NO. COA03-976

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 01 CRS 000052
00 CRS 059355

DAVON ALOU JONES

Appeal by defendant from judgment dated 7 March 2002 by Judge Charles Lamm in Superior Court, Forsyth County. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

McGEE, Judge.

Davon Alou Jones (defendant) was convicted on 7 March 2002 of possession with intent to sell and deliver cocaine and of having attained the status of habitual felon. The trial court determined that, as a result of the habitual felon status, the class H felony was aggravated to a class C felony and sentenced defendant to a minimum term of 90 months and a maximum term of 117 months in prison. Defendant appeals.

The State's evidence at trial tended to show that on 7 December 2000, Officer Oliver Gilley (Officer Gilley) of the

Winston-Salem Police Department observed defendant hand a controlled substance to a man who had walked up to defendant's vehicle. Officer Gilley drove around the block and followed defendant for about half a mile. Officer Gilley noticed that the light over defendant's license plate was burned out and initiated a traffic stop. Defendant gave Officer Gilley his license and registration, told Officer Gilley that he had earlier received a warning ticket for the same violation, and showed Officer Gilley the warning ticket. Officer Gilley returned to his patrol vehicle to check defendant's license and registration and informed the police department communications operator that he had observed a hand-to-hand drug transaction. Officer Mark Hamilton (Officer Hamilton) arrived to assist Officer Gilley and the two officers approached defendant's vehicle. Officer Gilley returned defendant's license and registration and issued him a warning ticket. Officer Gilley told defendant that he observed defendant engage in a hand-to-hand transaction and asked if defendant would consent to a search of his vehicle. Defendant told Officer Gilley that he did not have any drugs or weapons and that he would allow a search of his person and his vehicle.

Officer Gilley told defendant to step out, walk to the back of defendant's car, and to put his hands on the car so that defendant could be searched. However, defendant ran across the street and Officer Gilley ran after him. Officer Hamilton called the police department communications operator, and then followed defendant and Officer Gilley.

Defendant ran behind several houses, jumped a fence, and fell as he crossed a yard. Officer Gilley told defendant to stop several times. When defendant fell, the officers tried to place defendant under arrest and a struggle ensued. Officer Gilley sprayed defendant with pepper spray, but defendant continued to struggle. During the struggle, Officer Gilley saw defendant put his right hand into his right front pocket and pull out a clear plastic bag that held a white rock-like substance that appeared to be crack cocaine. Defendant emptied much of the bag onto the ground. It took the officers three to five minutes, and three sets of handcuffs, to secure defendant.

After defendant was in custody, Officer Gilley and Officer Hamilton tried to recover the substance that defendant had emptied onto the ground. The officers picked up the white rock-like substance and a small bag. Officer Gilley took the substance to his office, sealed it in a bag, weighed it, put it in a manila envelope, and placed it in the evidence vault. The officers also seized three grams of a green leafy substance which appeared to be marijuana and a $100 bill from defendant.

Agent Ann Hamlin (Agent Hamlin), a special agent with the State Bureau of Investigation (SBI) drug chemistry lab, testified that Agent Deena Koontz (Agent Koontz), the SBI special agent in charge of the drug chemistry section, examined the white substance. Agent Hamlin, who supervised Agent Koontz, reviewed Agent Koontz's final report and notes for accuracy. Agent Hamlin rendered an opinion that was consistent with Agent Koontz's conclusion that the

white substance analyzed by Agent Koontz was cocaine, a schedule II controlled substance.

Defendant testified but ignored direct questions and gave non-responsive answers. The jury convicted defendant of possession with intent to sell and deliver cocaine.

The State presented evidence in the habitual felon proceeding tending to show that defendant had been convicted of three prior felonies in Forsyth County that would qualify for habitual felon status in North Carolina: (1) conviction on 16 October 1995 of felony possession of cocaine; (2) conviction on 5 March 1996 of possession with intent to sell and deliver cocaine; and (3) conviction on 3 June 1997 of possession with intent to sell and deliver cocaine.

Defendant testified regarding his status as an habitual felon but again ignored direct questions and gave non-responsive answers. The jury determined defendant had attained the status of habitual felon.

At the outset, we note defendant has failed to put forth an argument in support of assignments of error one through five and assignments of error eight through twelve. Those assignments of error are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Defendant assigns error to the trial court's admission of Agent Koontz's lab analysis indicating the identity and quantity of cocaine, and to the trial court's allowing Agent Hamlin to testify as to the identification and weight of the cocaine seized by

Officers Gilley and Hamilton. Agent Hamlin testified to the contents of the report prepared by Agent Koontz, who did not testify at trial. Defendant contends that the report was inadmissible hearsay and its admission and Agent Hamlin's testimony was in violation of the rules of evidence and the Confrontation Clause of the federal constitution.

The State asserts that the lab analysis was admitted as a business record; however, we conclude that the lab analysis was admitted to demonstrate the basis of the expert opinion given by Agent Hamlin. *See generally State v. Golphin*, 352 N.C. 364, 467, 533 S.E.2d 168, 235 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004). Because the lab analysis was not admitted for the purpose of proving the truth of the matter asserted in the document, its admission does not implicate the prohibition on hearsay evidence. Such evidence is admitted for the limited purpose for which it was offered and not as substantive evidence. *State v. Huffstetler*, 312 N.C. 92, 107, 322 S.E.2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). However, the disclosure of the basis for an expert's opinion "'is essential to the factfinder's assessment of the credibility and weight to be given to it.'" *Golphin*, 352 N.C. at 467, 533 S.E.2d at 235 (quoting *State v. Jones*, 322 N.C. 406, 412, 368 S.E.2d 844, 847 (1988)).

A qualified expert is permitted to testify in the form of an opinion "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue[.]" N.C. Gen. Stat. § 8C-1, Rule 702 (2003). An expert may base his or her opinion on

> [t]he facts or data in the particular case . . . [that] may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.C.G.S. § 8C-1, Rule 703. Our Supreme Court has held 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." *State v. Fair*, 354 N.C. 131, 162, 557 S.E.2d 500, 522 (2001) ("It is the expert opinion itself, not its factual basis, that constitutes substantive evidence."), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Moreover, "[i]nherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise be inadmissible hearsay." *State v. Daughtry*, 340 N.C. 488, 511, 459 S.E.2d 747, 758 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996).

Furthermore, in *Huffstetler*, our Supreme Court reviewed whether a defendant's Sixth Amendment right of confrontation was violated when he was not afforded the opportunity to cross-examine the person who conducted all the tests on which the expert's opinion was based. *Huffstetler*, 312 N.C. at 106-08, 322 S.E.2d at 119-21. In *Huffstetler*, the Supreme Court initially found the tests were inherently reliable and concluded that the defendant's constitutional right was not violated:

> The 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. In such cases the defendant will have the right to fully cross-examine the expert witness who testifies against him. He will be free to vigorously cross-examine the expert witness, as did the defendant in the present case, concerning the procedures followed in gathering information and the reliability of information upon which the expert relies in forming his opinion. The jury will have plenary opportunity . . . to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. The opportunity to fully cross-examine the expert witness testifying against him will insure, as in the present case, that the defendant's right to confront and cross-examine his accusers guaranteed by the Sixth Amendment is not denied.

Id. at 108, 322 S.E.2d at 120-21 (internal citations omitted); *see also State v. Carmon*, 156 N.C. App. 235, 244, 576 S.E.2d 730, 737, *aff'd*, 357 N.C. 500, 586 S.E.2d 90 (2003) (The defendant's Sixth Amendment rights were not violated where an agent with the State Bureau of Investigation testified as to the results of testing done by another agent since the defendant had the opportunity to cross-examine the testifying expert.).

In the case before us, after a recitation of Agent Hamlin's professional credentials, Agent Hamlin was tendered and accepted as an expert in controlled substance analysis without objection by defendant. Agent Hamlin, after a thorough review of the methodology undertaken by Agent Koontz, relied on Agent Koontz's lab analysis in forming her opinion that the white substance was cocaine. Her opinion was based on data reasonably relied upon by

others in the field. *Carmon*, 156 N.C. App. at 244, 576 S.E.2d at 737.

Defendant directs this Court to the recent decision by the U.S. Supreme Court in *Crawford v. Washington*, ___ U.S. ___, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Supreme Court held inadmissible a tape recording of the out-of-court interrogation by police of the defendant's wife, who was unavailable to testify at her husband's criminal trial due to Washington's marital privilege law. The Supreme Court classified the recording as "testimonial," and interpreted the Confrontation Clause to forbid categorically the admission of testimonial hearsay that had never been subject to cross-examination.

We fail to see the applicability of *Crawford* under the circumstances presented in this case, since it is well established that an expert may base his or her opinion on tests performed by others in the field and defendant was given an opportunity to cross-examine Agent Hamlin as to the basis of her opinion. Thus, we find that there has been no violation of defendant's right of confrontation. Defendant's assignments of error number six and seven are overruled.

Defendant also argues that the trial court erred by failing to conduct an independent inquiry into defendant's competency. We disagree.

In this case, two competency hearings were held on 25 October 2001 and 4 March 2002. Prior to the 25 October 2001 hearing, Dr. Ellen Nicola (Dr. Nicola) evaluated defendant's behavior on 13 July

2001 and found defendant was not capable of proceeding to trial. Dr. Nicola was uncertain of this conclusion and recommended defendant be admitted to Dorothea Dix Hospital (Dorothea Dix) for further evaluation. A motion and order was issued on 15 August 2001 committing defendant to Dorothea Dix. During defendant's two-week admission at Dorothea Dix, Dr. Nicole Wolfe (Dr. Wolfe) observed and interviewed defendant. Dr. Wolfe also observed defendant on 23 October 2001. At the 25 October 2001 hearing, both Dr. Wolfe and Dr. Nicola testified as to defendant's capacity to proceed to trial. Dr. Wolfe testified that defendant was capable of proceeding to trial and "could cooperate if he felt like it." Specifically, Dr. Wolfe testified that defendant was: (1) capable of comprehending his position with respect to the criminal charges against him, (2) capable of understanding the nature and object of the proceedings against him, (3) capable of cooperating with his counsel "if he wanted to," (4) capable of assisting in his defense in a rational or reasonable manner, and (5) did not have any sort of mental illness or defect that would prevent him from being capable of proceeding to trial. Dr. Nicola testified that she agreed with Dr. Wolfe's opinion. The trial court concluded that defendant had the capacity to proceed to trial.

Dr. Wolfe reevaluated defendant's capacity to stand trial on 14 February 2002. The trial court held another competency hearing on 4 March 2002, a day before defendant's trial commenced. At the 4 March competency hearing, Dr. Wolfe testified that defendant was capable of proceeding to trial. Defendant did not present any

evidence at this hearing. Based on the uncontroverted testimony of Dr. Wolfe, the trial court found that defendant: (1) understood the nature of the charges against him, (2) was mentally competent to assist in his defense, (3) did not need any medication for any mental disease, defect, or illness, (4) was mentally competent to represent himself if he so chose, (5) had no mental illness, disease, or defect that would prevent him from doing so, and (6) was capable of proceeding to trial.

Defendant contends that a bona fide doubt as to his competency to stand trial was demonstrated by the initial view of Dr. Nicola that defendant was not competent, by Dr. Wolfe's various admissions that defendant's writings and conduct made no sense, and by defendant's constant and continuous erratic behavior and failure to cooperate with his attorney during any of the pretrial or trial proceedings. Defendant further contends that the trial court erred in not holding a new competency hearing. Defendant primarily relies upon N.C. Gen. Stat. § 15A-1001(a) (2003), which states,

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

"When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b) (2003). If the trial court fails to hold a competency hearing once there arises a bona fide or a sufficient doubt as to the accused's

competence to stand trial, the right to due process is violated. *Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103 (1975). However, "[t]he court's conclusion regarding defendant's capacity is binding on appeal if supported by the evidence." *State v. Aytche*, 98 N.C. App. 358, 363, 391 S.E.2d 43, 46 (1990).

> When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary.

State v. Heptinstall, 309 N.C. 231, 234-35, 306 S.E.2d 109, 111 (1983); *see also State v. McCoy* 303 N.C. 1, 18, 277 S.E.2d 515, 528 (1981).

In *Aytche*, the trial court heard testimony from defense counsel that the defendant was unable to assist in his defense, heard the defendant answer questions regarding his ability to understand the proceedings, observed the physical appearance of the defendant, reviewed samples of the defendant's handwriting, heard testimony from the defendant's jailer, and reviewed the report of a physician who had seen the defendant on the evening prior to trial. *Aytche*, 98 N.C. App. at 362-63, 391 S.E.2d at 45-46. This Court found that the evidence provided to the trial court was sufficient to uphold the trial court's conclusion that the defendant was competent to stand trial. *Id.* at 363, 391 S.E.2d at 46.

Our Supreme Court upheld the trial court's decision in *Heptinstall* that the defendant was capable of proceeding to trial

despite lengthy testimony regarding the defendant's documented bizarre behavior, numerous commitments to Dorothea Dix Hospital and a mental institution in Florida, and the opinions of family members and others who knew him that the defendant was "not in his 'right mind' and was not competent to aid in defending the charges against him." *Heptinstall*, 309 N.C. at 233-34, 306 S.E.2d at 110-11. The trial court made this determination based on testimony from a forensic psychologist that the defendant was alert, aware of his surroundings and the charges against him, had a good memory, appeared to be of normal intelligence, was able to understand the seriousness of the charges against him, and was capable of assisting his attorneys in preparing his defense. *Id.* at 235, 306 S.E.2d at 111. Our Supreme Court found this evidence to be sufficient to support the trial court's determination. *Id.*

In the case before us, the trial court had sufficient evidence to support a finding that defendant was capable of proceeding to trial. Since it is within the trial court's discretion to determine a defendant's capacity, the decision will not be disturbed unless there is no competent evidence to support it. *Heptinstall*, 309 N.C. at 234, 306 S.E.2d at 111. The trial court adequately responded to questions of defendant's capacity by holding two hearings concerning this issue. The adequacy of the trial court's response is further supported where a competency hearing was held the day prior to trial, and where the trial lasted only three days. The evidence the trial court relied upon, namely the testimony of a psychiatrist and a psychologist stating

defendant was capable of proceeding to trial, was sufficient for the trial court to rule defendant was capable of proceeding to trial, even if there was also evidence to the contrary. Defendant's assignment of error number thirteen is overruled.

In defendant's final argument, defendant contends that the trial court erred in using defendant's prior conviction of possession of cocaine as one of the underlying felonies to establish his status as an habitual felon.

Pursuant to our Supreme Court's rulings in *State v. Jones*, ___ N.C. ___, 598 S.E.2d 125 (2004) and *State v. Sneed*, ___ N.C. ___, ___ S.E.2d ___ (2004), defendant's assignment of error is without merit. In Jones, our Supreme Court concluded:

> Under N.C.G.S. § 90-95(d)(2), the phrase"punishable as a Class I felony" does not simply denote a sentencing classification, but rather, dictates that a conviction for possession of the substances listed therein, including cocaine, is elevated to a felony classification for all purposes. Concerning the controlled substances listed therein, the specific exceptions contained in section 90-95(d)(2) control over the general rule that possession of any Schedule II, III, or IV controlled substance is a misdemeanor.

___ N.C. at ___, 598 S.E.2d at ___; *see also Sneed*, ___ N.C. at ___, ___ S.E.2d at ___. The Court also held because N.C.G.S. § 90-95(d)(2) classifies possession of cocaine as a felony, conviction for possession of cocaine pursuant to the statute may serve as an underlying felony for the purpose of obtaining an habitual felon indictment. *Jones*, ___ N.C. at ___, 598 S.E.2d at ___. Accordingly, we find no error in the trial court's use of defendant's conviction of possession of cocaine as an underlying

felony establishing his status as an habitual felon. Defendant's assignment of error number fourteen is without merit.

No error.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).