

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-272

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 05CRS16074-77

ABU-BAKR RAHMAN

Appeal by defendant from judgment entered 7 July 2005 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 11 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ann B. Wall, for the State.

Russell J. Hollers III, for defendant appellant.

McCULLOUGH, Judge.

Defendant Abu-Bakr Rahman appeals judgment entered after a jury verdict of guilty of trafficking in cocaine by possession, trafficking in cocaine by delivery, trafficking in cocaine by transportation, and trafficking in cocaine by sale. We determine there was no error.

FACTS

On 19 April 2005, Abu-Bakr Rahman ("defendant") was indicted for trafficking in cocaine by possession, trafficking in cocaine by delivery, trafficking in cocaine by transportation, and trafficking in cocaine by sale. The case was tried before a jury during the 5

July 2005 Criminal Session of the Superior Court of Wake County.

The State presented evidence at trial which tended to show the following: On 7 October 2004, Detective Sam Wilson ("Detective Wilson"), a Wake County Sheriff's Department investigator, went to a parking lot shared by Miami Subs and Waffle House to engage in a drug transaction. Detective Wilson parked his unmarked car in a lighted area of the parking lot. A team consisting of Detective Chad Hines, Deputy Boris Neal, a SWAT team and other investigators in unmarked cars was also present in the area.

A man known to Detective Wilson as "Eddie" and defendant walked up to Detective Wilson's car from behind the Miami Subs restaurant. Defendant got into Detective Wilson's vehicle while "Eddie" stood in front of it. Defendant then used Detective Wilson's scales to measure out about 40 to 44 grams of cocaine from a package he produced which weighed approximately 66 grams. Then defendant gave the repackaged cocaine to Detective Wilson. Detective Wilson paid defendant \$1,500.

Defendant got out of Detective Wilson's vehicle. Defendant and "Eddie" went to a vehicle that was parked near the Waffle House and got in it. As defendant drove out of the parking lot, Detective Wilson radioed its license plate number to Detective Chad Hines, who wrote it down.

Subsequently, defendant was taken into custody and transported to the Wake County Sheriff's Office. At the Sheriff's office, while looking through a two-way mirror, Detective Wilson identified defendant as the man from whom he had purchased cocaine earlier in

the evening. While defendant was at the Sheriff's Office, he was searched and eight bills totaling \$270 were found in his possession. The serial numbers of the bills found on defendant matched some of the bill serial numbers recorded by Detective Wilson before he went to make the undercover drug purchase. Warrants were then drawn up for defendant's arrest on charges related to the cocaine sale to Detective Wilson. The substance defendant sold to Detective Wilson was later identified as 42.8 grams of cocaine by Amy Bommer, a City County Bureau of Investigation forensic drug chemist, who was qualified at trial as an expert in forensic chemistry.

The jury returned guilty verdicts on trafficking in cocaine by delivery, sale, transportation, and possession. Defendant was sentenced to imprisonment for a minimum of thirty-five months and a maximum of forty-two months.

Defendant appeals.

ANALYSIS

_____ At the outset, the North Carolina Rules of Appellate Procedure require an appellant's brief to contain a full and complete statement of the facts. N.C. R. App. P. 28(b)(5). In the instant case, defendant's statement of the facts was much too abbreviated.

_____ Defendant included five assignments of error in the record on appeal. Defendant briefed only three of the assignments of error, and therefore the remaining assignments of error are abandoned. N.C. R. App. P. 28(b)(6). Two of the assignments of error that were briefed will be discussed under part I, while the remaining

assignment of error that was briefed will be discussed under part II.

I.

Defendant contends that the trial court committed plain error by (1) allowing testimony that defendant was part of a larger drug investigation and by (2) allowing Detective Wilson to testify that he was afraid that defendant was going to rob him. We disagree.

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4). "Before an error by the trial court amounts to 'plain error,' we must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Waddell*, 351 N.C. 413, 419, 527 S.E.2d 644, 648-49 (2000). "Therefore, the test for 'plain error' places a much heavier burden upon the defendant than that imposed upon those defendants who have preserved their rights on appeal by timely objection." *Id.* at 419, 527 S.E.2d at 649.

We are not convinced that absent the challenged testimony the jury probably would have reached a different verdict. Defendant was charged with the separate offenses of trafficking in cocaine by possession, delivery, transportation and sale in violation of N.C. Gen. Stat. § 90-95(h) (2005). N.C. Gen. Stat. § 90-95(h)(3)(a) states:

Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine ... shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars (\$50,000) [.]

Id.

After reviewing the record, we conclude there was sufficient evidence that defendant would have been convicted even if the evidence in question was not admitted. For example, Detective Wilson testified that defendant delivered the cocaine by bringing it to Detective Wilson in Detective Wilson's car. Detective Wilson testified that defendant possessed the cocaine when he produced it, measured its weight, repackaged it and sold it to Detective Wilson. Detective Wilson further testified that he purchased about 44 grams of cocaine from defendant. In addition, Detective Wilson testified that defendant did not sell all of the cocaine that defendant possessed. Finally, Detective Wilson testified defendant left the Detective's car, got into a parked car, and drove off. This evidence, along with other evidence in the record and transcript, illustrates that the jury would probably not have reached a different verdict even if it was error by the trial court to allow the contested evidence. Therefore, we disagree with defendant's contention.

II.

Defendant contends that his trial counsel's failure to object to testimony that (1) defendant was a part of a larger drug investigation and that (2) an officer was afraid defendant was going to rob him, denied him his right to the effective assistance of counsel. We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984). In order to meet this burden a defendant must satisfy a two-part test:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. (Emphasis added)."

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (citation omitted).

"Thus, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's

alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

In the instant case, there is no reasonable probability that the result of the proceeding would have been different had the contested testimony not been allowed by the trial court. The contested testimony involved references to the larger drug operation and Detective Wilson's feelings about possibly being robbed. Even if this testimony was not allowed, there still would have been testimony regarding defendant selling around 40 grams of cocaine to Detective Wilson. In addition, there would have been testimony regarding defendant carrying the cocaine, measuring it, and repackaging it. Thus, there is no reasonable probability that the result of the trial would have been any different.

Accordingly, we disagree with defendant's contention.

No error.

Chief Judge MARTIN and Judge LEVINSON concur.

Report per Rule 30(e).