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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-346

Filed 6 February 2024

Union County, Nos. 21CRS422 21CRS51670-72

STATE OF NORTH CAROLINA

v.

TRASHEAN J. HUNTLEY

Appeal by defendant from judgments entered 15 July 2022 and 11 October 2022 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle M. McCullen, for the State.

Appellate Defender Glenn Gerding by Assistant Appellate Defender Michele A. Goldman, for the defendant-appellant.

TYSON, Judge.

Trashean J. Huntley (“Defendant”) appeals from judgments entered upon a jury’s verdict of guilty of felony fleeing to elude arrest, failure to wear a seatbelt, failure to stop at a red light, attaining the status of a habitual felon, and his guilty plea possession of a firearm by a felon. Our review shows no error at trial. We

remand for resentencing due to conceded errors in determining Defendant's prior record level.

I. Background

Monroe Police Detective Matthew Sierk was patrolling in an unmarked vehicle and wearing plain clothes on 11 May 2021. Detective Sierk observed Defendant inside a car stopped at an intersection. Detective Sierk believed Defendant had an outstanding felony warrant. Detective Sierk also believed Defendant was not wearing a seatbelt.

Detective Sierk requested Detective Joseph Malone in an unmarked car to stop Defendant. Detective Malone observed Defendant drive through a red light. Both officers activated their lights and sirens. Defendant did not pull over, sped up, ran through two stop signs, and crossed a double yellow line to pass a car.

Detective Sierk called for marked vehicles to assist in stopping Defendant. Prior to marked backup vehicles arriving, Detective Malone saw what he believed to be a gun drop out of the open driver's side window. Sergeant Tim Sikes responded from the opposite lane of travel, made a u-turn, and got behind Defendant. Approximately a mile later Defendant pulled over and was arrested. Sergeant Adam Craig searched the area where Detective Malone spotted the gun drop and located a gun laying on the ground.

Defendant was indicted for felony flee to elude arrest with a motor vehicle, possession of a firearm by a felon, failure to stop at a red light, littering not greater

than fifteen pounds, passing too closely on the left, and failure to wear a seatbelt. The State dismissed the littering not greater than fifteen pounds and passing too closely on the left charges at the conclusion of its case in chief.

Defendant was convicted of felony fleeing to elude arrest, failure to stop at a red light, failure to wear a seatbelt, and attaining habitual felon status. The jury failed to reach a verdict on the charge of possession of firearm by a felon. Defendant was sentenced to an active sentence of 80 to 108 months on 15 July 2022 and gave oral notice of appeal.

Defendant later entered a guilty plea to possession of a firearm by a felon. He was sentenced to an active sentence of 17 to 30 months to run consecutive to his other sentence on 11 October 2022. Defendant filed a petition for writ of certiorari on 30 June 2023, which was allowed by order on 5 September 2023 by this Court. This Court also ordered Defendant's appeals to be joined on 5 September 2023.

II. Jurisdiction

This Court possesses jurisdiction over Defendant's appeal of the 15 July 2022 judgment pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023). This Court possesses jurisdiction over Defendant's appeal of the 11 October 2022 judgment pursuant to the writ of certiorari. *See* N.C. R. App. P. 21(a) (A "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has

been lost by failure to take timely action.”). The joined appeals are properly before us. *Id.*

III. Issues

Defendant argues the trial court erred by not requiring Defendant’s counsel to subpoena and call a witness after an absolute impasse had occurred between them and also erred in miscalculating his prior record level for sentencing.

IV. Absolute Impasse

A. Standard of Review

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*. 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

B. Analysis

Defendant argues the trial court committed reversible error by not requiring Defendant’s counsel to call Hasim Heath as a witness, after Defendant and his counsel had reached an absolute impasse. Defendant asserts the trial court’s failure to require his counsel to follow his wishes on the issue violated his constitutional rights.

Defendant argues he is entitled to a new trial due to an “*Ali*” error and to have his strategic wishes honored by defense counsel. An *Ali* error occurs when “counsel and a fully informed criminal defendant client reach an absolute impasse as to such

tactical decisions, the client's wishes must control[.]" *State v Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991).

A defendant's disagreement with counsel will not rise to the level of "an absolute impasse" as noted in a prior decision by this Court, *State v. Curry*, 256 N.C. App. 86, 97, 805 S.E.2d 552, 559 (2017). In *Curry*, the defendant argued an impasse had occurred because his trial counsel did not believe his version of the crime and charges pending against him. *Id.* at 98, 805 S.E.2d at 559. This Court held "no actual impasse exists where there is no conflict between a defendant and counsel[.]" *Id.* at 97, 805 S.E.2d at 559 (citation omitted). This Court emphasized that conclusory allegations asserting an impasse are not enough to award a new trial. *Id.* at 98, 805 S.E.2d at 559.

Defendant and his counsel both initially agreed for Heath not to be subpoenaed. ("There are two eyewitnesses there other than law enforcement officers. One of the two is Mr. Heath. [Defendant] does not want to call him for reasons that I would support, frankly."). Defendant changed his mind after the State could not produce evidence from a GoPro camera of his interview with police on the night he was arrested.

Defendant demanded for Heath to be subpoenaed. Defendant's counsel agreed. Defendant's counsel made three separate motions for a continuance to subpoena Heath, which were denied. While Defendant and his counsel both agreed to have Heath subpoenaed, Defendant's counsel was unable to subpoena him due to the

ongoing nature of the trial. Defendant's and his counsel's agreement on this strategy cannot be said to rise to the level of an "absolute impasse as to such tactical decisions" as was described in *Ali*. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Defendant's argument is overruled.

V. Prior Record Level Calculation

Defendant argues he was sentenced based on an incorrect calculation of his prior record level in both the 15 July 2022 and 11 October 2022 judgments. The State concedes the 11 October 2022 judgment should be remanded for resentencing because it included the 15 July conviction for felony fleeing to elude in its calculation of prior record level points for the 11 October 2022 sentencing on the possession of a firearm by a felon charge when both charges were initially joined for trial together.

The State asserts Defendant stipulated to the prior record level, citing the following portion from Defendant's sentencing hearing on 15 July 2022:

THE COURT: Oh, for today? All right All right. And let me make sure, [Defendant], your're not stipulating to the record, right? I just want to make sure- -

[DEFENDANT'S COUNSEL]: He's asking if you agree that you're prior record level III or not.

DEFENDANT: Oh, yeah, I'm agreeing to that.

THE COURT: You are agreeing? Okay. I'm going to verify just to make sure.

DEFENDANT: That's my - - yeah, ain't no reason to not to.

THE COURT: Well, it's up to you. You don't have to. What I've got to do - -

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DEFENDANT: If I don't, then what?

THE COURT: I just got to go through and look and - - what I'm going to do anyway, I'm going to do anyway, I'm going to highlight that and make sure it all matches up okay with the convictions.

DEFENDANT: Okay.

THE COURT: But yeah, it's up to you. You don't have to. That's your right. If you do agree I'll just have you sign the back of it. That's the only difference it makes, whether or not you sign the back of it agreeing that those are your convictions. But, again, that's up to you. It doesn't matter. If you're not sure, if you want a minute to take with [your counsel], that's fine, too.

DEFENDANT: I ain't really - - I have to look over it again.

THE COURT: Okay.

DEFENDANT: Now that you put it in that kind of light.

THE COURT: Let me do this. I'm going to just go through and verify it myself, and that way you don't have to - -

DEFENDANT: Yeah, I don't want to waste my time.

Defendant was informed he did not have to stipulate to being a prior record level III offender and responded he did not want to review it to enter the stipulation to the court. Defendant never signed the stipulation on the prior record level worksheet. In the event this Court did not agree the above colloquy was a stipulation, the State concedes a pre-2014 possession of paraphernalia conviction requires the State to prove that a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia for the conviction to be treated as a Class 1 misdemeanor.

See State v. McNeil, 262 N.C. App 341, 821 S.E.2d 862 (2018). In light of the error and the State's concession, the judgments are vacated and this cause is remanded for re-sentencing based upon the joined charges and correct calculation of Defendant's prior record level. *Id.*

VI. Conclusion

We find no *Ali* error in counsel's subpoenaing of Heath. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Defendant's judgments are vacated and this cause is remanded for resentencing utilizing Defendant's correct prior record level. Defendant's underlying convictions remain undisturbed. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR AT TRIAL, REMANDED FOR RESENTINCING

Judges WOOD and STADING concur.

Report per Rule 30(e).