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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-413

Filed: 15 January 2019

Iredell County, No. 14 CRS 685

STATE OF NORTH CAROLINA

v.

TERESA LOUISE BOVA

Appeal by defendant from judgment entered 22 September 2017 by Judge Gregory R. Hayes in Iredell County Superior Court. Heard in the Court of Appeals 16 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

Paul F. Herzog for defendant-appellant.

BRYANT, Judge.

Where defendant fails to establish the applicability of N.C. Gen. Stat. §§ 15A-1022 or 15A-1022.1, we determine there is no merit to defendant's appeal and affirm the judgment of the trial court.

On 23 May 2014, defendant Teresa Louise Bova was cited for driving while subject to an impairing substance, in violation of General Statutes, section 20-138.1.

On 13 February 2015, defendant appeared pro se in Iredell County District Court before the Honorable Deborah Brown, Judge presiding. Defendant pled guilty to the cited offense and was sentenced as a Level Five with a minimum and maximum active term of sixty days. The trial court suspended the sentence and placed defendant on supervised probation for a period of twelve months. Defendant appealed the judgment to Iredell County Superior Court.

On 29 March 2015, the State served notice of its intent to prove a grossly aggravating factor, that defendant had been convicted of an offense involving impaired driving after the date of the charged offense but before sentencing in the current case. In addition, the State gave notice of its intent to prove aggravating factors: defendant was grossly impaired at the time she was driving in regard to the current offense; defendant's driving was especially reckless; defendant's driving was especially dangerous; and that defendant's negligent driving led to an accident causing property damage of $1,000.00 or more, or damage of any amount to a vehicle seized.

Defendant's trial came before Iredell Superior Court on 21 September 2017, the Honorable Gregory R. Hayes, Judge presiding. The evidence presented during trial tended to show that on 14 March 2014, Officer Justin Harris with the Morrisville Police Department responded to a report of a vehicular accident at the Country Club Apartments located on West Wilson Avenue around 10 p.m. Upon arrival, Officer

Harris observed a group of ten people in the apartment complex parking lot yelling and pointing to the officer's left. Officer Harris turned to observe a black vehicle drive over a curb onto a grassy area, turn left, and drive back over a curb onto the vehicular area toward the officer's patrol car. Officer Harris, who was driving a marked patrol car, turned on his blue lights and put his vehicle in reverse to move out of the path of the oncoming black vehicle. The suspect vehicle came to a stop in front of the patrol car. Officer Harris approached the stopped vehicle and observed defendant sitting in the driver's seat.

> When I approached the vehicle I walked up to the door, her window was down at the time, and I began to talk with her, try to -- she was just kind of in a daze looking straight ahead. I was speaking to her, but she wasn't really talking back to me. It was like she was disoriented. She was not talking at the time. She was just kind of looking straight ahead like what happened, like she was disoriented.

Officer Harris engaged defendant in conversation and noticed that initially defendant provided only short answers to his questions, but the longer they spoke the less disoriented she seemed and the more alert she became. Defendant performed field sobriety tests as requested by Officer Harris with little to no indication of impairment. But in conversing with Officer Harris about the reason for her driving, defendant disclosed that she didn't remember anything other than that she had been in the car waiting for a friend and then Officer Harris was standing next to her driver's side door. While she was sitting in the car, she had been "huffing an air

duster." Officer Harris observed an air duster spray can on the backseat floorboard. When he picked it up, "the can was cold to the touch like it had just been discharged." Defendant acknowledged it as the can she had been using.

Frank Llewelyn, a forensic toxicologist and forensic scientist supervisor with the Triad Regional Laboratory in Greensboro, a part of the North Carolina State Laboratory System, testified that the air duster contained 1,1-Difluoroethane HFC-152a, which he referred to as DFE. Llewelyn testified that DFE was not a controlled substance, but a type of Freon.

> Q What effect, if any, would that have on an individual if it were used as an inhalant?
>
> A Well, it -- there are a couple of factors that go into that, depending on the duration of use, how much the individual would have used. There are a variety of effects that can be produced from inhaling a substance like this. The general ones would be that when you basically, you inhale a gas other than oxygen, you are depriving your body of oxygen, which is the fuel source that it needs to properly operate, okay. So you are replacing the oxygen that's circulating in your blood, it's going to your brain that allows you to just do your normal day to day operations. So in doing so, some of the commonly observed side effects may be drowsiness, a dazed state, a euphoric state where the person is just kind of out in their own world. A dazed state where they're just, they're distant, disoriented. Muscular incoordination could be exhibited. Central nervous system depression will take place because of the lack of oxygen in the brain where the brain is being starved of its fuel source. So it's doing everything it can to survive, so it's not sending out those nerve impulses that allow you to properly function. It's been associated with amnesia, temporary little blackouts, and just momentary like loss of where you are and what

> you were doing.
>
> Q Now, if one were to inhale or huff the duster, could that affect or impair your normal, your mental and physical faculties or both?
>
> A Yes, sir. The improper use of a gas like this by reducing the amount of oxygen in the blood circulating in your body, yes, sir, it does carry the potential to be an impairing substance and produce those effects that you spoke of.
>
> Q More or less a high?
>
> A Yes, sir.

The jury found defendant guilty of driving while impaired. Following the denial of defendant's motion to set aside the jury verdict, the trial court commenced a sentencing hearing. The State withdrew its request for a finding of the grossly aggravating factor of a prior conviction occurring after the date of the current offense, and for a finding of the aggravating factor that defendant's negligent driving caused property damage in excess of $1,000.00 or any property damage to the vehicle seized. The State proffered that if defendant were willing to concede the existence of two aggravating factors—that her driving was especially reckless and dangerous—the State would not proceed on the aggravating factor of gross impairment. Defendant through counsel stipulated to the existence of the two aggravating factors to be considered along with mitigating factors. The State filed with the clerk of court a stipulation "that pursuant to N.C.G.S. § 20-179 (c): 1. The driving of the defendant was especially reckless. 2. The driving of the defendant was especially dangerous."

The stipulation was signed by an assistant district attorney, defense counsel, and defendant.

In accordance with the jury verdict, the trial court entered judgment against defendant for the offense of impaired driving in violation of General Statutes, section 20-138.1. The court found that there were no grossly aggravating factors present and that the aggravating factors present were substantially counterbalanced by mitigating factors of defendant having a safe driving record and having voluntarily submitted herself to a mental health facility for assessment and voluntarily participated in any recommended treatment. Accordingly, the court imposed a Level Four punishment level. Defendant was sentenced to an active term of 120 days. That sentence was suspended, and defendant was placed on supervised probation for a term of 24 months. As a special term of probation, defendant was ordered to serve an active term of 48 hours. Defendant appeals.

Right to Appellate Review

On appeal, defendant challenges whether the trial court properly accepted her stipulation to two aggravating factors before sentencing her.

"Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . (16) Error occurred in the entry of

the plea." N.C. Gen. Stat. § 15A-1446(d)(16) (2017). *See also State v. Artis*, 174 N.C. App. 668, 676, 622 S.E.2d 204, 210 (2005) (reviewing the trial court's entry of judgment on the charge of habitual misdemeanor assault where at trial defense counsel stipulated to the defendant's prior misdemeanor convictions and the trial court failed to examine the defendant about the stipulations). We hold defendant's argument is properly before this Court.

Argument

Defendant argues that the trial court erred by accepting stipulations from defense counsel to establish the existence of two aggravating factors without personally examining defendant. Defendant contends the trial court violated General Statutes, sections 15A-1022 and 15A-1022.1, and defendant must be resentenced. We disagree.

The charge against defendant for driving while impaired was first heard in district court, and following entry of a guilty plea, defendant appealed to superior court where she entered a plea of not guilty and demanded a jury trial.

After the jury returned a verdict of guilty of DWI against defendant and defendant's motion to set aside the verdict was denied, the trial court moved to the sentencing phase of the trial. The State offered that if defendant were willing to stipulate to the existence of two aggravating factors—(1) her driving was dangerous and (2) her driving was especially reckless, *see* N.C. Gen. Stat. § 20-179(d)(2) (2017)—

the State would not proceed on a third aggravating factor (gross impairment). Through counsel, defendant stipulated to the two aggravating factors, and in a document filed with the clerk's office and signed by the State's assistant district attorney, defense counsel, and defendant, defendant stipulated to the two aggravating factors in writing. The trial court found that the aggravating factors were substantially counterbalanced by mitigating factors (defendant had a safe driving record, voluntarily submitted herself to a mental health facility for assessment, and has voluntarily participated in any treatment recommended by such facility). Defendant was sentenced to a Level Four punishment. Now on appeal, defendant contends the trial court erred by accepting her stipulations in violation of General Statutes, sections 15A-1022 and 15A-1022.1.

Sections 15A-1022 and 15A-1022.1 are both codified within General Statutes Chapter 15A, Article 58 entitled "Procedures Relating to Guilty Pleas in Superior Court." Section 15A-1022 is entitled "Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required." *Id.* § 15A-1022 (2017). Defendant did not plead guilty, but demanded a jury trial in Superior Court.[1] General Statutes, section 15A-1022.1 is entitled "Procedure in accepting admissions of the existence of aggravating factors in *felonies*." *Id.* § 15A-1022.1 (2017) (emphasis added). Defendant also did not admit to the existence of an

[1] Defendant acknowledges in her brief that the right to a jury trial as to aggravating factors exists only where defendant *denies* them.

aggravating factor in a *felony*. Thus, sections 15A-1022 and 15A-1022.1 are inapplicable to the current matter. Moreover, we reject defendant's implicit contention that her stipulation to aggravating factors could not be accepted absent a colloquy with the Court.

AFFIRMED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).