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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-189

Filed: 3 November 2020

Forsyth County, Nos. 14 CRS 54011–12, 54014

STATE OF NORTH CAROLINA

v.

RICARDO DOMINIC WHITE

Appeal by defendant from judgment entered 7 April 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Rory Agan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

BRYANT, Judge.

Where the indictment alleged two bases for a charge of maintaining a vehicle, and the trial court permitted the jury to convict defendant on one of the two bases, the indictment was not facially invalid. We find no error.

Factual and Procedural Background

STATE V. WHITE

Opinion of the Court

On 23 April 2014, Winston-Salem Police Officer A.C. Sawyers was patrolling near the Extended Stay America motel. During his investigation, Officer Sawyers encountered defendant Ricardo Dominic White and a woman acting suspiciously. He discovered that the woman, who had rented two rooms, had an active arrest warrant. Defendant was listed as a secondary guest for one of the rooms. Officer Sawyers searched the room rented to the woman and defendant, and found scales, bags for packaging, and a small amount of marijuana. He also discovered that defendant had an outstanding warrant for a probation violation. Officer Sawyers and his partner subsequently arrested defendant and found a rental vehicle key in his pocket. Officer Sawyers discovered the vehicle parked at a nearby Hampton Inn, and after searching the vehicle, he found \$1,467 in cash, two large bags of an off-white substance later determined to be heroin, a baggie of marijuana, a spent 10mm bullet shell casing, and a cell phone.

On 20 July 2015, the Forsyth County Grand Jury returned indictments against defendant for trafficking in heroin, possession of drug paraphernalia, felony possession of cocaine, two counts of possession of up to 1/2 ounce of marijuana, maintaining a vehicle for the purpose of keeping or selling heroin and marijuana, and possession of heroin with intent to sell and deliver. The matter proceeded to trial, and the jury returned verdicts finding defendant guilty of trafficking in heroin, possession of drug paraphernalia, one of the two possession of marijuana charges,

STATE V. WHITE

Opinion of the Court

maintaining a vehicle, and possession with intent to sell and deliver heroin. On 7 April 2017, the trial court consolidated for judgment the charges of trafficking in heroin, possession of drug paraphernalia, and possession of marijuana, and sentenced defendant to a minimum of 90 months and a maximum of 120 months in the custody of the North Carolina Department of Adult Correction.

On 5 April 2019, defendant filed a petition for writ of certiorari with this Court. On 22 April 2019, this Court granted certiorari.

Standard of Review

An attack on an indictment is waived when its validity is not challenged in the trial court. However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.

State v. Wallace, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citation omitted).

“This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review.” *State v. Pendergraft*, 238 N.C. App. 516, 521, 767 S.E.2d 674, 679 (2014) (citations omitted).

Indictment

In his sole argument on appeal, defendant contends that the indictment charging him with maintaining a vehicle was facially invalid. We disagree.

STATE V. WHITE

Opinion of the Court

Our General Statutes provide that it is a crime “[t]o knowingly keep or maintain any . . . 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) (2019). It is pursuant to this statute that defendant was charged with maintaining a vehicle. The indictment alleged that defendant “did knowingly keep and maintain a vehicle, A HYUNDAI SONATA that was used for keeping and selling controlled substances, HEROIN AND MARIJUANA, in violation of the North Carolina Controlled Substances Act, for the purpose of using such substances.”

Defendant contends, however, that the statute in fact alleges two possible bases for a criminal charge: either that defendant maintained a vehicle for the *use* of controlled substances, or that defendant maintained a vehicle for the *keeping or selling* of controlled substances. Defendant notes the two clauses in the indictment—one, that defendant maintained a vehicle “for keeping and selling controlled substances,” and the other, that defendant did so “for the purpose of using such substances.” Defendant contends that this improperly created two alternative bases for conviction and that a defendant cannot be charged for one and convicted of the other.

STATE V. WHITE

Opinion of the Court

In support of his position, defendant cites *State v. Miller*, 159 N.C. App. 608, 583 S.E.2d 620 (2003). In *Miller*, the defendant was charged by short-form indictments with two counts of *statutory sexual offense* pursuant to N.C. Gen. Stat. § 14-27.7A. However, he was tried, convicted, and sentenced for two counts of *first-degree sexual offense* pursuant to N.C. Gen. Stat. § 14-27.4(a)(1). The defendant appealed his conviction, and on appeal, this Court held that the indictments frustrated the purpose of an indictment in a criminal prosecution, which is to provide a defendant with notice of the charges against him, and therefore, the indictments were fatally defective. *Id.* at 614, 583 S.E.2d at 623.

However, in the instant case, *Miller* is inapposite. In *Miller*, the defendant was indicted under one statute but convicted under another. In the instant case, defendant was indicted and convicted under the same statute, N.C. Gen. Stat. § 90-108(a)(7). More importantly, our holding in *Miller* was premised upon the requirement that an indictment placed a defendant on notice of the charges against him. In the instant case, it is clear that the indictment did so.

Even assuming *arguendo* that the indictment offered two bases for conviction under the statute, they are not mutually exclusive. It would have been possible for the jury to find defendant guilty of maintaining a vehicle for the sale of controlled substances, or the use of controlled substances, or both. Our Supreme Court has held that “[t]he use of a conjunctive in the indictment does not require the State to prove

STATE V. WHITE

Opinion of the Court

various alternative matters alleged.” *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (citation omitted). It is sufficient that the indictment alleges all of the elements of the offense and that the State subsequently presents evidence to support at least one basis for conviction of that offense.

The matter is further clarified by the trial court’s instructions to the jury. The trial court instructed the jury that it could find defendant guilty if he “kept or maintained a vehicle used for the purpose of unlawfully keeping or selling heroin and marijuana.” Even assuming *arguendo* that the indictment alleged two possible bases for conviction, the trial court’s instruction narrowed that focus to one: whether defendant maintained the vehicle for the purpose of keeping or selling controlled substances.

It is clear, from the plain language of the indictment, that defendant was charged with maintaining a vehicle for, *inter alia*, keeping and selling heroin and marijuana. It is equally clear that the jury was instructed on precisely that point: that it could only find defendant guilty if it found that he maintained a vehicle for the purpose of keeping and selling marijuana. The indictment did not contain misleading language or fail to allege the elements of the charge, nor did the jury instruction permit conviction on some basis not alleged in the indictment. We therefore hold that the indictment on the charge of maintaining a vehicle was not facially invalid and

STATE V. WHITE

Opinion of the Court

that the trial court committed no error in entering judgment on that conviction by the jury.

NO ERROR.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).