IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-519

Filed: 6 December 2016

Wake County, No. 12 CRS 216306

STATE OF NORTH CAROLINA

v.

REUBEN MAINA MITHAMO, Defendant.

Appeal by Defendant from judgment entered 16 April 2015 by Judge James E. Hardin Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Mary McCullers Reece for Defendant-Appellant.

INMAN, Judge.

Reuben Maina Mithamo ("Defendant") appeals from a judgment entered upon his conviction for driving while impaired ("DWI"). Defendant contends he was denied effective assistance of counsel at sentencing. After careful review, we hold Defendant received a fair trial free from prejudicial error.

The State adduced evidence that on the evening of 20 July 2012, Mark Armstrong was attempting a left turn from Old Milburnie Road onto New Bern

Avenue when Defendant drove a burgundy Toyota sedan through a red light at the intersection, forcing Mr. Armstrong to brake suddenly. Mr. Armstrong turned his Jeep around and followed Defendant's car, which was noticeably damaged on the left front. At the next intersection, another motorist honked his horn at Mr. Armstrong and said something that led him to call 911. Mr. Armstrong followed Defendant's vehicle for approximately two miles, observing that it "had trouble keeping its lane at times" and that its "[s]peed was erratic." Defendant turned into the parking lot of a Walmart store at McKnight Drive and Knightdale Boulevard and parked.[1]

Knightdale Police Officer Ron Fullerton arrived as Defendant was parking his car and noted the "heavy damage" to the front of the vehicle: the left headlight was broken, and the left front bumper "was almost completely off, and it was . . . hanging down and pushed up against the tire." Because the broken headlight lens was "still warm to the touch," Officer Fullerton surmised the damage had occurred "very recently."

As Defendant exited his vehicle, Officer Fullerton saw that he was "very unsteady on his feet[, c]ould not keep his balance and . . . almost fell over." Defendant "looked at his car and asked [Officer Fullerton] what happened." Defendant "had no marks on his face" or other "outward signs of injury" and did not claim to be hurt.

[1] New Bern Avenue becomes Knightdale Boulevard.

Officer Fullerton detected "a very strong odor of an alcoholic beverage coming from [defendant's] person." Defendant also "had red glassy eyes and . . . slurred speech." When asked for his driver's license, Defendant was unable to produce it from his pants pocket. Officer Fullerton asked Defendant three times to sit down on the push bar of his patrol car "so he wouldn't stagger or fall down on the concrete." When Defendant did not respond, the officer helped him onto the car. Defendant told Officer Fullerton, "I was in an accident and I have to go to work at Walmart on Capital Boulevard[,]" which Officer Fullerton testified was "nowhere close" to the Walmart on Knightdale Boulevard. Officer Fullerton asked Defendant if he had been drinking. He replied, "I had one beer." He then said, "I only had a soda."

Given the apparent degree of Defendant's impairment, Officer Fullerton did not ask him to attempt any field sobriety tests. After being instructed and shown how to blow into the Alco-Sensor device, Defendant "actually sucked in three times and never blew." Officer Fullerton arrested Defendant for DWI and assisted him to the patrol car. Defendant's wife, who was working at the Walmart, came outside and spoke briefly to the officer.

Defendant was initially taken to the police department, where he was unable to provide a proper breath sample for the Intoxilyzer. Officer Fullerton transported Defendant to jail, obtained a search warrant to draw his blood, and submitted the blood sample to the State Crime Laboratory for testing. Subsequent analysis

measured Defendant's blood alcohol concentration as .20 grams per deciliter. A copy of the lab report was published to the jury.

Defendant testified that on the night before his DWI arrest, he fell onto a wooden pallet and struck his face while working as a stock person at Walmart. He completed his shift at 7:00 a.m. on 20 July 2012 and went home to sleep. He woke up at 3:00 p.m. and drove to the Walmart on New Bern Avenue to buy freon for his car's air conditioner. After returning home, he began to experience a "kind of . . . unconsciousness" or "confusion." Defendant left his house again at 7:30 p.m. and drove to the Walmart in Knightdale to pick up his wife from work. As he reached Corporation Parkway, he "started seeing the lights changing" and experienced a loss of control. He continued driving to Walmart to meet his wife despite "feeling uncomfortable and uneasy." Until he spoke to Officer Fullerton in the parking lot, Defendant "did not realize" his car was damaged.

When asked at trial if he remembered "being in an accident on the way" to meet his wife, Defendant affirmed he "had a collision with a van" while "having that affliction of being not really even [able] to drive or to go because [he] was feeling uncomfortable." Defendant did not recall going to the police department but remembered being taken to a "detention camp."

On cross-examination, Defendant acknowledged having been involved in "two wrecks" on 20 July 2012, the first of which occurred on New Hope Road when he was

"coming to buy the freon." He described this accident as "not very serious" and averred he left the scene after talking with an officer. The second collision occurred "at Corporation Parkway and New Hope Road" when he drove through a traffic light that "was changing yellow." Defendant did not remain at the second collision because "that person said it was okay."

Defendant denied consuming alcohol on 20 July 2012 and insisted that he never drank. He claimed to have been "unconscious" during his interaction with Officer Fullerton and explained that he walked with a limp because a previous injury had left one of his legs shorter than the other. Defendant suggested that his eyes were red because he was tired and hungry. He did not seek medical attention for the "serious injury in [his] head" but treated himself with "strong pain killers," a "calcium citrus" supplement, and fish oil.

The trial court denied Defendant's motions to dismiss at the conclusion of the evidence. It also denied Defendant's request for a jury instruction on automatism or unconsciousness as an affirmative defense to the DWI charge.

After the jury returned its guilty verdict, the court held a separate sentencing hearing pursuant to N.C. Gen. Stat. § 20-179 (2015). Officer Fullerton offered his opinion that Defendant was "[e]xtremely impaired" and estimated the cost of damage to Defendant's vehicle to exceed $1,000.00. On cross-examination, he conceded that he did not witness the collision that damaged Defendant's car and lacked personal

knowledge of whether Defendant had "exchanged information with the other driver" or was at fault in the collision. The jury found the aggravating factors that Defendant was grossly impaired, that he had a blood alcohol level of at least .15, and that he drove his vehicle especially recklessly and especially dangerously. *See* N.C. Gen. Stat. § 20-179(d)(1), (2) (2015). The jury found that the State failed to prove that Defendant fled the scene of a hit-and-run accident or that his negligent driving led to a reportable accident. *See* N.C. Gen. Stat. § 20-179(d)(3), (9) (2015).

The trial court heard Defendant's proffer with regard to mitigating factors. *See* N.C. Gen. Stat. § 20-179(e). Counsel presented a copy of Defendant's driving record and a certificate confirming that Defendant had voluntarily obtained a substance abuse assessment and complied with the recommended treatment. Counsel further advised the court that Defendant had completed more than the twenty-four hours of community service imposed by the district court – notwithstanding his appeal to superior court from the district court conviction – and that "[he] was polite and cooperative" with the arresting officer. The court found each of the mitigating factors urged by counsel. *See* N.C. Gen. Stat. § 20-179(e)(4), (6), (7) (2015).

Upon concluding that the aggravating factors substantially outweighed the mitigating factors, the trial court imposed a Level Three punishment of 180 days in the Misdemeanor Confinement Program. The court suspended Defendant's sentence, placed him on supervised probation for twelve months, and ordered him to serve

forty-five days' confinement as a condition of special probation. *See* N.C. Gen. Stat. § 20-179(f)(1), (i) (2015). Defendant gave notice of appeal in open court.

Defendant now contends he received ineffective assistance of counsel ("IAC") at his sentencing hearing, in violation of his rights under U.S. Const. amend. VI, XIV, and N.C. Const. art. 1 §§ 19, 23. It is well established that " 'sentencing is a critical stage of a criminal proceeding to which the right to effective assistance of counsel applies.' " *State v. Strickland*, 318 N.C. 653, 660, 351 S.E.2d 281, 285 (1987) (quoting *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E. 2d 518, 521 (1985)).

To support an IAC claim, a defendant must show 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. *State v. Braswell*, 312 N.C. 553, 561-63, 324 S.E.2d 241, 248-49 (1985). In the sentencing context, a defendant must establish a reasonable probability that counsel's supposed deficiency led to a harsher sentence than the court otherwise would have imposed. *Strickland*, 318 N.C. at 661, 351 S.E.2d at 285. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984); *see also State v. Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

DWI sentencing hearings are governed by N.C. Gen. Stat. § 20-179. In superior court, the jury finds any grossly aggravating factors or aggravating factors,[2] and the trial court finds any mitigating factors. N.C. Gen. Stat. § 20-179(c)-(e). In the absence of one or more grossly aggravating factors, the court must "weigh the seriousness of each aggravating factor" and "the degree of mitigation of each [mitigating] factor in the light of the particular circumstances of the case." N.C. Gen. Stat. § 20-179(d)-(e). The court then weighs the aggravating factors against the mitigating factors. N.C. Gen. Stat. § 20-179(f). If it determines that the "aggravating factors substantially outweigh any mitigating factors," the court must impose a Level Three punishment. N.C. Gen. Stat. § 20-179(f)(1). A Level Four punishment is required if no aggravating or mitigating factors are found or if such factors are "substantially counterbalanced." N.C. Gen. Stat. § 20-179(f)(2). If the "mitigating factors substantially outweigh any aggravating factors," the court must impose a Level Five punishment.[3] N.C. Gen. Stat. § 20-179(f)(3). "The weighing of factors in aggravation and mitigation is within the sound discretion of the sentencing court . . . ." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997).

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[2] The trial court, rather than the jury, must find the existence of a defendant's prior convictions for purposes of the grossly aggravating factor in subdivision (c)(1) and the aggravating factor in subdivision (d)(5). N.C. Gen. Stat. § 20-179(c).

[3] A Level Three punishment is generally more severe than a Level Four or Level Five punishment. See N.C. Gen. Stat. § 20-179(i)-(k) (2015).

Defendant does not object to his counsel's performance with regard to the aggravating and mitigating factors found at sentencing. *Cf. generally Strickland*, 318 N.C. at 661, 351 S.E.2d at 285 (noting that "defendant has not brought forward any evidence of factors in mitigation that he contends should have been presented during the sentencing hearing"). He instead finds fault with counsel's argument to the sentencing court. Because both aggravating and mitigating factors had been found, defendant asserts that the decision to impose a Level Three, Four, or Five punishment under N.C. Gen. Stat. § 20-179(f) "was entirely discretionary with the court." Therefore, he argues, "counsel's failure to advocate for a Level Four or Level Five sentence fell below an objective standard of advocacy[.]" Defendant further asserts that counsel's argument "suggested that [Defendant] consented to" a Level Three punishment.

A review of the trial transcript shows counsel's active representation of Defendant throughout the sentencing hearing. In addition to cross-examining Officer Fullerton, counsel urged the court to consider the jury's findings of Defendant's gross impairment and high blood alcohol level as a single aggravating factor under N.C. Gen. Stat. § 20-179(d)(1). Counsel raised a similar argument with regard to the findings of especially reckless and especially dangerous driving under subdivision (d)(2).[4]

[4] Although counsel referred to the two aggravators as "especially reckless and especially careless driving," his position was understood, albeit rejected, by the court.

Following his proffer of mitigating factors, counsel did state, "I believe the Court at the appropriate time is going to find [Defendant] most likely as a level three," but asked to "be heard once the Court finds that." The prosecutor deemed it "shocking that no one was seriously injured or killed as a result of the Defendant's driving" and urged the court to "give [Defendant] every active day that you possibly can." Defense counsel then concluded his sentencing argument as follows:

> I do think that the Court is ultimately going to find the aggravating factors are more significant than the mitigating factors. I understand that. I would ask you if you do sentence him at a level three, being a zealous advocate, that you consider the lower end and give him three days active, 72 hours in the jail, and place him on a period of supervised probation.
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> [Defendant] is 57 years old. He's currently unemployed. He has three grown children. He is married. Has only been in this country since 2011. Nevertheless, we understand that the Court was disturbed by these facts and perhaps questions the veracity of the Defendant, but we would ask you to consider that.

Counsel thus asked the court to impose the minimum possible period of active confinement authorized for a Level Three punishment under N.C. Gen. Stat. § 20-179(i).

Before announcing its sentence, the court remarked on counsel's "outstanding job" of representing Defendant. The court then addressed Defendant directly, as follows:

> I will tell you, Mr. Mithamo, based upon the evidence that I heard . . . , I'm absolutely amazed that

> someone was not injured in this case. I'm amazed by that. I'll tell you that based upon what I heard and what I saw in this courtroom, I believe that as to material terms, your story is incredible. That is having an impact on your sentence in my mind.

Despite counsel's argument, the court sentenced Defendant to the maximum, six-month term of imprisonment authorized under Level Three, *see* N.C. Gen. Stat. § 20-179(i), but did suspend the sentence subject to a 45-day period of special probation.

" 'Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics.' " *State v. Taylor*, 79 N.C. App. 635, 638, 339 S.E.2d 859, 861 (1986) (quoting *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984)). We will not engage in such second-guessing here. It is abundantly clear that counsel's sentencing argument was a tactic designed to obtain some measure of leniency for Defendant in the face of both extremely unfavorable facts and Defendant's own dubious trial testimony. *See Strickland*, 318 N.C. at 661-62, 351 S.E.2d at 285 ("The record does not indicate that trial counsel's minimal remarks were other than part of his litigation strategy during the sentencing phase of trial."). The duty of zealous advocacy does not obligate counsel to adopt a maximalist position with respect to every matter within the discretion of the trial court, particularly where counsel's professional experience and judgment lead him to conclude that such a position is apt to elicit an unfavorable result for his client. *See id*; *Taylor*, 79 N.C. App. at 638, 339 S.E.2d at 861 (finding "no basis for holding that

counsel's decision to remain silent at the sentencing hearing was not 'strategy and trial tactics' properly left within the control of counsel"). Defendant has shown neither unreasonable performance by counsel nor any probability of a more favorable sentencing outcome had counsel offered an alternative argument to the court.

We do not agree with Defendant's assertion that "the only reason for proving the existence of mitigating factors" under N.C. Gen. Stat. § 20-179 is "in hopes of persuading the court to enter a Level Four or Five sentence, as opposed to a Level Three sentence." Within each punishment level, the court must exercise significant discretion in selecting the particular sanctions included in its sentence. *See* N.C. Gen. Stat. § 20-179(i)-(k). Its choice of sentence is likely to be informed by any mitigating factors established by the defense.

Finally, to the extent Defendant suggests that his sentence was tainted by counsel's pre-trial colloquy with the court regarding Defendant's decision to present a defense of automatism, we find nothing in the record to support this claim. Defendant's IAC claim is overruled.

NO ERROR.

Judges STROUD and TYSON concur.

Report per Rule 30(e).