IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-513

Filed: 19 January 2016

Lincoln County, Nos. 11 CRS 53550–51, 53555, 53557

STATE OF NORTH CAROLINA

v.

ADRIAN BERNARD McLEAN

Appeal by defendant from orders entered 24 September 2013 by Judge Charles T. Edwards in Lincoln County Superior Court. Heard in the Court of Appeals 3 November 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.*

*Michael E. Casterline for the defendant.*

BRYANT, Judge.

Where defendant cannot show that his trial attorney's representation was deficient such that it prejudiced defendant entitling him to a new trial, we find no error.

In the early morning hours of 7 October 2011, a Lincoln County S.W.A.T. team conducted a raid on a three-bedroom house on Seminole Drive in Maiden, North Carolina pursuant to a no-knock search warrant. With guns drawn, the officers

entered the bedroom where defendant, Adrian McLean, and his girlfriend, Adrienne Fletcher, were sleeping with their one-year-old baby. Defendant and Fletcher were handcuffed and brought into the living room with the baby. Their two older children joined them in the living room.

Law enforcement officers conducted a thorough search of the house and vehicles parked outside. These officers found 6.5 grams of powder cocaine, 100.5 grams of cocaine base, and a digital scale stuffed inside a box that had once held garbage bags. A suitcase containing rolls of quarters was found in the master bedroom, and more rolls of quarters were found in the trunk of a car. A large number of $1 bills, with an unknown total value, were also found in the master bedroom. Additional currency was found in two other locations in the master bedroom. A total of $8,125.00 in paper currency and $3,976.88 in coins, mostly quarters, was seized. A .22 caliber handgun was also found in the master bedroom.

Defendant was indicted on multiple drug charges and one charge of possession of a firearm by a felon, all related to the drug raid on the Seminole Drive house. He was tried by jury on 23–24 September 2013 in the Criminal Superior Court of Lincoln County, before the Honorable Charles T. Edwards.

At trial, Officer Reid testified that he was a lieutenant with the Lincoln County Sheriff's Department, supervising the narcotics investigations and the S.W.A.T.

team. He had obtained a warrant for the house on Seminole Drive on the evening before the raid, and he was present while that house was secured and searched.

On cross-examination, defendant's attorney asked Officer Reid what information he had used to obtain the Seminole Drive search warrant. Reid initially answered that a controlled purchase had been made from the residence. Defendant's attorney asked if marked funds had been used for the purchase and whether the funds had been recovered. Officer Reid stated that marked currency had been used, but he did not know if the marked currency had been recovered from defendant's residence. Defendant's attorney then elicited more information about the controlled purchase from Officer Reid, namely that the purchase was made by a person (named Emanual Baker), known to police as Confidential Informant number 72, and that the purchase had not taken place at the Seminole Drive residence.

On re-direct, Officer Reid testified that he met the informant at an agreed-upon location on 6 October 2011, the day before the raid; that the informant and his car were searched and the informant was given marked money. Officer Reid watched the informant as he made a phone call to defendant and asked to buy some crack cocaine. Other investigators watched defendant as he left the Seminole Drive residence and drove to a house on Highway 150, where the informant purchased the crack cocaine. Afterward, the informant was searched again and the drugs he had

purchased were seized. Officer Reid testified that the controlled purchase was used as probable cause to obtain the search warrant.

Adrienne Fletcher testified for the State pursuant to a plea agreement that allowed her to receive two years' probation instead of active time. Fletcher testified that she and defendant had lived in the house on Seminole Drive for two years. Defendant, who was employed sporadically, generally contributed money for rent. He also helped out by staying home and watching their youngest daughter while Fletcher worked at her full-time job in home health care. Fletcher testified that she believed the cash in the dresser, which was found in a drawer containing her undergarments, was rent money that defendant had given to her. Fletcher also stated that defendant gambled and that he used the rolls of quarters for gambling. Fletcher testified that she had not known about the cocaine found in the kitchen cabinet, nor did she know that there was over $12,000.00 in cash in the house.

Before the jury was charged, the State dismissed the following charges against defendant: Felony Possession of Cocaine, Conspiracy to Traffic in Cocaine, Conspiracy to Sell or Deliver Cocaine, and Possession with Intent to Sell or Deliver Marijuana. He was found guilty of Maintaining a Dwelling Place for Controlled Substance, Felony Possession with Intent to Sell or Deliver Cocaine, Trafficking in Cocaine by Possession, and Possession of Firearm by a Felon. Judge Edwards found that defendant was a prior record level II for sentencing. On 24 September 2013,

Judge Edwards entered a judgment on the Class G trafficking charge and consolidated the other offenses in a separate judgment, giving defendant a total sentence of 47 to 57 months.

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On appeal, defendant argues that defendant was denied effective assistance of counsel when his trial attorney elicited prejudicial and otherwise inadmissible evidence that defendant sold drugs to a police informant. We disagree.

"[Ineffective assistance of counsel claims] brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citation omitted). This rule is in accord with the principle that "the reviewing court ordinarily limits its review to material included in 'the record on appeal and the verbatim transcript of proceedings . . . .' " *Id.* at 166, 557 S.E.2d at 524–25 (quoting N.C. R. App. P. 9(a) (2013)). This record appears sufficient to permit direct review of this claim.

A criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const. amends. VI, VIII, XIV; Const. of N.C., Art. I §§ 19, 23, 27; *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984); *State v. Braswell*,

312 N.C. 553, 324 S.E.2d 241 (1985). A defendant who alleges ineffective assistance of counsel must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The North Carolina Supreme Court has expressly adopted the test from *Strickland* "as a uniform standard to be applied to measure ineffective assistance under the North Carolina Constitution." *Braswell*, 312 N.C. at 562–63, 324 S.E.2d at 248.

In conducting a defense, "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for the defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001). Accordingly, North Carolina courts have consistently declined "to second-guess [defendant's] counsel's trial strategy." *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

If the defendant meets his burden to show that counsel's performance was deficient, he must then show that the conduct was so serious as to deprive defendant

of a fair trial. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

Defendant argues that because his trial attorney brought forth incriminating evidence through cross-examination of Officer Reid, which defendant contends the State would not otherwise have been allowed to present to the jury, counsel's performance was deficient, and defendant was thereby prejudiced. We disagree.

Here, on cross-examination, Officer Reid responded to questions about the basis for obtaining a search warrant for the raid on defendant's residence:

> Q. Okay. And so your application for the search warrant, you indicated it was based on somebody that went in and bought stuff?
>
> A. Yes. A controlled purchase is what we call it.
>
> Q. But you don't know if that money [marked bills used for the controlled purchase] was found in [defendant's residence] or not?
>
> A. No, sir, I do not.
>
> Q. Do you know who went in, who sent you in?
>
> A. Yes, I sure do.
>
> Q. And who was that?

> A. Confidential Informant number 72.
>
> Q. And who is that?
>
> A. Emanual Baker.
>
> Q. And are you saying that that purchase took place at this 3553 Seminole Drive [defendant's residence]?
>
> A. No, sir, it did not.
>
> Q. So how are you able to use that information to get your search warrant then?
>
> A. We were informed during the investigation that [defendant] would not sell any type of controlled substances from his home at Seminole Drive . . . .

On redirect, the State elicited more specific testimony from Officer Reid regarding the purchase of controlled substances from defendant on the day before the raid:

> Q. You had indicated there was a confidential informant?
>
> A. That's correct.
>
> Q. All right. When was this purchase made?
>
> A. On October 6, 2011, the day before [the raid on defendant's residence].
>
> Q. . . . [W]hat I . . . want to know about are the circumstances about the sale the following day which led you to getting the search warrant.
>
> A. We met Confidential Informant number 72 at a location. We searched him and searched his person to make sure that there was no controlled substances on him. Once we

> were satisfied of his search of his person and the search of his vehicle, we gave him marked money that we are issued through special funds at the Sheriff's Office.
>
> We kept constant visual contact of [Confidential Informant]. He made a phone call to [defendant] on the cell telephone ordering an amount of crack cocaine. We had investigators positioned at 3553 Seminole Drive where [defendant] resides at. They observed [defendant] get into his vehicle. . . .
>
> [Defendant] goes to another residence on Falcon Ridge where a relative of his lived, where the controlled substance was actually purchased by our confidential informant.
>
> At that time, investigators followed [defendant] back to his residence at 3553 Seminole Drive. Myself and Investigator Sain followed Confidential Informant number 72 from that location on Falcon Ridge to a disclosed location where we immediately searched [Confidential Informant], searched his vehicle, took the controlled substances that we purchased to gain probable cause for the search warrant and secured them in evidence.

Defendant argues that the above elicited testimony was highly prejudicial and that, but for defense counsel's opening the door to otherwise inadmissible testimony of defendant's sale of crack cocaine to the confidential informant, the jury likely would have returned a different verdict.

Defendant relies on *State v. Baker*, 109 N.C. App. 643, 428 S.E.2d 476 (1993), to support his argument that the testimony elicited by defense counsel was so prejudicial to defendant as to warrant a new trial. In *Baker*, the defense attorney posed a question to a witness which led directly to the introduction of the defendant's criminal record, which would otherwise have been inadmissible at trial. 109 N.C.

App. at 646–49, 428 S.E.2d at 478–79 ("THE COURT: . . . I believe it would not have been admissible save and except for what you told this jury."). Specifically, the defense attorney in *Baker*, in his question to the witness, stated that the defendant had no criminal record. *Id.* at 646, 428 S.E.2d at 478. Accordingly, his misstatement elicited his correction of that mistake, which resulted in telling the jury about the defendant's otherwise inadmissible criminal record. *Id.* at 648, 428 S.E.2d at 479. This Court stated, "[c]learly, defense counsel's statements led directly to introduction of evidence which, as the trial court recognized, would not have been otherwise admissible during the trial." *Id.* at 648, 428 S.E.2d at 479. However, in ordering a new trial, this Court noted that defense counsel's error was compounded by a failure to object to improper or incomplete jury instructions regarding defendant's convictions. *Id.* at 648–49, 428 S.E.2d at 479–80.

Here, we are not prepared to say that the State's evidence setting forth the basis for the search warrant was otherwise inadmissible as defendant claims, since there was unchallenged testimony that the raid of the residence was executed based on a search warrant. Notwithstanding, assuming arguendo the challenged evidence was otherwise inadmissible, the State produced an overwhelming amount of evidence to show beyond a reasonable doubt that defendant committed the charged offenses, including trafficking in cocaine and maintaining a dwelling for possession of drugs,

among other charges. The presence of drugs, drug paraphernalia (scales), and money with drug residue at defendant's Seminole Drive residence was substantial.

Specifically, officers found 6.5 grams of powder cocaine and 100.5 grams of cocaine base inside plastic bags which, along with a digital scale, were stuffed with other plastic bags into a box that had once held garbage bags. Officers also seized a total of $8,125.00 in paper currency, $3,976.88 in coins, and a .22 caliber handgun. The jury heard testimony without objection that law enforcement officers had entered the Seminole Drive residence pursuant to a search warrant, and that as a result of the items seized pursuant to the search warrant, defendant was charged with numerous drug offenses, as well as possession of a handgun by a felon. Defendant was never charged with possession with intent to sell and deliver cocaine based on the controlled buy to the confidential informant.

It appears that defendant's counsel made a tactical decision to cross-examine Officer Reid, perhaps to try and generate a reasonable doubt in the jury's mind regarding the possession of the drugs found at the residence: "Q: But you don't know if that money [marked bills used for the controlled purchase between Confidential Informant number 72 and defendant] was found in [defendant's residence] or not? A. No, sir, I do not." By eliciting Officer Reid's testimony regarding the basis for the search warrant—the controlled purchase—it would appear that defendant's counsel attempted to show that the officers who conducted the search of defendant's residence

found no marked bills from the controlled purchase, thereby attempting to cast some doubt regarding who was actually in possession of the drugs, money, or both. For instance, defendant could argue that if there was no evidence that marked bills from the controlled buy were recovered during the search of defendant's residence the next day, perhaps neither the drugs nor the money belonged to defendant, or there could be a reasonable doubt based thereon. It is for this reason our courts have declined to "second-guess . . . counsel's trial strategy." *See Lowery*, 318 N.C. at 68, 347 S.E.2d at 739.

Defendant bears a heavy burden to show that his counsel's performance was so deficient as to deprive him of a fair trial. *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Because we will not second-guess defendant's attorney's trial strategy, and because of the overwhelming evidence against defendant to support the jury verdicts, defendant cannot meet his burden to show that his attorney's performance prejudiced him such that he is entitled to a new trial.

Accordingly, defendant's argument that he was denied effective assistance of counsel is overruled.

NO ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).