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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-886

Filed 16 May 2023

Dare County, Nos. 21CRS50700, 22CRS25

STATE OF NORTH CAROLINA

v.

ELWOOD JO CEPHUS, Defendant.

Appeal by defendant from judgment entered 16 March 2022 by Judge Joshua W. Willey, Jr. in Dare County Superior Court. Heard in the Court of Appeals 26 April 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Danielle M. Orait, for the State.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.

FLOOD, Judge.

Elwood Jo Cephus (“Defendant”) appeals from a judgment entered after a jury found him guilty of: (1) trafficking in heroin by possession; (2) conspiracy to sell heroin; and (3) possession with intent to sell and/or deliver heroin. Defendant argues that the trial court abused its discretion by denying his motion to continue because the State did not timely produce discovery, and that he received ineffective assistance

of counsel because his trial counsel did not adequately inform him of the evidence against him so he could accept a plea deal. After careful review, we conclude the trial court did not abuse its discretion in denying Defendant's motion to continue, and we dismiss Defendant's ineffective assistance of counsel without prejudice to allow him the opportunity to file a Motion for Appropriate Relief with the trial court.

I. Factual & Procedural Background

On 27 May 2021, members of the Dare County Sheriff's Office Narcotics Task Force arrested Mitchell Lucas ("Lucas") in his mother's home for possession with intent to sell and deliver cocaine. Lucas informed the officers Defendant kept fourteen grams of heroin in Lucas's home. Lucas agreed to initiate a recorded phone-call with Defendant. During the call, Lucas told Defendant he "had a sale and to cover this sale he needed to know where the drugs were." Defendant responded, "the heroin was in a black cosmetic bag with all of his belongings inside of it." Officers seized the bag from Lucas's residence. Inside the bag, officers found toiletries, clothes, bags of raw heroin, a Pyrex measuring cup, baking soda, and paperwork containing Defendant's name and a Raleigh address.

Lucas then informed the officers Defendant was transporting cocaine back from Greenville with a woman driving a PT Cruiser. Two officers stopped and searched the vehicle on Highway 64. The officers recorded the encounter. Defendant admitted ownership of the heroin.

Meanwhile, a different officer transported Lucas to the Dare County Detention Center to interview him. In the recorded interview, Lucas disclosed he had known Defendant for over fifteen years, and the two recently started selling heroin together. Because Defendant did not know any people in Dare County, Defendant provided the heroin, Defendant and Lucas packaged the heroin together, and Lucas made the final sales.

On 1 June 2021, a grand jury indicted Defendant for trafficking heroin by possession, conspiracy to sell/deliver heroin, and possession with intent to sell or deliver heroin. On 16 June 2021, the State provided Defendant's trial counsel with seventy-one pages of "voluntary discovery" marked as the State's "entire investigative file." As of 28 June 2021, Defendant had not yet accepted or rejected the State's plea offer for 70–93 months' imprisonment, as Defendant asked for a continuance until the State returned a lab result for the drugs. On 1 February 2022, the State provided Defendant's trial counsel with 138 additional pages of discovery, including a lab report. The State noted it would "continue its duty to disclose any other materials that become available as required by law." Defendant rejected the State's plea offer two weeks later. The day of the trial, a grand jury indicted Defendant for obtaining habitual felon status.

On 2 and 3 March 2022, the State sent Defendant's trial counsel two different audio recordings. The State provided Defendant's counsel with additional discovery

materials on 11 March 2022. On the morning of trial, the State provided Defendant's counsel a video of the stop.

Also on the morning of his trial, Defendant wrote a letter to the trial court contesting the timing of the discovery and the effectiveness of his trial counsel. The letter stated Defendant rejected his plea offer before he reviewed all the discovery material, including the audio recordings, and before he knew Lucas would testify against him. Defendant further contended his due process rights were being violated because he did not have a chance to review all of the evidence used against him until the morning of his trial. Finally, Defendant claimed he received ineffective assistance of counsel because he saw his lawyer only twice in ten months, did not receive a copy of discovery, and did not receive recordings of the audio until the morning of trial, despite requesting the recordings three days earlier.

Before trial, Defendant filed a Motion to Continue due to "recently produced discovery." Defendant's trial counsel stated she was unable to communicate with Defendant leading up to trial because she was sick and had lost her voice. Defendant's trial counsel stated concern that she had only received the traffic stop video that morning, and stated Defendant "believe[d] [her] representation to be ineffective[.]" In response, the prosecutor stated the video did not contain any significant information, and he himself had not watched the video. The trial court denied Defendant's Motion to Continue because Defendant was not prejudiced by the fact he had not heard the audio recordings, as he had received written summaries of

their contents. After the trial court denied Defendant's Motion to Continue, Defendant made an oral statement to the court where he reiterated the concerns set out in his letter, and provided he would have accepted the plea offer had he "known the evidence" beforehand.

Defendant was tried on 14 March 2022, and a jury returned a guilty verdict two days later. After the jury left the courtroom, Defendant's counsel stipulated Defendant would not need jury services during the second phase of the trial. Defendant then admitted to obtaining habitual felon status, and admitted to discussing the nature of the charges, the elements of the crime, any possible defenses, and the right not to admit this status and be tried by a jury. Defendant also stated he was satisfied with his trial counsel's legal services.

The trial court sentenced Defendant to 70–93 months' imprisonment for his trafficking conviction and obtaining habitual felon status, and an additional 88–118 months' imprisonment for his conspiracy and possession with intent to sell/deliver to run after the completion of his first sentence. Additionally, the trial court ordered Defendant to pay a \$50,000 fine, court costs, and attorneys' fees, all of which were reduced to a civil judgment. Defendant gave oral notice of appeal.

II. Jurisdiction

This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2021). *See State v. Harper*, 285 N.C. App. 507, 510, 877 S.E.2d 771, 776 (2022).

III. Analysis

The issues before this Court are whether: (A) the trial court abused its discretion by denying Defendant's Motion to Continue, and (B) Defendant's trial counsel provided ineffective assistance of counsel ("IAC").

A. Denial of Defendant's Motion to Continue

Defendant argues the trial court abused its discretion in denying Defendant's Motion to Continue because he did not have a "meaningful opportunity to review" the State's audio recordings, hindering his preparation. Defendant further argues the denial of his Motion to Continue materially prejudiced him because "it took away his opportunity to both meaningfully assist with his own defense and attempt to reopen plea negotiations with the State now fully aware of the evidence against him." Defendant claims "[i]t is highly probable" the State would have reopened plea negotiations if Defendant expressed a desire to plead guilty to his original plea deal.

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citation omitted). "When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal." *Id.* at 33, 550 S.E.2d at 146 (citation omitted). When a motion to continue raises a constitutional issue, the trial court's denial of the motion "is grounds for a new trial only when [the] defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error." *Id.* at

33–34, 550 S.E.2d at 146 (citation omitted).

“It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one’s accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense.” *State v. McFadden*, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). “However, no set length of time is guaranteed and whether [the] defendant is denied due process must be determined under the circumstances of each case.” *Id.* at 616, 234 S.E.2d at 747 (citations omitted).

“To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense.” *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993) (citation omitted). “To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.” *Id.* at 329, 234 S.E.2d at 337 (internal quotation marks and citation omitted).

In *Tunstall*, our Supreme Court held the trial court did not err in denying a defendant’s motion to continue for his trial counsel being unavailable the day before trial and the lateness of discovery because, (1) “[t]here [was] no evidence in the record tending to show that the defendant and his counsel were unable to consult fully with each other during the seven months between the appointment of counsel” and the defendant going to prison; (2) the defendant testified only to the amount of time he

spoke to his counsel before the hearing, not to the amount of communication he had with counsel the ten months since counsel had been appointed; and (3) the defendant did not show how extra time would have helped his counsel better prepare for trial, especially considering his counsel skillfully confronted the witnesses against the defendant. *Id.* at 331–32, 234 S.E.2d at 337–38.

Here, nine-and-a-half months passed between the time Defendant was arrested on 27 May 2021 and his trial on 14 March 2022. Defendant’s trial counsel first appears in the Record in the State’s response to her discovery request dated 16 June 2021, nearly nine months before trial. Like in *Tunstall*, “there is no evidence in the [R]ecord tending to show” why Defendant and his trial counsel could not consult with each other for those nine months. *See id.* at 331, 234 S.E.2d at 337–38. In fact, the Record tends to show Defendant’s trial counsel began preparing Defendant’s defense at least before 16 June 2021, when, upon a discovery request, the State sent Defendant’s counsel its entire investigative file. Further, Defendant did not mention how many times he spoke with his counsel about his defense in the nine months leading up to his trial. *See id.* at 331, 234 S.E.2d at 338. Finally, Defendant fails to show how the discovery of the audio recordings the week leading up to trial hindered his counsel’s ability to confront the witnesses against him, especially considering he and his trial counsel previously received summaries of the recordings. *See id.* at 332, 234 S.E.2d at 338.

As shown above, Defendant does not demonstrate that he and his counsel could

not adequately prepare for trial in the nine months leading up to trial. Therefore, the trial court did not abuse its discretion in denying Defendant's Motion to Continue.

B. Ineffective Assistance of Counsel

Defendant contends he received IAC because his trial counsel did not fully inform him of all the evidence against him before Defendant rejected the State's plea deal and failed to include Defendant's habitual felon charge in his Motion to Continue.

This Court reviews IAC claims *de novo*. *State v. McDougald*, 279 N.C. App. 25, 31, 862 S.E.2d 877, 882 (2021) (citation omitted). "To establish a claim for IAC, a defendant" must prove: (1) his trial counsel's "performance was 'deficient,' meaning counsel functioned below an 'objective standard of reasonableness' under prevailing professional norms"; and (2) the trial counsel's "deficient performance prejudiced [the defendant], meaning there is a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different.'" *Id.* at 31, 862 S.E.2d at 882 (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)).

"During plea negotiations defendants are entitled to the effective assistance of competent counsel." *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398, 406 (2012) (internal quotation marks and citation omitted). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Id.* at 163, 132 S. Ct. at 1384, 182 L. Ed. 2d

at 407 (citation omitted).

The prejudice requirement “focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process. . . . [T]he defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985).

In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court[,] . . . , that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164, 132 S. Ct. at 1385, 182 L. Ed. 2d at 407.

Once a court determines a defendant was prejudiced by IAC during a plea negotiation, “[t]he correct remedy in these circumstances . . . is to order the State to reoffer the plea agreement.” *Id.* at 174, 132 S. Ct. at 1391, 182 L. Ed. 2d at 414.

Presuming [the defendant] accepts the offer, the . . . trial court can then exercise its discretion in determining whether to vacate the convictions and resentence [the defendant] pursuant to the plea agreement, to vacate only some of the convictions and resentence [the defendant] accordingly, or to leave the convictions and sentence from trial undisturbed.

Id. at 174, 132 S. Ct. at 1391, 182 L. Ed. 2d at 414 (citation omitted); *see also* N.C. Gen. Stat. §§ 15A-1021–15A-1024 (2021). The trial court should use its best discretion “in all the circumstances of the case.” *Lafler*, 566 U.S. at 175, 132 S. Ct. at

1391, 182 L. Ed. 2d at 414.

The State contends that the Record is insufficient for this Court to address Defendant's IAC claim, and this Court should dismiss Defendant's appeal without prejudice to allow Defendant the opportunity to file a Motion for Appropriate Relief followed by an evidentiary hearing.

IAC claims should generally "be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018) (citation omitted). This avenue is favorable because it gives the State an opportunity to defend against the defendant's allegations "at a full evidentiary hearing on the merits" *Id.* at 285, 821 S.E.2d at 861. IAC claims brought for the first time on direct appeal are "often incomplete or inadequate," as trial records are developed to litigate a defendant's innocence or guilt, not IAC. *Massaro v. United States*, 538 U.S. 500, 504–05, 123 S. Ct. 1690, 1694, 155 L. Ed. 2d 714, 720 (2003).

When an IAC claim is brought for the first time on direct appeal, an "appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse." *Id.* at 505, 123 S. Ct. at 1694, 155 L. Ed. 2d at 720. In these scenarios, courts are asked to review the record "without the benefit of information provided by [the] defendant to trial counsel, as well as [the] defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing

on a motion for appropriate relief.” *Allen*, 262 N.C. App. at 286, 821 S.E.2d at 861 (citation omitted). “[S]hould the reviewing court determine that [IAC] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s rights to reassert them during a subsequent motion for appropriate relief proceeding.” *Id.* at 286, 821 S.E.2d at 861–62 (quoting *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 515 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002)) (alteration omitted).

Here, Defendant asserts an IAC claim for the first time on direct appeal. Defendant contends he received IAC because his trial counsel did not adequately inform him of the evidence against him before he rejected his plea deal. The Record contains little information regarding Defendant’s decision to reject the plea deal, and no information regarding the advice given by counsel informing this decision. The only references to Defendant’s decision to reject his plea agreement are in the letter he wrote to the trial court and the oral assertion he made before his trial, stating he “would have adamantly accepted [the] prosecution’s plea offer.” The delivery of the letter and Defendant’s oral assertion both took place a month after Defendant rejected the plea deal. Further, only three documents in the Record reference Defendant’s rejection of the plea agreement. On 28 June 2021, Defendant asked for a continuance on the plea until the lab results were returned. On 30 August 2021, Defendant asked for another continuance due to illness. Defendant finally rejected the plea offer on 14 February 2022. Aside from the reference to the lab report on 28

June 2021, the Record does not provide any information regarding Defendant's decision to reject the plea offer, nor does the Record contain any mental impressions from Defendant or his counsel.

This Court is without adequate information to review Defendant's IAC claim regarding his decision to reject the State's plea offer, and we dismiss this issue on appeal without prejudice. *See Allen*, 262 N.C. App. at 285–86, 821 S.E.2d at 861–62; *see also Massaro*, 538 U.S. at 504–05, 123 S. Ct. at 1694, 155 L. Ed. 2d at 720. Defendant has the right to reassert his IAC claim with the trial court pursuant to a Motion for Appropriate Relief. *See Allen*, 262 N.C. App. at 286, 821 S.E.2d at 861–62. Should the trial court determine Defendant received IAC during plea negotiations, it is for the trial court to determine what to do with Defendant's sentencing and Defendant's convictions. *See Lafler*, 566 U.S. at 174–75, 132 S. Ct. at 1391, 182 L. Ed. 2d at 414; *see also* N.C. Gen. Stat. §§ 15A-1021–15A-1024.

IV. Conclusion

We conclude the trial court did not abuse its discretion in denying Defendant's motion to continue, and the Record contains insufficient information to address Defendant's IAC claim. For the stated reasons above, we hold the trial court did not err in its denial of Defendant's motion, and we dismiss Defendant's IAC claim without prejudice.

NO ERROR in part, DISMISSED in part.

Judges DILLON and WOOD concur.

STATE V. CEPHUS

Opinion of the Court

Report per Rule 30(e).