IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-773

No. COA22-195

Filed 15 November 2022

Rutherford County, Nos. 19CRS966, 968, 50124, 50125

STATE OF NORTH CAROLINA

v.

GARY LEE THOMPSON, Defendant.

Appeal by Defendant from judgments entered 23 July 2021 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean ("Dean") Webster, III, for the State.

Stephen G. Driggers for Defendant-Appellant.

INMAN, Judge.

¶ 1 Gary Lee Thompson ("Defendant") appeals from judgments entered on a jury verdict finding him guilty of various drug possession crimes and argues: (1) the trial court erred in denying his motion to dismiss the charge of possession of a controlled substance with intent to sell or deliver because the State failed to present sufficient evidence of Defendant's intent; (2) the trial court erred in denying Defendant's motion

to continue so that he could secure a necessary witness; and (3) his trial counsel's failure to locate the same witness constituted ineffective assistance of counsel. After careful review of the record and our caselaw, we hold Defendant's trial was free from error and dismiss Defendant's ineffective assistance of counsel claim without prejudice.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The record below discloses the following:

¶ 3 On 12 January 2019, a man claiming to be a landlord called the Rutherford County Sheriff's Department around 1:00 a.m. to report a suspicious vehicle with a man asleep inside parked on his property's driveway. Deputies Dylan Henderson and Mason Jolley responded to the call, and Deputy Henderson approached the Toyota truck and found Defendant asleep in the driver's seat. The deputy flashed his light and tapped on the window, but Defendant did not wake or respond, so Deputy Henderson opened the unlocked driver's door. At this, Defendant awoke and appeared to be "under the influence of something."

¶ 4 When asked, Defendant provided police with his personal information and explained he had fallen asleep in his truck while waiting for someone to come out of the house. Deputy Henderson then spoke with a young woman at the residence; she confirmed Defendant had been in the home earlier and invited Defendant to sleep inside. Deputy Henderson informed Defendant, who had fallen asleep again, of the

woman's offer to sleep inside the home. As Defendant left the truck to walk toward the house, Deputy Henderson shone his flashlight into the vehicle and saw a "small baggie of the crystal substance," which he believed to be methamphetamine, in the driver's seat. Deputy Henderson immediately detained Defendant and searched the vehicle. In the small pouch Defendant had been holding while he sat in the truck, Deputy Henderson found "crystal substances" in seven baggies, five smaller ones and two larger ones, digital scales, smoking pipes, and "well over 40" pills. Deputy Jolley searched Defendant and found more than $2,000 in cash bound by a rubber band in his pocket. The deputies arrested Defendant and took him into custody.

¶ 5 On 9 December 2019, a grand jury indicted Defendant for, among other things, one count of possession with intent to sell or deliver a Schedule II controlled substance, one count of possessing drug paraphernalia, and one count of maintaining a vehicle for keeping and selling controlled substances. Defendant was later indicted for habitual felon status on 7 May 2021.

¶ 6 On 12 November 2020, Defendant filed a motion to suppress the search and the items found in his Toyota truck. Defendant's motion to suppress and case came on for trial on 21 July 2021. The trial court heard evidence and arguments on Defendant's motion to suppress and ultimately denied the motion because reasonable suspicion and the "community care doctrine" justified the deputies' initial action of opening the door to Defendant's truck and the deputies subsequently developed

probable cause to search the truck. Before the jury was impaneled, defense counsel moved to continue the trial to secure a "necessary witness" who was allegedly at the home that evening and saw the landlord open the door of Defendant's truck before police arrived. The trial court also denied this motion.

¶ 7 At trial, Deputies Henderson and Jolley testified consistent with the above recitation of facts. In addition, a forensic scientist testified that one of the baggies of crystalline material contained approximately 13.52 grams of methamphetamine. The forensic scientist did not, however, test any of the other crystalline material or the pills found in Defendant's car. At the close of the State's evidence and again at the close of all evidence, defense counsel moved to dismiss all charges against Defendant; the trial court denied both motions. Defense counsel also renewed her motion to continue, and the trial court denied it a second time.

¶ 8 The jury found Defendant guilty on all three charges and of attaining habitual felon status, and the trial court sentenced Defendant to 97 to 129 months in prison. Defendant timely filed written notice of appeal.

II. ANALYSIS

A. Sufficient Evidence of Intent to Sell or Deliver Controlled Substance

¶ 9 Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession with intent to sell or deliver methamphetamine because the State produced insufficient evidence of his *intent* to sell or deliver the controlled

substance and asks this Court to vacate and remand for entry of judgment on the lesser-included offense of possession of methamphetamine. We disagree.

¶ 10 We review 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). The motion is properly denied if there is "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense include therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.Ed.2d 451, 455 (2000) (citation omitted). We consider all evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

¶ 11 To prove possession with intent to sell or deliver a controlled substance, the State must demonstrate: (1) the defendant possessed the substance; (2) the substance was a controlled substance; and (3) *the defendant intended to sell or distribute the controlled substance*. *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001). We may consider both direct and circumstantial evidence of a defendant's intent to sell or deliver. *State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 15. Intent "may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005) (citation omitted). "[T]his is a fact-specific inquiry in which the

totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this factor—by itself—supports an inference of possession with intent to sell or deliver." *State v. Coley*, 257 N.C. App. 780, 788-89, 810 S.E.2d 359, 365 (2018).

¶ 12 The State's passing contention on appeal that Defendant did not properly preserve this issue for our review is without merit. Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all evidence. On the motion to dismiss at trial, defense counsel argued: "there hasn't been sufficient evidence that this is an amount . . . 13.52 grams . . . that would have been a possess with intent amount." Again, before this Court, Defendant argues his possession of 13.52 grams of methamphetamine does not evince an intent to sell or deliver. Deputies found multiple bags of crystalline substance in Defendant's Toyota, but only the substance of one bag weighing 13.52 grams was tested and confirmed to be methamphetamine. Defendant further contends "his demeanor at the scene" was not consistent with someone on an "upper" and alleges, without evidentiary support, that the contraband may have been planted on him while he slept because of "his apparent surprise when [Deputy] Henderson produced the baggie."

¶ 13 However, Defendant ignores other items, in addition to the baggie containing 13.52 grams of methamphetamine, police found in a small leather pouch in the Toyota truck and on Defendant's person, which could support an inference of intent to sell or

deliver the controlled substance: (1) crystalline substance packaged in six other baggies; (2) digital scales; (3) pipes; (4) small empty bags; (5) more than 40 pills packaged in four bags; and (6) $2,000 in cash. The additional crystalline substances, which were similar in appearance to the substance confirmed to be methamphetamine, weighed 5.90 grams and 7.67 grams, bringing the total weight of crystalline substances to approximately 27 grams. Deputy Henderson testified that, in his experience dealing with people using methamphetamine, one gram is the typical single dosage.

¶ 14 A recent decision by our Supreme Court in *State v. Blagg* informs our analysis on this issue. In *Blagg*, the defendant claimed, as Defendant does here, that the State failed to produce sufficient evidence for the charge of possession with intent to sell or deliver. *Blagg*, ¶¶ 6-9. The Court considered the packaging of the methamphetamine, how the substance was stored, the defendant's activities, the quantity of methamphetamine found, and the presence of drug paraphernalia. *Id*. ¶¶ 17-26 (noting these factors are not exhaustive and none is dispositive). It held evidence of more than eight grams of methamphetamine in the defendant's car, in multiple baggies, with drug paraphernalia, as well as the defendant's presence at a residence suspected of illegal drug activity, was sufficient for the charge of intent to sell and deliver. *Id*. ¶ 28.

¶ 15 Here, Defendant possessed multiple baggies of crystalline substance in his vehicle, at least one of which was confirmed to be 13.52 grams of methamphetamine, far more than the eight grams discovered in the defendant's car in *Blagg*. *Id.* ¶¶ 22-25. Per Deputy Henderson's testimony, the quantity of methamphetamine Defendant possessed far exceeded the typical amount for personal use. Along with the controlled substance split between multiple baggies, Defendant's Toyota truck contained: digital scales with which to weigh the drugs; pipes; and empty baggies. Unlike in *Blagg*, where there was no cash, Defendant also had cash in the amount of over $2,000 on his person. *Id.* ¶ 26.

¶ 16 Considering the totality of the circumstances in the light most favorable to the State, as we must when reviewing the trial court's denial of a motion to dismiss, *Coley*, 257 N.C. App. at 786, 788-89, 810 S.E.2d at 363, 365, we conclude the State produced sufficient evidence of Defendant's intent to support an inference of possession with intent to sell or deliver. *See id.* at 788-89, 810 S.E.2d at 365 (holding evidence of 11.5 grams of marijuana packed in two sandwich bags, a digital scale, 23 other loose sandwich bags, and a box of sandwich bags was sufficient to support an inference that the defendant intended to sell marijuana); *State v. Alston*, 91 N.C. App. 707, 710-11, 373 S.E.2d 306, 310 (1988) (concluding a large sum of cash and 4.27 grams of cocaine split among twenty envelopes was sufficient to support an inference of intent because "[e]ven where the amount of a controlled substance is small, the

method of packaging is evidence from which the jury may infer intent to sell"). *But see State v. Turner*, 168 N.C. App. 152, 158-59, 607 S.E.2d 19, 24 (2005) (holding that evidence of ten rocks of cocaine weighing a total of 4.8 grams alone was insufficient to evince the defendant's intent to sell or deliver the controlled substance). We hold the trial court did not err in denying Defendant's motion to dismiss this charge.

B. Motion to Continue and Ineffective Assistance of Counsel Claim

¶ 17 Defendant next asserts that the trial court erred in denying his motion to continue the trial so he could secure a potential necessary witness. He also contends that his trial counsel's failure to locate the witness constituted ineffective assistance of counsel. We dismiss Defendant's ineffective assistance of counsel claim without prejudice to his filing a motion for appropriate relief below.

¶ 18 Generally, we review the trial court's denial of a motion to continue for abuse of discretion. *Morin v. Sharp*, 144 N.C. App 369, 373, 549 S.E.2d 871, 873 (2001). However, a motion to continue that raises a constitutional concern, such as an alleged violation of a defendant's right to effective counsel, is a question of law fully reviewable on appeal. *State v. Johnson*, 379 N.C. 629, 2021-NCSC-165, ¶ 14; *State v. Maher*, 305 N.C. 544, 547, 290 S.E.2d 694, 696 (1982). "A denial of a motion to continue is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and that [the defendant's] case was prejudiced thereby." *Johnson*, ¶ 14 (cleaned up). "A violation of the defendant's rights under the

Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2021).

¶ 19 Defendant sought to subpoena Tyler Brandle because he allegedly witnessed the self-proclaimed landlord open the door to Defendant's truck before that individual called the police on the morning of 12 January 2019. Defendant knew about this potential witness for several months and defense counsel learned about Mr. Brandle over one month before trial. They had been unable to reach Mr. Brandle because Defendant had an incorrect telephone number for him. Defendant finally contacted Mr. Brandle the day before trial and learned he was not available to testify because he would be of town for work. Considering that Defendant had knowledge that Mr. Brandle was a potential witness for several months, the specific content of his testimony was unknown, Defendant's case had been pending for a year and a half, and the case had been set for trial numerous times, the trial court denied Defendant's motion.

¶ 20 Defendant's constitutional challenge to the trial court's denial of his motion to continue depends upon the merits of his ineffective assistance of counsel claim. Defendant concedes "[t]he record is incomplete as to what [Mr.] Brandle's testimony might have been, and consequently, whether [Defendant] was prejudiced by trial

counsel's failure to locate and subpoena [the witness]," and we cannot determine on this record what steps, if any, counsel took to secure Mr. Brandle as a witness and if counsel's conduct, or lack thereof, deprived Defendant of his right to effective assistance of counsel. *See State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004). Accordingly, we dismiss without prejudice Defendant's ineffective assistance of counsel claim to file a motion for appropriate relief below. *See id.* ("[W]hen this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." (citation omitted)). Because we dismiss Defendant's ineffective assistance of counsel claim, we cannot address Defendant's constitutional challenge to the trial court's denial of the motion to continue.

III. CONCLUSION

¶ 21 For the reasons set forth above, we hold the trial court did not err in denying Defendant's motion to dismiss the charge of possession with intent to sell or deliver a controlled substance. We dismiss Defendant's claim for ineffective assistance of counsel without prejudice.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).