IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-800-2

Filed: 20 September 2016

Wake County, Nos. 11 CRS 203626-27, 203631-37, 14 CRS 196

STATE OF NORTH CAROLINA

v.

NICOLAS OLIVARES PINEDA

Appeal by Defendant from judgments entered 23 May 2014 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 18 December 2015. On 9 June 2016, the Supreme Court allowed the State's petition for discretionary review and remanded the matter to the Court of Appeals for reconsideration.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott Stroud, for the State.

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

STEPHENS, Judge.

On remand for reconsideration from our Supreme Court, we address only Defendant Nicolas Olivares Pineda's argument that the trial court erred in failing to arrest judgment on the jury's four verdicts finding Pineda guilty of trafficking heroin

by delivery where the jury also returned guilty verdicts for trafficking the same heroin by sale. We find no error.

Factual and Procedural History

A detailed account of the facts and procedural history of this case can be found in our previous opinion in this matter. *See State v. Pineda*, 782 S.E.2d 582 (2016) (unpublished), *available at* 2016 N.C. App. LEXIS 177. In summary, Pineda was identified as a heroin trafficker as the result of an undercover investigation of a heroin distribution network in the Raleigh area conducted by the Wake County Sheriff's Office in 2010-2011. As a result of the evidence collected during the investigation, on 19 April 2011, the Wake County Grand Jury returned twenty indictments charging Pineda with trafficking in heroin on five dates. The trafficking indictments for 3 November 2010, 21 December 2010, 4 February 2011, and 14 February 2011 charge that Pineda trafficked in 28 grams or more of heroin by possession, transportation, sale, and delivery. The indictments for 23 November 2010 charge that Pineda trafficked in 14 grams or more of heroin by possession, transportation, sale, and delivery. On 25 February 2014, the Grand Jury returned an additional indictment charging that, between 3 November 2010 and 14 February 2011, Pineda conspired to traffic in heroin by sale of 28 grams or more.

All charges were joined for trial at the 19 May 2014 criminal session of Wake County Superior Court, the Honorable Henry W. Hight, Jr., Judge presiding. Prior

to jury selection, the State took a voluntary dismissal of two of the charges alleged to have occurred on 14 February 2011, trafficking heroin by sale and by delivery. The jury found Pineda guilty on the remaining nineteen charges. On 23 May 2014, the trial court entered the following sentences: on each of the fifteen charges involving 28 grams or more of heroin, including the conspiracy charge, Pineda was sentenced to 225-279 months in prison and fined $500,000, while on each of the four charges involving 14 grams or more of heroin, Pineda was sentenced to 90-117 months in prison and fined $100,000. All sentences were ordered to be served consecutively. Pineda gave notice of appeal in open court. In his appeal, Pineda argued that the trial court erred in denying his motions to (1) arrest judgment on the jury's four verdicts finding him guilty of trafficking heroin by delivery and (2) dismiss the charges with offense dates 3 November 2010, 21 December 2010, and 14 February 2011.

The matter was heard in this Court on 18 December 2015, and, in an unpublished opinion filed 16 February 2016, this panel found no error in the denial of Pineda's motion to dismiss, but held that the trial court erred in entering judgments upon Pineda's convictions for trafficking the same heroin by both sale and delivery, citing case law on N.C. Gen. Stat. § 90-95(a)(1) (2015) (providing that "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance"). On 4 March 2016, the State

filed a petition for discretionary review in our Supreme Court, correctly noting that Pineda was actually indicted and convicted of violating a different subsection of the Controlled Substances Act, N.C. Gen. Stat. § 90-95(h)(4). By order entered 10 June 2016, the Supreme Court allowed the State's petition for the limited purpose of remanding to this Court for reconsideration in light of the correct statute of conviction, to wit, section 90-95(h)(4).

Discussion

As noted *supra*, the jury found Pineda guilty of violating N.C. Gen. Stat. § 90-95(h)(4) by trafficking heroin by sale and trafficking heroin by delivery on 3 November 2010, 23 November 2010, 21 December 2010, and 14 February 2011. At sentencing, Pineda moved the trial court to arrest judgment on the four charges of trafficking heroin by delivery, contending that those convictions merged into the convictions for trafficking by sale of the same heroin on the same dates. The court denied that motion. Pineda contends that this denial was error. We disagree.

Section 90-95(h)(4) provides that "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate . . . shall be guilty of a felony which felony shall be known as 'trafficking in opium or heroin . . . .' " N.C. Gen. Stat. § 90-95(h)(4). Our Supreme Court has held that the various statutory trafficking offenses in subsection 90-95(h)(4) are "separate and distinct offenses" for which a defendant "may be convicted and punished separately . . . ." *State v. Perry*,

316 N.C. 87, 103-04, 340 S.E.2d 450, 461 (1986). Pineda contends that any applicability of this language to the offenses of sale and delivery is dicta and suggests that four years later in *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990), our Supreme Court "took a more careful look at the acts of sale and delivery . . . . reach[ing] the conclusion that sale and delivery were parts of the same act, transfer of possession of heroin." After careful review, we conclude that Pineda misreads the holding in *Moore* and ignores the Court's reasoning in *Perry*.

In *Perry*, the defendant had been convicted of violating subsection 90-95(h)(4) by trafficking in heroin by possessing 28 grams or more, trafficking in heroin by transporting 28 grams or more, and trafficking in heroin by manufacturing 28 grams or more, as well as conspiracy to possess 28 grams or more of heroin and conspiracy to manufacture 28 grams or more of heroin. 316 N.C. at 89, 340 S.E.2d at 453. On appeal, the defendant argued "that the trial judge erred by refusing to direct the State to elect between prosecuting [him] for trafficking in heroin and the offenses of possessing, manufacturing and transporting heroin." *Id.* at 102, 340 S.E.2d at 460. In discussing the legislative intent behind subsection 90-95(h), the Supreme Court cited and relied upon *State v. Anderson*, for the proposition that "[*t*]*he distinct acts denounced by the statute* (*manufacture, sell, deliver, possess*) *have been held to constitute separate and distinct offenses*." 57 N.C. App. 602, 605, 292 S.E.2d 163, 166

(citations omitted; emphasis added), *disc. review denied*, 306 N.C. 559, 294 S.E.2d 372 (1982). The Supreme Court held

> that possessing, manufacturing, and transporting heroin are separate and distinct offenses. Further, when a person commits any one of these offenses which involves 4 grams or more of heroin, he is guilty of trafficking. Therefore, [a] defendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin.

Perry, 316 N.C. at 103-04, 340 S.E.2d at 461. Thus, while the defendant in *Perry* had not been convicted of trafficking by sale and by delivery, he did present the question of whether the individual acts of trafficking enumerated in the statute were distinct offenses which could each sustain a separate conviction even when the same contraband was involved. Regarding subsection 90-95(h)(4), the Supreme Court answered that question in the affirmative, and *Perry* remains good law on that point.

In contrast, in *Moore*, the Supreme Court did not consider subsection 90-95(h)(4) at all, but rather was asked "to determine whether a defendant may be convicted under [subsection] 90-95(a)(1) for both the sale and the delivery of a controlled substance arising from one transaction." 327 N.C. at 379, 395 S.E.2d at 125 (analyzing the language making it unlawful "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance"). To

answer this question, the Court engaged in a careful and detailed analysis of the wording and punctuation of that subsection:

> Having examined the statute, we now conclude that the language of [subsection] 90-95(a)(1) creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance. . . . By phrasing [subsection] 90-95(a)(1) to make it unlawful to "manufacture, *sell or deliver*, or possess with intent to manufacture, sell or deliver, a controlled substance" (emphasis added), the legislature, *solely for the purpose of this statutory subsection*, has made each single transaction involving transfer of a controlled substance one criminal offense, which is committed by either or both of two acts—sale or delivery.
>
> A sale is a transfer of property for a specified price payable in money. Delivery is the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. *We need not address the relationship between the acts of sale and delivery as it might exist under any other statutory* or common law *provision, because by the statutory language at issue here the legislature has made it one criminal offense to sell or deliver* a controlled substance under [subsection] 90-95(a)(1).

Id. at 381-82, 395 S.E.2d at 126-27 (citations and some internal quotation marks omitted; some emphasis in original; some emphasis added). Ultimately, the Court held that, while "[a] defendant may be indicted and tried under [subsection] 90-95(a)(1) . . . for the transfer of a controlled substance . . . by selling . . . or by delivering the substance, or both. . . . . [he] may not . . . be convicted under [the subsection] of

both the sale and the delivery of a controlled substance arising from a single transfer." *Id.* at 382, 395 S.E.2d at 127.

Thus, not only does the textual analysis underlying the Court's reasoning in *Moore* not apply to the wording of subsection 90-95(h)(4), the Court in *Moore* explicitly stated that its interpretation regarding sale and delivery applied "*solely for the purpose of this statutory subsection* [90-95(a)(1)]" and further emphasized that its holding did not "address the relationship between the acts of sale and delivery as it might exist under any other statutory . . . provision . . . ." *Id.* at 382, 395 S.E.2d at 126-27 (emphasis in original). In the case before us, *Perry*, interpreting section 90-95(h)(4), controls such that trafficking heroin by sale and trafficking heroin by delivery are "separate and distinct offenses" for which Pineda was properly "convicted and punished separately." 316 N.C. at 103-04 , 340 S.E.2d at 461. For these reasons, the trial court did not err in denying Pineda's motion to arrest judgment on the four convictions of trafficking heroin by delivery. This argument is overruled.

NO ERROR.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).