NO. COA08-274

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Guilford County
No. 06 CRS 100231

DAMIEN LAMONT SLADE

Appeal by defendant from judgment entered 31 August 2007 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mahonee, for the State.

Leslie Rawls, for defendant-appellant.

ELMORE, Judge.

Defendant appeals from judgment entered consistent with a jury verdict finding him guilty of attempted robbery with a firearm. For the reasons discussed below, we find no error.

The State's evidence tends to show that around 8:00 p.m. on 20 September 2006, Vlora Smith (Smith) left the Looking Ahead Salon in Greensboro. When Smith got into her car, defendant and another man approached her vehicle, defendant held a gun to her head, and demanded her purse and wallet. Smith told defendant she did not have either. After demanding money a few more times, defendant and

the other man then ran off. The defendant did not present any evidence.

At the sentencing phase, neither the State nor defendant presented evidence. Counsel for defendant did submit to the court that defendant was well-mannered, attended all appointments and court hearings, held a steady job, and retained solid family support. Counsel then requested the court consider a sentence in the presumptive range. Judgment was entered on the verdict sentencing defendant within the presumptive range to an active term of 58 to 79 months in prison, with credit for time served in pre-judgment custody. Defendant appeals.

In his sole assignment of error, defendant argues he received ineffective assistance of counsel at the sentencing hearing in violation of his constitutional rights. Defendant claims by presenting mitigating factors at the sentencing hearing, but then asking the court to impose a sentence in the presumptive range instead of arguing for a mitigated sentence, trial counsel ceased to operate as defendant's advocate and deprived defendant of his constitutional right to effective assistance of counsel. We do not agree.

In order to prove ineffective assistance of counsel, defendant must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced defendant. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (adopting the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 80

L. Ed. 2d. 674 (1984)). The benchmark for evaluating counsel's conduct is whether it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 80 L. Ed. 2d at 692-93. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 674.

In support of his argument, defendant cites *State v. Davidson*, 77 N.C. App. 540, 335 S.E.2d 518 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986), in which this Court found that the defendant received ineffective assistance during sentencing where counsel implied the defendant had lied to him, performed a prosecutorial function by noting the defendant had just completed a sentence for armed robbery, and criticized the defendant for refusing a plea bargain. *Id.* at 545, 335 S.E.2d at 521-22. This Court found that the defense counsel's actions fell far short of the requirement of reasonably adequate assistance and his performance was so deficient that it amounted to no representation at all. *Id.* at 546, 335 S.E.2d at 522 (citations omitted). Defendant claims that like the defense counsel in *Davidson*, his counsel's position was not "'fundamentally . . . that of an advocate,'" thus defendant did not receive "'the most effective statement possible . . . in light of the available dispositional opportunities.'" *Id.* (citation omitted).

However, unlike the facts in *Davidson*, counsel's performance here is not "altogether lacking in positive advocacy." *Id.* at 545, 335 S.E.2d at 521. Here, counsel did not speak negatively about defendant and instead portrayed defendant in a positive light. Counsel offered to the court that defendant was a model client, had strong family support, and maintained a job.

Further, this Court indulges a strong presumption that trial counsel's conduct is within the wide range of acceptable professional conduct. *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citations omitted). "'Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics.'" *State v. Taylor*, 79 N.C. App. 635, 638, 339 S.E.2d 859, 861, *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986) (quoting *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984)). Thus, proving that trial counsel's performance was deficient is a heavy burden for defendant to bear.

With these principles in mind, this Court has previously held that defense counsel's decision to make a short statement requesting a lenient sentence in lieu of calling witnesses at the sentencing hearing does not amount to ineffective assistance. *State v. Montford*, 137 N.C. App. 495, 502-03, 529 S.E.2d 247, 253, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000) (relying on *State v. Taylor*, 79 N.C. App. 635, 339 S.E.2d 859, *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986), which held that counsel's complete silence at a sentencing hearing does not constitute

ineffective assistance). Since defendant advocated for his client in a positive light, we find that defense counsel's actions do not fall short of an objective standard of reasonableness.

Moreover, defendant fails to adequately argue that he was prejudiced by trial counsel's allegedly deficient performance. He does not contend that had counsel requested defendant be sentenced in the mitigated range, there is a reasonable probability the trial judge would have done so. Although we note that under "certain circumstances, the deficiency of the counsel's performance is so great that prejudice need not be argued," there are no such circumstances here. *State v. Harrington*, 171 N.C. App. 17, 32, 614 S.E.2d 337, 349, *disc. review denied sub nom., State v. Rattis*, 360 N.C. 70, 623 S.E.2d 35 (2005). Further, we note that the trial court enjoys wide discretion in determining whether or not to impose a mitigated sentence. N.C. Gen. Stat. § 15A-1340.16(c) (2007). It is well established that "a trial court is not required to consider evidence of aggravation or mitigation unless it deviates from the presumptive range[.]" *State v. Taylor*, 155 N.C. App. 251, 267, 574 S.E.2d 58, 69 (2002) (citations omitted), *cert. denied*, 357 N.C. 65, 579 S.E.2d 572 (2003). Thus, defendant has failed to show that even if his counsel sought a mitigated sentence, the trial court would have been likely to grant it.

After reviewing the record, we conclude defendant has not satisfied either prong of the *Braswell* test. Trial counsel's performance was not deficient so as to fall below an objective standard of reasonableness and defendant was not prejudiced. Accordingly, this assignment of error is overruled.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).