IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-670

No. COA22-68

Filed 4 October 2022

McDowell County, Nos. 20CRS345, 20CRS347, 20CRS50384-85

STATE OF NORTH CAROLINA

v.

WESLEY CLAYTON RHOM, JR., Defendant.

Appeal by defendant from judgments entered 8 July 2021 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for the State-appellee.

Currin & Currin, by George B. Currin, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Wesley Clayton Rhom, Jr., appeals from his conviction for multiple drug trafficking related offenses and aggregate of consecutive sentences imposed. Defendant raises three issues on appeal: (i) whether the trial court erred in failing to consider his "substantial assistance" at sentencing; (ii) whether he received ineffective assistance of counsel; and (iii) whether the trial court improperly

considered his refusal to enter into a plea agreement in determining the severity of the sentences imposed. This Court has jurisdiction over this appeal pursuant to N.C. Gen. Stat. §§ 7A-26, 7A-27, and 15A-1444(a). Upon careful review, we discern no error.

I.

¶ 2 On 5 March 2020, Detectives Paul Alkire and Jesse Hicks of the McDowell County Sheriff's Office, and Special Agent Justin Carter with the State Bureau of Investigation, conducted a joint saturation patrol around U.S. 70 East, Harmony Grove Road, and Nebo School Road in McDowell County, North Carolina. At about 10:00 p.m., while traveling on U.S. 70 East, Detective Alkire observed an orange Suzuki Hayabusa motorcycle parked at Samir's gas station. Detective Alkire noticed the motorcycle was not displaying a North Carolina vehicle registration, and he radioed Detective Hicks and Special Agent Carter.

¶ 3 While conducting surveillance from across the street, Detective Alkire observed an individual (later identified as defendant) get off the motorcycle and walk over to a black car. Defendant spoke with the occupants of the black car for a few minutes and then returned to the motorcycle. The black car and the motorcycle then drove out of the gas station parking lot onto U.S. 70 East. Detectives Alkire and Hicks followed close behind.

¶ 4 The black car and the motorcycle traveled at a lower rate of speed than the

posted speed limit. About one-half mile away from the gas station, as the vehicles approached the intersection of Highway 70 and Rolands Chapel Road, Detective Hicks activated his blue lights. The black car and motorcycle pulled off the road.

¶ 5 As Detective Hicks exited his police vehicle, defendant's motorcycle was still running. Detective Hicks gave defendant a verbal command to shut off the engine, but instead, defendant "revved the motorcycle up and tried to take off." However, defendant's back tire was positioned off the pavement in some gravel and grass, and he only made it a few feet before the motorcycle laid down on its side.

¶ 6 Defendant took off running while carrying his helmet and backpack, but only covered a short distance before Detectives Hicks and Alkire apprehended him and placed him in handcuffs. Special Agent Carter provided secondary assistance with securing the patrol vehicle area. Agent Carter also spoke with defendant's wife, who was in the black car.

¶ 7 Detective Hicks helped defendant to his feet, scanned him with his flashlight, and noticed defendant's pockets were "bulging" and "stuffed." Detective Hicks searched defendant's front pockets and retrieved a clear plastic bag containing a crystal-like substance along with a roll of U.S. currency. Detective Alkire was present and assisted with placing items obtained from defendant into an evidence bag. Detective Alkire removed defendant's backpack and retrieved a clear plastic bag containing grayish-white powder, a digital scale, and an AR magazine. Detective

Hicks read defendant his Miranda rights and asked him if the substance found in the backpack was fentanyl. Defendant responded that it was not. Detective Alkire also searched the "magnetic tank bag," which contained defendant's wallet, U.S. currency, and a "glass pipe with residue on it."

¶ 8 Lieutenant Chris Taylor of the McDowell County Sheriff's Office arrived on scene around 11:00 or 11:30 p.m. Lieutenant Taylor transported defendant to the McDowell County Sheriff's Office and interviewed defendant at approximately 12:08 a.m. on 6 March 2020. Defendant waived his Miranda rights and agreed to provide complete, detailed, and truthful information regarding his involvement and the involvement of others in the drug trade.

¶ 9 About one month before his arrest, defendant began going to Atlanta, Georgia, to pick up ten kilograms of methamphetamine and seven ounces of heroin twice per week. Defendant stated he was distributing the methamphetamine and heroin, and he provided Lieutenant Taylor with a list of about ten to twenty people whom he was providing narcotics to. Some of these individuals were living in McDowell County and Burke County, and they were known to law enforcement. Defendant further stated he obtained the drugs in Atlanta from "a Hispanic male named Hugo[,]" and "there was also a Hispanic female in California that was apparently in control of the whole organization."

¶ 10 Lieutenant Taylor requested defendant provide "phone numbers for the

Hispanics in Atlanta" to facilitate further investigation with federal agencies, but defendant declined to assist. Defendant declined to do any "proactive work" requested by Lieutenant Taylor and ended his cooperation with law enforcement after he was presented with the first plea offer.

¶ 11 Detective Hicks sent the crystal-like substance and the grayish-white powdery substance recovered from defendant's possession to the North Carolina State Crime Lab for analysis. Karen Fox, a forensic drug chemist, tested the suspected narcotics. Fox testified the crystal-like substance was approximately 32.18 grams of methamphetamine, a Schedule II Controlled Substance. Fox also stated the grayish-white powdery substance was approximately 135.80 grams of heroin, a Schedule I Controlled Substance.

¶ 12 Defendant was charged with one count of trafficking heroin by possession of 28 grams or more, one count of trafficking heroin by transportation of 28 grams or more, one count of trafficking methamphetamine by possession of 28 grams or more but less than 200 grams, one count of trafficking methamphetamine by transportation of 28 grams or more but less than 200 grams, possession of methamphetamine with intent to sell or deliver, possession of methamphetamine, possession of heroin with intent to sell or deliver, and possession of heroin. Defendant entered a plea of not guilty on all charges.

¶ 13 Defendant was tried by jury and found guilty on all charges. The trial court

dismissed the counts for possession of heroin and possession of methamphetamine as duplicative and included in the offenses of possession with intent to sell or deliver. Defendant stipulated he had 19 points and is at prior record level VI for purposes of felony sentencing. The trial court sentenced defendant to multiple consecutive sentences on 8 July 2021. The aggregate of the consecutive sentences imposed was a minimum of 450 months and a maximum of 564 months imprisonment. Defendant timely filed Notice of Appeal on 22 July 2021.

II.

¶ 14 Defendant contends the trial court misapprehended the law in determining it lacked discretion to consider evidence of substantial assistance at sentencing. Specifically, defendant takes issue with the trial court's statement, "While I'm sentencing you only on the charges which you were convicted of, there was some testimony that maybe it goes further[,] [b]ut I didn't consider that other stuff." Defendant asserts "the only reasonable interpretation of the trial court's comment that it 'didn't consider that other stuff,' is that the court was referring to defendant's cooperative statement, wherein he detailed his involvement with others in the drug trade." We disagree.

¶ 15 We review the trial court's ruling on "substantial assistance" for abuse of discretion. *State v. Willis*, 92 N.C. App. 494, 498, 374 S.E.2d 613, 616 (1988), *disc. rev. denied*, 324 N.C. 341, 378 S.E.2d 808 (1989) (citation omitted). "When a trial

court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error. Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) (citations omitted). Errors of law are subject to *de novo* review. *State v. Wray*, 206 N.C. App. 354, 356, 698 S.E.2d 137, 139-40 (2010).

¶ 16 North Carolina General Statutes § 90-95(h) provides for mandatory minimum sentencing upon conviction for offenses involving the selling, manufacturing, delivering, transporting, or possession of methamphetamines and opioids, based on quantity of the controlled substances. N.C. Gen. Stat. § 90-95(h)(3b), (4) (2021). The statute also provides, in pertinent part:

> The sentencing judge *may* reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of the person's knowledge, provided *substantial assistance* in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

§ 90-95(h)(5) (emphasis added). "[W]hether a trial court finds that a criminal defendant's 'aid' amounts to 'substantial assistance' is *discretionary*." *State v. Hamad*, 92 N.C. App. 282, 289, 374 S.E.2d 410, 414 (1988), *aff'd per curiam*, 325 N.C.

544, 385 S.E.2d 144 (1989) (citation omitted) (emphasis in original).

¶ 17 Defense counsel did not raise the issue of substantial assistance at sentencing, nor did the trial court refer to its discretionary power to impose a lesser sentence based on alleged substantial assistance. Defendant's argument relies upon a cherry-picked remark. He removes all context and exaggerates its scope to support his legal conclusion. The full statement reads:

> THE COURT: Anything else from the defendant?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: Mr. Rhom, you got yourself into a business that has [ ] severe ramifications.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And your activity, I am sure, has affected adversely a tremendous amount of people. While I'm sentencing you only on the charges which you were convicted of, there was some testimony that maybe it goes further. But I didn't consider that other stuff. I'm considering basically what you were, in fact, convicted of. You know, I hate it for you personally, but to some extent, I kind of feel like maybe you might've known the risk that was going on in this. That is a tremendous amount of street poison that you were dealing with.

¶ 18 Here, the trial court acknowledges testimony that may implicate defendant in further criminal conduct, yet it specifies the sentences rendered were for his actual crimes of conviction. Further, it serves to impress upon defendant the gravity of his offenses, the personal consequences he must face, and the adverse impact his

activities had upon the lives of others. In context, defendant's "only reasonable interpretation" appears to be nothing more than a convenient distortion.

¶ 19 There is no indication in the record that the trial court believed it did not have discretion to consider defendant's alleged cooperation with law enforcement as substantial assistance in this case. We discern no error.

III.

¶ 20 Defendant argues he received ineffective assistance of counsel when defense counsel failed to argue at sentencing that defendant should receive a reduced sentence based on his substantial assistance to law enforcement. We disagree.

¶ 21 "Sentencing is a critical stage of the criminal proceeding during which the criminal defendant is entitled to effective assistance of counsel." *State v. Lambert*, 146 N.C. App. 360, 363, 553 S.E.2d 71, 75 (2001) (citation omitted). Under *Strickland v. Washington*, a defendant claiming ineffective assistance of counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. 466 U.S. 668, 692, 80 L. Ed. 2d 674, 696 (1984). To demonstrate prejudice, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698.

¶ 22 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. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (quotation marks and citation omitted). Otherwise, "when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* at 123, 604 S.E.2d at 881 (citation omitted).

¶ 23 Defendant may subjectively believe his cooperation with law enforcement supports a finding of substantial assistance, which would warrant the leniency of a reduced sentence, concurrent sentences, or at the very least, consideration as a mitigating factor. However, defendant fails to demonstrate deficient performance or prejudice where the trial court heard testimony about the quality and nature of defendant's alleged cooperation with law enforcement. Then, without need of argument from counsel, the trial court was presented with the opportunity to find substantial assistance, and it declined to do so. Included in the record are five Judgment and Commitment forms, wherein the trial court specifies it, "1. makes no written findings because the term imposed is: . . . (d) for drug trafficking." Immediately to the right of this finding is an *unchecked* box which reads, "for which

the [c]ourt finds the defendant provided substantial assistance."

¶ 24 Even if the trial court had found substantial assistance, "the statute is permissive, not mandatory . . . ." *State v. Perkerol*, 77 N.C. App. 292, 301, 335 S.E.2d 60, 66 (1985); *see also* § 90-95(h)(5) (emphasis added) ("The sentencing judge *may* . . . impose a prison term less than the applicable minimum prison term . . . if the sentencing judge *enters in the record a finding* that the person to be sentenced has rendered such substantial assistance."). Leniency in sentencing is discretionary; "defendant has no right to a lesser sentence even if he does provide what he believes to be substantial assistance." *Perkerol*, 77 N.C. App. at 301, 335 S.E.2d at 66.

¶ 25 Defendant's argument is overruled.

IV.

¶ 26 Defendant argues the trial court improperly considered his refusal to enter into a plea agreement in determining the severity of the sentences imposed. Specifically, defendant asserts an aggregate minimum sentence of 450 months incarceration can be reasonably inferred as punishment for his rejection of the plea offer and the exercise of his constitutional right to trial by jury. We disagree.

¶ 27 "The standard of review for questions concerning constitutional rights is *de novo*." *State v. Guerrero*, 279 N.C. App. 236, 246, 2021-NCCOA-457, ¶ 24 (citation omitted). "Further, the extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *Id.*

(*purgandum*).

¶ 28 "A criminal defendant may not be punished at sentencing for exercising this constitutional right to trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (citations omitted).

> "Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result."

Id.

¶ 29 In the case *sub judice*, the trial court made the following comments to defendant before the trial began:

> THE COURT: Mr. Rhom, there was some discussions. And I think your attorney has made you aware about—with counsel and me as well—in regard to you pleading to all the charges including the other pending charges against you. There was some discussion in there, and I think maybe your attorney might have indicated possible ranges or the possibility of those if you did plead. But I want to tell you, those things are fixing to go off the table here, so if you are going to plead, you need to decide right now because I'm not going to be held to anything in the end of this case in regard to sentencing. It will be what it is. It may be less, it may be more, it may not be—I mean, I don't know. But if you're going to plead, you need to decide right now. And you need to tell your attorney what you want to do. You need to understand too it's your choice. It is nobody else's whether you accept or reject any kind of plea or whether you agree to anything in this case.

> THE DEFENDANT: I understand.
>
> THE COURT: You will be subject to the outcome. It will be solely in the discretion of the Court as it sees it based on evidence and facts and circumstances at the time of sentencing. Do you understand—by the time of sentencing?

¶ 30 Defendant asserts "the trial court's comments reveal a thinly veiled warning to defendant that if he rejected the plea offer and proceeded to trial, he would face a more severe sentence." This argument lacks merit.

¶ 31 The trial court permissibly explained it would not be bound by sentencing terms in a plea agreement if no such plea agreement exists. Further, the trial court did not reference defendant's acceptance or rejection of a plea agreement at the time of sentencing. The trial court followed the sentencing guidelines specified for convictions under § 90-95(h)(3b) and (4). "The burden is on the defendant to overcome the presumption that a court acted with proper motivation in imposing a more severe sentence." *State v. Daughtry*, 61 N.C. App. 320, 324, 300 S.E.2d 719, 721 (1983) (citation omitted). We discern no threat, impropriety, or improper motivation in this case.

V.

¶ 32 For the foregoing reasons, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges DILLON and CARPENTER concur.

Report per Rule 30(e).