IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-270

Filed: 20 December 2016

Yancey County, Nos. 12 CRS 50712-13

STATE OF NORTH CAROLINA

v.

CONSTANCE MICHELLE SHEPERD

Appeal by Defendant from judgment entered 27 August 2015 by Judge Gary M. Gavenus in Superior Court, Yancey County. Heard in the Court of Appeals 12 December 2016.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jon H. Hunt, for Defendant-Appellant.

McGEE, Chief Judge.

Constance Michelle Sheperd ("Defendant") appeals from judgment entered upon her conviction for trafficking in opium by possession of an amount between fourteen and twenty-eight grams. Defendant contends the indictment purporting to charge her with this offense was facially invalid, and the trial court committed plain error in instructing the jury on an offense for which Defendant had not been charged. We find Defendant received a fair trial free from error.

Lieutenant John Robinson ("Lt. Robinson") of the Yancey County Sheriff's Department ("YCSD") received several text messages on his work-issued cellular telephone from an unknown number on 29 October 2012. The first message read: "Jonathan[,] its michelle your cousin[,] want to know if you want to buy vicodin 5s for 5 dollars each[,] 40 of them." Lt. Robinson decided to reply in an attempt to meet the unidentified person seeking to sell the prescription medication. After exchanging a few texts, the person agreed to meet Lt. Robinson at the Sav-Mor store in Burnsville, North Carolina. Lt. Robinson enlisted YCSD Detective Mark Letterman ("Det. Letterman") to follow him to the Sav-Mor.

Lt. Robinson and Det. Letterman arrived at the Sav-Mor parking lot in separate cars. Lt. Robinson spotted two females sitting in a pickup truck parked apart from other cars in the lot. Lt. Robinson and Det. Letterman approached the pickup truck. Defendant was sitting in the passenger seat and Amma Jean Tilson ("Ms. Tilson") was sitting in the driver's seat. Lt. Robinson took Defendant—a woman he had known for over twenty-five years—to his patrol car, while Det. Letterman took Ms. Tilson to his patrol car. Lt. Robinson told Defendant he needed the pills. Defendant replied she did not know what Lt. Robinson was talking about. Lt. Robinson showed Defendant some of the text messages on his phone that he had received from her, at which point Defendant became apologetic and admitted she had pills. Defendant produced from her bra a plastic bag containing pills and handed the

bag to Lt. Robinson. Afterward, Defendant and Ms. Tilson were transported to the Yancey County Sheriff's Department.

The bag containing the pills was subsequently sent to the North Carolina State Crime Laboratory for testing. Elizabeth Reagan, a forensic chemist from the crime lab, testified she analyzed the pills and determined them to be Vicodin, a prescription opium derivative, and that the total weight of the pills was 23.65 grams.[1]

A Yancey County grand jury indicted Defendant on 23 February 2015 for (1) conspiracy to sell or deliver a schedule III controlled substance, (2) possession with intent to manufacture, sell or deliver a schedule III controlled substance, and (3) trafficking in opium or heroin. Defendant was tried by a jury in Yancey County Superior Court on 27 August 2015. Prior to jury selection, Defendant moved to dismiss the indictments against her on the grounds that all were facially defective. The trial court denied Defendant's motions.

At the close of the State's evidence, Defendant again moved to dismiss all the charges against her, this time arguing insufficient evidence. The trial court denied Defendant's motion. Defendant renewed her motion to dismiss at the close of all the evidence. The trial court granted Defendant's motion to dismiss the charges of conspiracy to sell and deliver schedule III drugs and possession with intent to sell and deliver schedule III drugs, but denied Defendant's motion to dismiss the charge

[1] The forensic chemist testified she weighed thirty-seven of the forty tablets, and that the remaining three tablets were not weighed because they had been crushed.

of trafficking in opium by possession of an amount between fourteen and twenty-eight grams. The jury convicted Defendant of the remaining charge of trafficking in opium by possession of an amount between fourteen and twenty-eight grams. The trial court sentenced Defendant to a term of 90 to 120 months in prison. Defendant filed written notice of appeal on 10 September 2015.

Defendant concedes that, while her written notice of appeal was timely filed, it was defective because her trial counsel did not state in Defendant's notice of appeal the court to which the case was being appealed, did not demonstrate that a copy of the notice had been served upon the State, and incorrectly stated that Defendant sought to appeal the verdict, rather than the trial court's judgment. *See* N.C.R. App. P. 4(a)(2) and (b) (providing that notice of appeal may be taken by "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties[;]" and that the notice of appeal "shall designate the judgment or order from which appeal is taken and the court to which appeal is taken."). In recognition of these defects in Defendant's notice of appeal, Defendant filed a petition for writ of *certiorari* contemporaneous with the filing of her appellate brief asking this Court to review the trial court's judgment. The State does not oppose issuance of the writ and, in our discretion, we allow Defendant's petition for writ of *certiorari*.

Defendant first contends the trial court lacked jurisdiction to try her for trafficking in opium by possession of an amount between fourteen and twenty-eight grams where Defendant had only been indicted for a possession offense. We disagree.

"A challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

N.C. Gen. Stat. § 15A-924(a)(5) (2015) provides that a criminal pleading must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .

"In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46 (1998). An indictment is fatally defective if it "wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citation omitted) (alteration in original). "[I]f the indictment at issue is fatally defective, the superior court lacks subject matter jurisdiction over

the case" for that offense. *State v. Williams*, __ N.C. App. __, __, 774 S.E.2d 880, 883 (2015).

N.C. Gen. Stat. § 90-95(h)(4) makes it unlawful to traffic in opium or heroin, and provides in part that:

> Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate . . . including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:
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> . . . .
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> b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000) . . . .

See N.C. Gen. Stat. § 90-95(h)(4)(b.) (2015). "The crime of trafficking in opium, N.C. Gen. Stat. § 90-95(h)(4), contains two essential elements. Defendant must engage in the '(1) knowing possession (either actual or constructive) of (2) a specified amount of [opium].'" *State v. Hunt*, ___ N.C. App. ___, ___, 790 S.E.2d 874, 878 (2016) (quoting *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987)) (alteration in original).

The indictment at issue in this case read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named

> above[,] the defendant named above unlawfully, willfully and feloniously did possess fourteen grams or more, but less than twenty-eight grams of opium or opiate, or salt, compound, derivative, or preparation of opium or opiate, or mixture containing such substance.

Defendant does not dispute the fact that the indictment alleges the essential elements of the offense of trafficking in opium by possession of an amount between fourteen and twenty-eight grams. Rather, Defendant contends the indictment was defective for failing to include the name of the offense, "trafficking," which she argues was necessary to provide notice to Defendant that she was being tried for trafficking, rather than a possession offense. Furthermore, Defendant contends this omission is not cured by the fact that the section of the indictment listing the offense contained (1) the words "Trafficking, Opium or Heroin," (2) the statutory subdivision identifying the offense of trafficking in opium or heroin, and (3) the class of felony corresponding to the offense of trafficking in opium by possession of an amount between fourteen and twenty-eight grams.

Defendant cannot point to any authority in support of her contention that the indictment required more than asserting "facts supporting every element of [trafficking in opium by possession of an amount between fourteen and twenty-eight grams] and the defendant's commission thereof[.]" *See* N.C.G.S. § 15A-924(a)(5). "Trafficking" is the name of the offense, not an element to be proven at trial. Even assuming that providing the *name* of the offense was necessary to provide notice to

Defendant of the offense she was accused of committing, Defendant was provided such notice because the charging instrument explicitly listed "Trafficking, Opium or Heroin" as the offense Defendant was accused of committing. The indictment alleged all that was required to try Defendant for the offense of trafficking in opium by possession of an amount between fourteen and twenty-eight grams. Defendant's argument is without merit.

Defendant next contends the trial court committed plain error by instructing the jury on a crime for which Defendant had not been charged; namely, trafficking in opium. Given our determination that Defendant was, in fact, sufficiently charged with trafficking in opium by possession, this contention is similarly without merit. As a result, we find that Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).