

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-758

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 00 CRS 80494, 80495

VIVIAN O. KING

Appeal by defendant from judgment entered 12 September 2000 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender Frederick G. Lind, for defendant-appellant.

EAGLES, Chief Judge.

Vivian O. King ("defendant") was found guilty of possession with intent to sell or deliver marijuana and maintaining a dwelling for keeping a controlled substance. Defendant appeals from judgment entered on the jury verdicts. After careful consideration of the briefs and record, we find no error.

Police in California notified the Guilford County Sheriff's Department that a drug-sniffing canine had "alerted positive to the presence of narcotics" for a United Parcel Service ("UPS") package bound for High Point. Upon its arrival, Sheriff's Detective James

Anders ("Anders") picked up the package and took it to Guilford County Sheriff's Department. There, Detective Richard Melton's ("Melton") canine also "alerted on" the package. Anders obtained a search warrant to open the package and found a metal tin which held 5.09 pounds of compressed marijuana wrapped in plastic.

Detective Charlotte Rogers ("Rogers"), posing as a UPS driver, delivered the package to its addressee, Amanda Clark, at 306 Ward Avenue, Apartment A in High Point. Defendant answered the door, identified herself as Amanda Clark, and signed for the package as "A. Clark." After waiting approximately fifteen minutes, Anders, accompanied by three or four officers, executed a search warrant for defendant's residence. Anders verbally identified himself before entering the residence and each officer wore a raid vest with "Sheriff's Department" printed on the front and back. Anders found the opened UPS box under a table in the living room. Inside defendant's bedroom closet, he found the tin of marijuana and two other similar tins. The search also yielded a set of postal scales, butts of marijuana cigarettes, three plastic baggies with marijuana residue, two metal cans containing marijuana residue, and Western Union receipts for wire transfers from defendant to two individuals in California.

At trial the jury returned verdicts finding defendant guilty of possession with intent to sell or deliver marijuana and maintaining a dwelling for keeping a controlled substance. The trial court consolidated the convictions for sentencing and sentenced defendant to a suspended term of six to eight months

imprisonment. The trial court also placed defendant on supervised probation for thirty-six months and imposed a \$2,000.00 fine. Defendant appeals.

Defendant contends that the trial court erred in: (1) denying defendant's request for a jury instruction on undercover officers and (2) imposing a \$2,000.00 fine on defendant as a condition of probation. After careful review, we find no error.

Defendant argues that the trial court erred in refusing to instruct the jury that the sheriff's detectives who testified were interested witnesses due to their status as undercover agents. Defendant requested the pattern instruction on informants and undercover agents, see N.C.P.I.--Crim. 104.30 (1998), based on testimony that Rogers, Anders, and Melton had all worked undercover in drug interdiction operations. The trial court gave the instruction only for Rogers, who had posed as a UPS driver in delivering the marijuana to defendant. The trial court stated:

You may find from the evidence that a State's witness, Detective C. A. Rogers, is interested in the outcome of this case because of her activities as an undercover agent. If so, you should examine such testimony with care and caution in light of that interest. If, after doing so, you believe her testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

However, the trial court refused to give the instruction in regard to Anders and Melton, stating, "I don't believe that the evidence supports that." Defendant contends that the instruction was warranted for Anders and Melton because they "were involved in an operation to interdict packages from UPS that [contained]

narcotics." Defendant claims that she was prejudiced by the lack of such an instruction due to the conflicts between her testimony and that of Anders.

Police officers are not deemed, as a matter of law, to be interested witnesses. *State v. Sowden*, 48 N.C. App. 570, 574-75, 269 S.E.2d 274, 277 (1980). However, it is "error for a trial judge not to give the special instruction for the testimony of an undercover agent where the officer participated in an undercover capacity in the offense for which the defendant was convicted." *State v. Moose*, 101 N.C. App. 59, 69, 398 S.E.2d 898, 904 (1990), *disc. review denied*, 328 N.C. 575, 403 S.E.2d 519 (1991). Here, neither Anders nor Melton participated in an undercover capacity in the shipment of marijuana to defendant. When they executed the search warrant for defendant's residence, they acted overtly in their law enforcement capacity. "[T]hus, the defendant was not entitled to the undercover agent instruction" as to these officers. *Id.* at 70, 398 S.E.2d at 904.

Defendant next contends that the trial court erred by imposing a \$2,000.00 fine. Defendant argues that this was error since she lived on a fixed income consisting of Social Security disability benefits and food stamps. Defendant notes the court expressed its desire to impose an active prison sentence but was prevented from doing so by the Structured Sentencing statutes. Defendant further notes that the trial court was aware of her financial circumstances since it appointed counsel for her appeal. Defendant asserts that the trial court was "punishing [her] with a tremendous fine she

could not really afford to pay because [she] exercised her right to a jury trial."

The trial court may impose a fine in conjunction with a suspended prison sentence. See G.S. § 15A-1340.17(b) (1999). "[T]he amount of the fine is in the discretion of the court." *Id.* However, "[i]n exercising its discretion, the trial court must take into account the nature of the crime, the level of the offense, and the aggravating and mitigating factors, just as it would in setting the length of imprisonment for a defendant." *State v. Sanford Video & News, Inc.*, __ N.C. App. __, __, 553 S.E.2d 217, 218 (2001). Our statutes further provide that "the court should consider the burden that payment will impose in view of the financial resources of the defendant." G.S. § 15A-1362(a) (1999).

We find no abuse of discretion by the trial court. Defendant was convicted of two Class I felony drug offenses. Police found defendant in possession of a tin containing more than five pounds of marijuana. According to Anders, the marijuana had an estimated street value of approximately \$25,000.00. Police also found two additional tins containing marijuana residue, a set of scales, and three plastic baggies with marijuana residue. Receipts discovered in the residence reflected wire transfers of \$2,595.00 and \$2,110.00 from defendant to recipients in California. Based on the evidence presented at trial, we cannot say the imposition of a \$2,000.00 fine was disproportionate to her offenses or was otherwise unreasonable due to her limited resources. Moreover, we find nothing in the record to suggest that the trial court sought

to punish defendant for exercising her right to a trial by jury;
nor has defendant pointed to any evidence to support this claim.

Accordingly, we find no error.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).