NO. COA07-211

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

STATE OF NORTH CAROLINA

v. Onslow County
No. 05 CRS 52873

DARIN ANDREW DUNCAN,
Defendant.

On writ of certiorari to review judgment dated 9 May 2006 by Judge Russell J. Lanier, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 24 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Y. Harper, for the State.

Sue Genrich Berry for defendant-appellant.

BRYANT, Judge.

Darin Andrew Duncan (defendant) appeals from his convictions for possession of cocaine and possession of a controlled substance (cocaine) on the premises of a local confinement facility. For the reasons stated below, we arrest the conviction for possession of cocaine and remand for entry of a new judgment on the remaining conviction.

On 14 March 2006, the Onslow County grand jury indicted defendant on charges of possession of a controlled substance (cocaine) on the premises of a local confinement facility, possession of cocaine, and attaining the status of an habitual

felon. At trial, the State introduced evidence tending to show the following: On 30 March 2005, Officer John Ervin arrested defendant on an outstanding warrant and transported him to the police department for booking. Officer Ervin then transported defendant to the Onslow County Jail, and Officer John Bojack took custody of defendant and patted him down.

After being processed at the jail, defendant was permitted to use a telephone. Officer Bojack observed that while defendant was on the telephone, he was shaking his leg "like his trousers were full of fire ants or something . . . ." Officer Bojack walked over to defendant and found a little plastic package between defendant's feet. The substance in the plastic package was submitted for chemical analysis. A forensic chemist with the North Carolina State Bureau of Investigation testified that she had examined the contents of the package and had determined that it contained 1.4 grams of cocaine base.

At the trial on 7 May 2006, defendant presented no evidence, and the trial court instructed the jury as to both possession offenses. The jury subsequently found defendant to be guilty of both possession offenses on 8 May 2006, and defendant then admitted his habitual felon status. The trial court consolidated the two convictions for judgment and sentenced defendant as an habitual felon to a term of 101 to 131 months imprisonment, which was the shortest possible mitigated-range sentence for defendant's prior record level. Pursuant to this Court's writ of *certiorari* entered

22 September 2006, defendant seeks review of the trial court's judgment.

Defendant contends the trial court erred by sentencing him for both possession convictions since both charges arose out of a single possession of cocaine. He argues he is entitled to a new sentencing hearing. For the reasons stated below, we agree that defendant should only have been sentenced for the charge of possession of a controlled substance (cocaine) on the premises of a local confinement facility, but we find that a new sentencing hearing is not required.

Possession of cocaine (N.C. Gen. Stat. § 90-95(d)(2) (2005)) is a lesser included offense of possession of a controlled substance (cocaine) on the premises of a local confinement facility (N.C. Gen. Stat. § 90-95(e)(9) (2005)). Because "a lesser included offense requires no proof beyond that required for the greater offense, . . . the two crimes are considered identical for double jeopardy purposes." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987). As the State correctly concedes in its brief, defendant should only have been sentenced for one offense because the two charges arose from a single transaction and one of the offenses was a lesser included offense of the other. *See State v. Partin*, 48 N.C. App. 274, 281, 269 S.E.2d 250, 255 (double jeopardy prohibition protects a defendant from multiple punishments for the same offense), *disc. review denied and appeal dismissed*, 301 N.C. 404, 273 S.E.2d 449 (1980). Upon sentencing defendant for

possession of a controlled substance (cocaine) on the premises of a local confinement facility, the trial court should have arrested defendant's conviction for possession of cocaine.

Given that the trial court imposed the shortest possible mitigated-range sentence and that the trial court cannot impose a greater sentence on remand in this instance, *see* N.C. Gen. Stat. § 15A-1335 (2005), this case is remanded for arrest of judgment upon the conviction for possession of cocaine and for entry of a new judgment for the offense of possession of a controlled substance on the premises of a local confinement facility as enhanced by defendant's habitual felon status.

Remanded for reasons stated in this opinion.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).