Supreme Court of North Carolina

IN RE:

DAVID LEE SMITH

From Office of Admin. Hearings
(13MIS12404 13MIS12404)
From N.C. Court of Appeals
(04-1033 P05-866 P05-922 P12-176 P14-529 P16-263 P20-230)
From Wake
(03CRS49692 03CRS56350 03CRS49693 03CRS49691 03CRS49694)

ORDER

Upon consideration of the emergency petition filed by Defendant on the 10th of August 2021 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 27th of October 2021."

Ervin, J., recused

s/ Berger, J.
For the Court

Upon consideration of the emergency petition filed by Defendant on the 26th of August 2021 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 27th of October 2021."

Ervin, J., recused

s/ Berger, J.
For the Court

The following order has been entered on the Emergency Motion filed on the 26th of August 2021 by Defendant to Amend Pro Se Petition:

"Motion Dismissed as moot by order of the Court in conference, this the 27th of October 2021."

Ervin, J., recused

s/ Berger, J.
For the Court

Upon consideration of the emergency petition filed by Defendant on the 31st of August 2021 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 27th of October 2021."

Ervin, J., recused

s/ Berger, J.
For the Court

Upon consideration of the emergency petition filed by Defendant on the 14th of September 2021 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 27th of October 2021."

Ervin, J., recused

s/ Berger, J.
For the Court

Upon consideration of the petition filed by Defendant on the 30th of September 2021 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 27th of October 2021."

Ervin, J., recused

s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November 2021.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

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

Copy to:
North Carolina Court of Appeals
Mr. David Lee Smith, For Smith, David Lee
Ms. Kimberly N. Callahan, Special Deputy Attorney General, For State of NC - (By Email)
Ms. Kathleen N. Bolton, Assistant Attorney General, For State of NC - (By Email)
Ms. N. Lorrin Freeman, District Attorney
Hon. Frank Blair Williams, Clerk
West Publishing - (By Email)
Lexis-Nexis - (By Email)

NO. COA04-1033

NORTH CAROLINA COURT OF APPEALS

Filed: 17 May 2005

STATE OF NORTH CAROLINA

v.

Wake County
03CRS49691-49694
03CRS56350

DAVID LEE SMITH

Appeal by defendant from judgments and commitments entered 12 December 2003 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 24 March 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

LEVINSON, Judge.

Defendant (David Lee Smith) appeals from habitual felon convictions and judgments on indictments for felonious larceny of a utility trailer (03 CRS 49691); felonious larceny of a Ford F-250 pickup truck (03 CRS 49692); felonious larceny of a tractor (03 CRS 49693); and felonious breaking or entering and felonious larceny of a lawn mower, chain saws and landscaping equipment (03 CRS 49694). A jury found defendant guilty on all counts, and consecutive prison sentences were imposed. The defendant argues the trial court erred in entering judgment on duplicative counts of larceny when all counts arose from a single act of taking. In addition, the defendant argues that the trial court erred in failing to dismiss all of the charges based on the State's failure to adduce

sufficient evidence of lack of consent to the breaking or entering and to the larcenies. We remand for the reasons set forth below.

The evidence presented at trial tended to show the following: Defendant was tried for events that took place late in the evening of 28 May 2003. Sometime around midnight, Detective Kevin Herring of the Apex Police Department was driving in his personal automobile when he noticed a pickup truck with a Town of Apex seal on the side. The pickup was pulling a utility trailer, which was carrying a Kubota tractor. His suspicions aroused by the lack of tail lights on the trailer, the presence of the town seal on the truck, and the late hour, Detective Herring used his mobile phone to contact the Apex police communicator, who confirmed the trailer's tag was registered to the Town of Apex. Because Detective Herring was driving his personal car, which lacked blue lights and a siren, he could not signal the driver of the truck to stop. He therefore followed the truck through Chatham County and into Harnett County until he lost sight of the vehicle. Soon thereafter, in the early morning hours, Apex police officers were dispatched to the location where Detective Herring had last seen the pick-up truck with the trailer. The officers located the abandoned pick-up truck in a nearby mobile home park.

That same night Officer Don D. Day of the Apex Police Department was patrolling an area that included the Apex Parks and Recreation Department maintenance building at 2306 Laura Duncan Road. He received an order to check the maintenance building for a possible break-in. The town's public works director told the

investigating officers that he knew of no work going on and that no one was authorized to take a town vehicle outside the town limits. Officer Day noted that the large double swinging triangular gates securing the driveway into the park, which should have been padlocked, were wide open. He then traveled some fifty yards down the main driveway into the park and discovered that a second set of large gates securing the maintenance and storage area, which also should have been locked, were open. Finally, a third set of gates set in the chain link fence securing the maintenance yard, which also should have been locked, were open. Officer Day described this fence as ten to twelve feet high with barbed wire at the top.

Officer Day immediately reported the apparent break-in to his supervisor, Sergeant Shawn Pearson, who notified Dennis Stanley, the department maintenance supervisor and emergency contact person for the facility. Stanley testified that when he arrived at the maintenance facility, he disabled the main building's alarm system. He immediately noticed that a Ford F-250 truck, a flatbed utility trailer and an orange B-24 series Kubota tractor were missing. He also noted a lawn mower and several smaller power landscaping tools were missing, including four chainsaws, two leaf blowers, and a weed eater.

Stanley described the maintenance yard's security system as a high-tech system with a video camera inside the main shop building and three video cameras surveying nearly the entire exterior area of the maintenance yard, which included several aluminum storage sheds. The cameras make a recording on a video cassette recorder

attached to a video monitor with a fourteen-inch screen. He further testified that at the end of his work shift that day he had locked the door to the shop building, locked the gate to the chain link fence, and locked the main gate to the maintenance yard. He stated that the keys to the Ford truck were left inside the truck.

Testimony indicated that only the five employees of the maintenance department had access to the trucks, but just two employees, Corey Crabtree and Alex Roadletter, were assigned to use the particular Ford F-250 truck that was stolen. Crabtree carried in the truck a metal Altoid mint tin which was used to hold loose change.

Having viewed the videotape made by the security cameras, Stanley stated that he did not recognize the person on the videotape as anyone he had worked with since he joined the department in 1998. He also stated that the defendant had never worked for the maintenance department. The videotape reportedly showed a black male wearing work gloves loading equipment into the truck. He drove the truck, which was towing the utility trailer carrying the tractor, to the locked gate and stopped. The suspect on the videotape got out of the truck and removed an article from a tool box which he used to open the lock securing the gate. Stanley identified the Ford pickup truck recovered by the authorities as the truck that had been stolen. The videotape was received into evidence and was viewed by the jury.

Leyle Wilson, a field operations agent with the City County Bureau of Investigation (C.C.B.I.), processed the stolen Ford truck for evidence. She lifted two latent fingerprints from the Altoid tin which Crabtree had described in his testimony.

Clara Irlend, a latent fingerprint examiner for the C.C.B.I., testified that she ran the prints collected from the Altoids tin through the Bureau's Automated Fingerprint Identification System (A.F.I.S.), leading her to some possible matches. After describing the fingerprint identification process in detail, she gave her opinion that the latent print was a near identical match to the prints of a David Lee Smith whose prints had been obtained by her department on 5 June 2003. A photograph of the David Lee Smith whose prints were found in the A.F.I.S. database was received into evidence. Defendant testified that he was fingerprinted on that date pursuant to an arrest for resisting an officer and driving with a revoked license, and that he had given fingerprints to the C.C.B.I. on numerous occasions.

The defendant testified to a criminal history in which he had pled guilty or had been convicted of crimes on seven separate occasions. He denied knowing where the Apex parks and recreation facility is located and denied that he was the person on the videotape. He admitted that he had seen the trucks used by the Apex parks department and that he believed they were all Fords; stated that Crabtree looked familiar; and was noncommittal on the question of whether he had seen the Altoid tin before ("I can't say

I have, can't say I haven't."). He also testified to recent arrests on unrelated charges.

Defendant brings forward several assignments of error. He first contends that the trial court erred by failing to dismiss three of the four larceny charges because the State offered no evidence tending to establish that he stole the items on four separate occasions. We agree.

It is well settled that "[a] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (quoting *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986)). We have referred to this rule as the "single taking rule." *State v. Rawlins*, ___ N.C. App. ___, ___, 601 S.E.2d 267, 272 (2004).

Our courts have applied the single taking rule in cases with facts remarkably similar to those of the instant case. In *Froneberger*, 81 N.C. App. 398, 344 S.E.2d 344, the defendant was convicted on four counts of felonious larceny of several silver pieces. The only evidence to support four separate larcenies was the fact that the defendant pawned the silver on separate occasions and had unlimited access to the home from which he stole the silver. *Id.* at 401, 344 S.E.2d at 347. This Court concluded the evidence was insufficient to support four separate convictions for larceny. *Id.* at 401-02, 344 S.E.2d at 346-47. It was equally possible that the defendant had taken all of the silver at one

time, rather than four separate times. *Id.* at 402, 344 S.E.2d at 347. We held "[a] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *Id.* at 401, 344 S.E.2d at 347.

In *State v. Marr*, 342 N.C. 607, 467 S.E.2d 236 (1996), our Supreme Court applied the single taking rule where defendant had been convicted as an accessory before the fact of four separate larcenies. Although there was evidence that two buildings had been entered and two vehicles taken, the taking of the vehicles and the various items from the buildings was all part of the same transaction. *Id.* at 613, 467 S.E.2d at 239.

In *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003), we applied the single taking rule where defendant broke into an equipment lot and stole two circular saws, a reciprocating saw, a volt meter, and several drill bits from three different trucks. *Id.* at 91, 577 S.E.2d at 704. The defendant was convicted on two counts of larceny. Although the defendant could not have physically taken all of the tools in a single trip, the vans were parked inside the same locked fence in close proximity and the larcenies occurred within the same general time period. *Id.* at 96, 577 S.E.2d at 707. Consequently, this Court held the larcenies were part of a single continuous transaction, necessitating that one of the convictions be vacated. *Id.*

Similarly, in the instant case, the evidence showed a single transaction occurred. The surveillance video showed an individual

loading the pickup truck with the lawn tools, attaching the utility trailer to the truck, and driving the truck out of the facility. All of the evidence indicated that this occurred on the evening of 28 May 2003, in one single continuous act.

We conclude that the evidence does not support more than one larceny conviction. We therefore remand with instructions for the Superior Court to arrest judgment on three of the four larceny convictions, and at the same time to enter new judgment(s) and sentence(s) for one felonious breaking or entering and one felonious larceny.

We next turn to defendant's argument that the trial court erred when it failed to dismiss the breaking and entering charge, as well as all of the larceny charges, because there was insufficient evidence of lack of consent for each charge. We disagree.

In reviewing a claim of insufficiency of the evidence, this Court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond reasonable doubt. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982). The State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct." *State v. Holmes*, 142 N.C. App. 614, 617, 544 S.E.2d 18, 20 (2001).

To support a conviction for felonious breaking or entering under N.C.G.S. § 14-54(a) (2003), "there must exist substantial evidence of each of the following: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 103 (1988).

Although the State did not offer direct testimony that the defendant lacked consent to break or enter the locked Apex Parks and Recreation Department maintenance facility, the circumstantial evidence is overwhelming. The evidence tended to show the defendant was inside a locked facility in the middle of the night. The main building had an alarm system. The entire compound was surveyed by four video cameras and surrounded by a ten to twelve foot high fence topped with barbed wire. The presence of the security system and fence give rise to an inference that the general public was not permitted entry. The defendant was not there during normal working hours, nor was he an employee of the Apex Parks and Recreation Department. The defendant loaded various items which did not belong to him into a pickup truck which, likewise, did not belong to him. The State offered evidence that only Corey Crabtree, Alex Roadletter and their three co-workers at the maintenance yard were authorized to use the truck. Using a tow strap, the defendant pulled a tractor out of a storage bay then mounted it onto a utility trailer, damaging the trailer's tail lights. He then hitched the trailer to the pickup truck. He drove the truck to the locked gate and stopped. The defendant got out of

the truck and removed an article from a tool box which he used to open the lock securing the gate. No work was authorized that night and no one was permitted to take the truck outside the town limits. The fact that he wore gloves suggests that the defendant wanted to avoid leaving fingerprints. Moreover, the defendant's own testimony is entirely inconsistent with any inference that he acted with consent. Specifically, he denied knowing where the Apex parks and recreation facility is located, denied that he was the person on the videotape, and denied that had ever been in possession of the stolen vehicles and items.

Viewing the evidence in its totality and in the light most favorable to the State, there is substantial evidence that the defendant lacked consent to break or enter the maintenance facility. This assignment of error is overruled.

Lack of consent is clearly an essential element of larceny. "The essential elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). The same evidence that supports a finding that defendant lacked consent to break or enter the facility also supports a finding that he took the vehicles and various items from the maintenance facility without consent. This assignment of error is overruled.

We have considered defendant's remaining arguments and conclude they are without merit.

Reversed in part and Remanded.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e). P.(15)