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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-234

Filed: 3 November 2020

Guilford County, No. 16 CRS 91317

STATE OF NORTH CAROLINA

v.

WILLIE JAMES BARBER

Appeal by defendant from judgment entered 14 October 2019 by Judge Lora Christine Cabbage in Guilford County Superior Court. Heard in the Court of Appeals 6 October 2020.

Joshua H. Stein Attorney General, by Assistant Attorney General James R. Baker, for the State.

Gilda C. Rodriguez for defendant.

ARROWOOD, Judge.

Willie James Barber (“defendant”) appeals from judgment entered 14 October 2019 following a jury trial for various criminal offenses. For the following reasons, we find no error in defendant’s trial but dismiss defendant’s claim of

ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

I. Background

On 11 December 2016, officers of the Greensboro Police Department arrived at defendant's residence to investigate a Crime Stoppers complaint. Defendant answered the door of the one-bedroom apartment. Defendant's girlfriend, Theresa Owens and her son, Huell Owens ("Mr. Owens"), were present at the time. Defendant is the only person named on the lease of the subject residence.

Following a brief conversation with defendant at the door, the officers detected the smell of marijuana emanating from the apartment. The officers informed defendant of their observation. At this point, Mr. Owens approached the door and stated that he had smoked marijuana inside the residence. Defendant provided the officers with permission to enter the residence and perform a walk-through. Once inside, one of the officers instantly observed a "marijuana roach" on the kitchen counter. The officers asked defendant for his consent to search the entire apartment, but defendant did not provide a definitive response. One of the officers then left to obtain a search warrant while the other officers remained at the residence with the occupants. During this interim period, an officer waiting at the residence observed a digital scale under a couch cushion and another one on top of a radio in the living room.

After obtaining a search warrant, law enforcement searched the residence and located heroin, crack cocaine, “Inositol pills”—which are apparently used as a cutting agent for heroin and crack cocaine—as well as marijuana, digital scales, and three “BB guns” with the “orange tips removed.” All of the narcotics and other items were found in defendant’s bedroom (with the exception of a few digital scales confiscated in the living room).

After the search and advising all occupants of their legal rights, the officers asked if anyone wished to take ownership of the items seized as they could not readily ascertain to whom the drugs belonged. Defendant claimed responsibility for, and ownership of, the contraband seized. Because the officers were not certain that the drugs actually belonged to defendant, all three occupants were arrested and transported to the Guilford County Jail. At the station, defendant again confessed to being the owner of the narcotics, specifically the seized cocaine and heroin, but could not say the precise amount of the drugs found.

On 17 April 2017, defendant was indicted for possession with intent to sell and deliver cocaine and misdemeanor possession of drug paraphernalia. Later, a superseding indictment was entered charging defendant with possession with intent to sell and deliver cocaine; misdemeanor possession of drug paraphernalia; and trafficking in heroin. The State voluntarily dismissed the charge of possession with intent to sell and deliver cocaine.

This action was tried before a jury on 7 October 2019. At the close of the State's evidence, defendant moved to dismiss for insufficient evidence. The motion was denied, and defendant was found guilty of possession of drug paraphernalia and trafficking by possession of an amount greater than fourteen grams and less than twenty-eight grams of heroin. The trial court entered judgment on 14 October 2019. Defendant gave oral notice of appeal in open court.

II. Discussion

Defendant argues that he received ineffective assistance of counsel as a result of certain statements made by his attorney at trial. Defendant next contends that the trial court erred by denying his motion to dismiss the charge of trafficking in heroin. Defendant asserts that the State failed to establish that defendant constructively possessed the heroin seized at his residence. We will address each issue in turn.

A. Ineffective Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel at trial because his trial attorney disclosed to the jury pool that defendant had been previously convicted of murder and served a thirty-three-year sentence and, separately, because his attorney made a false representation to the jury during opening statements.

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During jury selection, defendant's trial counsel stated the following: "The evidence, ladies and gentlemen, may show that [defendant] was previously convicted of murder and served 33 years in prison. The evidence will also show that [defendant] satisfactorily completed his 12 months of post-release supervision." The prosecutor assigned to this case had previously represented to defendant's trial counsel that the government did not intend to offer evidence pertaining to defendant's murder conviction unless defendant testified. However, because defendant's attorney had already revealed the conviction during jury selection (presumably to the same jurors who decided defendant's case), the State did not censor or mute video footage played before the jury from an arresting officer's bodycam during which defendant disclosed his prior murder conviction.

Thereafter, during opening statements, defendant's attorney made the following assertion: "What [the police] didn't find [in defendant's residence] are cutting agents that are consistent with the manufacture of cocaine or heroin." Later in trial, a witness for the State, Detective Eric Follis ("Detective Follis"), testified that officers seized "Inosit[o]l pills, which is a cutting agent for both heroin and crack cocaine[.]" Detective Follis and the prosecutor then had the following exchange:

Q And Mr. Baucino mentioned in his opening statement a couple of times there were no cutting agents. Do you know what a cutting agent is?

A Yes.

Q What is that?

A A cutting agent is something you mix with—let's say you get a gram of a drug, say heroin, for instance. Common cutting agents we come across are Inosit[o]l, Miralax, things of that nature.

Inside of the residence, we located Inosit[o]l pills. They're capsules which when you open the capsule, you got the Inosit[o]l powder inside of it, which you then mix with that one gram of heroin you had, and you can turn it into 4 grams of heroin.

The State subsequently admitted the Inositol pills seized at defendant's residence into evidence. Defense counsel did not object to Detective Follis' testimony nor did counsel challenge the admission of the Inositol pills into evidence.

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citing *State v. Martin*, 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983)).

In order to establish that counsel was ineffective, defendant must satisfy a two-part test:

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

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Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). “Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Givens*, 246 N.C. App. 121, 124, 783 S.E.2d 42, 45 (2016) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)).

Importantly, however, “claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citing *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). A motion for appropriate relief is the preferable mechanism to raise such a claim because “[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor.” *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation omitted). “[S]hould the reviewing court determine that [the ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *State v. Fair*, 354 N.C. 131,

167, 557 S.E.2d 500, 525 (2001) (citing *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985)).

In this case, we cannot properly determine this issue on direct appeal because an evidentiary hearing on this issue has not been held and the “cold record” is not dispositive. *Kinch*, 314 N.C. at 106, 331 S.E.2d at 669 (concluding same); *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted) (Ineffective assistance of counsel “claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.”); *State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to whether defendant consented to his counsel’s argument regarding his guilt and determining that said issue was appropriately deferred for consideration in a motion for appropriate relief). Therefore, we dismiss defendant’s claim for ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

Should this issue be raised below upon appropriate motion, the trial court “should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined

to be relevant to defendant's allegations of ineffective assistance of counsel." *Buckner*, 351 N.C. at 412, 527 S.E.2d at 314.

B. Motion to Dismiss

Defendant next asserts that the trial court erred when it denied his motion to dismiss the charge of trafficking in heroin because the State failed to establish that defendant constructively possessed the heroin seized. 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) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citations omitted). Substantial evidence has been defined by our North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

The offense of trafficking in heroin by possession has two elements: "(1) knowing possession (either actual or constructive) of (2) a specified amount of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987) (citing *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985)); *see also* N.C. Gen. Stat. § 90-95(h)(4)b (2019). "Possession of a controlled substance may be actual or constructive." *State v. Steele*, 201 N.C. App. 689, 692, 689 S.E.2d 155, 158 (2010) (citing *State v.*

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McLaurin, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987)). “ ‘A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.’ ” *Id.* at 692, 689 S.E.2d at 158 (quoting *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002)). “Where contraband is found on premises under the control of the defendant, that in itself is sufficient to go to the jury on the question of constructive possession.” *State v. Peek*, 89 N.C. App. 123, 126, 365 S.E.2d 320, 322 (1988) (citation omitted).

In the instant case, although defendant did not physically possess the confiscated heroin, the evidence presented at trial tended to show he constructively possessed the heroin found in his residence. *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3, *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001) (citing *Peek*, 89 N.C. App. at 126, 365 S.E.2d at 322) (“Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance.”). The undisputed evidence established that it was defendant who initially provided law enforcement officers with permission to enter his residence and perform a walkthrough. In their initial walkthrough, the officers saw a controlled substance. When defendant did not consent to a full search of the apartment the officers obtained a search warrant. During the execution of this warrant, the heroin

at issue was located in defendant's bedroom. The evidence further established that defendant was the only person named on the lease of the residence in which the heroin (and other contraband) was seized; defendant also slept in the particular bedroom where the drugs were found. *See State v. Turner*, 168 N.C. App. 152, 156, 607 S.E.2d 19, 22-23 (2005) (noting that "close proximity to the controlled substance and conduct indicating an awareness of the drugs, such as efforts at concealment or behavior suggesting a fear of discovery—are sufficient to permit a jury to find constructive possession."). In addition to the corroborating and incriminating evidence above, defendant confessed—on multiple occasions—to owning and possessing the heroin and contraband found in his apartment. This evidence is sufficient, taken in the light most favorable to the State, to show that defendant had the intent and power to control the heroin and other unlawful items seized in his residence. *See State v. Miller*, 363 N.C. 96, 100, 678 S.E.2d 592, 595 (2009) (holding that the State presented sufficient evidence from which a reasonable mind could conclude that defendant constructively possessed the controlled substance).

III. Conclusion

For the reasons above, we hold that the trial court did not err by denying defendant's motion to dismiss as the State offered substantial evidence to prove the offense of trafficking in heroin. We, therefore, find no error in defendant's conviction.

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Defendant's claim of ineffective assistance of counsel is dismissed without prejudice to his right to file a motion for appropriate relief in the trial court.

NO ERROR WITH RESPECT TO TRIAL; DISMISSED WITHOUT PREJUDICE AS TO CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).