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NO. COA02-1729

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v.

Wilkes County
No. 02 CRS 50226

HERACLIO SANCHEZ-JIMENEZ

Appeal by defendant from judgment entered 8 August 2002 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 15 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

William D. Auman for defendant-appellant.

LEVINSON, Judge.

Defendant (Heraclio Jiminez) appeals from judgment and conviction of trafficking in cocaine by possession and by transportation. We conclude that defendant received a fair trial, free of reversible error.

The State's evidence tended to show the following: On 15 January 2002 the Wilkes County Sheriff's Department narcotics division was involved in an undercover drug investigation. Law enforcement officers had recently charged a Wilkes County man with certain drug offenses. This individual lived in Wilkesboro and was known by the nickname "Snoop." Hoping to obtain a sentence

reduction on his own drug trafficking charges, Snoop agreed to assist the sheriff's department in apprehending others. Accordingly, he contacted his drug supplier, Isidro Roman, and "ordered" a half kilogram (eighteen ounces) of cocaine.

The cocaine was to be delivered to Snoop's residence on 15 January 2002. On that date, Deputy James Minton of the Wilkes County Sheriff's Department waited with Snoop inside his trailer, while other law enforcement officers hid outside. At around 7:00 p.m., Roman arrived at Snoop's house, driving his own car in which defendant was a passenger. Law enforcement officers approached Roman's car and observed that Roman and defendant were both "extremely nervous," and were "shuffling around in the vehicle" and "fumbling in under the seat." After the officers ordered defendant and Roman out of the car, Deputy Todd Holbrook looked in the car and found a box of Tide™ laundry detergent on the floor of the passenger side of the car, near where defendant had been sitting. Holbrook squeezed the box and felt hard objects inside, instead of laundry powder. He opened the box and discovered what was subsequently determined to be approximately 494 grams of cocaine.

After the officers discovered the cocaine, defendant and Roman were arrested and transported to the law enforcement center. Both were originally from Mexico and required the assistance of an interpreter, as neither was a fluent English speaker. At the law enforcement center, Roman agreed to make a statement, which was reduced to writing and signed by him. Roman's statement identified defendant as the one who supplied him with the cocaine that he had

planned to sell to Snoop on 15 January 2002. In February, 2002, defendant was indicted for trafficking in cocaine by possession and by transportation. He was tried before a Wilkes County jury on 7 August 2002.

At trial, Isidro Roman testified for the State, with the assistance of an interpreter. On 13 January 2002 he had received a phone call from Snoop, asking to buy 18 ounces of cocaine. Using a phone number previously supplied by a friend, Roman called his drug source, whom he knew only by the code name "Amigo de la Traviesas," and arranged to buy a half kilo of cocaine. On 15 January 2002 he drove to the planned meeting spot, a gas station near Sanford. The defendant was waiting at the gas station when Roman arrived, and got into Roman's car. Defendant had the box of Tide in his possession, and told Roman that it contained the cocaine. The defendant wanted twelve thousand five hundred dollars for the cocaine, so Roman intended to sell the cocaine to Snoop for fifteen thousand dollars, pay defendant, and keep the \$2500.00 difference. Because Roman would not have money to pay for the cocaine until after he sold it, the defendant rode with him to Wilkesboro. Roman testified that defendant maintained physical possession of the box of Tide throughout the drive back to Wilkesboro.

The defendant testified, with the assistance of an interpreter, that he had only recently arrived in the United States, and that his wife and newborn baby were still in Mexico. On 15 January 2002 he had no employment or money, and had asked

Roman for food. He was riding in Roman's car only because Roman had agreed to buy him a meal. Defendant denied selling or possessing cocaine.

On 8 August 2002 defendant was convicted of both charges. He received consecutive prison sentences of 175 to 219 months, and was fined \$500,000. From this conviction and sentence, defendant appeals.

Defendant presents three arguments on appeal. He argues first that the trial court erred by "failing to require the State to respond to the defendant's motion to reveal any deal offered to the codefendant." On 16 May 2002 defendant filed a motion seeking disclosure of any "grants of immunity, charge reductions and/or sentence reductions" that the State had offered its witnesses. Defendant argues that the trial court committed reversible error by not entering a formal ruling on this motion. This argument is without merit.

Defendant's motion was applicable only to Isidro Roman, as the other State's witnesses all were law enforcement officers or employees of the Wilkes County Sheriff's Department. The trial transcript reflects that, prior to Mr. Roman testifying, defense counsel asked to be heard in order to place the following statements on the record:

DEFENSE COUNSEL: . . . I actually have two things to put on the record, Your Honor. I had also filed a motion requiring, or requesting the State to provide me with the deal that had been offered to Mr. Roman, and I wanted to put it on the record that [the

prosecutor] has complied with that, and did several weeks ago, Your Honor.

THE COURT: All right.

Thus, the defendant informed the trial court that the State had voluntarily provided the information requested in his motion. That being so, it would be pointless for the court to enter an order directing the State to give defendant information already in defendant's possession. Moreover, it seems clear that defendant was communicating to the trial court that his motion had become moot, and no longer needed to be addressed by the court.

We conclude that the error, if any, in the trial court's failure to enter a ruling on defendant's motion, was error invited by the defendant. Under N.C.G.S. § 15A-1443(c) (2003), "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." As this Court has noted, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (citing *State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996)), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 142 (2002). This assignment of error is overruled.

Defendant next argues that the trial court erred by denying his motion to dismiss the charges against him for insufficiency of the evidence. We disagree.

Upon a defendant's motion to dismiss for insufficient evidence, the trial court "must determine only whether there is

substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). "If substantial evidence of each element is presented, the motion for dismissal is properly denied. 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *State v. Shelman*, __ N.C. App. __, __, 584 S.E.2d 88, 92 (2003) (quoting *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997)). Moreover, in its ruling on a motion to dismiss, "the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation omitted).

Defendant herein was charged with trafficking in cocaine by transportation and by possession, in violation of N.C.G.S. § 90-95, which provides in relevant part that "[a]ny person who . . . transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as 'trafficking in cocaine.'" N.C.G.S. § 90-95(h)(3) (2003). The State must prove the following to sustain a conviction:

[C]onviction of drug trafficking requires proof that the defendant (1) knowingly (2) possessed or transported a given controlled substance, and also that (3) the amount transported was greater than the statutory threshold amount.

State v. Shelman, __ N.C. App. __, __, 584 S.E.2d 88, 94 (2003) (citing *State v. Acolatse*, __ N.C. App. __, __, 581 S.E.2d 807, 809 (2003)).

In the present case, there is no dispute concerning the weight of the cocaine. Moreover, Roman's testimony places defendant in knowing possession of the box of cocaine. We conclude that the State presented sufficient evidence to submit to the jury the charge of trafficking in cocaine by possession.

"A conviction for trafficking in cocaine by transportation requires that the State show a 'substantial movement.'" *State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996) (quoting *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991)). Transportation is shown by evidence of carrying or movement of narcotics "from one place to another." *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (quoting *Cunard Steamship Company v. Mellon*, 262 U.S. 100, 122, 67 L. Ed. 894, 901, (1923) ("we believe that it is correct to view transportation as 'any real carrying about or movement from one place to another'"). In the instant case, there was evidence that defendant transported the cocaine from the meeting place in Sanford to Snoop's house in Wilkesboro. This is evidence of defendant's "carrying about or mov[ing]" the cocaine.

We conclude that the State presented sufficient evidence to submit the offenses of trafficking in cocaine by possession and by transportation to the jury. This assignment of error is overruled.

Finally, defendant argues that his sentence should be vacated on the grounds that it is in violation of the Eighth Amendment to the U.S. Constitution. We do not agree.

The Eighth Amendment is applicable to North Carolina under the Fourteenth Amendment, see *Robinson v. California*, 370 U.S. 660, 8 L. Ed. 2d 758, (1962), and provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California*, 538 U.S. 11, 17, 155 L. Ed. 2d 108, 117 (2003) (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 115 L. Ed. 2d 836, 866 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

Defendant contends that his sentence violates the Eighth Amendment because it is "grossly disproportionate" to the offense. To support his argument, defendant cites *Solem v. Helm*, 463 U.S. 277, 77 L. Ed. 2d 637 (1983) (life sentence without parole, imposed under recidivist statute, set aside under Eighth Amendment as disproportionate). However, in *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836 (1991), also cited by defendant, the United States Supreme Court held that sentencing a first time offender to life in prison without possibility of parole for possession of 672 grams of cocaine was not "grossly disproportionate" to the offense, and thus did not violate the Eighth Amendment. "'Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's

proscription of cruel and unusual punishment.'" *State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (quoting *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)), *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003).

Further, it is well established that a sentence "within the maximum authorized by statute is not cruel and unusual in a constitutional sense unless the punishment provisions of the statute itself are unconstitutional." *State v. Williams*, 295 N.C. 655, 679, 249 S.E.2d 709, 725 (1978), *superseded by statute on other grounds*, *State v. McCullough*, 79 N.C. App. 541, 340 S.E.2d 132 (1986). In the instant case, the defendant was sentenced pursuant to N.C.G.S. § 90-95(h), which provides in pertinent part that

(3) Any person who . . . transports, or possesses 28 grams or more of cocaine . . . shall be guilty of . . . "trafficking in cocaine" and if the quantity of such substance or mixture involved:

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars (\$ 250,000).

N.C.G.S. § 90-95(h)(3)c (2003) (emphasis added). Defendant was convicted of possession and transportation of over 400 grams of cocaine, and was sentenced to 175 to 219 months for each offense, as prescribed by statute.

We conclude the sentence defendant received for trafficking in cocaine "is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference

of gross disproportionality.'" *Ewing*, 538 U.S. at 34, 155 L. Ed. 2d at 123 (quoting *Harmelin*, 501 U.S. at 1005, 115 L. Ed. 2d at 871). Nor is the imposition of *consecutive* sentences for drug trafficking a violation of the Eighth Amendment. *State v. Parker*, 137 N.C. App. 590, 604, 530 S.E.2d 297, 306 (2000) (holding that where "sentences imposed upon defendant, albeit consecutive, were within the presumptive statutory range authorized for her drug trafficking offenses" there was no Eighth Amendment violation).

We also reject defendant's argument that it is a violation of the Eighth Amendment for defendant to receive a harsher sentence than Roman, his codefendant:

defendant contends that the trial court committed reversible error in . . . imposing a sentence against defendant which was greatly in excess of the sentence given his codefendant. . . . Defendant received a prison sentence for a . . . permissible term[.] The fact that others tried on similar charges are given shorter sentences is not ground for legal objection[.]

State v. Sligh, 27 N.C. App. 668, 669-70, 219 S.E.2d 801, 802 (1975) (citation omitted). In addition, defendant's argument in this regard was recently rejected by this Court in *State v. Shelman*, __ N.C. App. __, __, 584 S.E.2d 88, 96-97 (2003) ("Nor did the court err by sentencing defendant to a greater sentence than that received by [codefendant]") (citing *State v. Garris*, 265 N.C. 711, 712, 144 S.E.2d 901, 902 (1965) ("no requirement of law that defendants charged with similar offenses be given the same punishment"). This assignment of error is overruled.

For the reasons discussed above, we conclude that defendant received a fair trial, free of reversible error.

No error.

Judges MARTIN and STEELMAN concur.

Report per Rule 30(e).