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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-721

No. COA19-443-2

Filed 21 December 2021

Wake County, Nos. 17CRS208127, 17CRS001541

STATE OF NORTH CAROLINA

v.

ROBERT LEE HODGE, Defendant.

Appeal by Defendant from judgment entered 17 July 2018 by Judge Rebecca W. Holt in Wake County Superior Court. By opinion filed 18 February 2020, this Court found no error in the trial court's judgment. By order entered 31 August 2021, our Supreme Court remanded to this Court with instructions to reevaluate our opinion in light of additional evidence. Originally heard in the Court of Appeals 13 November 2019.

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

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, and Kellie Dorise Mannette, for the Defendant.*

GRIFFIN, Judge.

Defendant appealed from the trial court's judgment entering a jury verdict finding him guilty of attaining habitual felon status. Defendant argued the trial court

(1) lacked subject matter jurisdiction over the charge of habitual felon status because the original indictment was marked “not a true bill”; and (2) abused its discretion in granting a continuance to correct the indictment error. This Court held the trial court properly obtained jurisdiction via a valid indictment before entering judgment on the underlying felony charge, and that the trial court did not abuse its discretion by granting a continuance to fix the error.

¶ 2 Defendant appealed to our Supreme Court. The Supreme Court entered an order directing the trial court to make additional findings of fact with respect to whether a true bill of indictment existed during its proceedings. Following the trial court’s timely response, the Supreme Court remanded to this Court for reevaluation of our opinion in consideration of the additional findings of fact. After considering the additional findings of fact, we once again discern no error.

### **I. Factual and Procedural Background**

¶ 3 On 7 November 2017, the grand jury indicted Defendant on a number of charges, including at least one felony offense. The grand jury also indicted Defendant for attaining the status of habitual felon, but the grand jury marked the original indictment for this charge as “NOT A TRUE BILL[.]” Following a trial in April 2018, the jury convicted Defendant of some of the substantive crimes with which he was charged.

¶ 4 The trial court held a bench conference regarding the habitual felon indictment

marked “NOT A TRUE BILL[.]” The trial court continued judgment and sentencing on the underlying charges until 21 May 2018. On 17 April 2018, the State obtained a superseding indictment charging Defendant with attaining habitual felon status, properly marked as a “TRUE BILL.”

¶ 5 On 21 May 2018, the trial court tried Defendant for attaining habitual felon status. Defendant moved to dismiss, arguing the trial court did not have jurisdiction over the habitual felon charge due to fault in the original indictment. The trial court denied Defendant’s motion. During this trial, an assistant clerk of superior court testified that, in addition to the original indictment marked “NOT A TRUE BILL[.]” she also found a copy of the indictment marked as a true bill in the court’s records from 7 November 2017. This trial on habitual felon status ultimately ended in a mistrial.

¶ 6 On 16 July 2018, the trial court conducted a second trial on Defendant’s habitual felon status. Defendant moved to dismiss for lack of jurisdiction. The trial court again denied his motion. The jury found Defendant guilty of attaining habitual felon status, and the trial court entered judgment on and sentenced Defendant for each of the convicted underlying charges and for attaining habitual felon status. Defendant appealed to this Court.

¶ 7 In our first opinion, this Court held that, “[w]hile the State could not establish jurisdiction over the habitual felon charge without evidence beyond a charging

document marked ‘NOT A TRUE BILL[,]’ the State obtained a valid indictment before judgment was entered on the substantive felony.” *State v. Hodge*, 270 N.C. App. 110, 115, 840 S.E.2d 285, 289 (2020) (hereinafter *Hodge I*). We further held that, “despite the highly irregular nature of the proceedings and the grossly disproportionate sentence that resulted, Defendant did not suffer prejudicial procedural conduct” and the trial court’s continuance did not “so offend[] the public sense of fair play that it constituted an abuse of discretion.” *Id.* at 117, 840 S.E.2d at 290 (citation omitted).<sup>1</sup> Defendant timely appealed to our Supreme Court.

¶ 8

On 5 May 2021, the Supreme Court issued an order remanding this matter to the trial court and requesting additional “factual findings from the trial court as to whether the grand jury found the bill to be a true bill of indictment and whether the true bill of indictment was returned in open court.” *State v. Hodge*, 377 N.C. 561, \_\_\_, 857 S.E.2d 132, 133 (2021). The trial court timely responded, determining that:

- 1) Yes, there was a true bill for habitual felon indictment dated 7 November 2017;
- 2) Yes, pursuant to N.C.G.S. § 15A-628(c), the true bill was returned by the foreman of the grand jury to the presiding judge in open court;
- 3) Yes, pursuant to N.C.G.S. § 15A-628(d), the clerk did keep a permanent record of the true bill along with all matters returned by the grand jury to the judge; and

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<sup>1</sup> Additional factual background of the proceedings up to this point can be found in our prior opinion in this case. *Hodge I*, 270 N.C. App. 110, 840 S.E.2d 285.

4) Yes, [D]efendant was properly served with the true bill[.]

*State v. Hodge*, \_\_\_ N.C. \_\_\_, 861 S.E.2d 561, \_\_\_ (2021) (hereinafter *Hodge II*).

Following the trial court’s response, our Supreme Court

conclude[d] that the record in this case ha[d] been duly supplemented by these additional findings of fact, and therefore remand[ed] this case to [this Court] for the limited purpose of reevaluating [our opinion] in this case in light of the additional findings of fact which were not available for consideration . . . at the time of the issuance of [our] opinion.

*Id.*

## II. Analysis

¶ 9

We now reevaluate our prior holding in this case in consideration of the additional factual findings produced by the trial court upon request from our Supreme Court. In our first opinion, the pivotal issue was whether the trial court properly obtained jurisdiction from a valid indictment to convict and sentence Defendant for attaining habitual felon status before the court entered judgment on the underlying substantive felony. *Hodge I*, 270 N.C. App. at 114–15, 840 S.E.2d at 288–89. Further, Defendant contended that the trial court abused its discretion by continuing his case, because he ultimately received a more severe sentence due to his habitual felon conviction, and because its continuance “offended the public sense of fair play and ‘undermine[d] public faith in the criminal justice system.’” *Id.* at 117,

840 S.E.2d at 290.

¶ 10 “A valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (citations and internal marks omitted). Further, “the proceeding by which the state seeks to establish that [the] defendant is an habitual felon is necessarily ancillary to a pending prosecution for the ‘principal,’ or substantive, felony.” *State v. Allen*, 292 N.C. 431, 433–34, 233 S.E.2d 585, 587 (1977). “The [North Carolina Habitual Felons Act] does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant’s status as an habitual felon.” *Id.* at 434, 233 S.E.2d at 587. “[F]or the purpose of our habitual felon laws, until judgment [is] entered upon [the] defendant’s conviction of [the underlying substantive felony], there remain[s] a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach.” *State v. Oakes*, 113 N.C. App. 332, 339, 438 S.E.2d 477, 481 (1994).

¶ 11 In our prior opinion in this case, this Court held that the trial court retained jurisdiction to try and to sentence Defendant as an habitual felon because the State properly obtained the April 2018 bill of indictment before judgment had been entered on Defendant’s underlying substantive charges. *Hodge I*, 270 N.C. App. at 115, 840 S.E.2d at 289. “While the State could not establish jurisdiction over the habitual felon charge without evidence beyond a charging document marked ‘NOT A TRUE

BILL[,]’ the State obtained a valid indictment before judgment was entered on the substantive felony.” *Id.*

¶ 12           However, the trial court’s additional findings of fact show that the grand jury properly conveyed to the trial court jurisdiction to try and to sentence Defendant for attaining habitual felon status from the start of the proceedings in this case. New evidence shows there was a true bill of indictment prior to the beginning of trial on Defendant’s underlying substantive charges in 2018. The trial court’s additional findings state “there was a true bill for habitual felon indictment dated 7 November 2017[,]” on the same date the grand jury returned valid indictments for Defendant’s underlying substantive charges. *Hodge II*, \_\_\_ N.C. \_\_\_, \_\_\_, 861 S.E.2d 561, \_\_\_. The trial court also found that “[D]efendant was properly served with the true bill[.]” *Id.* A true bill of indictment for the habitual felon charge existed prior to the beginning of Defendant’s trial on the underlying substantive charges—before entry of judgment on those charges—and Defendant was on notice that he was also being charged as a recidivist prior to his conviction. *See Oakes*, 113 N.C. App. at 338, 438 S.E.2d at 480 (stating purpose of habitual felon indictment is to give the defendant “notice that he is to be charged as a recidivist” so that he has “a full understanding of the possible consequences of conviction” (citations omitted)).

¶ 13           We hold the trial court had jurisdiction to try and to sentence Defendant as an habitual felon from the start of the proceedings in this case.

¶ 14 Further, in light of the additional findings of fact, we hold the trial court did not abuse its discretion by continuing sentencing. Its decision did not result in an outcome prejudicial to Defendant. Continuing the case and allowing the State to produce a second true bill of indictment did not result in Defendant being subjected to an increased sentence that was otherwise impermissible because the trial court had jurisdiction to try Defendant as an habitual felon before the State acquired the April 2018 indictment. The trial court’s additional findings show that any error in this case was purely clerical, and, still, “we cannot say that the trial court’s grant of a continuance so offended the public sense of fair play that it constituted an abuse of discretion.” *Hodge I*, 270 N.C. App. at 117, 840 S.E.2d at 290 (citing *Oakes*, 113 N.C. App. at 336–37, 438 S.E.2d at 479–80).

### III. Conclusion

¶ 15 For the foregoing reasons, we once again hold that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Chief Judge STROUD and Judge MURPHY concur.

Report per Rule 30(e).