IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1041

Filed: 2 July 2019

Forsyth County, Nos. 17 CRS 52826, 1516

STATE OF NORTH CAROLINA

v.

KERRY BERNARD MILLER, JR.

Appeal by Defendant from Judgment entered 8 November 2017 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 26 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Grace, Tisdale & Clifton, P.A., by Christopher R. Clifton and Greer B. Taylor, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Kerry Bernard Miller, Jr. (Defendant) appeals from convictions for Possession with Intent to Sell or Deliver Cocaine (PWISD Cocaine) and attaining Habitual-Felon status. The evidence and Record before us tend to show the following:

On 23 March 2017, several officers with the Winston-Salem Police Department, including Sergeant Scott Doss (Sgt. Doss), attempted to execute arrest warrants on James Lee Martin (Martin). Sgt. Doss received word that officers had observed someone they believed to be Martin and traveled to where that person was last seen. On arrival, Sgt. Doss was informed that the subject, believed to be Martin, was seen getting into the passenger seat of a black Toyota Avalon, which was headed toward Fifth Street. Sgt. Doss followed the car into a Petro Gas Station on New Walkertown Road, pulled into the gas station in front of the car, and activated his blue lights. The car sped out of the gas station parking lot. Corporal Daniel Battjes (Cpl. Battjes) gave chase in his own car. A third officer, Corporal Rafael Duque (Cpl. Duque), attempted to block the Avalon with his unmarked car, and the Avalon rammed Cpl. Duque's vehicle. After the Avalon came to rest, Cpl. Battjes saw a man in a red jumpsuit flee out of the Avalon's passenger-side door. As the suspect in the red jumpsuit left the car, Cpl. Battjes saw objects falling to the ground.

Sgt. Doss, Cpl. Duque, and Cpl. Battjes chased the suspect on foot, still believing the passenger to be Martin. The fleeing suspect was eventually apprehended, and the officers discovered he was not Martin. The suspect identified himself as "Brian" but was in fact Defendant. Officers found $219 in cash in a creek near where Defendant was apprehended. Back at the Avalon, a set of electronic scales and two bags of white powder were found outside the car and along the path of

Defendant's flight. Officers also found empty plastic bags in the armrest and three cellular phones in and around the passenger side of the vehicle. One bag of white powder was tested and determined to be 5.04 grams of cocaine. The other bag of white powder was not tested but was weighed at 1.24 grams.

Defendant was indicted for PWISD Cocaine and for having attained the status of a Habitual Felon. The matter came on for trial on 30 October 2017 on the PWISD Cocaine charge. On 31 October 2017, the second day of trial, the State rested, and at the close of the State's evidence, Defendant moved for "directed verdict," arguing "the State has not provided sufficient evidence that a reasonable jury can conclude that the defendant is guilty." The trial court considered this as a Motion to Dismiss and denied Defendant's Motion. Defendant declined to put on evidence. The trial court then recessed for the evening.

When the trial resumed the following day, 1 November 2017, Defendant failed to appear. After discussion with the attorneys and multiple attempts to reach Defendant, the trial court concluded that Defendant had intentionally absented himself from the proceedings; due to Defendant's decision not to present evidence, he would suffer no prejudice; and the trial should proceed *in absentia*. The trial court also issued an order for Defendant's arrest. Thereafter, the trial court allowed Defendant's trial counsel to renew his Motion to Dismiss at the close of all evidence,

which was again denied, and the trial proceeded with closing arguments and the jury charge. The jury returned its verdict finding Defendant guilty of PWISD Cocaine.

The trial court decided to then proceed with the guilt phase of the Habitual-Felon-status trial before the same jury with Defendant *in absentia*. After a trial by jury—at which copies of three prior felony judgments against Defendant were introduced into evidence—the jury returned a verdict finding Defendant guilty of having attained the status of a Habitual Felon. The trial court announced it would continue judgment from term to term until Defendant was apprehended, at which time it would conduct a sentencing hearing.

Upon Defendant's re-apprehension by law enforcement and his return to court several days later, the trial court held a sentencing hearing on 8 November 2017. At the conclusion of this hearing, the trial court entered a consolidated judgment on the charges and sentenced Defendant in the presumptive range to a minimum of 75 months and a maximum of 102 months in the custody of the North Carolina Department of Adult Correction.

Issues

On appeal, Defendant raises the following issues: (I) Whether the trial court erred in denying Defendant's Motions to Dismiss the charges of (A) PWISD Cocaine and (B) having attained Habitual-Felon status; and (II) Whether the trial court erred

in conducting the guilt phase of Defendant's Habitual-Felon trial in Defendant's absence.

Analysis

I. Motions to Dismiss

In his first and second arguments, Defendant contends the trial court erred in denying his Motions to Dismiss the charges of PWISD Cocaine and having attained the status of a Habitual Felon. We disagree.

"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) (citation omitted). "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 (2000) (citation and quotation marks omitted). "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) (citation omitted).

A. PWISD Cocaine

First, Defendant contends the trial court erred in denying his Motion to Dismiss the charge of PWISD Cocaine. "The offense of possession with intent to sell or deliver has three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (2005) (citations omitted). Specifically, Defendant contends the State failed to demonstrate the third element—intent. As Defendant does not challenge the remaining two elements of the offense, we limit our analysis to whether the State presented sufficient evidence of intent.

"While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *Id.* at 105, 612 S.E.2d at 175-76 (citation omitted). This Court has recognized "the intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Id.* at 106, 612 S.E.2d at 176 (citations omitted).

Defendant concedes that the evidence at trial was sufficient to show Defendant in possession of two bags containing a total of 6.28 grams of cocaine, an electronic scale, and more than $200 in cash, which items were all found near the site of Defendant's capture or along the path of his flight from the officers. He contends, however, that the "amount of cocaine was insufficient to support an inference that

[Defendant] intended to sell or deliver any cocaine." He further notes that while the electronic scale was found, "no other paraphernalia involved in the cutting, packaging, storing or distributing [of] cocaine was found" and asserts that the amount of money was likewise not determinative.

"Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount." *Id*. at 105, 612 S.E.2d at 176 (citation and quotation marks omitted). This Court has previously held "a controlled substance's substantial amount may be determined by comparing the amount possessed to the amount necessary to constitute a trafficking offense." *Id.* at 106, 612 S.E.2d at 176. Pursuant to the Controlled Substances Act, possession of cocaine rises to the level of a trafficking offense where the amount possessed is at least 28 grams. *See* N.C. Gen. Stat. § 90-95(h)(3) (2017). We have previously held that where a Defendant was in possession of 1–2 grams of cocaine, this amount was insufficient to infer intent. *See Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176 (possession of 1.2 grams of cocaine was insufficient to infer intent to sell or distribute); *State v. Battle*, 167 N.C. App. 730, 733, 606 S.E.2d 418, 421 (2005) (possession of 1.9 grams of cocaine was insufficient to infer intent to sell or distribute).

Here, the evidence (in the light most favorable to the State) showed Defendant in possession of 6.28 grams of cocaine (including 5.04 grams of cocaine confirmed through testing). We need not reach the issue of whether the amount of cocaine found

in Defendant's possession (at least 3–5 times more than the amounts in *Nettles* and *Battle* but less than a fourth of the amount required for a trafficking offense) constitutes a "substantial amount" sufficient, standing alone, to support denial of Defendant's Motion to Dismiss. This is because the State also presented additional evidence from which the jury could infer intent.

Specifically, the State presented the scale dropped from the Avalon and $219 in cash found near where Defendant was apprehended. Again, this Court has held intent may be inferred from, *inter alia*, "the presence of cash or drug paraphernalia." *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176 (citations omitted). While the amount of money standing alone may not be dispositive of intent, it is one factor—along with the cocaine packaged in separate bags and the electronic scale—from which intent may be inferred.

Moreover, Defendant ignores the additional evidence of the presence of the empty plastic bags and the three abandoned cellular phones in the passenger compartment of the Avalon. Unlike *Nettles*, where there was no evidence the contraband was being "packaged, stored, or labeled in a manner consistent with the sale of drugs[,]" the presence of this paraphernalia, taken in the light most favorable to the State, supports a finding that the cocaine in the instant case was being prepared for distribution. *See id.* at 107, 612 S.E.2d at 176. When the evidence of the quantity of cocaine and cash is considered in light of the evidence of the scale,

plastic baggies, and multiple cellphones, it collectively rises to a level from which an intent to sell and distribute may be inferred by a jury. Accordingly, we hold the State presented substantial evidence of intent to sell or deliver and the trial court did not err in denying Defendant's Motion to Dismiss the charge of PWISD Cocaine.

B. Habitual Felon

The indictment for attaining Habitual-Felon status alleged three underlying felonies: (1) Possession of Cocaine, the offense occurring on 10 January 2004 and the conviction on 29 April 2004; (2) Possession of Cocaine, the offense occurring on 15 April 2006 and the conviction on 22 June 2006; and (3) Possession with Intent to Sell or Distribute Cocaine, the offense occurring on 20 March 2013 and the conviction on 10 April 2014. Defendant did not stipulate to these convictions. Instead, the State presented three documents to the jury—State's Exhibits 18(a), 19(a), and 20(a)—purporting to show the convictions for those offenses. On appeal, Defendant contends the third exhibit, Exhibit 20(a), "should not have been deemed sufficient proof of the third underlying felony charge[,]" as it consisted of only the judgment from that conviction. Defendant contends the document lacked critical information, as "[i]t is necessary to know whether the charge in the indictment is one for which [Defendant] was ultimately convicted or that conviction is for a lesser included offense."

Our General Statutes provide, in proving Habitual-Felon status,

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior

> conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

N.C. Gen. Stat. § 14-7.4 (2017).

During the Habitual-Felon portion of the hearing, the State presented testimony by Karen Bumgardner (Bumgardner), the Forsyth County Clerk of Superior Court. Bumgardner specifically testified Exhibit 20(a) was "a front and back page of a copy of a judgment" that indicated Defendant "was convicted or pled to" the felony of "[p]ossession with intent to sell and/or deliver [c]ocaine." Indeed, we note Exhibit 20(a), as contained in our Record, is a certified copy of the judgment against Defendant in that case, as alleged by the State. Notwithstanding Defendant's contentions, this evidence was sufficient to show Defendant's conviction for the prior felony. Therefore, the trial court did not err in denying Defendant's Motion to Dismiss the charge of attaining Habitual-Felon status.

II. Sentencing

In his third argument, Defendant contends the trial court erred in conducting the trial on Defendant's Habitual-Felon charge in Defendant's absence. Defendant contends this phase of the trial constituted a sentencing hearing that could not occur *in absentia*. We disagree.

Our Supreme Court has long held:

> While our decisions have established that in case of waiver the presence of the accused is not necessary to a valid trial and conviction, all of the authorities here and elsewhere, so far as we have examined, are to the effect that when a sentence, either in felonies less than capital or in misdemeanors, involves and includes corporal punishment, the presence of the accused is essential.

State v. Cherry, 154 N.C. 624, 627, 70 S.E. 294, 295 (1911). Thus, we have long recognized a criminal defendant may not be sentenced *in absentia*. *See State v. Stockton*, 13 N.C. App. 287, 292, 185 S.E.2d 459, 463 (1971) ("But when a sentence involving corporal punishment is imposed upon a verdict, either on a capital felony charge, a felony charge less than capital, or a misdemeanor, the defendant must be present." (citations omitted)).

In this case, however, the Habitual-Felon-status trial did not constitute a sentencing proceeding. Rather, as the habitual-felon statute provides:

> If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, *the proceedings shall be as if the issue of habitual felon were a principal charge*.

N.C. Gen. Stat. § 14-7.5 (2017) (emphasis added).

After the jury found Defendant guilty of PWISD Cocaine, the Habitual-Felon charge was presented to the jury, and a hearing on that charge proceeded "as if the issue of habitual felon were a principal charge." *See id.* As Defendant concedes, a non-capital defendant may waive his right to confrontation by his voluntary and

unexplained absence during such a proceeding. *See State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991). "In such cases, it is not error for the court to proceed with trial in the defendant's absence." *State v. Tedder*, 169 N.C. App. 446, 451, 610 S.E.2d 774, 777 (2005) (citation omitted).

Defendant cites *State v. Penland* in support of his position that the Habitual-Felon trial was a sentencing proceeding. 89 N.C. App. 350, 365 S.E.2d 721 (1988). In *Penland*, the defendant was charged with assault with a deadly weapon upon a law enforcement officer and separately with having attained habitual-felon status. He was found guilty, and the trial court entered separate judgments and sentences on the charges. On appeal, this Court noted "[a] court may not treat the violation of the Habitual Felon Act as a substantive offense." *Id.* at 351, 365 S.E.2d at 722 (citation omitted). However, *Penland* refers not to the *procedure* used to try the habitual-felon charge but rather the actual *sentencing*. In *Penland*, this Court found error with the fact the defendant was sentenced for attaining habitual-felon status as a separate and additional offense rather than as an offense that serves "to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status." *Id.* at 351, 365 S.E.2d at 721 (citation omitted). In this case, however, Defendant was not independently sentenced on the Habitual-Felon charge; rather, that charge was consolidated with the

underlying felony for sentencing and served only "to enhance the punishment[.]" *See id.* (citation omitted). Therefore, *Penland* is inapplicable.

Rather, the trial court postponed the sentencing hearing until Defendant was apprehended and brought back before the court on 8 November 2017. During that proceeding, the trial court specifically noted:

> Under the law, I may not sentence someone who has fled from the trial. I may proceed with the trial, I may proceed to verdict, but I may not sentence someone until that person is brought back before me. So that is why we are here.

It was only at this point, with Defendant present in the courtroom, that the trial court sentenced Defendant on the charges against him. Consequently, we conclude the trial court did not err in proceeding with the Habitual-Felon trial in Defendant's absence where the trial court did not impose sentence on Defendant *in absentia*.

Conclusion

Consequently, for the foregoing reasons, we conclude: (1) the trial court did not err in denying Defendant's Motions to Dismiss the charges of PWISD Cocaine and of obtaining Habitual-Felon status; and (2) the trial court did not err in proceeding with the guilt phase of the Habitual-Felon-status trial while Defendant was *in absentia* where the trial court did not impose sentence upon Defendant in his absence.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).