IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-209

Filed: 17 November 2020

Onslow County, No. 17 CRS 57968

STATE OF NORTH CAROLINA

v.

DAVID WILLIAMS, JR., Defendant.

Appeal by defendant from judgment entered 28 August 2019 by Judge Stephan R. Futrell in Onslow County Superior Court. Heard in the Court of Appeals 23 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrina G. Bass, for the State.

Stephen G. Driggers for defendant-appellant.

YOUNG, Judge.

Where the evidence at trial was insufficient to show a mutual understanding or agreement, the trial court erred in denying defendant's motion to dismiss the charge of conspiracy. We reverse defendant's conviction on that charge and remand for resentencing.

I. Factual and Procedural Background

On 18 August 2017, a confidential informant, Daniel England (England) contacted Detective Jonathan Marshburn of the Narcotics Division of the Onslow County Sheriff's Office (Det. Marshburn). England informed Det. Marshburn that he could purchase one gram of crack cocaine from Bobby Canady, Jr. (Canady) for $100. Det. Marshburn agreed to conduct a controlled purchase of drugs with England. He met England, searching his person, while two other officers, Sergeant Adrian Berrera (Sgt. Berrera) and Detective Aaron Hernandez (Det. Hernandez), searched England's vehicle. He then equipped England with a recording device and $100 to make the purchase. England drove to his meeting with Canady, and the officers followed to observe. England and Canady spoke for several minutes, but Canady did not have drugs on his person. Canady got into a vehicle with England and called David Williams, Jr. (defendant). Canady told England that defendant would bring the cocaine.

England and Canady drove to meet defendant, again followed by the three officers. Det. Marshburn and Det. Hernandez recognized defendant as he approached. Defendant approached the passenger side of Canady's vehicle and spoke briefly, then conducted a hand-to-hand transaction. England had previously provided Canady with the money for the crack cocaine. Canady gave defendant the money and defendant gave Canady the crack cocaine wrapped in plastic. Canady then gave the crack cocaine to England, and Canady and England departed.

After his meeting with Canady, England returned to the officers, who recovered the crack cocaine from him, received the recording of the transaction, and searched England and his vehicle. England also identified defendant, as "Dave-o," as the man who sold the crack cocaine to Canady.

The Onslow County Grand Jury indicted defendant for delivery of cocaine, conspiracy to sell or deliver cocaine, possession of drug paraphernalia, possession with intent to manufacture, sell, and deliver cocaine, manufacture of cocaine, and sale of cocaine. The State voluntarily dismissed the charges of possession of drug paraphernalia and manufacture of cocaine. The Grand Jury further indicted defendant for attaining the status of an habitual felon.

The matter proceeded to trial. At the close of the State's evidence, defendant moved to dismiss the charges against him. Specifically, defendant argued, *inter alia*, that "there has not been any showing of a conspiracy to deliver drugs in this case." The trial court denied the motion, and defendant declined to put on evidence. Defendant renewed his motion, and the trial court again denied it.

The jury returned verdicts finding defendant guilty of delivery of cocaine, conspiracy to deliver cocaine, possession with intent to sell or deliver cocaine, and sale of cocaine. Defendant subsequently pleaded guilty to having attained the status of an habitual felon. The trial court consolidated the offenses for judgment, and sentenced defendant to a minimum of 100 months and a maximum of 132 months, in

the presumptive range, in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss the charge of conspiracy for insufficiency of the evidence. We agree.

A. Standard of Review

"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). " '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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

B. Analysis

A criminal conspiracy is "an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987). The State must show a "mutual, implied understanding" in order to withstand a motion to dismiss. *Id*.

Defendant does not dispute that England approached Canady to purchase crack cocaine, that Canady received England's money, that Canady and England went to defendant to obtain the crack cocaine, that Canady acquired the crack cocaine from defendant, or that Canady then provided said crack cocaine to England. Rather, the only issue that defendant appears to dispute on appeal is that there was a mutual, implied understanding between defendant and Canady that the crack cocaine was to be sold to England. Defendant contends that the only evidence shows that he had an intent to sell to Canady, not that he conspired to use Canady to sell to England.

In support of his position, defendant cites this Court's decision in *State v. Euceda-Valle*, 182 N.C. App. 268, 641 S.E.2d 858 (2007). In that case, an officer pulled over a speeding vehicle, and noted that the driver and passenger were nervous and that the vehicle reeked of air freshener. Officers conducted a canine sniff of the vehicle, and discovered ten packages of cocaine in the trunk. The defendant, the driver, was convicted of, *inter alia*, conspiracy to traffic in cocaine. He appealed from, *inter alia*, the denial of his motion to dismiss the charge of conspiracy. This Court held that the evidence, taken in the light most favorable to the State, showed that

the defendant and his passenger were nervous, and that the cocaine was confiscated from the trunk. The evidence did not show any agreement, conversations, or unusual movements, or the possession of large amounts of money or weapons, or anything else suggesting a conspiracy aside from their proximity. Accordingly, this Court held that the evidence was insufficient to support a conviction for conspiracy. *Id*. at 276, 641 S.E.2d at 864-65.

In the instant case, as in *Euceda-Valle*, the evidence of a conspiracy is tenuous at best. Rather, the evidence shows a sequence of unlawful exchanges – England making his purchase from Canady, and Canady making his purchase from defendant. There is no evidence that defendant entered into an agreement with Canady to sell cocaine to a third party; the only evidence is that defendant agreed to sell cocaine to Canady.

Certainly, it is not impossible for the State to show that the use of an intermediary can constitute a conspiracy. For example, in *Worthington*, one defendant, Warren, referred to the other, Worthington, as "his man" for obtaining drugs and the manner in which "his man" preferred to arrange deals, and officers found a notebook in Worthington's residence containing a record of payments and balances for dated transactions. We held that this evidence, viewed in the light most favorable to the State, "was sufficient to take the issue of conspiracy to the jury." *Worthington*, 84 N.C. App. at 163, 352 S.E.2d at 703.

Similarly, in *State v. Drakeford*, 104 N.C. App. 298, 409 S.E.2d 319 (1991), an undercover officer contacted a drug dealer, Simpkins, who contacted his colleague, the defendant, and the two traveled to Maryland and then to New York. On the return trip, Simpkins told the defendant that, if he sold the drugs, he would split the money with the defendant. On appeal from the denial of the defendant's motion to dismiss the charge of conspiracy, this Court noted that the evidence showed an "implied understanding that if Simpkins drove to Maryland, defendant would procure the cocaine for resale in North Carolina." *Id.* at 300, 409 S.E.2d at 321. Accordingly, this Court held that the trial court did not err in denying the motion to dismiss.

In the instant case, however, there is no record of past transactions. There is no evidence of an ongoing arrangement or understanding between defendant and Canady to supply crack cocaine to customers. There is no evidence that Canady indicated a desire to resell the cocaine. The evidence merely demonstrated that Canady sought to purchase crack cocaine from defendant, and was able to do so. In the absence of any evidence of an agreement or understanding between defendant and Canady, the evidence can only show possession, sale, or delivery of crack cocaine, not conspiracy to do so. Accordingly, we hold that the trial court erred in denying defendant's motion to dismiss the charge of conspiracy. We reverse his conviction on this charge. Because the charges were consolidated for sentencing, we remand for resentencing.

REVERSED AND REMANDED.

Judges DILLON and INMAN concur.

Report per Rule 30(e).