

SUPREME COURT OF NORTH CAROLINA

State v. Wagner, 356 N.C. 599

572 S.E.2d 777 (2002) · No. No. 108A02 · Decided December 20, 2002

SUMMARY

The Supreme Court of North Carolina held that an indictment charging felonious possession of drug paraphernalia was facially invalid because it was unsupported by the cited statute, depriving the trial court of jurisdiction. The court vacated that conviction and the corresponding Court of Appeals decision. It also held that resentencing the defendant for attempted possession of cocaine to a term more severe than his original sentence violated N.C.G.S. § 15A-1335, and remanded for resentencing.

CASE DETAILS

COURT	Supreme Court of North Carolina
WRITING FOR THE COURT	Per Curiam
JURISDICTION	North Carolina
DECIDED	December 20, 2002
DOCKET	No. 108A02
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Appeal from the Court of Appeals' decision upholding defendant's convictions and sentences after the trial court denied his motion to dismiss and sentenced him following a jury trial.
STANDARD OF REVIEW	The Supreme Court reviewed jurisdictional validity of the indictment and the legality of the sentence as questions of law.
PRECEDENTIAL VALUE	Published, precedential decision of the Supreme Court of North Carolina.
PARTIES	Belvin E. Wagner v. State of North Carolina

TOPICS

- criminal procedure
- appellate jurisdiction
- sentencing
- post-conviction relief
- plea bargaining

PRACTICE AREAS

- criminal law
- criminal procedure
- appellate jurisdiction
- sentencing
- post-conviction relief

QUESTIONS PRESENTED

1. Whether the indictment charging felonious possession of drug paraphernalia was facially invalid because the statute cited in the indictment did not support that offense, thereby depriving the trial court and Court of Appeals of jurisdiction.
2. Whether North Carolina General Statutes section 15A-1335 prohibited imposing a more severe sentence for attempted possession of cocaine after defendant's prior guilty plea and sentence for the same offense had been set aside on collateral review.
3. Whether the fact that the original conviction resulted from a negotiated guilty plea rather than a jury verdict affected application of section 15A-1335.

HOLDINGS

1. An indictment that facially fails to charge a cognizable criminal offense deprives the trial court of jurisdiction; the resulting conviction is void, and the appellate court lacks jurisdiction over the conviction as well.
2. North Carolina General Statutes section 15A-1335 prohibits imposing a more severe sentence for the same offense or conduct after the defendant's prior conviction or sentence has been set aside on direct review or collateral attack.

KEY QUOTATIONS

"For a court to have jurisdiction, 'a criminal offense [must] be charged in the warrant or indictment upon which the State brings the defendant to trial.'" (779)

"Pursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand." (779)

"This Court has held that '[a] plea of guilty, accepted and entered by the trial court, is the equivalent of conviction.'" (779)

FACTUAL BACKGROUND

Defendant was arrested without a warrant during an undercover operation while attempting to purchase cocaine. He initially pleaded guilty to attempted possession of cocaine as an habitual felon and received 101 to 131 months' imprisonment. After the plea and judgment were vacated because the parties had incorrectly calculated his prior-record level, defendant was reindicted, convicted after a jury trial, and sentenced to substantially longer terms; the new indictment also charged felonious possession of drug paraphernalia based on an antenna found during the original arrest.

PROCEDURAL HISTORY

Defendant originally pleaded guilty to attempted possession of cocaine as an habitual felon and received a sentence of 101 to 131 months. After defendant successfully moved for appropriate relief based on an erroneous prior-record-level calculation, the trial court vacated the plea and judgment. Defendant was subsequently indicted for attempted possession of cocaine, felonious possession of drug paraphernalia, and habitual-felon

status, convicted by a jury, and sentenced to two consecutive terms of 135 to 171 months. The Court of Appeals upheld the convictions and sentences. The Supreme Court of North Carolina vacated the drug-paraphernalia conviction for lack of jurisdiction and reversed and remanded as to the attempted-possession sentence.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The Court of Appeals must further remand to the trial court for resentencing on the attempted-possession conviction in a manner consistent with the opinion and section 15A-1335. The drug-paraphernalia conviction and the Court of Appeals' decision concerning that conviction are vacated.

CASES CITED

- State v. Vestal, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972)
- State v. Earley, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975)
- State v. Morgan, 246 N.C. 596, 599, 99 S.E.2d 764, 766 (1957)
- State v. Brown, 320 N.C. 179, 210, 358 S.E.2d 1, 22, cert. denied, 484 U.S. 970 (1987)
- State v. Hemby, 333 N.C. 331, 336-37, 426 S.E.2d 77, 80 (1993)
- State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998)

OPINION

PER CURIAM.

572 S.E.2d 777 (2002) 356 N.C. 599 STATE of North Carolina v. Belvin E. WAGNER. No. 108A02. Supreme Court of North Carolina. December 20, 2002. *778 Roy Cooper, Attorney General by Joan M. Cunningham, Assistant Attorney General, for the State. J. Clark Fischer, Winston-Salem, for defendant-appellant. Rudolph, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., Chapel Hill, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

North Carolina Prisoner Legal Services, Inc. by Kristin D. Parks, amicus curiae. PER CURIAM. Defendant Belvin Eugene Wagner was originally arrested without a warrant when he attempted to purchase cocaine during an undercover drug operation on 17 July 1998 in which undercover law enforcement officers used blanched macadamia nuts as fake crack cocaine.

On 17 August 1998, based on an information, defendant entered a negotiated guilty plea to the offense of attempted possession of cocaine as an habitual felon. This plea bargain provided that defendant would receive a minimum sentence of 101 months' imprisonment based on his criminal history, which was calculated to be at level VI.

The trial court entered judgment sentencing defendant to serve 101 to 131 months' confinement. Defendant thereafter filed a motion for appropriate relief asserting that his record level had been improperly calculated as a level VI when in fact his criminal history resulted in a level V for sentencing purposes. Concluding that defendant's plea bargain and guilty plea were based on "the mutual mistake of all parties as to [defendant's] proper record level for sentencing purposes," the trial court on 10 May 2000, nunc pro tunc 2 May 2000, vacated and set aside defendant's guilty plea and the judgment entered thereon.

On 15 May 2000 defendant was indicted for (i) attempt to possess cocaine, (ii) felonious possession of drug paraphernalia, and (iii) being an habitual felon. The paraphernalia on which this charge was based, an antenna used as a crack pipe, was found on defendant's person on 17 July 1998, at the time defendant was originally arrested for attempted possession of cocaine.

The prosecutor subsequently offered defendant a plea bargain of 101 to 131 months' imprisonment, the same sentence he had received before his plea was vacated. Defendant rejected this offer of plea. Defendant moved to dismiss the paraphernalia indictment, claiming unconstitutional vindictive prosecution and violation of N.C.G.S. § 15A-1335. Defendant's motion to dismiss was denied.

On 17 October 2000 a jury found defendant guilty of attempt to possess cocaine, felonious possession of drug paraphernalia, and being an habitual felon. The trial court sentenced defendant at level VI to serve two consecutive 135- to 171-month sentences.

Before this Court defendant asserts that the Court of Appeals erred in upholding these convictions and sentences. Defendant again contends that the felony drug paraphernalia indictment after his successful motion for appropriate relief was based on unconstitutional *779 vindictive prosecution and was in violation of N.C.G.S. § 15A-1335 and that the subsequent sentence for attempted possession of cocaine also violated N.C.G.S. § 15A-1335.

Defendant does not challenge the trial court's finding of a record level VI for his criminal history. Initially, we note that a jurisdictional issue not raised in the Court of Appeals has been raised in this Court, namely, that the 15 May 2000 indictment for felonious possession of drug paraphernalia is invalid on its face in that the charge of felonious possession of drug paraphernalia is not supported by any statute, a fact that the State concedes.

N.C.G.S. § 90-95(e)(3), cited in the indictment, does not pertain to drug paraphernalia. For a court to have jurisdiction, "a criminal offense [must] be charged in the warrant or indictment upon which the State brings the defendant to trial." *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972). Inasmuch as the indictment for felonious possession of drug paraphernalia was facially invalid, the trial court never had jurisdiction over this charge.

Moreover, appellate jurisdiction is derivative of the trial court's jurisdiction. *State v. Earley*, 24 N.C.App. 387, 389, 210 S.E.2d 541, 543 (1975); see also *State v. Morgan*, 246 N.C. 596, 599, 99 S.E.2d 764, 766 (1957).

Therefore, the Court of Appeals also lacked jurisdiction to hear defendant's appeal of the felonious possession of drug paraphernalia conviction. Accordingly, for lack of jurisdiction in the trial court, defendant's conviction for felonious possession of drug paraphernalia is void and is vacated. Similarly, the opinion of the Court of Appeals as it pertains to the conviction for felonious possession of drug paraphernalia is vacated.

Having vacated defendant's conviction for felonious possession of drug paraphernalia, we do not need to address defendant's assignment of error challenging the trial court's denial of his motion to dismiss based on vindictive prosecution. Defendant was also improperly sentenced for his conviction for attempt to possess cocaine. N.C.G.S. § 15A-1335 provides: When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C.G.S. § 15A-1335 (2001). Pursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand. In this case, contrary to the State's contention, the fact that defendant's original conviction resulted from a negotiated plea bargain rather than a finding of guilty by a jury is of no consequence.

This Court has held that "[a] plea of guilty, accepted and entered by the trial court, is the equivalent of conviction." *State v. Brown*, 320 N.C. 179, 210, 358 S.E.2d 1, 22, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

After defendant's plea and sentence were set aside pursuant to his motion for appropriate relief, a sentence of 135 to 175 months' imprisonment for defendant's conviction at trial for attempt to possess cocaine was contrary to the mandate of section 15A-1335 when defendant's original sentence was only 101 to 131 months' imprisonment for the same offense. See *State v. Hemby*, 333 N.C.

331, 336-37, 426 S.E.2d 77, 80 (1993). This case is distinguishable from *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), in that the sentence defendant initially received pursuant to the plea agreement was a lawful mitigated sentence for a record level VI offender. Unlike the defendant in *Wall*, this defendant by his motion for appropriate relief did not seek specific performance of a plea bargain containing an unauthorized sentence.

Under section 15A-1340.13(b), the court shall determine the prior record sentence for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable *780 statutes require or authorize another minimum sentence of imprisonment.

N.C.G.S. § 15A-1340.13(b) (2001). In this case N.C.G.S. § 15A-1335 is an applicable statute requiring "another minimum sentence of imprisonment." Id. In summary, for the reasons stated herein, defendant's conviction for felonious possession of drug paraphernalia and the the Court of Appeals' decision as to that conviction are vacated.

As to the judgment for attempted possession of cocaine, the decision of the Court of Appeals is reversed and remanded to that court for further remand to the trial court for resentencing in a manner not inconsistent with this opinion. VACATED IN PART AND REVERSED AND REMANDED IN PART.