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NO. COA07-1148

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v.

ANTONIO LAMONT SHINE

Cabarrus County
No. 06 CRS 53192

Court of Appeals

Slip Opinion

Appeal by defendant from judgment entered 1 March 2007 by Judge Christopher M. Collier in Cabarrus County Superior Court. Heard in the Court of Appeals 5 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General David W. Boone, for the State.

Richard E. Jester for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a judgment entered upon his convictions for trafficking in cocaine by possession, possession with intent to sell or deliver (PWISD) cocaine, PWISD marijuana, PWISD methylenedioxymethamphetamine (MDMA), possession of drug paraphernalia, and resisting a public officer. We find no error.

On 1 August 2006, North Carolina Alcohol Law Enforcement Agent Chris Kluttz stopped a sport utility vehicle (SUV) driven by defendant on Concord Mills Boulevard in Concord, North Carolina. John Thomas was seated beside defendant in the front passenger's seat; Frederick Fuller was in the rear passenger's seat. While

waiting for assistance, Agent Kluttz observed defendant take an object from the center console of the SUV and "pass[] it toward the back of the vehicle." When Concord Police Officer Joel Patterson arrived at the scene, Agent Kluttz informed him "that the center console was opened and [defendant] looked like he handed something to the rear passenger." Officer Patterson approached the driver's side of the SUV to address defendant. Agent Kluttz opened the passenger's side door and noticed an odor of marijuana in the vehicle. He brought Fuller outside and frisked him for weapons. Fuller objected, saying, "[M]an, you can't search me, you can't search me." Agent Kluttz then spoke to Thomas, who admitted that he was in possession of marijuana.

Agent Kluttz searched Thomas and found a clear plastic baggy containing cocaine. Defendant rushed at Agent Kluttz and Thomas and was placed in handcuffs before fleeing on foot toward Concord Mills. While Officer Patterson chased defendant, Agent Kluttz performed a more thorough search of Fuller. During the search, a large black plastic bag fell out of Fuller's pants from his crotch area. Inside the black bag were several smaller bags containing a small quantity of marijuana, 58.3 grams of cocaine, and tablets of MDMA and methamphetamine. Fuller claimed "that the drugs didn't belong to him, that they belonged to [defendant]." Both Fuller and Thomas told Agent Kluttz that defendant had removed the black bag from the SUV's center console, handed it to Fuller, and told him to put it down his pants. A search of the SUV's interior revealed a small bag containing 0.2 grams of cocaine and a digital scale

coated with cocaine in the center console. Police also found a small bag of marijuana under the front passenger's seat.

Fuller testified that defendant had handed the black bag to Thomas, who then passed it to Fuller. Fuller did not know what was in the black bag, but defendant told him to "take it." Fuller stuffed the bag into his pants after being assured by defendant and Thomas that he could not be searched. Fuller was charged with trafficking in cocaine and pled guilty to PWISD cocaine in exchange for giving truthful testimony at defendant's trial.

Testifying for the defense, Thomas denied that defendant had opened the SUV's center console or that anything had been passed to Fuller from the front seat. Thomas told Agent Kluttz about the cocaine on his person, but did not know Fuller had the black bag until Fuller told Agent Kluttz that he had something on him.

On appeal, defendant asserts that the trial court erred by failing to declare a mistrial *ex mero motu* after ruling that Agent Kluttz had been improperly allowed to testify about defendant's possession of $7,173 in cash at the time of the vehicle stop. Over a general objection, Agent Kluttz informed the jury that Officer Patterson had delivered the cash to him after frisking defendant for weapons. Agent Kluttz also described the currency as three $100 bills, eight $50 bills, two hundred and eighty $20 bills, seventy-three $10 bills, twenty-eight $5 bills, and three $1 bills. During Officer Patterson's testimony, however, the court determined that his frisk of defendant exceeded the permissible scope of a

pat-down search under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968).

The court sustained defendant's objection to any evidence arising from the frisk and offered to immediately instruct the jury to disregard Agent Kluttz's earlier testimony. Defense counsel asked the court to delay a jury instruction until the conclusion of the trial. As part of its final charge to the jury, the court instructed as follows:

> Now members of the jury you will recall hearing testimony concerning a sum of $7,173 purportedly related to this investigation.... I instruct you to disregard that testimony and strike it from your minds. That testimony is to have no bearing whatsoever in your deliberations.

Although he did not object to the instruction, defendant now claims that it was insufficient to cure the jury's exposure to the subject evidence, and that the trial court should have declared a mistrial.

A trial court may declare a mistrial on its own motion pursuant to N.C. Gen. Stat. § 15A-1061 (2007). A mistrial should be granted "'"only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law."'" *State v. Bowman*, 349 N.C. 459, 472, 509 S.E.2d 428, 436 (1998) (citations omitted), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). "[B]ecause the trial court is in the best position to determine whether the degree of influence on the jury was irreparable," *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d

1099 (1998), its decision not to declare a mistrial is reviewed only for manifest abuse of discretion. *Bowman*, 349 N.C. at 472, 509 S.E.2d at 436. "Moreover, the trial court may use a curative instruction to remove possible prejudice arising from improper material put before the jury." *State v. Ramirez*, 156 N.C. App. 249, 253, 576 S.E.2d 714, 718, *disc. review denied*, 357 N.C. 255, 583 S.E.2d 286, *cert. denied*, 540 U.S. 991, 157 L. Ed. 2d 388 (2003). "It is well-settled that where the trial court withdraws incompetent evidence and instructs the jury not to consider that evidence, any prejudice is ordinarily cured." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

We find no abuse of discretion by the trial court. After concluding that Officer Patterson's frisk of defendant was excessive, the court sustained defendant's objection to all evidence produced by the frisk and instructed the jury to disregard the prior testimony about the $7,173. "'Jurors are presumed to follow a trial judge's instructions.'" *State v. Phillips*, 171 N.C. App. 622, 629, 615 S.E.2d 382, 386 (2005) (quoting *State v. Taylor*, 340 N.C. 52, 64, 455 S.E.2d 859, 866 (1995)), *disc. review denied and appeal dismissed*, 360 N.C. 74, 622 S.E.2d 628 (2005). The court's actions were sufficient to cure any prejudice to defendant.

Defendant next claims that his appointed counsel was constitutionally ineffective in failing to move for a mistrial once the trial court had belatedly determined that Agent Kluttz's testimony about the $7,173 was improper. To state a constitutional claim, defendant must show that his counsel's performance was

objectively unreasonable. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). He must also establish a reasonable probability that counsel's error adversely affected the outcome of his trial, or that it undermined the essential fairness of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002).

We do not believe that counsel's failure to request a mistrial met the constitutional standard for ineffective assistance under *Strickland* and *Braswell*. As discussed above, the court was not required to end the trial based on Agent Kluttz's testimony about the $7,173. Moreover, the court indicated its preferred remedy for this testimony--a curative instruction directing the jury to disregard it. We find no reasonable probability that a mistrial would have been declared but for counsel's failure to request it. Counsel's omission did not affect the fairness or reliability of the trial, given the court's curative instruction to the jury. Defendant's assignment of error is overruled.

Defendant also argues that he was denied his constitutional right to counsel, because the trial court failed to question him directly to determine if he was satisfied with his appointed counsel after he announced that he had hired private counsel.

Having carefully reviewed the transcript, we find no merit to this claim.

The transcript reflects that the court revoked defendant's bond and issued an order for his arrest when he was not present in the courtroom on the morning of the trial. Defendant was taken into custody and appeared in court with his appointed counsel, Wayne Pickett, who asked to strike the arrest order. Defendant told the judge that he had been present at the courthouse during calendar call but had been instructed by his "paid lawyer," Charles Alston, to wait outside the courtroom. When the judge responded that he "thought Mr. Pickett was your lawyer," defendant said, "Yeah, but I got, I just hired a lawyer because we're going to trial." The prosecutor reported her conversation with Attorney Alston earlier that morning when he "came in to talk to the co-defendant's attorney . . . ." He told the prosecutor that he had spoken to defendant by phone but had not seen him. The prosecutor advised the judge that "Mr. Alston did not say he was making a general appearance [for defendant]," and that she "did tell [Alston] that [defendant's] case would be number one for trial." Defendant responded that there was "some funny stuff going on," that he "need[ed] to be prepared for this with [his] witness and stuff," and that he had "to have somebody know my case and be ready to fight[.]"

Based upon defendant's claim that he had "hired somebody else," Pickett moved to withdraw. The judge denied the motion.

After a break in the proceedings, Pickett offered the following explanation of the morning's events:

> What had happened, I understand [defendant] had contacted Mr. Charles Alston from Charlotte and there was some misunderstanding this morning about whether [defendant] should be in the courtroom at the time the calendar was called....
>
> Your Honor, this was not some attempt by [defendant] to avoid anything or whatever. He is here. All of his witnesses are here. There was some issue about representation. That is all resolved. I am now his attorney. We are ready to go to trial tomorrow afternoon[.]

Pickett asked the judge to reinstate defendant's release bond. The judge refused to allow defendant's release overnight, which led to the following exchange:

> THE COURT: [B]ased on statements [defendant] made earlier today, it sounded like he wasn't very anxious to go to trial and my fear was that he would not show up to guarantee himself another continuance. . . .
>
> He didn't know Mr. Alston wasn't representing him and at that point he wasn't happy with you. And I take you at your word that he's very happy with you now, but my intention is to release him after we get the jury impaneled tomorrow.
>
> DEFENDANT: Can I speak to Your Honor?
>
> THE COURT: Talk to your lawyer.

Although counsel Pickett offered additional argument in favor of defendant's release on bond, he made no further mention of the issue of representation.

Defendant now contends that the trial judge should have asked him directly about "his willingness to proceed with his appointed

counsel." He notes that he did not personally express satisfaction with appointed counsel and apprised the judge of his "specific attempts to hire an attorney, Mr. Alston, to represent him."

An indigent defendant has the constitutional right to appointed counsel. *See Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977). A defendant who retains private counsel has a constitutional right to his counsel of choice. *McFadden*, 292 N.C. at 611, 234 S.E.2d at 744. However, a defendant represented by appointed counsel does not have the right to his counsel of choice, or to "'insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services.'" *State v. Anderson*, 350 N.C. 152, 168, 513 S.E.2d 296, 306 (1999) (quoting *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981)), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). In order to obtain substitute counsel, an indigent "'defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict.'" *State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62 (1998) (quoting *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 528-29 (1976)).

Defendant appeared at trial with his appointed counsel. Alston was not present and had not entered an appearance on defendant's behalf. Defendant did not move for a continuance in order to retain Alston or any other private attorney. Moreover, his appointed counsel advised the court that defendant had

misunderstood his communication with Alston, that the issue of defendant's representation had been resolved, and that defendant intended to proceed through appointed counsel. Absent an indication to the contrary, the court was entitled to rely upon counsel's representations. Finally, defendant did not request the appointment of substitute counsel or allege any facts tending to support such a request. Therefore, the court had no reason to engage defendant in a colloquy about his relationship with appointed counsel.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C. R. App. P. 28(b)(6) (2008), we deem them abandoned.

No error.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).