IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-287

Filed: 1 November 2016

Wilson County, Nos. 14 CRS 51791; 15 CRS 00002

STATE OF NORTH CAROLINA

v.

TYQUAN LEE HINES

Appeal by defendant from judgment entered 6 August 2015 by Judge Milton F. Fitch in Wilson County Superior Court. Heard in the Court of Appeals 24 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Erin O'Kane Scott, for the State.*

*Gilda C. Rodriguez for defendant-appellant.*

TYSON, Judge.

A jury found Tyquan Lee Hines ("Defendant") guilty of possession of phencyclidine ("PCP") and having attained habitual felon status. We find no error in the jury's verdict or the judgment entered therein. We dismiss Defendant's ineffective of assistance of counsel claim without prejudice.

## I. Background

The State adduced evidence that the Wilson County Police Department entered into a "trespassing agreement" with Summerset Court Apartments, under which officers would patrol the apartment grounds for non-residents and arrest trespassers. On the night of 11 May 2014, Officer Amanda Escamilla and Detective Chelsea Sanders encountered Defendant and three other men at the apartment complex. The officers approached the group and asked them whom they were visiting. Detective Sanders noted "a strong chemical odor" suggestive of PCP coming from the group. Two of the men walked away from the officers, leaving Defendant and Michael Taylor. Defendant said that he was visiting a cousin but could not provide a name or an apartment number. The officers advised Defendant and Taylor that they were trespassing and ordered them to leave. As Defendant walked past Detective Sanders, she identified him as the source of the suspicious odor and told Officer Escamilla about the "chemical smell coming from [Defendant]."

Defendant and Taylor reached the opposite side of the apartment complex and began "yelling" or "screaming" at a volume Officer Escamilla believed was in violation of the city noise ordinance. The officers approached the two men a second time "for the suspicion of the smell of PCP" and to "tell[] them to keep it down because it was so late and people were sleeping." After confirming the "real sweet chemical smell" noted by Detective Sanders, Officer Escamilla informed Defendant that she intended to search him based on the "smell of narcotics on his person." Defendant refused, and

a "short scuffle" ensued. As the officers were placing Defendant in handcuffs to be searched, they saw him "crumbling up a cigarette and dropping it . . . to the cement. The butt fell on the ground but the rest of the cigarette fell in the back part of his pocket." As Officer Escamilla retrieved the cigarette, she "could see that it was oily" and again noted the "chemical smell." The cigarette was admitted into evidence at trial along with a glass vial with cigarette residue found in Defendant's pocket. Officer Escamilla testified that users typically ingest PCP by smoking a cigarette or marijuana cigarette laced with the substance, which she described as "oily."

North Carolina State Crime Laboratory forensic chemist Nicole Manley analyzed the cigarette seized from Defendant on 11 May 2014. She observed a "dried liquid residue" on the cigarette and noted the "very distinct odor" of PCP. Subsequent tests confirmed the presence of one-half gram of PCP. A copy of Manley's lab report was admitted and published to the jury.

Court adjourned for the day at the conclusion of the State's case-in-chief. The next morning, defense counsel moved to suppress the evidence obtained by Officer Escamilla and Detective Sanders on the ground that the stop and search violated the Fourth Amendment. The court held a suppression hearing out of the jury's presence and denied Defendant's motion. Defendant made a motion to dismiss for insufficient evidence, which was also denied.

Defendant testified in his own defense and asserted the officers had no reason to stop him or subject him to a search because he was visiting his family members at the apartment complex and not trespassing. Defendant admitted having smoked PCP approximately twelve hours before his encounter with the officers on 11 May 2014. He also admitted that he "crumbled up the cigarette while they [were] trying to . . . put [him] in handcuffs." Asked by the prosecutor, "What was on that cigarette," Defendant replied, "PCP, sir." The court denied Defendant's renewed motion to suppress and motion to dismiss at the conclusion of all the evidence.

After the jury returned its guilty verdict on the possession of PCP charge, the trial proceeded to the habitual felon phase. The State introduced certified copies of three judgments reflecting Defendant's guilty pleas to felonious possession with intent to sell or deliver marijuana on 23 April 2003, 12 January 2005, and 10 February 2010. A deputy clerk of the Wilson County Superior Court attested to certifying the judgments after retrieving them from the court files. The jury found Defendant to be a habitual felon. The trial court sentenced Defendant as a habitual felon with a prior record level IV to an active prison term of thirty-eight to fifty-eight months. Defendant filed timely notice of appeal from the judgment.

## II. Issue

Defendant claims the trial court erred or abused its discretion in denying his counsel's request for a continuance in order to have additional time to prepare for

trial. Defendant argues the court's ruling deprived him of effective assistance of defense counsel and resulted in a miscarriage of justice.

## III. Standard of Review

Generally the trial court's denial of a motion for a continuance is reviewed only for abuse of discretion. *E.g., State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977). When a continuance is sought for the purpose of preserving a constitutional right, the standard of review is *de novo*. *State v. Little*, 56 N.C. App. 765, 767, 290 S.E.2d 393, 395 (1982).

## IV. Motion to Continue

The transcript reflects that when Defendant's case was called for trial on the afternoon of 5 August 2015, his counsel made an oral motion to continue. The court then heard from the parties as follows:

> [COUNSEL]: Judge, I respectfully move this Court to continue this matter based on the following: [Defendant] was assigned to me, I was appointed to his case in the early part of the year. I note that he was about to serve his sentence in North Carolina Department of Adult Corrections [sic] at that point in time where he stayed until –
>
> [PROSECUTOR]: July 7.
>
> [COUNSEL]: -- July 7 of this year.
>
> Judge, I know that he was not able to get in to have a meaningful conversation with me about his case. I did not know his whereabouts until last week when I was told by [the prosecutor] exactly when he got out, had not seen

him, Judge, and would not have had an opportunity to see him.

[Defendant] tells me in speaking with him today and on yesterday that he has a number of witnesses that he would also like to have subpoenaed and testify on his behalf and there are a number of issues that would proceed.

There's also a habitual felony enhancement the State intends to proceed on. Very serious matter and deserves its full attention and I cannot effectively advocate for the young man if I have not had an opportunity to speak with the Defendant since January or February.

. . . .

THE COURT: Did you ever go to D.O.C. to see your client?

[COUNSEL]: I had no way of knowing exactly where he was.

THE COURT: If you knew that he was in D.O.C. just like if you know that he's in the Wilson County Jail, you have an obligation to go see your client.

[COUNSEL]: Yes, sir, Your Honor. Judge, I was aware of that but I honestly did not know where he was or what his status was, did not know.

. . . .

THE COURT: . . . What says the State?

[PROSECUTOR]: Your Honor, having brought my witness back, I would oppose it without argument.

THE COURT: You started off by saying having brought my witness back. Brought your witness

> back from where?
>
> [PROSECUTOR]: . . . [S]he was on vacation and then she's been in Kinston today with her mother in the hospital . . . .
>
> THE COURT: How long has it been set for trial?
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> [PROSECUTOR]: It was continued from the April 1st Administrative calendar to this trial date.
>
> THE COURT: From April to this trial date?
>
> MR. STADIEM: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Motion denied. Exception noted.

In his brief to this Court, Defendant acknowledges his counsel was assigned to represent him on the possession of PCP charge on 12 May 2014, and that counsel's appointment was extended to the habitual felon charge on 26 January 2015.

Defendant concedes he failed to file a written motion for continuance "on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins" as required by N.C. Gen. Stat. § 15A-952(c) (2015), and that this failure "constitutes a waiver of the motion" under N.C. Gen. Stat. § 15A-952(e) (2015). However, subsection (e) allows the trial court to overlook the waiver in its discretion. *Id.*

Presuming, without deciding, counsel's oral motion on the morning of trial was both proper and sufficient to assert a constitutional claim, the following standard applies:

> "It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). A defendant must "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. Thomas*, 294 N.C. 105, 113, 240 S.E.2d 426, 433 (1978) (citation omitted).

*State v. Rogers*, 352 N.C. 119, 124-25, 529 S.E.2d 671, 674-75 (2000).

"To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (citation omitted). N.C. Gen. Stat. § 15A-952(g) (2015) requires the trial court to consider whether the denial of continuance "would be likely to result in a miscarriage of justice" or whether "the case taken as a whole is so unusual and so complex. . . . that more time is needed for adequate preparation."

We find no error or abuse of discretion here. As the trial court observed, Defendant and his counsel had ample time to consult and prepare a defense. *See Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336. Defendant's brief to this Court

characterizes counsel's failure to contact him while he was in prison as "inexcusable." Nothing in the record suggests Defendant made any efforts to contact counsel during his incarceration. Moreover, Defendant was released from prison on 7 July 2015, almost one month prior to his trial date. The charges at issue were neither unusual nor legally or factually complex. Defendant's argument is overruled.

V. Ineffective Assistance of Counsel

Defendant also claims he received ineffective assistance of counsel ("IAC") in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 19 and 23 of the North Carolina Constitution. *See, e.g.*, *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985). Should this Court determine the "cold record" on appeal does not allow a full assessment of counsel's performance, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), Defendant asks this Court to dismiss his IAC claim without prejudice.

To support an IAC claim, a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that this deficiency had a probable impact on the outcome of the trial. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. "In bringing an [IAC] claim based on the failure to adequately present a defense, the central question is whether a supportable defense could have been developed. The burden of showing the probability that this defense existed is

on the defendant." *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) (citation omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *Fair*, 354 N.C. at 166, 557 S.E.2d at 524.

However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [post-conviction] proceeding." *Id.* at 167, 557 S.E.2d at 525; *accord State v. Pemberton*, 228 N.C. App. 234, 242-43, 743 S.E.2d 719, 725 (2013).

As specific grounds for asserting IAC, Defendant points to counsel's failure to file timely pre-trial motions to continue his trial and to suppress the evidence obtained by Officer Escamilla after stopping him on 11 May 2014. Defendant further faults counsel for failing to communicate with him prior to trial, to prepare him for cross-examination about his criminal record under N.C. Gen. Stat. § 8C-1, Rule 609 (2015), and to discourage him from testifying.

We conclude that the cold record before this Court does not allow us to effectively review Defendant's IAC claim. Defendant does not explain how a timely-filed motion to continue or motion to suppress would have met with more success than the motions actually made by counsel on the morning of trial and after the State's case-in-chief.

The record does not disclose whether counsel's apparent lack of communication with Defendant impeded counsel's preparedness or otherwise prejudiced his defense. *Cf. State v. Piche*, 102 N.C. App. 630, 638, 403 S.E.2d 559, 563-64 (1991) (denying IAC claim based on inadequate communication and preparation where "[d]efendant has not pointed to any prejudicial error of counsel, nor referred to any defense which would have changed the outcome of defendant's trial"); *cf. also State v. Covington*, 205 N.C. App. 254, 257-58, 696 S.E.2d 183, 186 (2010).

## VI. Conclusion

We find no error in the jury's verdict or in the judgments entered thereon. Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant makes no showing with regard to counsel's influence on his decision to testify or his responses on cross-examination. Defendant had an "absolute right to testify" in his own defense notwithstanding any contrary advice from counsel. *State v. Colson,* 186 N.C. App. 281, 283-84, 650 S.E.2d 656, 658 (2007). We dismiss this IAC claim, without prejudice to Defendant's right to file a motion for appropriate relief. *See Pemberton*, 228 N.C. App. at 245-46, 743 S.E.2d at 727.

NO ERROR IN PART; DISMISSED IN PART.

Judges STROUD and INMAN concur.

Report per Rule 30(e).