

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 14-753

Filed: 7 April 2015

STATE OF NORTH CAROLINA

v.

Martin County

12 CRS 50769

WILLIAM HENRY JAMES

On writ of certiorari by defendant from judgment entered 5 February 2014 by Judge Alma L. Hinton in Martin County Superior Court. Heard in the Court of Appeals 21 January 2015.

Roy Cooper, Attorney General, by Scott K. Beaver, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Benjamin Dowling-Sendor, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Where defendant neither cross-examined the State's expert witness regarding the sufficiency of the sample size, nor made it a basis for his motion to dismiss at trial, defendant's argument is dismissed. We decline to take judicial notice of Version 4 and Version 7 of the SBI protocols, as they were never presented to the trial court.

I. Factual and Procedural Background

On 4 June 2012, narcotics officers from Martin and Washington Counties used a confidential informant to arrange a purchase of oxycodone pills from William Henry James (defendant). Defendant was in the passenger seat of a red car at the scene of

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the arranged purchase. When the deputies and officers arrived, the red car drove off. During the ensuing pursuit, defendant threw pills and pill bottles out of the car. This was observed by law enforcement officers. Deputy Sawyer of the Washington County Sheriff's Office retrieved two pill bottles containing a number of pills and Agent Davis, Narcotics Agent with the Martin County Sheriff's Office, retrieved four whole pills and two pill halves lying in the grass next to the road. The pills and pill bottles were then given to Deputy Wynne of the Martin County Sheriff's Office.

After returning to the Martin County Sheriff's Office, Deputy Wynne placed the pill bottles into separate evidence bags. Wynne testified that the four whole pills and two pill halves were placed into the evidence bag containing the bottle with similarly marked pills. Sixty-five pills were sent to the State Bureau of Investigation Laboratory for analysis.

Agent Alicia Matkowsky, a forensic chemist with the SBI, performed a chemical analysis on one pill from each bottle and concluded that both pills contained oxycodone, a substance containing opiates. The total weight of the two pills tested was 0.99 gram. Agent Matkowsky visually inspected the other sixty-three pills and concluded that based on the physical characteristics with respect to shape, color, and imprint, the pills were "consistent with" oxycodone. The total weight of the sixty-five pills submitted was 31.79 grams.

On 28 January 2013, defendant was indicted for trafficking in opium by possession of 28 grams or more; trafficking in opium by transportation of 28 grams or

more; and possession with intent to sell or deliver opium. On 5 February 2014, a jury found defendant guilty of all three charges. Defendant was sentenced to the statutorily mandated active sentence of 225 to 279 months imprisonment and a fine of \$500,000.

Defendant appeals.

II. Standard of Review

“This court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “This Court will not consider arguments based upon matters not

presented to or adjudicated by the trial court.” *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

III. Motion to Dismiss

In his only argument, defendant contends that the trial court erred in denying his motion to dismiss because the State’s evidence was flawed in that Agent Matkowsky’s sampling technique was improper. We disagree.

The facts of *State v. Dobbs*, 208 N.C. App. 272, 702 S.E.2d 349 (2010), are substantially similar to the instant case. In *Dobbs*, defendant was indicted for possession with intent to manufacture, sell, or deliver a Schedule III controlled substance; the sale and delivery of a Schedule III controlled substance; and trafficking in opium or an opium derivative by sale or delivery. *Id.* at 273, 702 S.E.2d at 350. A jury found defendant guilty of all charges. *Id.* at 274, 702 S.E.2d at 350. At trial, Special Agent Amanda Aharon, a chemist for the SBI, testified as an expert witness regarding eight tablets that she received from the Brunswick County Sheriff’s Department. *Id.* at 275, 702 S.E.2d at 351. The total weight of the tablets was 8.5 grams. *Id.* Agent Aharon testified that her visual observation of the tablets’ coloration and markings, when compared to the pharmaceutical database, indicated the tablets were a combination of hydrocodone and acetaminophen. *Id.* Agent Aharon then conducted a chemical analysis of one tablet which tested positive for hydrocodone, an opium derivative. *Id.* On appeal, defendant argued that the trial

court erred in denying his motion to dismiss because the chemical analysis of one tablet was insufficient evidence that he trafficked by sale or delivery of more than four grams and less than fourteen grams of Dihydrocodeinone. *Id.* at 274, 702 S.E.2d at 351. Because Agent Aharon was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss, this Court dismissed defendant's argument. *Id.* at 276, 702 S.E.2d at 352.

In the instant case, Agent Matkowsky testified as an expert witness and was accepted by the trial court as an expert witness, without objection from defendant. Defendant did not cross-examine Agent Matkowsky regarding the sufficiency of the sample size and did not make the sufficiency of the sample size a basis for his motion to dismiss. The issue of whether the two chemically analyzed pills established a sufficient basis to show that there were 28 grams or more under N.C. Gen. Stat. § 90-95(h)(4) is not properly before this Court.

Defendant's argument is dismissed.

Even assuming *arguendo* that the issue was properly preserved for appeal, "[a] chemical analysis is required . . . , but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *State v. Ward*, 364 N.C. 133, 148, 694 S.E.2d 738, 747 (2010). Every pill need not be chemically analyzed, however. *Id.* In *State v.*

Meyers, 61 N.C. App. 554, 556, 301 S.E.2d 401, 402 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984), it was held that a chemical analysis of twenty tablets selected at random, “coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone.” *Dobbs*, 208 N.C. App. at 276, 702 S.E.2d at 352.

In the instant case, one pill, physically consistent with the other pills, was chosen at random from each exhibit and tested positive for oxycodone. Agent Matkowsky testified that she visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were “consistent with” those pills that tested positive for oxycodone. The total weight of the pills was 31.79 grams, exceeding the 28 gram requirement for trafficking. As a result, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance. *See* N.C. Gen. Stat. § 90-90 (2013).

IV. Judicial Notice

Defendant requests that this Court take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols. We decline to do so.

In *State v. Williams*, 207 N.C. App. 499, 505 700 S.E.2d 774, 778 (2010), defendant requested that judicial notice be taken of the North Carolina Department of Correction Policies—Procedures, No. VII.F Sex Offender Management Interim

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Policy 2007. This Court declined, noting that defendant did not specifically mention the policy before the trial court; the policy was not included in the record for appeal, but was rather appended to defendant's brief; and that taking judicial notice of the policy would introduce "information which has not been subjected to adversarial testing in the trial courts." *Id.*, at 505–06, 700 S.E.2d at 778 (quoting *State v. Vogt*, 200 N.C. App. 664, 669, 685 S.E.2d 23 (2009), *aff'd* 364 N.C. 425 (2010)). In *Johnson v. Johnson*, ___ N.C. App. ___, 750 S.E.2d 25, 29 (2013), the trial court declined to take judicial notice of Internet websites used to calculate the amount of defendant's pension where that information was not offered as evidence before the trial court. This Court held that a "flaw cannot be corrected with a post-trial memorandum that relies upon Internet websites and other materials not before the trial court as competent, admitted evidence." *Id.* at ___, 750 S.E.2d at 31.

In the instant case, both Version 4 and Version 7 of the SBI protocols are found on the North Carolina State Crime Laboratory's website. Defendant did not present either version to the trial court, but seeks to have them considered for the first time on appeal by appending them to his brief. The State did not have an opportunity to test the veracity of the protocols at trial.

Version 4 of the SBI protocols had an effective date of 8 March 2013. Agent Matkowsky completed her chemical analysis on 8 October 2013. Defendant has presented no information that would show that Version 4 was the controlling version of the protocols on the date of Agent Matkowsky's chemical analysis. In fact, between

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Version 4 and the date of Agent Matkowsky's chemical analysis, Version 5 went into effect with an effective date of 10 May 2013. Version 5 of the SBI protocols does not appear in the record or defendant's brief.

Version 7 of the SBI protocols had an effective date of 18 April 2014. Since Agent Matkowsky's chemical analysis took place roughly six months prior to that date, Version 7 is wholly irrelevant.

DISMISSED.

Judges DIETZ and INMAN concur.