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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-56

Filed: 2 July 2019

Edgecombe County, Nos. 16 CRS 53420; 18 CRS 105-108

STATE OF NORTH CAROLINA

v.

DOMINIQUE JACQU WINFIELD, Defendant.

Appeal by defendant from judgment entered 6 June 2018 by Judge Walter H. Godwin, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 21 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathy M. McCraw, for the State.

Sarah Holladay, for defendant.

ARROWOOD, Judge.

Dominique Jacquez Winfield¹ (“defendant”) appeals from a judgment revoking his probation and activating his suspended sentence. For the following reasons, we affirm in part and dismiss in part.

¹ While the record indicates defendant’s middle name is “Jacqu”, he refers to his middle name as “Jacquez” in his brief.

I. Background

On 6 October 2017, defendant pleaded guilty to a variety of crimes alleged to have been committed on 23 February 2017 and 2 August 2017. For each of the two sets of convictions, defendant was placed on 18 months' supervised probation in Durham County. On 27 February 2018, defendant was placed on 12 months' supervised probation in Edgecombe County, and on 3 April 2018 defendant was placed on 24 months' supervised probation in Orange County for two additional sets of crimes. As part of his probation, defendant was prohibited from (1) possessing a firearm; (2) using, possessing, or controlling any illegal drug or controlled substance or being knowingly present at any place where illegal drugs or controlled substances are sold, kept, or used; and/or, (3) committing a new criminal offense.

On 9 April 2018, defendant was arrested for violating probation. The supporting violation report stated that defendant willfully violated these three conditions of parole. Defendant was (1) "found in possession of an SKS rifle," (2) "found in possession of ecstasy," and (3) "charged with possession of firearm by felon and possession of schedule I controlled substance."

On 6 June 2018, a hearing was held in Edgecombe County Superior Court before the Honorable Walter H. Godwin, Jr. Defendant had been incarcerated and had not yet been appointed counsel. Judge Godwin appointed attorney Matthew Sperati, who had been sitting in the courtroom and who had worked with defendant

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before, as defendant's counsel. Judge Godwin offered to continue the case until the next day so defense counsel could have time to talk to his client, but Mr. Sperati asked to keep the case open. Approximately, two hours and forty minutes later, the probation revocation hearing began.

Defendant denied that he violated probation. The State called defendant's probation officer, Meredith Boyd, as its first witness. Ms. Boyd had not been defendant's probation officer at the time the violation report was taken out and testified that she was "not familiar with him personally." Ms. Boyd confirmed that the violation report made by her predecessor, who no longer worked with probation, contained the three violations mentioned above. Defense counsel had no questions for the witness.

The State then called Officer Dustin Wester ("Officer Wester") of the Rocky Mount police department. On 9 April 2018, Officer Wester was working patrol with another officer when he received a Facebook Live video² in which he saw defendant and two other individuals sitting on a bed next to an SKS assault rifle. In the video defendant also held up a bag of colorful pills that Officer Wester believed to be ecstasy. Officer Wester knew where one of the other individuals in the video, Quadarius Grimes, lived and went to that residence where he located defendant.

² Because the Facebook Live video was not available for presentation to the court, the trial court admitted Officer Wester's testimony about the video for the limited purpose of explaining the officer's conduct and why he went to the residence.

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Officer Wester made contact with Mr. Grimes who informed him where the rifle was inside the home. The officers also located the pills in plain view in the kitchen of the residence.

Officer Wester testified that there was body cam footage available for the trial court and that he had shared this footage with defense counsel. The footage consists of three body camera videos and is approximately two hours and five minutes long. A relevant portion of the footage was played for the trial court without objection from defense counsel, who advised Judge Godwin that that footage was hard to hear so he might want to get close to the laptop to hear it. Part of the footage contained the interrogation of defendant at the police station during which he admitted that he had held the gun in question before.³

After the footage was played, Officer Wester testified that he was not sure if the firearm had been tested for DNA or if the ecstasy pill had been sent off to the lab for verification. However, he testified that he knew the pill to be ecstasy on visual inspection based on his experience working in narcotics and because, “[e]cstasy pills have certain stamps on them and . . . multiple colors and things of that nature are used for ecstasy.” On cross-examination, defense counsel only asked Officer Wester one question, which was whether Mr. Grimes claimed responsibility for the

³ While the record does not indicate which portion of the video was shown to the trial court, defendant indicated in his brief that he believes that this was the part that was shown.

ownership of the gun. Officer Wester confirmed that he had. Defense counsel presented no evidence for the defendant.

During his closing argument, defense counsel argued that, while defendant had admitted to possessing the rifle at some point in the past, there was no distinct timeline on when that had occurred, and it could have happened before defendant was on probation. He also argued it was unclear how defendant held the rifle, whether he grazed it or held it for a longer period of time. As for the pills, defense counsel argued that there was no way to confirm they were ecstasy without a formal drug test.

The trial court ultimately found that defendant “violated [his probation] conditions wilfully [*sic*] and without valid excuse prior to the expiration of the probationary period.” While the trial court made no finding of fact as to the pills, it did find that defendant had both actual and constructive possession of the firearm. The trial court thus revoked defendant’s probation and activated his sentence. Defendant gave notice of appeal in open court.

II. Discussion

Defendant argues his probation should not have been revoked because: (1) there was insufficient evidence to support a finding that he possessed a firearm or a schedule I controlled substance, and (2) he received ineffective assistance of counsel. We address the issues in the order they were raised.

1. Insufficient Evidence

After reviewing the totality of the evidence, we believe, under an abuse of discretion standard, there is sufficient evidence to uphold the trial court's finding that defendant had violated his probation.

A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and internal quotation marks omitted). "A trial court abuses its discretion if its decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hancock* __ N.C. App __, __, 789 S.E.2d 522, 524 (2016) (citation and internal quotation marks omitted).

Alleged probation violations do not need to be proven beyond a reasonable doubt, but the evidence only needs to be "sufficient to reasonably satisfy the judge in the exercise of his sound discretion that a valid condition of the suspended sentence has been violated." *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (citations omitted).

The North Carolina General Statutes set forth the regular conditions of

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probation, including that “a defendant must [c]ommit no criminal offense in any jurisdiction.” N.C. Gen. Stat. § 15A-1343(b)(1) (2017). In addition, defendant was ordered not to possess a firearm or illegal drugs, nor be present in a place where illegal drugs were sold, kept, or used. Here, the officer testified that defendant was seen next to a firearm and in possession of ecstasy, admitted to being in possession of said firearm, and was arrested in a residence where ecstasy was found. While the evidence may have been short of what would be needed to convict someone beyond a reasonable doubt, it was sufficient for the trial court to determine that defendant had violated the conditions of his probation by possessing the firearm and the ecstasy.

The probation violation report was a major component of that evidence. “[A] sworn violation report constitutes competent evidence sufficient to support the trial court’s finding that defendant committed [the] violation.” *Hancock*, __ N.C. App. at __, 789 S.E.2d at 526. Defendant’s parole officer testified that the violation report found that defendant was in possession of the rifle and the ecstasy and that he was charged with possession of firearm by a felon and possession of a schedule I substance. While this could be sufficient evidence in itself, the State presented additional evidence that defendant willfully violated his probation.

For example, the trial court found that defendant had both actual and constructive possession of the rifle. “Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an

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item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.” *State v. Wirt*, __ N.C. App. __, __, 822 S.E.2d 668, 671 (2018) (citation omitted). The State must show “other incriminating circumstances” to find constructive possession if the defendant is not in exclusive possession of the location where the contraband is found. *State v. Chekanow*, 370 N.C. 488, 493, 809 S.E.2d 546, 550 (2018) (citation omitted).

In the instant case, Officer Wester testified that he saw defendant sitting next to the rifle in the Facebook Live video. Furthermore, in the body camera footage defendant can be heard admitting to holding the rifle. While defendant was not in exclusive possession of the home where Officer Wester found him and the rifle, his confession to holding the weapon is enough for a finding of actual possession and constitutes further incriminating circumstances for constructive possession.

Likewise, there was evidence presented that Officer Wester saw defendant holding the pills in the Facebook Live video. Officers then found pills in plain view in the kitchen of the residence. While they were not tested at the time of the probation hearing, Officer Wester testified that based upon his experience working with narcotics that the pills were ecstasy.

Based upon this evidence, we cannot conclude that the trial court’s decision to revoke probation was “manifestly unsupported by reason” or “so arbitrary that it

could not have been the result of a reasoned decision.” *Hancock*, ___ N.C. App. at ___, 789 S.E.2d at 524. For these reasons, we affirm the trial court’s order.

2. Ineffective Assistance of Counsel

Defendant argues that he received *per se* ineffective assistance of counsel due to his counsel having less than three hours to prepare for his hearing. Defendant contends that he is entitled to a new probation hearing, or, in the alternate, he asks for his claim to be dismissed without prejudice.

Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal. A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel at a full evidentiary hearing on the merits of the ineffective assistance of counsel claim.

State v. Allen, ___ N.C. App. ___, ___, 821 S.E.2d 860, 861 (2018) (citations and internal quotation marks omitted) (alteration in original).

Defendant contends that the facts in this case justify a finding that his counsel was ineffective *per se*. For there to be a *per se* ineffective assistance of counsel violation:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

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requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984). “[O]nly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.” *United States v. Cronin*, 466 U.S. 648, 662, 80 L. Ed. 2d 657, 670 (1984) (footnote omitted).

Defendant argues that his counsel was ineffective because he did not have enough time to prepare for the probation hearing. Defense counsel had approximately two hours and forty minutes to prepare, and the body camera footage alone is over two hours long. Defendant contends that defense counsel did not have enough time to call witnesses, such as Mr. Grimes, who could have testified about the rifle and the events that occurred the night of defendant's arrest.

Our Supreme Court has found that while a defendant must have a reasonable time to prepare for their defense, “no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case.” *State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976) (citations omitted). In the instant case, it

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cannot be presumed that defense counsel's actions were ineffective because it is unclear how much of his actions were part of his strategy. This Court has noted:

[t]he appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Allen, __ N.C. App. at __, 821 S.E.2d at 861 (emphasis in original) (quoting *Massaro v. United States*, 538 US 500, 505, 155 L.Ed.2d 714, 720-21 (2003)).

While less than three hours is a brief amount of time to prepare for a hearing, it is possible that defense counsel looked over the majority of the evidence and decided he did not need more time than that. Officer Wester testified that he shared the body camera footage with defense counsel, and it is clear from the testimony that defense counsel listened to at least some portion of the video because he told the trial court that the footage was hard to hear. The decisions to hold the case open, not watch the entirety of the body camera footage video, and not call witnesses might have been part of a well-thought-out legal strategy on the part of defense counsel. On the face of the record, we cannot determine defense counsel's thought processes or tactics. Therefore, we dismiss this issue without prejudice for defendant's right to file a motion for appropriate relief.

III. Conclusion

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For the foregoing reasons, we affirm the trial court's judgment revoking defendant's probation, and dismiss without prejudice defendant's claim of ineffective assistance of counsel.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge MCGEE and Judge INMAN concur.

Report per Rule 30(e).