An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-117

Filed: 18 June 2019

Guilford County, Nos. 16 CRS 26239, 65787, 700971

STATE OF NORTH CAROLINA

v.

JONATHAN DAVID GEORGE, Defendant.

Appeal by defendant from judgment entered 25 September 2018 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lauren Lewis Ikpe, for the State.

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

YOUNG, Judge.

Where the trial court correctly interpreted the habitual impaired driving statute as one describing a felony offense, the trial court did not err in sentencing defendant as a felon.

I. Factual and Procedural Background

On 10 February 2016, law enforcement officers stopped Jonathan David George (defendant), who was operating a vehicle, and cited him for driving while impaired. Defendant was also cited for habitual driving while impaired. The Guilford County Grand Jury subsequently indicted defendant for driving while impaired. They also returned an indictment, alleging prior impaired driving incidents in 2005, 2009, and 2013, charging defendant with habitual impaired driving. Defendant was also indicted for driving while license revoked, due to an impaired driving revocation, and for failure to comply with license restrictions.

The matter proceeded to trial. During pretrial motions, defendant stipulated to prior impaired driving offenses. Defendant also stipulated that his license was revoked, but not that he was driving at the time.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied this motion. Defendant declined to present evidence.

The jury returned verdicts finding defendant guilty of driving while impaired and driving while license revoked. As agreed, defendant stipulated to his prior impaired driving offenses. The trial court consolidated the charges of driving while impaired with license revoked, driving while impaired, and habitual driving while impaired for judgment. The trial court sentenced defendant to a minimum of 12

months and a maximum of 24 months in the custody of the North Carolina Department of Adult Correction.[1]

Defendant appeals.

II. Sentencing

In his sole argument on appeal, defendant contends that the trial court committed plain error, or structural error, in imposing a felony conviction pursuant to the habitual impaired driving statute. We disagree.

A. Standard of Review

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Where a trial court enters a sentence "in violation of statutory mandate, that issue is automatically preserved for appeal." *State v. Hayes*, ___ N.C. App. ___, ___, 788 S.E.2d 651, 652, *writ denied, review denied,* 369 N.C. 75, 792 S.E.2d 794 (2016).

[1] The trial court noted in its judgment and commitment that it made additional findings on aggravating factors. Those findings are absent from the record on appeal. However, because defendant does not challenge this aspect of the sentence on appeal, this deficiency does not impede our appellate review.

"Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721, *writ denied,* ___ N.C. ___, 707 S.E.2d 246 (2011) (citations omitted).

B. Analysis

Defendant stipulated to three prior convictions for driving while impaired, proving that he had attained the status of an habitual impaired driver, within the definition of N.C. Gen. Stat. § 20-138.5. That statute provides that a person convicted under the statute "shall be punished as a Class F felon[.]" N.C. Gen. Stat. § 20-138.5(b) (2017). Notably, defendant does not allege any error with respect to his conviction. Rather, defendant raises a hypertechnical argument with respect to the language of the statute. To wit: Defendant contends that the language "punished as a Class F felon" does not mean that the statute describes a felony offense, but rather that it describes a misdemeanor offense with an elevated felony-level punishment.

This matter has been explicitly addressed by this Court. In *State v. Priddy*, this Court concluded that "the legislature clearly intended felonious habitual impaired driving to constitute a separate felony offense." *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 612 (1994). Defendant concedes this in his brief. However, defendant claims that the language in *Priddy*, in light of other cases, creates some "confusion."

There is no confusion in this matter. This Court has found the statute to be constitutional on its face and in its application. *State v. Vardiman*, 146 N.C. App. 381, 383, 552 S.E.2d 697, 699 (2001). In *Vardiman*, with which defendant purports to agree, this Court held that the habitual impaired driving statute "is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense." *Id*. at 385, 552 S.E.2d at 700. There is no question that the offense described is a substantive offense.

Defendant contends that the offense ought to be construed as a misdemeanor, albeit one punished as a felony, because recidivism statutes do not state a separate offense, instead elevating the punishment of another offense. Impaired driving is a misdemeanor, defendant contends, and therefore habitual impaired driving is simply a misdemeanor with an elevated punishment.

However, both the statute and our jurisprudence are clear: This statute is not merely a recidivism statute, designed to elevate lesser offenses, but also a substantive offense in its own right. As the statute describes a substantive offense, one which this Court has found to be constitutionally sound, our course is clear. "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978).

The statute's meaning is plain: This is a Class F felony. Defendant cannot compare this unambiguous statute to others in an attempt to paint it as a misdemeanor. His argument is without merit.

We hold that the trial court did not err in interpreting the statute as one describing a felony.

NO ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).