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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-500

Filed: 6 December 2016

Haywood County, Nos. 14 CRS 50262-63

STATE OF NORTH CAROLINA

v.

ANTHONY JASPER TOLLIVER

Appeal by defendant from judgment entered 25 September 2015 by Judge Mark E. Powell in Haywood County Superior Court. Heard in the Court of Appeals 19 October 2016.

*Roy Cooper, Attorney General, by Matthew L. Liles, Assistant Attorney General, for the State.*

*Michael E. Casterline for defendant-appellant.*

DAVIS, Judge.

Anthony Jasper Tolliver (“Defendant”) appeals from his convictions for trafficking in methamphetamine, possession of marijuana, and possession of drug paraphernalia. On appeal, he contends that he received ineffective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error.

**Factual Background**

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On 24 January 2014, Troopers Andrew Waycaster and Chris Morgan of the North Carolina Highway Patrol were in a marked patrol vehicle heading eastbound on I-40 in Haywood County. A trained canine assigned to Trooper Morgan was also in the patrol vehicle. At approximately 2:12 p.m., the troopers observed a black Ford Expedition that was traveling five miles over the speed limit and following very closely behind another vehicle. The troopers saw the Expedition continue to move closer to the vehicle in front of it. After the driver of the Expedition had to apply his brakes to keep from hitting the other vehicle, the troopers activated their blue lights. The Expedition pulled over to the shoulder of the road, and Trooper Waycaster approached the passenger side of the vehicle.

As he approached the Expedition, Trooper Waycaster noticed that the back of the vehicle was full of luggage, obstructing his view of that portion of the vehicle. Defendant was riding in the back of the Expedition next to the luggage, and two other men — Levi Esh, the driver, and Lee Burgess, another passenger — were sitting in the front seats of the vehicle. Trooper Waycaster noticed that Defendant was exhibiting “nervous behavior” by “moving around in his seat.”

Trooper Waycaster asked Defendant to roll down the back passenger side window and Burgess to roll down the front passenger side window. Once the windows were rolled down, Trooper Waycaster detected the odor of marijuana emanating from the interior of the Expedition.

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After obtaining Esh's driver's license, Trooper Waycaster asked him to exit the vehicle. He then asked Esh if he could search the Expedition, and Esh consented to the search. The two troopers decided to handcuff all three men — Defendant and Burgess outside the vehicles and Esh in the front seat of the patrol car. Trooper Waycaster later testified that this handcuffing was for safety purposes given that he and Trooper Morgan were outnumbered by the Expedition's occupants.

Trooper Morgan then deployed his canine to sniff the interior of the Expedition. After the dog alerted to the presence of drugs, Trooper Waycaster conducted a search of the vehicle. He found a large knife in the front passenger side of the vehicle and a small, black nylon case next to where Defendant had been sitting. The nylon case contained a glass smoking pipe with white residue and a small plastic bag with a crystalline substance inside of it. Trooper Waycaster asked Defendant if the case was his, and Defendant responded that the case did not belong to him.

Additional troopers arrived at the scene to provide assistance as the Expedition was being searched. Among the items found during the search were a large black suitcase with a T-shirt tied around the handle and a smaller red suitcase.

Trooper Waycaster removed the black suitcase from the back of the vehicle and set it on the ground near where Defendant and Burgess were standing. He opened the front zipper of the black suitcase and found a small glass jar containing marijuana. Gesturing to the jar of marijuana and the black suitcase, he asked,

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“Whose is this?” Defendant responded that the suitcase and jar of marijuana belonged to him. He further stated that “he thought he had smoked all the marijuana in California[,]” and that he “didn’t mean to bring any with him.”

As the troopers continued to search through the luggage in the Expedition, they found a substantial quantity of methamphetamine. At that point, Trooper Waycaster directed Esh, Burgess, and Defendant to all stand next to the patrol car, and he advised them collectively of their *Miranda* rights. Trooper Waycaster then asked each of them individually whether they understood and wanted to waive those rights. All three men stated that they understood their rights and desired to waive them.

The troopers subsequently determined that the black suitcase also contained a green metal box with a lock on it. Trooper Waycaster asked Defendant if he had the key to the lock, but Defendant denied knowing anything about the metal box. The troopers unlocked the box with bolt cutters. Inside the box, they discovered several glass pipes, a set of digital scales, and a bag containing a crystalline substance that was later determined to be methamphetamine.

Upon searching the red suitcase, the troopers discovered a key chain with a key that matched the lock on the green metal box. The red suitcase also contained a

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hard hat with the initials “A.J.”<sup>1</sup> as well as some receipts that were later matched to a debit card in Defendant’s wallet.

Defendant, Esh, and Burgess were all placed under arrest at a nearby service station. Special Agent Clayton Haines with the Drug Enforcement Administration (“DEA”) arrived at approximately 3:55 p.m. to interview the three men at the service station. At the beginning of his interview with Defendant, Special Agent Haines asked him whether he understood the *Miranda* warning that Trooper Waycaster had given to him, and Defendant responded affirmatively. Special Agent Haines then asked if Defendant “wanted to talk to [him,]” and Defendant once again responded in the affirmative.

During the interview, Defendant told Special Agent Haines that he was a construction worker who had left California two days earlier and was driving back to Statesville, North Carolina, where his construction company was based. Special Agent Haines asked Defendant if anything in the vehicle belonged to him, and Defendant admitted that the glass jar containing marijuana was his.

Special Agent Haines then informed Defendant that there was a metal box in the black suitcase and a key in the red suitcase that opened the metal box. Defendant responded that he “didn’t know how any of those got there.”

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<sup>1</sup> The initials “A.J.” corresponded to Defendant’s first and middle names — Anthony Jasper.

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As Special Agent Haines asked additional questions, Defendant — who had at first been answering “freely and openly” — became noticeably nervous and fidgety. For this reason, Special Agent Haines ended the interview.

On 30 March 2015, Defendant was indicted on charges of trafficking in methamphetamine, possession of marijuana, and possession of drug paraphernalia. Beginning on 21 September 2015, a jury trial was held before the Honorable Mark E. Powell in Haywood County Superior Court. Prior to jury selection, Defendant’s appointed attorney, Roy Patton, Jr., informed the Court of his desire to move for the suppression of the statements Defendant made to Trooper Waycaster before he was advised of his *Miranda* rights and the later statements he made to Special Agent Haines. However, Patton did not file a written motion to suppress until the morning of 22 September 2015 — after the trial had begun. The motion to suppress contained the following pertinent assertions:

2. The stop occurred at approximately 2 12 pm[.] The defendant was advised of his rights [at] 3 03 pm[.] During the intervening 1 hour and 9 moments [sic] there were four State Troopers at the scene, the defendant(s) were in handcuffs and were being asked repeatedly questions pertaining to the location of controlled substances within the vehicle and its contents and the ownership of various pieces of luggage and baggage in which there appeared to be items of illegal drugs and paraphernalia[.] These facts appear both in the statements of Trooper Waycaster and each other officer, as well as in the provided videos[.]
3. Without regard to the other defendants charged, this defendant was being questioned by the officers repeatedly

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prior to hearing his Miranda rights, and no statement made by him during this period of 1 09 hour [sic] nor any later statement should be admitted, as any later statement would have come to the officers as a fruit of the forbidden questions[.]

The trial court denied the motion to suppress by order dated 25 September 2015, which the court subsequently amended on 15 October 2015. In its amended order, the trial court determined that Defendant's motion was untimely, was not supported by an affidavit, and "[did] not allege a legal basis for the motion and [did] not as a matter of law support the grounds alleged[.]"

Patton then asked the court to allow him to withdraw and declare a mistrial. Defendant stated his belief that he would "do better off" with a different attorney. After hearing from all parties, the trial court denied Patton's motion to withdraw.

During the trial, Trooper Waycaster testified that he charged Defendant with trafficking in methamphetamine because of the crystalline substance the troopers found in the green metal box. He stated that because Defendant had admitted that the glass jar of marijuana belonged to him, Trooper Waycaster concluded that the black suitcase also belonged to Defendant. Trooper Waycaster further testified that several of Defendant's personal belongings — receipts linked to his debit card number and a hard hat bearing his initials — were found in the red suitcase along with a key that unlocked the green metal box.

On 25 September 2015, the jury found Defendant guilty of trafficking in methamphetamine, possession of marijuana, and possession of drug paraphernalia. The trial court sentenced Defendant to 73 to 90 months imprisonment. Defendant gave oral notice of appeal in open court.

### **Analysis**

On appeal, Defendant's sole argument is that he was deprived of effective assistance of counsel because his trial counsel failed to properly file a motion to suppress. He contends that had his attorney filed a timely written motion to suppress, the trial court would have granted the motion and suppressed both his initial statements to Trooper Waycaster and his subsequent statements to Special Agent Haines.

In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citations and quotation marks omitted), *cert. denied*, \_\_ U.S. \_\_, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012).

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.



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

The warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), “appl[y] only in the situation where a defendant is subject to custodial interrogation.” *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). “Not all restraints on freedom of movement amount to custody for purposes of *Miranda*.” *Howes v. Fields*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1181, 1189, 182 L. Ed. 2d 17, 28 (2012). “Circumstances supporting an objective showing that one is ‘in custody’ might include a police officer standing guard at the door, locked doors or application of handcuffs.” *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001).

The State contends that Defendant was not actually in custody at the time he responded to Trooper Waycaster’s questions. While conceding that Defendant was in handcuffs at the time these statements were made, the State asserts that the occupants of the Expedition were handcuffed solely for the safety of the officers due to the fact that the three men outnumbered the troopers and, therefore, that no *Miranda* warnings were required at that time. Defendant argues, conversely, that he was, in fact, in custody during this time period and that, for this reason, Trooper Waycaster’s questioning of Defendant was in violation of *Miranda* and its progeny.

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We need not resolve this issue because even assuming, without deciding, that Defendant's initial statements to Trooper Waycaster would have been deemed inadmissible had a proper motion to suppress been filed, Defendant has failed to show that he was prejudiced by his attorney's failure to file such a motion. This is so for two reasons. First, similar incriminating information was subsequently elicited from Defendant by Special Agent Haines, and we reject Defendant's argument that any *Miranda* violation that may have occurred as a result of Trooper Waycaster's questioning of him tainted his subsequent statements to Special Agent Haines. Second, in their search of the Expedition, the troopers discovered evidence linking Defendant to the green metal box containing methamphetamine that was found inside the black suitcase.

It is clear from the record that Defendant (1) was eventually read his *Miranda* rights by Trooper Waycaster; (2) confirmed to Special Agent Haines that he understood these rights; and (3) proceeded to waive his rights by agreeing to speak with Special Agent Haines. In his statements to Special Agent Haines, Defendant acknowledged his ownership of the glass jar of marijuana that was found in the black suitcase just as he had done in response to the questioning by Trooper Waycaster.

Defendant contends that the improper questioning by Trooper Waycaster tainted his subsequent statements to Special Agent Haines, thereby rendering them inadmissible. In analyzing this argument, we are guided by the United States

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Supreme Court's decision in *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985).

In *Elstad*, the Supreme Court held as follows:

It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

*Id.* at 309, 84 L. Ed. 2d at 232.

Therefore, a later statement otherwise admissible is only deemed to have been tainted "where an earlier inadmissible confession is coerced or given under circumstances calculated to undermine the suspect's ability to exercise his or her free will." *State v. Barlow*, 330 N.C. 133, 139, 409 S.E.2d 906, 910 (1991); *see also State v. Edgerton*, 328 N.C. 319, 321, 401 S.E.2d 351, 352 (1991) ("The questioning of the defendant by Mr. Perry did not taint the confession given to Mr. Bowden. Even if the defendant was in custody when questioned by Mr. Perry there was no evidence that the questioning was coercive.").

In order to determine whether an earlier statement given by a defendant without a prior *Miranda* warning was coercive, we must consider a number of factors surrounding the giving of the earlier statement.

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Among these factors are whether the defendant was in custody when he made the statement; the mental capacity of the defendant; and the presence of psychological coercion, physical torture, threats, or promises. However, voluntariness is determined in light of the totality of the circumstances surrounding the confession. The presence or absence of one or more of these factors is not determinative.

*Barlow*, 330 N.C. at 140-41, 409 S.E.2d at 911 (internal citations omitted).

The record is devoid of any indication that Trooper Waycaster made any threats or promises that influenced Defendant's responses or that Defendant possessed a diminished mental capacity rendering him unable to understand why Trooper Waycaster was asking him whether the items belonged to him. Finally, there is no indication that any physical or psychological coercion was applied during this encounter.

Trooper Waycaster testified that he advised Defendant of his *Miranda* rights upon Defendant's admission of his ownership of the glass jar of marijuana. He explained how Defendant and the other two men then waived these rights.

[PROSECUTOR:] Did you advise these three people of their rights all at once?

[TROOPER WAYCASTER:] Yes, sir.

[PROSECUTOR:] Did you advise them of the right to remain silent?

[TROOPER WAYCASTER:] Yes, sir.

[PROSECUTOR:] Did you advise them if they said

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anything it could be used against them in a court of law?

[TROOPER WAYCASTER:] Yes, sir.

[PROSECUTOR:] Did you advise them that they had a right to an attorney?

[TROOPER WAYCASTER:] Yes, sir.

[PROSECUTOR:] Did you advise them if they couldn't afford one, that they would be provided one regardless of that?

[TROOPER WAYCASTER:] Yes, sir.

[PROSECUTOR:] And after you advised them of those rights, what happened next?

[TROOPER WAYCASTER:] I asked all three of them individually, not at the same time, if they understood and waived their rights.

[THE PROSECUTOR:] And then what happened next?

[TROOPER WAYCASTER:] They all three stated they understood and waived their rights.

Defendant's encounter with Special Agent Haines occurred approximately two hours after his questioning by Trooper Waycaster. During his testimony, Special Agent Haines explained how he confirmed that Defendant both understood and was willing to waive his *Miranda* rights, testifying as follows:

[PROSECUTOR:] All right. What did you and [Defendant] talk about?

[SPECIAL AGENT HAINES:] . . . I began by asking him if he understood his *Miranda* warning first; he stated that

he did. I asked him if he wanted to talk to me; he stated that he did.

Defendant then freely admitted to Special Agent Haines that the glass jar of marijuana belonged to him. Therefore, even assuming *arguendo* that a properly filed motion to suppress would have rendered Defendant's initial statements to Trooper Waycaster inadmissible, no valid basis would have existed for the trial court to likewise suppress Defendant's later admission to Special Agent Haines concerning his ownership of the jar of marijuana.

Furthermore, based on their search of the luggage contained in the Expedition, the troopers were able to link Defendant to the green metal box containing methamphetamine. On cross-examination, Trooper Waycaster testified as follows on this issue:

[MR. PATTON:] Now, in fact, you don't know who the owner of either quantities of methamphetamine you found and attributed to [Defendant] -- you don't actually know the owners of that, do you?

.....

[TROOPER WAYCASTER]: Based on . . . the admission to the amount of -- the small amount of marijuana in the glass jar in the suitcase where the green box was located with the large amount of methamphetamine and the keys or key that unlocked the black Master lock, the receipts found that matched the debit card that was in [Defendant's] wallet, along with his Social Security card identifying his wallet . . . . The receipts, the key that unlocked the lock that was on the green box that was in the suitcase that [Defendant] claimed ownership of the marijuana, I would

say that that was his methamphetamine and marijuana.

In sum, the evidence shows that (1) Defendant admitted the glass jar of marijuana found in the black suitcase belonged to him; (2) both the hard hat bearing Defendant's initials and receipts tied to his debit card were found in the red suitcase along with a Master key; and (3) the Master key unlocked the green metal box that was located in the black suitcase. This evidence allowed the jury to find Defendant guilty of the charges for which he was convicted. Thus, Defendant is unable to show any prejudice from his trial counsel's actions.

Accordingly, we conclude that Defendant's ineffective assistance of counsel claim lacks merit. *See State v. Allen*, 233 N.C. App. 507, 507, 756 S.E.2d 852, 855 (2014) ("A claim of ineffective assistance of counsel will be denied where defendant cannot show how his counsel's error prejudiced him.").

### **Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR

Judges INMAN and ENOCHS concur.

Report per Rule 30(e).