IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-191

Filed: 6 September 2016

Pitt County, Nos. 13 CRS 57868-70

STATE OF NORTH CAROLINA

v.

ANGEL VAZQUEZ

Appeal by defendant from judgment entered 15 April 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 24 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Melo & Rojas PLLC, by Jim Melo, for defendant-appellant.

TYSON, Judge.

Angel Vazquez ("Defendant") appeals from judgment entered upon his convictions of two counts of conspiracy to traffick in cocaine by possession. We find no error in part, and dismiss in part.

I. Background

In the fall of 2012, the Greenville Police Department's Special Investigations Unit and the United States Drug Enforcement Agency ("DEA") began an

investigation of Adrian Ortiz ("Ortiz"). Ortiz was a "mid-level" cocaine dealer living in Greenville, North Carolina, whose supplier was believed to be located in Raleigh. Law enforcement employed a confidential informant ("CI") during the investigation of Ortiz. The CI and Ortiz had previously become acquainted "on the street" in Greenville.

A. 12 December 2012 Transaction

Greenville Police investigators planned for the CI to purchase cocaine from Ortiz on 12 December 2012. The CI called Ortiz and the two planned to meet in a grocery store's parking lot. The CI purchased four ounces of cocaine from Ortiz for $4,400.00 in currency, which law enforcement officers had given to him for the transaction. The plan was for the CI to request an additional two ounces of cocaine, with hopes that Ortiz would contact his supplier. Following the transaction, the CI returned to the law enforcement officers and awaited a call from Ortiz regarding the additional two ounces of cocaine.

Law enforcement officers conducted surveillance on Ortiz after the transaction. When Ortiz left the parking lot where the sale occurred, he traveled to a shopping mall located in Rocky Mount. From the mall, Ortiz traveled to a McDonald's restaurant located off of Poole Road in Raleigh. Ortiz left the McDonald's and drove to Defendant's residence at 1512 Clover Ridge Court in Raleigh.

A DEA agent was conducting surveillance on Defendant's residence. Ortiz sat outside Defendant's residence for ten or fifteen minutes. Defendant arrived in a yellow Nissan Xterra vehicle and went in the front door. The garage door opened, and Ortiz went inside. Ortiz left the residence approximately ten minutes later and put something inside the toolbox on the bed of his truck.

Ortiz returned to the grocery store parking lot in Greenville and met with the CI. Ortiz opened the toolbox on his truck, and gave the CI cocaine in exchange for money.

B. 25 January 2013 Transaction

Greenville Police investigators arranged for another controlled transaction between the CI and Ortiz on 25 January 2013. The officers provided the CI with $10,000.00 in currency to purchase nine ounces of cocaine. The CI and Ortiz met in the same grocery store parking lot, where the previous transaction had occurred. The two left together and the officers maintained surveillance. Ortiz got inside the CI's vehicle, and the two drove to the same McDonald's restaurant located off Poole Road in Raleigh that Ortiz had previously visited.

A Hispanic male known as "Popeye" met Ortiz and the CI at the McDonald's restaurant. Ortiz and the CI followed Popeye's burgundy truck to a nearby apartment complex, located on Calumet Drive in Raleigh. Ortiz and the CI went

inside an apartment with Popeye, remained there for about twenty minutes, and then returned to Greenville in the CI's vehicle.

The CI had procured nine ounces of cocaine, which he brought back to Greenville and delivered to law enforcement officers. He testified he saw Popeye retrieve the cocaine from inside the oven. This was the first time the CI had met Popeye.

C. 7 February 2013 Meeting

Law enforcement's goal was for the CI to meet face-to-face with Ortiz's supplier in order to negotiate and conduct a larger scale cocaine transaction. On 7 February 2013, the CI met Ortiz in the same grocery store parking lot in Greenville. They traveled to the same McDonald's restaurant located off Poole Road in Raleigh and met a Hispanic male. The CI and Ortiz rode with the Hispanic male to a Mexican restaurant located on Capital Boulevard in Raleigh. The men remained at the Mexican restaurant from 2:28 p.m. until 4:13 p.m. Present at the meeting were Defendant, the CI, Ortiz, and Popeye.

The CI testified the goal of the 7 February 2013 meeting was "to talk about buying big amounts of cocaine." The CI told Defendant he had a buyer in Virginia who would buy five to ten kilos at a time. Defendant and the CI discussed the price of cocaine, and Defendant stated cocaine was selling for around $32,000.00 per kilo.

Defendant told the CI, while at the Mexican restaurant, that "his people" in Atlanta were slow, and were only bringing in two kilos of cocaine at a time, and he could not provide the CI the requested amount "because he needed to take care of his customers." Defendant further stated "his people" in Atlanta were supplying him high quality cocaine. Defendant stated it was not possible at that time for him to procure such a large quantity of cocaine.

The CI later testified Defendant told him he would "try his best" to get a larger quantity of cocaine from Atlanta. The CI and Ortiz returned to Greenville after the meeting. At the conclusion of the meeting, Defendant invited the CI to stay in Raleigh for the night to socialize. The CI replied he had to work, but that they could go out and celebrate one weekend, after they had "made some good money."

The CI spoke with Defendant a few times on the phone after the meeting with Ortiz. The CI asked Defendant if he could deal directly with him, instead of Ortiz. Defendant stated he "didn't want to leave Ortiz out of the picture," and instructed the CI to contact Ortiz if he needed anything.

D. 27 March 2013 Transaction

The CI cooperated with the DEA to make another controlled purchase from Ortiz on 27 March 2013. The CI contacted Defendant and told him he needed to purchase more cocaine. Defendant instructed him to contact Ortiz.

The CI called Ortiz to arrange a purchase. The CI traveled to Raleigh and again met Ortiz at the same McDonald's located off of Poole Road. Popeye arrived in his burgundy truck. Ortiz and the CI followed Popeye to the apartment on Calumet Drive, where the 25 January 2013 transaction had occurred, and the CI purchased nine ounces of cocaine. A DEA officer continued surveillance of Popeye after the sale was completed, and observed him drive to Defendant's residence.

E. Ortiz's testimony

Ortiz testified the first time he met Defendant was at a residence in Raleigh. The second time he encountered Defendant was at the Mexican restaurant on 7 February 2013. Ortiz testified that he dealt directly with Popeye for all of his cocaine purchases. Ortiz tried to call Defendant on one occasion, and he was told to deal directly with Popeye. Ortiz testified he did not participate in the conversation at the Mexican restaurant.

F. Defendant's Charges and Conviction

On 12 May 2014, Defendant was indicted on three separate indictments. The first indictment charged Defendant with conspiracy to traffick in cocaine in excess of 28 grams but less than 200 grams, by transportation and possession on 12 December 2012. The second indictment charged Defendant with conspiracy to traffick in cocaine in excess of 200 grams but less than 400 grams, by transportation and possession on 25 January 2013. The third indictment charged Defendant with conspiracy to traffick

in cocaine in excess of 200 grams but less than 400 grams, by transportation and possession on 27 March 2013.

The case came on for trial on 14 April 2015. The same day, the jury returned verdicts finding Defendant guilty on all three charges. The trial court stated there "were at least two conspiracies," and arrested judgment on all counts in case number 13 CRS 56869, the charges stemming from the 25 January 2013 transaction. The court arrested judgment on the counts of conspiracy to traffick in cocaine by transportation charged on the remaining two indictments.

The two charges of conspiracy to traffick in cocaine by possession were consolidated for judgment, and Defendant was sentenced to an active term of 70 to 93 months in prison. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to continue in violation of his constitutional rights to counsel and due process; and (2) denying his motion to dismiss where insufficient evidence was presented to support more than one conspiracy charge.

III. Motion to Continue

Defendant argues the trial court's denial of his motion to continue violated his constitutionally protected rights to effective assistance of counsel and due process of the law. We disagree.

A. Standard of Review

A motion to continue generally rests solely within the trial court's discretion and is reviewable on appeal only for an abuse of discretion. *State v. Thomas,* 294 N.C. 105, 111, 240 S.E.2d 426, 431 (1978) (citations omitted). "Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970) (citations omitted).

When the motion to continue is based on a constitutional right, "the question presented is one of law and not of discretion and the order of the court below is reviewable." *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976) (citations omitted). "Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error." *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001) (citations omitted), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 221 (2002).

To demonstrate he did not have ample time to investigate, prepare, and present his defense, a defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609,

632 (2002) (citation and internal quotation marks omitted), *cert denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

B. Analysis

On 9 September 2014, Defendant's attorney submitted a discovery motion, a motion to reveal the CI's identity, and a motion for the production of exculpatory information. Trial was set for Monday, 13 April 2015. Defense counsel moved for a continuance when the case was called for trial.

Defense counsel stated that on 10 April 2015, the previous Friday, at 4:26 p.m. the prosecutor sent him a fax disclosing the name of the CI, which was previously unknown to defense counsel. He asserted such short notice of the identity of the CI, the State's primary witness against Defendant, did not provide counsel with sufficient opportunity to prepare any rebuttal evidence against him. Furthermore, defense counsel argued only the CI's name was provided. The State did not provide defense counsel with information regarding payments to the CI, plea agreements the State had entered into with the CI, information regarding arrangements between the CI and law enforcement, or any other potentially exculpatory information regarding the CI.

Defense counsel also asserted he had not received information through discovery of: recordings and logs received from the government's tracking of three cellular telephone numbers; tracking correspondence received from the tracking of a

2008 Nissan Xterra vehicle and a 2004 Chevrolet vehicle; or any and all handwritten notes of DEA agents, the Greenville Police Department, the SBI, and the Farmville Police Department.

Defense counsel had received discovery on 17 February 2015, which consisted primarily of the State's requests for the pen register and trap and trace data and vehicle tracking data to be gathered from the alleged co-conspirators and the orders granting the requests. The discovery did not contain any specific information about the CI or any of the actual pen register and trap and trace data or car tracking data.

At the hearing on Defendant's motion to continue, the prosecutor informed the court that the trap and trace and tracking information was currently "sealed by a court order" in Pitt and Wake Counties. The court denied the motion to continue. Prior to the CI's testimony, defense counsel objected and asserted the State had not provided him with information required under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) (holding the prosecution has a constitutional duty to disclose evidence if it is favorable to the defense and material to the outcome of the trial or sentencing).

The trial court asked the prosecutor whether he knew "of any exculpatory things [the CI] is going to say?" The prosecutor responded that he did not, and stated the State had made no agreements with the CI.

The prosecutor also stated he presumed the CI had been paid, but defense counsel would be free to question him about payments on cross-examination. The court determined that the name of the CI had been provided to Defendant in two separate documents in the initial discovery material provided by the State and overruled Defendant's objection.

"It is implicit in the constitutional guarantees of assistance of counsel . . . that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977) (citations omitted). "To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *Williams*, 355 N.C. at 540-41, 565 S.E.2d at 632.

In determining whether a trial court erred in denying a motion to continue, appellate courts are to consider four factors:

> (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Wright, 210 N.C. App. 52, 60, 708 S.E.2d 112, 119 (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 200, 710 S.E.2d 9 (2011).

1. Discovery Information Regarding the CI

The trial court found, and the record shows, the initial discovery material provided to defense counsel contained the name of the CI. Two documents entitled "Greenville Police Department Report of Special Funds Expenditures" show that the CI received sums of money from the police on 12 December 2012 and 25 January 2013, and state the first and last name of the CI. On the Friday prior to trial, the State notified defense counsel of the State's intent to call the CI as a witness at trial. The record shows the State timely provided discovery regarding the CI's identity and participation in the controlled purchases, and informed defense counsel that the State would call the CI as a witness at trial.

Defendant argues that even if the State timely provided defense counsel with the CI's name, the State did not fulfill its duty under *Brady*, because the State is obligated to not just provide basic information, such as the CI's name, but any additional exculpatory evidence such as the CI's criminal record, any promises of immunity, prior inconsistent statements, and any other information bearing on bias and credibility of the CI.

Defendant cites cases in which this Court addresses the State's disclosure requirements when the CI has not been located and was not called to testify. Here,

the State provided information in discovery identifying the CI by first and last name, and the CI's role in the controlled purchases of cocaine. The CI was produced as a witness at trial.

Defense counsel had ample opportunity to cross-examine the CI, and elicited information from the CI admitting he had been paid for working with law enforcement. The CI denied any plea agreements with the State or arrangements with law enforcement. One of the investigating officers also testified regarding the payment of the CI. "[D]efendant has not shown specific prejudice so as to constitute an abuse of discretion" by the trial court's denial of his motion to continue on his assertion his counsel was provided insufficient and untimely information about the CI through discovery. *State v. Godwin*, 336 N.C. 499, 505, 444 S.E.2d 206, 209 (1994). This argument is overruled.

2. Telephone and Vehicle Tracking Data

On 17 February 2015, defense counsel received discovery from the State, which showed law enforcement's request and the trial court's orders allowing the use of pen register and trap and trace devices to track Defendant and the co-conspirators' telephones and vehicles. Defense counsel did not receive any actual data from the tracking and monitoring of the phones and vehicles, and the prosecutor informed the trial court that the data was sealed by the superior courts of Wake and Pitt counties. The record shows neither Defendant nor the State reviewed the information under

seal. Defendant asserts it is likely the information under seal contains favorable or exculpatory information.

"One of the minimum requirements of materiality of evidence, in the context of discovery is that the evidence sought might have affected the outcome of the trial." *State v. Tatum*, 291 N.C. 73, 79, 229 S.E.2d 562, 566 (1976). The factual record before us is insufficient to determine whether the State had any duty to obtain or disclose the information under court order seal, or whether Defendant was prejudiced by his counsel for not having reviewed the information. We dismiss Defendant's assertion on appeal of the denial of his motion to continue regarding the telephone and tracking information under seal by the superior courts without prejudice. Defendant may review available procedures to develop a factual record.

IV. Motion to Dismiss

Defendant argues the trial court erred by denying his motion to dismiss, in part, where insufficient evidence was presented to support more than one conspiracy charge. We disagree.

A. Standard of Review

When ruling upon a defendant's motion to dismiss, the trial court determines whether substantial evidence exists of: (1) each essential element of the offense charged; and, (2) whether defendant is the perpetrator of the crime. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith,* 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted).

Upon a motion to dismiss, the court must review the evidence in the light most favorable to the State to determine whether substantial evidence was presented of each element of the offense. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

B. Analysis

"It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime." *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (1984) (citations omitted). "It is also clear that where a series of agreements or acts constitutes a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy." *Id*. (emphasis in original). Defendant argues the evidence shows only one meeting of the minds.

To determine whether a single or multiple conspiracies are involved, the "essential question is the nature of the agreement or agreements, . . . factors such as time intervals, participants, objectives, and number of meetings all must be considered." *Id*.

Evidence was presented tending to show that on 12 December 2012, Ortiz went to Defendant's residence after the CI requested more cocaine. He went inside Defendant's residence and came out with something he placed inside the toolbox of his truck. Ortiz returned to Greenville, removed and gave Defendant cocaine from the toolbox of his truck. The evidence was sufficient to establish Defendant conspired with Ortiz to provide cocaine to the CI.

The trial court arrested judgment on the conviction that was based on the 25 January 2013 transaction. The evidence showed the 27 March 2013 transaction began when the CI called Defendant for cocaine, and Defendant told him to contact Ortiz. Ortiz contacted Popeye, who provided the cocaine. The participants, method of delivery, volume of drugs, and each transaction were not part of the same agreement. The purchases were separated by a significant amount of time and did not take place at regular intervals. *Id.* The March transaction occurred after the February meeting, and was consistent with Defendant's efforts to be a source of cocaine for the CI. The evidence shows at least two separate and distinct conspiracies. This argument is overruled.

V. Conclusion

Defendant failed to show the trial court abused its discretion by denying Defendant's motion to continue after asserting the State had not provided adequate and timely discovery information about the CI. Defendant's arguments are overruled.

The factual record before us is insufficient for us to determine whether the trial court abused its discretion by denying Defendant's motion to continue based upon Defendant's argument that trial counsel was not provided discovery of *Brady* information under seal, where the contents of such information is unknown to all parties and the Court. Defendant's argument on appeal asserting error in the denial of his motion to continue because he was not provided the telephone and tracking information, which was placed under seal by the superior courts, is dismissed without prejudice.

The State presented sufficient evidence of Defendant's commission of at least two conspiracies. Defendant's arguments on this issue are overruled.

NO ERROR IN PART, DISMISSED IN PART.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).