

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-208

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 06 CRS 063871, 31289

LASONYA RENEE JONES

Court of Appeals

Appeal by defendant from judgment entered 12 September 2007 by Judge V. Brad Long in Forsyth County Superior Court. Heard in the Court of Appeals 8 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange for the State.

Slip Opinion

Christopher R. Clifton for defendant-appellant.

BRYANT, Judge.

Defendant was found guilty by a jury of felony possession of cocaine and having attained habitual felon status. The trial court entered judgment for these offenses on 12 September 2007 and committed defendant for a term of 107 to 138 months in the custody of the North Carolina Department of Correction. For the reasons stated below, we hold no error.

The evidence at trial tended to show that on 8 December 2006, Officer Jeff Azar of the Winston-Salem Police Department observed defendant, whom he knew by sight, sitting on the porch of 915 New

Hope Lane in Winston-Salem. At that time, Officer Azar ran defendant's name through his in-car laptop and determined that there was an active outstanding order for defendant's arrest. Officer Azar arrested defendant and placed her in his patrol car for transport to the Forsyth County Jail. While en route to the jail, Officer Azar contacted Officer Kimberly Oakes requesting that she meet him at the jail so that she could search defendant upon arrival, as it is the policy of the Winston-Salem Police Department that only female officers search female suspects.

When Officer Azar arrived at the jail, Officer Oakes was already present. Officer Oakes took defendant into a room used by the police department for searches. During the search, Officer Oakes found a white substance in defendant's right front pocket. Officer Oakes asked defendant "what it was." Defendant replied that it "look like a tooth or something." Officer Oakes placed the substance in her pocket, finished the search, and then took defendant into the magistrate's office. Officer Oakes gave Officer Azar the substance she found in defendant's pocket, and Officer Azar took the substance to his patrol car to field test it. Defendant was placed on a bench and Officer Oakes sat at a table in order to complete her paperwork. While Officer Oakes was completing her paperwork, defendant stated that she thought she had gotten rid of all the crack before she was arrested. At the time defendant made this statement, Officer Oakes had not advised defendant of her *Miranda* rights.

Prior to trial, defendant filed a motion to suppress her statements to police. After conducting a voir dire examination, the trial court concluded that defendant's response to Officer Oakes' question "what is this?" should be suppressed because defendant was in police custody and subject to a *Miranda* rights. However, the trial court found that defendant's statement to Officer Oakes that she thought she had gotten rid of all of the crack before she was arrested was a voluntary statement and should not be suppressed.

Following a jury trial, defendant was convicted of felony possession of cocaine and having attained habitual felon status. Defendant appeals.

On appeal defendant raises two issues: (I) whether the trial court committed reversible error by denying defendant's motion to suppress her inculpatory statement, and (II) whether the sentence imposed constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 27 of the North Carolina Constitution.

I

Defendant first argues that the trial court erroneously denied her motion to suppress her inculpatory statement to police because it was obtained in violation of her *Miranda* rights. Specifically, defendant argues that because she had not been read her *Miranda* rights during a custodial interrogation prior to stating to a

police officer that she thought she had gotten rid of all of the crack before she was arrested, her statement was inadmissible.

Our review of the trial court's "denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993).

"The Fifth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, provides a criminal suspect with the right not to be forced to incriminate himself." *State v. Tucker*, 109 N.C. App. 565, 569, 428 S.E.2d 210, 213 (1993) (citing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)). "Miranda warnings are only required when an accused is about to be subjected to custodial interrogation." *Id.* However, "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478, 16 L. Ed. 2d at 726.

The trial court conducted a voir dire hearing on defendant's motion to suppress and made the following relevant findings in support of its decision:

[A]pproximately five minutes after the off-white substance was found in the defendant's jacket pocket, while Officer Oakes and Officer Azar were doing paperwork, the defendant stated, "I thought I had gotten rid of all of it before I was arrested."

[T]he court finds that the statement of the defendant was not in response to any question. The court finds that the defendant was not questioned after Officer Oakes's question to the defendant of, "what is this." The court further finds that the five-minute lapse in time between the defendant's statement and Officer Oakes's question removes the statement from being in response to the question and makes it a voluntary statement of the defendant.

Based upon its findings, the trial court concluded that defendant's statement was a voluntary statement, not in response to custodial questioning, and therefore admissible.

After a review of the record, we hold that there was competent evidence to support the trial court's findings of fact and that the findings of fact support the court's conclusions of law. The trial court properly denied defendant's motion to suppress her statement. Accordingly, defendant's assignment of error is overruled.

II

Defendant next argues the imposition of a term of imprisonment of 107-138 months as a habitual felon where the underlying offense of conviction was possession of less than .1 grams of cocaine is grossly disproportionate and thereby violative of the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment. We disagree.

Under North Carolina General Statute section 14-7.1, "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." N.C. Gen. Stat. § 14-7.1 (2007). "When an habitual felon . . . commits

any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article . . . be sentenced as a Class C felon." N.C. Gen. Stat. § 14-7.6 (2007). However, "[o]nly 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. Clifton*, 158 N.C. App. 88, 94, 580 S.E.2d 40, 45 (2003) (citations and quotations omitted).

Here, the jury found defendant guilty of achieving habitual felon status and the trial court determined defendant's prior record level to be IV. The sentence in the mitigated range for defendant's conviction of possession of cocaine in violation of N.C. Gen. Stat. § 90-95(d)(2), a Class I felony, without consideration of the Habitual Felon Act, is a minimum of 4 to 6 months to a maximum of 6 to 8 months, given a prior record level of IV. See N.C. Gen. Stat. § 15A-1340.17. However, pursuant to the North Carolina Habitual Felon Act, defendant was sentenced as a Class C felon, which, in the mitigated range, exposed defendant to a sentence with a minimum of 80 to 107 months to a maximum of 107 to 138 months, given a prior record level of IV. Defendant was sentenced to a minimum term of 107 months and a maximum term of 138 months.

This Court has previously upheld the sentence of a defendant as an habitual felon where the defendant was convicted of an underlying Class I felony. See *State v. Hairston*, 137 N.C. App.

352, 528 S.E.2d 29 (2000) (where the underlying felony was felonious breaking and entering a motor vehicle, a Class I felony under N.C. Gen. Stat. § 14-56). Furthermore, "when deciding whether a sentence is grossly disproportionate, we must place on the scales not only [defendant's] current felonies, but also [her] . . . history of felony recidivism." *Clifton*, 158 N.C. App. at 96, 580 S.E.2d at 46 (citation and quotations omitted).

On these facts, we hold this case does not "meet the standard of an 'exceedingly rare' and 'extreme' case, in which the 'grossly disproportionate' principle would be violated." *Id.* at 94, 580 S.E.2d at 45 (citations and quotations omitted). Accordingly, we find no error.

No error.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).