IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 14-799

Filed: 17 March 2015

STATE OF NORTH CAROLINA,

v.

Wake County
No. 12 CRS 207459
No. 12 CRS 207462

DARYL LAMONT JONES,

Defendant.

Appeal by Defendant from judgments entered 7 February 2014 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 22 January 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Phillip T. Reynolds for the State.

Strickland, Lapas, Agner & Associates, by Adrian M. Lapas for the Defendant.

DILLON, Judge.

Daryl Lamont Jones ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of possession of cocaine and of possession of marijuana with the intent to sell or deliver. We find no error.

I. Background

On 1 April 2012, Defendant was driving a vehicle when he was stopped by law enforcement for speeding. During the stop, deputies discovered drugs and drug

paraphernalia in Defendant's vehicle. Defendant was indicted on a number of charges in connection with the stop. He was tried by a jury.

The evidence at trial tended to show as follows: During the stop of Defendant's vehicle, a deputy detected a strong odor of marijuana coming from inside. Defendant admitted to the deputy that he had a little bag of marijuana in the center console of his vehicle. The deputy searched the console where he discovered a sandwich bag containing a small quantity of marijuana.

After Defendant was secured in the deputy's patrol car, another deputy searched Defendant's vehicle and found 26.3 grams of marijuana in a sandwich bag, drug paraphernalia and residue, and five cell phones.

The jury found Defendant guilty of (1) possession of cocaine and (2) possession of marijuana with the intent to sell or deliver. During sentencing the trial court attributed 6 prior record points to Defendant and assigned him a Prior Record Level of III. Based on Defendant's prior record level, the trial court sentenced Defendant to a prison term of 6 to 17 months on each count, with the sentences to run consecutively. The trial court suspended said sentences and placed Defendant on supervised probation for 24 months. Defendant appealed.

II. Analysis

Defendant makes two arguments on appeal: Defendant contends that the trial court erred (1) in denying his motion to dismiss the possession of marijuana with intent to sell or deliver based on insufficient evidence; and (2) in sentencing him as a

Prior Record Level III offender. For the following reasons, we believe that Defendant received a fair trial, free from reversible error.

A. Motion to Dismiss

Defendant argues that the trial court should have dismissed the possession of marijuana charge with intent to sell or deliver because there was insufficient evidence to support submitting this charge to the jury. We disagree.

In support of his argument, Defendant points to the testimony from the CCBI forensic chemist that only 26.3 grams – or a little less than one ounce – of marijuana was found and that this small amount is in keeping with personal use. He contends that the other items found only raise a suspicion or conjecture that he possessed the marijuana with the intent to sell or deliver it.

To survive a motion to dismiss for insufficiency of the evidence, the State must present *substantial* evidence of each element of the charged offense and of the defendant being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence" is such evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). As our Supreme Court has stated, "[i]n resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002).

In the present case, the State was required to present substantial evidence of three elements: (1) possession; (2) of a controlled substance; (3) with the intent to sell or deliver that controlled substance. N.C. Gen. Stat. § 90-95(a)(1) (2012). Defendant only argues a lack of substantial evidence regarding the third element.

Certainly, the amount of marijuana found – being less than one ounce – standing alone would be insufficient to constitute substantial evidence that Defendant possessed the drug with the intent to sell or deliver it. However, the intent to sell or distribute may be inferred from other factors which might be present, such as the presence of packaging materials, cash, or drug paraphernalia. *See State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974); *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005). Here, in addition to the 26.3 grams of marijuana found in a bag, law enforcement also found marijuana residue in other parts of the vehicle, a small digital scale with marijuana residue, a calculator, a number of small sandwich bags with "green leaflets" in or on them and which were similar in style to the bag which contained the 26.3 grams, five cell phones, and other items. There was testimony from a deputy that he had learned from his experience and training that "people who are selling drugs usually do [carry] multiple cell phones" and that buyers generally do not, nor do buyers have their own baggies. We hold that based on the evidence presented, a reasonable mind could conclude that Defendant possessed marijuana with the intent to distribute or sell it. Accordingly, Defendant's argument is overruled.

B. Sentencing

Defendant argues that the trial court erred in assigning a prior record level point based on the fact that the offense for which he was being sentenced was committed while he was on probation. Specifically, he contends that the State failed to provide him with notice at least 30 days prior to trial that it would seek this prior record level point as required under the Structured Sentencing Act *and* that the trial court otherwise did not comply with N.C. Gen. Stat. § 15A-1022.1, by not engaging in a certain colloquy with Defendant before accepting his admission of this aggravating factor.

1. Notice under N.C. Gen. Stat. § 15A-1340.16(a6)

Under the Structured Sentencing Act, in determining prior record level points, the trial court can add a point if it is shown that the crime for which the defendant is being sentenced was committed while he was on probation. N.C. Gen. Stat. § 15A-1340.14(b)(7) (2012). The State generally must first provide the defendant with written notice *at least 30 days in advance* of its intent to use this fact in the calculation of his Prior Record Level. *Id.* § 1340.16 (a6). However, this right to notice may be waived by the defendant. *Id.*

In the present case, the State concedes that it did not give Defendant the required notice to seek an additional prior record level point based on a finding that Defendant committed his offenses while he was on probation. However, the State contends that Defendant waived the notice requirement. We agree.

After the jury returned its verdicts, the State indicated that it was seeking a Prior Record Level III punishment based on 6 prior record level points, including a point for the fact that the offenses occurred while Defendant was on probation, whereupon the following exchange took place:

> [DEFENSE COUNSEL]: . . . it was towards the end of his probation when [the new offenses] actually occurred.
>
> THE COURT: So notice wasn't given, notice of probation violation?
>
> [DEFENSE COUNSEL]: No.
>
> [PROSECUTOR]: No. Okay. Sorry.
>
> [DEFENSE COUNSEL]: We will stipulate that he was on probation at the time, but he is not on probation anymore to my understanding.
>
> THE COURT: Okay. . . .

Subsequently, the trial court allowed Defendant's counsel to argue other factors and then heard directly from Defendant; after which, the trial court imposed the sentence, stating that it "finds the prior record points of [D]efendant to be six, *as stipulated by Defendant*[.]" (Emphasis added.) At no point during the sentencing phase did Defendant or his counsel object to the consideration of the fact of his probationary status in calculating his prior record level points. Accordingly, we believe that "Defendant's failure to object to the lack of notice at the sentencing hearing, coupled with his counsel's stipulation, operates as a waiver of" his statutory right to notice.

State v. Jolly, ___ N.C. App. ___,732 S.E.2d 393, 2012 WL 4501636, *4 (2012) (unpublished opinion).

2. Failure to Comply with N.C. Gen. Stat. 15A-1022.1

Defendant's counsel stipulated to Defendant's probationary status. Defendant contends that the trial court erred in failing to conduct a formal colloquy with him as required by N.C. Gen. Stat. § 15A-1022.1 before accepting his admission of his probationary status. We note that Defendant appears to conflate this argument with the waiver argument discussed above. Specifically, Defendant appears to argue in part that the trial court was required to engage in the colloquy pursuant to N.C. Gen. Stat. § 15A-1022.1 to determine whether he *waived* his right to notice of the State's intention of seeking an additional sentencing point. However, this statute does not create any such requirement; rather, it creates a procedure with regard to a defendant's *admission* of an additional sentencing point. N.C. Gen. Stat. § 15A-1022.1 (2012). Having already concluded that Defendant *waived* his right to notice, we now address whether the trial court committed reversible error in accepting Defendant's *admission* to his probationary status.

Normally, a jury must find aggravating factors. N.C. Gen. Stat. § 15A-1340.16(a1) (2012). However, a defendant "may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury[.]" *Id.* Any admissions, though, "must be consistent with the provisions of G.S. 15A-1022.1[.]" *Id.* N.C. Gen. Stat. § 15A-1022.1 requires that a trial court follow

a certain procedure, including engaging in a colloquy with the defendant, before accepting a stipulation to an aggravating factor. *Id.* § 15A-1022.1(b).

In the present case, assuming that the trial court erred in failing to engage in such a colloquy, Defendant bears the burden of demonstrating that such error was prejudicial in order to obtain a new sentencing hearing. *Id.* §§ 15A-1442(6), 15A-1443(a). Nothing in the record suggests that Defendant was *not* on probation when he committed the offenses for which he was convicted. Defendant has failed to meet his burden of demonstrating prejudice. Accordingly, this argument is overruled.

III. Conclusion

Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).