IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-14

No. COA20-33

Filed: 2 February 2021

Clay County, Nos. 17 CRS 42, 17 CRS 43

STATE OF NORTH CAROLINA

v.

JILL LANETTE KOEHN

Appeal by defendant from judgments entered 28 August 2019 by Judge J. Thomas Davis in Clay County Superior Court. Heard in the Court of Appeals 12 January 2021.

Joshua H. Stein, Attorney General, by Assistant Attorney General Phyllis A. Turner, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant.

ARROWOOD, Judge.

¶ 1 Jill Lanette Koehn ("defendant") appeals from judgments entered 28 August 2019 following convictions for driving while impaired, possessing a controlled substance on the premises of a penal institution or local confinement facility, and driving with an expired registration. Defendant challenges the trial

court's entry of two separate judgments for two convictions of violating the North Carolina statute prohibiting persons from possessing a controlled substance on the premises of a penal institution or local confinement facility. For the following reasons, we find no error.

I. Background

¶ 2 On 23 September 2015, defendant was stopped while traveling on North Carolina Highway 69 in Clay County, North Carolina. During the routine traffic stop, Trooper Adrian Gordon ("Trooper Gordon") of the North Carolina Highway Patrol testified that he observed defendant make "erratic movements" and that her speech was "[r]apid and broken[.]" Trooper Gordon administered a field sobriety test, believing that defendant may be driving while impaired. Defendant failed to satisfactorily complete the test and was placed under arrest for driving while impaired and with an expired registration. Trooper Gordon also searched defendant's vehicle and found a black digital scale that defendant later admitted using to weigh marijuana.

¶ 3 Defendant was transported to the local jail. Before being admitted into the actual facility, Trooper Gordon asked defendant whether "she had anything on her person that [he] needed to know about before [they] entered the jail facility." Trooper Gordon testified that defendant "didn't say she had anything." At trial, Trooper Gordon stated that he was "trying to help" defendant because "it's a lesser of a crime

[to possess a controlled substance outside of the jail] than it is when you're inside the jail."

¶ 4 Once inside the jail, defendant was searched and found to be in possession of a bottle containing seventeen Clonazepam pills (a controlled substance), a gram of marijuana (a controlled substance), and a glass marijuana smoking pipe.

¶ 5 Defendant was indicted on four charges: one count of driving while impaired, one count of driving with an expired registration plate, and two counts of possessing a controlled substance on the premises of a penal institution or local confinement facility (one for the possession of marijuana and the other for the possession of Clonazepam). The jury found defendant guilty of all charges. On 28 August 2019, the trial court entered three judgments. The court consolidated one count of possession of a controlled substance on jail premises with the registration charge and entered a separate judgment for the second count of possession of a controlled substance on the premises of a penal institution or local confinement facility. The trial court sentenced defendant to six to seventeen months' imprisonment, consecutively, under each judgment. Both sentences were suspended for thirty months. The trial court entered an independent judgment for the driving-while-impaired conviction, sentencing defendant to sixty days' minimum and sixty days' maximum. This sentence was suspended for twelve months. Defendant filed a notice of appeal on 29 August 2019.

II. Discussion

¶ 6 The issue raised on appeal is whether the trial court erred by entering two judgments for two convictions of possessing a controlled substance on the premises of a penal institution or local confinement facility. We find no error in the trial court's entry of two separate judgments for two separate convictions under the statute prohibiting persons from possessing a controlled substance on jail premises. *See* N.C. Gen. Stat. § 90-95(e)(9) (2019).

A. Issue Preservation

¶ 7 Defendant argues that the double jeopardy clauses of the United States and North Carolina Constitutions prohibit multiple punishments for the same offense, here, possessing a controlled substance on the premises of a penal institution or local confinement facility. Because defendant failed to object on the grounds of double jeopardy in the trial court, the State contends that this appeal should be dismissed "since the double jeopardy issue is the only issue presented to this Court." Defendant maintains that her failure to object at trial on double jeopardy grounds does not preclude appellate review. In the alternative, defendant argues that this Court may reach the merits of the appeal under Rule 2 of the North Carolina Rules of Appellate Procedure. *See* N.C.R. App. P. 2 ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of the[] [appellate]

rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.").

¶ 8 Under the facts of this case, we find that the instant appeal is ripe and properly before this Court pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2019). Under this provision, sentencing errors "may be the subject of appellate review even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(18) (allowing appellate review when the "sentence imposed was [allegedly] unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law."); *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (holding that an error at sentencing is not considered an error at trial for the purposes of Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure).[1] Because defendant challenges the judgments entered 28 August 2019 *and* the contemporaneous sentences associated therewith, defendant's appeal is properly before this Court. *State v. Hall*, 203 N.C. App. 712, 716, 692 S.E.2d 446, 450 (2010). We, therefore, address the merits of defendant's appeal.

B. N.C. Gen. Stat. § 90-95(e)(9)

[1] Rule 10(a)(1) states, in pertinent portion, the following: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1).

¶ 9 Defendant, as noted *supra*, was convicted of two counts of possessing a controlled substance on the premises of a penal institution or local confinement facility under N.C. Gen. Stat. § 90-95(e)(9), which states that "[a]ny person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C. Gen. Stat. § 90-95(e)(9).[2] Section 90-95(a)(3), in turn, makes it unlawful for any person "[t]o possess a controlled substance." N.C. Gen. Stat. § 90-95(a)(3). The legislative intent of N.C. Gen. Stat. § 90-95(e)(9) is "to deter and prevent drug possession among those individuals present at local confinement facilities." *State v. Dent*, 174 N.C. App. 459, 467, 621 S.E.2d 274, 280 (2005).

¶ 10 In this case, defendant contends that she cannot be punished twice for possessing two different controlled substances on jail premises at the same time under N.C. Gen. Stat. § 90-95(e)(9). In other words, defendant argues that she cannot be convicted twice under N.C. Gen. Stat. § 90-95(e)(9) where she supposedly committed only one offense under the statute. By extension, defendant claims that the trial court was not authorized to enter two independent judgments for those convictions. Defendant maintains that such a result is in contravention to the double

[2] We also note that defendant agreed that the charges against her were accurate prior to trial.

jeopardy protections set out in the United States and North Carolina constitutions. Defendant proffers no binding legal authority to support this position.

¶ 11 "The Fifth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, protects against double jeopardy, which includes multiple punishments for the same offense." *Hall*, 203 N.C. App. at 716, 692 S.E.2d at 450 (citing *State v. Cameron*, 283 N.C. 191, 197-98, 195 S.E.2d 481, 485 (1973); U.S. Const. amend. V). "[O]nce a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 154 L. Ed. 2d 588, 595 (2003) (citation omitted). Moreover, " 'even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.' " *State v. Ditenhafer*, __ N.C. App. __, __, 840 S.E.2d 850, 857 (2020) (quoting *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984)).

¶ 12 As noted above, "[a]ny person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C. Gen. Stat. § 90-95(e)(9). Section 90-95(a)(3) makes it unlawful for any person

"[t]o possess ***a*** controlled substance." N.C. Gen. Stat. § 90-95(a)(3) (emphasis added). Thus, N.C. Gen. Stat. § 90-95(e)(9), by reference to N.C. Gen. Stat. § 90-95(a)(3), distinguishes between possessing a single controlled substance on jail premises, on one hand, and multiple controlled substances, on the other. *See State v. Poole*, 223 N.C. App. 185, 192, 733 S.E.2d 564, 570 (2012) (citation omitted) ("The offense of possession of a controlled substance in a local confinement facility requires proof that a defendant was in possession of ***a*** controlled substance.") (emphasis added).

¶ 13 Here, it is undisputed that defendant was in possession of *two* controlled substances (as defined by N.C. Gen. Stat. § 90-95) while in custody at the Clay County jail. Because possessing a single controlled substance on the premises of a penal institution or local confinement facility violates N.C. Gen. Stat. § 90-95(e)(9), the possession of two different controlled substances in such a facility amounts to two separate, distinct, and punishable violations of the same. *See State v. Moncree,* 188 N.C. App. 221, 231, 655 S.E.2d 464, 470 (2008) (citing *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984)) ("In order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space."); *see also Hall*, 203 N.C. App. at 718, 692 S.E.2d at 451 (holding that two convictions for the possession of two controlled substances contained in a single pill did not violate double jeopardy); *Ditenhafer*, __ N.C. App. at __, 840 S.E.2d at 857 (holding that double jeopardy did not apply to defendant's two

convictions for felony obstruction of justice); *Lampkin v. State*, 141 P.3d 362 (Alaska Ct. App. 2006) (affirming separate convictions for possessing oxycodone and tetrahydrocannabinol on jail premises). Indeed, defendant herself acknowledges that "had [she] been charged with and found guilty of possessing both clonazepam and marijuana outside the jail, she could have been sentenced for two separate crimes[.]" The same logic applies here.

¶ 14 The State identified both controlled substances found on defendant's person in the Clay County jail through defendant's own statements and testimony and Trooper Gordon's testimony. The State proffered evidence showing two distinct unlawful acts by defendant: possession of marijuana on jail premises and the possession of Clonazepam on jail premises. As noted above, the legislative intent behind N.C. Gen. Stat. § 90-95(e)(9) is "to deter and prevent drug possession among those individuals present at local confinement facilities." *Dent*, 174 N.C. App. at 467, 621 S.E.2d at 280. To allow inmates to transport controlled substances of any type and quantity into penal institutions with the maximum punishment being one charge and one sentence would militate against the deterrence and prevention considerations behind N.C. Gen. Stat. § 90-95(e)(9). It is, thus, clear that the North Carolina General Assembly intended that possessing more than one controlled substance on jail premises is to be treated differently, and punished separately, than possessing one controlled substance in such a facility. *See generally State v. Cameron*, 283 N.C. 191,

203, 195 S.E.2d 481, 489 (1973) ("We hold, then, that in the instant case two separate, distinct, and punishable crimes were established, and that the court did not err in imposing consecutive sentences."). As such, defendant's convictions under N.C. Gen. Stat. § 90-95(e)(9)—and the judgments entered for the same—do not implicate the double jeopardy protections of the United States and North Carolina Constitutions.

III. Conclusion

¶ 15 For the foregoing reasons, we hold that the trial court did not err by entering two judgments and imposing two consecutive sentences for the two lawful convictions under N.C. Gen. Stat. § 90-95(e)(9). We conclude that defendant received a fair trial free of error.

NO ERROR.

Judges DILLON and INMAN concur.

Report per Rule 30(e).