NO. COA14-556
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Hoke County
No. 10 CRS 050069

JACQUELINE DENISE MONROE

Appeal by defendant from judgment entered 5 June 2013 by Judge Mary Ann Tally in Hoke County Superior Court. Heard in the Court of Appeals 10 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Rebecca E. Lem, for the State.

Narendra K. Ghosh for defendant-appellant.

ELMORE, Judge.

Defendant appeals from a judgment entered upon a conviction by a jury of conspiracy to sell or deliver cocaine. The trial court classified the offense as a Class G felony and sentenced defendant as a Prior Record Level II offender to a term of a minimum of twelve months and a maximum of fifteen months. The court suspended the sentence and placed defendant on supervised probation for a period of twenty-four months. The sole question

presented is whether the court erred by classifying the offense as a Class G felony. For the following reasons, we hold the court did not err.

Although the sale of a controlled substance and the delivery of a controlled substance are two separate offenses, conspiracy to sell or deliver cocaine is a single offense. *State v. McLamb*, 313 N.C. 572, 579, 330 S.E.2d 476, 481 (1985). A person who sells a Schedule I or II controlled substance is guilty of a Class G felony whereas one who possesses, manufactures, or possesses with intent to sell or deliver a Schedule I or II controlled substance is guilty of a Class H felony. N.C. Gen. Stat. § 90-95(b)(1) (2013). In sentencing a defendant who is convicted of an attempt or conspiracy to commit a violation of the controlled substances statutes, the court must classify the offense as "the same class as the offense which was the object of the attempt or conspiracy and is punishable as specified for that class of offense[.]" N.C. Gen. Stat. § 90-98 (2013). The classification of the offense is a question of fact and may be stipulated. *State v. Wingate*, 213 N.C. App. 419, 420, 713 S.E.2d 188, 189-190 (2011).

The transcript shows that upon commencing the sentencing hearing, the court asked defendant's counsel, "[w]hat level of

offense is this, Mr. Thompson?" Defendant's counsel replied, "Your Honor, it's a Class G." We construe counsel's statement as a factual stipulation to the classification pursuant to *Wingate*.

Defendant, nonetheless, argues that the stipulation is not binding and that the jury's verdict is ambiguous insofar as it does not expressly state whether the conspiracy was to sell or whether it was to deliver. The fact that the stipulation occurred with regard to an offense for which the defendant is being sentenced, instead of with regard to classifying a prior conviction, makes no difference as *Wingate* is clear that the classification of the offense may be stipulated. We further note that in *Wingate* the offense at issue was conspiracy to sell or deliver cocaine, just as in the case at bar. Although the jury at bar did not expressly delineate whether the conspiracy was to sell or whether it was to deliver, we note that all of the evidence showed a sale of cocaine occurred, as cash was exchanged for cocaine. *See State v. Carr,* 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (stating that the sale of a controlled substance is "the exchange of a controlled substance for money or any other form of consideration"). We also note that the court would have properly denied any request for a

special verdict as to whether defendant conspired to deliver cocaine given the absence of evidence of mere delivery or intent solely to deliver.

We find no error.

No error.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).