IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-126

No. COA19-1069

Filed 6 April 2021

Orange County, No. 17 CRS 051665

STATE OF NORTH CAROLINA

v.

MITCHELL ALLEN MCCAIN, JR., Defendant.

Appeal by Defendant from judgment entered 17 May 2019 by Judge James P. Hill, Jr. in Orange County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General James B. Trachtman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

MURPHY, Judge.

¶ 1 The trial court did not commit plain error by admitting into evidence a police officer's testimony regarding field sobriety tests when, in light of testimony regarding objective observations of Defendant's impairment, the testimony did not have a probable impact on the jury's finding of guilt. However, we remand for resentencing

as Defendant received ineffective assistance of counsel during sentencing because his trial counsel failed to object to the use of a statutory aggravating factor when the State did not provide the required notice under N.C.G.S. § 20-179(a1)(1).

BACKGROUND

¶ 2 On 13 June 2017, Defendant Mitchell Allen McCain, Jr., ("Defendant"), was driving his tractor-trailer on Interstate 85 from Cowpens, South Carolina to Newport News, Virginia. Trooper Blakley ("Blakley") was stationed at a nearby weigh-station when he received a phone call regarding the tractor-trailer driven by Defendant. Once Defendant pulled into the weigh-station, Blakley asked Defendant to move into the inspection lot. Blakley noted Defendant avoided eye contact and did not acknowledge Blakley. After Defendant did not respond, Blakley repeated his request. Defendant finally looked at Blakley and began driving toward the inspection lot. As Defendant drove toward the inspection lot, Blakley leaned out his window to inspect the tractor-trailer and detected the smell of burnt marijuana.

¶ 3 As Blakley approached Defendant's vehicle, he again noticed the smell of burnt marijuana coming from the tractor-trailer and witnessed Defendant stumble out of the vehicle with a wobbly gait. He also observed Defendant was very lethargic. Blakley asked Defendant for his driver's license three times before Defendant retrieved it. While Defendant searched for his driver's license in his wallet, Blakley noticed Defendant flipped past it once or twice before he eventually found it. After

noticing a strong smell of burnt marijuana emanating from Defendant, Blakley thought he was dealing with an impaired driver and decided to perform field sobriety tests.

¶ 4 The first test was the walk-and-turn, where Defendant was placed on a line on a flat, level surface and asked to walk heel-to-toe nine steps on the line while keeping his arms at his side. After taking the required number of steps, Defendant was required to turn and, remaining on the line, walk nine steps heel-to-toe back to the beginning, keeping his arms at his side. Regarding the results of the walk-and-turn, Blakley testified:

> [BLAKLEY]: I noticed -- indicated on the DWI report that he could not keep his balance, he started too soon, and took 10 steps, missing heel to toe, stepping off the line, and using his arms for balance while he was conducting the -- performing the test.
>
> . . .
>
> [THE STATE]: How many [cues] of impairment are associated with the walk-and-turn test?
>
> [BLAKLEY]: Eight.
>
> [THE STATE]: How many did [Defendant] show?
>
> [BLAKLEY]: Eight.
>
> [THE STATE]: Okay. And based on your training and experience, how many [cues] on the walk-and-turn test support a correct arrest decision?
>
> [BLAKLEY]: Two indicate impairment.

> [THE STATE]: Okay. And do you consider other factors, not just the walk and turn, when you're making your impairment determination?
>
> [BLAKLEY]: Yes, sir.

¶ 5 Next, Defendant performed the one-leg stand. On this test, Defendant was instructed to stand with his feet together and arms at his side. He was told to maintain his position until instructed to raise one leg six inches off the ground with his foot parallel to the ground. While in that position, he was instructed to look at his elevated foot and count out loud until told to stop. Blakley testified, "[during the one-leg stand, Defendant] swayed while balancing, using his arms for balance, hopped some, put his foot down. And those were the four [cues] on the one-leg stand."

¶ 6 During the third test, finger-to-nose, Defendant was instructed to stand with his feet together, put his hands out by his sides, put his head back, and close his eyes. At that time, he was told to touch the tip of his nose with the tip of his finger. Blakley instructed Defendant to touch the tip of his nose six separate times, three times with his left hand and three times with his right hand. Regarding the results of the finger-to-nose, Blakley testified:

> [BLAKLEY]: On finger to nose, the first attempt was with the left hand, touched the bridge of his nose; the second was with the right, and it was, again, bridge of the nose; third was left hand, touched underneath nose, near the nostril; number four was right hand, touched the left nostril; number five was right hand, right nostril is where he touched; and number six was with the left hand, and he

> touched the tip of his nose then.
>
> [THE STATE]: And so you gave him six instructions to touch the nose. How many times did he successfully touch his nose as you instructed and demonstrated?
>
> [BLAKLEY]: Once out of the six.
>
> [THE STATE]: Okay. Based on your training and experience, what did that mean to you?
>
> [BLAKLEY]: It also indicated impairment.

¶ 7 Finally, Defendant performed the Rhomberg balance test where he was required to stand with his feet together, head back, eyes closed, and wait for thirty seconds. Once Defendant thought those thirty seconds had passed, he was to open his eyes and say stop. Regarding the results of the Rhomberg balance test, Blakley testified:

> [THE STATE]: Trooper, tell the jury what you're looking for on the Rhomberg balance test.
>
> [BLAKLEY]: I'm looking for swaying motion. I'm looking for an internal clock that's either too slow or too fast that's out of a normal 30-second -- you know, what you would think 30 seconds went by.
>
> [THE STATE]: And did [Defendant] perform that test?
>
> [BLAKLEY]: He did, yes, sir.
>
> [THE STATE]: What did you notice?
>
> [BLAKLEY]: I noticed that situation was moderate. It was noticeable he was -- he was swaying while he was standing there.

> . . .
>
> [THE STATE]: And you mentioned the time estimation portion. Did [Defendant] also do that?
>
> [BLAKLEY]: Yes. While they do this, I have a stopwatch, and I measure the time that goes by that they are trying to estimate 30 seconds. And it was 46, 16 seconds past the 30 we were looking for.

¶ 8 Based on his observations and the field sobriety tests, Blakley believed Defendant was impaired, arrested him, and issued a citation for driving while impaired ("DWI"). After the arrest, during a visual search of the tractor-trailer's cab, Blakley observed ashes in the cab of the vehicle, but did not find any drugs or paraphernalia on Defendant's person or in the tractor-trailer.

¶ 9 At trial, Blakley testified he received training on the identification of marijuana at basic law enforcement training in 1991 and through the North Carolina Highway Patrol in 1994. He testified he conducted an average of seventy-five DWI investigations per year during the first twelve or thirteen years of his twenty-five-year career. Since then, he conducted approximately thirty investigations per year.

¶ 10 On 17 May 2019, a jury found Defendant guilty of DWI and the trial court sentenced him to a suspended sentence of 120 days. Defendant gave notice of appeal in open court.

¶ 11 Before trial, the State filed a Form AOC-CR-338 *Notice of Grossly Aggravating and Aggravating Factors (DWI)*. The form contained text next to a check box that

read "[D]efendant had at least one prior conviction of an offense involving impaired driving that occurred more than seven (7) years before the date of this offense." The State did not check the box. During sentencing, the State indicated it was not asking for any aggravating factors and did not give notice of any aggravating factors. However, the State asked the trial court to consider Defendant's prior driving record. The trial court stated it could find a statutory aggravating factor based on Defendant's prior 1991 DWI conviction to which Defense counsel agreed. Defense counsel requested Defendant be sentenced at Level Five because Defendant was polite, cooperative, and not impaired by alcohol. The trial court found Defendant's prior DWI conviction was an aggravating factor, found one mitigating factor, and imposed Level Four punishment.

¶ 12 Defendant appeals his conviction of driving while impaired under N.C.G.S. § 20-138.1 and asserts two issues on appeal. First, Defendant argues the trial court plainly erred by allowing Blakley to testify that the results of Defendant's field sobriety tests indicated marijuana impairment because Blakley's expert testimony was not the product of reliable principles and methods, and therefore could not be admitted to show marijuana impairment. Second, Defendant argues he received ineffective assistance of counsel during sentencing because his trial counsel failed to object to the use of a statutory aggravating factor for which the State did not provide notice.

ANALYSIS

A. Plain Error

¶ 13 Defendant argues the trial court plainly erred by allowing Blakley to testify that the results of Defendant's field sobriety tests indicated marijuana impairment. Defendant contends, given Blakley's specialized training, certification, and experience conducting field sobriety tests, he testified as an expert. Specifically, he argues the admission of Blakley's expert testimony was plain error because field sobriety tests are designed for alcohol impairment and are not reliable indicators of marijuana impairment. Assuming, *arguendo*, the admission of Blakley's testimony regarding whether the field sobriety tests indicated marijuana impairment was erroneous, upon review of the Record, its admission did not amount to plain error.

1. Standard of Review

¶ 14 "[W]e recently held that an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review." *State v. Gray*, 259 N.C. App. 351, 354, 815 S.E.2d 736, 739 (2018) (assigning plain error to the trial court's admission of expert testimony). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a

probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 334 (citations and internal quotation marks omitted).

2. Prejudice

¶ 15 Assuming, *arguendo*, the field sobriety tests were not reliable indicators of marijuana impairment, Defendant was not prejudiced by their erroneous admission because Blakley's testimony regarding his objective observations was otherwise admissible. In light of this otherwise admissible evidence, it is not probable "that the jury . . . would have returned a different verdict[.]" *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327. In *State v. Streckfuss*, we reviewed whether the trial court erred in allowing a police officer to testify regarding field sobriety tests. *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 327 (2005). The trial court found the police officer could only testify as a lay witness and concluded "[the officer] cannot testify that he administered standardized field sobriety tests. The officer may testify what he asked the defendant to do and what the defendant did in response thereto." *Id.* at 88, 614 S.E.2d at 328. On appeal, we noted:

> [the officer] could not testify that he believed [the] defendant to be impaired because [the] defendant failed the tests; however, he could testify that he formed an opinion that [the] defendant was impaired when [the officer] asked [the] defendant to stand on one leg and [the] defendant started to hop and then fell over. In other words, [the officer] was permitted to testify as a lay witness, rather than as an expert.

Id. at 89, 614 S.E.2d at 328. The same reasoning applies here. Moreover, we have found "field sobriety tests are not required to establish a defendant's faculties as being appreciably impaired under [N.C.G.S.] § 20-138.1." *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002).

¶ 16 At trial, Blakley testified to objective observations of impairment, his administration of the field sobriety tests, and Defendant's failure of the tests. Here, had the trial court excluded his testimony regarding the administration and results of the field sobriety tests, his testimony regarding his objective observations of impairment as a lay witness would still have been admissible evidence of impairment. This testimony regarding observations of impairment included: Blakley instructed Defendant more than once to drive to the inspection lot before Defendant started moving; Blakley noticed the smell of burnt marijuana coming from Defendant's tractor-trailer, inside the tractor-trailer, and emanating from Defendant's person; Defendant stumbled out of the tractor-trailer, had a wobbly gait and acted very lethargic; Blakley requested Defendant's driver's license multiple times, and noticed Defendant flipped past it once or twice while attempting to find it; and, another officer, Trooper Darnell, testified he smelled burnt marijuana within the tractor-trailer. Consequently, assuming, *arguendo*, the erroneous admission of Blakley's testimony was error, it was not plain error since there was sufficient evidence from Blakley's objective observations of impairment such that without the error it is not

probable "that the jury . . . would have returned a different verdict[.]" *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327.

¶ 17 Even assuming, *arguendo*, the admission of Blakley's testimony regarding whether the field sobriety tests indicated impairment was erroneous, Defendant has not demonstrated plain error by the admission of this evidence.

B. Ineffective Assistance of Counsel

1. Standard of Review

¶ 18 "On appeal, [we] review[] whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "*[D]e novo* means fresh or anew; for a second time[.]" *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (internal quotations omitted).[1]

¶ 19 Defendant argues Defense counsel's failure to object to the use of Defendant's prior driving history as a statutory aggravating factor was ineffective assistance of counsel. A defendant's right to counsel includes the right to effective assistance of counsel under the United States and North Carolina Constitutions. U.S. Const.

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[1] We note, generally ineffective assistance of counsel claims are not reviewed on appeal as "[i]t is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits [only] 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 the appointment of investigators or an evidentiary hearing." *State v. Burton*, 251 N.C. App. 600, 604, 796 S.E.2d 65, 68 (2017) (quoting *State v. Turner*, 237 N.C. App. 388, 395, 765 S.E.2d 77, 83 (2014)). However, because the Record here requires no further investigation, this is that rare instance where review is appropriate.

amends. VI, XIV; N.C. Const. art. I, §§ 19, 23. "Clearly sentencing is a critical stage of a criminal proceeding to which the right to effective assistance of counsel applies." *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E.2d 518, 521 (1985).

¶ 20 "To prevail in this argument [the] defendant must show that his counsel's conduct fell below an objective standard of reasonableness." *Davidson*, 77 N.C. App. at 544, 335 S.E.2d at 520-521.

> [T]he defendant must show 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, the defendant must show 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.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)).

2. Deficient Performance

¶ 21 Defendant argues Defense counsel's failure to object to the use of a statutory aggravating factor in sentencing without notice by the State constitutes deficient performance. In *State v. Davidson*, we found the defense counsel's performance deficient and prejudicial when counsel failed to argue mitigating factors, present any favorable aspects of the defendant's background, or advocate for leniency. *Davidson*, 77 N.C. App. at 545, 335 S.E.2d at 521. We recently found, "[w]hen the State fails to

give notice of its intent to use aggravating sentencing factors as required by [N.C.G.S.] § 20-179(a1)(1), the trial court's use of those factors in determining a defendant's sentencing level is reversible error." *State v. Hughes*, 265 N.C. App. 80, 80, 827 S.E.2d 318, 319, *writ denied, review denied*, 372 N.C. 705, 830 S.E.2d 827 (2019).

¶ 22 Conversely, we have found a defense counsel's choice to remain silent during sentencing did not constitute "deficient performance prejudicial to the defendant." *State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861 (1986). In *Taylor*, we determined, "[t]he record . . . provide[d] no basis for holding that counsel's decision to remain silent at the sentencing hearing was not 'strategy and trial tactics' properly left within the control of counsel." *Taylo*r, 79 N.C. App. at 638, 339 S.E.2d at 861.

¶ 23 Here, the Record reveals the basis for Defense counsel's failure to object to the aggravating factor. During sentencing, the State informed the trial court it wanted to be sure the notice of aggravating factors had been filed, as the State's counsel did not have a copy in the file. Defense counsel responded, "I think because you didn't use it, even if you didn't file it, I think the Judge can take notice of the driving record." The trial court agreed it could take notice of the certified driving record. Defense counsel failed to object to the aggravating factor based upon a misapprehension of the law and not trial strategy.

¶ 24 Based on *Hughes*, we find Defense counsel deficiently performed by agreeing

with the trial court's assertion it could "take notice of the driving record" and find a statutory aggravating factor based on Defendant's driving record even though the State did not provide notice as required by statute. *See* N.C.G.S. § 20-179(a1)(1); s*ee also Hughes*, 265 N.C. App. at 80, 827 S.E.2d at 319. Defense counsel's performance here is similar to *Davidson*, where the defense counsel failed to advocate for the defendant. Additionally, Defense counsel's consent to the use of the prior driving record was not a "trial strategy," as in *Taylor*, since its admission could only have increased Defendant's sentence. Defense counsel failed to recognize N.C.G.S. § 20-179(a1)(1) requires notice under *Hughes* and failed to object to the lack of notice despite the law. Defense counsel's failure to object to the trial court's use of aggravated sentencing factors without notice from the State constitutes deficient performance.

3. Prejudice

¶ 25 Defendant argues he was prejudiced by Defense counsel's deficient performance since there is a reasonable probability he would have received a lesser sentence without the aggravating factor. The severity of a DWI sentence is based on the presence or absence of aggravating and mitigating factors. *See* N.C.G.S. §§ 20-179(f)-(k) (2019). If a trial court finds "[t]here are no aggravating and mitigating factors, or that aggravating factors are substantially counterbalanced by mitigating factors, the judge shall note in the judgment any factors found and [find] that the

defendant is subject to the Level Four punishment . . . ." N.C.G.S. § 20-179(f)(2) (2019). Additionally, if the trial court finds "[t]he mitigating factors substantially outweigh any aggravating factors, the judge shall note in the judgment the factors found and the judge's finding that the defendant is subject to the Level Five punishment[.]" N.C.G.S. § 20-179(f)(3) (2019); *see also State v. Geisslercrain*, 233 N.C. App. 186, 191, 756 S.E.2d 92, 95 (2014) (internal citations and marks omitted) ("[I]f the trial court determines that [t]he mitigating factors substantially outweigh any aggravating factors, the trial court *must* impose a Level Five punishment . . . . And if there are only mitigating factors present—and no aggravating factors present—the trial court *must* impose a Level Five punishment.").

¶ 26 Here, the trial court found one mitigating factor and one aggravating factor. Had Defense counsel objected, rather than consented, to the use of the prior driving record as an aggravating factor, the trial court may have found one mitigating factor and no aggravating factor. As noted above, finding only one mitigating factor would require the trial court to impose a Level Five punishment, a lower punishment. *See Geisslercrain*, 233 N.C. App. at 191, 756 S.E.2d at 95. As a result, the deficient performance of Defense counsel prejudiced Defendant by subjecting him to Level Four punishment instead of Level Five punishment.

¶ 27 Since Defense counsel's deficient performance prejudiced Defendant, Defendant received ineffective assistance of counsel. Accordingly, we vacate

Defendant's sentence and remand to the trial court for resentencing. *See State v. Mackey*, 209 N.C. App. 116, 126, 708 S.E.2d 719, 725 (vacating the defendant's sentence and remanding for resentencing after the State failed to provide "sufficient notice of its intent to seek an aggravated range sentence for [the] defendant"), *disc. rev. denied*, 365 N.C. 193, 707 S.E.2d 246 (2011).

CONCLUSION

¶ 28 The trial court did not commit plain error in allowing Blakley to testify the field sobriety tests showed Defendant's impairment by marijuana as Defendant cannot show prejudice due to the additional admissible evidence supporting his conviction of DWI by marijuana. Defendant, however, received ineffective assistance of counsel at the sentencing stage. Defense counsel failed to object to the trial court's use of a prior DWI as an aggravating factor without the proper notice from the State and Defendant was prejudiced by being sentenced at a higher punishment level.

NO PLAIN ERROR IN PART; VACATED AND REMANDED FOR RESENTENCING IN PART.

Chief Judge STROUD and Judge COLLINS concur.

Report per Rule 30(e).