IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-333

No. COA20-735

Filed 6 July 2021

Durham County, No. 17 CRS 50973

STATE OF NORTH CAROLINA

v.

DAVID HARRIS

Appeal by defendant from judgment entered 19 July 2019 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 9 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip A. Rubin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

TYSON, Judge.

¶ 1 David Anthony Harris ("Defendant") appeals from a jury's verdict finding him guilty of trafficking heroin, possession of cocaine with intent to sell or deliver, maintaining a dwelling for keeping or selling a controlled substance, and possession of drug paraphernalia. We find no error.

I. Background

¶ 2 Durham County Sheriff's deputies Pinner and Valdivieso independently executed two search warrants on 9 February 2017 at 409 East End Avenue, Durham, North Carolina, a house owned by Defendant. The first warrant was issued to Sergeant Wendy Pinner at 10:55 a.m. that day. She sought to seize a pit bull dog named "Big Girl." The affidavit asserted Sergeant Pinner had received a call the previous day regarding activity at 409 East End Avenue. Upon arrival, she observed a pit bull suffering from multiple injuries. Defendant told Sergeant Pinner neighborhood dogs had attacked "Big Girl," but he had refused to obtain veterinary care. Based upon her evaluation of the scene, Sergeant Pinner believed there was probable cause to believe cruelty to animals was occurring at that address.

¶ 3 Later that day, Detective Charli Valdivieso obtained a search warrant for suspected drug offenses. In the affidavit for the warrant, Detective Valdivieso explained a confidential informant ("CI") had contacted him around 5 February 2017. The CI described an individual named "Dave," his residence, and the motor vehicle he drove. The CI alleged that "Dave" had sold narcotics. Detective Valdivieso procured a photo of Defendant as a possible picture of "Dave," and the CI confirmed his identity.

¶ 4 During that week, Detective Valdivieso arranged a controlled purchase from Defendant, using the CI. Detective Valdivieso and Lieutenant John Pinner had the CI contact Defendant and arrange a meeting with him. Defendant was observed

leaving 409 East End Avenue and meeting the CI at a predetermined location. Defendant sold crack cocaine to the CI.

¶ 5 Deputy Bradley Grabarek was the surveillance officer located at 409 East End Avenue. He alerted Detective Valdivieso when Defendant left the house for the controlled sale and purchase. Grabarek had served in the Durham County Sheriff's Office for nine years since 2008.

¶ 6 Officers executed the search warrant for 409 East End Avenue on 9 February 2017. Officers found 12.1 grams of cocaine, 8.5 grams of cocaine base, and 18.31 grams of heroin. Also recovered was over $3,600 in U.S. currency, drug paraphernalia, a digital scale, and drug packaging materials. During the search, Defendant told Detective Valdivieso that he was the only person who lived there. A bill from Duke University Hospital, with Defendant's name and the address of 409 East End Avenue, Durham, NC, and a credit card, with Defendant's name on it, were also found therein.

¶ 7 In 2018, Deputy Grabarek became the subject of a Federal Bureau of Investigation ("FBI") inquiry. The FBI determined Grabarek was addicted to drugs and had used stolen evidence and illegal narcotics evidence purchase money to fuel his addiction. In 2019, Grabarek pled guilty to a single count of theft of government property. A federal court judge placed Grabarek on three years of probation and authorized a restitution payment plan totaling $15,300.

A. Defendant's Pre-Trial Motions

¶ 8 Defendant was indicted by a grand jury on 5 June 2017. Defendant was represented by private counsel, Ralph Frasier, who filed motions to suppress both warrants executed on 9 February 2017. The motions alleged each warrant was too vague and invalid on its face. The trial court calendared the suppression motions to be heard on 15 July 2019.

¶ 9 At the pretrial hearing, Frasier argued he had just learned of Grabarek's involvement in the case as the surveillance officer. Frasier asserted that he could not subpoena Grabarek to appear in state court, as Grabarek was in federal custody, and was unable to cross-examine him.

¶ 10 The prosecutor informed and corrected Frasier that Grabarek was not in federal custody and the burden of the motion rested on defense counsel to show. During the hearing, the prosecutor explicitly informed Frasier of "a *Franks* motion to contest the truthfulness of what was alleged."

¶ 11 The trial court concluded the warrant application was facially sufficient to establish probable cause and denied the motions to suppress. The trial court's written order noted that there was "no reason to doubt the truthfulness of the testimony provided to the magistrate."

B. Defendant's Trial and Sentencing

¶ 12 At trial, the State presented testimony from Detective Valdivieso regarding his contact with the CI and his search of the residence. Sergeant Pinner testified about

her interactions with Defendant during her inspection of 409 East End Avenue for animal cruelty. The State also presented the Duke University Hospital medical bill as well as transcripts of text messages sent from a cell phone number associated with Defendant.

¶ 13 Defendant presented evidence from Defendant's sister who claimed he lived with her and that 409 East End Avenue, Durham North Carolina was rented to Michael Leverette. Leverette, who is serving a 264-month sentence in federal prison, submitted an affidavit averring that he had rented the home and the drugs recovered therein belonged to him.

¶ 14 The State's rebuttal evidence included testimony from Sergeant Justin Ellerbe, a detention intelligence officer, who had overheard a prison conversation between Leverette and another prisoner. Sergeant Ellerbe overheard Leverette claim he was going to "take" Defendant's charges, as his federal sentence would purportedly protect him from State charges.

¶ 15 The jury convicted Defendant on all four counts on 19 July 2019. Defendant received an active sentence of 90 to 120 months for the trafficking charge, and an active concurrent sentence of 10 to 25 months for the other three offenses.

C. Defendant's Appeal and Transcription Extensions

¶ 16 Defendant gave oral notice of appeal following entry of judgment on 19 July 2019. The order authorizing the production of the trial transcript was delivered to the court reporter, Patricia Nelson, that day.

¶ 17 Defendant filed and received seven successive motions for extensions of time to file the transcript on behalf of the court reporter. Such extensions were in addition to the standing extension pursuant to the Emergency Directives and Order of the Chief Justice of North Carolina for court operations during the COVID-19 Pandemic.

¶ 18 This Court ultimately entered a final deadline of 6 July 2020 for the transcriptionist to turn over all materials to the Court. The order noted failure to comply may result in a show cause hearing allowing the trial court to take whatever action appropriate to compel the production and delivery of the transcript.

¶ 19 Ms. Nelson delivered the transcript on 9 July 2020, one day before Defendant completed his concurrent sentence for the non-trafficking offenses. Only one of the motions for extension of time, the last motion filed on 19 June 2020, mentioned concern of a speedy appeal.

II. Issues

¶ 20 Defendant argues: (1) his trial counsel rendered ineffective assistance of counsel by failing to request a continuance and a *Franks* hearing after learning of Grabarek's involvement; and (2) his due process right to a speedy appeal was violated by the court reporter's failure to timely produce a transcript.

III. Ineffective Assistance of Counsel

A. Standard of Review

¶ 21 We review 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).

¶ 22 To show ineffective assistance of counsel ("IAC"), a defendant must satisfy both of the two-prongs stated by the Supreme Court of the United States. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). The *Strickland* test has been explicitly adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985).

¶ 23 Pursuant to *Strickland*:

> 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. *Unless a defendant makes both showings*, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (emphasis supplied).

B. Analysis

¶ 24 "In general, 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). The direct appeal of IAC claims is only proper "when the cold record reveals that no further investigation is required" and the claim can be decided on the merits. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). On direct appeal, this Court reviews only the material included in the record and the transcript of proceedings. *See id.* at 166, 557 S.E.2d at 524-25.

¶ 25 A defendant alleging IAC must show counsel's performance was deficient, and that the alleged deficiency was prejudicial to deprive the defendant of a reliable trial result. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Our Supreme Court concluded, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

¶ 26 Defendant asserts ineffective assistance from his trial counsel plausibly prejudiced the outcome in two ways: (1) at a *Franks* hearing, Defendant could have found facts necessary to refute the issuance of the search warrant; or, (2) the discovery of Deputy Grabarek's corruption could have led the State to offer a more favorable guilty plea. We disagree and discuss each assertion in turn.

1. Failure to Request a Franks *Hearing*

¶ 27 Defendant asserts the lack of a *Franks* hearing prejudiced him because he "may have been able to make a showing that Grabarek lied about seeing [Defendant] leave the house, and that Valdivieso had reason to distrust Grabarek."

¶ 28 In *Franks v. Delaware*, the Supreme Court of the United States held that when a "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause" a defendant may request a hearing. *Franks v. Delaware*, 438 U.S. 154, 155–56, 57 L. Ed. 2d 667, 672 (1978).

¶ 29 Defendant's assertion is misplaced. The mere potential of a different outcome is not enough to show Defendant was prejudiced by his counsel's failings. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 178 L. Ed. 2d 624, 647 (2011).

¶ 30 No evidence in the record before this Court tends to show Defendant would be successful at a *Franks* hearing. Grabarek's statements or participation were not necessary to any finding of probable cause. Presuming *arguendo*, the affiant, Detective Valdivieso, did have reason to distrust Grabarek at the time of his involvement and included his statement recklessly, other ample evidence in the record exists to support the finding of probable cause necessary for the issuance of

the warrant.

¶ 31 Sergeant Pinner had visited Defendant at the 409 East End Avenue address the previous day. Moreover, the CI had already identified Defendant's residence prior to the controlled purchase. These two elements clearly meet the "commonsense . . . totality-of-the-circumstances approach" adopted by our Supreme Court for determining probable cause. *State v. McKinney*, 361 N.C. 53, 62, 637 S.E.2d 868, 874 (2006) (citing *Illinois v. Gates*, 462 U.S. 213, 230–31, 76 L. Ed. 2d 527, 543 (1983)).

¶ 32 Based on the record before us, a *Franks* hearing regarding Grabarek's involvement would have not been successful for Defendant. Defendant's failure to meet the *Franks* test does not show the substantial likelihood of a different result, even if his counsel had requested it. *Richter*, 562 U.S. at 112, 178 L. Ed. 2d at 647. Defendant cannot prove prejudice resulting from the purported IAC in the record before us under this theory.

2. Discovery of Police Misconduct Would Lead to a More Favorable Plea

¶ 33 Defendant asserts he was prejudiced by his counsel's ineffective assistance. He argues if Deputy Grabarek's misconduct had been established as a factor of the case, the State may have offered a more favorable plea deal. Defendant points to statements by the Durham County District Attorney, as well as the Assistant District Attorney, regarding their disapproval of police misconduct.

¶ 34 Defendant's reliance upon such statements is misplaced. In *Strickland*, the

Supreme Court of the United States held the prejudice analysis "should not depend on the idiosyncracies [sic] of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland*, 466 U.S. at 695, 80 L. Ed. 2d at 698. Defendant's assertions regarding the conceivable or supposed impact such statements would have on the outcome of the case are "irrelevant to the prejudice inquiry." *Id.* Defendant cannot support an IAC claim by relying upon individual statements and personalities involved in the case to demonstrate a substantial showing of prejudice. *See id.*

¶ 35 On the record before this Court, Defendant has failed to show he would have been successful at a *Franks* hearing and has not presented a viable IAC claim. In the event Defendant has more evidence beyond that contained in the record, we dismiss his IAC claim without prejudice to potentially file a motion for appropriate relief. *Stroud*, 147 N.C. App. at 553, 557 S.E.2d at 547 ("In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.").

IV. Due Process Right to a Speedy Appeal

¶ 36 Defendant contends his due process right to a speedy appeal was violated due to the year-long delay in obtaining the transcripts of his trial. We disagree.

A. Standard of Review

¶ 37 This Court reviews alleged violations of constitutional rights *de novo*. *State v.*

Graham, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

B. Analysis

¶ 38 No constitutional right to an appeal exists under the Constitution of the United States for a criminal conviction. *Goeke v. Branch*, 514 U.S. 115, 119, 131 L. Ed. 2d 152, 158 (1995) (citing *Ortega-Rodriguez v. United States*, 507 U.S. 234, 253, 122 L. Ed. 2d 581, 600 (1993) (Rehnquist, C.J., dissenting)). In rare instances where undue delays prevent processing an appeal, a defendant's due process rights may be violated. *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 175 (2000) (citing *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984)).

¶ 39 To determine whether a due process violation has occurred, we consider the following factors: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of their right to a speedy appeal; and (4) any prejudice to defendant resulting from the delay. *See id.* at 158, 541 S.E.2d at 172 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 116-17 (1972)). No single factor is dispositive. The four considerations "are related factors and must be considered together with such circumstance as may be relevant." *Id.*

1. Length of the Delay

¶ 40 The one-year delay in delivering the trial transcript to Defendant and this Court is not sufficiently lengthy to implicate his due process rights. This Court has previously held, "we do not consider a delay of a year to be 'presumptively

prejudicial.'" *In re T.H.*, 218 N.C. App. 123, 131, 721 S.E.2d 728, 734 (2012). This Court has frequently declined to conclude due process violations occurred in cases where delays far exceeded one year. *See Hammonds*, 141 N.C. App. at 165, 541 S.E.2d at 176; *see also State v. China*, 150 N.C. App. 469, 475, 564 S.E.2d 64, 69 (2002). Applying prior precedents, the year-long delay in the delivery of the trial transcript was not so unduly long to be prejudicial. *Id.*

2. Reason for the Delay

¶ 41 This Court examines if "the delay was due to the neglect or willfulness of the prosecution." *State v. Johnson*, 275 N.C. 264, 269, 167 S.E.2d 274, 278 (1969). Defendant's assertion that the court reporter's delay should be attributed against the State is both unpersuasive and unsupported.

¶ 42 This Court has previously declined to attribute extensions of time for the reporter to complete and deliver the transcript against the prosecution or the State. *State v. Berryman*, 170 N.C. App. 336, 343, 612 S.E.2d 672, 677 (2005), *aff'd*, 360 N.C. 209, 624 S.E.2d 350 (2006) ("It was not the duty of the State to contact the court reporter or the court concerning the preparation of the transcript."); *see also Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 176 (holding the reporter's requests for extensions of time were not attributable to the prosecution).

¶ 43 While the transcription delay and delivery are not necessarily the fault of Defendant, this fact does not shift the burden nor require the prosecution to bear the

fault. Because the delay was not the fault of or attributable to the prosecution, this factor weighs against Defendant in his argument of prejudice. *Id.*

3. Defendant's Assertion of His Right to a Speedy Appeal

¶ 44 Defendant first asserted his right to a speedy appeal 19 June 2020. Defendant argues his extension motions should be considered as invoking his right to a speedy appeal, as he had no other options. We disagree.

¶ 45 Defendant could have sought an order from the trial court compelling the court reporter to produce the transcript in a timely manner. *See Berryman*, 170 N.C. App. at 344, 612 S.E.2d at 677. "Defendant could have contacted. . . the trial court, or the Clerk of this Court to determine the status of his appeal." *China*, 150 N.C. App. at 474, 564 S.E.2d at 68. Defendant's failure to timely assert his right to a "speedy appeal" or to take any action to compel the production and delivery of the trial transcript weighs against his claim of a due process violation and prejudice. *Id.* at 474-75, 564 S.E.2d at 68.

4. Prejudice

¶ 46 We have recognized three interests protected by a speedy appeal: "1) prevention of oppressive incarceration; 2) minimization of anxiety and concern of the defendant; and 3) limiting the possibility that the defense will be impaired." *Berryman*, 170 N.C. App. at 344, 612 S.E.2d at 677. Defendant served his concurrent sentence for the three consolidated offenses before the trial transcript was delivered.

He argues the transcriptionist's delay impeded the ability to seek release from the sentence. We disagree.

¶ 47 This consolidated sentence for the three lesser offenses runs concurrently with Defendant's much longer drug trafficking sentence, under which he remains incarcerated. Defendant has failed to show how being able to complete his appeal earlier was prejudicial. Even if the concurrent sentence for the consolidated offenses were vacated, no practical change would occur for Defendant, who continues to serve the longer concurrent drug trafficking sentence.

¶ 48 Defendant claims he suffered increased "anxiety," because he could not be sure when he would receive his transcript. The record is silent on this matter and no evidence tends to show any "anxiety" or concern. "Defendant has failed to show that he suffered any more anxiety than any other appellant." *China*, 150 N.C. App. at 475, 564 S.E.2d at 69. General claims of increased "anxiety" are insufficient to demonstrate prejudice, absent substantial evidence from the record. *See id.*

¶ 49 Defendant finally asserts the court reporter rushed her work to avoid contempt and produced a low-quality transcript. While the transcript contains spelling errors and spacing irregularities, no evidence shows these deficiencies resulted from the delay. Defendant argues it was difficult and time consuming to pursue an appeal. Because the transcript is readable, we find the Defendant suffers no impairment from its spelling and spacing irregularities.

V. Conclusion

¶ 50 Based upon the record before us, Defendant has not demonstrated any basis to show he suffered ineffective assistance of counsel under the *Strickland* test. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 562, 324 S.E.2d at 248. In the event Defendant has more evidence beyond that contained in the record, we dismiss his IAC claim without prejudice to potentially file a motion for appropriate relief.

¶ 51 Balancing the four factors set out above, Defendant's due process rights were not violated. There is no substantial showing that he suffered prejudice.

¶ 52 Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgments entered thereon. *It is so ordered.*

NO ERROR; IAC CLAIM DISMISSED WITHOUT PREJUDICE.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).