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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-946

Filed: 18 July 2017

Clay County, No. 15CRS21, 15CRS7

STATE OF NORTH CAROLINA

v.

ROBERT DARRELL CARTER, Defendant.

Appeal by Defendant from judgment entered 4 May 2016 by Judge Marvin P. Pope, Jr. in Clay County Superior Court. Heard in the Court of Appeals 20 April 2017.

*Attorney General Joshua A. Stein, by Assistant Attorney General Roberta A. Ouellette, for the State.*

*Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.*

DILLON, Judge.

A jury found Robert Darrell Carter (“Defendant”) guilty of various drug crimes, including (1) possession of methamphetamine with the intent to sell or deliver, and (2) maintaining a building or other place for keeping and selling controlled substances. On appeal, Defendant argues that he was denied effective assistance of counsel, based on his counsel’s failure to move to dismiss the above two charges based

on insufficient evidence. After careful review, we vacate the conviction based on maintaining a building and we reverse the PWISD conviction and remand for resentencing for the lesser-included offense of possession.

### I. Background

On 11 September 2013, two detectives with the Clay County Sheriff's Department went to a fruit stand where Defendant was employed to serve Defendant with an arrest warrant. The detectives arrested Defendant, and while conducting a post-arrest search, they discovered on Defendant's person, among other items, three plastic baggies containing a total of 0.63 grams of methamphetamine, two unlabeled pill bottles containing fifty-two (52) tablets of oxycodone, and a syringe.

Defendant was convicted by a jury of various drug-related crimes based on the events at the fruit stand. Defendant appeals.

### II. Analysis

Defendant argues that he received ineffective assistance of counsel ("IAC") when his attorney failed to make a motion to dismiss for insufficient evidence of the charges of (1) possession with intent to sell or distribute methamphetamine; and (2) maintaining a building or other place for keeping and selling controlled substances.

In order to succeed on a claim for ineffective assistance of counsel, a defendant must prove:

First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that

counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, . . . that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). As our Supreme Court has explained the fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985).

“Claims of ineffective assistance of counsel are . . . most properly raised in a motion for appropriate relief” at the trial court level. *State v. Jones*, 176 N.C. App. 678, 688, 627 S.E.2d 265, 271 (2006). When a claim for ineffective assistance of counsel is brought on appeal, it may be decided on the merits when no further investigation or evidentiary hearing is necessary and the cold record is sufficient for review. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001).

Here, we conclude that the record and the verbatim transcript of the proceedings below permit us to review Defendant’s claims. We address Defendant’s IAC claims with respect to each charged offense.

*A. Possession with Intent to Sell or Distribute a Controlled Substance*

The offense of possession with intent to sell or deliver a controlled substance has three elements: “One, there must be possession of a substance . . . . Two, the substance must be a controlled substance. Three, there must be intent to distribute or sell the controlled substance.” *State v. Casey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483-84 (1982) (internal citation omitted). Defendant contends that there was insufficient evidence to support the third element of this charge, as the circumstantial evidence the State presented was not substantial to show intent to sell or distribute. Defendant further argues his trial counsel was ineffective for not moving to dismiss this charge, as there was a reasonable probability the court would have granted the motion. We agree.

An intent to sell or deliver “may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.” *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005). “Although ‘quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver,’ it must be a substantial amount.” *Id.* at 105-06, 612 S.E.2d at 175-76 (citing *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991)). “[A] controlled substance's substantial amount may be determined by comparing the amount possessed to the amount necessary to constitute a trafficking offense.” *Id.* at 106, 612 S.E.2d at 176. Our General Statutes provide that in order to be guilty of trafficking

methamphetamine, an individual must possess at least twenty-eight grams or more of methamphetamine or any mixture containing methamphetamine. N.C. Gen. Stat. § 90-95(h)(3b) (2015).

Here, the State presented little evidence supporting Defendant's alleged intent to sell or distribute methamphetamine. With regards to the quantity, only 0.63 grams of methamphetamine were found on Defendant, or .0225% of the minimum amount to presumptively constitute trafficking. No evidence was presented at trial regarding the actual amount or value of the methamphetamine possessed by Defendant. Only the indictment sheet and verdict form indicated the amount of methamphetamine Defendant was convicted of possessing with intent to sell. The 0.63 grams was packaged in five separate baggies, a manner of packaging that one of the detectives testified was consistent with Defendant having purchased the methamphetamine packaged in that manner. Additionally, the State also asserted the \$431 Defendant possessed as evidence of intent to sell. Defendant was also in possession of a syringe.

The State's evidence of intent to sell is much less than evidence presented in similar cases where this Court determined that a motion to dismiss should have been granted. In *State v. Wilkins*, 208 N.C. App. 729, 703 S.E.2d 807 (2010), investigators seized 1.89 grams of marijuana packaged in three separate bags, and \$1,264.00 in cash from the defendant. The State argued that the marijuana being divided between three separate bags and the amount of cash found on the defendant constituted

sufficient evidence of intent to sell. The Court determined that “[d]efendant possessed a very small amount of marijuana that was packaged in three small bags and he had \$1,264.00 in cash on his person. The evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller[,]” and that the motion to dismiss should have been granted. *State v. Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811. In *State v. Nettles*, this Court held that possession of 1.2 grams of crack cocaine along with \$411.00 and a safety pin, which is typically used to clean a crack pipe, was insufficient to support a charge of possession with intent to sell or deliver. *State v. Nettles*, 170 N.C. App. at 107-8, 612 S.E.2d at 176-77 (basing the holding, in part, on the absence of testimony from police officer “that defendant possessed an amount that was more than a drug user normally would possess for personal use.”)

We find the evidence at hand substantially similar to that in *Wilkins* and *Nettles*. The State presented no evidence that the 0.63 grams of methamphetamine, a very small amount, possessed by Defendant “was more than a drug user normally would possess for personal use.” *Id.* No evidence was presented that the manner in which the methamphetamine was packaged was more consistent with Defendant intending to sell rather than having previously used the methamphetamine. The \$431.00 found on Defendant was almost two-thirds less than the \$1,264.00 found insufficient in *Wilkins* to support an inference of intent to sell. *Wilkins*, 208 N.C.

App. at 733, 703 S.E.2d at 811. There was no evidence of other drug paraphernalia consistent with an intent to sell methamphetamine such as weighing scales, chemicals, or empty plastic baggies. *See State v. Rich*, 87 N.C. App. 380, 383-84, 361 S.E.2d 321, 324 (1987) (holding intent to sell established where 20 grams of cocaine were found along with a chemical used for diluting cocaine and 100 plastic bags). Also, the syringe found on Defendant, like the safety pin in *Nettles*, indicates Defendant possessed the methamphetamine for personal use. *Nettles*, 170 N.C. App. at 107-8, 612 S.E.2d at 176-77.<sup>1</sup>

Following *Wilkins* and *Nettles*, we find that the State's evidence of intent to sell cannot be considered “substantial evidence” supporting the charge of possession of methamphetamine with intent to sell. And we are unable to identify any strategic reason why defense counsel would not have made a motion to dismiss the possession with intent to sell or distribute methamphetamine charge for insufficient evidence. *See State v. Canty*, 224 N.C. App. 514, 520-21, 736 S.E.2d 532, 537 (2012) (holding that defense counsel's failure to make motion to suppress evidence obtained from illegal search fell below objective standard of reasonableness where it was impossible to “discern a strategic advantage by not filing a motion to suppress the incriminating evidence”). Therefore, we conclude that Defendant was prejudiced by his trial

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<sup>1</sup> We note that the detectives found two cell phones when they searched Defendant. However, the State made no argument in its brief on appeal concerning the significance of Defendant's possession of these cell phones; and, therefore, we do not consider their significance either.

counsel's failure to make a motion to dismiss the possession with intent to sell or distribute methamphetamine charge, as there is a "reasonable probability" the trial court would have granted such a motion to dismiss had it been made. *State v. Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

*B. Maintaining a Place for Keeping and Selling Controlled Substances*

Defendant contends that his trial counsel's performance was insufficient for failing to move to dismiss the charge of "knowingly and intentionally keeping and maintaining a building, to wit: a produce stand, that was used for keeping and selling controlled substances." Defendant argues that the State failed to present sufficient evidence that he "kept or maintained" the fruit stand and used it for "keeping and selling a controlled substance." We agree.

N.C. Gen. Stat. § 90-108(a)(7) (2015) makes it unlawful:

To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of the Article.

To obtain a conviction for knowingly and intentionally maintaining a place used for keeping or selling a controlled substance, the State must prove the defendant: "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Fuller*, 196 N.C. App. 412, 424, 674 S.E.2d 824, 832 (2009) (citation and quotation

marks omitted). The word “keeping,” in the context of the statute, “denotes not just possession, but possession that occurs over a duration of time.” *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994) (holding that evidence was insufficient to sustain a conviction).

In the present case, the State’s evidence tended to show that Defendant’s father owned the fruit stand and that Defendant was working the stand on the day the detectives arrived to serve the arrest warrant. The State, otherwise, presented no evidence regarding the length of time Defendant had been working at the fruit stand, whether he had an ownership interest in the property, was responsible for rent or utilities on the fruit stand, or whether Defendant was responsible for maintaining the fruit stand. There was no evidence that drugs or drug paraphernalia were found anywhere at the stand except on Defendant’s person.

We find the case of *State v. Carter* instructive on this element. In *State v. Carter*, 184 N.C. App. 706, 646 S.E.2d 846 (2007), even though the State showed that the defendant was the sole occupant of a house at the time officers executed a search warrant, the officers had found three photographs of the defendant in the house as well as the defendant’s social security card and birth certificate, this Court vacated the defendant’s conviction for knowingly and intentionally maintaining a place used for keeping or selling controlled substances. 184 N.C. App. at 709-10, 646 S.E.2d at 849. The State failed to establish the “keeping or maintaining element” because it

“presented no evidence indicating that defendant owned the property, bore any expense for renting or maintaining the property, or took any other responsibility for the residence.” *Id.*

In *Carter*, the Court noted several cases important to its determination that the State failed to establish the “keeping or maintaining element”:

This Court has routinely held similar evidence to be insufficient to survive a motion to dismiss. *See, e.g., State v. Harris*, 157 N.C. App. 647, 651-53, 580 S.E.2d 63, 66-67 (2003) (evidence was insufficient when it showed only that defendant was seen at dwelling several times, bedroom contained some of defendant's personal property, and none of defendant's personal papers listed dwelling as defendant's address); *State v. Kraus*, 147 N.C. App. 766, 768-69, 557 S.E.2d 144, 147 (2001) (evidence was insufficient when defendant was sole occupant of hotel room, possessed access key to that room, and had spent prior evening in room, but no evidence indicated defendant bore expense of renting room); *State v. Bowens*, 140 N.C. App. 217, 221-22, 535 S.E.2d 870, 873 (2000) (evidence was insufficient when defendant was present at dwelling on several occasions; men's clothing, not identified as belonging to defendant, was found in dwelling; and State had made no effort to determine who paid the rent, utilities, or telephone bills)[.]

*Id.* at 710, 646 S.E.2d at 849.

Based on our Supreme Court’s guidance in *Mitchell* and our reasoning in *Carter*, and the aforementioned cases cited therein, we find the State has failed to establish that Defendant “kept or maintained” the fruit stand for the purpose of keeping or selling controlled substances. Again, as we cannot discern any strategic

reason why Defendant's trial counsel failed to move to dismiss this charge, we find that Defendant's trial counsel provided ineffective assistance of counsel. *See State v. Canty*, 224 N.C. App. at 520-21, 736 S.E.2d at 537 (finding ineffective assistance of counsel when no strategic reason discernible from counsel's failure to make motion). As such, we find there was a "reasonable probability" the trial court would have granted a motion to dismiss this charge for insufficient evidence had one been made by Defendant's trial counsel. *State v. Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

### III. Conclusion

As Defendant does not contest the "possession" element of the possession with intent to sell or distribute methamphetamine charge, we therefore reverse Defendant's conviction for possession of methamphetamine with intent to sell or distribute and remand this matter to the trial court for resentencing on the lesser-included offense of possession of methamphetamine.

For the charge of knowingly and intentionally maintaining a place used for keeping or selling a controlled substance, we vacate Defendant's conviction for the aforementioned reasons.

VACATED IN PART, REVERSED IN PART AND REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).