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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1109

Filed: 5 June 2018

Mecklenburg County, No. 14 CRS 247592, 15 CRS 25914, 16 CRS 32661

STATE OF NORTH CAROLINA

v.

JERMAINE EARL HICKS, Defendant.

Appeal by Defendant from judgment entered 14 June 2017 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

HUNTER, JR., ROBERT N., Judge.

Jermaine Earl Hicks ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession of a firearm by a felon, possession of marijuana, and obtaining habitual felon status. On appeal, Defendant argues the trial court abused its discretion and violated Defendant's constitutional rights by

allowing the State's expert witness to testify when the State failed to provide the defense with a copy of that expert witness's *Curriculum Vitae* ("CV"). We disagree.

I. Factual and Procedural Background

On 27 July 2015, a grand jury indicted Defendant with possession with intent to sell or deliver a controlled substance and for obtaining habitual felon status. On 5 December 2015, a grand jury indicted Defendant for possession of firearm by a felon. The case came on for trial on 6 February 2016. The State first called Detective Richard Morgan ("Morgan") with the Charlotte-Mecklenburg Police Department. On 4 December 2014, Morgan "was assigned to locate a gentleman named Jermaine Hicks who had outstanding warrants for his arrest." Other officers accompanied Morgan to Defendant's residence, where Morgan located Defendant. After handcuffing Defendant, Morgan and the officers "conducted a safety sweep of the residence." Morgan found a "semiautomatic handgun just under the mattress in the bedroom."

The State next called Sergeant Brian Crum ("Crum") with the Charlotte-Mecklenburg Police Department. Crum was involved in the search of Defendant's residence. In the kitchen freezer, Crum found a package that contained a "white, waxy substance." Also, on top of the refrigerator, Crum found "a clear, plastic bin that contained a green, leafy substance."

After Crum's cross-examination, the trial court excused the jury and defense counsel stated:

> When the State intends to introduce expert evidence they are required to provide the basis of the expert opinion as well as a copy of that expert's curriculum vitae prior to trial. As we indicated, this trial started yesterday. I do have a copy of the lab reports. I did not receive a copy of the curriculum vitae until 11:30 this morning after trial started and so, as a result, I would contend that that expert should not be allowed to testify.

The trial court stated, "In my discretion, I'm going to allow it." The State agreed with the trial court's ruling. Counsel for defense then stated:

> The report was provided in September. And, like I say, in terms of - - for strategic reasons I knew that I did not have the curriculum vitae which is required by statute. And it is not on me in terms of - - if the State doesn't provide it then the onus is on them to make their argument as to why they should be allowed to go forward.

The State responded:

> I apologize. I didn't realize he didn't have it. I sent the full lab file, including the bench notes from this analysist, back in September.
>
> I didn't receive an objection to the lab report coming in, but in an abundance of caution I would like to call the lab analyst to testify [to] that.

The trial court then asked defense counsel, "How are you prejudiced by not having the CV? You had the report." Defense counsel stated:

> Yes, sir. And I'm not saying in terms of there's prejudice. I'm saying that we have rules that both sides

> have to follow and that rule specifically states this is what she has to do, but she hasn't done that and the Court is saying regardless of that statutory requirement you are going to allow him to testify and I am just noting my objection under a constitutional basis.

The trial court then ruled, "I believe, in my discretion, I'm going to allow him to testify."

The State next called Detective Kevin Lovell ("Lovell") with the Charlotte-Mecklenburg Police Department. Lovell participated in the search of Defendant's apartment. Lovell found a backpack in Defendant's living room. There was a "green, leafy substance" inside the backpack. Following the search of Defendant's apartment, Lovell's involvement in the case was "[m]inimal."

The State next called Andrew Oprysko ("Oprysko") to the stand. Oprysko is a "Criminalist" with the Charlotte-Mecklenburg Police Department Crime Laboratory, where he works in the "Chemistry unit." Primarily Oprysko "analyze[s] submitted evidence and test[s] for the possible presence of controlled substances[.]" When asked about his qualifications, Oprysko stated:

> I have a Bachelor of Science in forensic science from the University of New Haven. Then when I began my first job, which was in the New York City Police Department Crime Laboratory in 2004, I underwent their six-month-long training program where I learned how to analyze different types of controlled substances, the legal issues surrounding them, the different types of instruments I need to use, paperwork requirements; things of that nature.

> When I started work with the Charlotte-Mecklenburg Police Department Crime Laboratory about five-and-a-half years ago I underwent kind of a, sort a, refresher training course just to kind of come up-to-speed on the local laws, policies, procedures; things of that nature.

Oprysko had been analyzing substances as a criminalist for about 12 years, and "analyzed somewhere around 4,400 cases" for trial purposes. Oprysko had also "testified over a hundred times between Charlotte and New York City." Following Oprysko's testimony as to his qualifications, the State tendered him without objection as "an expert in the field of forensic chemistry." Oprysko analyzed the "green leafy substance" found in Defendant's apartment and concluded it was marijuana. Oprysko also tested another substance found in Defendant's apartment and concluded it contained cocaine.

On cross-examination, the only question defense counsel asked regarding Oprysko's curriculum vitae was whether Oprysko had been a criminalist for 10 years.

At the close of the State's evidence, defense counsel made a motion to dismiss. The trial court denied Defendant's motion. Defendant did not put on any evidence. Counsel for Defendant then renewed its motion to dismiss. The trial court again denied Defendant's motion.

Following deliberations, the jury returned unanimous guilty verdicts for possession of a firearm by a felon, possession of marijuana and habitual felon status.

The jury found Defendant not guilty of the other charges. The trial court consolidated the two offenses of possession of firearm by a felon and possession of marijuana for one judgment. The trial court stated, "The possession of the firearm by the felon is a Class G felony. He's going to be sentenced based on the fact that he's a habitual felon as a Class C felon." The trial court sentenced Defendant to "83 months minimum, 112 months maximum[.]" The trial court also ordered Defendant to "reimburse the State of North Carolina for the court costs of this case, including his attorney fees."

Defendant orally appealed.

II. Standard of Review

This Court reviews a trial court's ruling regarding a discovery violation for an abuse of discretion. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906-07 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Constitutional issues are subject to *de novo* review. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

III. Introduction

As an initial matter, all of Defendant's assignments of error revolve around the issue of whether the State's failure to provide Oprysko's CV violated our discovery statutes. Our case law establishes marijuana is distinguishable from other controlled substances requiring a more technical analysis for positive identification, and therefore the State is not required to submit marijuana for chemical analysis. In other words, the State need not provide an expert to identify marijuana for the jury since an officer may testify, based on his training and experience, a substance is marijuana. *See State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012). Because Defendant was not convicted of cocaine possession, the relationship between the lack of a CV and the need for its prior production seems tenuous.

IV. Analysis

Defendant first contends the State violated N.C. Gen. Stat. § 15A-903(a)(2) by failing to provide Oprysko's CV within a reasonable time prior to trial. Specifically, Defendant argues the provisions of N.C. Gen. Stat. § 15A-903(a)(2) are mandatory and there are no exceptions under which the State can fail to comply with the discovery statutes. We disagree.

The discovery statute provides, in pertinent part:

> (a) Upon motion of the defendant, the court must order:
>
> . . . .

> (2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and that State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2017).

Defendant relies on our State Supreme Court's holding in *State v. Cook*, 362 N.C. 285, 661 S.E.2d 874 (2008), to support his argument the provisions of N.C. Gen. Stat. § 15A-903(a)(2) are mandatory and there are no exceptions under which the State can fail to comply with the discovery statutes. The defendant in *Cook* drove while impaired and caused an accident resulting in death and serious injury. *Id.* at 286-87, 661 S.E.2d at 875-76. At trial, the defendant in *Cook* argued the State failed to provide the expert's report regarding defendant's blood alcohol level within a reasonable time prior to trial, and failed to provide sufficient notice of the nature of the expert witness's testimony. *Id.* at 288, 661 S.E.2d at 876. The defendant asked the trial court for a continuance in order to research the proposed expert testimony, and to find its own expert on the subject of retrograde extrapolation. *Id.* at 288, 661 S.E.2d at 876. The trial court denied defendant's motion to continue, and the jury subsequently convicted defendant of second-degree murder and two counts of assault

with a deadly weapon inflicting serious injury. *Id.* at 288, 661 S.E.2d at 876. On appeal, defendant contended prejudice by the late discovery and the trial court's denial of his motion to continue. *Id.* at 290, 661 S.E.2d at 877. The Supreme Court ruled the trial court abused its discretion by denying defendant's motion to continue on the discovery violation. *Id.* at 298, 661 S.E.2d at 882. The *Cook* Court also concluded defendant suffered no prejudice. *Id.* at 298, 661 S.E.2d at 882.

Cook is readily distinguishable from the instant case. The State provided the current Defendant with the expert's report at least four months prior to trial. Unlike *Cook*, Defendant received notice of the type of testimony he faced. *Id.* at 296, 661 S.E.2d at 880. We conclude Defendant had adequate notice Oprysko was going to testify the "green, leafy substance" found in Defendant's apartment was marijuana. We also conclude the trial court's decision to allow Oprysko to testify was not an arbitrary ruling, but one supported by reason, especially since Defendant did not argue he was prejudiced by the alleged discovery violation.[1] This assignment of error is overruled.

In his second assignment of error, Defendant contends the trial court's decision to allow Oprysko to testify violated Defendant's constitutional right to the assistance of counsel and the right to confront a witness called to testify against him. Specifically, Defendant argues "implicit in the constitutional provisions is the

[1] The trial court asked defense counsel, "How are you prejudiced by not having the CV? You had the report." Defendant responded, "Yes, sir. And I'm not saying in terms of there's prejudice."

requirement that an accused have a reasonable time to investigate, prepare and present his defense." This argument is without merit.

Once the State provided Defendant with Oprysko's CV, Defendant did not ask for a recess or a continuance in order to investigate Oprysko's background or credentials. Defendant also failed to request a *voir dire* to establish whether Oprysko was qualified to render expert testimony. When the State tendered Oprysko as an expert in the field of forensic chemistry, counsel for Defendant stated, "No objection." Additionally, on cross-examination, Defendant's only question concerning Oprysko's CV related to whether Oprysko had been a criminalist for ten years.

We conclude Defendant was not denied his right to investigate, prepare and present a defense because Defendant had the expert's report months prior to trial. Defense counsel also had ample opportunity to challenge Oprysko's qualifications, and failed to do so. Additionally, Defendant was unable to articulate how he was prejudiced by not receiving Oprysko's CV until the trial began. This assignment of error is overruled.

In his third assignment of error, Defendant contends this Court is unable to conduct a meaningful review because the record is unclear whether the trial court found the State violated N.C. Gen. Stat. § 15A-903(a)(2). We disagree.

In his brief to this Court, Defendant states, "There is a substantial difference at the appellate level between a trial court determining that there was not a discovery

violation and a court's discretionary decision to allow a witness to testify despite a discovery violation." Even though the trial court did not make an explicit finding the State violated the discovery statute, there is ample information in the transcript for this Court to review the trial court's discretionary decision to allow the State's expert to testify. Our review of the record indicates counsel for Defendant admitted he was not prejudiced by the State's omitting Oprysko's CV from discovery. Counsel for Defendant also admitted he did not inform the State of its omission months prior to trial for "strategic reasons." The State informed the trial court it didn't realize Defendant did not receive Oprysko's CV when it sent Oprysko's report. Finally, Defendant did not request a *voir dire* of Oprysko regarding his qualifications. In light of these circumstances, this Court cannot conclude the trial court's "ruling was so arbitrary that it cannot be said to be the result of a reasoned decision." *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008). The trial court did not abuse its discretion, and this assignment of error is overruled.

In his final assignment of error, Defendant contends affirming the trial court's method of addressing the State's discovery violation would undermine the legislative intent behind N.C. Gen. Stat. § 15A-903(a)(2). We disagree.

Our State Supreme Court has held the purpose of the discovery procedures of Chapter 15A is to "protect the defendant from unfair surprise." *State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983). When a defendant fails to inform the trial

court of potential unfair surprise, the defendant cannot properly contend the trial court's failure to impose sanctions is an abuse of discretion. *Id.* at 331, 298 S.E.2d 639.

Here, Defendant did not allege unfair surprise in receiving Oprysko's CV after trial began. Defense counsel's actions indicate he was not concerned with the contents of Oprysko's CV since he was aware the CV was missing, and for strategic reasons did not contact the State in order to obtain it. Defense counsel also did not contend unfair surprise or any other prejudice to Defendant resulting from the missing CV. We do not see how the legislature's intent to protect a defendant from unfair surprise would be frustrated under the circumstances of this case. This assignment of error is overruled.

V. Conclusion

We find no prejudicial error in the trial court's decision to allow Oprysko to testify under the circumstances of this case.

NO ERROR.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).