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NO. COA12-1539
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v.

Onslow County
Nos. 11 CRS 52980
07 CRS 55971

JOHN KENNEDY MEADOWS
Defendant

Appeal by defendant by writ of certiorari from judgments entered 2 August 2012 by Judge Arnold O. Jones, II in Onslow County Superior Court. Heard in the Court of Appeals 6 June 2013.

Roy Cooper, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Hannah Hall, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Defendant John Kennedy Meadows ("Defendant") appeals by writ of certiorari from his judgments for two counts of possession of cocaine and for attaining habitual felon status. On appeal, Defendant argues that the trial court erred in denying his motion *in limine* to exclude chemical analysis

reports and expert testimony regarding those reports. After careful review, we remand to the trial court for reconsideration of Defendant's motion in light of the 2011 amendment to Rule 702(a) of the North Carolina Rules of Evidence.

Factual Background

On 4 May 2011, Defendant was arrested for (1) possession with intent to manufacture, sell, or deliver cocaine; (2) manufacturing cocaine; and (3) possession of drug paraphernalia. The substances found in his possession were originally submitted for analysis by the Onslow County Sheriff's Office to NarTest, a testing facility that utilizes a machine called the NarTest NTX 2000 to analyze substances believed to be controlled substances. On 18 January 2012, Defendant filed a motion to dismiss or, in the alternative, to suppress the results of the drug analysis that utilized the NarTest NTX 2000 machine.

On 15 March 2012, a second, separate analysis of these substances was performed by the Pitt County Sheriff's Office.¹ Defendant was then indicted by an Onslow County grand jury on 8 May 2012 on charges of (1) possession of a Schedule II controlled substance (cocaine); (2) possession of drug paraphernalia; and (3) attaining habitual felon status.

¹ Although the record is not clear on this point, it appears that the samples were sent to the Pitt County Sheriff's Office for analysis because that office – unlike the Onslow County Sheriff's Office – had its own laboratory.

On 1 June 2012, Defendant filed two additional motions: (1) "Motion *In Limine* to Strike Evidence of All Drug Analysis Performed by 'NARTEST' and/or 'Pitt County Sheriff's Forensic Services' and Results Thereof"; and (2) "Motion to Discover Testing Procedures and Data Delivered There from." Defendant's motion *in limine* sought to exclude all drug analyses performed by NarTest or by the Pitt County Sheriff's Office.² With regard to the analysis by the Pitt County Sheriff's Office, his motion asserted that the Sheriff's Office had not been accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board ("ASCLD/LAB") and thus was not qualified to test the substances at issue.³

A hearing on Defendant's motion *in limine* was held on 30 July 2012 in Onslow County Superior Court. During the hearing, the parties conducted a *voir dire* examination of Dr. Michael Kuzemko ("Dr. Kuzemko"), a forensic chemist from the Pitt County Sheriff's Office who performed the chemical analysis of the

² Defendant thereafter focused his argument solely on the analysis performed by the Pitt County Sheriff's Office and abandoned his argument regarding the analysis utilizing the NarTest machine. Therefore, the trial court's ruling on Defendant's motion *in limine* did not address the NarTest analysis.

³ Defendant's motion also raised a chain of custody issue consisting primarily of his assertion that the Pitt County Sheriff's Office "did not hold the proper credentials to be operating as [a] laborator[y] for testing drugs" and that, therefore, the substances had likely been tainted.

substances at issue. Dr. Kuzemko explained the procedures he used to analyze them and testified that, based on the results of his analysis, he concluded that the substances were in fact cocaine base. At the conclusion of the *voir dire* examination, the trial court denied Defendant's motion, ruling that the lab reports and expert testimony that Dr. Kuzemko planned to offer at trial would be admissible.

Following the denial of his motion, Defendant pled guilty to two counts of possession of cocaine and to attaining habitual felon status. In his plea agreement, however, Defendant expressly reserved the right to appeal the trial court's denial of his motion *in limine*. The trial court sentenced Defendant to a presumptive-range term of 77 to 102 months imprisonment with 1,332 days credit for time served.

Analysis

I. Appellate Jurisdiction

Although Defendant expressly reserved his right to appeal the denial of his motion *in limine* when he pled guilty, he failed to properly give notice of appeal from his underlying convictions. See *State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542-43 (2010) (holding that defendant must appeal from final judgment rather than solely from denial of pre-trial motion to suppress in order for appellate court to have jurisdiction). In recognition of his failure to properly give

notice of appeal, Defendant has filed a petition for writ of certiorari asking this Court to nevertheless consider his challenge to the denial of his motion *in limine*. Because it appears that Defendant lost his right to pursue an appeal through the inadvertence or misunderstanding of his trial counsel and not through any fault of his own, we elect – pursuant to Rule 21(a) of the North Carolina Rules of Appellate Procedure – to grant Defendant’s petition for writ of certiorari and consider his appeal. N.C. R. App. P. 21(a).

II. Denial of Defendant’s Motion *in Limine*

Defendant argues that the trial court erred in determining that Dr. Kuzemko’s expert testimony and the results of his analysis were sufficiently reliable under Rule 702(a) of the North Carolina Rules of Evidence. Because we conclude that the trial court applied the incorrect version of Rule 702(a) in ruling on his motion, we must remand to the trial court for further proceedings.

The North Carolina General Assembly amended Rule 702(a) in 2011, adding language similar to the corresponding federal rule of evidence. In light of the amendment, Rule 702(a) now states as follows:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

The session law addressing the effective date of the amendment stated that the amendment would become effective on 1 October 2011 and "appl[y] to actions arising on or after that date." 2011 N.C. Sess. Law ch. 371, §1.1. During the hearing on Defendant's motion *in limine*, the trial court determined that the *prior* version, rather than the *amended* version, of Rule 702(a) was applicable to Defendant's motion *in limine*. The trial court proceeded to apply the prior version of Rule 702(a) in ruling that Dr. Kuzemko was qualified to offer expert testimony in the areas of drug analysis and forensic chemistry.

This Court, however, recently held that the proper "trigger date for applying the amended version of Rule 702(a) is . . . the date that the bill of indictment was filed." *State v. Gamez*, ___ N.C. App. ___, ___, 745 S.E.2d 876, 878-79 (2013). In so holding, we noted that the issuance of the indictment "marks the beginning of the prosecution" and "gives the court

jurisdiction to try a criminal defendant.” *Id.* at ____, 745 S.E.2d at 878 (citations and quotation marks omitted).

Here, Defendant was indicted by the grand jury on 8 May 2012 – after the effective date of the amendment to Rule 702(a). We therefore hold that the trial court erred in applying the prior version of Rule 702(a). Accordingly, we reverse the trial court’s denial of Defendant’s motion *in limine* and remand to the trial court for application of Rule 702(a) – as amended – in its reconsideration of the motion. *See State v. Williams*, 195 N.C. App. 554, 561, 673 S.E.2d 394, 398-99 (2009) (reversing trial court’s denial of motion to suppress and remanding for redetermination where trial court mistakenly applied improper legal standard).

Conclusion

For the reasons stated above, we reverse the trial court’s denial of Defendant’s motion *in limine* and remand to the trial court for reconsideration as set forth above.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).