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NO. COA01-455

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Durham County
Nos. 98 CRS 38495
99 CRS 18397

JAMES GORDON JONES

Appeal by defendant from judgments entered 9 November 2000 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Paul Pooley, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted for possession of heroin with intent to sell or deliver within 300 feet of school property in violation of N.C. Gen. Stat. §§ 90-95(a)(1) and 90-95(e)(8), and resisting a public officer in violation of N.C. Gen. Stat. § 14-223. In a separate indictment, defendant was charged with being an habitual felon in violation of N.C. Gen. Stat. § 14-7.1. Defendant was tried at the 6 November 2000 Criminal Session of Durham County Superior Court. Defendant was found guilty of possession of heroin and resisting a public officer. Following a separate jury

proceeding, defendant was also found guilty of being an habitual felon. Defendant was sentenced to a minimum of 116 months and a maximum of 149 months in prison.

The State's evidence at trial tended to show that on 15 December 1998 Deputy Raheem Abdul Aleem ("Deputy Aleem") and Sergeant D.J. O'Mary ("Sergeant O'Mary") of the Durham County Sheriff's Department were engaged in drug interdiction efforts in an area around Burton Elementary School ("the school") known for its high level of drug trafficking. Sergeant O'Mary approached several individuals in a park near the school, while Deputy Aleem watched from across the park. Deputy Aleem observed defendant walking in the direction of Sergeant O'Mary. Deputy Aleem saw defendant stop walking, take something from his pocket, bend down to the ground, drop the item from his pocket, cover the item, and then resume walking towards Sergeant O'Mary. Deputy Aleem then approached defendant and asked if he had any drugs. Defendant answered that he did not and consented to being searched by Deputy Aleem. Deputy Aleem's search of defendant did not uncover any drugs.

Defendant then accompanied Deputy Aleem to the area of the park where defendant had dropped the item from his pocket. As Deputy Aleem bent over to pick up what appeared to be a paper bag, defendant pushed him and ran away. Deputy Aleem pursued defendant but was unable to catch him. Deputy Aleem and Sergeant O'Mary then retrieved the paper bag, which contained what was later determined to be 0.5 grams of heroin. Deputy Aleem testified that the heroin

was found within 300 feet of the school's property line.

In the habitual felon proceeding, the State's evidence tended to show that defendant had prior felony convictions for larceny from the person, possession of cocaine with intent to sell or deliver, and possession of heroin.

We first note that several of defendant's assignments of error are not presented and discussed in his brief, and are thus deemed abandoned pursuant to N.C. R. App. P. 28(a).

Defendant's first contention is that the trial court erred in instructing the jury on possession of heroin with intent to sell or deliver and simple possession of heroin. Defendant maintains that he waived his right to have the trial court submit these lesser included offenses to the jury, and that the trial court was required to honor this waiver and only submit to the jury the greater offense charged in the indictment, which was possession of heroin with intent to sell or deliver within 300 feet of school property. Defendant's argument lacks merit.

In determining whether to charge the jury on lesser included offenses, the trial judge must make two determinations. "The first is whether the lesser offense is, as a matter of law, an included offense of the crime for which defendant is indicted." *State v. Thomas*, 325 N.C. 583, 590, 386 S.E.2d 555, 559 (1989). The pertinent statute, N.C. Gen. Stat. § 15-170, provides:

> Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

N.C.G.S. § 15-170 (2000). Under N.C.G.S. § 15-170, the rule in this jurisdiction has long been as follows:

> "When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment."

State v. Hudson, 345 N.C. 729, 732-33, 483 S.E.2d 436, 438-39 (1997) (citations omitted). The second determination to be made "is whether there is evidence in the case which will support a conviction of the lesser included offense." *Thomas*, 325 N.C. at 591, 386 S.E.2d at 559. It is settled that a defendant is entitled to have the jury consider all lesser included offenses supported by the indictment and raised by the evidence. *See id.*

Defendant in the instant case was indicted for possession with intent to sell or deliver heroin within 300 feet of school property. The essential elements of the lesser offenses that were submitted to the jury--possession of heroin with intent to sell or deliver and simple possession of heroin--are clearly contained within the offense charged in the indictment. Therefore, these lesser offenses are, as a matter of law, lesser included offenses of the crime for which defendant was indicted. Further, defendant does not argue that the evidence in this case is insufficient to support a conviction for the lesser included offenses submitted to the jury. Thus, we conclude that defendant was entitled to have the jury consider the lesser included offenses submitted by the trial court.

Nonetheless, defendant contends that he knowingly, intelligently, and voluntarily waived his right to have the jury instructed on lesser included offenses by requesting that those instructions not be given, and that his right to **not** have the jury instructed on lesser included offenses was abridged by the trial court when it instructed the jury on possession of heroin with intent to sell or deliver and simple possession of heroin. In support of the proposition that a defendant has a right to **not** have the jury instructed on lesser included offenses raised by the evidence, defendant relies on *State v. Sierra,* 335 N.C. 753, 440 S.E.2d 791 (1994), *State v. Williams,* 333 N.C. 719, 430 S.E.2d 888 (1993), *State v. Robinson,* 115 N.C. App. 358, 444 S.E.2d 475 (1994), and *State v. Liner*, 98 N.C. App. 600, 391 S.E.2d 820 (1990).

However, the cases cited by defendant do not support the proposition that a defendant has a right to **not** have lesser included offenses raised by the evidence submitted to the jury. Rather, *Sierra, Williams, Robinson,* and *Liner*, all stand for the following proposition:

> [A] defendant who knowingly, intelligently, and voluntarily waives his right to have the trial judge submit to the jury possible verdicts of lesser included offenses and instructions thereon may not thereafter assign as error on appeal the judge's *failure* to submit such possible verdicts of lesser included offenses even though the evidence at trial gave rise to possible verdicts of lesser included offenses.

Liner, 98 N.C. App. at 609, 391 S.E.2d at 825 (emphasis added); *see*

also N.C. Gen. Stat. § 15A-1443(c) (2000) ("A defendant is not prejudiced . . . by error resulting from his own conduct."). This proposition, and the cases in support thereof cited by defendant, do not compel the conclusion that a defendant has a right to **not** have lesser included offenses raised by the evidence submitted to the jury.

Defendant has failed to present any authority to support the proposition that a defendant has a right to avoid instructions on lesser included offenses raised by the evidence. Likewise, our research has failed to disclose any case law or statutory authority for that proposition. Therefore, we conclude that a defendant has no such right. Accordingly, we conclude that the jury was properly instructed on the lesser included offenses of possession of heroin with intent to sell or deliver and simple possession of heroin. Defendant's first assignment of error is overruled.

Defendant next contends that he was denied the right to proceed *pro se* due to the trial court's failure to conduct a hearing pursuant to N.C. Gen. Stat. § 15A-1242 to determine whether defendant wished to represent himself after defendant stated to the court that he was dissatisfied with his court-appointed attorney. Based on the record summarized below, we find that defendant did not clearly and unequivocally request to proceed *pro se*. Having failed to properly assert the right to represent himself, defendant cannot successfully claim that he was denied that right.

The record discloses several occasions during the course of defendant's trial where defendant expressed disagreement or

dissatisfaction with the representation being provided by his court-appointed attorney, Ms. Williams. At the close of cross-examination of one of the State's witnesses, defendant interrupted his attorney, and indicated that there were further questions that needed to be asked of the witness. The trial court removed the jury from the courtroom, and following a discussion with defendant and counsel, the trial court offered defendant the choice of representing himself or proceeding with his attorney. Defendant responded, "I want Ms. Williams to represent me."

Later in the trial the following exchange took place between the trial court and defendant outside the presence of the jury:

> THE COURT: Now, let me just ask this. There was some disagreement between you and your lawyer, but it appears that you have been talking in a civilized tone to her and apparently she has responded by asking questions after you converse with her. Are you satisfied with her legal services at this point?
>
> [DEFENDANT]: I have always basically been satisfied.
>
> THE COURT: You've always been basically satisfied with Ms. Williams' legal services, is that correct?
>
> [DEFENDANT]: Yes.

During jury deliberations, defendant asked to be heard by the trial court concerning Ms. Williams' potential representation of him on appeal. During this exchange, defendant told the court, "She ain't doing what she should be doing to help me." Following the jury's verdict, defendant again asked to be heard, and the following exchange took place:

> THE COURT: Now, you have complained about Ms. Williams several times during this trial. So, for the record, are you satisfied with her services or not satisfied?
>
> [DEFENDANT]: No, sir, I'm not satisfied.

The trial court responded by finding that Ms. Williams had provided defendant with effective representation. The judge then questioned defendant whether he requested a jury trial on the habitual felon charge, and whether he wished to testify in the habitual felon proceeding. The trial court requested a member of the public defender's staff, "as a friend of the Court," to accompany defendant and Ms. Williams to a conference room to discuss defendant's options for the habitual felon proceeding.

After two or three minutes, during which the court heard defendant "cursing and using foul language," defendant was brought back into the courtroom and asked how he wished to proceed. Defendant requested a jury trial on the habitual felon charge and attempted to address the court concerning the disagreement between he and his attorney in the conference room. The court warned defendant not to disrupt the court once the jury returned or he would be chained down with his mouth taped shut.

Defendant asserts that his statement that he was not satisfied with his attorney constituted a clear and unequivocal request to represent himself, and in order to protect his right to proceed *pro se* the trial court was required to advise him of that right and ascertain whether he wished to exercise it by following the procedures outlined in N.C. Gen. Stat. § 15A-1242. In the alternative, defendant suggests that he was prevented from making

an unequivocal request to represent himself because the court ordered him silenced.

A criminal defendant has a federal constitutional right to the assistance of counsel in his defense, which implicitly includes the right to refuse the assistance of counsel and to conduct his own defense. *State v. Johnson,* 341 N.C. 104, 110, 459 S.E.2d 246, 249 (1995) (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975)). In North Carolina, this right of self-representation is also guaranteed by Article I, Section 23 of the North Carolina Constitution and by N.C.G.S. § 15A-1242. *State v. Legrande,* 346 N.C. 718, 725, 487 S.E.2d 727, 730 (1997). "If a defendant desires to proceed *pro se*, he or she may not be forced to accept representation by unwanted counsel." *Johnson,* 341 N.C. at 110, 459 S.E.2d at 250.

N.C.G.S. § 15A-1242 sets forth the prerequisites necessary before a defendant may waive his constitutional right to counsel and represent himself at trial as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2000).

However, a formal hearing in accordance with N.C.G.S. § 15A-1242 is not required whenever a defendant indicates to the trial court that he is dissatisfied with his counsel. *State v. Gerald,* 304 N.C. 511, 519, 284 S.E.2d 312, 317 (1981). Unlike the right to counsel, the right to self-representation does not arise until asserted. *State v. Williams,* 334 N.C. 440, 454, 434 S.E.2d 588, 596 (1993), *vacated on other grounds, North Carolina v. Bryant,* 511 U.S. 1001, 128 L. Ed. 2d 42 (1994). To properly assert the right to self-representation, the defendant must "clearly and unequivocally" request to represent himself. *Id.* (quoting *Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 582). In *Gerald*, the Supreme Court stated:

> that although the better practice when a defendant indicates problems with his counsel is for the court to inquire whether defendant wishes to conduct his own defense, it is not reversible error for the court not to do so when there has been no intimation that defendant desired to represent himself. Each case, therefore, must be considered on its own merits.

Gerald, 304 N.C. at 518, 284 S.E.2d at 317. "Only if a defendant clearly expresses his desire to have counsel removed and to proceed *pro se* is the trial court obligated to make further inquiry pursuant to N.C.G.S. § 15A-1242 to determine if defendant understands the consequences of his decision and voluntarily and intelligently wishes to waive his right to the representation of counsel." *Johnson,* 341 N.C. at 111, 459 S.E.2d at 250. In the absence of a clear expression by the defendant of a desire to

proceed *pro se*, a trial judge faced with a claim of conflict between defendant and his attorney "must determine only that the defendant's present counsel is able to render competent assistance and that the nature of the conflict will not render such assistance ineffective." *Id.*

In the instant case, defendant never requested that he be allowed to represent himself at trial. While defendant expressed disagreement with his attorney on multiple occasions during the course of the trial, and indicated after the jury returned its verdict that he was not satisfied with her services, at no time did he request that Ms. Williams be removed from his case and that he be allowed to represent himself. Thus, the trial court's determination that defendant's counsel had provided competent assistance was sufficient. Under the facts of this case, no further inquiry was necessary. None of the factors that would trigger a hearing in accord with N.C.G.S. § 15A-1242 were present. We also find no merit in defendant's contention that the trial court prevented him from making an unequivocal request to represent himself by ordering him to be silent when the jury returned to the courtroom. Based on the foregoing, defendant's assignment of error is overruled.

In his last argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of possession of heroin with intent to sell or deliver within 300 feet of school property. Defendant asserts that the State failed to present substantial evidence that defendant's alleged possession of heroin

occurred within 300 feet of school property.

In ruling on a motion to dismiss, the question for the trial court is whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. *State v. Bruce*, 315 N.C. 273, 281, 337 S.E.2d 510, 515 (1985). "The trial court is to view all of the evidence in the light most favorable to the State and give the State all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *Id.*

We first note that although defendant was charged with possession of heroin with intent to sell or deliver within 300 feet of school property, he was actually convicted of simple possession of heroin. Thus, any alleged error in denying defendant's motion to dismiss was harmless.

In order to uphold the trial court's denial of defendant's motion to dismiss, we need only find substantial evidence of the crime charged in the indictment *or* a lesser included offense of the crime charged. *See* N.C.G.S. § 15-170 ("Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime . . . ."). As we earlier stated, possession of heroin is a lesser included offense of possession of heroin with intent to sell or deliver within 300 feet of school property. "'Felonious possession of a controlled substance has two essential elements. The substance must be possessed and the substance must be knowingly possessed.'" *State*

v. Weldon, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (quoting *State v. Rogers,* 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)). The record here shows that Deputy Aleem saw defendant place an object on the ground. When Deputy Aleem picked up the object, it contained a substance later determined to be heroin. Thus, there is substantial evidence that defendant knowingly possessed heroin. Accordingly, defendant's motion to dismiss was properly denied.

For the foregoing reasons, we find no error in defendant's trial. However, we do find a clerical error in defendant's judgment that needs to be corrected. The judgment incorrectly indicates that defendant was convicted of sale or delivery of a controlled substance within 300 feet of school property, a Class E felony. In fact, defendant was convicted of possession of heroin in violation of N.C.G.S. § 90-95(a)(3), a Class I felony. Since defendant was sentenced as an habitual felon, this amendment to the judgment does not require a new sentencing hearing, only a correction of the clerical error.

No error at trial; remanded for correction of clerical error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).