NO. COA08-145

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Cleveland County
No. 06 CRS 6595-6597

ROBERT DEMETRIOUS PARKS, JR.

Appeal by Defendant from judgment entered 4 October 2007 by Judge Charles P. Guinn in Cleveland County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General, James C. Holloway, for the State.

Parish, Cooke & Condlin, by James R. Parish, for Defendant.

ARROWOOD, Judge.

Defendant appeals from judgments entered 4 October 2007 convicting him of possession with the intent to sell or deliver cocaine pursuant to N.C. Gen. Stat. § 90-95(a), of selling or delivering cocaine pursuant to N.C. Gen. Stat. § 90-95(a), and of attaining the status of an habitual felon. We vacate and remand in part and affirm in part.

The State's evidence tends to show the following: On 14 June 2006, Sergeant Scott Champion (Sergeant Champion) employed at the vice narcotics unit in Shelby, North Carolina, conducted undercover buys with an informant. At approximately 3:00 P.M., Sergeant

Champion and several other detectives met the informant near the city park. Sergeant Champion searched the informant, issued the money, and equipped him with audio/video equipment. Sergeant Champion turned on the audio/video equipment and confirmed that it operated properly. Sergeant Champion then directed the informant to go to Defendant's house. Sergeant Champion listened to the audio as the informant exited the vehicle, walked to the residence, and opened the door. The informant walked into the house and asked someone inside for "three for fifty," which Sergeant Champion explained meant three rocks of crack cocaine for fifty dollars. The informant remained in Defendant's house for approximately two minutes, and thereafter returned to his vehicle, giving Sergeant Champion directions that he was returning to the meeting location. When Sergeant Champion, the other detectives, and the informant arrived at the meeting location, Sergeant Champion turned off the recording system and secured the evidence the informant had purchased.

On 11 December 2006, Defendant was indicted on charges of possession with intent to sell or deliver cocaine, pursuant to N.C. Gen. Stat. § 90-95(a), of selling or delivering cocaine, pursuant to N.C. Gen. Stat. § 90-95(a)(1), and of obtaining the status of an habitual felon, pursuant to N.C. Gen. Stat. § 14-7.1. Defendant's trial began on 1 October 2007, and on 4 October 2007, a jury found Defendant guilty of possession with intent to sell and deliver cocaine and of selling or delivering cocaine. Defendant pleaded guilty to attaining the status of an habitual felon. The trial

court entered judgments convicting Defendant of possession with intent to sell or deliver cocaine and of selling cocaine, sentencing Defendant to two consecutive sentences of 126 to 161 months incarceration. From these judgments, Defendant appeals.

Involuntary Plea

In Defendant's first argument, he contends that the trial court coerced his plea of guilt to obtaining the status of an habitual felon. We agree.

"Essential to the preservation of the constitutional guarantee of a fair trial is the right of a criminal defendant to plead not guilty and force the State to establish his guilt beyond a reasonable doubt." *State v. Pait*, 81 N.C. App. 286, 289, 343 S.E.2d 573, 576 (1986) (citing *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968)). "By pleading guilty a defendant not only relieves the State of its burden but also waives many of his own rights, including the right to have a jury determine his guilt." *Pait*, 81 N.C. App. at 289, 343 S.E.2d at 576 (1986). "The right to plead not guilty is absolute and neither the court nor the State should interfere with the free, unfettered exercise of that right; its surrender by a plea of guilty must be voluntary and with full knowledge and understanding of the consequences." *Id.* "A guilty plea that is procured through threats or intimidation is constitutionally invalid." *Id.* (citing *State v. Benfield*, 264 N.C. 75, 140 S.E.2d 706 (1965)).

In *Benfield*, the trial court indicated to defense counsel that "he (the judge) was of the opinion that the jury was going to

convict the defendant, and, if so, he felt inclined to give him a long sentence[.]" *Benefield,* 264 N.C. at 76-77, 140 S.E.2d at 708. The court "gave counsel an opportunity to confer with defendant." *Id.* Defendant, who knew that his co-defendant had pleaded guilty and received a suspended sentence, changed his plea to guilty and when asked by the court indicated that the plea was freely made. *Id.* Our Supreme Court held that defendant changed his plea because of what the trial judge said and that it was not done voluntarily under the circumstances. *Id.*

In *Pait*, the defendant's counsel had just been appointed to represent him and wanted time to review the case. He tendered a plea of not guilty. The trial judge became visibly agitated, and said in an angry voice that he was tired of "frivolous pleas" and directed counsel to confer with client and enter an "honest plea". Defendant then changed his plea to guilty. *Pait,* 81 N.C. App. at 287-88, 343 S.E.2d at 576. This Court held that even though the trial court "did not explicitly threaten defendant with a longer sentence[.]" The "self-evident purpose and effect of the judge's remarks was to provoke a plea of guilty." *Id.* at 290, 343 S.E.2d at 576. Thus the Court vacated the judgment of the trial court.

In the instant case, the following conversation between the court, Defendant and his attorney transpired at trial:

> The Court: I need to know pretty soon . . . as to what you and your client's decision is in regard to the bifurcation of the trial in regard to the habitual felon.
>
> Defense Counsel: I'll need to speak with him and his mother.

The Court: Let me first of all speak with you [and] the district attorney before you go speak with them and that might be of benefit to you.

. . . .

The Court: Have you and your lawyer talked about the charges of habitual felon that are now pending against you, sir?

Defendant: He explained it to me a little bit. I just can't really understand it real good. [sic]

. . . .

The Court: Well in each case I indicated to him that if he admitted the fact that he was the status of habitual felon that I would sentence him within the presumptive range but that it would be at 126 months minimum in each case as opposed to the 151 which would be the maximum of the presumptive range.

Defense Counsel: Correct. I may have said, 21, but I was mistaken. It's 126. Do you want to take it or not? You need to take it?

Defendant: You've saying [sic] the 126 is what I'd get or something.

The Court: Essentially sir, if you admit to this, you're going to be sentenced at 126 month minimum to a maximum of 161 months in each case and they will run consecutively. If you don't and the jury returns a verdict, I have indicated to your attorney that I will sentence you at the level of 151 months. So you're saving 25 months in each case, provided that the jury would convict you of being an habitual felon. That's over four years. That's the carrot that's held out in front of you right now if you decide you want to admit to the status of habitual felon.

Defendant: One status or both status? [sic]

The Court: Both of them, Sir. It's the same evidence that's going to convict you on each one.

> . . . .
>
> The Court: Do you now accept that arrangement?
>
> Defendant: Yeah, I accept it.
>
> The Court: Other than what I've just said to you, has anybody made you any promises or threatened you in any way to cause you to enter this plea against your wishes.
>
> Defendant: No, Sir.

We conclude that *Pait* and *Benfield* are controlling in this case, and Defendant's guilty plea was not made voluntarily under the circumstances. The clear statement made by the trial court that he would sentence Defendant to twenty-five additional months imprisonment in each underlying felony if he did not plead guilty to being an habitual felony is tantamount to the court's words in *Benfield,* in which the trial court indicated to defense counsel that "he (the judge) was of the opinion that the jury was going to convict the defendant, and, if so, he felt inclined to give him a long sentence[.]" *Benfield*, 264 N.C. at 76-77, 140 S.E.2d at 708. Because the judgments entered were based upon an involuntary plea of guilty for having obtained the status of an habitual felon they are vacated and the cases are remanded to the Superior Court for a new trial on the issue of whether Defendant has obtained the status of an habitual felon.

Because the foregoing judgments are vacated and remanded, we need not address Defendant's arguments regarding sentencing and the establishment of Defendant's prior record level.

Double Jeopardy

Defendant next argues that the trial court erred by failing to arrest judgment for the conviction of possession with the intent to sell and deliver cocaine because the offense is a lesser-included offense of sale of cocaine. Defendant contends that the conviction of both possession with the intent to sell and deliver cocaine and sell of cocaine constituted double jeopardy. We disagree.

"[P]ossession is not an element of sale and sale is not an element of possession." *State v. Aiken*, 286 N.C. 202, 206, 209 S.E.2d 763, 766 (1974). "Thus, neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other." *Id.* "Thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each." *Id.* This assignment of error is overruled. We find no error in Defendant's convictions for possession with intent to sell and deliver cocaine and sale of cocaine.

Vacated and Remanded in part; No error in part.

Judges BRYANT and JACKSON concur.

Report per Rule 30(e).