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NO. COA14-576
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Onslow County
Nos. 12 CRS 057424-26

CHARLES MICHAEL LIGHTSEY

Appeal by defendant from judgment entered 16 January 2014 by Judge Paul L. Jones in Onslow County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

McCULLOUGH, Judge.

Defendant Charles Michael Lightsey appeals from his convictions of manufacturing methamphetamine, possession with the intent to manufacture, sell or deliver methamphetamine, three counts of possessing a precursor of methamphetamine, possession of drug paraphernalia, and resisting a public

officer. Based on the reasons stated herein, we find no error in part and vacate in part.

I. Background

On 9 October 2013, defendant was indicted in 12 CRS 057424 for one count of manufacturing methamphetamine; one count of possession with the intent to manufacture, sell and deliver methamphetamine; one count of trafficking by possessing 200 grams or more but less than 400 grams of methamphetamine; and trafficking by manufacturing 200 grams or more but less than 400 grams of methamphetamine.

Defendant was indicted in 12 CRS 057425 on three counts of possessing an immediate precursor chemical with the intent to manufacture methamphetamine. Defendant was also indicted in 12 CRS 057426 for one count of possessing drug paraphernalia and one count of resisting a public officer.

Defendant's case came on for trial at the 13 January 2014 Criminal Session of Onslow County Superior Court, the Honorable Paul L. Jones, presiding.

The evidence tended to show that on 26 October 2012, Deputy Adrian Barrera, Major John Lewis, and Detective Gerardo Gonzalez of the Onslow County Sheriff's Department were in an unmarked vehicle, headed to a residence on Edgewater Drive to look for an

individual who had warrants for his arrest. All three officers were part of the narcotics division. As they were approaching the bypass at Highway 258 and Highway 53, Major Lewis and Detective Gonzalez recognized defendant in an adjacent vehicle, riding in the passenger seat. Major Lewis testified that he knew defendant had a pending warrant and recognized the driver of the vehicle as Natasha Brewer. The officers decided to follow Brewer and defendant.

Brewer's vehicle made a right onto Pony Farm Road, into the first mobile home park on the left, and pulled into the driveway of trailer number three. As soon as Brewer's vehicle stopped, "the passenger's door . . . flew open, and [defendant] exited the vehicle and began to run." Defendant ran towards the back of the trailer. Detective Gonzalez screamed aloud "Sheriff's office. Don't run. Sheriff's office. Don't move." However, defendant continued to run and all three officers chased him.

Detective Barrera unsuccessfully fired a taser at defendant. Subsequently, Detective Barrera saw defendant throw "some type of cellophane wrapper away from him." Major Lewis testified that Detective Barrera communicated to him that defendant was "throwing stuff." Detective Barrera successfully

tased defendant a second time, which provided an opportunity for the officers to apprehend defendant.

Major Lewis testified that when defendant fell after being tased, "he was resisting. He wasn't following commands at that point[.]" Defendant was chewing something white in color and the officers told him to spit it out. Defendant began spitting chunks of a white, paste-like substance out of his mouth which was later collected by the officers. Officers also found a pack of cigarettes and a light bulb used as a smoking pipe near defendant. The cigarette pack contained a plastic bag with a crystal-like substance that defendant admitted to Detective Gonzalez was methamphetamine. The substance was later tested positive for .87 grams of methamphetamine.

After defendant was taken into custody, the officers returned to Brewer's vehicle and secured the vehicle. No contraband was found inside Brewer's vehicle. Brewer informed the officers that she was giving defendant a ride to trailer number three, defendant's aunt's residence. In her statement to police, Brewer stated that as she and defendant were pulling into the driveway of trailer number three, defendant told Brewer that "he was working here earlier today and now he had to go" and then got out of her vehicle and started running. Brewer

stated that “working” meant defendant had been cooking methamphetamine. At trial, Brewer testified that defendant had called her on 26 October 2012 and said he and his girlfriend had been fighting. Brewer picked up defendant at his “aunt Pat’s” house and dropped defendant off at his friend’s house. Around 2:00 p.m., Brewer picked defendant back up from his friend’s house and headed toward his aunt’s house. When Brewer and defendant pulled into the driveway of trailer number three, both Brewer and defendant recognized that the unmarked car following them contained detectives from the Onslow County Sheriff’s office. Defendant apologized to Brewer, saying, “I’m sorry,” and ran out of the car. Brewer testified that she lied when she provided in her statement to police that defendant stated he had been “working” that day.

Detective Gonzalez testified that he and Major Lewis walked up to the front door of trailer number three to talk to the owner of the trailer, Patricia Melendez. Beside the front door, Detective Gonzalez saw a black tote with a tackle box on top of it. When Melendez answered the door, she told officers that defendant was like her nephew and that he had been at her house. When questioned about the black tote near her front door, defendant denied that it belonged to him and Melendez stated

that it did not belong to her. Melendez then gave permission to the officers to search the items. Detective Gonzalez testified that based on his training and experience concerning methamphetamine labs, the black tote drew his attention because it was a "way or method of transport that people use to transport their equipment without being seen, being a box that has – it doesn't – it's not transparent." Inside the black tote, Detective Gonzalez saw items that were consistent with the manufacture of methamphetamine using the "one-pot" method. Officer Melendez testified that the substance in the bottles indicated that it was the end of the process in the manufacture of methamphetamine. Upon seeing this, Detective Gonzalez asked Melendez whether defendant had brought any other items into her residence and she stated "yes, that he had left some clothes and another backpack, and the backpack was right in the . . . living room area." In the backpack, Detective Gonzalez saw a "Coleman fuel and other supplies, funnels. I believe another one-pot was there that was also in the last stage."

Officers obtained a search warrant. Jamie Whitehead, an expert witness in the field of drug chemistry, testified that in the black tote, a "one-pot" methamphetamine lab was found. There was a plastic bottle, containing a "white sludge material

with black pieces in it with a liquid, and it had gold beads on the top." After testing the substance, Whitehead found it to be 142 grams of liquid containing methamphetamine. Also in the black tote, Whitehead found another plastic bottle that had a white sludge material which was a hydrochloric acid generator used to "salt out the liquid to make it into the solid[, usable] form of methamphetamine." Other items found in the black tote – plastic tubing, a funnel, and coffee filters – were all items that could be used in the manufacture of methamphetamine.

Officers also searched a bag that was found beside the black tote and found items related to the manufacture of methamphetamine – a facemask, plastic tubing, wire cutters, and vice grips. Inside the backpack found inside Melendez's home was evidence of another "one-pot" methamphetamine lab – a plastic bottle containing a white sludge material with a liquid and black material. Whitehead testified that the bottle contained 105 grams of a liquid containing methamphetamine. On the floor of the living room, Whitehead found a plastic bag containing multiple coffee filters, three lithium batteries, and a one quart container of clean-strip acetone. Whitehead testified that lithium and acetone are immediate precursor chemicals for methamphetamine.

Patricia Melendez testified at trial that defendant was "like [her] nephew" and had known defendant since he was born. In October 2012, Melendez lived by herself in a trailer off Pony Farm Road, on lot number three. Around 7:30 a.m. the morning of 26 October 2012, defendant appeared at Melendez's residence, told her that he had been fighting with his girlfriend and needed a place to "take a shower, put his clothes, and he had some rims for a car, and to leave them until he figured out what he was gonna do." Melendez testified that defendant had a "duffel bag, tote-type thing, and a backpack he just set there in the living room[.]" Defendant offered Melendez one hundred dollars if he could "do what he does." When asked whether Melendez knew what that meant, Melendez testified, "[y]es, but he never said it. But yes, I knew what it was. . . . He wanted to cook up some of his – that meth stuff." Melendez told him "no." Defendant left the trailer around 2:00 or 3:00 p.m. and Melendez went to sleep. Melendez testified that when defendant left, he took his tote but left "other stuff" in her trailer. Melendez testified that she never saw the black tote until officers arrived at her trailer and did not know who had placed it there.

At the close of the State’s evidence, defendant made a motion to dismiss all charges. The trial court dismissed the charge of trafficking by manufacturing 200 grams or more but less than 400 grams of methamphetamine. Defendant’s motion was denied as to all other charges.

On 15 January 2014, a jury found defendant not guilty of trafficking by possessing 200 grams or more but less than 400 grams of methamphetamine and found him guilty of all remaining charges.

Defendant was sentenced as follows: 25 to 39 months for the three counts of possessing a precursor of methamphetamine, consolidated; 110 to 144 months for manufacturing methamphetamine, to begin at the expiration of the 25 to 39 month sentence; 10 to 21 months for possession with the intent to manufacture, sell and deliver methamphetamine, to run concurrently with the 110 to 144 month sentence; and 100 days for the two misdemeanors of possessing drug paraphernalia and resisting a public officer.

Defendant appeals.

II. Discussion

On appeal, defendant argues (A) that he was denied his constitutional right to conflict-free counsel and (B) that the

trial court erred by failing to dismiss the charge of resisting a public officer.

A. Constitutional Right to Conflict-Free Counsel

Defendant first argues that he was denied his constitutional right to effective assistance of counsel where his counsel at trial labored under a conflict of interest that adversely affected his performance. Defendant contends that he was prejudiced by counsel's prior representation of witness Patricia Melendez in the following ways: (1) counsel refrained from "vigorously attacking" Melendez's credibility; and (2) counsel affirmatively asked the trial court not to instruct the jurors to consider prior convictions of prosecution witnesses in assessing their credibility. Furthermore, defendant asserts that the trial court failed to make a sufficient inquiry to ensure that defendant understood and knowingly waived the conflict. We disagree.

"An accused's right to counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth Amendment to the United States Constitution." *State v. Rogers*, 219 N.C. App. 296, 299-300, 725 S.E.2d 342, 345 (2012) (citation omitted). "It thus follows that defendants in criminal cases have a constitutional right to effective assistance of counsel.

Included within that right is the right to representation that is free from conflicts of interest." *State v. Thomas*, 187 N.C. App. 140, 143, 651 S.E.2d 924, 926 (2007) (citations and quotation marks omitted).

"[T]o establish a conflict of interest violation of the constitutional right to effective assistance of counsel, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *State v. Howard*, 56 N.C. App. 41, 46, 286 S.E.2d 853, 857 (1982) (citation and quotation marks omitted). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance of counsel." *Id.* (citation omitted).

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. However, when a trial court is made aware of a possible conflict of interest, the trial court must take control of the situation. Further, the trial court should conduct a hearing to determine whether there exists such a conflict of interest that the defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the [S]ixth Amendment. The failure to hold such a hearing, in and of itself, constitutes reversible error.

State v. Mims, 180 N.C. App. 403, 410, 637 S.E.2d 244, 248 (2006) (citations and quotation marks omitted).

In the present case, we find that defendant raised no objection. Evidence at trial indicated that defense counsel had represented witness Melendez in 2009, five years prior to defendant's trial, in an unrelated matter. Defense counsel had represented Melendez on two counts of no operator's license, which were dismissed, and failure to stop for a light and siren, which the trial court entered a prayer for judgment. Defendant was no longer representing Melendez, and thus, there was no concurrent conflict of interest. *See Thomas*, 187 N.C. App. at 143-44, 651 S.E.2d at 926-27 (stating that where the defendant was not prevented from receiving the representation guaranteed by the Sixth Amendment where defense counsel had represented a witness three years prior to the defendant's trial, was no longer representing him, and therefore, there was no concurrent conflict of interest).

Defendant argues that defense counsel's performance was adversely affected by his conflict of interest, as demonstrated by failure to aggressively attack Melendez's credibility. Defendant also contends that his counsel's conflict of interest was exhibited when defense counsel requested that the trial

court not instruct the jury on North Carolina Pattern Jury Instruction 105.35: Impeachment of a Witness:

> Evidence has been received concerning criminal convictions of a witness. You may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on the witness's truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve the witness's testimony at this trial. You may not consider this evidence for any other purpose.

N.C.P.I., Crim. 105.35. At the beginning of the charge conference, defense counsel inquired of the trial court, whether jury instruction 105.35 was going to be given. The trial court cautioned defense counsel from seeking this instruction by stating the following:

> THE COURT: You know, [defense counsel], I heard you. Then again, it's one you have to be real careful about because impeachment -- I mean, remember, at some point, she was your client. Do you want to think about that? You didn't represent her on the embezzlement but --
>
> [DEFENSE COUNSEL:] No, sir.
>
> THE COURT: But you did bring out during the trial the fact that you did represent her at one point.
>
> [DEFENSE COUNSEL:] I did.

> THE COURT: But --
>
> [DEFENSE COUNSEL:] And, Judge, my tactic, as far as closing, with her testimony is probably not related to that. I just didn't want to get caught with my pants down, so to speak, at closing.
>
> THE COURT: Okay. Well, if you want it, I mean, I think I'm, you know, bound to give it. . . .

Subsequently, defense counsel requested that the trial court refrain from giving this jury instruction:

> [DEFENSE COUNSEL:] Judge, I'm going to respectfully ask the Court to not give [instruction 105.35], because confusion could be had with the other witness, also. When I was going over this last night, I was trying to put myself, if I was Judge Jones, what would I be looking at giving, so I would have these today. I think that the way I'm going to go about that, from a strategic point of view, with her, would eliminate the confusion and not attack her on that level. That's not what I'm looking for. Just the fact that she testified she had a conviction would be enough.
>
> THE COURT: The jury heard her when she said she had been convicted of shoplifting, embezzlement, worthless checks, and other things. You don't want to leave the jury with the impression that, why is her former lawyer attacking her now?
>
> [DEFENSE COUNSEL:] Right.

After careful review, we find that the transcript reveals that the jury was fully aware that credibility was an issue,

even though pattern jury instruction 105.35 was not given. The trial court instructed the jury regarding the credibility of witnesses by stating that the jury was "the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of that testimony." Defense counsel also extensively attempted to undermine Melendez's credibility by: questioning whether Melendez's interpretation of defendant's ambiguous statement that he was "going to do what he does" meant he was going to smoke methamphetamine or cook methamphetamine in her house; eliciting testimony from Melendez that she made inconsistent statements by failing to mention the fact that defendant had offered her $100 in her first statement to police because she was trying to avoid law enforcement; obtaining testimony that Melendez had been convicted of embezzlement, larceny, and shoplifting; and, asking why Melendez had included in her second statement to police that she was furious at defendant on 26 October 2012.

Lastly, defendant asserts that the trial court failed to make a sufficient inquiry to understand that defendant understood and knowingly waived the conflict. However, we note that the potential conflict of interest was brought to the

attention of the trial court and defendant conceded that defense counsel's prior representation of Melendez was irrelevant to his trial, as evidenced by the following exchange:

> THE COURT: The record should reflect that the jurors are outside the presence of the court. During a side bar conference, it was revealed by [defense counsel] that he may have represented this witness at some time in the past, possibly 2009, for driving while license revoked.
>
> [DEFENSE COUNSEL:] Judge, actually -- and I'm sorry to interrupt the Court. I've just gotten information from my office. It would be two counts of -- or NOL, no operator's license, and a failure to heed a light and siren -- failure to stop for a light and siren.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL:] I believe Ms. Melendez is that client. Do you recognize me, Ms. --
>
> THE WITNESS: Yes, I recognized you when I came into the courtroom this morning.
>
> THE COURT: Okay. Have you advised your -- Mr. Lightsey of that?
>
> [DEFENSE COUNSEL:] Yes, sir, I have.
>
> THE COURT: All right. Well, with that acknowledgement, Mr. Lightsey, do you understand what he's saying? She has been his client in the past, but for what he represented her for --
>
> THE DEFENDANT: It's nothing to do with this.

> THE COURT: Sir?
>
> THE DEFENDANT: It's got nothing to do with this.
>
> THE COURT: It has nothing to do with this. It's not a felony for impeachment purposes, so --
>
> [DEFENSE COUNSEL:] Two counts of NOL dismissed and a PJC on the failure to heed.
>
> . . . .
>
> THE COURT: . . . It's on the record, but I think that the effect basically is none since the charges were dismissed. Okay. Anything further?
>
> [DEFENSE COUNSEL:] So Mr. Lightsey understands that I did represent her and is waiving any conflict in my professional conduct, and I'm good to go and he's good to go?
>
> THE COURT: Yes, sir.

This exchange between the trial court and defendant indicates that the trial court determined that there was no actual conflict of interest as defense counsel's prior representation of Melendez did not result in impeachable offenses; that defendant understood the circumstances of his counsel's representation of Melendez; and, that defendant knowingly waived any potential conflict, stating that the prior representation had "nothing to do with this."

Based on the foregoing, we hold that defendant was not prevented from receiving the quality of representation guaranteed by the Sixth Amendment. Accordingly, defendant’s argument is overruled.

B. Dismissal of the Charge of Resisting a Public Officer

In his next argument, defendant contends that the trial court erred by failing to dismiss his charge of resisting a public officer, where the evidence showed that the duty being performed by Detective Gonzalez was service of outstanding warrants, not investigation of a drug activity as listed in the indictment. We agree.

“This Court reviews *de novo* a trial court’s ruling on a motion to dismiss, and we view the evidence in the light most favorable to the State, giving the State every reasonable inference therefrom.” *State v. Carver*, __ N.C. App. __, __, 725 S.E.2d 902, 904 (2012) (citation omitted).

N.C. Gen. Stat. § 14-223 (2013) provides that “[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.” “In order to charge a violation of G.S. 14-223 the bill of indictment must indicate the specific official duty

the officer was discharging or attempting to discharge." *State v. Davis*, 90 N.C. App. 185, 190, 368 S.E.2d 52, 56 (1988) (citation omitted). If an indictment does not describe the duty the officer was discharging or attempting to discharge, it fails. *State v. Ellis*, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005).

Here, defendant's indictment provided as follows:

> And jurors for the State upon their oath present that on or about the date of offense shown and in Onslow County the defendant named above unlawfully and willfully did resist, delay and obstruct G. Gonzalez, a public officer holding the office of Onslow County Sheriff's Office Detective, by running from the officer. At the time, the officer was discharging and attempting to discharge a duty of his office, *investigating a controlled substance violation*.

(emphasis added). Nonetheless, the evidence at trial indicated that the three officers recognized defendant in Brewer's vehicle and began following defendant based on known pending warrants for defendant's arrest. The officers were attempting to discharge the warrants for his arrest when defendant ran from Detective Gonzalez and resisted arrest. Testimony at trial demonstrated that officers only suspected a controlled substance violation after defendant had been arrested. Therefore, the evidence is insufficient to raise an inference that defendant

resisted, delayed, or obstructed Detective Gonzalez in attempting to take defendant into custody after investigating a controlled substance violation and the trial court erred by failing to dismiss the charge of resisting a public officer in the performance of his duty. Consequently, the judgment for resisting a public officer must be vacated.

III. Conclusion

For the reasons set forth above, we find no error in part and vacate the judgment for resisting a public officer.

No error in part; vacated in part.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).