resulting judgment. The case is remanded for a new disposition.

VACATED AND REMANDED FOR NEW DISPOSITION.

Judge ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).