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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-173

No. COA20-615

Filed 20 April 2021

Guilford County, No. 19CRS66322

STATE OF NORTH CAROLINA

v.

BRIANA LEANA RICHMOND

Appeal by defendant from judgment entered 11 October 2019 by the Honorable R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2021.

Joshua H. Stein, Attorney General, by Donna B. Wojcik, Assistant Attorney General, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant-Appellant.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 Ms. Richmond (“Defendant”) was alleged to have stolen a black bag containing marijuana and \$12,000 in cash, all of which belonged to Kasey Edwards (“Edwards”). Defendant was charged with felony larceny and rejected an offer from the State to

plead to the lesser offense of misdemeanor larceny. At Defendant's jury trial for felony larceny, Mr. Dowling, counsel for Defendant ("Defense Counsel"), delivered the following opening statement:

Good morning, ladies and gentlemen. One thing I can agree with [the State] is that this involves \$12,000 or the existence of \$12,000 cash that Mr. Edwards says was taken from him. My client did take a bag. I anticipate the testimony will be that he received that bag back with what was in that bag, which was the marijuana. The key for you, ladies and gentlemen, is to establish whether that \$12,000 even existed, how—how the State is able to prove that is what you are going to have to consider in terms of this particular case. Thank you.

¶ 2

Immediately, the trial court *sua sponte* sent the jury out and conducted a *Harbison* inquiry. *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1984). In *Harbison*, the North Carolina Supreme Court held ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, is established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent. Thus, the discussion between a defendant and his counsel whereby counsel obtains the defendant's permission to admit the defendant's guilt of a charged offense has been traditionally referenced as a *Harbison* inquiry.

¶ 3

During an off-the-record bench conference, the following colloquy occurred:

Mr. Dowling: Judge, my client indicates she did not authorize me to make that statement.

Court: Okay. Has your client authorized you to admit guilt

to any potential lesser included offense?

Mr. Dowling: No, Judge.

Court: Okay. Do you want to clarify your opening statement to the jury and continue with your opening statement?

Mr. Dowling: I will do that, yes.

Court: Okay. That's perfectly fine. I will allow you to do that at this point. So for—this is a Harbison inquiry. She at this point has not authorized you to admit guilt, obviously, to the felony larceny or a potential misdemeanor larceny. Is that correct?

Mr. Dowling: That's correct, Judge.

Court: Okay. And you didn't admit guilt to the jury in the opening statement. You admitted she took the bag but then returned it. Whether it was authorized by the victim or otherwise, I'll let you clarify that to the jury in just a minute to continue with an opening statement.

Mr. Dowling: That's fine, Judge.

Court: Will that be satisfactory to the Defendant?

Mr. Dowling: That will be satisfactory.

Defendant: Yes.

Court: Otherwise, you'll be arguing not guilty to the jury until and unless she authorizes you to admit guilt to any lesser included. Is that correct?

Mr. Dowling: Yes, Your Honor.

but it contained only marijuana and no cash. Defendant further testified to texting Edwards and apologizing for taking the bag. Defense Counsel then stated in his closing argument that Defendant’s mother testified credibly about what Defendant “stole.”

II. Jurisdiction

¶ 5 Jurisdiction lies in this Court as a matter of right over a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat § 15A-1444(a) (2019).

III. Issue

¶ 6 The issue on appeal is whether Defendant received *per se* ineffective assistance of counsel because Defense Counsel conceded Defendant’s guilt of misdemeanor larceny without Defendant’s consent.

IV. Standard of Review

¶ 7 This Court reviews *de novo* whether a defendant was denied the effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

V. Analysis

¶ 8 Defendant contends that at trial, Defense Counsel conceded guilt of the lesser-included offense of misdemeanor larceny. Defendant further contends that because the record affirmatively shows Defendant did not authorize Defense Counsel to make

such a concession, her conviction should be vacated, and the case remanded for a new trial.

¶ 9

North Carolina courts have adopted the United States Supreme Court's language in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and enunciated the following two-part test:

First, the 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 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) (quoting *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).

¶ 10

Importantly, however, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citing *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). A motion for appropriate relief is the preferable mechanism to raise such a claim because "[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation

omitted). “[S]hould the reviewing court determine that [the ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [motion for appropriate relief] proceeding.” *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citing *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985)).

¶ 11 In this case, we cannot properly assess the ineffective assistance of counsel issue on direct appeal because an evidentiary hearing on this issue has not been held and the “cold record” is not dispositive. *Kinch*, 314 N.C. at 106, 331 S.E.2d at 669 (concluding same); *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted) (Ineffective assistance of counsel “claims brought on direct review 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 the appointment of investigators or an evidentiary hearing.”); *State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to whether defendant consented to his counsel’s argument regarding his guilt and determining that said issue was appropriately deferred for consideration in a motion for appropriate relief). Therefore, we dismiss Defendant’s claim for ineffective assistance of counsel without prejudice to her right to file a motion for appropriate relief in the trial court.

¶ 12 Should this issue be raised below in a motion for appropriate relief, the trial court “should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant’s allegations of ineffective assistance of counsel.” *Buckner*, 351 N.C. at 412, 527 S.E.2d at 314.

VI. Conclusion

¶ 13 This Court dismisses Defendant’s claim for ineffective assistance of counsel without prejudice. Defendant may exercise her right to file a motion for appropriate relief in the trial court. *It is so ordered.*

DISMISS WITHOUT PREJUDICE.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).