NO. COA09-86

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Martin County
No. 06 CRS 51060

DERRICK LEMAR SHEPARD

Appeal by Defendant from judgment entered 11 September 2008 by Judge William C. Griffin, Jr. in Superior Court, Martin County. Heard in the Court of Appeals 7 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Paul Y. K. Castle for defendant-appellant.

WYNN, Judge.

Defendant Derrick Shepard appeals from a judgment revoking his probation and activating his suspended sentence for sale of cocaine and felony possession of a schedule II controlled substance. After carefully reviewing the record, we affirm.

On 17 September 2007, Defendant pled guilty to one count of selling cocaine and one count of felony possession of a schedule II controlled substance. Defendant received a suspended sentence of twenty to twenty-four months imprisonment, and thirty-six months of supervised probation. The conditions of Defendant's probation included requirements that he "[s]ubmit at reasonable times to

warrantless searches" for stolen goods, controlled substances, and contraband.

On 1 March 2008, Defendant's probation officer filed a probation violation report alleging that Defendant willfully violated the conditions of his probation. The report alleged that "on 03-01-08 a warrantless search was conducted at offenders residence located on Perry Street. Controlled substance (cocaine) and contraband (baggie) were found."

Defendant's probation violation hearing occurred on 11 September 2008. At the hearing, Defendant's probation officer testified that, on 1 March 2008, she and other probation officers and narcotics agents conducted a warrantless search at Defendant's residence. Defendant's probation officer, familiar with the residence from previous searches, proceeded directly to Defendant's bedroom, where she found Defendant laying in bed and a pair of pants nearby on a chair. The probation officer testified that Defendant admitted the pants were his when asked, and she "found two small baggies and a bag of, what appeared to be, cocaine in his left-front pants pocket." According to Defendant's probation officer, Defendant was arrested and additional criminal charges resulted from her discovery. Defendant did not present evidence at the hearing.

At the conclusion of the hearing, the trial court found sufficient evidence that Defendant willfully violated the conditions of his probation. Accordingly, the trial court entered

judgment revoking Defendant's probation and activating his suspended sentence.

On appeal, Defendant contends the trial court erred by revoking his probation because: (I) his underlying conviction for sale of cocaine was based upon a fatally defective indictment; (II) charges forming the sole basis for the trial court's revocation of his probation remained pending; and (III) the evidence was insufficient to support a finding that Defendant violated a condition of his probation because the State failed to prove that the substance discovered was actually cocaine.

I.

Defendant first attacks the judgment that originally placed him on probation. He contends that the trial court lacked subject matter jurisdiction because the indictment was fatally defective where two separate offenses, sale of cocaine and delivery of cocaine, were improperly merged into one offense.

The State contends that Defendant's argument is an impermissible collateral attack on his underlying conviction, and that this Court's review is limited to "whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid[.]" *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971). The State further contends that Defendant is precluded from appealing this issue due to his guilty plea. *See State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004).

However, it is well-established that the trial court does not acquire subject-matter jurisdiction when an indictment is fatally defective, *State v. Frink*, 177 N.C. App. 144, 146, 627 S.E.2d 472, 473 (2006), and a challenge to the sufficiency of an indictment may be asserted at any time, including for the first time on appeal. *See State v. Bullock*, 154 N.C. App. 234, 244, 574 S.E.2d 17, 23 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*, 540 U.S. 928, 157 L. Ed. 2d 231 (2003). Moreover, this Court has held that a defendant's tendering of a guilty plea does not waive his right to challenge the sufficiency of an indictment. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citing *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 798-99 (1974)). Accordingly, we find that this issue is properly before this Court.

Nonetheless, Defendant's argument lacks merit. "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused[.]" *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). An indictment "is sufficient if it charges the offense in a plain, intelligible and explicit manner, with averments sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the same offense." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972) (citations omitted).

"A defendant may be indicted and tried under N.C.G.S. § 90-95(a)(1) . . . for the transfer of a controlled substance, whether it be by selling the substance, or by delivering the

substance, or both." *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990). "[A] defendant may not, however, be convicted under N.C.G.S. § 90-95(a)(1) of both the sale and the delivery of a controlled substance arising from a single transfer." *Id.*

In the case *sub judice*, the indictment stated:

> The jurors for the State upon their oath present that on or about the date shown above and in the county named above, the defendant named above unlawfully, willfully and feloniously did sell and deliver to Denekia Miller a controlled substance, cocaine, which is included in Schedule II of the North Carolina Controlled Substances Act.

Although the State could have charged Defendant separately for sale and delivery, he was permissibly indicted for both. *Moore*, 327 N.C. at 382, 395 S.E.2d at 127. Furthermore, Defendant was not convicted of "both the sale and the delivery of cocaine arising from a single transfer." *Id.* Defendant's signed sworn transcript of plea states that Defendant "will plead guilty to poss. of cocaine and sale of cocaine consolidated for one judgment. All other charges in 06-CRS-51060, 07-CRS-50479 and 03-CRS-50944 will be dismissed." Likewise, the judgment shows Defendant pled guilty to sale of cocaine (but not delivery of cocaine), and the separately charged offense of felony possession of a Schedule II controlled substance. Therefore, the indictment was proper and the trial court acquired subject-matter jurisdiction. Accordingly, this assignment of error is without merit.

II.

Defendant next argues that the trial court erred in revoking his probation because the charge that formed the basis for the violation was still pending in court. We disagree.

In support of his argument, Defendant cites *State v. Guffey*, 253 N.C. 43, 116 S.E.2d 148 (1960), which held that "when a criminal charge is pending in a court of competent jurisdiction, which charge is the sole basis for activating a previously suspended sentence, such sentence should not be activated unless there is a conviction on the pending charge or there is a plea of guilty entered thereto." *Id.* at 45, 116 S.E.2d at 150. However, *Guffey* distinguished an earlier case that affirmed a probation revocation on the ground that the revocation was not based solely on the pending criminal charge, but rather on the judge's independent finding of facts supporting a violation of a valid probationary condition. *State v. Greer*, 173 N.C. 759, 92 S.E. 79 (1917); *see also State v. Debnam*, 23 N.C. App. 478, 480-81, 209 S.E.2d 409, 410-11 (1974).

Here, the trial judge did not revoke Defendant's probation solely on the basis of the pending criminal charges. Instead, the judge revoked Defendant's probation after hearing evidence and based on a separate finding that Defendant violated a condition of his probation. Accordingly, Defendant's reliance on *Guffey* is misplaced and this argument is without merit.

III.

Finally, Defendant contends that the trial court erred by revoking his probation because the State did not prove the

substance discovered in his pants pocket was actually cocaine. We disagree.

"Probation is an act of grace by the State to one convicted of a crime." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E.2d 723, 725, *disc. rev. denied*, 301 N.C. 99, 273 S.E.2d 304 (1980). "All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated." *State v. Monroe*, 83 N.C. App. 143, 145, 349 S.E.2d 315, 317 (1986) (citing *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967)). "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002) (citation omitted). "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *Id.* at 438, 562 S.E.2d at 540 (citation omitted).

Here, assuming *arguendo* that the State did not prove Defendant actually possessed cocaine, we conclude that the evidence was nonetheless sufficient to support a finding that Defendant willfully possessed contraband. Defendant's probation officer testified that she found "two small baggies and a bag of, what appeared to be, cocaine . . . ." Baggies of this sort that are

commonly used to package illegal drugs may be considered drug contraband. *See, e.g.*, *State v. Mitchell*, 104 N.C. App. 514, 519, 410 S.E.2d 211, 214 (1991), *rev'd in part on other grounds*, 336 N.C. 22, 442 S.E.2d 24 (1994). Moreover, the probation officer also testified that, during previous searches, she found several $20 bills in Defendant's possession even though he was unemployed.

"[A] proceeding to revoke probation is not bound by strict rules of evidence and an alleged violation of a probationary condition need not be proven beyond a reasonable doubt." *State v. Hill*, 132 N.C. App. 209, 211, 510 S.E.2d 413, 414 (1999). Accordingly, we find that the State presented competent evidence to support the trial court's finding that Defendant violated his probation by possessing drug contraband.

Defendant also argues that the trial court violated his due process rights because it did not enter findings of fact before revoking his probation. Defendant did not assign this argument as error. Accordingly, this argument is not properly before this Court. *See* N.C.R. App. P. 10(a) (2008); *State v. Shaffer*, __ N.C. App. __, __, 666 S.E.2d 856, 858 (2008), *disc. review denied*, 363 N.C. 137, 674 S.E.2d 418 (2009).

Affirmed.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).