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NO. COA11-470
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CRS 38740-41, 61949

JAMAL NEMAY WILLIAMS

Appeal by Defendant from judgments entered 3 August 2010 by Judge Calvin E. Murphy in Superior Court, Mecklenburg County. Heard in the Court of Appeals 1 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Mercedes O. Chut for Defendant-Appellant.

McGEE, Judge.

Jamal Nemay Williams (Defendant) appeals from his conviction for possession of heroin and of having attained habitual felon status. We find plain error and remand for a new trial.

Defendant was indicted for possession of heroin, possession of cocaine, and having attained habitual felon status. Prior to trial, the possession of cocaine charge was dismissed. Evidence

at trial showed that Officer Paul Blackwood (Officer Blackwood) of the Charlotte-Mecklenburg Police Department was on patrol on 2 May 2009 when he received a request to assist an undercover operation. Officer Blackwood was informed that a possible narcotics transaction had occurred in the parking lot of a Bojangles restaurant and that the suspects were possibly consuming narcotics. Based on this information, Officer Blackwood was directed to approach the suspect vehicle. Officer Blackwood pulled up next to the vehicle and observed two men inside. Defendant was sitting in the driver's seat, and another individual was in the back seat.

When Officer Blackwood approached the driver's side of the vehicle, he saw a small bag containing powder in Defendant's lap. Officer Blackwood testified that the bag appeared to contain heroin. He took the bag and placed it on top of the vehicle. After Defendant exited the vehicle, Officer Blackwood saw another item on the front floorboard of the driver's side. Officer Blackwood testified that this item appeared to contain cocaine. Thereafter, Officer Blackwood placed Defendant under arrest and searched Defendant's vehicle. Defendant was transported to the police station after indicating that he wished to cooperate with police.

Detective Sidney Lackey (Det. Lackey) spoke to Defendant on 2 May 2009, after learning that Defendant had been arrested on drug charges and wanted to cooperate. Det. Lackey was not involved with Defendant's arrest, but knew Defendant from previous police work. Defendant signed a *Miranda* waiver form and told Det. Lackey that the substances recovered were "dope" and "cut." Based on Det. Lackey's training and experience, he believed that Defendant was referring to heroin. A video of the interview was also entered into evidence.

The State introduced a lab report into evidence that indicated that the packet recovered from Defendant's lap contained 0.03 grams of heroin. The lab report was admitted into evidence without objection from Defendant. The heroin was also admitted into evidence.

Defendant testified in his own defense. He claimed that on 2 May 2009, he was driving when a friend, James Stewart (Mr. Stewart), flagged him down and asked for a ride to Bojangles. Upon arriving at Bojangles, Defendant exited the vehicle to purchase a snack, while Mr. Stewart stayed in the back seat of the vehicle. When Defendant returned to the vehicle, Stewart yelled "police" and threw something at the back of Defendant's head. Defendant then noticed a bag fall onto the floorboard of

the car, but claimed that he did not know what was in the bag at the time. However, Defendant admitted that he was arrested for possession of heroin and cocaine shortly thereafter, and testified that he later discovered that one of the substances was heroin.

A jury found Defendant guilty of possession of heroin and of having attained habitual felon status on 3 August 2010. The trial court sentenced Defendant to a presumptive-range term of 121 to 155 months in prison.

Defendant argues that the trial court committed plain error by admitting the lab report into evidence. Defendant contends that the lab report constituted impermissible hearsay and violated his Sixth Amendment confrontation right because the author of the report did not testify at trial. *See Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 174 L. Ed. 2d 314 (2009). Defendant failed to object to the introduction of the lab report and thus did not preserve this issue for appellate review. This Court's review is therefore limited to whether the trial court's admission of the lab report constituted plain error. *See* N.C.R. App. P. 10(a)(4).

Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury

reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Our Supreme Court has explained:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial[.]

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal citations omitted).

Defendant argues that admission of the lab report constituted plain error because it was the only evidence of an essential element of the offense for which he was convicted that established that the substance found in Defendant's vehicle was heroin. We agree.

Testimonial statements from unavailable witnesses presented at trial without a defendant having an opportunity to cross-examine those witnesses prior to trial violate the Confrontation Clause of the United States Constitution. *Crawford v. Washington*, 541 U.S. 36, 50-52, 158 L.Ed.2d 177, 187 (2004). In the present case, the lab report was testimonial in nature. *See*

Melendez-Diaz, ___ U.S. at ___, 174 L.Ed.2d at 321–22 (holding that reports of chemical analyses were testimonial in nature, and subject to the Confrontation Clause requirements). Additionally, there was no evidence that Defendant had an opportunity to cross-examine the author of that report. Therefore, admitting the report constituted a violation of Defendant's rights under the Confrontation Clause. *See State v. Jones*, ___ N.C. App. ___, ___, 703 S.E.2d 772, 774 (2010).

Defendant was charged with possession of heroin. This charge requires that the State prove beyond a reasonable doubt that the substance found in Defendant's lap was in fact heroin. *See* N.C. Gen. Stat. § 90-95(a)(1)(2009).

At trial, Officer Blackwood testified that the packet he observed on Defendant's lap appeared to contain heroin. Officer Blackwood also testified that the other packet recovered from the floorboard of the vehicle appeared to contain cocaine. Det. Lackey testified that Defendant told him the substances in the two packets were "dope" and "cut." Det. Lackey testified that he understood "dope" to refer to heroin. Det. Lackey understood "cut" to be "an agent that is used to take some of the edge off the actual heroin, so you can use it to cut the heroin."

Nothing in the transcript indicates that Det. Lackey personally observed the two packets or their contents.

> The testimony of defendant and police officers alone, despite both officers' credentials and experience, is insufficient to show that the substance possessed was [an illegal narcotic]. The State must still present evidence as to the chemical makeup of the substance. *State v. Nabors*, ___ N.C. App. ___, ___, 700 S.E.2d 153, 158 (2010) ("[M]ere lay opinion that a substance is a controlled substance based solely on its physical appearance is insufficient evidence from which a jury could find beyond a reasonable doubt that the substance is, in fact, controlled."); *State v. Meadows*, ___ N.C. App. ___, ___, 687 S.E.2d 305, 309 ("'[E]xisting precedent suggests that controlled substances defined in terms of their chemical composition can only be identified through the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.'") (quoting *State v. Ward*, 199 N.C. App. 1, 26, 681 S.E.2d 354, 371 (2009), *aff'd*, 364 N.C. 133, 694 S.E.2d 738 (2010)), *cert. denied*, 364 N.C. App. 245, 699 S.E.2d 640 (2010); *State v. Llamas-Hernandez*, 189 N.C. App. 640, 653, 659 S.E.2d 79, 87 (2008) (Steelman, J., concurring in part and dissenting in part), *rev'd and dissent adopted*, 363 N.C. 8, 673 S.E.2d 658 (2009).

State v. Williams, ___ N.C. App. ___, ___, 702 S.E.2d 233, 238 (2010).

In the present case, the only admissible evidence presented at trial was lay testimony. Det. Lackey testified concerning Defendant's statement that the substances recovered were "dope"

and "cut," and Det. Lackey testified that he understood "dope" to refer to heroin. Officer Blackwood testified that the substance recovered from Defendant's lap appeared to be heroin, and the substance recovered from the floorboard appeared to be cocaine. This testimony was based solely on visual observation, and not on chemical analysis. Officer Blackwood's tentative identification of one of the packets containing powder as cocaine was, in fact, incorrect. This fact demonstrates the reasoning behind the requirement that suspected illegal drugs be identified at trial by properly admitted testimony and reports supported by expert chemical analysis of the suspected contraband.

We conclude that the erroneous admission of the lab report was not harmless and probably resulted in the jury's reaching a different verdict than it otherwise would have reached; therefore, it constituted plain error. *See id.* For the foregoing reasons, Defendant is entitled to a new trial.

New trial.

Judges ELMORE and McCULLOUGH concur.

Report per Rule 30(e).