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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-504

Filed: 17 April 2018

Mecklenburg County, No. 16 CRS 211087

STATE OF NORTH CAROLINA

v.

DOUGLAS TRENT JORDAN, Defendant.

Appeal by Defendant from Judgment entered 5 January 2017 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 December 2017.

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

Richard J. Costanza for Defendant-Appellant.

INMAN, Judge.

Douglas Trent Jordan ("Defendant") appeals from a Judgment following a jury verdict finding him guilty of habitual driving while impaired. Defendant argues that the trial court committed reversible error by failing to formally arraign him on his previous driving while impaired convictions as required by N.C. Gen. Stat. § 15A-928. We disagree.

Factual and Procedural History

The State's evidence at trial tended to show the following:

On 25 March 2016, Officer Emily Acker-Estes ("Officer Acker-Estes") of the Charlotte-Mecklenburg Police Department encountered Defendant after she was flagged down by two motorists on her way home from work. The motorists reported a car stopped at an intersection in which the driver was asleep. Officer Acker-Estes approached the car and found Defendant behind the steering wheel with the engine running and his foot on the brake pedal.

Officer Acker-Estes woke Defendant and noticed he smelled of alcohol, had red glassy eyes, and had a french fry stuck to the left side of his neck.

Officers Jordan Ivey ("Officer Ivey") and Officer Daniel Kennerly ("Officer Kennerly"), also of the Charlotte-Mecklenburg Police Department, then arrived on scene. At an officer's instruction, Defendant exited the car.

Officer Kennerly directed Defendant to perform several standardized field sobriety tests, including the horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand test. Based on Defendant's performance, Officer Kennerly placed Defendant under arrest for driving while impaired and took him to the Charlotte Law Enforcement Center. At the Law Enforcement Center, Defendant provided a breath sample, which registered a blood alcohol concentration of .12.

Defendant was indicted for habitual impaired driving pursuant to N.C. Gen. Stat. § 20-138.5, which is a two part indictment with one count for driving while impaired and one count enhancing the charge to habitual driving while impaired.

Defendant's case came before a jury on 3 January 2017 in the Mecklenburg County Superior Court. Before the State rested its case and outside the presence of the jury, Defendant admitted to having three prior driving while impaired convictions within the ten years prior to the charges on which he then stood trial. The jury returned a verdict on 5 January 2017 finding Defendant guilty of habitual driving while impaired. Defendant timely appealed.

Analysis

Defendant's sole argument on appeal is that the trial court committed reversible error by failing to properly arraign him on the habitual driving while impaired charge in compliance with N.C. Gen. Stat. § 15A-928(c). We hold this argument is without merit.

It is well-established that "habitual impaired driving is precisely the type of offense to which N.C. Gen. Stat. § 15A-928 applies." *State v. Silva*, __ N.C. App. __, __, 796 S.E.2d 72, 75 (2017). N.C. Gen. Stat. § 15A-928 provides in relevant part:

> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the

case must then proceed as follows:

> (1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.
>
> (2) If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case. This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence.

N.C. Gen. Stat. § 15A-928(c) (2015). The purpose of section 15A-928(c) is "to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent." *State v. Jernigan*, 118 N.C. App. 240, 244, 455 S.E.2d 163, 166 (1995) (citation omitted).

In *Jernigan*, the defendant appealed his conviction for habitual driving while impaired on the ground that "the trial court did not formally arraign [him] upon the charge alleging the previous convictions and did not advise [him] that he could admit the previous convictions, deny them, or remain silent, as required by [N.C. Gen. Stat. §] 15A-928(c)." *Id.* at 243, 455 S.E.2d at 165. This Court, in rejecting the defendant's

argument, explained that "[w]here there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding." *Id.* at 244, 455 S.E.2d at 166 (quoting *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980)). Ultimately, our Court held there was no reversible error because the "defendant's attorney informed the court that he had discussed the case with [the] defendant[,] . . . that [the] defendant would stipulate to the previous convictions[,]" and on appeal, the "defendant [made] no contention . . . that he was not aware of the charges against him, that he did not understand his rights, or that he did not understand the effect of the stipulation." *Jernigan*, 188 N.C. App. at 244, 455 S.E.2d at 166.

Here, Defendant has not argued that he was unaware of the charges against him, or that he did not understand his rights, or that he was prejudiced in any way as a result of the trial court's failure to comply strictly with the language of N.C. Gen. Stat. § 15A-928(c). A review of the transcript reveals the following colloquy between the trial court and Defendant regarding the previous convictions:

> THE COURT: Outside the presence of the jury, we are – Ms. Wallwork, have you had the chance to talk to your client about this part of the process?
>
> MS. WALLWORK: I have, Your Honor.
>
> THE COURT: All right, [Defendant], do you understand that there's a two-count bill of indictment for which you've

> been charged with felony driving while impaired?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And count two of the indictment alleges that within ten years of the date of the offense for which you are presently on trial, and that is the ten years from March 25th, 2016, you have been convicted of three or more offenses of [sic] involving impaired driving.
>
> The indictment says that the defendant has previously been convicted on May the 12th of 2011 of impaired driving in Lincoln County District Court, and convicted on January the 12th, 2012 of impaired driving in Lincoln County District Court, and convicted on January the 12th of 2012 of impaired driving in Lincoln County District Court.
>
> Do you now admit to those previous convictions?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you're doing that of your own free will after having had a chance to talk with your attorney; is that right?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you have any questions of me about anything that's transpired here in the last five minutes?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Thank you, sir.

Based on this colloquy, we conclude that Defendant was informed of his prior convictions and was provided a fair opportunity to either admit or deny them, or remain silent. Additionally, as in *Jernigan*, Defendant's trial counsel expressed

Defendant's intent to admit to his prior convictions on several occasions. During the pre-trial motion phase, trial counsel stated: "I will let Your Honor know that [Defendant] does intend to admit the enhancement, he will not be contesting his habitual status." Before the close of the State's evidence, Defendant's trial counsel stated ". . . The Court will then inquire on the record as to whether [Defendant] is admitting the previous convictions that make him habitual eligible. I would give the court a preview that he is." We conclude that the present case is indistinguishable from *Jernigan*, and therefore hold the trial court did not commit reversible error by failing to strictly comply with the language of N.C. Gen. Stat. § 15A-928(c).

Defendant asserts that we should reconsider our continued adherence to *Jernigan*, arguing that the "must" and "shall" language contained in N.C. Gen. Stat. § 15A-928 creates an explicit requirement mandating the trial court's compliance. This argument is without merit. The North Carolina Supreme Court has held that the inclusion of the words "must" and "shall" in a statute does not always "indicate a legislative intent to make a provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action[.]" *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978) (declining to interpret N.C. Gen. Stat. § 15A-644 "as requiring the quashing of a bill of indictment under the circumstances of [that] case [because doing so] would be to attribute to the Legislature an intent to paramount mere form over substance").

Further, it is well-settled that "[w]here 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." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). So even if we were persuaded by Defendant's argument, we would be bound by this Court's decision in *Jernigan*.

Conclusion

For the foregoing reasons, we hold that the trial court did not commit reversible error by not formally arraigning Defendant.

NO ERROR.

Judges HUNTER and BERGER concur.

Report per Rule 30(e).