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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-696

Filed: 7 May 2019

Forsyth County, No. 17CRS197, 17CRS50582, 17CRS50584-85, 17CRS50622

STATE OF NORTH CAROLINA

v.

BARRY D. RICHARDSON, Defendant.

Appeal by Defendant from judgments entered 1 November 2017 by Judge Angela B. Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Richard J. Costanza for Defendant-Appellant.

INMAN, Judge.

Barry D. Richardson ("Defendant") appeals his convictions for possession with intent to sell or deliver marijuana, possession with intent to sell or deliver cocaine, possession of a firearm by a felon, resisting a public officer, possession of drug paraphernalia, breaking or entering, trafficking in cocaine by possession, and attaining habitual felon status. Defendant argues that his attorney denied him his

right to effective assistance of counsel by failing to file a timely pre-trial motion to suppress statements obtained by law enforcement in violation of *Miranda* and failing at trial to object to a police officer's inadmissible opinion testimony. After careful review of the record and applicable law, we dismiss Defendant's ineffective assistance of counsel claim regarding his attorney's untimely motion to suppress statements for *Miranda* violations without prejudice so he can file a motion for appropriate relief. We also hold that Defendant has failed to demonstrate error with respect to his argument that he was prejudiced when his attorney failed to object to inadmissible opinion testimony.

I. Factual and Procedural History

The evidence introduced at trial revealed the following relevant facts:

A. Background Facts

On 19 January 2017, Officer Gary Neal ("Officer Neal") of the Winston-Salem Police Department was driving along East 5th Street when he was forced to quickly apply his brakes because Defendant's vehicle, a silver Buick, suddenly pulled out from an intersection. After learning that the Buick was registered to a female whose driving privileges had been suspended/revoked, Officer Neal activated his patrol car's traffic lights and stopped the vehicle. The patrol car's dash-camera then recorded Officer Neal's interactions with Defendant.

When Officer Neal approached the Buick he saw that Defendant was the driver, Defendant's girlfriend, Brianna Goldsmith ("Goldsmith"), was in the front passenger's seat, and her preschool-age son was in the back seat.[1] Defendant informed Officer Neal that he did not have a driver's license or any photo identification, but provided his name and date of birth. This information, coupled with a "MOB" tattoo visible on Defendant's arm, allowed Officer Neal to confirm Defendant's identify via the patrol car computer. The computer database showed that Defendant's driver's license was suspended, that Defendant was on probation, and that Defendant had previously been arrested for drug-related offenses.

Officer Neal then prepared a citation charging Defendant with making an unsafe movement and driving with a revoked license and asked Defendant to step out of the vehicle so he could explain the citation to him. Officer Neal testified that he asked Defendant to exit the vehicle because Defendant's criminal history showed he had "a propensity to sell narcotics" and because, in Officer Neal's experience, drug dealers often carry weapons. Defendant complied with the request and exited the vehicle without opposition. As Officer Neal was about to give the citation to Defendant, Defendant removed his right arm from the pocket of his hoodie sweatshirt and a small plastic bag fell to the ground. Officer Neal observed what appeared to be crack cocaine in the plastic bag.

[1] The record does not disclose whether this child is Defendant's son as well.

Upon this discovery, Officer Neal attempted to take Defendant into custody. Although he initially complied, Defendant wrestled free from Officer Neal and fled the scene. Officer Neal remained with the Buick and radioed an alert that he had a fleeing suspect. Officer Neal discovered that the plastic bag dropped by Defendant contained two smaller sandwich bags and, after conducting a field test on the substances found within each bag, determined that one bag contained crack cocaine while the other bag contained heroin.

Following the field test, Officer Neal asked Goldsmith to exit the vehicle. As Goldsmith stepped out of the vehicle, Officer Neal smelled what appeared to be unburnt marijuana emanating from the car. Officer Neal searched the vehicle and found a camouflage drawstring backpack on the floorboard of the front passenger seat, and within that backpack found over $6,000 in cash, approximately 100 grams of crack cocaine, 360 grams of marijuana, a digital scale, plastic baggies, and a loaded .45 caliber handgun. Officer Neal did not find any controlled substances on the driver's side of the car, its center console, or within Defendant's reach from the driver's seat.

Minutes later, Officer Mouhgmadou Dime ("Officer Dime") apprehended Defendant and placed him in the back of his patrol car. Officer Neal, after having another officer supervise Goldsmith and the Buick, arrived at the location where Defendant was being detained by Officer Dime. Officer Neal first identified

Defendant as the fleeing suspect and then proceeded to question him regarding the Buick, the drugs, the firearm, and the cash. Officer Neal asked Defendant if he was willing to claim sole ownership of those items, to which Defendant agreed. This questioning was recorded through Officer Neal's attached body camera. Following the questioning, another officer handed Officer Neal two items found in Defendant's possession when he was detained: a bag containing four grams of marijuana and $794 in cash.

The next day, Officer Neal obtained warrants charging Defendant with possession with intent to sell or deliver heroin and possession of heroin. After Officer Neal picked up Defendant from jail to serve those warrants on him and bring him before a magistrate, Defendant exclaimed that he did not possess or know how to sell heroin, because he only sold "crack powder." When Officer Neal asked Defendant "how he didn't know how to sell heroin if he sold crack powder," Defendant responded, "[t]hat's all I do. Look at my record."

B. Procedural Background

In April 2017, Defendant was indicted on charges of : (1) being a habitual felon; (2) possession with intent to sell or deliver marijuana; (3) possession with intent to sell or deliver cocaine; (4) possession of a stolen firearm; (5) possession of a firearm by a felon; (6) resisting a public officer; (7) possession of drug paraphernalia; (8) misdemeanor breaking or entering; (9) trafficking in cocaine by transportation; (10)

trafficking in cocaine by possession; and (11) possession with intent to sell or deliver heroin.

On 24 April 2017, the State filed notice of its intention to present evidence at trial of Defendant's statements, evidence obtained by a search without a search warrant, and evidence obtained with a search warrant when Defendant was not present. Although the notice was originally served on a different attorney, on 4 May 2017, Defendant's attorney signed a form acknowledging that the State provided him with discovery, which included the notice of intent.

Defendant's cases came on for trial on 30 October 2017 in Forsyth County Superior Court. Before the State presented evidence, Defendant's attorney argued that the trial court should hear a motion to suppress that he had filed three days before the trial started. The State objected, claiming that the motion was not filed within the time limit provided by N.C. Gen. Stat. § 15A-976(b). The trial court summarily denied Defendant's motion and memorialized its ruling in a written order on 20 November 2017. Defendant's attorney later renewed his motion to suppress at trial, but the trial court summarily denied it again.

Officers Neal and Dime testified at Defendant's trial. Defendant's attorney objected to—and orally motioned to suppress—Officer Neal's testimony regarding certain statements made by Defendant to Officer Neal, arguing that those statements were obtained in violation of Defendant's *Miranda* rights. The trial court orally, and

later in another written order, denied the motion to suppress as untimely. Officers Neal and Dime were never questioned, by either the State or defense counsel, regarding whether they read Defendant his *Miranda* rights.

On 1 November 2017, the jury found Defendant guilty of: (1) possession with intent to sell or deliver marijuana; (2) possession with intent to sell or deliver cocaine; (3) possession of a firearm by a felon; (4) resisting a public officer; (5) possession of drug paraphernalia; (6) misdemeanor breaking or entering; and (7) trafficking in cocaine by possession. Defendant pled guilty to being a habitual felon and was acquitted of the remaining charges.

The trial court consolidated Defendant's convictions into three judgments, all with punishments in the presumptive range. Defendant was ordered to serve consecutive sentences of 67 to 93 months, 96 to 128 months, and 58 to 82 months in prison; and pay $3,137.50 in court costs. Defendant was also given credit for 204 days spent in confinement prior to these judgments.

Defendant appeals.

II. Analysis

Defendant argues that his trial attorney deprived him of effective assistance of counsel when he: (1) failed to timely file a motion to suppress statements obtained in violation of Defendant's *Miranda* rights; and (2) failed to object to inadmissible lay

witness testimony by Officer Neal that the plastic baggie dropped by Defendant outside his vehicle appeared to contain crack cocaine.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692 (1984). To prove an ineffective assistance of counsel claim, a defendant must satisfy a two-part test. First, a defendant must prove that counsel's performance was deficient. Deficient performance encompasses "errors so serious that counsel was functioning" below an objective standard of reasonableness "under prevailing professional norms." *Id.* at 687-88, 80 L. Ed. 2d at 693. The second prong requires that the deficient performance prejudiced the defendant. Prejudice is a " 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

A. Untimely Motion to Suppress Statements Made

We conclude that Defendant's attorney's untimely motions to suppress constituted deficient performance. Article 53, Chapter 15A of our General Statutes provides that if the State notifies a criminal defendant at least 20 working days before trial, of its intention to use evidence that contains the defendant's statement, evidence obtained without a search warrant, or evidence obtained with a search warrant when the defendant was not present, the defendant "may move to suppress

the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State." N.C. Gen. Stat. §§ 15A-975(a)-(b), 15A-976(b) (2017).

Here, the State filed and served on Defendant notice on 24 April 2017 of its intention to use evidence of Defendant's statements to Officer Neal. Defendant's attorney filed his first motion to suppress more than five months later, on 27 October 2017—the Friday before trial began. Defendant's counsel renewed the same motion, and then later raised a new motion, during the trial. The trial court correctly dismissed the motions to suppress as untimely.[2] Defense counsel's delay in seeking to suppress the statements stripped Defendant of "the opportunity to present his evidence and arguments in a *voir dire* suppression hearing and, therefore, no ruling was obtained nor order entered." *State v. Rivera*, __ N.C. App. __, __, __ S.E.2d __, __ (Mar. 19, 2019) (COA18-517).

Defendant argues that if his attorney had timely filed a motion to suppress, the jury would not have learned of Defendant's statements to Officer Neal as they were obtained in violation of his *Miranda* rights, which, by extension, would have "had an impact on the jury's decision to convict" Defendant. But the record lacks findings of fact or evidence necessary to review Defendant's contention. We therefore must dismiss Defendant's appeal in this regard.

[2] There was some argument during trial regarding the adequacy of the State's notice to Defendant's attorney. Defendant does not raise this issue, and we do not address it.

When an ineffective assistance of counsel claim is brought on direct appeal, it "will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (emphasis added). If such a claim is "brought prematurely, we dismiss [that] claim[] without prejudice, allowing [the] defendant to bring [it] pursuant to a subsequent motion for appropriate relief in the trial court." *State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004).

We recently discussed in *State v. Rivera* the impropriety of directly reviewing an ineffective assistance of counsel claim based on trial counsel's failure to file a motion to suppress. __ N.C. App. __, __, __ S.E.2d __, __ (Mar. 19, 2019) (COA18-517). We noted in *Rivera* that, in prior cases, "we have shown reluctance to conduct direct review of an [ineffective assistance of counsel] claim when the claim is based on evidence admitted at trial after counsel's failure to obtain a suppression hearing due to violations of Article 53." *Id.* at __, __ S.E.2d at __. This is because, in the absence of an evidentiary hearing, a trial court is not given the opportunity to "make findings concerning the admission of the challenged evidence." *Id.* at __, __ S.E.2d at __ (quotation marks and citation omitted). And, without any finding by the trial court as to evidence challenged on appeal, "it is simply not possible for this Court to adjudge whether [a] defendant was prejudiced by counsel's failure" to file a motion to suppress

that evidence.[3] *Id.* at __, __ S.E.2d at __ (quotation marks and citations omitted). As such, "unless it is clear that an MAR proceeding would not result in additional evidence that could influence our decision on appellate review," a direct review of these cases is inappropriate. *Id.* at __, __ S.E.2d at __.

Here, it is not clear that additional evidence that could affect Defendant's outcome on appellate review would not be revealed in a MAR proceeding. No Article 53 suppression hearing was held regarding Defendant's statements to Officer Neal. Neither Officer Neal nor Dime testified at trial regarding whether Defendant was read his *Miranda* rights prior to being interrogated, either the day of the incident in question or when Officer Neal brought him before a magistrate on 20 January 2017.[4] *See Rivera*, __ N.C. App. at __, __ S.E.2d at __ ("This Court can only surmise who might have testified at the suppression hearing and what evidence that testimony

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[3] *Rivera* discussed and relied on our Supreme Court's holding in *State v. Miller*, which involved a defendant who requested plain error review after his counsel failed to timely file a motion to suppress. __ N.C. __, __, 814 S.E.2d 82, 82 (2018). In reversing the Court of Appeals, our Supreme Court discouraged appellate review of such issues in the absence of a suppression hearing. Allowing appellate review, the Supreme Court cautioned, would create an incentive for a defendant to wait to raise a Fourth Amendment issue until appeal "and take advantage of the undeveloped record," or would prompt the State to introduce potentially unnecessary evidence that the defendant might not challenge on appeal. *Id.* at __, 814 S.E.2d at 84. *Rivera* analogized *Miller* to ineffective assistance of counsel claims and reasoned: "[a]lthough *Miller* involve[d] plain error review, the defendant's burden to demonstrate prejudice on plain error review is very similar to the defendant's burden to demonstrate prejudice on direct appeal of an [ineffective assistance of counsel] claim." *Rivera*, __ N.C. App. at __, __ S.E.2d at __. *Rivera* extended *Miller*'s holding to the relevant ineffective assistance of counsel claims going forward.

[4] Unlike when Defendant was first questioned by Officer Neal, no video or audio evidence was introduced during his conversation with Officer Neal on 20 January 2017 when he was taken to see a magistrate.

would have elicited."). Because defense counsel did not timely seek to suppress Defendant's statements, the State was never invited to introduce evidence pertaining to whether Defendant was advised of his *Miranda* rights. Even if we were to review the patrol car's dash-camera and Officer Neal's body camera footage to see if Defendant was in fact given his *Miranda* rights, we would be performing a fact-finding function reserved solely for the trial court.[5] *See Miller*, __ N.C. at __, 814 S.E.2d at 85 (reviewing "video footage for limited purposes after a suppression hearing had occurred and a full evidentiary record ha[s] been compiled. . . . is very different from using video footage to *substitute* for a suppression hearing and an evidentiary record, and making determinations about witness credibility in the process" (emphasis in original)).

Accordingly, without a proper suppression hearing, "[D]efendant's failure to comply with Article 53 . . . significantly impairs [our] ability to conduct meaningful or fair appellate review." *Rivera*, __ N.C. App. at __, __ S.E.2d at __. We thus dismiss this issue of Defendant's appeal without prejudice to allow him to file a motion for

[5] Defendant cites to our opinion in *State v. Canty*, where we held that, although the defendant was directly appealing his ineffective assistance of counsel claim because his attorney failed to file a motion to suppress, "there [was] a very detailed transcript and a DVD of the traffic stop" in question to allow us to perform appellate review. 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012). *Canty* is inapposite here because *Miller* expressly denounced reviewing video footage absent a trial court conducting a suppression hearing. *See Miller*, __ N.C. at __, 814 S.E.2d at 82 (holding that the "Court of Appeals made determinations about the credibility of [the police officer's] testimony" when it reviewed the body camera footage and the officer's testimony at trial). Further, unlike in *Canty*, the transcript here is not fully developed; whether Defendant's *Miranda* rights were observed was simply not addressed by the evidence introduced at trial.

appropriate relief in the superior court claiming ineffective assistance of counsel for his attorney's failure to timely file a motion to suppress. *See* N.C. Gen. Stat. § 15A-1415(b)(3) (2017) ("[T]he defendant may assert by a motion for appropriate relief . . . [that] [t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.").

B. Inadmissible Opinion Testimony

At trial, Officer Neal testified to the following:

> [STATE]: Corporal Neal, you said that you were extending the e-citation, so the ticket, to [Defendant].
> [OFFICER NEAL]: Yes, sir.
> [STATE]: As you did that, what happened?
> [OFFICER NEAL]: As I did that, again, I said he removed his right hand from his jacket pocket, his hoodie, and at that same time a plastic bag consistent with a clear sandwich bag fell to the ground with some velocity, as though it had some weight in it. *In observing that, I observed what appeared to be crack cocaine*[,] . . . [Defendant] and I both looked down at the bag, looked up at each other. I could see some kind of surprise in his eyes. At that point I stepped on the bag and told him to turn around. I was attempting to take him into custody for a drug investigation at that point. . . .
>
> [STATE]: Now, Corporal Neal, after you picked up the bag that the defendant dropped to the ground, what did you do—or what did you see, I mean?
> [OFFICER NEAL]: Off-white rock-like substances that even further—upon further, closer examination *led me to believe that it was crack cocaine*.

(emphasis added). Defendant contends that Officer Neal committed legal error by testifying to what he believed to be illegal contraband and was thus prejudiced by his

attorney's failure to object to this testimony. We reject Defendant's argument that he was denied effective assistance of counsel as there was additional evidence showing that the contraband dropped by Defendant was crack cocaine.

In cases involving a controlled substance, "the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification." *State v. Carter*, __ N.C. App. __, __, 803 S.E.2d 464, 466-67 (2017). Any "testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible." *Id.* at __, 803 S.E.2d at 467. However, such visual testimony is not prohibited when it is being offered "for other purposes, such as conducting criminal investigations." *State v. Ward*, 364 N.C. 133, 147-48, 694 S.E.2d 738, 747 (2010); *see also Carter*, __ N.C. App. at __, 803 S.E.2d at 467 ("[T]he Supreme Court in *Ward* noted that its decision did not prohibit . . . . testimony by an officer regarding visual identification of a controlled substance for the limited purpose of explaining the officer's investigative actions.").

While the State argues that Officer Neal's testimony "was clearly" being used to show his investigative actions, because Defendant's attorney "did not object to the testimony, we have no way of knowing whether it was offered" for substantive purposes "or merely to explain [Officer Neal's] subsequent actions." *Carter*, __ N.C. App. at __, 803 S.E.2d at 467. Even if we assume that Officer Neal's testimony was

inadmissible, other evidence established that the plastic bag he saw fall from Defendant's pocket was crack cocaine. *See State v. Carter*, 237 N.C. App. 274, 284, 765 S.E.2d 56, 63 (2014) ("It is well established that '[i]f there is overwhelming evidence of defendant's guilt or an abundance of other evidence to support the State's contention, the erroneous admission of evidence is harmless.' " (quoting *State v. Crawford*, 104 N.C. App. 591, 598, 410 S.E.2d 499, 503 (1991))).

The State introduced into evidence at trial the substances that were in the plastic baggies found with Defendant on the day of his arrest. Officer Neal further testified that the plastic baggies he saw Defendant drop were "similar to the ones [he] found within the bag" in the car.[6] A forensic chemist for the State chemically tested these substances, and determined that they were, in part, cocaine. In light of this evidence, Defendant cannot meet his high burden of showing that there is a reasonable probability that the result would have been different had his attorney objected to Officer Neal's testimony.

III. Conclusion

As to Defendant's first argument, we dismiss without prejudice so he can file a

[6] Although Officer Neal testified that he also field tested the contraband dropped by Defendant, that testimony regarding the results of the field test would have been inadmissible as no additional evidence was adduced showcasing the test's reliability. *See State v. James*, 215 N.C. App. 588, 590, 715 S.E.2d 884, 886 (2011) ("[T]he testimony regarding the results of the [field] test would be inadmissible because the State did not sufficiently establish the reliability of the [field] test pursuant to 'any of the 'indices of reliability' . . . or any alternative indicia of reliability[.]' " (quoting *State v. Meadows*, 201 N.C. App. 707, 712, 687 S.E.2d 305, 308-09 (2010))). Even absent this testimony, Defendant still cannot establish prejudice.

motion for appropriate relief, but we find no error as to Defendant's second argument that Officer Neal's opinion testimony prejudiced him to such an extent that he should be awarded a new trial.

DISMISSED IN PART, NO ERROR IN PART.

Judges DILLON and COLLINS concur.

Report per Rule 30(e).