NO. COA08-119

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Pasquotank County
No. 07 CRS 451

ROBERT B. JACKSON

Appeal by defendant from judgment entered 26 June 2007 by Judge Alma L. Hinton in Pasquotank County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Robert C. Croom, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

JACKSON, Judge.

Robert B. Jackson ("defendant") appeals his convictions for drug trafficking by possession and drug trafficking by selling. For the reasons stated below, we hold no error.

On 2 December 2005, Shawn Cradle ("Cradle"), a confidential informant, met with Investigator William G. Williams, III ("Investigator Williams") of the Pasquotank County Sheriff's Office and agreed to buy two ounces of cocaine from defendant under Investigator Williams' direction. Cradle was interviewed extensively about defendant and his dealings. Investigator Williams searched Cradle for contraband, gave him $2000.00, and

provided a car that had been searched by Investigator Winslow for contraband.

Cradle met defendant in the laundry room of defendant's apartment complex, where defendant told him that the cocaine was in a dryer. Cradle then retrieved the cocaine from the dryer. Cradle paid defendant $1900.00 for the cocaine and returned to meet Investigators Williams and Winslow, who had been watching the apartment complex from a fire station across the street. Back at the investigators' office, Cradle gave the investigators the cocaine he had purchased from defendant and the unspent $100.00. Cradle was interviewed about the incident and searched again.

On 2 February 2006, Investigator Williams drove the substance to the State Bureau of Investigation ("SBI") crime lab in Garner for analysis. The substance was analyzed on 29 November 2006 and found to be 55.8 grams (approximately two ounces) of cocaine hydrochloride - schedule II. Defendant subsequently was indicted and tried in Pasquotank County Superior Court. Cradle and Investigator Williams were the only witnesses to testify. The SBI lab report was introduced into evidence without objection.

On 26 June 2007, the jury found defendant guilty of drug trafficking by possession and guilty of drug trafficking by selling. Defendant was sentenced to two active terms of thirty-five to forty-two months confinement in the Department of Correction, to run consecutively, fined a combined $100,000.00, and ordered to pay $2,200.00 in restitution and $622.00 in attorney's fees. He gave notice of appeal in open court.

Defendant argues that the trial court committed plain error by allowing the SBI lab report into evidence. We disagree.

The SBI lab report was introduced into evidence without objection. In general, "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" to preserve a question for appellate review. N.C. R. App. P. 10(b)(1) (2007). However, defendants in criminal cases may appeal an issue otherwise not preserved "where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2007).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis and alterations in original) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "However, before engaging in plain error analysis it is

necessary to determine whether the [allegation] complained of constitutes error." *State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citing *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986)), *cert. denied*, ___ U.S. ___, 170 L. Ed. 2d 760 (2008).

Defendant first contends that admission of the SBI lab report violated the rule against hearsay. "Hearsay is not admissible *except as provided by statute* or by these rules [of evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2007) (emphasis added). North Carolina General Statutes, section 90-95(g) provides that the State may introduce into evidence, without further authentication, a lab report prepared by the SBI, after analysis, showing the identity, nature, and quantity of a suspected controlled substance if:

> (1) The State notifies the defendant at least 15 days before trial of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
>
> (2) The defendant fails to notify the State at least five days before trial that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g) (2007).

Although defendant contends to the contrary, the record before this Court shows that defendant was notified on 17 April 2007 – more than fifteen days before trial – of the State's intention to introduce the SBI lab report in question into evidence. The State provided a copy of the SBI lab report on or about that same date. Defendant failed to object at least five days before trial or otherwise to the introduction of the SBI lab report into evidence.

Therefore, the requirements of section 90-95(g) were met and the admission of the SBI lab report did not violate the rule against hearsay. Defendant's assignment of error is overruled.

Defendant further contends that admission of the SBI lab report violated his constitutional right to confront his accusers. As no objection was made at trial, no constitutional issue was raised and passed upon at trial. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322 S.E.2d 517, 519 (1988)). Therefore, this issue is not properly before this Court.

Having determined that the SBI lab report was admissible pursuant to section 90-95(g), the trial court did not err in admitting it into evidence.

No error.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).