NO. COA03-1563

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 02 CRS 251843-44

JEFFREY BERNARD MITCHELL

Appeal by defendant from judgment entered 18 July 2003 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

M. Victoria Jayne for defendant-appellant.

LEVINSON, Judge.

On 2 December 2002, defendant Jeffrey Bernard Mitchell was indicted on charges of possession with intent to sell or deliver a controlled substance and sale of a controlled substance. The case was tried at the 17 July 2003 Criminal Session of Mecklenburg County Superior Court.

The evidence presented at trial tended to show the following: On 14 November 2002, Officers Kyle John Odell and T.J. Slater of the Charlotte-Mecklenburg Police Department were assigned to the David-3 Street Interdiction Unit and were on patrol in the Piedmont

Courts Housing Project. Officers Odell and Slater were in plain clothes and driving a van when they noticed defendant standing on a corner. The officers testified that defendant stood out because he was an older black male and had a large build. Defendant was described as wearing nice clothes, "a zip-up jacket, blue jeans, a toboggan hat that said New York on it." Officer Odell testified that most of the people in the Piedmont Courts area were young kids or older gentlemen, but that as soon as they saw defendant, they realized that he did not belong there.

The officers pulled up to defendant. Officer Odell looked out the window and said "hey, what's up, you know." Defendant walked over to the van, looked the officers over and looked inside the van, and asked them if they "wanted green or if [they] wanted hard." Officer Odell testified that "green" meant marijuana while "hard" meant crack cocaine. Officer Odell told him he was "looking for some hard and that I needed two dime rocks," or two $10 rocks of cocaine. Then, two other people walked up, and one of them thought they knew Officer Odell. They asked him what he wanted, and Officer Odell also told him he needed two dimes. The man pulled out a baggie with five or six crack rocks in it. The defendant then told the two men that "this one was his" and they backed off. Then, defendant pulled out a clear plastic baggie with ten or fifteen crack rocks in it. Defendant handed a rock to Officer Odell for him to examine. Officer Odell smelled it to see if it was real, told Officer Slater it was, and handed defendant a twenty dollar bill. Defendant then walked back over to the

sidewalk. As soon as the officers left the area, Officer Slater contacted the take-down unit and gave them a description of the defendant and his location. About five minutes later, the officers were called back to the scene and identified the defendant in an area near where the drug buy was made.

At trial, defendant testified that he went to Piedmont Courts to visit his friend, Henry Herman, and to play cards. Defendant testified that he stayed at Herman's home for two to two and a half hours. Defendant was unable to serve a subpoena on Herman to have him testify at trial. Defendant attempted to introduce the testimony of Joe Carter, an investigator employed by defendant's counsel. Carter, who interviewed Herman, testified on *voir dire* that he interviewed Henry Herman and Herman told him that he was playing cards with defendant on the night he was arrested. Defendant sought to introduce this testimony to corroborate his alibi testimony that he was not present in the parking lot at the time of the drug buy.

Defendant was convicted of selling cocaine and possession with intent to sell or deliver cocaine and sentenced to a term of twelve to fifteen months imprisonment. Defendant appeals.

Defendant first contends the trial court erred by refusing to allow Carter to testify regarding Herman's statements. Defendant argues that the statements of the investigator who interviewed Herman were trustworthy and he was denied a fair trial by exclusion of this evidence. We limit our review to that which defendant argues in his brief, the applicability of Rule 804.

After careful review of the record, briefs and contentions of the parties, we find no error. The trial court found that Herman was unavailable, and that defendant had made "diligent attempts and reasonable efforts" to serve him with a subpoena. However, the inquiry into whether to admit Carter's testimony does not end there. "Once a trial court establishes that a declarant is unavailable pursuant to Rule 804(a) of the North Carolina Rules of Evidence, there is a six-part inquiry to determine the admissibility of the hearsay evidence proffered under Rule 804(b)(5)." *State v. Valentine*, 357 N.C. 512, 517, 591 S.E.2d 846, 852 (2003) (citing *State v. Fowler*, 353 N.C. 599, 608-09, 548 S.E.2d 684, 696 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002); *State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986)). In determining whether to admit the testimony of an unavailable declarant, the trial court must determine:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

Id. at 518, 591 S.E.2d at 852 (citations omitted); *see also* N.C.G.S. 8C-1, Rule 804(b)(5) (2003). In the instant case, there is no evidence in the record that defense counsel gave the prosecutor timely, written notice of his intent to use Carter's testimony. Written notice of the intent to use Carter's testimony was a prerequisite to admission of evidence under Rule 804(b)(5).

State v. Hester, 343 N.C. 266, 271, 470 S.E.2d 25, 28 (1996). Accordingly, this assignment of error is overruled.

Defendant next contends the trial court abused its discretion by sentencing him to an active term of imprisonment, rather than imposing an intermediate punishment. This argument lacks merit.

The trial court consolidated the two offenses and sentenced defendant in the presumptive range as a Class G, Level II offender. For such offenders, the trial court is restricted to sentencing individuals to an intermediate (I) or active (A) sentence. N.C.G.S. §§ 15A-1340.11, 1340.17 (2003). Defendant concedes the court properly sentenced him in the presumptive range for Class G, Level II offenders. Nevertheless, defendant argues the circumstances presented in the instant case should have compelled the trial court to impose something other than an active sentence. Defendant points to the following circumstances in support of his contention: (1) his cooperation with trial counsel; (2) no prior history of illegal drug use; (3) support in the community and gainful employment; (3) no history of probation violations or failures to appear, which illustrated he was a good candidate for supervised probation; and (4) no prior felony record. After reviewing the record, we discern no abuse of discretion in the trial court's decision to sentence defendant to an active term of imprisonment, notwithstanding its alternative option to sentence him to an intermediate punishment. This assignment of error is overruled.

Defendant next argues that he received ineffective assistance

of counsel because his attorney failed to secure Henry Herman's presence at the trial. Defendant contends that there would have been a different result at trial had Herman testified.

A defendant's ineffective assistance of counsel claim may be brought on direct review "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Because the record on appeal is not sufficiently complete to undertake such a review, we dismiss this assignment of error without prejudice to defendant's ability to file a motion for appropriate relief in the trial division.

No error.

Judges TIMMONS-GOODSON and CALABRIA concur.

Report per Rule 30(e).