

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

CLOREY EUGENE FRANCE

From N.C. Court of Appeals
(12-50)
From Cabarrus
(09CRS52770-71 09CRS9072)

ORDER

The following order has been entered on the motion filed on the 3rd of August 2020 by Defendant for Temporary Stay:

"Motion Denied by order of the Court in conference, this the 6th of August 2020."

Ervin, J., Recused

**s/ Davis, J.
For the Court**

Upon consideration of the petition filed by Defendant on the 3rd of August 2020 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 6th of August 2020."

Ervin, J., Recused

**s/ Davis, J.
For the Court**

The following order has been entered on the motion filed on the 3rd of August 2020 by Defendant for Immediate Release:

"Motion Denied by order of the Court in conference, this the 6th of August 2020."

Ervin, J., Recused

**s/ Davis, J.
For the Court**

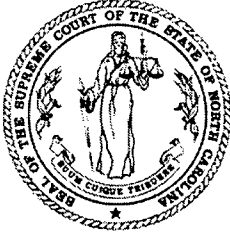
Upon consideration of the petition filed by Defendant on the 3rd of August 2020 in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 6th of August 2020."

Ervin, J., Recused

**s/ Davis, J.
For the Court**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of August 2020.



Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. Scott T. Stroud, Special Deputy Attorney General, For State of North Carolina - (By Email)

Mr. Corey Eugene France, For France, Clorey Eugene

Ms. Roxann L. Vaneekhoven, District Attorney

Hon. William W. Baggs, Clerk

West Publishing - (By Email)

Lexis-Nexis - (By Email)

45

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA12-50
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 09 CRS 9072, 52770-71,

CLOREY EUGENE FRANCE

Appeal by defendant from judgments entered 30 March 2011 and 31 March 2011 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 6 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Scott Stroud, for the State.

Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Clorey Eugene France appeals from judgments entered based upon jury verdicts finding him guilty of felonious breaking or entering, breaking or entering into a motor vehicle, attempted first degree burglary, possession of housebreaking implements, misdemeanor possession of stolen goods, and having

-2-

attained the status of an habitual felon. The trial court consolidated defendant's conviction for misdemeanor possession of stolen goods with his conviction for possession of housebreaking implements for sentencing purposes, and sentenced defendant as an habitual felon to four consecutive terms of 116 to 149 months imprisonment. Defendant gave notice of appeal in open court.

At trial the State's evidence tended to show that in the early morning hours of 20 August 2009, Darren and Michelle Furr awoke to the sound of ringing chimes, which indicated that the door to their detached garage was opened. Mrs. Furr called 911 and went to a window which faced the driveway in the front of her house. As she arrived at the window, she heard a rattling sound that appeared to come from the door leading to another garage which was attached to their house. Through the window, Mrs. Furr saw a man, later identified as defendant, reaching into the passenger side of her Chevrolet Suburban. Defendant ran when Mrs. Furr attempted to open the window, and Mr. Furr and his son chased after him. Mr. Furr lost sight of defendant, but responding officers located defendant in a tree in the front yard of a nearby house and took him into custody.

-3-

Defendant presented no evidence at trial, but did move to dismiss the charges against him. Defendant now argues the trial court erred in denying his motion to dismiss the charges of possession of housebreaking implements and misdemeanor possession of stolen goods. The State concedes that the trial court erred in this matter, and we agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007), *appeal after new trial on other grounds*, 197 N.C. App. 403, 677 S.E.2d 14 (2009). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citations and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

The gravamen of the offense of possession of housebreaking implements, as defined by G.S. 14-55, lies in the possession, "without lawful excuse," of an implement or implements either enumerated in the statute or which fairly come within the meaning of the term "other implements of housebreaking." Thus, an article may be

-4-

deemed an implement of housebreaking, the possession of which is made criminal by the statute, when (1) it is a picklock, key, bit, or any other instrument capable of being used for the purpose of housebreaking, and (2) at the time and place alleged, the person charged with its possession did in fact possess it for that purpose, i.e., without lawful excuse. Possession alone of the article is not the crime; the gist of the offense is its possession for the unlawful purpose of breaking into a building. Hence, although a prosecution under G.S. 14-55 does not require proof of any specific intent to break into a particular building at a particular time and place, the burden rests on the State to show beyond a reasonable doubt that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking. Such a showing will of necessity depend upon the strength of circumstantial evidence.

State v. Bagley, 300 N.C. 736, 740-41, 268 S.E.2d 77, 79-80 (1980) (citations omitted, emphasis in original). "The elements of possession of stolen goods are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010) (citation and quotation marks omitted).

Here, the indictment charging defendant with possession of housebreaking implements alleged defendant possessed as

-5-

housebreaking implements a screwdriver and latex gloves. Our Supreme Court has held that gloves are not housebreaking implements within the meaning of N.C. Gen. Stat. § 14-55, and thus possession of gloves cannot be the basis for a conviction for possession of housebreaking implements. *State v. Morgan*, 268 N.C. 214, 220, 150 S.E.2d 377, 381 (1966) ("Obviously, gloves, flashlights, and socks are not breaking tools."). Further, while screwdrivers may be implements of housebreaking, see *State v. Lovelace*, 272 N.C. 496, 158 S.E.2d 624 (1968), the State presented no evidence that defendant possessed the screwdriver at issue without lawful excuse. At least two screwdrivers were found in defendant's car, which was parked within 100 yards from the victims' house. However, defendant was arrested while he was away from his car, did not have the screwdrivers in his immediate possession, and there was no indication that defendant had used or attempted to use a screwdriver to break into any building. Accordingly, because gloves are not housebreaking implements and because the State presented no evidence that defendant possessed the screwdrivers for an unlawful purpose, the trial court erred in denying defendant's motion to dismiss the charge of possession of housebreaking implements.

-6-

The indictment charging defendant with possession of stolen property alleged that he possessed a set of keys, which had previously been stolen from Mr. Furr. However, neither Mr. nor Mrs. Furr testified that the keys found in defendant's possession were those that were in Mrs. Furr's purse, which had been stolen in April 2009, or were otherwise stolen from them. Mrs. Furr testified that she wasn't sure where the keys had come from, and that they could have been either hers or her husband's, but she never identified them as her keys. Mr. Furr also testified that he never identified the keys found on defendant as having been stolen. While one of the keys found in defendant's possession unlocked a lock to the back door of the Furr's home, and the Furrs both testified that defendant did not have permission to have a key to their home, the State presented no evidence that the keys found in defendant's possession were actually stolen property. Accordingly, we hold the trial court erred in denying defendant's motion to dismiss the charge of misdemeanor possession of stolen property.

Based on the foregoing, we vacate the judgment entered upon defendant's convictions on the charges of possession of housebreaking implements and misdemeanor possession of stolen property. Because defendant has presented no issue regarding

-7-

the judgments entered upon his remaining convictions, we find no error as to those judgments.

No error in part, vacated in part.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).