NO. COA09-206

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Johnston County
Nos. 06 CRS 54305
06 CRS 54307-08

TRAVIS DEVON AVERY

Appeal by defendant from judgments entered 18 January 2007 by Judge E. Lynn Johnson in Johnston County Superior Court. Heard in the Court of Appeals.30 November 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Haral E. Carlin, for defendant-appellant.

CALABRIA, Judge.

Defendant Travis Avery appeals from judgments entered after a jury found him guilty of two counts of conspiracy to sell cocaine, and one count each of sale of cocaine, delivery of cocaine, and possession with intent to sell or deliver cocaine. Defendant contends that the trial court erred by entering judgment on the separate convictions for sale and delivery of cocaine, and by denying his motion to dismiss when the evidence supported only one conspiracy charge. We find no error in part and remand in part for resentencing.

On 5 June 2006, the Johnston County grand jury returned three separate indictments against defendant: one three-count indictment for possession with intent to sell or deliver cocaine, sale of cocaine, and delivery of cocaine, and two indictments for conspiracy to sell cocaine. The case came on for trial at the 15 January 2007 criminal session of Johnston County Superior Court.

At trial, the evidence showed that an informant, Jeremy Barbour, contacted the Johnston County Sheriff's Department in March of 2006 and told Detective Jason Guseman that he could buy drugs from defendant. Mr. Barbour wanted to be a paid informant for the sheriff's department. On 24 March 2006, Mr. Barbour, in his capacity as an informant, called defendant to buy cocaine. Defendant instructed Mr. Barbour to drive to a convenience store. At the store, Mr. Barbour called defendant again, and defendant instructed Mr. Barbour to drive to defendant's aunt's home. Defendant met Mr. Barbour at the home, and Mr. Barbour paid defendant about $150.00 for the cocaine.

On 28 March 2006, Mr. Barbour called defendant again to buy cocaine. Defendant had Mr. Barbour drive to a convenience store. When Mr. Barbour arrived at the store, he realized that defendant had another man, Gregory Williams, with him. Mr. Barbour saw defendant hand drugs to Mr. Williams. All three men went inside the store. Mr. Williams and Mr. Barbour went inside the bathroom, and Mr. Barbour gave Mr. Williams money in exchange for cocaine.

On 4 April 2006, Mr. Barbour called defendant to purchase cocaine for a third time. Again, defendant instructed Mr. Barbour

to drive to a convenience store. When Mr. Barbour arrived at the store, defendant was not there. Mr. Barbour called defendant, and defendant instructed him to drive to the mailboxes near a trailer park. At the mailboxes, Mr. Barbour gave money to an unidentified woman and she gave Mr. Barbour cocaine. Defendant was not present for the third transaction.

Defendant did not present any evidence. The trial court denied defendant's motion to dismiss. The jury found defendant guilty of one count each of possession with intent to sell or deliver cocaine, sale of cocaine, and delivery of cocaine, and two counts of conspiracy to sell cocaine. The trial court consolidated the first three counts into one judgment, and imposed a term of 16 to 20 months in prison. The trial court imposed consecutive terms of 16 to 20 months in prison for each of the conspiracy counts, giving defendant a total of three consecutive terms of 16 to 20 months in prison. Defendant filed a petition for writ of certiorari on 23 June 2008, and this Court ordered a belated appeal on 9 July 2008.

Defendant's first argument on appeal is that the trial court erred by entering judgment on separate convictions for the sale and delivery of cocaine. The State concedes that defendant is entitled to a new sentencing hearing, and we agree.

It is unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1)(2007). "[T]he language of N.C.G.S. § 90-95(a)(1) creates three offenses: (1)

manufacture of a controlled substance, (2) *transfer of a controlled substance by sale or delivery*, and (3) possession with intent to manufacture, sell or deliver a controlled substance." *State v. Moore*, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (emphasis added). "We need not address the relationship between the acts of sale and delivery as it might exist under any other statutory or common law provision, because by the statutory language at issue here the legislature has made it one criminal offense to 'sell or deliver' a controlled substance under N.C.G.S. § 90-95(a)(1)." *Id.* at 382, 395 S.E.2d at 127.

Here, defendant was indicted for sale of cocaine and delivery of cocaine in separate counts, the jury found him guilty of each count, and the trial court entered a judgment that included both counts. According to N.C. Gen. Stat. § 90-95(a)(1), however, sale or delivery of cocaine is only one offense. Although the counts were consolidated into one judgment, we remand in part for resentencing upon a conviction for sale or delivery of cocaine. *See State v. Rogers*, 186 N.C. App. 676, 677-78, 652 S.E.2d 276, 277 (2007).

In defendant's second argument, he contends that the trial court erred when it denied his motion to dismiss the charge of conspiracy to sell cocaine, because the evidence is sufficient to support only one conspiracy conviction. We disagree.

In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence: (1) of each essential element of the offense; and, (2)

of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002). The trial court must view the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994.

"A criminal conspiracy is 'an agreement, express or implied, between two or more persons, to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.'" *State v. Brewton*, 173 N.C. App. 323, 327, 618 S.E.2d 850, 854 (quoting *State v. Gell*, 351 N.C. 192, 209, 524 S.E.2d 332, 343, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000)).

The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is ordinarily a question of fact for the jury. *See State v. Rozier*, 69 N.C. App. 38, 54, 316 S.E.2d 893, 903 (2005). "The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered." *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004).

In the instant case, considering the separate meetings at which Mr. Barbour purchased drugs and the variety of locations and participants, including no fewer than three different individuals who actually handed drugs to Mr. Barbour, the State provided sufficient evidence of separate conspiracies, rather than one conspiracy. Moreover, we note that defendant did not object to the

trial court's submission of multiple conspiracy charges to the jury, nor did his motion to dismiss address the insufficiency of the evidence to support multiple conspiracy charges that he now raises on appeal. Accordingly, we conclude that the trial court properly submitted multiple conspiracy charges to the jury.

No error at trial. Remand for resentencing.

Judges WYNN and STROUD concur.

Report per Rule 30(e).