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NO. COA10-1358
NORTH CAROLINA COURT OF APPEALS

Filed: 7 June 2011

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 08 CRS 228809

TEVALL TRONE YOUNG

Appeal by Defendant from judgment entered 6 November 2009 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 March 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

Gilda C. Rodriguez, for Defendant.

BEASLEY, Judge.

Tevall Trone Young ("Defendant") appeals from his conviction of trafficking in cocaine by possessing at least 28 grams but less than 200 grams of cocaine.

On appeal, Defendant contends that the trial court erroneously denied a motion in which he sought to learn the identity of a confidential informant. Because the confidential

informant did not witness or participate in the offense for which Defendant was actually charged, Defendant was not entitled to receive the confidential informant's identity, therefore, we find no error.

In February 2008, Detective Charles Davis ("Detective Davis") of the Charlotte Mecklenburg Police Department was engaged in an undercover operation in an effort to covertly investigate the distribution of illegal narcotics. On 21 February 2008, Detective Davis made contact with a confidential informant. The informant accompanied Detective Davis to a vehicle parked outside of a local residence. Shortly after arriving, the informant entered the vehicle, where Defendant waited, and emerged several minutes later with an unknown amount of cocaine. Thereafter, the informant introduced Detective Davis to Defendant, and Defendant provided Detective Davis with his cell phone number.

On 27 February 2008, Detective Davis called Defendant and arranged to purchase fourteen grams of cocaine. The two agreed to meet at the home of Defendant's mother. However, upon arriving at the agreed upon location, Defendant informed Detective Davis that he did not have enough cocaine to complete the transaction and they would have to travel to his cousin's home to obtain the rest. Detective Davis agreed and transported Defendant to a local apartment complex. Defendant entered the

complex and returned to Detective Davis' vehicle several minutes later. Defendant placed a digital scale on the center console of the vehicle and weighed 15.1 grams of cocaine. Detective Davis paid \$500 for the cocaine. On 25 March 2008, Detective Davis again met with Defendant and purchased approximately thirty grams of cocaine.

On 30 June 2008, Defendant was indicted for several drug offenses related to the transaction that occurred on 25 March 2008. Defendant's trial commenced on 3 November 2009. At trial, Defendant identified the confidential informant as a friend and co-worker. Defendant explained that on 21 February 2008, the informant called and asked that he retrieve some "dope" from the informant's apartment. After initially denying the request, Defendant eventually agreed and obtained the cocaine from the informant's apartment. The informant explained to Defendant that he felt his life was in danger and that Defendant was the only one that he could trust to obtain the drugs. Defendant further testified that he did not receive any money from the informant's 21 February 2008 transaction, and that the informant had given Detective Davis Defendant's telephone number.

Following a jury trial, Defendant was convicted of "trafficking in cocaine by possessing at least 28 grams but less than 200 grams of cocaine." Defendant was sentenced to a term

of 35 to 42 months in the custody of the North Carolina Department of Correction. Defendant appeals from his trafficking in cocaine by possession conviction arguing that: (I) the trial court erred in denying his motion to reveal the identity of a confidential informant; (II) the trial court erred when it denied his motion to set aside the jury's verdict; and (III) he was denied the right to effective assistance of trial counsel.

I.

At trial, Defendant filed a motion seeking to require the State to disclose the identity of the confidential informant. The trial court denied Defendant's motion. Defendant first argues that the trial court's denial of his motion was erroneous. We disagree. It is well established that:

ordinarily, a defendant is not necessarily entitled to elicit the name of a confidential informant; . . . however, when 'the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause . . .' disclosure is required.

State v. Cherry, 55 N.C. App. 603, 606, 286 S.E.2d 368, 370 (1982) (citation omitted). "Once defendant has made a 'plausible' showing of the materiality of the informer's testimony, the trial court must balance the public's interest with defendant's right to present his case taking into

consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *State v. Newkirk*, 73 N.C. App. 83, 86, 325 S.E.2d 518, 520 (1985) (internal quotation marks omitted). However, before courts engage in a balancing of competing interests, a defendant seeking the identity of a confidential informant must first sufficiently demonstrate that the circumstances of his case warrant disclosure. *State v. Gaither*, 148 N.C. App. 534, 541, 559 S.E.2d 212, 216 (2002). "[A] defendant who makes no defense on the merits, and who does not contend that the informant participated in or witnessed the alleged crime, has no constitutional right to discover the name of the informant." *Id.* at 541, 559 S.E.2d at 217 (citing *State v. Ketchie*, 286 N.C. 387, 392, 211 S.E.2d 207, 211 (1975)).

Here, because the confidential informant neither participated in, nor witnessed, the crime for which Defendant was eventually charged, the State is not required to disclose the identity of the confidential informant. In *State v. Parks*, our Court reviewed a set of factual circumstances similar to those presented for review in the case at bar. 28 N.C. App. 20, 220 S.E.2d 382 (1975). There, a confidential informant arranged for an agent of the State Bureau of Investigation to meet with the defendant. *Id.* at 20, 220 S.E.2d at 383. During the initial meeting, the defendant sold the agent a pound of

marijuana, utilizing the confidential informants as intermediaries. *Id.* at 21, 220 S.E.2d at 383. The following week, the pair met again and engaged in a second drug transaction. *Id.* at 22-24, 220 S.E.2d at 384-85. The confidential informants were not used as intermediaries at the second meeting. *Id.* The defendant was indicted for his actions related to the second drug transaction. *Id.* at 20, 220 S.E.2d at 383. At trial, the court denied the defendant's motion for the disclosure of the identities of the confidential informants utilized at the first drug transaction. *Id.* at 24, 220 S.E.2d at 385. On appeal, our Court held that:

the informants never participated in the negotiation or actual culmination of the purported unlawful transaction. Without question, the informants provided Eastman with the necessary entree to defendant's purported drug business, but once the course of dealing was established on 30 August 1974 and defendant felt confident that he was dealing with a safe buyer, the relationship became one uniquely personal between defendant and Eastman.

Id. at 26, 220 S.E.2d at 386. Our Court's analysis in *Parker* is controlling in the current action.

Similar to the facts presented for appellate review in *Parker*, a confidential informant in this case participated in an initial drug transaction. However, the confidential informant played no role in any transaction that occurred thereafter. Most importantly, the confidential informant was neither a

witness nor a participant to the offense for which Defendant was indicted and eventually convicted. While it is undisputed that the informant played a significant role in initiating the relationship between Defendant and Detective Davis, he was completely absent from the transaction occurring on 25 March 2008. In both transactions following the initial meeting, Detective Davis and Defendant were the primary participants. The subsequent transactions were based upon the unique personal relationship that developed between Defendant and Detective Davis. See *Id.* Accordingly, Defendant's argument is without merit.

II.

Defendant next argues that the trial court erroneously "denied [his] motion to set aside the verdict because the evidence established entrapment as a matter of law." We disagree.

"Entrapment is 'the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.'" *State v. Broome*, 136 N.C. App. 82, 88, 523 S.E.2d 448, 453 (1999) (quoting *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975)). The defense of entrapment consists of two elements: "(1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit

a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant." *State v. Davis*, 126 N.C. App. 415, 418, 485 S.E.2d 329, 331 (1997) (citation omitted). The defense of entrapment is unavailable to defendants that displayed a predisposition to engage in the charged criminal offense. *Id.* "Predisposition may be shown by the defendant's ready compliance, acquiescence in, or willingness to cooperate in the proposed criminal plan." *Id.*

The Defendant failed to produce sufficient evidence that would indicate that he established the defense of entrapment as a matter of law. "This Court may reverse the denial of a motion to dismiss based upon an affirmative defense only if the evidence in support of that affirmative defense is undisputed and does not require determination of a witness' credibility." *State v. Lockhart*, 181 N.C. App. 316, 321, 639 S.E.2d 5, 8 (2007). Typically, the determination as to whether a defendant has been entrapped is reserved for a jury. *State v. Branham*, 153 N.C. App. 91, 99, 569 S.E.2d 24, 29 (2002). It is only when the undisputed evidence reveals that a defendant was induced to engage in criminal conduct that he would otherwise not have committed, can a court hold as a matter of law that a defendant was entrapped. *Id.* at 100, 569 S.E.2d at 29.

In this case, Defendant failed to submit undisputed evidence that Detective Davis induced Defendant to engage in the

trafficking offense, or that the crime originated in the mind of Detective Davis. The trial court provided an instruction as to the defense of entrapment; therefore, the issue before this Court on review is whether the undisputed evidence establishes Defendant's entrapment defense. See *id.* at 100, 569 S.E.2d at 30. After a thorough review of the record, we hold that it does not.

Defendant generally testified that he initially declined Detective Davis' requests to engage in drug transactions and only relented under pressure and threats from the detective. However, the State presented conflicting evidence in which Detective Davis testified that he participated in two direct drug transactions with Defendant. On each occasion, Detective Davis and Defendant arranged to engage in the drug transaction, Defendant provided Detective Davis with a controlled substance, and Detective Davis paid Defendant a previously agreed upon amount in exchange for the cocaine.

There was evidence presented at trial from which a jury could reasonably infer that Defendant was predisposed to commit the offense trafficking in cocaine. While Defendant's testimony may have been sufficient to raise the defense of entrapment, it fell short of "compelling a conclusion of entrapment as a matter of law." *Davis*, 126 N.C. App. at 418, 485 S.E.2d at 331.

III.

In his final argument on appeal, Defendant contends that he was denied the right to effective assistance of counsel at trial. We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). It is well established that:

[t]o prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Poindexter*, 359 N.C. 287, 290-91, 608 S.E.2d 761, 764 (2005). Deficient performance may be established by showing that "counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052). Generally, "to establish prejudice, a '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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 534, 123 S. Ct. 2527 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052).

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). Courts are not always required to consider whether the performance of a defendant's trial counsel was deficient if it would be easier to first examine any prejudice that may have arisen as a result of an alleged deficiency. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699-700. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.*

On appeal, Defendant argues that his trial counsel was deficient for failing to file the motion seeking a disclosure of the confidential informant in a timely manner, and failing to seek a full recordation of the trial court proceedings. Assuming *arguendo*, that the actions of Defendant's trial counsel were deficient, Defendant fails to clearly articulate how these actions deprived him of a fair trial.

First, as we discussed in Section I, Defendant was not entitled to a disclosure of the identity of the confidential informant. Therefore, no prejudice could have arisen from any delay in filing the motion. Moreover, the trial court considered Defendant's motion and received arguments from both parties. Next, though Defendant's trial counsel did not seek a recordation of a portion of the trial proceedings in which he sought to have several prospective jurors removed for cause, none of the prospective jurors challenged by Defendant served

upon the final jury selected. Additionally, Defendant raises no specific objections to the trial court's decision to remove any of the prospective jurors. Defendant's ineffective assistance of counsel argument is without merit.

No error.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).