NO. COA13-210

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Sampson County
No. 11 CRS 53331

MORRIS S. MCDONALD,
Defendant.

Appeal by defendant from judgments entered 12 October 2012 by Judge John E. Nobles in Sampson County Superior Court. Heard in the Court of Appeals 7 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of possession with intent to sell and deliver cocaine, possession of drug paraphernalia, and attaining habitual felon status.

The State presented evidence tending to show that a confidential informant contacted the police about making a controlled drug buy from defendant. On or about 29 November 2011, the confidential informant made an undercover purchase of 0.3 grams of cocaine from defendant at defendant's home. The law enforcement officers who arranged the transaction then obtained a warrant to search defendant's residence. Officers with the Sampson County Sheriff's Department executed the warrant on 1 December 2011. At trial, the officers who conducted the controlled buy operation and search of defendant's residence testified that during the search they found "an off-white rock-like substance" which was subsequently analyzed as 9.7 grams of cocaine base. The officers also found $891.00 in cash, digital scales, a marijuana cigarette, and ammunition. During trial, the confidential informant testified that she had purchased cocaine from defendant in the past, probably more than fifty times.

Defendant was acquitted of charges arising out of the 29 November 2011 controlled buy transaction but was convicted of charges arising out of the 1 December 2011 search of his residence. Defendant was also found guilty of attaining habitual felon status.

On appeal, defendant contends that his trial counsel rendered ineffective assistance of counsel in violation of his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). In order to prevail on this attack, the defendant must satisfy a two-part test established by the United States Supreme Court and "expressly adopt[ed]" by the North Carolina Supreme Court. *Id.* at 562, 324 S.E.2d at 248.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698; *accord State v. Poindexter*, 359 N.C. 287, 608 S.E.2d 761 (2005). Therefore, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

We first address defendant's argument that counsel rendered ineffective assistance of counsel by referring to Exhibit Number 14, the off-white rock-like substance found during the search of defendant's residence, as "crack cocaine." During her cross-examination of Agent Dwayne Barber of the Sampson County Sheriff's Office, defense counsel asked: "And when you were participating in the search warrant on December 1, you collected

Exhibit Number 14, the crack cocaine?" On appeal, defendant asserts that by making this statement in front of the jury, counsel conceded defendant's guilt to the offense of possession with intent to sell and deliver cocaine. Defendant relies on *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), in support of his contention that he is entitled to a new trial.

In *Harbison*, the defendant maintained that he acted in self-defense, and defendant's trial counsel adhered to this theory throughout the trial. *Id.* at 177, 337 S.E.2d at 506. However, during closing arguments and without the defendant's consent, counsel stated, "I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." *Id.* at 177–78, 337 S.E.2d at 506. In their decision to award the defendant a new trial, our Supreme Court held that "every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent" is a *per se* violation of the defendant's right to the effective assistance of counsel. *Id.* at 180, 337 S.E.2d at 507–08. The *Harbison* Court established that when the trial counsel's error amounts to a *per*

se violation of the defendant's rights "the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507.

However, in his reliance on *Harbison*, defendant overlooks the fact that cases decided by our Supreme Court after *Harbison* hold that a defendant is entitled to a new trial for a violation of his right to effective counsel if the attorney *expressly* admits the defendant's guilt of a crime in addressing the jury. *See State v. Randle*, 167 N.C. App. 547, 551, 605 S.E.2d 692, 694 (2004) ("our Supreme Court has found no *Harbison* violation where defense counsel did not expressly admit the defendant's guilt"); *see also State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (holding that there was no *Harbison* error where defense counsel did not concede to the jury that defendant himself had committed any crime); *and State v. Fisher*, 318 N.C. 512, 532–33, 350 S.E.2d 334, 346 (1986) (holding that there was no *Harbison* violation where the defense counsel conceded malice to the jury but did not expressly admit guilt, and told the jury that it could find the defendant not guilty).

In *State v. Goss*, 361 N.C. 610, 651 S.E.2d 867 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008), the defendant claimed that his trial counsel's remark during closing

arguments that "[defendant's] statement alone guarantees he'll serve a substantial amount of time in prison and face the terrible consequences of a *first degree* murder conviction," amounted to a concession of the defendant's guilt for first-degree murder. *Id.* at 622–23, 651 S.E.2d at 875. The defendant argued that because this concession was made without his consent it was a *per se* violation of his rights. *Id.* at 623, 651 S.E.2d at 875. However, after a review of the record, our Supreme Court determined that "the statement of defense counsel to which defendant assigns error clearly did not amount to *Harbison* error. Rather, when this statement is viewed in the context of defense counsel's entire closing argument, it appears that his reference to first-degree murder was accidental and went unnoticed." *Id.* at 624–25, 651 S.E.2d at 876. Further, the Court stated

> [d]efendant would have this Court interpret *Harbison* to allow a defendant to seize upon a *lapsus linguae* uttered by trial counsel in order to be awarded a new trial. However, we are unconvinced that the statement in question amounted to a concession of defendant's guilt . . . . Absent such a concession, defendant has the burden of showing that his trial counsel's performance fell below an objective standard of reasonableness, a burden which defendant has failed to carry.

Id. at 625, 651 S.E.2d at 876 (citing *Strickland*, 466 U.S. at 687-88, 80 L. E. 2d 674).

Here, counsel's statement during cross-examination that the substance was "crack cocaine" appears to have been a *lapsus linguae* which the record indicates "was accidental and went unnoticed." *See id.* Therefore, we hold that this was not a concession of defendant's guilt amounting to a *per se* violation of defendant's right to effective assistance of counsel.

"As this case does not fall with the *Harbison* line of cases where violation of the defendant's Sixth Amendment rights are presumed, the defendant's claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors." *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346. Applying *Braswell*, we need not address the first prong of *Strickland*——whether counsel's performance was in fact deficient——if we "can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different . . . ." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

In the State's direct examination of Agent Barber (before defense counsel's *lapsus linguae* during cross-examination), Agent Barber informed the court that in defendant's statement to

the police after the search of his residence, defendant admitted to selling "crack" from his home. Further, Agent Lauren Wiley, a drug chemist for the North Carolina State Crime Lab who performed the chemical analysis of Exhibit Number 14, subsequently testified that in her opinion the substance was "9.7 grams of cocaine base." There was sufficient evidence for the jury to reasonably find that the substance was cocaine. We therefore hold that defense counsel's misstatement did not prejudice defendant as there is no indication in the record that, had counsel not made this statement, the result of the proceeding would have been different.

Defendant cites four additional errors committed by counsel which, he argues, warrant a new trial. We consider these claims together because they all pertain to either counsel's failure to object to testimony or to make certain motions during trial. Defendant contends that counsel failed to object during trial in two instances. First, when both a law enforcement officer and the prosecutor referred to substances found during the search as "narcotics," and second, when the confidential informant testified that she had purchased cocaine from defendant on fifty previous occasions. Defendant asserts that counsel's failure to object "set the tone for the remainder of the trial" and caused

him irreparable prejudice. In addition, defendant claims that counsel failed to move to suppress the results of the chemical analysis of the substance alleged to be cocaine because of an absent link in the chain of custody. Finally, defendant argues that counsel failed to move to dismiss the habitual felon charge for insufficient evidence based on the fact that one of the three offenses was not fully identified in the judgment offered as proof of the prior conviction.

Generally, we will not second-guess the strategic or tactical decisions made by defense counsel. *See State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002). "Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979) (internal quotation marks omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). *Strickland* explained that

> [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption that counsel's conduct falls*

> *within the wide range of reasonable professional assistance;* that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694–95 (emphasis added) (internal quotation marks omitted). "[D]ecisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." *Milano*, 297 N.C. at 495, 256 S.E.2d at 160 (internal quotation marks omitted). The four errors that defendant cites involve either counsel's failure to object or failure to make a motion at trial; after a review of the record, we conclude that under these circumstances the alleged errors can be considered "strategic and tactical decisions." *See id.* "Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

As explained above, before considering whether defense counsel's performance was in fact deficient, we will first look to whether there is a reasonable probability that the alleged

errors prejudiced the defense. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . ." *Strickland*, 466 U.S. at 693, 80 L. Ed. 2d at 697. Defendant asserts that these four alleged errors prejudiced him irreparably, but has failed to demonstrate how, "but for counsel's errors, there would have been a different result in the proceedings." *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

The State's evidence in this case was overwhelming: the prosecution presented physical evidence of the drugs obtained during both the controlled buy operation and the subsequent search of defendant's residence. The chemist who performed the analysis of the drug samples testified as to the results of the tests she performed on each sample. Further, the confidential informant testified regarding the controlled buy transaction, and her testimony was corroborated with both audio and video recordings that were played for the jury. Therefore, even if counsel had objected to the allegedly prejudicial statements, there is not a reasonable probability that the outcome would have been different.

Defendant argues that counsel's failure to move to suppress the laboratory results was prejudicial because "[w]ithout testimony relating to the analysis of the sample found in [defendant's] bedroom, the State could not have proved that [defendant] possessed cocaine." However, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. As previously set forth, the State presented ample evidence that defendant possessed cocaine, including defendant's own statement to the police where he admitted to selling cocaine from his residence, as well as the audio and video recordings of the controlled buy operation that were played for the jury. Even assuming, *arguendo*, that it was an "unreasonable error" for counsel to not address a break in the chain of custody, defendant's argument still fails as he has not shown that counsel's alleged error was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

Finally, there is not a reasonable probability that, had defense counsel made a motion to dismiss the habitual felon charge, defendant would have prevailed. Defendant argues that "[t]here was no evidence to establish Defendant's guilt of one of the three underlying felonies specified in the indictment [and defendant] may have avoided the finding that he was a habitual felon if counsel had made a motion to dismiss the habitual charge at the close of the evidence." However, for the purpose of establishing habitual felon status, "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C. Gen. Stat. § 14-7.4 (2011).

Here, the prosecutor presented certified copies of three judgments to show that defendant had previously been convicted of three separate felony offenses. Although one of the judgments failed to identify the substance defendant was convicted of possessing with the intent to sell or deliver, the prosecutor remedied this deficiency (with the consent of defense counsel) by submitting a certified copy of the transcript of plea which was a part of the court record of that conviction. This transcript of plea identified the offense in full and set forth the terms of the agreement, including the sentence. Thus,

counsel's failure to move to dismiss the habitual felon charge did not prejudice defendant.

Therefore, we reject defendant's ineffective assistance of counsel argument as there is not a reasonable probability that, but for counsel's alleged errors, "there would have been a different result in the proceedings." *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

Defendant's final argument on appeal is that the trial court committed plain error by admitting the confidential informant's testimony that she had purchased cocaine from defendant on fifty previous occasions. Because defendant did not object to the admission of this evidence at trial, he did not preserve this issue for appeal. *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012). To prevail on this issue, defendant must demonstrate that the trial court committed a fundamental error which had a probable impact upon the jury's verdict. *Id.* at 518, 723 S.E.2d at 334. We conclude that defendant cannot meet this burden because, as explained above, even if the testimony from the confidential informant had been excluded, the evidence of defendant's guilt arising out of the search of his residence is overwhelming. Therefore, defendant's argument is overruled.

No error.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).