NO. COA12-632
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 10 CRS 252530-31

JUAN PARTIDA-RODRIGUEZ

Appeal by defendant from judgment entered 6 October 2011 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Iain M. Stauffer, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

BRYANT, Judge.

Where the State's evidence was insufficient to show the existence of two separate agreements between defendant and his co-conspirator, one of defendant's conspiracy convictions must be vacated.

Facts and Procedural History

The State presented testimony from several law enforcement officers regarding the events that took place on 2 July 2010 and 7 July 2010 leading to defendant Juan Partida-Rodriguez's arrest and conviction. Detective Paul Foushee, a vice narcotics detective for the Charlotte-Mecklenburg Police Department testified that he encountered defendant on 2 July 2010 during an undercover operation. Detective Foushee arranged to meet defendant at a Bojangles' restaurant for the purpose of making an undercover heroin buy. While at Bojangles', two Hispanic males in a burgundy Toyota Scion motioned for Detective Foushee to follow them to another parking lot located a block away, where they parked near each other. Detective Foushee testified that defendant exited a Toyota Scion and entered Detective Foushee's vehicle to ask how much heroin he wanted. Detective Foushee purchased 0.22 grams of heroin from Defendant for $60.00 and left the scene without making an arrest.

On 7 July 2010, Detective Foushee called the same telephone number that he called on 2 July 2010, asked to purchase heroin, and was told to meet at the same Bojangles' restaurant as before. Detective Foushee testified that defendant arrived on the scene driving the same Toyota Scion as before and motioned for Detective Foushee to park near a store located adjacent to

the Bojangles' parking lot. The passenger side door of defendant's vehicle faced Detective Foushee's driver side door. Detective Foushee communicated with the passenger of the car, a man identified as Damian Arrchega, and purchased "12 balloons" of heroin in exchange for $100.00.

The Toyota Scion drove away from the scene after the exchange and thereafter, defendant was arrested at a traffic stop conducted by other Charlotte-Mecklenburg police officers. Defendant was searched and a cellular phone and $1,200.00 in cash were recovered.

On 5 July 2011, defendant was indicted on the following five charges with the offense date of 7 July 2010: conspiracy to traffic in heroin by possession; conspiracy to traffic in heroin by transportation; trafficking in heroin by possession; trafficking in heroin by transportation; and possession with the intent to sell or deliver heroin. On 6 October 2011, a jury found defendant guilty on all counts. Defendant was sentenced to two consecutive terms of 70 to 84 months imprisonment.

Defendant's sole issue on appeal is whether the trial court erred by denying his motion to dismiss one of the two conspiracy

to traffic in heroin charges where the evidence was insufficient to support more than one agreement.

The standard of review for motions to dismiss based on insufficiency of the evidence is as follows:

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. . . . When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Scott, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citations).

> The question is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Lynch, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citations and quotation marks omitted).

"A criminal conspiracy is an agreement by two or more persons to perform an unlawful act or to perform a lawful act in an unlawful manner." *State v. Rozier*, 69 N.C. App. 38, 49, 316 S.E.2d 893, 900 (1984) (citation omitted).

> [T]he gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime. . . . [W]here a series of agreements or acts constitutes a ***single*** conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy.

Id. at 52, 316 S.E.2d at 902 (citations omitted) (emphasis in original).

"To determine whether single or multiple conspiracies are involved, the 'essential question is the nature of the agreement or agreements, . . . but factors such as time intervals, participants, objectives, and number of meetings all must be considered.'" ***State v. Wilson***, 106 N.C. App. 342, 345, 416 S.E.2d 603, 605 (1992) (citation omitted). A criminal conspiracy is complete when the agreement has been reached. ***Rozier***, 69 N.C. App. at 49, 316 S.E.2d at 900.

"Circumstantial evidence may be used to show a conspiracy." ***Id.*** at 49, 316 S.E.2d at 901. "It is not necessary that the individual charged expressly state his willingness to participate; a mutual, implied understanding is sufficient." ***Id.*** at 50, 316 S.E.2d at 901. Furthermore, "an agreement or understanding for the purposes of conspiracy may be inferred from the conduct of the parties." ***State v. Batchelor***, 157 N.C. App. 421, 427, 579 S.E.2d 422, 427 (2003) (citation omitted).

Defendant argues that his situation is analogous to *State v. Hicks*, 86 N.C. App. 36, 356 S.E.2d 595 (1987), and we agree. In *Hicks*, the defendant was charged with conspiracy to commit breaking and entering and conspiracy to commit larceny. *Id.* at 37, 356 S.E.2d at 595. Both of these conspiracy charges involved the same co-conspirators and stemmed from the same offense date. *Id.* at 42, 356 S.E.2d at 598. The *Hicks* Court noted "that the State, having elected to charge separate conspiracies, must prove not only the existence of at least two agreements but also that they were separate." *Id.* The *Hicks* Court also held that "under North Carolina law multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies." *Id.* Based on the foregoing, our Court concluded that

> [t]he whole objective of the agreement was to break into the house and 'get what [they] could get.' The agreement was entered into during one meeting and with very little said and with one objective in mind. There was no evidence of two separate agreements or of any other meetings between the participants.

Id. at 42, 356 S.E.2d at 598.

In the case *sub judice*, the State's evidence established the existence of one agreement and only one conspiracy: defendant conspired with Damian Arrechega to drive to meet

Detective Foushee on 7 July 2010 for the purpose of selling heroin. Upon arrival at a Bojangles' restaurant, defendant motioned for Detective Foushee to park at a store adjacent to the restaurant. Once in the parking lot, Detective Foushee purchased heroin from passenger Damian Arrechega; defendant was the driver of the vehicle.

The foregoing demonstrated that an agreement was entered into by defendant and Damian Arrechega on 7 July 2010 and that the objective of the agreement was to sell Detective Foushee heroin. Because "multiple overt acts arising from a single agreement do not support a finding of multiple conspiracies," we hold that the State failed to meet its burden of showing two separate agreements between the co-conspirators to commit the substantive underlying offenses – to traffic in heroin by possession and to traffic in heroin by transportation. *Id.* Therefore, one of defendant's conspiracy convictions must be vacated.

Accordingly, we remand for entry of judgment consistent with this opinion.

Judges MCGEE and THIGPEN concur.

Report per Rule 30(e).