IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-228

No. COA20-381

Filed 18 May 2021

Guilford County, Nos. 18 CRS 68585, 24202

STATE OF NORTH CAROLINA

v.

RANDY RIVERA

Appeal by Defendant from Judgments entered 2 August 2019 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Wendy J. Lindberg, for the State.

Joseph P. Lattimore for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Randy Rivera (Defendant) appeals from Judgments entered 2 August 2019 after a jury convicted him of Trafficking in Cocaine by Possession, Trafficking in Cocaine by Transportation, Possession with Intent to Distribute Cocaine and his subsequent plea to having obtained Habitual-Felon-Status. Defendant, recognizing

his written Notice of Appeal was untimely filed, has filed a Petition for Writ of Certiorari requesting this Court review the merits of his appeal. Because, however, Defendant has failed to demonstrate sufficient merit in his appeal to warrant issuance of the writ of certiorari, we deny his Petition and dismiss this appeal. The Record, including evidence adduced at trial, reflects the following:

¶ 2 On 21 May 2018, a Guilford County Grand Jury indicted Defendant on one count of each of Trafficking in Cocaine by Possession, Trafficking in Cocaine by Transportation, and Possession with Intent to Distribute Cocaine. On 16 April 2018, a Guilford County Grand Jury indicted Defendant on one count of attaining Habitual-Felon-Status.

¶ 3 At trial, Officer N.B. Fisher, of the Greensboro Police Department, testified he received a complaint in January of 2018 that someone was selling narcotics from a residence at 601-A Holt Avenue. That complaint described the individual as a "skinny" African-American man who was approximately 30- to 35-years-old and wore long dreadlocks. On 18 February 2018, while executing a search warrant on the residence at 601-A Holt Avenue, Officer Fisher observed Defendant, a man Officer Fisher testified matched the description in the complaint, exit the residence and walk up to a Chrysler vehicle and walk back into the residence. Officer Fisher radioed for backup from other officers. Approximately 20 to 30 minutes later, Officer Fisher saw Defendant come out of the residence again and walk into the driveway.

¶ 4 Officer E.M. Follis, also with the Greensboro Police Department, was the first officer to arrive as backup. When he saw Defendant, who Officer Follis testified matched the description in the complaint, Officer Follis exited his vehicle and approached Defendant with his weapon drawn. Officer Follis testified he ordered Defendant to get on the ground. Officer Follis stated Defendant began to walk toward Officer Follis and, after a brief struggle, Officer Follis was able to detain Defendant and search his outer layer of clothing. According to Officer Follis, he felt what was immediately recognizable as crack cocaine in Defendant's right jacket pocket. Officer Follis then found what appeared to be powder cocaine in Defendant's left pocket. Officer Follis seized these items and Defendant was taken to jail for processing.

¶ 5 Officer Fisher met Defendant at the jail. According to Officer Fisher, when Officer Fisher told Defendant he was being charged with trafficking based on the weight of the alleged narcotics, Defendant responded, "one was crack; one was powder."

¶ 6 Britnee Meyers, a forensic scientist with the drug chemistry unit at the North Carolina State Crime Lab, testified she tested the substances Officer Follis found on Defendant. The State tendered Meyers as an expert "in the field of forensic drug chemistry" and "in the analysis and identification of controlled substances" without objection from Defendant. Meyers testified she received two samples which she weighed individually; Sample 1A weighed "22.28 plus or minus .02 grams," and

Sample 2 weighed "14.10 plus or minus .02 grams." Meyers stated she performed initial, confirmatory "microcrystalline" tests on each sample. Both samples exhibited "frost-shaped crystals indicative of cocaine." Meyers explained she then performed "an infrared test" whereby she shined light through the sample causing "the molecules of the sample to vibrate." The infrared instrument measured "these vibrations" and "compared [the vibrations] to a library of known standards in order to identify any controlled substances that may be present." Sample 1A's test identified "cocaine base," and Sample 2's test identified "cocaine hydrochloride." The State submitted Meyers's laboratory reports into evidence without objection from Defendant.

¶ 7 At the close of the State's evidence, Defendant moved to dismiss all the charges; the trial court denied the Motion. After the close of all the evidence, Defense counsel made another general Motion to Dismiss all the charges; again, the trial court denied the Motion.

¶ 8 The jury returned guilty verdicts for the charges of Trafficking in Cocaine by Transportation, Trafficking in Cocaine by Possession, and Possession with Intent to Distribute Cocaine. Defendant pled guilty to being a Habitual Felon. During sentencing, the trial court stated: "I do recall that you admitted wrongdoing to a law enforcement officer after you were arrested. I'm going to give you credit for doing that. I will find that mitigating factor. . . . I will impose the sentence in [18 CRS

68585] in the mitigated range . . . ." The trial court ran the sentences for all counts in 18 CRS 68585 concurrently. Defendant did not give oral notice of appeal at trial and sentencing. The trial court entered Judgments in 18 CRS 68585 and 18 CRS 24202 on 2 August 2019. Defendant, acting pro se, filed written Notice of Appeal to this Court from "the judgment and sentence" on 28 August 2019.

Issue

¶ 9 The issue, in this case, is whether Defendant has demonstrated sufficient merit to his appeal for this Court to exercise its discretion to issue a writ of certiorari where Defendant failed to timely file written Notice of Appeal pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure.

Analysis

I. Jurisdiction

¶ 10 "A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2019). A defendant seeking to appeal a judgment "in a criminal action may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court . . . within fourteen days after entry of the judgment or order[.]" N.C.R. App. P. 4(a) (2021) (Rule 4). This Court lacks the jurisdiction to hear a defendant's appeal when the defendant has failed to file timely notice of appeal. *State v. McCoy*, 171 N.C. App.

636, 638, 615 S.E.2d 319, 320 (2005) (citations omitted). Here, because Defendant failed to timely file Notice of Appeal, this Court is without jurisdiction to review his appeal and we are constrained to dismiss it.

¶ 11 Recognizing, however, he filed written Notice of Appeal from the trial court's Judgments after the fourteen-day period provided by Rule 4 and, thus, has lost his right to prosecute his appeal, Defendant has filed, concurrently with his brief to this Court, a Petition for Writ of Certiorari seeking review of his appeal. Rule 21 of our Rules of Appellate Procedure provides: "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1) (2021); *see also* N.C. Gen. Stat. § 7A-32(c) (2019). "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id.*

¶ 12 On appeal, Defendant argues (A) the trial court plainly erred in admitting Britnee Meyers's expert testimony the substances found in Defendant's possession were cocaine, and (B) the trial court erred in denying his Motion to Dismiss all charges at the close of all the evidence.

A. Reliability of Expert Witness Testimony

¶ 13 Defendant argues the trial court plainly erred by admitting testimony of the State's chemical analyst stating the substances found on Defendant were, in fact, cocaine. Specifically, Defendant contends the State failed to lay the proper foundation for the reliability, pursuant to Rule of Evidence 702(a), of the expert's methods and analysis to permit her expert opinion as to the chemical composition of the substances found on Defendant.

¶ 14 Defendant acknowledges his trial counsel made no objection to this evidence. "[A]n 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) (citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

¶ 15 Even if we were to assume, without deciding, the trial court erred in admitting the expert testimony, any such error would not rise to plain error given the other admissible evidence not challenged by Defendant. Simply put, considering the other evidence the jury heard, the jury would probably not have reached a different verdict. Most significantly, at trial, Officer Fisher testified that when he advised Defendant of the trafficking charges based on the weight of the substances found on Defendant's person Defendant stated, "one was crack; one was powder." Defendant does not

challenge this evidence on appeal. Moreover, at sentencing, the trial court found Defendant "admitted wrongdoing" to law enforcement, gave Defendant credit for this admission as a mitigating factor, and sentenced Defendant in the mitigated range.

¶ 16 The jury also heard the expert explain her preliminary tests showing the crystalline structure of the substances obtained from Defendant were "indicative of cocaine." Defendant does not challenge this evidence on appeal. Therefore, absent the alleged error in admitting the expert's testimony as to the chemical composition of the substances, the jury heard overwhelming evidence—including Defendant's own admission—of Defendant's guilt. Consequently, Defendant has failed to demonstrate sufficient merit to his argument the trial court plainly erred in admitting this evidence. *See State v. Walker*, 316 N.C. 33, 40, 340 S.E.2d 80, 84 (1986) ("[T]he overwhelming evidence against the defendant prevented the error complained of from rising to the level of 'plain error[.]' ").

B. Trafficking by Transportation

¶ 17 Defendant also challenges the trial court's denial of his Motion to Dismiss the charge of Trafficking Cocaine by Transportation. Defense counsel moved to dismiss all charges at the close of the State's evidence, and the trial court denied the Motion. After the close of all the evidence, Defense counsel made another general Motion to Dismiss all the charges. Again, the trial court denied the Motion. In his brief, Defendant argues the trial court erred in denying his Motion to Dismiss the

Trafficking Cocaine by Transportation charge because there was insufficient evidence to prove Defendant transported the cocaine found on his person.

¶ 18 The State must present substantial evidence of the essential elements of an offense and that the defendant was the perpetrator in order to survive a motion to dismiss for insufficient evidence. *State v. Fritsch*, 351 N.C 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation and quotation marks omitted). The trial court must view the evidence in the light most favorable to the State and afford the State the benefit of every reasonable inference from the evidence. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002) (citation omitted).

¶ 19 "A conviction for trafficking in cocaine by transportation requires that the State show a substantial movement." *State v. Williams*, 177 N.C. App. 725, 729, 630 S.E.2d 216, 219 (2006) (citation and quotation marks omitted). Transportation is shown by evidence of carrying or moving narcotics "from one place to another." *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (citation and quotation marks omitted). "Our courts have determined that even a very slight movement may be 'real' or 'substantial' enough to constitute 'transportation' depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434,

436 (1993) (citation omitted). We have held a defendant who, with drugs in his possession, left his dwelling, got into a truck and started—but did not complete—backing out of his driveway had sufficiently moved the drugs to constitute trafficking. *Outlaw*, 96 N.C. App. at 197, 385 S.E.2d at 168-69.

¶ 20 Here, the jury heard evidence that officers saw Defendant come out of the residence, grab something from the Chrysler outside the residence, and walk back into the residence. Officers then saw Defendant exit the residence and walk into the driveway just before police arrested Defendant and found the cocaine on his person. Officers testified that Defendant matched the description of an individual alleged to have been selling drugs out of the residence. Thus, even this short movement from the residence to the driveway was sufficient for the jury to infer Defendant moved the cocaine for the purpose of selling it, and the movement was significant enough to be considered transportation. *See id.*; *McRae*, 110 N.C. App. at 646, 430 S.E.2d at 436. Therefore, Defendant's argument the trial court erred in denying his Motion to Dismiss the trafficking charge fails. Consequently, Defendant has, again, failed to establish sufficient merit to his appeal for this Court to issue its writ of certiorari.

Conclusion

¶ 21 Accordingly, for the foregoing reasons, we deny Defendant's Petition for Writ of Certiorari and dismiss this appeal.

APPEAL DISMISSED.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).