IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-509

Filed: 6 December 2016

Wake County, No. 11 CRS 220929

STATE OF NORTH CAROLINA

v.

BRYAN ALAN JOHNSON

Appeal by defendant from judgment entered 26 March 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 October 2017.

Attorney General Roy Cooper, by Assistant Attorney General Alexander G. Walton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

TYSON, Judge.

Bryan Alan Johnson ("Defendant") appeals from his convictions of felonious possession of hydromorphone, felonious maintaining a vehicle for the unlawful keeping of controlled substances, and embezzlement of hydromorphone under N.C. Gen. Stat. § 90-108(a)(14). We find no error in part, vacate in part, reverse in part, and remand for resentencing. We deny Defendant's ineffective assistance of counsel claim.

I. Background

Around 8:30 a.m., Raleigh police officer C.M. Erving responded to a report of a person asleep at the wheel of a vehicle. Officer Erving arrived at Defendant's apartment complex and saw the door of a Chevrolet Blazer open. Defendant was slumped over in the driver's seat of the Blazer. He was wearing green scrubs and an identification badge from the Durham, North Carolina Veterans Administration Medical Center located in ("the Durham VA"). Defendant was employed as a licensed practical nurse at the Durham VA.

Defendant's face was "completely white in color." Officer Erving shook Defendant and did not get a response. He rubbed Defendant's sternum with his flashlight and Defendant awoke. Officer Erving testified Defendant's pupils were very constricted and pinpoint. He inquired whether Defendant was okay. Defendant replied he had completed a double shift, had taken a Vicodin, and was extremely tired. Officer Erving testified Defendant was under "some type of impairment." Defendant was slow to respond to questions. His mannerisms were lethargic and his speech was slurred.

Raleigh police officer J.R. Little and Sergeant Barbara Cojocar arrived. Officer Little testified Defendant was very slow to answer simple questions, and was not alert. Sgt. Cojocar described Defendant as a "little groggy" and "a little out of it."

A. Vehicle Search

The officers obtained Defendant's consent to search the Blazer. Officer Little and Sgt. Cojocar testified Defendant moved his hands as if he was trying to reach under his seat, "[a]lmost in a secretive manner." His movements were slow, and consistent with his mannerisms and speech. Sgt. Cojocar testified Defendant "appeared to be nervous, fidgety, and appeared to be quite interested in what was underneath the driver's seat."

The officers asked Defendant to exit from the vehicle. The Blazer was described as "squalid" and in disarray, with items strewn about. Under the driver's seat, Sgt. Cojocar found two orange pills, which were loose inside a white paper cup, five pills in blister packs, and two empty blister packs. The blister packs were labeled "Dilaudid Hydromorphone Hydrochloride, two milligrams," a Schedule II controlled substance. One of these seven pills was later analyzed, and was found to contain hydromorphone. The remaining pills were consistent with a pharmaceutical preparation containing hydromorphone.

Sgt. Cojocar also found three pills in a package labeled oxycodone under the driver's seat. One of the pills was later tested and found to contain oxycodone. The other two pills were indicative of oxycodone. A prescription bottle bearing a twelve digit prescription number, and containing two pills, was also found under the driver's seat. One of the pills was later tested and found to contain methadone, and the other pill was indicative of methadone. At trial, Defendant introduced a prescription for

methadone for his father, Robert Johnson, which bore the same prescription number. The hydromorphone, oxycodone, and methadone were all recovered from under the driver's seat of the Blazer.

The officers also found other prescription medications, which were not scheduled and controlled substances, inside the Blazer. Prescription medications were found contained in a bag and loose on the passenger seat. Two of the medications had originated from the Durham VA. The other medication originated from the Fayetteville VA, and was inside a prescription bottle bearing the name of Robert E. Johnson.

B. Apartment Search

The officers obtained Defendant's consent to search his apartment. The conditions inside the apartment were in extreme disarray. Officers found medical supplies bearing the VA logo as well as "small amounts of pills everywhere, both out of the bottle and in bottles." Defendant accessed his online pharmacy records with Sgt. Cojocar, but was unable to locate any prescriptions for the controlled substances found inside the Blazer. A small amount of marijuana was also recovered inside the apartment.

A hospital discharge bag was located in Defendant's bedroom. The bag contained two prescription bottles and eight loose pills. One of the bottles was for a prescription of citalopram, which had been prescribed to a female patient. Other

empty prescription bottles were found with the names of patients torn off. Numerous other prescription medications, which were not scheduled controlled substances, were found inside Defendant's apartment. Defendant was unable to provide a prescription for any of these medications. The officers also found a patient list identified as from the Durham VA, dated 23 August 2011, which contained names and medical information. One of the names on the list corresponded with the name on a medication found inside the apartment.

C. Chief Pendergrass's Testimony

Jane Pendergrass, the chief of pharmacy at the Durham VA, testified at trial. She testified licensed practical nurses, such as Defendant, are allowed to administer medications to patients. Controlled substances are stored inside a locked, computerized Omnicell machine. A password verification is required to access the medications stored inside.

The machine maintains a record of the dates and times medications are removed, to which patients the drugs are administered, the staff member who removed the drugs, and the amount removed. When a drug is "wasted," as refused or not taken by the patient, a staff member and witness must enter this information into the Omnicell.

On 4 September 2011 at 10:55 p.m., the evening before his arrest, Defendant, or someone using his password, removed five Dilaudid/hydromorphone tablets from

the Omnicell for a patient. One hour later, at 11:55 p.m., five more Dilaudid/hydromorphone tablets were removed from the machine for the same patient. Chief Pendergrass was unable to determine whether the Dilaudid/hydromorphone or oxycodone recovered from inside the Blazer came from the Durham VA. She testified the methadone pills found inside the Blazer did not originate from the Durham VA.

Chief Pendergrass testified that numerous of the State's exhibits, all non-controlled substances, were medications taken from the Durham VA. She testified the cup found under the driver's seat, which contained loose pills, was the type of cup used by the Durham VA for medication administration.

D. Defendant's Testimony

Defendant lived in Raleigh and traveled to Lillington every weekend to care for his brother, David Johnson, and their father, Robert Johnson, who both suffered from type 1 diabetes. Robert Johnson suffered from ulcerated sores on his feet and other ongoing medical issues. David Johnson had previously had part of his leg amputated. Defendant assisted his father and brother with their medications and changing their dressings. Defendant also suffered from type 1 diabetes and rheumatoid arthritis. He was prescribed medications for these conditions, including Vicodin for pain.

In 2011, Defendant owned a Volvo sedan vehicle. In early September, Defendant experienced car trouble, but was able to complete the drive to his family's home in Lillington. Defendant borrowed his father's Chevrolet Blazer, and drove that vehicle to work at the Durham VA on 4 September 2011. His shift began at 3:00 p.m. on 4 September 2011.

Defendant left the hospital around 6:00 a.m. on 5 September 2011, after working a double shift. He made stops at Walmart and Hardee's. When he arrived home, Defendant remained inside the Blazer to listen to a morning radio show, while eating his biscuit. He took a Vicodin tablet for pain. At some point, Defendant fell asleep while inside the Blazer.

Defendant testified that if patient refused to take his medications, he would place the "wasted" medication in the pocket of his scrub top. He acknowledged this was not an appropriate practice. While he intended to place the medications in the pharmacy return bin where they belonged, he often took the medications home.

Defendant also testified he was unaware of the Dilaudid/hydromorphone pills under the seat of the Blazer. He testified they could have belonged to his father or brother. The Blazer was used to transport them to and from medical appointments. During this time period, Defendant's father had been issued prescriptions for both Dilaudid and methadone.

Defendant's brother had been issued a prescription for oxycodone and was given hydromorphone following the amputation of his leg. Defendant picked up prescriptions for his father and brother as needed. Defendant denied taking any hydromorphone from the Durham VA.

The jury found Defendant guilty of felonious possession of hydromorphone, felonious maintaining a vehicle for the unlawful keeping of controlled substances, and embezzlement of hydromorphone under N.C. Gen. Stat. § 90-108(a)(14). The trial court sentenced Defendant to three concurrent six to eight month prison terms. These sentences were suspended and Defendant was placed on supervised probation for thirty-six momths. Defendant appeals.

II. Jurisdiction

Jurisdiction of right by timely appeal lies in this Court from final judgment of the superior court following a jury's verdict pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Defendant argues: (1) the trial court lacked jurisdiction to convict Defendant of felonious possession of hydromorphone, where the indictment did not allege he possessed more than four dosage units of the substance; (2) the trial court erred by denying his motion to dismiss the charge of embezzlement; (3) the trial court lacked jurisdiction to convict Defendant of the embezzlement charge where the indictment

was insufficient; (4) the trial court erred by instructing the jury it could convict Defendant of the embezzlement charge if the jury found the Durham VA was a practitioner when that theory was not alleged in the indictment; (5) the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle for the purpose of unlawfully keeping a controlled substance; (6) Defendant's attorneys provided ineffective assistance of counsel by failing to file a motion to suppress; and (7) the trial court erred by imposing a thirty-six month probationary term, where the maximum term was thirty months.

IV. Sufficiency of the Possession of Hydromorphone Indictment

Defendant argues the indictment purporting to charge him with felonious possession of hydromorphone failed to allege an essential element of the offense, that he possessed more than four dosage units of hydromorphone, and the trial court lacked jurisdiction to enter judgment on this offense.

A. Standard of Review

"Whether an indictment is fatally defective is a question of law reviewed by this Court *de novo*." *State v. Cobos*, 211 N.C. App. 536, 540, 711 S.E.2d 464, 467 (2011) (citation omitted). "[I]t is well-settled that the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion

was made in the trial division." *Id*. at 540, 711 S.E.2d at 467-68 (citation and internal quotation marks omitted).

"Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams,* 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

B. Analysis

If the amount or volume of a controlled substance allegedly possessed is an essential element of an offense, it must be properly alleged in the indictment. *Cobos*, 211 N.C. App. at 540-41, 711 S.E.2d at 468; *State v. Peoples*, 65 N.C. App. 168, 169, 308 S.E.2d 500, 501 (1983). Here, the indictment alleges that on 5 September 2011, Defendant "unlawfully, willfully and feloniously did possess a controlled substance, Hydromorphone, which is included in Schedule II of the North Carolina Controlled Substances Act. This act was done in violation of N.C.G.S. 90-95(a)(3)." Possession of less than four dosage units of hydromorphone is a Class 1 misdemeanor, while possession of more than four dosage units constitutes a Class I felony. N.C. Gen. Stat. § 90-95(d)(2) (2015).

In *State v. Partridge*, 157 N.C. App. 568, 569, 579 S.E.2d 398, 398-99, *disc. review improvidently allowed*, 357 N.C. 572, 597 S.E.2d 673 (2003), the defendant was convicted of felony possession of marijuana upon an indictment which merely alleged that he "did unlawfully, wilfully and feloniously possess a controlled

substance, marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act." This Court recognized that possession of less than a half-ounce of marijuana is statutorily classified as a Class 3 misdemeanor, possession of more than one-half ounce of marijuana is a Class 1 misdemeanor, and possession of more than one and one-half ounces of marijuana is a Class I felony. *Id*. at 571, 569 S.E.2d at 400. This Court held:

> Possession of more than one and one-half ounces of marijuana is thus an essential element of the crime of felony possession of marijuana. Therefore, because the indictment charging [the] defendant failed to allege [the] defendant was in possession of more than one and one-half ounces, the trial court was without jurisdiction to allow [the] defendant to be convicted of felony possession of marijuana.

Id. (citation omitted).

Because the jury in *Partridge* necessarily found all of the elements of simple possession of marijuana, this Court remanded to the trial court "for the imposition of judgment and appropriate sentencing on that lesser-included offense." *Id*. Similarly here, Defendant was convicted of "Felonious Possession of More Than Four Dosage Units of Hydromorphone" upon an indictment which alleged he unlawfully, willfully and feloniously did possess a controlled substance, Hydromorphone, which is included in Schedule II of the North Carolina Controlled Substances Act."

We are bound by our Court's precedent in *Partridge*. The indictment failed to allege Defendant possessed more than four dosage units of hydromorphone to provide

the trial court with jurisdiction to enter judgment on the felony. *Id.* The jury necessarily found all of the elements of simple possession of hydromorphone. The felony conviction is vacated, and this case is remanded for entry of judgment and sentencing on that lesser-included misdemeanor offense. *Id.*

V. Embezzlement

A. Indictment

Defendant argues the indictment charging him with embezzlement of a controlled substance under N.C. Gen. Stat. § 90-108(a)(14) was fatally defective, where it failed to allege the Durham VA was a "registrant or practitioner." We disagree.

Defendant was charged and convicted under N.C. Gen. Stat. § 90-108(a)(14), which makes it unlawful for any person

> [w]ho is an employee of a *registrant or practitioner* and who is authorized to possess controlled substances or has access to controlled substances by virtue of his employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use any controlled substance which shall have come into his possession or under his care.

N.C. Gen. Stat. §§ 90-108(a)(14) (2015) (emphasis supplied).

"'Registrant' means a person registered by the Commission to manufacture, distribute, or dispense any controlled substance as required by this Article." N.C.

Gen. Stat. § 90-87(25) (2015). The term "person" includes any legal entity. N.C. Gen. Stat. §90-87(20) (2015). The term "Commission" means "the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services established under Part 4 of Article 3 of Chapter 143B of the General Statutes." N.C. Gen. Stat. §90-87(3a) (2015).

The definition of "practitioner" includes "[a] pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State." N.C. Gen. Stat. § 90-87(22)(b) (2015).

Here, the indictment alleged as follows:

> And, the jurors for the State upon their oath present that on or about February 9, 2011 to September 5, 2011, in Durham County, the defendant named above unlawfully, willfully and feloniously did intentionally divert and embezzle Hydromorphone, listed as a Schedule II Controlled Substance in the North Carolina Controlled Substance Act, and non-controlled prescription drugs. The defendant committed the diversion and embezzlement of Hydromorphone and non-controlled prescription drugs in his capacity as a Licensed Practical Nurse (LPN), *while he was employed at the Durham Veterans Affairs Medical Center, 508 Fulton Street, Durham, North Carolina, a DEA registrant DEA#AV4317447), a Federal facility or entity capable of owning property and doing business and federally funded by the United States Department of Veterans Affairs*; and in that capacity, the defendant had the authority to possess said Hydromorphone and non-controlled prescription drugs. Said diversion and

> embezzlement was committed by taking out dosage units of Hydromorphone from the Omnicell cabinet which stores narcotics and non-controlled prescription drugs from the Unitdose cart which stores prescription drugs. On or about February 9, 2011 to September 5, 2011, the defendant diverted and embezzled 14 milligrams of Hydromorphone and non-controlled prescription drugs. The defendant's actions were in violation of N.C.G.S. 90-108(a)(14). (emphasis supplied).

Defendant argues the State's allegation that the Durham VA was "a DEA registrant" did not suffice to allege that it was registered by North Carolina's Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services. N.C. Gen. Stat. § 90-87(25). Defendant also argues the indictment failed to allege the Durham VA was a "practitioner" under the statutory definition. N.C. Gen. Stat. § 90-87(22).

The purpose of the indictment is

> (1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

State v. Cronin, 299 N.C. 229, 234-35, 262 S.E.2d 277, 281 (1979) (citation omitted). "[A]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977). "Our courts have recognized that[,] while an indictment should give a

defendant sufficient notice of the charges against him, it should not be subject to hyper technical scrutiny with respect to form." *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (citation omitted).

The indictment for embezzlement of a controlled substance by an employee of a registrant or practitioner pursuant to N.C. Gen. Stat. § 90-108(a)(14) was sufficient to apprise Defendant of the charge against him, protect him from being placed in jeopardy twice for the same offense, and allowed Defendant to adequately prepare for trial. *Cronin*, 299 N.C. at 234, 262 S.E.2d at 281. Defendant was adequately placed on notice of the charge against him, that he diverted and embezzled controlled substances for his own use, which were under his authority while he was employed at the Durham VA.

Defendant also argues that even if the indictment sufficed to allege the Durham VA was a "registrant," it still failed to allege the Durham VA was a "practitioner." Defendant argues the trial court deprived Defendant of due process by instructing the jury that it could convicted Defendant if it found the Durham VA was a "practitioner." As stated, the indictment was sufficient to apprise Defendant of the charge against him, and to allow him to prepare for trial. The trial court's instruction mirrored the language of the statute. *Palmer*, 293 N.C. at 638, 239 S.E.2d at 410. These arguments are overruled.

B. Sufficiency of the Evidence

Defendant argues the trial court erred by denying his motion to dismiss the charge of embezzlement of a controlled substance by an employee of a registrant or practitioner where the State failed to present sufficient evidence that: (1) the Durham VA was an entity capable of owning property; (2) the Durham VA was a registrant or practitioner, as those terms are defined in the Controlled Substances Act; and (3) the hydromorphone found in the Blazer came from the Durham VA. We disagree.

1. Standard of Review

The standard of review for the denial of a motion to dismiss is *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citation omitted). In order to survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) of the defendant being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed 2d 150 (2000). Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987).

The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. "Contradictions and

discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." *Id*. at 379, 526 S.E.2d at 455. It does not matter whether the State's evidence is direct, circumstantial, or both; the test for resolving a challenge to the sufficiency of the evidence is the same regardless. *Id*.

2. Analysis

An essential element of embezzlement, which must be alleged in an indictment and proven, is "ownership of the property in a person, corporation or other legal entity able to own property." *State v. Hughes*, 118 N.C. App. 573, 576, 455 S.E.2d 912, 914 (1995). Embezzlement occurs when "a defendant offends the ownership rights of another." *State v. Woody*, 132 N.C. App. 788, 789, 513 S.E.2d 801, 803 (1999). Embezzlement of a controlled substance by an employee of a registrant or practitioner occurs when a defendant offends the ownership rights of the registrant or practitioner. N.C. Gen. Stat. § 90-108(a)(14).

The State must prove "the act of conversion, which by definition requires proof that someone other than a defendant owned the relevant property" in Defendant's possession. *Woody*, 132 N.C. App. at 789-90, 513 S.E.2d at 803. Pursuant to the trial court's instructions, the jury had to find Defendant "embezzled and diverted to his own use controlled substances of his employer[.]"

In recognition of this essential element, the State alleged in the indictment that the Durham VA was a "facility or entity capable of owning property[.]" During

the State's direct examination of Jane Pendergrass, the Chief of Pharmacy for the Durham VA, the following exchange occurred:

> Q. Chief Pendergrass, can you tell us what the Durham VA, what that – the whole name of that institution is?
>
> A. It's the Department of Veterans Affairs Medical Center in Durham, North Carolina.
>
> Q. Is that a federal facility?
>
> A. Yes, it is.
>
> Q. Is that a facility that's capable of owning property?
>
> A. No.
>
> Q. I'm sorry. Doing business and is federally funded by the United States?
>
> A. That's correct.

Defendant argues this exchange established the Durham VA was not an entity capable of owning property. As a result, Defendant asserts the State failed to present sufficient evidence that Defendant embezzled "controlled substances of his employer" to allow conviction pursuant to the trial court's instruction. Chief Pendergrass testified that part of her duty in overseeing pharmacy operations at the Durham VA is to participate in investigations of suspected thievery of medications. She testified how the Durham VA keeps, controls, accesses, and dispenses the controlled substances, and that the Durham VA is doing business on behalf of the United States government.

Defendant also argues the State failed to present evidence that the Durham VA was a "registrant or practitioner" under N.C. Gen. Stat. § 90-87(25). The trial court instructed the jury it could convict Defendant upon a finding that the Durham VA was a "practitioner," "to include any pharmacy, hospital or other institution licensed and registered or otherwise permitted to dispense or administer controlled substances within the normal course of professional practice." Evidence was presented tending to show Defendant was a nurse employed by the Durham VA, a federally funded hospital facility. Taken as a whole, and in the light most favorable to the State, the evidence presented is sufficient to permit a reasonable juror to conclude the Durham VA was capable of owning property and a "practitioner" under the statutory definition.

Evidence was presented tending to show Defendant had direct access to the Omnicell machine at the Durham VA, and withdrew ten milligrams of hydromorphone, twice within an hour, during the evening prior to his arrest. Chief Pendergrass testified the Omnicell machine distributes blister packs of hydromorphone. Numerous other non-controlled prescription medications, found inside the Blazer and recovered from Defendant's apartment originated from the Durham VA.

Defendant admitted he had developed a history of bringing medications home from the Durham VA without following proper procedure to dispose of them when

they were refused by a patient or not otherwise administered. When the officers encountered Defendant, testimony showed he appeared to be "quite interested in what was underneath the driver's seat" and attempted to reach underneath the seat in a "secretive manner."

The State presented substantial evidence to allow a jury to determine whether the hydromorphone found beneath Defendant's seat came from the Durham VA. Viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference, sufficient evidence was presented to allow the jury to convict Defendant of the embezzlement charge. The trial court properly denied Defendant's motion to dismiss this charge. Defendant's arguments are overruled.

VI. Maintaining a Vehicle Used for the Keeping of a Controlled Substance

Defendant argues the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle for the keeping of a controlled substance. He asserts the State presented insufficient evidence tending to show Defendant used the Blazer for the keeping of a controlled substance on more than a single occasion. We agree.

The statutes prescribe a Class I felony to intentionally and knowingly keep or maintain a vehicle "which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article." N.C. Gen. Stat. §§ 90-

108(a)(7), (b) (2015). Defendant relies on our Supreme Court's decision in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994).

In *Mitchell*, the Supreme Court held the State had presented insufficient evidence of maintaining a vehicle despite the fact that "the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia[.]" *Id.* at 34, 442 S.E.2d at 31. Similarly, in *State v. Lane*, 163 N.C. App. 495, 500, 594 S.E.2d 107, 111 (2004), this Court held the State presented insufficient evidence of maintaining a vehicle where the defendant possessed eight Ziploc bags of cocaine in a vehicle on only one occasion.

The statute "does not prohibit the mere temporary possession of [controlled substances]within a vehicle." *Mitchell*, 336 N.C. at 32-33, 442 S.E.2d at 30. No evidence was presented tending to show controlled substances were inside the Blazer on any occasions other than the morning of Defendant's arrest on 5 September 2011.

Whether sufficient evidence was presented of the "keeping or maintaining" element depends upon a totality of the circumstances, and no single factor is determinative. *Id.* at 34, 442 S.E.2d at 30. The State failed to present any evidence of other factors, which would have indicated Defendant kept his father's Blazer vehicle for the purpose of keeping controlled substances. The trial court erred by denying Defendant's motion to dismiss this charge. Defendant's conviction for

felonious maintaining a vehicle for the unlawful possession of controlled substances is reversed.

VII. Ineffective Assistance of Counsel

Defendant argues his trial counsel rendered ineffective assistance in his defense by failing to file a motion to suppress when the evidence at trial demonstrated Defendant, who lacked familiarity with the justice system and was confronted by three police officers, was too impaired to voluntarily and understandingly consent to the searches of the vehicle and his apartment.

A. Standard of Review

To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). A defendant is prejudiced by counsel's deficient performance when there is "a reasonable probability that, but for counsel's errors, there would have been a different result." *Id.* at 563, 324 S.E.2d at 248.

When a defendant alleges counsel was deficient in "fail[ing] to litigate a Fourth Amendment claim competently[,]" the defendant must show that the "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v.*

Morrison, 477 U.S. 365, 375, 91 L. Ed. 2d 305, 319 (1986). In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

However,

> [i]t is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing."

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)).

B. Analysis

Here, Defendant argues the evidence presented at trial showed Defendant was too impaired to voluntarily and understandingly consent to the searches, as demonstrated by the officers' testimony of his being found asleep, slow movements, dilated pupils, slurred speech, and general appearance of impairment.

Defendant's ineffective assistance of counsel claim requires a showing there is a "reasonable probability" that the result of the proceeding would have been different had his trial counsel filed a motion to suppress. *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248. This requires a determination of whether there is a "reasonable probability" the trial court would have granted Defendant's motion to suppress upon

a finding Defendant was unable to voluntarily and understandingly consent to the searches due to his level of impairment. *Id.*

To determine whether consent was given voluntarily and understandingly the court must review the totality of the circumstances. *State v. Medina*, 205 N.C. App. 683, 686, 697 S.E.2d 401, 404, *disc. review denied*, 364 N.C. 330, 701 S.E.2d 250 (2010) (citation omitted); *see also State v. Jenkins*, 300 N.C. 578, 585, 268 S.E.2d 458, 463 (1980) ("A defendant's subnormal mental capacity is a factor to be considered, but such lack of intelligence, standing alone, does not render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made.").

The "cold record" contains transcripts of Defendant's testimony and from the officers of Defendant's impairment when he consented to the searches, and allows this Court to review this claim on direct appeal. *Thompson*, 359 N.C. at 122-23, 604 S.E.2d at 881. At trial, Defendant testified, "They asked me if they can search my vehicle. I consented. Got out of the car while they searched it." Evidence showed Defendant was able to walk, stand, and converse with the officers. By his own admission, Defendant was embarrassed about the conditions inside both his father's vehicle and his apartment. He invited the officers into his apartment and accessed his computer to show the officers his online prescriptions records. Due to his active participation, Defendant has failed to show a "reasonable probability" of a different outcome had his trial counsel filed a motion to suppress the evidence obtained from

the searches of the vehicle and his apartment. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. Defendant's assertion of ineffective assistance of counsel is overruled.

VIII. Conclusion

The indictment for the charge of felonious possession of hydromorphone failed to allege Defendant possessed the required element of four or more dosage units to charge Defendant with a felony. This conviction is vacated, and that charge is remanded for resentencing on the lesser included charge of misdemeanor possession of hydromorphone. Defendant's argument asserting the trial court erred by imposing a thirty-six month term of probation where the maximum permissible term was thirty months is moot in light of our order to remand for resentencing. Upon remand, the trial court should make specific findings of fact if the court determines a longer probationary term is appropriate. *See State v. Mucci*, 163 N.C. App. 615, 624-25, 594 S.E.2d 411, 418 (2004).

The indictment for embezzlement of a controlled substance by an employee of a registrant or practitioner under N.C. Gen. Stat. § 90-108(a)(14) was not fatally defective and sufficiently apprised Defendant of the charge against him to allow him to prepare for trial. *Palmer*, 293 N.C. at 638, 239 S.E.2d at 410. The State presented sufficient evidence on the charge to withstand Defendant's motion to dismiss. The trial court properly instructed the jury on the charge. We find no error in Defendant's conviction thereon.

The State failed to present sufficient evidence tending to show Defendant maintained his father's vehicle for the purpose of keeping a controlled substance on more than one isolated occasion under N.C. Gen. Stat. § 90-108(a)(7). That conviction is vacated. *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 31.

Defendant failed to show a "reasonable probability" that the result of the proceedings would have been different had his trial counsel filed a motion to suppress, and argued the searches of the vehicle and Defendant's apartment he consented to were not voluntarily and understandingly made. Defendant's ineffective assistance of counsel claim is denied.

NO ERROR IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING. IAC CLAIM DENIED.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).