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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-196

No. COA20-538

Filed 15 March 2022

Catawba County, Nos. 16 CRS 170, 16 CRS 1233

STATE OF NORTH CAROLINA

v.

JOHN MICHAEL WALL, Defendant.

Appeal by defendant from judgment entered 1 November 2019 by Judge R. Stuart Albright in Superior Court, Catawba County. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Stephen G. Driggers, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 John Michael Wall ("Defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felonious possession of stolen goods pursuant to a breaking or entering and habitual felon status. Defendant argues the trial court lacked jurisdiction to sentence him as a habitual felon; the trial court erred in allowing the State to join file nos. 16 CRS 170 and 16 CRS 1233; and the trial court

erred in denying his purported motion to suppress. We hold the trial court committed no error.

I. Background

¶ 2 The procedural facts relevant to Defendant's appeal are as follows: On 6 January 2016, Defendant was indicted by the Catawba County Grand Jury in file no. 16 CRS 169 for attempt to obtain property by false pretenses and possession of stolen goods; the offense date on the indictment was 17 March 2015. On the same day, the Catawba County Grand Jury returned an indictment in file no. 16 CRS 170 charging Defendant as a habitual felon; the offense date on that indictment was also 17 March 2015.

¶ 3 On 7 March 2016, Defendant was indicted by the Catawba County Grand Jury in file no. 16 CRS 1233 for breaking or entering and larceny after breaking or entering; the offense date on the indictment was 19 November 2015. The State dismissed file no. 16 CRS 169 on 13 September 2018. On 4 June 2019, the Catawba County Grand Jury returned a superseding indictment in file no. 16 CRS 1233, which added a charge of felonious possession of stolen goods with an offense date of 19 November 2015.

¶ 4 The matters in file nos. 16 CRS 1233 and 16 CRS 170 came on for trial on 28 October 2019 in Superior Court, Catawba County. The State made an oral pretrial motion "to join the offenses listed on the indictment, file number 16 CRS 001233, as

well as the status offense of the defendant being a habitual felon." Defendant failed to object, and the trial court allowed the motion for joinder. After presentation of the evidence and while the jury deliberated, the State moved to amend the offense date on the habitual felon indictment in file no. 16 CRS 170 from 17 March 2015 to 19 November 2015. Defendant objected, arguing that file no. 16 CRS 170 did not attach to file no. 16 CRS 1233, and he was never served a habitual felon indictment that attached to file no. 16 CRS 1233. The trial court allowed the State's motion to amend the indictment and found that Defendant was served with the habitual felon indictment in file no. 16 CRS 170 on 3 February 2016. On 30 October 2019, the jury returned verdicts finding Defendant not guilty of felonious breaking or entering and felonious larceny, and on 31 October 2019, the jury returned a verdict finding Defendant guilty of felonious possession of goods stolen pursuant to a breaking or entering.

¶ 5 At the start of the habitual felon sentencing phase, Defendant objected to the introduction of the habitual felon indictment and argued that file no. 89 CRS 7326—the second felony listed on the habitual felon indictment in file no. 16 CRS 170—"was obtained without an attorney[.]" The trial court overruled Defendant's objection, finding "that questioning the validity of the original conviction is an impermissible collateral attack." On 31 October 2019, the jury returned a verdict finding Defendant guilty of being a habitual felon. The trial court sentenced Defendant to 111-146

months imprisonment. Defendant appeals.

II. Habitual Felon Indictment

¶ 6 Defendant argues the trial court lacked jurisdiction to sentence him as a habitual felon because the habitual felon indictment in file no. 16 CRS 170 did not attach to the substantive felony indictment in file no. 16 CRS 1233, as file no. 16 CRS 1233 was an "unrelated principal felony indictment" with a different offense date. According to Defendant, the State should have obtained "an indictment charging [Defendant] with habitual felon status that was ancillary to the indictment for the substantive offenses under 16 CRS 1233" and, in the absence of a new charging document, the trial court did not have jurisdiction to adjudicate the habitual felon charge.

¶ 7 We review *de novo* whether a trial court had subject matter jurisdiction. *State v. Collins*, 245 N.C. App. 478, 482–83, 783 S.E.2d 9, 13 (2016). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290 (2008) (citations and internal quotations omitted).

¶ 8 The Habitual Felons Act, codified at North Carolina General Statute §§ 14-7.1–14-7.6, "allows for the indictment of a defendant as a habitual felon if he has been convicted of or pled guilty to three felony offenses." *State v. Blakney*, 156 N.C. App. 671, 674, 577 S.E.2d 387, 390 (2003) (citation omitted). The Habitual Felons Act

requires two separate indictments to charge a defendant as a habitual felon: a substantive felony indictment and a habitual felon indictment. N.C. Gen. Stat. § 14-7.3 (2019). An indictment charging a defendant as a habitual felon must set forth the following:

> the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

Id. The date of the felony offense is not an essential element of a habitual felon charge. *State v. May*, 159 N.C. App. 159, 163, 583 S.E.2d 302, 305 (2003).

¶ 9 A substantive felony indictment need not reference a habitual felon indictment. *State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985). Furthermore, a "habitual felon indictment is not required to specifically refer to the predicate substantive felony. This is so because the defendant is not defending himself against the predicate substantive felony, but against the charge that he has been previously convicted of the required number of felonies." *State v. Mason*, 126 N.C. App. 318, 322, 484 S.E.2d 818, 820–21 (1997) (citations and quotations omitted). Additionally, a separate habitual felony indictment is not required for each substantive felony indictment. *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709 (1996).

¶ 10 It is also not necessary for the habitual felony indictment and the predicate substantive felony indictment to be handed down at the same time; "an habitual felon indictment may be returned before, after, or simultaneously with a substantive felony indictment." *State v. Flint*, 199 N.C. App. 709, 717–18, 682 S.E.2d 443, 448 (2009) (citation omitted). However, a habitual felon indictment cannot attach to a substantive felony proceeding if the alleged offense *occurred after* the habitual felony indictment was handed down. *See State v. Ross*, 221 N.C. App. 185, 190, 727 S.E.2d 370, 374 (2012) ("At the time the habitual felon indictments were returned, there was no pending prosecution for the June 2009 crimes 'to which the habitual felon proceeding could attach as an ancillary proceeding' because the crimes had not yet happened." (citation omitted)).

¶ 11 In *State v. Bowens*, 140 N.C. App. 217, 535 S.E.2d 870 (2000), the grand jury returned three substantive felony indictments and a habitual felon indictment. *Id.*, 140 N.C. App. at 219, 535 S.E.2d at 871. The habitual felon indictment referenced one of the three felony indictments: felonious possession of marijuana. *Id.* Subsequently, the trial court dismissed the charge of felonious possession of marijuana. *Id.*, 140 N.C. App. at 220, 535 S.E.2d at 872. The defendant argued that "if the habitual felon indictment references a principal felony and that felony is subsequently dismissed, the habitual felon indictment fails and should not be submitted to the jury." *Id.*, 140 N.C. App. at 224, 535 S.E.2d at 874. This Court

disagreed, holding that the principal felony referenced in the defendant's habitual felon indictment

> is not an essential element of being an habitual felon *and is treated as surplusage and ignored*. The essential purpose of an habitual felon indictment is to give a defendant notice he is being charged as an habitual felon so he may prepare a defense as to having a charge of the three listed felony convictions. In the instant case, [d]efendant had notice of the habitual felon charge against him, including the three felony convictions listed in the indictment, and the State's intention to prosecute him as an habitual felon. Since [d]efendant had notice and understanding of the habitual felon indictment, he had the opportunity to present a defense and was, therefore, not prejudiced. Accordingly, the habitual felon indictment was properly submitted to the jury.

Id., 140 N.C. App. at 225, 535 S.E.2d at 875 (emphasis added) (citations omitted).

¶ 12 In *State v. Murray*, 154 N.C. App. 631, 572 S.E.2d 845 (2002), the grand jury returned a substantive felony indictment charging defendant with felony larceny of a motor vehicle and a habitual felon indictment. *Id.*, 154 N.C. App. at 638, 572 S.E.2d at 850. Later, the grand jury returned a substantive felony indictment charging the defendant with felonious possession of stolen goods. *Id.* The defendant argued the habitual felon indictment was not ancillary to the indictment for felonious possession of stolen goods because the habitual felon indictment predated the substantive felony, of which the defendant was subsequently convicted. *Id.*, 154 N.C. App. at 637, 572 S.E.2d at 849. This Court held:

> Merely because these events caused the date on the habitual felon indictment to predate that on the substantive felony indictment does not mean that there did not exist a pending prosecution to which the habitual felon proceeding was ancillary. In fact, defendant was tried at the same session of criminal court by the same jury on the predicate felonious possession of stolen goods charge and then on the habitual felon charge. Our review of the record shows that on 28 August 2001, the jury entered a guilty verdict on the underlying felony and on 29 August 2001, the jury entered a verdict finding defendant to be an habitual felon. Thus, defendant's habitual felon indictment complies with the Habitual Felons Act set forth in N.C. Gen. Stat. § 14-7.1[.]

Id., 154 N.C. App. at 638, 572 S.E.2d at 850. Thus, the plain language of North Carolina General Statute § 14-7.3 does not require the habitual felon indictment charge defendant as a habitual felon at the time of the substantive offense. *See State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995).

¶ 13 Here, the habitual felon indictment returned against Defendant includes all the information required by North Carolina General Statute § 14-7.3 and "provides [D]efendant with adequate notice of the bases for the State's contention that [D]efendant had attained habitual felon status." *State v. Langley*, 371 N.C. 389, 395–96, 817 S.E.2d 191, 196 (2018). The offense date listed on the habitual felon indictment is not an essential element; therefore, it is "treated as surplusage and ignored." *Bowens*, 140 N.C. App. at 225, 535 S.E.2d at 875. "Because the original indictment itself was not flawed, any issue with respect to amending that indictment

is essentially moot, for the amendment could not have in any way prejudiced [D]efendant." *State v. Montford*, 137 N.C. App. 495, 501, 529 S.E.2d 247, 251 (2000).

¶ 14 From the time the habitual felon indictment was returned by the grand jury until Defendant was sentenced as a habitual felon, the habitual felon indictment attached to *a* substantive felony indictment: when the State dismissed the charges in file no. 16 CRS 169 on 13 September 2018, file no. 16 CRS 170 remained attached to the pending, non-completed felony prosecution in 16 CRS 1233. *See State v. Oakes*, 113 N.C. App. 332, 339, 438 S.E.2d 477, 481 (1994). It is immaterial that the habitual felon indictment preceded the substantive felony indictment in file no. 16 CRS 1233, *Bowens*, 154 N.C. App. at 638, 572 S.E.2d at 850; because the offense date in file no. 16 CRS 1233 (19 November 2015) occurred prior to the date the habitual felon indictment was handed down (6 January 2016), the habitual felon indictment became ancillary to the indictment in file no. 16 CRS 1233. *Cf. Ross*, 221 N.C. App. at 190, 727 S.E.2d at 374. Most importantly, Defendant was on notice he was being charged as a habitual felon. *Murray*, 154 N.C. App. at 638, 572 S.E.2d at 850. The trial court had jurisdiction to sentence Defendant as a habitual felon.

III. Joinder

¶ 15 Defendant argues "the trial court abused its discretion by allowing the State's motion to join the habitual felon indictment 16 CRS 170 with 16 CRS 1233 where the substantive offenses were not based on the same act or transaction, constituting part

of a single plan or scheme."

¶ 16 Defendant acknowledges that he did not object when the State moved to join file nos. 16 CRS 1233 and 16 CRS 170 for trial. As a result, Defendant asks this Court to invoke Appellate Rule 2 to review his unpreserved argument. Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted).

¶ 17 North Carolina General Statute § 15A-926 provides in pertinent part that "[t]wo or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2019). Here, as discussed in Section III, the habitual felon indictment in file no. 16 CRS 170 attached to the substantive felony indictment in file no. 16 CRS 1233. The Supreme Court has

explained that the effect of a habitual felon proceeding

> is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony, and the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony.

Cheek, 339 N.C. at 727, 453 S.E.2d at 863 (citations and internal quotations omitted). "In other words, the habitual felon indictment cannot be the sole charge on which the State proceeds at trial." *Blakney*, 156 N.C. App. at 674, 577 S.E.2d at 390. Because a habitual felon indictment cannot stand on its own, a habitual felon indictment is necessarily predicated on "the same act or transaction" as the substantive felony indictment, and joinder under N.C. Gen. Stat. § 15A-926(a) is proper. As a result, we do not consider this an "*exceptional circumstance*[]" justifying the use of Rule 2. *See Campbell*, 369 N.C. at 603, 799 S.E.2d at 602 (emphasis in original). In our discretion, we decline to use Rule 2 to review Defendant's unpreserved argument.

IV. Motion to Suppress

¶ 18 Finally, Defendant argues "the trial court abused its discretion by summarily denying [Defendant's] motion to suppress the use of his prior conviction under 89 CRS 7362 in the habitual felon indictment 16 CRS 170 because he had a right under N.C. Gen. Stat. § 1A-980 to present evidence the conviction was obtained in violation

of his right to counsel." (Capitalization altered.)

¶ 19 North Carolina General Statute § 15A-980 provides a defendant the right to "suppress the use of a prior conviction that was obtained in violation of his right to counsel . . . if its use will . . . [r]esult in a lengthened sentence of imprisonment." N.C. Gen. Stat. § 15A-980(a)(3) (2019). The statute specifies that a defendant who moves to suppress such prior conviction "must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it." N.C. Gen. Stat. § 15A-980(b). Generally, a defendant must file a pretrial motion to suppress the evidence. *See* N.C. Gen. Stat. § 15A-975(a) (2019) ("In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial[.]"). This statute "not only requires the defendant to raise his motion according to its mandate, but also places the burden on the defendant to demonstrate that he has done so." *State v. Drakeford*, 37 N.C. App. 340, 345, 246, S.E.2d 55, 59 (1978). Subsections(a), (b), and (c) of North Carolina General Statute § 15A-975

> provide in pertinent part that a defendant *may move to suppress evidence at trial only if defendant demonstrates* (a) that he did not have a reasonable opportunity to make the motion before trial; or (b) that the State did not give defendant sufficient notice of the State's intention to use such evidence; or (c) that after a pretrial determination and denial of the motion, additional facts have been discovered

> which could not have been discovered with reasonable diligence before determination of the motion.

State v. Harris, 71 N.C. App. 141, 143, 321 S.E.2d 480, 482 (1984) (emphasis added).

¶ 20 Here, as discussed above, the habitual felon indictment expressly sets forth each of the underlying felonies of which Defendant was charged and convicted of being in violation of, including file no. 89 CRS 7326. Defendant had a reasonable opportunity to raise his motion to suppress prior to trial and the exceptions listed in North Carolina General Statute § 15A-975(a) and (b) do not apply. *See id.* Additionally, Defendant did not argue that additional facts were discovered after a pretrial determination in violation of North Carolina General Statute § 15A-975(c). Accordingly, Defendant has failed to show that he complied with North Carolina General Statute § 15A-975. *Drakeford*, 37 N.C. App. at 345, 246, S.E.2d at 59. Moreover, under North Carolina General Statute § 15A-977(a),

> A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated.

N.C. Gen. Stat. § 15A-977(a) (2019). In addition to not filing a motion to suppress, Defendant also failed to file an accompanying affidavit in violation of North Carolina General Statute § 15A-977(a). As a result, Defendant waived the right to suppress

use of the prior conviction. *See* N.C. Gen. Stat. § 15A-980(b).

¶ 21 Defendant cites *State v. Blocker*, 219 N.C. App. 395, 727 S.E.2d 290 (2012), as support for his assertion that "the trial court's summary denial of [his] motion was an abuse of discretion." In *Blocker*, this Court held that the trial court abused its discretion by finding that the defendant's written motion to suppress a prior conviction, along with an accompanying affidavit, was an impermissible collateral attack on that prior conviction. *Id.*, 219 N.C. App. at 397, 727 S.E.2d at 291. Here, Defendant failed to file a written motion to suppress his prior conviction in violation of N.C. Gen. Stat. § 15A-977(a) and therefore, has waived his right to suppress the prior conviction.

V. Conclusion

¶ 22 We hold that the trial court had jurisdiction to sentence Defendant as a habitual felon. Further, we do not consider Defendant's argument that the trial court erred in joining file nos. 16 CRS 170 and 16 CRS 1233 an "exceptional circumstance[]" justifying the use of Rule 2. Finally, we hold the trial court did not err in denying Defendant's purported motion to suppress.

NO ERROR.

Judges ARROWOOD and JACKSON concur.

Report per Rule 30(e).