NO. COA14-188
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 12 CRS 56543
13 CRS 187

JAHKENE LADAIRE CLARK

Appeal by defendant from judgments entered 16 July 2013 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 10 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Bethany A. Burgon, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

HUNTER, Robert C., Judge.

Defendant Jahkene Clark appeals the judgments entered after a jury convicted him of: (1) two counts of conspiracy to traffic in cocaine; (2) trafficking in cocaine by possession; and (3) possession of heroin with the intent to sell or deliver ("PWISD"). On appeal, defendant argues that: (1) the trial court erred in denying his motion to dismiss the PWISD charge because the State's evidence only raised a suspicion or

conjecture of intent to sell; and (2) the trial court erred in denying defendant's motion to dismiss one of the conspiracy charges.

After careful review, we find no error in defendant's conviction for PWISD. However, we vacate defendant's conviction for conspiracy to traffic in cocaine by possession and remand for resentencing.

Background

The State's evidence presented at trial tended to establish the following: On 17 July 2012, Detective Tim McLaughin ("Detective McLaughin"), an officer with the Greenville Police Department drug task force, was at FedEx conducting a "package interdiction" where he was tasked with looking for any suspicious packages coming down the conveyer belt. He saw one package addressed to Ashley Acklin ("Ms. Acklin") at 2607 Whitaker Drive, Apt. D-7 (the "package"). The return address was not valid. Detective McLaughin placed the package in a line-up with four other packages. His drug dog indicated that the package contained narcotics.

After obtaining a search warrant, the drug task force opened the package. Inside, they found a Nestle tea powder can

wrapped in a black t-shirt. The can contained 4.3 ounces of a white powder, later identified as cocaine.

The drug task force made arrangements with FedEx to have the package delivered to Ms. Acklin. Detective McLaughin followed the FedEx driver to Ms. Acklin's apartment complex. Two other police officers, Officers Tim Green ("Officer Green") and William White ("Officer White"), went to Ms. Acklin's door after the package had been delivered. After knocking and announcing that they were from the Greenville Police Department, the two officers kicked in the door. Officer White entered first and saw defendant coming into the apartment from the balcony. Once Officer White had handcuffed defendant, he found $1,141 in defendant's right, front pocket and $4,600 in the cargo pocket of his shorts. Officer Green found Ms. Acklin in the dining room of the apartment and also placed her under arrest. The only other person in the apartment was Ms. Acklin's nine-year-old son.

At the time the package was being delivered and Officers Green and White were preparing to enter Ms. Acklin's apartment, Greenville Police Sergeant David Bowen ("Sgt. Bowen") was observing both the balconies and exits of Ms. Acklin's apartment building. Sgt. Bowen saw a brown box and green duffel bag

thrown off one of the balconies and land on the ground; he retrieved both items. The brown box was the package delivered by FedEx. The tea mix can with the bag of white powder was still in it. The duffel bag contained several items, including some men's clothes, a clear jar, two receipts for two separate $150 money transfers sent from defendant to Maria Cervatez in Texas, nineteen glassine bags with a small amount of tan powder in them, and a Tupperware container that appeared to have marijuana in it. A search of Ms. Acklin's apartment revealed a set of digital scales. It is unclear from the record where the scales were found; however, there is no evidence that defendant was charged for possession of paraphernalia in relation to the scales.

A forensic chemist in the Pitt County Sheriff's Department testified that the white powder in the package weighed 112 grams and contained cocaine hydrochloride. The tan powder found in the glassine packets was determined to be heroin and weighed a total of 0.666 grams, which constitutes approximately 0.02 ounces.

Ms. Acklin testified at trial, alleging that she had known defendant for approximately eight years. A few weeks before the police arrived at her apartment, defendant asked her for a

favor: defendant wanted his mail delivered to her apartment when he was out of town. Prior to the package containing the cocaine being delivered, defendant had two other packages delivered to Ms. Acklin's apartment. On the morning when the package was delivered, Ms. Acklin opened the door when the FedEx driver arrived. Defendant put the package down without opening it; at some point after the officers arrived, defendant threw the package off Ms. Acklin's balcony. Ms. Acklin was in her son's bedroom when Officers Green and White knocked on the front door and kicked in her door.

On 22 January 2013, defendant was indicted for: (1) conspiring with persons unknown to traffic in cocaine by possession; (2) conspiring with persons unknown to traffic in cocaine by transport; (3) trafficking in cocaine by possession; and (4) PWISD. The matter came on for trial on 15 July 2013. On 16 July 2013, the jury found defendant guilty of all four charges. The trial court sentenced defendant to: (1) 35 months to 42 months imprisonment for the two conspiracy convictions; (2) a consecutive term of 35 months to 42 months imprisonment for the trafficking in cocaine conviction; and (3) a consecutive term of 8 months to 19 months imprisonment for PWISD. Defendant timely appealed.

Arguments

Defendant first argues that the trial court erred in denying his motion to dismiss the PWISD charge. Specifically, defendant contends that, even viewing the evidence in a light most favorable to the State, the evidence was insufficient to permit a reasonable juror to conclude that defendant had the requisite intent to sell or deliver the heroin because the total amount of heroin from the nineteen bags weighed less than one gram. Therefore, defendant requests the Court vacate the judgment for PWISD and enter a judgment and conviction for the lesser offense of simple possession. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). To defeat a motion to dismiss, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-665, 652 S.E.2d 212, 213 (2007) (citations omitted). In considering

a motion to dismiss, the court must look at the evidence in the light most favorable to the State. *Id.* at 665, 652 S.E.2d at 213.

Defendant was charged with PWISD pursuant to N.C. Gen. Stat. § 90-95(a)(1) (2013) which makes it unlawful "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." On appeal, defendant is only challenging the sufficiency of the evidence showing that defendant had the intent to sell or deliver the heroin. This Court has noted that:

> While intent to sell or deliver may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred. The intent to sell or deliver may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia. Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount.

State v. Wilkins, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809-10 (2010) (internal quotation marks and citations omitted).

To determine whether the amount of the controlled substance is "substantial," a court may compare the amount possessed to the amount necessary to constitute a trafficking offense. *State*

v. Nettles, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005); *see also State v. Williams*, 307 N.C. 452, 457, 298 S.E.2d 372, 376 (1983) (holding that 2.7 grams of heroin was a "substantial amount" which would permit the jury to reasonably infer intent to sell or deliver because the amount was over two-thirds the amount required to support a conviction for trafficking). Here, the heroin found in the duffel bag weighed, in total, 0.666 grams—less than one-sixth the amount required for trafficking—which is insufficient on its own to prove that defendant had the requisite intent to sell or deliver. *See Wilkins*, 208 N.C. App. At 731, 703 S.E.2d at 801 (noting that 1.89 grams of marijuana was "insufficient," on its own, to prove that the defendant had the intent to sell or deliver). Thus, we must consider other factors establishing intent to sell or deliver based on the evidence presented in a light most favorable to the State.

With regard to the packaging, it is undisputed that the 0.666 grams of heroin was divided into nineteen, separate bags. While we agree that this division would lead to relatively small amounts of heroin in each package, the sheer number of bags in defendant's possession does not suggest personal use but, instead, raises an inference of an intent to sell or deliver. *Compare State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31,

35 (2004) (concluding that the evidence was sufficient to raise an inference of the defendant's intent to sell or deliver where the defendant possessed 5.5 grams of cocaine separated into 22 individually wrapped pieces), *aff'd per curiam*, 359 N.C. 800, 617 S.E.2d 271 (2005), *and State v. Williams*, 71 N.C. App. 136, 140, 321 S.E.2d 561, 564 (1984) (finding that "the circumstances of the packaging" were sufficient to allow the jury to find the defendant intended to sell or deliver marijuana when it was divided into seventeen separate, small brown envelopes), *with Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 810 (concluding that the packaging of the marijuana into three separate bags failed to "raise[] an inference that [the] defendant intended to sell the drugs").

Furthermore, under the totality of the circumstances, other factors in this case support an inference of intent to sell or deliver, including the amount of cash found on defendant and the presence of drug paraphernalia. *See generally Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176 ("Based on North Carolina case law, the intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.")

Here, defendant had $4,600 in the cargo pocket of his shorts consisting of six $100 bills and two hundred $20 bills. In addition, he had $1,141 in his right, front pocket made up of: eight $100 bills, two $50 bills, seven $20 bills, ten $10 bills, and one $1 bill. Finally, a set of digital scales was found in Ms. Acklin's apartment where defendant's FedEx package was sent and where defendant was found by police. Thus, in totality, evidence of the packaging, cash in defendant's possession, and presence of the digital scales in Ms. Acklin's apartment was sufficient to infer intent to sell or deliver, and the trial court did not err in denying defendant's motion to dismiss the PWISD charge.

Next, defendant argues that the trial court erred in denying defendant's motion to dismiss one of the conspiring to traffic cocaine charges. Specifically, defendant contends that the evidence only supported one conspiracy. We agree.

Essentially, conspiracy is an agreement to commit a criminal act. *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993). "[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." *State v. Rozier*, 69 N.C.

App. 38, 52, 316 S.E.2d 893, 902 (1984). Although an individual may be convicted of multiple counts of conspiracy "arising from multiple substantive narcotics offenses involving a single amount of drugs" when "each conspiracy involved separate elements of proof, and represented a separate agreement[,] . . . under North Carolina law[,] multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies." *Id.*; *see also State v. Howell*, 169 N.C. App. 741, 749, 611 S.E.2d 200, 205-206 (2005). Factors to consider when determining whether a single or multiple conspiracies are involved include "time intervals, participants, objectives, and number of meetings[.]" *Id.*

Here, defendant was charged with and convicted of engaging in multiple conspiracies related to the cocaine recovered from the package: conspiracy to traffic by possession and conspiracy to traffic by transportation. The State's evidence only shows one agreement between defendant and the sender of the drugs which included both the transportation of the cocaine in the package and the possession of it once it arrived. Both charges stem from the delivery and acceptance of the package and only involve two participants. Thus, "[s]ince the agreement to transport the [cocaine] . . . necessarily encompassed its

possession," *Howell*, 169 N.C. App. at 749, 611 S.E.2d at 205-06, we vacate defendant's conviction for conspiracy to traffic in cocaine by possession and remand for the trial court to enter a sentence on the single count of conspiracy to traffic cocaine by transport.

Conclusion

Based on the totality of the circumstances, taking the evidence in a light most favorable to the State, there was sufficient evidence presented to infer defendant's intent to sell or deliver the heroin. However, since there was only evidence of one agreement and, thus, only one conspiracy, we vacate defendant's conviction for conspiracy to traffic cocaine by possession and remand for resentencing.

NO ERROR IN PWISD CONVICTION; CONSPIRACY TO TRAFFIC COCAINE BY POSSESSION CONVICTION VACATED; REMANDED FOR RESENTENCNG.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).