IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1004

Filed: 4 June 2019

Guilford County, Nos. 88 CRS 52529-30

STATE OF NORTH CAROLINA

v.

JOHN EARL STURDIVANT, Defendant.

Appeal by defendant from judgment entered 6 March 2018 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Sarah Holladay for defendant-appellant.

BERGER, Judge.

John Earl Sturdivant ("Defendant") was tried on charges of trafficking in cocaine and conspiracy to traffic in cocaine in Guilford County Superior Court in March 1989. After the first day of trial, Defendant failed to appear for the remainder of the proceedings, and the jury found Defendant guilty of both charges *in absentia*.

The trial court entered a prayer for judgment continuance from term to term until Defendant was apprehended.

Defendant returned to Guilford County and turned himself in to authorities twenty-nine years later. In March 2018, the trial court sentenced him to 35 years in prison and ordered that he pay a $250,000.00 fine. Defendant appeals, alleging that his conviction should be overturned because there is no verbatim transcript of his trial from which he could obtain meaningful appellate review. The State stipulates that the trial transcript cannot be recreated, and concedes that "the record is insufficient to address" issues on appeal. Therefore, we vacate and remand for a new trial.

Factual and Procedural Background

Defendant was indicted for trafficking in cocaine and conspiracy to traffic in cocaine on October 17, 1988. On March 9, 1989, a jury was impaneled for trial of these charges. Defendant appeared on the first day of trial, but failed to appear for the remainder of the proceedings. The trial court entered an order for Defendant's arrest and placed him under a $1,000,000.00 secured bond. The jury found Defendant guilty of both charges in Defendant's absence, and a prayer for judgment was entered.

Between 2000 and 2002, all records, files, and court reporter stenographic notes from this case were destroyed per request by the Guilford County Clerk of

Superior Court. However, portions of Defendant's criminal case file were preserved on microfilm.

On March 6, 2018, judgment was entered and sentencing for Defendant's convictions occurred. At sentencing, Defendant stipulated that there was a factual basis for sentencing and that the prosecutor could relay the evidence to the trial court. The prosecutor provided the following summary of the facts:

> according to then Detective R. W. Saul, S-A-U-L, he was working in a plain clothes capacity and focusing on two individual persons of interest, a Tony Woody who the defendant is charged with conspiring with and another individual later identified as the defendant.
>
> There -- a couple of days prior to the defendant's arrest, there was an undercover transaction that took place between Officer R. F. Reese, R-E-E-S-E, coupled with a drug informant, and Mr. Woody in a motel room. This for less than -- a less than trafficking amount in cocaine.
>
> Reese and the informant then went back on August 31st to a Tuscaloosa Street address, 815 Tuscaloosa Street, to meet with Mr. Woody again. And he indicated at that point, as they negotiated, that they could each arrange for a half kilogram of cocaine for some $17,000. The officer and the informant agreed that they would return. When they did, they returned to the Tuscaloosa Street address.
>
> They went inside. Mr. Woody was present. He was in the backyard and came in with a paper bag in his hand. He opened the bag and inside there was a large Ziploc bag containing what was purported to be half a kilogram of cocaine inside.
>
> The -- the plan, according to Detective Saul, was that just as quickly as Officer Reese confirmed the drugs, he

would leave the address and -- and get the cash currency. The informant would remain behind.

Members of the narcotics division started heading towards Tuscaloosa Street as soon as that was confirmed. They observed that Mr. Woody was now standing in the front yard. He apparently took off running.

The informant indicated that Mr. Woody had put the cocaine back inside the bag and handed the bag of cocaine to Mr. Sturdivant who was standing in the backyard at the time the undercover officer and the informant initially arrived.

Mr. Sturdivant then went to a Trans Am that was parked there in the yard and placed the bag in the front floorboard at Mr. Woody's instruction.

Mr. Sturdivant was then arrested based upon those representations. The cocaine was found in -- in plain view there in the bag in the Trans Am as the informant indicated they would find it.

Mr. Woody apparently was apprehended there at the edge of the yard. They went ahead and executed the search warrant in a second vehicle that was registered to Mr. Sturdivant, a Toyota Celica.

They located in the passenger floorboard two plastic bags containing what the officers recognized to be cocaine. There was some baking soda, obviously a cutting agent used, coupled with some other items of paraphernalia consistent with sales found in the home as well. Some $200 in cash currency I think was seized too.

Officer Reese prepared a supplemental report as well that -- that spoke to the same events, Your Honor. The informant, he shared in his supplemental report, indicated that shortly after he left the cocaine was passed to Mr. Sturdivant who placed it in the vehicle.

> There was an SBI analysis, Your Honor. The item that was located in the vehicle registered to the defendant, as it turns out, was some 34.7 grams in Schedule II cocaine. The cocaine, it was the subject of the transaction found in the Trans Am, was 472 grams.
>
> That would be the showing for the State, Your Honor.

Defendant addressed the trial court on sentencing and apologized. He said,

> I take responsibility for what I did and -- and -- and I'm sorry. I apologize to the court for running off. I shouldn't have -- shouldn't have done that. I know it was wrong. I shouldn't -- and now, looking back, I should have stayed and just took what -- what was coming.

The trial court consolidated the charges and sentenced Defendant to 35 years in prison under the Fair Sentencing Act and ordered that he pay a $250,000.00 fine. Defendant gave notice of appeal in open court. Defendant argues that his conviction should be overturned because the State is unable to provide him with a transcript of the 1989 trial proceedings or an adequate alternative from which he could obtain meaningful appellate review. We agree.

Analysis

"[A]n indigent defendant is entitled to receive a copy of the trial transcript at State expense when necessary to perfect an appeal." *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000); *see also State v. Hobbs*, 190 N.C. App. 183, 185, 660 S.E.2d 168, 170 (2008). However, "[t]he unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must

demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citation omitted). Moreover, a defendant is not prejudiced where there are alternatives "available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817 (2000).

To determine if a defendant has lost the ability to secure meaningful appellate review, this Court must determine if (1) that defendant "made sufficient efforts to reconstruct the hearing in the absence of a transcript"; (2) the defendant's "reconstruction efforts produced an adequate alternative to a verbatim transcript—that is, one that would fulfill the same functions as a transcript"; and (3) "the lack of an adequate alternative to a verbatim transcript of the hearing served to deny [Defendant] meaningful appellate review such that a new hearing is required." *In re Shackleford*, ___ N.C. App. ___, ___,789 S.E.2d 15, 18-20 (2016).

Appellate counsel made diligent efforts to contact the trial judge, prosecutor, defense attorney, and courtroom clerk from the 1989 trial to reconstruct the record. Neither the trial judge nor defense counsel had notes or independent recollection of Defendant's trial. Defendant's appellate counsel was able to secure the prosecutor's "sparse notes"; correspondence between the prosecutor and defense counsel; court filings, including motions to suppress; and the evidence log from trial. However, the

State concedes that the trial transcript cannot be recreated, and that "the record is insufficient to address" issues on appeal.

The State instead argues that Defendant has forfeited his right to a transcript of his trial because he fled the jurisdiction for nearly 30 years. The State notes that "even constitutional protections are subject to forfeiture as a result of improper conduct by a defendant." *State v. James*, 215 N.C. App. 588, 591, 715 S.E.2d 884, 887 (2011).

We would agree with the State but for the fact the transcript and other pertinent records appear to have been destroyed pursuant to requests from the Guilford County Clerk of Superior Court. While the Administrative Office of the Courts had a protocol in place for destruction of criminal case files, Defendant's file should not have been included because his case had not been resolved fully. Thus, the unavailability of a transcript or adequate alternative was not the result of improper conduct by Defendant, but rather the apparent inadvertent destruction of the transcript by the Guilford County Clerk of Superior Court and the Administrative Office of the Courts.

Conclusion

Accordingly, we vacate the judgment and sentence, and remand for a new trial.

NEW TRIAL.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).