IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1208

Filed: 19 July 2016

Guilford County, Nos. 13 CRS 100207; 14 CRS 24555

STATE OF NORTH CAROLINA

v.

TISHEKKA NICOLE CAIN

Appeal by defendant from judgments entered 10 April 2015 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

McCULLOUGH, Judge.

Tishekka Nicole Cain appeals from her convictions of trafficking by transporting 28 grams or more but less than 200 grams of cocaine, trafficking by possessing 28 grams or more but less than 200 grams of cocaine, trafficking by possessing 200 grams or more but less than 400 grams of cocaine, possessing with the intent to sell or deliver methylone, and trafficking by possessing 4 grams or more but less than 14 grams of heroin. For the reasons stated herein, we find no error.

I. Background

On 3 March 2014, Tishekka Nicole Cain ("defendant") was indicted for trafficking by transporting 28 grams or more but less than 200 grams of cocaine and trafficking by possessing 28 grams or more but less than 200 grams of cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3). On 29 September 2014, defendant was indicted for trafficking by possessing 200 grams or more but less than 400 grams of cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3); possessing with the intent to sell or deliver methylone in violation of N.C. Gen. Stat. § 90-95(a)(1); and trafficking by possessing 4 grams or more but less than 14 grams of heroin in violation of N.C. Gen. Stat. § 90-95(h)(4).

On 26 September 2014, defendant filed a "Motion to Suppress Evidence and Statements." Defendant argued that all the evidence seized was obtained by means of searches and seizures without lawful authority in violation of the United States Constitution. Defendant also argued that she was not advised of her *Miranda* rights and that her statements were made under undue stress and emotional distress.

Defendant's case came on for trial at the 23 March 2015 criminal session of Guilford County Superior Court, the Honorable Susan E. Bray, presiding.

The evidence presented at defendant's suppression hearing and trial tended to show as follows: Detective Brad Jeter with the Greensboro Police Department testified that on 17 December 2013, he received a tip stating that William McKinney

("McKinney") was at a residence located on Mystic Drive, that he would be in possession of a large quantity of cocaine, and that he would be driving a black sedan. Detective Jeter was familiar with McKinney from narcotic-related investigations he had been involved in since 2007 or 2008. Detective Jeter initiated an investigation by asking several officers to surveil the location.

Detective Maurice McPhatter with the Greensboro Police Department observed McKinney exit 506 Mystic Drive and enter a black Ford Fusion. Officers were unable to maintain surveillance on McKinney as he drove away so they returned to the residence. About three to five minutes after leaving, McKinney returned to the Mystic Drive residence and entered apartment C. McKinney then left again for a second time and traveled to Creek Ridge Road, stopping at an apartment complex.

McKinney exited his vehicle and met a known drug dealer named Adrian Hickman who went by the street name "Heavy." McKinney met Heavy in the breezeway of the apartment complex and conducted what appeared to be a hand-to-hand drug transaction. McKinney then returned to the Mystic Drive residence and entered apartment C. Shortly thereafter, McKinney left apartment C and entered his vehicle. Defendant exited the same apartment and entered the passenger side of McKinney's vehicle.

Officers followed McKinney's vehicle and observed him commit traffic violations. Officers also knew that McKinney had a suspended driver's license prior

to initiating this investigation. Based on the foregoing, officers conducted a traffic stop of McKinney's vehicle.

Detective Marcus McPhatter testified that McKinney pulled directly over onto the shoulder. Detective Jeter and two others, Officer Corey Norton and Detective Farrish, shortly arrived on the scene. Detective Marcus McPhatter approached the driver's side of the vehicle and asked McKinney for his driver's license. McKinney stated that he did not have one. Defendant was sitting in the front passenger seat. At that time, officers could smell a strong odor of marijuana coming from the vehicle. Detective Marcus McPhatter asked McKinney to exit his vehicle and they stood near the trunk area. Defendant remained inside the vehicle. McKinney gave permission to search his person for any drugs or weapons. Detective Marcus McPhatter located a small bag of white substance in McKinney's left front jacket pocket which he believed "looked like MDMA, molly or -- [p]owder substance." McKinney was then placed under arrest and remained at the back side of the car.

After McKinney was arrested, defendant was asked to exit the vehicle and Officer Norton performed a search of the vehicle. Officer Norton found defendant's purse in the front passenger-side floorboard and a gram of marijuana in a clear plastic wrapper inside the purse. Defendant was arrested and placed in handcuffs. Defendant began crying. Detective Jeter testified that "the way she was crying is not usual to somebody that's been found in possession of that small amount of

marijuana." Detective Jeter asked defendant, "[h]ow much do you have?" and defendant replied, "[a] lot. Well, she said she didn't know what she had, but she said she had a lot." Detective Jeter "asked her could she remove it and she said she could." Detective Jeter instructed Detective Farrish to remove defendant's handcuffs or place them in front so she could remove the item. Defendant reached into her pants and pulled out two bags that contained cocaine. The cocaine was placed in a plastic evidence bag. Defendant and McKinney were then transported to a police substation.

Detective Maurice McPhatter, who had continued conducting surveillance on 506 Mystic Drive, was informed from the officers conducting the vehicle stop that drugs were recovered from both McKinney and defendant. Thereafter, Sherrie Michael ("Michael") was observed exiting apartment C and entering a vehicle. Michael was subsequently stopped by other detectives in the area for a vehicle violation. Michael was the owner of 506 Mystic Drive, apartment C and gave Detective Jeter verbal consent to search the apartment.

Officers found a large metal item adjacent to a hydraulic pump that was consistent with a "narcotics press or a kilo press," used to compact narcotics into smaller packages. In a closet, officers found a United Parcel Service ("UPS") mailing box that contained over an ounce of cocaine, heroin, a crystal-like drug that was consistent with the street name "molly," and several digital scales. The shipping label of the UPS box was addressed to defendant at the apartment's address.

Jamie Whitehead ("Ms. Whitehead"), an expert in the field of forensic chemistry and specializing in the analysis and identification of controlled substances, testified. Ms. Whitehead testified that she reviewed the work and documentation prepared by Ms. Meredith Lisle ("Ms. Lisle") for all the substances that were submitted in defendant's case. Ms. Lisle was similarly qualified as an expert in forensic chemistry and the identification of drugs. Ms. Whitehead did not independently test any of the substances. The substances found in defendant's possession at the vehicle stop were identified as 11.35 grams of cocaine base and 31.20 grams of a combination of cocaine base and cocaine hydrochloride, both Schedule II substances. The substances found in the UPS box were identified as 209.27 grams of cocaine hydrochloride, a Schedule II controlled substance; 3.71 grams of methylone, a Schedule I controlled substance; and 7.4305 grams of heroin, a Schedule I controlled substance.

The trial court granted defendant's motion to suppress her statement, "a lot," but denied defendant's motion to suppress the evidence of the two bags of cocaine found on her person during the traffic stop.

At the close of the State's evidence, defendant moved to dismiss all the charges. The trial court denied defendant's motion.

On 27 March 2015, a jury found defendant guilty on all charges. Defendant was sentenced to a term of 70 to 93 months for trafficking by possessing 200 grams

or more but less than 400 grams of cocaine, possession of methylone, and trafficking by possessing 4 grams or more but less than 14 grams of heroin. Defendant was also sentenced to a term of 35 to 51 months for trafficking by transporting 28 grams or more but less than 200 grams of cocaine and trafficking by possessing 28 grams or more but less than 200 grams of cocaine.

Defendant appeals.

II. Discussion

A. Motion to Suppress

Defendant first argues that the trial court erred by denying her motion to suppress the physical evidence seized from her person during the traffic stop.

"The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993) (citations omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

On 31 March 2015, the trial court entered an "Order Denying Motion to Suppress." On appeal, defendant challenges finding of fact number 34 and the trial court's conclusion of law which provide as follows:

> 34. In considering the totality of the circumstances at the time, the court looks at the characteristics of Defendant Cain, the setting of the interview/statement, and the details of the questioning. This encounter took place along the roadside after a vehicle stop when Defendant Cain was fully alert. There is no evidence of any threat or promise to induce her statement, nor is there evidence that the encounter was prolonged in any fashion. It does not appear to be an "interrogation" session as such, but rather one question in response to Cain's crying. Further, no officers had their weapons drawn or presented any overbearing presence. Nothing indicates coercion. Based on these circumstances, Defendant Cain's statement was voluntary.
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> The Court concludes as a matter of law that derivative evidence from an unwarned statement is not fruit of the poisonous tree if the statement was voluntary. U.S. v. Patane, 542 U.S. 630 (2004). U.S. v. Cauthen, 669 F. Supp. 2d 629, USDC, Middle District of North Carolina (2009). State v. Houston, 169 N.C. App. 367 (2005). State v. Goodman, 165 N.C. App. 865 (2004). In the Matter of L.I., 205 N.C. App. 155 (2010). Defendant Cain's statement, "a lot," will not be allowed in evidence at trial, but Detective Jeter will be allowed to testify that she pulled two bags of cocaine out of her pants, and the cocaine will be admitted into evidence at trial.

Specifically, defendant argues that the trial court's finding that her statement was voluntary was erroneous because she was clearly in custody and was interrogated without being advised of her *Miranda* rights. For that reason, defendant asserts that the cocaine seized from her person as a result of her statement constituted fruit of the poisonous tree. We disagree.

> The test for voluntariness in North Carolina is the same as the federal test. If, looking to the totality of the circumstances, the confession is the product of an

> essentially free and unconstrained choice by its maker, then he has willed to confess [and] it may be used against him; where, however, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Factors to be considered in this inquiry are whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citations and quotation marks omitted).

Here, the record evidence demonstrates that defendant was in custody prior to her statement of, "a lot," after officers discovered marijuana in her purse. Defendant concedes that she was not deceived. Although defendant was surrounded by four officers, no weapons were drawn and there was no evidence presented that there were physical threats or shows of violence to induce her statement. Detective Jeter testified that the way in which defendant was crying was unusual for someone who had been found to be in possession of a very small amount of marijuana. Based on this unusual reaction, he asked defendant, "[h]ow much do you have?" and defendant replied, "[a] lot" and removed two bags of cocaine from her pants. Although defendant had not been informed of her *Miranda* rights at that point in time, this one question posed by Detective Jeter did not amount to an interrogation. Considering the totality

of the circumstances, we hold that the trial court properly found that defendant's statement was voluntary.

Furthermore, "our Supreme Court has held that physical evidence obtained as a result of statements by a defendant made prior to receiving the necessary *Miranda* warnings need not be excluded." *State v. Houston*, 169 N.C. App. 367, 371-72, 610 S.E.2d 777, 781 (2005). Accordingly, we hold that the physical evidence seized from defendant's person, discovered as a result of defendant's voluntary statement, was properly admitted into evidence.

B. Trafficking in Cocaine by Transportation

In her second argument, defendant contends that the trial court erred by denying her motion to dismiss the charge of trafficking by transporting 28 grams or more but less than 200 grams of cocaine based on insufficiency of the evidence that she transported the cocaine. We disagree.

> The trial court's denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. On consideration of a motion to dismiss, the court need only determine whether there is substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense.

State v. Lee, 213 N.C. App. 392, 398, 713 S.E.2d 174, 179 (2011) (citations omitted). "The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the

jury to resolve." *State v. Phillpott*, 213 N.C. App. 468, 478, 713 S.E.2d 202, 209 (2011) (citation omitted).

N.C. Gen. Stat. § 90-95(h)(3) provides that "[a]ny person who sells, manufactures, delivers, *transports*, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine. . . .' " N.C. Gen. Stat. § 90-95(h)(3) (2015) (emphasis added).

"[A]lthough the word 'transport' has not been defined in the North Carolina Controlled Substances Act, G.S. § 90-86 *et seq.*, our courts have previously defined it as 'any real carrying about or movement from one place to another.' " *State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434, 436 (1993) (citation omitted). "[E]ven a very slight movement may be 'real' or 'substantial' enough to constitute 'transportation' depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. Manning*, 139 N.C. App. 454, 467, 534 S.E.2d 219, 227 (2000).

Here, officers observed defendant exit 506 Mystic Drive, apartment C, where various drugs including cocaine were found. The various drugs were discovered inside a UPS box that was addressed to defendant at 506 Mystic Drive, apartment C. Defendant then entered a vehicle driven by McKinney that traversed from the residence onto a public street or highway. This vehicle was pulled over by police and

subsequently, the two bags of cocaine were found on defendant's person. Viewing the evidence in the light most favorable to the State, we hold that a jury could reasonably find that defendant transported the cocaine. The trial court properly denied defendant's motion to dismiss the charge of trafficking by transporting 28 grams or more but less than 200 grams of cocaine.

C. Trafficking Cocaine by Possession, Possession of Methylone, and Trafficking Heroin by Possession

Defendant argues that the trial court erred by denying her motion to dismiss the following charges: (1) trafficking in cocaine by possessing 200 grams or more but less than 400 grams; (2) possessing with the intent to sell or deliver methylone; (3) trafficking in heroin by possessing 4 grams or more but less than 14 grams. Specifically, defendant argues that there was insufficient evidence that she possessed these drugs. Defendant contends that she was not present when these drugs were found at 506 Mystic Drive, apartment C and that the State failed to show any possessory interest in the apartment by defendant. We do not find defendant's arguments convincing.

Our Court has held that:

> [I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having

> actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Tisdale, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002) (citations and quotation marks omitted). "Whether constructive possession exists is based on the totality of the circumstances." *State v. Bailey*, 233 N.C. App. 688, 691, 757 S.E.2d 491, 493 (2014) (citation omitted).

In the present case, it is undisputed that defendant did not have actual physical possession of the cocaine, methylone, and heroin that were found at 506 Mystic Drive, apartment C. Therefore, the State was required to show "other incriminating circumstances." First, officers observed defendant exiting 506 Mystic Drive, apartment C where these substances were found. Cocaine was found on her person and at the apartment. The substances were found in a UPS shipping box that was addressed to defendant at 506 Mystic Drive, apartment C. In addition, officers discovered the tracking history for the UPS box and were able to see that defendant had signed for the box when it was delivered. Viewing the evidence in the light most favorable to the State and considering the totality of the circumstances, we hold that

there was sufficient evidence of constructive possession to carry the charges to the jury.

D. Expert Testimony

Defendant argues that the trial court committed plain error by allowing expert witness Jamie Whitehead to testify that certain substances were cocaine, methylone, and heroin when they were examined by another person who was unavailable to testify because admission of this evidence violated her confrontation rights under the United State Constitution and North Carolina Constitution.

As cited by the State, we hold that the reasoning set out in *State v. Bunn*, 173 N.C. App. 729, 619 S.E.2d 918 (2005), controls the outcome of the present case. Our Court provided as follows:

> [T]estimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence. Indeed, our Supreme Court has stated that [i]t is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence[,] and that [a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field. Regarding expert testimony and the Confrontation Clause, our Supreme Court has held that [t]he admission into evidence of expert opinion based upon information not itself admissible into evidence does not violate the Sixth Amendment guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination.

Id. at 732, 619 S.E.2d at 920 (citations and quotation marks omitted).

At trial, after recitation of her credentials, Ms. Whitehead was tendered and accepted, without objection by defendant, as an expert in the field of forensic chemistry and specializing in the analysis and identification of controlled substances. Ms. Whitehead testified that she did not independently test any of the substances submitted in defendant's case but that she had carefully and independently reviewed the work and documentation prepared by Ms. Meredith Lisle. Ms. Whitehead testified that Ms. Lisle was similarly qualified as an expert in forensic chemistry and the identification of drugs. Ms. Whitehead also testified that she made her own independent judgment in rendering an opinion as to each of the substances. Accordingly, we hold that the trial court did not err by allowing Ms. Whitehead to base an opinion on tests performed by others in the field and because defendant was given an opportunity to cross-examine Ms. Whitehead, there has been no violation of defendant's right of confrontation.

E. Ineffective Assistance of Counsel

In her last issue on appeal, defendant argues that her trial counsel rendered ineffective assistance of counsel by failing to object to the testimony of Ms. Whitehead. Defendant also argues that her trial counsel rendered ineffective assistance of counsel by failing to introduce evidence regarding her statement that "she didn't know what she had" made in response to Detective Jeter's question of "how much do you have?" Defendant contends that this statement would have exculpated her on

the charges of trafficking by transporting 28 grams or more but less than 200 grams of cocaine and trafficking by possessing 28 grams or more but less than 200 grams of cocaine. Defendant's arguments are without merit.

> To prevail on a claim for ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted). "This Court has held that [c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear. Moreover, this Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 30 (2005) (citations and quotation marks omitted).

Here, defense counsel failed to object to the testimony of Ms. Whitehead. However, as previously discussed, defendant's right to confront and cross-examine Ms. Whitehead was not violated. Therefore, we hold that defendant has failed to demonstrate that his counsel's performance was deficient.

In regards to trial counsel's failure to introduce defendant's statement that "she didn't know what she had" made in response to Detective Jeter's question of "[h]ow much do you have?", we hold that defendant is unable to show that trial counsel's performance was ineffective. It is apparent from the record that trial counsel employed the sound trial strategy of suppressing defendant's statements made to Detective Jeter that suggested defendant's knowledge of the substances she possessed on her person. We will not second-guess trial counsel's decisions regarding trial tactics and strategy.

III. Conclusion

We conclude that defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).