IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-827

No. COA22-342

Filed 6 December 2022

Forsyth County, Nos. 17CRS197, 17CRS50582, 17CRS50584-85, 17CRS50622

STATE OF NORTH CAROLINA

v.

BARRY DEVONTAE RICHARDSON, Defendant.

Appeal by Defendant from order entered 24 June 2021 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John Payne, for the State.

Randolph & Fischer, J. Clark Fischer, for the Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant was convicted of committing several drug-related crimes. This present appeal is the second to our Court in this matter. A detailed account of the facts in the underlying case can be found in our opinion rendered in the first appeal. *See State v. Richardson*, 265 N.C. App. 383, 827 S.E.2d 337 (2019) (unpublished). In the first appeal, Defendant argued that his trial counsel deprived him of effective assistance of counsel by failing to move for the suppression of statements obtained in

violation of his *Miranda* rights. We dismissed the issue without prejudice to allow Defendant to file a Motion for Appropriate Relief ("MAR").

¶ 2 On remand, Defendant filed an MAR. After a hearing, the trial court entered an Order vacating several of Defendant's convictions but upheld his conviction for possession with intent to sell or deliver cocaine. Defendant appeals.

I. Analysis

¶ 3 Defendant did not appropriately notice his appeal from the MAR Order. He has filed a petition for a writ of *certiorari*, which we grant in our discretion.

¶ 4 We review the trial court's MAR Order to determine "whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982).

¶ 5 In this second appeal, Defendant argues his trial counsel erred by failing to move for the suppression of a police officer's testimony that Defendant told the officer he only knew how to sell "crack powder and marijuana" and "that's all I do; look in my record."

¶ 6 It is axiomatic that a defendant's right to counsel includes the right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). When a defendant attacks his conviction on the basis that his counsel was ineffective, he must show two things: (1) his "counsel's performance . . . fell below

an objective standard of reasonableness" and (2) "the deficient performance prejudiced [him]." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Defendant bears the burden of showing that he was prejudiced, specifically, that there was a "reasonable probability that, but for counsel's [error], the result of the proceeding would have been different." *Id.* at 694.

¶ 7 We need not determine whether counsel's performance was deficient. Based on the other evidence supporting Defendant's conviction *separate* from Defendant's incriminating statements, Defendant has failed to show he was prejudiced by the admission of the challenged statements, as explained below.

¶ 8 To prove possession with intent to sell or deliver cocaine, the State must show that (1) the defendant possessed the crack cocaine and (2) the defendant intended to sell or deliver the narcotics to others. N.C. Gen. Stat. § 90-95(a)(1) (2018); *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005).

¶ 9 During trial, the jury heard evidence that while the police officer was issuing Defendant a citation for unsafe driving, a plastic bag containing cocaine and heroin fell out of Defendant's hoodie. Upon investigation, the police officer discovered a backpack in the floorboard of the front seat containing $6,020 in cash, approximately 100 grams of crack cocaine, 360 grams of marijuana, and a loaded handgun.

¶ 10 In its MAR Order, the trial court vacated other charges because the evidence required for those charges was found in the backpack. The trial court reasoned that

absent Defendant's incriminating statements, the jury could have had reasonable doubt that the backpack belonged to Defendant, a determination we need not address here. However, the cocaine fell out of Defendant's hoodie. Defendant's decision to resist arrest and flee from the police officer is "'universally conceded' to be admissible as evidence of consciousness of guilt and thus of guilt itself." *State v. Jones*, 292 N.C. 513, 525, 234 S.E.2d 555, 562 (1977).

¶ 11 Additionally, the quantity of powder cocaine found on Defendant's person is strong evidence of his intent to sell or deliver. *State v. Blagg*, 377 N.C. 482, 493, 858 S.E.2d 268, 276 (2021). Our Supreme Court held that evidence which included the discovery of only 5.5 grams of cocaine, which is 19.64% of the minimum amount to sustain a trafficking charge, was sufficient to withstand a motion to dismiss a possession with the intent to sell or deliver charge. *McNeil*, 359 N.C. at 801, 617 S.E.2d at 272 (2005). Here, Defendant possessed 6.43 grams. We conclude that this quantity, combined with the additional relevant evidence offered at trial, supports the trial court's conclusion that Defendant's conviction for possession with intent to sell or deliver cocaine. Accordingly, Defendant was not prejudiced by the admission of his incriminating statements.

II. Conclusion

¶ 12 Defendant has failed to meet his burden to show that he was prejudiced by his trial counsel's failure to move for the suppression of certain statements he made to a

police officer. We, therefore, affirm the trial court's Order denying his MAR related to his conviction for possession with intent to sell or deliver cocaine.

AFFIRMED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).