NO. COA06-1064

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v. Rowan County
No. 05 CRS 54333

WILLIAM GEROY FISHER

Appeal by defendant from judgment entered 9 March 2006 by Judge John W. Smith in Rowan County Superior Court. Heard in the Court of Appeals 26 March 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Allen W. Boyer for defendant appellant.

McCULLOUGH, Judge.

On 22 May 2005, defendant William Geroy Fisher was cited for impaired driving. On 14 November 2005, defendant was convicted in district court and placed on supervised probation. Defendant gave notice of appeal and a trial *de novo* was held in Rowan County Superior Court. The case was tried at the 8 March 2006 Criminal Session of Rowan County Superior Court.

The State presented evidence at trial which tended to show the following: On 22 May 2005, Officer Matthew Vail of the Salisbury Police Department received a call to investigate a car accident on West Horah Street. When he arrived on the scene, Officer Vail

observed that a 1987 Nissan pickup truck had struck a telephone pole. There was no one in the truck, but steam was coming out from underneath the hood, and fluid was dripping out from beneath the vehicle. A man was standing on the opposite side of the road from where the crash occurred. Officer Vail asked him if he saw anybody leaving the area, and the man described an "older black male wearing a white striped shirt and khaki pants."

Approximately five to ten minutes later, defendant walked up to the scene of the accident. He was wearing "a straw cap, white striped shirt button up, khaki pants and tan shoes." When he arrived at the scene, he advised Officer Vail that he had been involved in the accident. Officer Vail asked him to explain and asked whether defendant had been driving the vehicle. Defendant told him that he had been driving the truck westbound on Horah Street, swerved to avoid hitting a white Cadillac, and struck the telephone pole. Officer Vail smelled a strong odor of alcohol on defendant and asked him to perform a field sobriety test. Defendant attempted to perform a one-legged stand, but almost fell. Officer Vail did not ask him to perform any other tests because he was afraid defendant would hurt himself. Officer Vail then arrested defendant and transported him to the police department.

At the police department, Officer Vail informed defendant of his *Miranda* rights and questioned him regarding the crash. Defendant again admitted to operating the vehicle on Horah Street. Defendant submitted to an Intoxilyzer test, with the results showing that defendant had a blood alcohol concentration of .16.

At trial, defendant admitted being drunk on the night of the accident, but denied driving the truck.

Defendant's sole argument on appeal is that he received ineffective assistance of counsel because his attorney failed to object to prejudicial hearsay testimony. Specifically, defendant claims that the only direct evidence of his involvement as the driver of the wrecked truck was Officer Vail's testimony repeating a statement by a bystander as to what the driver was wearing. The description given by the bystander matched the defendant's description when he approached Officer Vail after the crash. Defendant claims that a jury would thus infer that he was the driver of the truck. Defendant argues that this evidence was offered to prove the truth of the matter asserted and that counsel was ineffective for failing to object to it. Defendant contends that absent this evidence, there would have been a different result at trial.

After careful review of the record, briefs and contentions of the parties, we find no error. We initially note that the preferred method for raising a claim of ineffective assistance of counsel is by a motion for appropriate relief. However, a defendant's ineffective assistance of counsel claim "brought on direct review will be decided on the merits 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). A review of the record in this case shows us that defendant's claim of ineffective assistance of counsel can be determined without further development of the record, and that it is proper to address it at this time.

To obtain relief for ineffective assistance of counsel, the defendant must demonstrate that his "counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)(citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). This requires a showing that: (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced his defense. *Id.* at 562, 324 S.E.2d at 248.

Upon review of the record, we conclude that defendant has failed to demonstrate any prejudice from his counsel's alleged deficient representation. Officer Vail testified that defendant volunteered to him that he had been driving the truck, had swerved to avoid hitting another car coming from the opposite direction, and hit the telephone pole. Defendant failed a sobriety test at the scene, and later registered a .16 blood alcohol concentration on an Intoxilyzer test. While at the police station, defendant again admitted to driving the truck. He then asked to use the telephone, stating that he was worried about what his girlfriend would say about him wrecking her truck. He was also overheard calling someone on the telephone and apologizing for wrecking the truck. Defendant's girlfriend at the time of the crash was in fact the owner of the truck. Thus, there was overwhelming evidence of

defendant's guilt, and we conclude that defendant has failed to demonstrate that there would have been a different result at trial had counsel objected to Officer Vail's testimony. Accordingly, we find no error.

No error.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).