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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-591-2

Filed 19 September 2023

New Hanover County, No. 18 CRS 56870

STATE OF NORTH CAROLINA

v.

MONTEZ GIBBS

Appeal by Defendant from judgment entered 24 September 2019 by Judge Joshua W. Willey, Jr. in New Hanover County Superior Court. This case was originally heard in the Court of Appeals on 8 June 2021. *See State v. Gibbs*, 2021-NCCOA-607, 864 S.E.2d 545. By opinion filed 16 June 2023, the North Carolina Supreme Court vacated and remanded to this Court.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

WOOD, Judge.

This case is before us on remand from the Supreme Court of North Carolina for consideration of whether fentanyl was an opiate as defined by the relevant criminalization and definitional statutes in effect at the time of Montez Gibbs's

(“Defendant”) conduct that is the basis for his conviction and sentence in this case. *State v. Gibbs*, No. 402A21, 2023 WL 4037472 (N.C. June 16, 2023). Specifically, our Supreme Court stated the question of “whether fentanyl was an opiate for purposes of the trafficking statute in 2018 is a question of law,” not a question of fact. *Id.* We address this sole issue as directed and hold N.C. Gen. Stat. § 90-95(h)(4)’s criminalization of *opiates* included fentanyl.

I. Factual and Procedural History

Officers found a white powdery substance in Defendant’s backpack on 7 April 2018. Jennifer West (“West”), a forensic chemist at the State Crime Lab, tested the substance, identifying it as fentanyl, a Schedule II drug. On 14 January 2019, Defendant was indicted for two counts of resisting a public officer, trafficking opiates by possession, possession of a Schedule II controlled substance, and possession of drug paraphernalia.

Defendant’s trial was held from 19 September 2019 to 24 September 2019. Before conducting jury selection, the State sought an “advisory ruling” on an issue “that could affect . . . whether the case goes to trial.” The prosecutor specifically sought clarification as to whether fentanyl was an opioid or whether fentanyl would qualify as an opiate. At the time of Defendant’s arrest, N.C. Gen. Stat. § 90-95(h)(4) (2018) criminalized trafficking in “opium or opiates,” as well as their derivatives but did not mention “opioids.” Thus, the State sought clarification of whether trafficking in fentanyl was criminalized under Section 90-95(h)(4). The trial court declined to

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give an advisory ruling, stating that whether trafficking in fentanyl was prohibited at the time would be determined by the expert's testimony. Thereafter, the State called West to testify as an expert.

During *voir dire*, West discussed the differences between opium, opioids, and opiates. Specifically, West testified, "directly out of the opium poppy, you can get five substances. . . . morphine, codeine, thebaine, papaverine, and noscapine." West further testified, "[O]pium derivatives were things that could be produced from the substances that came from the opium poppy; [for] example, heroin is made from morphine."

With respect to opiates, West testified, "Opiate originally was supposed to be defined as substances that mimic the effects; i.e., addiction, hit the same receptors, things such as that [T]hat was your fentanyl, and that was your meperidine." According to West, "[these] substances hit the same receptors but did not have the same structure as the opium or opium derivatives." When asked whether "fentanyl is . . . an opiate derivative," West stated, "It's not a derivative. . . . [Fentanyl is] not an opiate derivative," and "[i]t's not an opium derivative." West further testified that she would classify fentanyl as an opiate. Specifically, West testified, "I don't think it's incorrect to classify it as an opiate."

The prosecutor then read the definition of "opiate" under N.C. Gen. Stat. § 90-87(18) as "[a]ny substance having addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-

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forming or addiction-sustaining liability.” The trial court ultimately ruled West was qualified to offer expert testimony on whether fentanyl was an opiate and concluded Defendant had received adequate notice of West’s testimony.

On 24 September 2019, Defendant was convicted of resisting, delaying, or obstructing a public officer; trafficking by possession in opiates; possession with intent to sell or deliver fentanyl; and possession of drug paraphernalia. The trial court consolidated judgments and sentenced Defendant to seventy to ninety-three months imprisonment. Defendant appealed.

On appeal Defendant argued West was not qualified to testify as an expert regarding whether fentanyl was an opiate and that the trial court plainly erred by permitting West to offer expert testimony that fentanyl was an opiate because “her opinion was unreliable.” The State argued the trial court did not abuse its discretion by permitting West to testify that fentanyl is an opiate. The State further argued that if there was any error at trial, it was invited error. In an unpublished opinion filed 2 November 2021 (Gibbs I), this court ultimately concluded “West was not qualified to opine fentanyl satisfied the statutory definition of an opiate.” *State v. Gibbs*, 2021-NCCOA-607, ¶ 21. For that reason, we reversed Defendant’s conviction for trafficking by possession of an opiate and remanded to the trial court. *Id.* at ¶ 29.

On 1 March 2023, the Supreme Court allowed the State’s petition for writ of certiorari as to additional issues. The matter was heard in the Supreme Court on 26 April 2023. *State v. Gibbs*, No. 402A21, 2023 WL 4037472 (N.C. June 16, 2023). On

6 July 2023, our Supreme Court vacated and remanded the case to this Court “for consideration of whether fentanyl was an opiate as defined by the statutes in effect at the time of [Defendant’s] actions,” holding, “whether fentanyl was an opiate for purposes of the trafficking statute in 2018 is a question of law.” *Id.*

II. Analysis

When police officers discovered fentanyl in Defendant’s backpack on 7 April 2018, N.C. Gen. Stat. § 90-95(h)(4) (2017) criminalized the sale, manufacture, delivery, transportation, or possession of “opium or opiate, or any” derivative thereof. The statute defined an *opiate* as “any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability,” N.C. Gen. Stat. § 90-87(18) (2017), but did not address fentanyl or specifically address opioids.

In *State v. Garrett*, this Court addressed the question of whether fentanyl was an opiate under the 2015 version of N.C. Gen. Stat. § 90-95(h)(4), which, like the 2017 version at issue here, criminalized the sale, manufacture, delivery, transportation, or possession of “opium or opiate.” 277 N.C. App. 493, 497, 860 S.E.2d 282, 286 (2021). The relevant definitional statute in effect at that time—the defendant’s crime having occurred on 31 December 2016—the 2015 statute, contained the same pertinent language as the 2017 version at issue here. *Id.* at 494, 497, 860 S.E.2d at 284, 286. Both defined *opiate* “as any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug

having addiction-forming or addiction-sustaining liability.” N.C. Gen. Stat. § 90-87(18) (2016). *Id.* at 494, 860 S.E.2d at 284.

The *Garrett* court conducted its own research “of the differences between opium, opioids, and opiates,” finding *opiates* are “natural opioids,” and *fentanyl* is a “synthetic opioid.” *Id.* at 497-98, 860 S.E.2d at 286. The *Garrett* court considered the dictionary definition of opiate which states opiate is an:

A. alkaloid drug (such as morphine or codeine) that contains or is derived from opium, binds to cell receptors primarily in the central nervous system and gastrointestinal tract

B. a synthetic or semisynthetic drug (*such as fentanyl* or methadone) or an endogenous substance (such as beta-endorphin) that binds to opiate cell receptors and produces physiological effects like those of opium derivatives[.]

Id. at 499, 860 S.E.2d at 287. The *Garrett* court concluded this dictionary definition was consistent with the statutory definition of *opiate* contained in N.C. Gen. Stat. § 90-87(18) (2016) and held “[f]entanyl falls within this definition.” *Id.* at 499-500, 860 S.E.2d at 287.

Although the issues before us are different than the statutory interpretation and indictment issues in *Garrett*, we are aided by the research conducted by the *Garrett* court. Consequently, we hold *opiate* as used in N.C. Gen. Stat. § 90-95(h)(4) (2017) and defined in N.C. Gen. Stat. § 90-87(18) (2017) includes fentanyl as a matter of law. The operative language in both criminalization and definitional statutes is identical to the relevant portions of the 2015 and 2016 statutes discussed in *Garrett*.

Opiate, as used in N.C. Gen. Stat. § 90-95(h)(4) (2017), was sufficiently broad to encompass synthetic opioids, such as fentanyl, as well as natural opioids. The fact that N.C. Gen. Stat. § 90-87 was amended in 2017 to add a definition of *opioid* at subsection (18a)¹ does not change our analysis. We conclude “the legislature’s amendment of § 90-95(h)(4) intended to clarify, not alter, the meaning of this term, and to clarify the scope of the substances covered by the statute.” *Id.* at 500, 860 S.E.2d at 288. Thus, we conclude fentanyl is an opiate as a matter of law.

III. Conclusion

Because fentanyl is an opiate as a matter of law, there was no need for an expert witness to testify at Defendant’s trial regarding whether it was an opioid or opiate. Accordingly, we conclude there was no error regarding Defendant’s conviction for trafficking by possession of an opiate.

NO ERROR.

Chief Judge STROUD and Judge ARROWOOD concur.

Report per Rule 30(e).

¹ “‘Opioid’ means any synthetic narcotic drug having opiate-like activities but is not derived from opium.” N.C. Gen. Stat. § 90-87(18a) (2017).