NO. COA07-1473

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v. Wake County
No. 06CRS101057

RICKIE JOSEPH ANDERSON,
Defendant.

Appeal by defendant from judgment entered on or about 26 April 2007 by Judge J.B. Allen, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 17 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Seth P. Rosebrock, for the State.

Terry F. Rose, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of attempting to obtain a controlled substance by fraud. Defendant appeals. The issues before this Court are whether the trial court erred in denying defendant's (1) motion to continue based upon the unavailability of a necessary witness and (2) motion to suppress based on the introduction of convictions over ten years old. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show: On 6 November 2006, at approximately 7:30 p.m. defendant came into an Eckerd's Drug where Ms. Julie Finch ("Ms. Finch") was working as a pharmacist. Defendant presented a pharmacy technician ("technician") with a prescription to be filled, and Ms. Finch overheard defendant provide "a detailed description of why he needed the medication" because of "[a] jaw bone injury." Ms. Finch "became suspicious immediately because typically most people who have valid prescriptions don't feel the need to state why they need the medication." Ms. Finch was also suspicious "because it was the evening hours. If someone has just come from a medical clinic, typically those clinics are closed in the evenings." Defendant asked how long it would take to fill the prescription and asked that his insurance not be involved. The technician informed defendant it would probably be at least an hour until his prescription was filled. Ms. Finch also became suspicious because defendant "was extremely nice. He was very cooperative, very kind, very courteous, didn't complain at all about the wait, which is unusual."

Ms. Finch saw the prescription and the original date on it was approximately two weeks earlier on 25 or 26 October 2006. Ms. Finch thought the prescription "looked just like a photocopy." "This was the only situation in the five years [Ms. Finch] practiced pharmacy where [she] became 100 percent sure it was false." Ms. Finch submitted a claim to defendant's insurance and was informed defendant was only allowed to fill prescriptions at a

CVS on Glennwood [sic] Avenue. Ms. Finch called Mr. Robert Vurney ("Mr. Vurney"), a pharmacist at the CVS on Glennwood [sic] Avenue. Mr. Vurney informed Ms. Finch the original prescription had already been filled. Ms. Finch called the police. Officer H.G. Alexander with the Raleigh Police Department was dispatched to Eckerds and arrested defendant.

On or about 6 November 2006, a warrant was issued for defendant's arrest. On 29 November 2006, defendant filed a demand for a speedy trial. On 8 January 2007, defendant was indicted for attempting to obtain a controlled substance by fraud. On 6 March 2007, the State filed a "Notice of Intent to Introduce Prior Conviction Greater Than Ten Years Old pursuant to North Carolina General Statute § 8C-1 Rule 609[.]" On 16 March 2007, defendant filed a "Motion to Suppress Evidence of Prior Convictions Over 10 Years Old[.]"

Trial began on 25 April 2007. Defendant made a written motion to continue "because a necessary witness is currently unavailable." The trial court denied defendant's motion to continue, which was apparently filed when the case was called for trial.[1] As to defendant's motion to suppress, the trial court did not make a final ruling during pretrial motions, but stated that "[t]he State cannot get any evidence in unless the Defendant testifies." Defendant testified and the trial court did allow the jury to hear

[1] The motion in the record on appeal is neither signed, dated, nor file stamped, but has a typed date on the certificate of service of 25 April 2007. Based upon the transcript, it appears that the motion to continue was not brought to the court's attention until the case was called for trial.

the evidence of the prior convictions. On or about 26 April 2007, a jury found defendant guilty of attempting to obtain a controlled substance by fraud. The trial court determined defendant had a prior record level of six, suspended defendant's sentence, and placed defendant on supervised probation for 36 months. Defendant appeals. The issues before this Court are whether the trial court erred in denying defendant's motion to continue and motion to suppress.

II. Motion to Continue

Defendant first argues, "[t]he trial court erred in denying . . . [defendant's] motion to continue the trial based on unavailability of a necessary witness thereby denying . . . [defendant] his right to compulsory process pursuant to the Sixth Amendment of the United States Constitution." Defendant contends,

> Dr. Stoker was essential to . . . [defendant's] defense in that on November 6, 2006 he had been the one who had given . . . [defendant] pain medication while removing wires from his jaw. He had also given . . . [defendant] that same day a computer printout prescription on an 8 x 11 page of paper for Percocet. Dr. Stoker's testimony would go directly to issues of whether or not . . . [defendant] was still under the influence of medication so that he could have mistaken a photocopy of the prescription for the actual prescription. Dr. Stoker's testimony as to the form of the prescription - a 8x 11 computer printout - was also essential to . . . [defendant's] defense in that the original prescription would look very much like a photocopy.

When this Court reviews a motion to continue we use the following standard of review:

> Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error.

State v. Taylor, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001) (internal citations omitted), *cert. denied*, 535 U.S. 934, 152 L.Ed 2d 221 (2002).

We first note that defendant's motion to continue was not timely made pursuant to N.C. Gen. Stat. § 15A-952(c) and could properly be denied for that reason alone. *State v. Evans*, 40 N.C. App. 390, 391, 253 S.E.2d 35, 36 (1979). However, defendant's attorney did address his motion to continue before the trial court, and neither within the written motion itself nor during the pretrial motions was defendant's Sixth Amendment right ever raised. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see State v. Tirado*, 358 N.C. 551, 592, 599 S.E.2d 515, 542 (2004) ("Constitutional claims not raised

and passed on at trial will not ordinarily be considered on appeal."), *cert. denied*, 544 U.S. 909, 161 L.Ed 2d 285 (2005). Thus, we will not review defendant's motion to continue based on the Sixth Amendment, *see* N.C.R. App. P. 10(b)(1); *Eason* at 420, 402 S.E.2d at 814; *Tirado* at 592, 599 S.E.2d at 542, but will instead review for abuse of discretion. *See Taylor*, 354 at 33, 550 S.E.2d at 146.

Even if defendant's motion to continue had been timely, the trial court abused its discretion in denying the motion. Defendant's counsel was appointed on 7 November 2006, and the case had previously been set for trial during the week of 19 March 2007. Defendant then requested "a full months [sic] notice of the next court date to get the witness[,]" which was given. Defendant's counsel had adequate time to have a subpoena served upon Dr. Stoker. We cannot find that the trial court abused its discretion in denying defendant's motion to continue. This argument is overruled.

III. Motion to Suppress

Defendant next argues that "the trial court erred in denying the [defendant's] Motion to Suppress Evidence of Prior Convictions over Ten Years Old and allowing the admission of such convictions during the trial as such evidence was more prejudicial than probative." Defendant contends that

> when the jury hears that . . . [defendant] has had some past driving while impaired convictions then the jury is prejudiced to believe . . . [defendant] does [sic] a substance abuse problem an [sic] thus is more likely to believe that the presentation of a

> photocopy of a prescription was not an innocent accident but was done for the purpose of trying to obtain a controlled substance.
>
> Allowing the evidence of the prior convictions of driving while impaired was in violation of Rule 609 in that such evidence had no value for impeachment.

In *State v. Ortez*, this Court stated,

> Our standard of review of an order granting or denying a motion to suppress is strictly limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the trial court's ultimate conclusions of law.

178 N.C. App. 236, 243-44, 631 S.E.2d 188, 194 (2006) (citation, internal quotation marks, and brackets omitted) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *disc. rev. denied, appeal dismissed*, 361 N.C. 434, 649 S.E.2d 642 (2007). However, in order to receive a new trial defendant must show prejudice resulting from an error. *State v. Shelly*, 176 N.C. App. 575, 584, 627 S.E.2d 287, 295 (2006). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 609(b), evidence of a conviction which is over ten years old is inadmissible

> "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.C. Gen. Stat. § 8C-1, Rule 609(b) (2005). [This Court has interpreted] . . . "this part of Rule 609(b) to mean that the trial court must make findings as to the specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect." *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985).

State v. Muhammad, ___ N.C. App. ___, ___, 651 S.E.2d 569 (2007), *appeal dismissed*, 362 N.C. 242, ___ S.E.2d ___ (2008).

After the State had rested its case, defendant's counsel informed the court that defendant would testify in his own defense, and the court again heard argument regarding defendant's motion to suppress his convictions which were over ten years old. The trial court then made findings of fact and concluded that the probative value of the convictions substantially outweighed the prejudicial effect. Defendant did not assign error to any of the trial court's findings of fact or to the trial court's conclusions of law, but only generally to the trial court's denial of his motion to suppress because the "evidence was more prejudicial than probative."

"With regard to the weight assigned to the facts and circumstances, the trial court's ultimate determination is reversible only for a manifest abuse of discretion." *Muhammad* at ___, 651 S.E.2d at 575 (citation, internal quotation marks, and brackets omitted). Our inquiry is whether the trial court manifestly abused its discretion "with regard to the weight assigned to the facts and circumstances." *Muhammad* at ___, 651 S.E.2d at 575. "[T]he following considerations [are] factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the remoteness of the prior crime, and (c) the centrality of the defendant's credibility." *Shelly* at 582-83, 627 S.E.2d at 294. "This Court

[has also] noted that appropriate findings should address (a) whether the old convictions involved crimes of dishonesty, (b) whether the old convictions demonstrated a 'continuous pattern of behavior,' and (c) whether the crimes that were the subject of the old convictions were 'of a different type from that for which defendant was being tried.'" *Id.* at 583, 627 S.E.2d at 295 (citation omitted).

Although the trial court made findings of fact regarding the evidence presented by the State and the general nature of defendant's prior convictions, the trial court here failed to properly address the "factors[,]" *see id.* at 582-83, 627 S.E.2d at 294, or "appropriate findings[,] *id.* at 583, 627 S.E.2d at 295, noted *supra*, as required for an analysis under Rule 609(b). *See id.* at 582-83, 627 S.E.2d at 294. The trial court's findings did not support its conclusion of law, and the trial court therefore erred in its ruling upon the motion to dismiss.

However, although the trial court erred, defendant has failed to demonstrate prejudice. *See id.* at 584, 627 S.E.2d at 295. In *State v. Ross*, the defendant argued to the North Carolina Supreme Court that the admission of his 1970 sodomy conviction "tended to cause the jury to convict him because of his sexual preferences." 329 N.C. 108, 121, 405 S.E.2d 158, 165 (1991). The Supreme Court agreed that it was error for the trial court to have allowed in the prior conviction, but overruled the assignment of error concluding, "There was . . . substantial evidence of defendant's homosexuality apart from that supplied by the sodomy conviction." *See id.*

At trial the following dialogue took place between defendant and his attorney:

> Q. Now, this may be painful to go into. I'm going to ask you some questions about prior criminal record. Were you, back on October 1st 1999, convicted in Davidson county file 98-CR-13003 of possession of drug paraphernalia?
>
> A. Yes.

Defendant's attorney then asked defendant about his convictions in 1999 for possession of drug paraphernalia and misdemeanor larceny, his 1997 conviction for misdemeanor larceny, and his 1999 conviction for driving while license revoked, which convictions defendant did not recall. Defendant did however recall his convictions in 1998 for misdemeanor larceny and in 2004 for unauthorized use of a motor vehicle.

On cross examination, the State's attorney asked defendant about his recent admission to Dorothea Dix Hospital, "the first of last month":

> Q. So were you evaluated for addiction at Dix?
>
> A. Evaluation of -- of narcotics and there was no addiction. There was no abuse per the hospital nor the Dix.
>
> Q. So your family is so concerned about your drug use they wanted you to go to Dorothea Dix to be evaluated?
>
> A. My brother did that.

Here, defendant argues the evidence of the three prior driving while impaired convictions prejudiced him because the jury believed he had a substance abuse problem; however, just as in *Ross* "[t]here was . . . substantial evidence of defendant's [substance abuse

problem] apart from that supplied by the [driving while impaired] conviction[s]." *See id.* In fact, in addition to his 1999 conviction for possession of drug paraphernalia, there was evidence of defendant's very recent hospitalization for evaluation of his narcotic use. We therefore do not conclude that absent evidence of defendant's prior convictions "a different result would have been reached at the trial out of which the appeal arises." *See* N.C. Gen. Stat. § 15A-1443(a). This argument is overruled.

IV. Conclusion

We conclude that the trial court did not commit prejudicial error in denying defendant's motion to continue or motion to suppress. Accordingly, his convictions are affirmed.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).