IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-418

Filed: 6 December 2016

Dare County, Nos. 13 CRS 949, 15 CRS 278

STATE OF NORTH CAROLINA

v.

MARCUS ANTONIO LOGAN

Appeal by defendant from judgments entered 10 September 2015 by Judge J. Carlton Cole in Dare County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen A. Blum, for the State.

M. Alexander Charns, for defendant-appellant.

CALABRIA, Judge.

Marcus Antonio Logan ("defendant") appeals from judgments entered upon jury verdicts finding defendant guilty of possession with intent to sell or deliver heroin, selling or delivering heroin, and attaining the status of an habitual felon. The trial court did not err by failing to recuse itself, by denying defendant's motions to dismiss, or in sentencing. Defendant was not denied his right to effective assistance of counsel.

I. Background

Defendant was indicted 28 October 2013 on one count of possession with intent to sell or deliver heroin and one count of selling or delivering heroin. Defendant's charges made him eligible to be indicted as an habitual felon.

The State offered defendant a plea bargain. Defendant's attorney reviewed the consequences of a trial with defendant, along with potential sentencing as an habitual felon. At the hearing, the trial court stated that it was willing to try the case, since both attorneys were competent, but advised defendant to consider his attorney's recommendations.

The trial court stated in pertinent part:

> THE COURT: . . . I can assure you that Ms. Simmons is an outstanding attorney. She's been a prosecutor here, I have tried cases with her. She knows what the hell she is doing. And sometimes when you dig your hole you've just got to stay there and work your way out of it. Mr. Cruden is also an outstanding attorney. So I mean, this is a case I would be happy to try, got two good attorneys.
>
> Going back to my days when I was practicing law when I was a criminal attorney, trying to deal with my client and work with the prosecutor, you know, and the complexity, and I was pulling my hair out. And I talked to an old attorney who was a friend of mine and he said, J.C., he said, you can't make chicken salad out of chicken shit, no matter how you try, you just can't do it. So I mean, she can be superwoman attorney but if all she's got to work with is chicken shit, that is all she's got. She cannot make chicken salad out of that mess.
>
> I will strongly-- and I will let you-all go back out-- I will strongly suggest that you listen to her and if you want to roll the dice and go to trial as a habitual felon, you have got

> that right. Nobody can take that away from you. And, in addition you have got an outstanding attorney who can try the case for you. So I'm not going to waste anymore--
>
> DEFENDANT: May I speak?
>
> THE COURT: I'm not going to waste anymore of the rest of these folks' time while you try to decide how much time you are going to get, how much time. Take him out, Mr. Sheriff.

Defendant declined the plea agreement, and moved to recuse the judge based upon his comments. At the recusal hearing, the judge emphasized that no jurors were present during the plea hearing and stated that "the Court was trying to explain to Mr. Logan what he was working with." Defendant disagreed, contending that the judge's comments were "personal[,]" "humiliating[,]" and "embarrassing," because people were laughing. The trial judge also stated, "None of this is personal for me…. I was trying to explain to you that these attorneys can only work with the facts that they have before them. They cannot manufacture. It was nothing personal directed at you." The trial court entered an order denying the motion to recuse for good cause, stating that "the Defendant's guilt or innocence will be determined by a jury of his peers and the Court will only be ruling on matters of law."

Defendant was indicted for having attained the status of habitual felon, and tried in Dare County Superior Court. At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss the charges, alleging insufficiency of the evidence. The trial court denied these motions. The jury returned

verdicts finding defendant guilty of possession with intent to sell or deliver heroin, selling or delivering heroin, and having attained the status of an habitual felon. On 10 September 2015, the trial court sentenced defendant to a minimum of 101 months and a maximum of 134 months for selling or delivering heroin, and a minimum of 89 months and a maximum of 119 months for possession with intent to sell or deliver, to run consecutively, in the Department of Adult Correction. Defendant appeals.

II. Motion to Recuse

In his first argument, defendant contends that the trial court erred by denying his pre-trial motion to recuse. We disagree.

A. Standard of Review

The standard of review for a denial of a motion to recuse is abuse of discretion. *State v. Inman*, 39 N.C. App. 366, 369, 249 S.E.2d 884, 886 (1979) (holding that the trial judge "did not abuse his discretion by refusing to recuse himself"). "An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *State v. Sloan*, 180 N.C. App. 527, 532, 638 S.E.2d 36, 40 (2006) (citation and quotations omitted), *aff'd per curiam,* 361 N.C. 584, 650 S.E.2d 594 (2007).

B. Analysis

A defendant has a "right to be tried before a judge whose impartiality cannot reasonably be questioned." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). A judge must disqualify him- or herself from presiding over a criminal trial or

proceeding only if he or she is prejudiced against the moving party, in favor of the adverse party, closely related to the defendant, or "[f]or any other reason unable to perform the duties required of him in an impartial manner." N.C. Gen. Stat. § 15A-1223 (2015). The burden is on the party moving for recusal to "demonstrate objectively that grounds for disqualification actually exist." *Fie*, 320 N.C. at 627, 359 S.E.2d at 775. The moving party may meet this burden by showing "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *Id.*

In *Fie*, the judge wrote a letter to a district attorney requesting that a grand jury consider two defendants. The judge drafted the letter after presiding over a different trial and hearing witness testimony that indicated the defendants might be implicated in a crime. The letter, in effect, initiated criminal proceedings against the defendants. Our Supreme Court held that a perception could be created in the mind of a reasonable person that the judge thought the defendants were guilty of the crimes with which they were charged and that it would be difficult for the defendants to receive a fair and impartial trial before that same judge. Because of this perception, it was error not to recuse that judge upon a recusal motion. The Court did not reach the question of whether the judge was *actually* impartial. *Fie,* 320 N.C. at 628, 359 S.E.2d at 775-76.

In the instant case, defendant did not show by substantial evidence that the judge had a personal bias, prejudice, or interest such that he would be unable to rule impartially. The judge's comments regarding making "chicken salad" out of "chicken shit" were not referencing defendant or the evidence of his case specifically. Rather, the comments were general and reference the fact that defendant would be indicted as an habitual felon with a higher presumptive sentence if he decided to go to trial instead of taking the plea agreement. The judge's comments would not create the perception in the mind of a reasonable person that the judge thought defendant was guilty and that it would be difficult for him to receive a fair and impartial trial before the judge. Defendant has not met his burden of demonstrating that the trial court had a personal bias or other threat to its impartiality, and as such, we hold that the trial court did not err in denying defendant's motion for recusal.

This argument is without merit.

III. Sentencing

In his second argument, defendant contends that the trial court erred in sentencing defendant to a consecutive sentence which was a harsher punishment than required by law. We disagree.

A. Standard of Review

"When a defendant assigns error to the sentence imposed by the trial court, our standard of review is 'whether [the] sentence is supported by evidence introduced

at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)).

B. Analysis

N.C. Gen. Stat. § 15A-1444(a1) provides in part:

> A defendant who has been found guilty… is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing *only if the minimum sentence of imprisonment does not fall within the presumptive range* for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1) (2015) (emphasis added). In the instant case, defendant's sentences were imposed within the presumptive range, and defendant has not filed a petition for writ of certiorari. In addition, defendant concedes that it was within the trial judge's discretion to impose concurrent or consecutive sentences. Because defendant has no appeal as of right from a sentence imposed within the presumptive range, we dismiss this argument.

IV. Motion to Dismiss

In his third argument, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

A. Standard of Review

"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).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"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).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

Defendant contends that the State failed to prove each essential element of the charges against defendant. Specifically, in his motions to dismiss at trial, defendant

alleged that "the critical issue and the element the State has woefully failed to prove is possessing the substance."

Our General Statutes provide that it is "unlawful for any person: . . . (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance; [or] (3) To possess a controlled substance." N.C. Gen. Stat. § 90-95(a) (2015). Thus, the State had the burden of presenting evidence that defendant created, sold, delivered, or possessed with intent to sell or deliver, heroin, and that defendant in fact possessed heroin. The only argument raised by defendant in his motions to dismiss, and thus the only argument we will consider, is whether the State presented substantial evidence of the element of possession.

In the instant case, the State presented circumstantial evidence that defendant placed the heroin on the ground for the informant to pick up. The State presented evidence that defendant possessed the heroin by showing that he brought it to the meeting location, pointed it out on the ground to the informant, and received payment from the informant, who then picked up the heroin from the ground. This evidence, reviewed in the light most favorable to the State and giving the State the benefit of every reasonable inference, constituted substantial evidence of the element of possession. The trial court therefore did not err in denying defendant's motion to dismiss.

This argument is without merit.

V. Effective Assistance of Counsel

In his fourth argument, defendant contends that he was denied his right to effective assistance of counsel. Specifically, defendant contends that his right to effective assistance of counsel was denied when the prosecutor elicited on examination of the informant that defendant's attorney (who previously was a prosecuting attorney) dismissed some of the informant's drug charges. We disagree.

A. Standard of Review

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a 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.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotations omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

B. Analysis

When the State elicited the testimony at issue, defendant's attorney did not object, move to strike, ask for a mistrial, or move to withdraw. Defendant argues that his attorney became a *de facto* witness, and that her subsequent question to the informant about their "long history" continued to make her a witness. Defendant

argues that the trial court should have held a hearing to determine the history of the informant and defendant's attorney and whether defendant was aware of it.

To prevail on a claim of ineffective assistance of counsel, defendant must show prejudice; that but for the alleged poor performance, there is a reasonable probability a different result would have been reached at trial. *Allen*, 360 N.C. at 316, 626 S.E.2d at 286.

In the instant case, defendant has failed to show there is a reasonable probability that without his attorney's alleged errors, the result of the proceeding would have been different. Defendant argues that the information elicited regarding his defense attorney dismissing some of the informant's prior charges when she served as a prosecutor undermined the attorney's credibility, was prejudicial, and made her a *de facto* witness in the trial. However, defendant fails to show how any of these arguments translate into a reasonable probability that the result of the proceeding would have been different. In the absence of a showing of prejudice, defendant's claim of ineffective assistance of counsel must fail.

This argument is without merit.

VI. Conclusion

The trial court did not err in denying defendant's motion to recuse, sentencing defendant to a consecutive sentence within the presumptive range, or denying his

motion to dismiss. Defendant was not denied his right to effective assistance of counsel.

NO ERROR IN PART, DISMISSED IN PART.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).