NO. COA13-32
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v.

Columbus County
Nos. 10 CRS 53818-20

WILLIAM LEON CHESTNUT

Appeal by defendant from judgments entered 29 August 2012 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 23 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Tammy A. Bouchelle, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

ERVIN, Judge.

Defendant William Leon Chestnut appeals from judgments sentencing him to consecutive terms of 70 to 84 months imprisonment based upon his convictions for trafficking in opium or heroin by possession, trafficking in opium or heroin by delivery, and trafficking in opium or heroin by sale. On appeal, Defendant contends that the trial court erred by denying his motion to dismiss the trafficking in opium or heroin charges

that had been lodged against him and by impermissibly punishing him for electing to exercise his right to trial by jury instead of entering a guilty plea. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

In October 2010, Carleen Lewis and Amanda Williamson were working as confidential informants for the Columbus County Sheriff's Office. On 19 October 2010, the Columbus County Sheriff's Office was attempting to make an undercover purchase of narcotics from an individual named Anthony Burris. Although Ms. Lewis and Ms. Williamson travelled to the Atex store in Chadbourn to meet him, Mr. Burris failed to appear. However, Ms. Williamson saw Defendant and believed the two women could obtain drugs from him. In light of that assumption, Ms. Williamson approached Defendant and "asked him if he had anything." Defendant replied that he had 11 Percocet pills for sale at $4.00 per pill. Since the women did not have exact change, Ms. Lewis went into the Atex store to remedy that problem. After Ms. Lewis returned with the money, Ms. Williamson paid Defendant for the pills. A subsequent chemical

analysis revealed that all of the pills had the same appearance, that the pills had a combined weight of 5.7 grams, and that the single pill which the analyst tested contained oxycodone and acetaminophen.

B. Procedural History

On 5 November 2010, warrants for arrest charging Defendant with trafficking in opium or heroin by possession, trafficking in opium or heroin by delivery, and trafficking in opium or heroin by sale were issued. On 5 May 2011, the Columbus County grand jury returned bills of indictment charging defendant with trafficking in opium or heroin by possession, trafficking in opium or heroin by delivery, and trafficking in opium or heroin by sale. The charges against Defendant came on for trial before the trial court and a jury at the 27 August 2012 criminal session of the Columbus County Superior Court. On 29 August 2012, the jury returned verdicts convicting Defendant as charged. At the ensuing sentencing hearing, the trial court sentenced defendant to three consecutive terms of 70 to 84 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Denial of Dismissal Motion

In his brief, Defendant contends that the trial court erred by denying his motion to dismiss the trafficking in opium or heroin charges that had been lodged against him on the grounds that the General Assembly never intended for the statutory provisions applicable to trafficking in opium and heroin to apply to the possession, delivery, or sale of small amounts of prescription medications which were obviously intended for individual use. On the contrary, Defendant contends that the trafficking statutes were intended to apply to large-scale drug distribution operations and that application of the literal language of N.C. Gen. Stat. § 90-95 to the possession, delivery, or sale of prescription pills containing small fractions of opioid painkillers produces an absurd and unjust result. Defendant asserts that the rule of lenity requires that he be punished under N.C. Gen. Stat. § 90-95(d)(2) rather than under N.C. Gen. Stat. § 90-95(h)(4). The Supreme Court recently rejected an identical argument in *State v. Ellison*, __ N.C. __, 738 S.E.2d 161 (2013), however, holding "that the opium trafficking statute applies in cases involving tablets and pills of prescription pharmaceutical drugs." *Id.* at __, 738 S.E.2d at 164. As a result, we conclude that Defendant's challenge to the denial of his dismissal motions is without merit.

B. Exercise of the Right to Trial by Jury

In addition, Defendant argues the trial court impermissibly punished him for exercising his right to trial. According to Defendant, various comments made by the trial court during the course of his trial and sentencing indicate that the trial court imposed a harsher sentence upon Defendant because he did not plead guilty. We do not find this contention persuasive.

As the Supreme Court has clearly stated:

> No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial. This right ought not to be denied or abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence.

State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977).

> Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). As a result, Defendant would be entitled to a new sentencing hearing in the event that the trial court made statements during the course of Defendant's trial or sentencing hearing indicating that the sentence imposed upon Defendant was affected by his decision to go to trial rather than enter a guilty plea.

During the course of the trial, the trial court conducted two colloquies with Defendant concerning the issue of whether Defendant had made a knowing and voluntary decision to reject a plea offer which had been made to him by the State. At the beginning of the trial, the trial court noted that "the State currently is offering a plea offer of 70 to 84 months on each count," that "that would be consolidated to only one 70 to 84 month sentence," and that "the State would dismiss the habitual felon indictment if he took that plea." Defendant rejected the proffered plea agreement. Subsequently, the trial court conducted another colloquy with Defendant concerning the subject of plea negotiations, during which the trial court stated that, in the event that Defendant "were to plead guilty at this point," "the State would consolidate all charges into one sentence" of 70 to 84 months imprisonment and indicated that, in the event that Defendant was "found guilty as to all three of those [charges,]" "the Court could stack those and you [could] get three times" what the State was offering. Once again, Defendant declined to accept the State's plea offer. At Defendant's sentencing hearing, in response to Defendant's request that his convictions be consolidated for judgment in light of his medical condition, the fact that all three of his convictions arose from a single incident, and the fact that he

did not have any previous trafficking convictions, the trial court stated that:

> Mr. Chestnut, the latest stats show that about as many young people die from drug overdoses now as car accidents. It is a major problem. Asking me to show mercy, certainly before this trial started, he was warned about his exposure, if convicted, especially convicted of multiple charges. Halfway through the trial made inquiry again if he understood at this point as to what possible punishment he was facing if convicted. The jury has spoken and it didn't take them long to speak at this point. He has a history of drug related charges. The Court is not going to consolidate these sentences.

Although Defendant contends, in reliance upon these statements, that the trial court threatened to impose consecutive sentences upon Defendant in the event that he declined the State's plea offers and insisted upon exercising his right to trial by jury and then carried out that threat after the jury convicted Defendant as charged, we do not understand the trial court's comments in that light.

The first two comments upon which Defendant relies constituted nothing more than an attempt to ensure that Defendant was fully advised of the nature of the plea offer that the State extended to him and that Defendant had made a knowing and intelligent decision to refrain from accepting that offer. According to well-established North Carolina law, "a trial judge

does not err by simply engaging in a colloquy with a criminal defendant for the purpose of ensuring that the defendant understands and fully appreciates the nature and scope of the available options." *State v. Pinkerton*, 205 N.C. App. 490, 504, 697 S.E.2d 1, 10 (2010) (Judge Robert C. Hunter, dissenting) (internal quotation marks omitted), *rev'd per curiam for the reasons stated in the dissenting opinion*, 365 N.C. 6, 708 S.E.2d 702 (2011); *see also State v. Tice*, 191 N.C. App. 506, 513, 664 S.E.2d 368, 373 (2008) (holding that a pretrial colloquy between the trial court and the defendant was merely intended to "ensur[e] that defendant was fully informed of the risk [that] he was taking given that he had previously rejected a plea that would have resulted in a misdemeanor sentence"). We are unable to discern any threat to impose consecutive sentences in the event that Defendant declined the State's plea offers in either of these statements by the trial court.

Similarly, this Court has repeatedly held that a mere reference to the fact that a defendant refused to accept a plea offer does not, without more, justify a conclusion that a trial court punished the defendant for refusing to accept a proposed negotiated plea. *Tice*, 191 N.C. App. at 513-16, 664 S.E.2d at 373-75 (stating that, taken in context, the trial court's comments that the defendant had "to be feeling awfully dumb []

right now" since he had had "ample opportunities to dispose of this case" "in a more favorable fashion and [he] chose not to do so" did not, taken in context, reflect a decision to punish the defendant for exercising his right to trial by jury and, instead, suggested that the defendant's sentence stemmed from the fact that he had fabricated testimony and presented false evidence); *State v. Person*, 187 N.C. App. 512, 528, 653 S.E.2d 560, 570 (2007) (stating that the trial court's statement noting that the defendant had declined to accept a negotiated plea offer was nothing more than a comment "on defendant's lack of credibility when claiming he wanted 'another opportunity to prove' himself as an 'honorable, law abiding, caring, loving man [and] citizen' and that he had been misled by 'the wrong crowd'"), *rev'd in part on other grounds,* 362 N.C. 340, 663 S.E.2d 311 (2008), *State v. Gantt*, 161 N.C. App. 265, 272-73, 588 S.E.2d 893, 898 (2003) (stating that the trial court's comment prior to the imposition of sentence that the defendant had been given "one opportunity where [he] could have exposed [himself] probably to about 70 months but [he] chose not to take advantage of that" did not "rise to the level of the statements our Courts have held to be improper considerations of a defendant's exercise of his right to a jury trial"), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). When taken

in the context of Defendant's request that the trial court show mercy and consolidate all of his convictions for judgment, the comments that the trial court made at Defendant's sentencing hearing cannot be reasonably understood as reflecting an intent to punish Defendant for exercising his right to trial by jury. Instead, the trial court's comments indicate that Defendant's sentence was based on the seriousness of the prescription drug problem and the nature and extent of Defendant's criminal record. Although the trial court did mention Defendant's decision to refrain from accepting the negotiated plea offered by the State, these comments were purely factual in nature and do not differ in any material way from the comments held to be insufficient to justify an award of relief in *Tice*, *Person*, and *Gantt*. As a result, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of this claim.

III. Conclusion

Thus, for the reasons set forth above, neither of Defendant's challenges to the trial court's judgments have merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Judges GEER and DILLON concur.

Report per Rule 30(e).