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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-821

Filed 7 May 2025

Wayne County, No. 21 CRS 051878

STATE OF NORTH CAROLINA

v.

MICHAEL A. THOMPSON, Defendant.

Appeal by Defendant from judgment entered 13 October 2023 by Judge Henry L. Stevens in Wayne County Superior Court. Heard in the Court of Appeals 19 March 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Danielle M. Orait, for the State.

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

STADING, Judge.

Michael A. Thompson (“Defendant”) appeals from final judgment after a jury convicted him of possession with intent to sell and deliver cocaine and possession of drug paraphernalia. On appeal, Defendant asserts that he received ineffective assistance of counsel (“IAC”). The first issue raised by Defendant is dismissed without prejudice. However, we discern no error with respect to his second concern.

I. Background

In May 2021, Detective Philip French, a Corporal of the Goldsboro Police Department's Vice Unit, began conducting a narcotics investigation into a residence located on East Pine Street in Goldsboro. While engaging in surveillance on 25 May 2021, Detective French observed "a heavy presence of stop and go traffic." He noticed multiple vehicles arrived at the residence quickly, stayed for approximately thirty seconds to a minute, and departed immediately thereafter. He also saw what looked like an illegal transaction outside the residence: two vehicles parked on the curb, the occupants of each vehicle exited, and the occupants exchanged cash for a shoebox. Detective French relayed this information to other officers in the area, who conducted a stop of the vehicle possessing the shoebox. Inside of the shoebox, law enforcement discovered a stolen firearm. Based on these observations, Detective French believed that "the occupants of the house were probably selling narcotics."

Detective French continued his investigation of the residence on 1 June 2021. Over the span of five-and-a-half hours, he saw approximately twenty vehicles quickly stop, the vehicles' occupants enter the residence, and leave about a minute thereafter. Detective French then used a confidential informant ("CI") to go to the residence and make a physical observation. The CI observed "crack cocaine packaging material," prompting Detective French to obtain a search warrant.

On 3 June 2021, Detective French "coordinated [the] placement of a surveillance camera" near the residence to capture ongoing activity. The surveillance

footage showed Defendant exiting the residence, entering the back seat of a vehicle for a short period of time, and returning inside the residence. Shortly after, the Goldsboro Police Department's Emergency Response Team ("ERT") executed the search warrant for the residence while Detective French was present. Upon executing the search, the ERT found Defendant alone in a bedroom where several pieces of contraband were located, including: two bags of off-white rocks; baking soda; digital scales with residue; sandwich bags; and a razor blade. When searching Defendant's person, the ERT recovered \$840 and a cellphone.

Defendant was arrested and later indicted for possession of cocaine with intent to sell and deliver and possession of drug paraphernalia. The State filed a notice of intent to introduce a certified chemical analysis of one of the bags of off-white powder under N.C. Gen. Stat. § 90-95(g) (2023). Defendant did not file a written objection.

At trial, the State presented several witnesses, including Detective French and two ERT members—Investigator Anthony Tilghman and Corporal Donnie Head. When the State attempted to introduce the chemical analysis report, Defendant orally objected—which the trial court overruled since he failed to file a written objection in accordance with N.C. Gen. Stat. § 90-95(g)(2). The jury later found Defendant guilty of both offenses. At sentencing, the trial court consolidated the offenses and ordered Defendant to serve an active term of 11 to 23 months of incarceration. Defendant entered his notice of appeal.

II. Jurisdiction

This Court has jurisdiction to review Defendant’s appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) (“From any final judgment of a superior court”) and 15A-1444(a) (2023) (“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.”).

III. Analysis

Defendant argues two issues: (1) whether Defendant received IAC because his trial counsel failed to file a written objection in accordance with N.C. Gen. Stat. § 90-95(g)(2); and (2) whether Defendant received IAC because his trial counsel failed to move for dismissal of his charges at the close of evidence.

“[T]his Court reviews 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). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation omitted).

“The Sixth Amendment to the United States Constitution guarantees to all defendants the right to counsel in criminal proceedings. The right to counsel necessarily encompasses ‘the right to effective assistance of counsel.’” *State v. Oglesby*, 382 N.C. 235, 242, 876 S.E.2d 249, 256 (2022) (citation omitted). To establish IAC, a defendant must satisfy 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 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, 104 S. Ct. 2052, 2064 (1984)).

"However, it is rare that this Court will be in a position to decide a defendant's IAC claim on direct appeal" *State v. Rivera*, 264 N.C. App. 525, 535, 826 S.E.2d 511, 518 (2019); *see also State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal."). "In general, 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); *see also State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."). "A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel' at a full evidentiary

hearing on the merits of the ineffective assistance of counsel claim.” *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018) (citations omitted).

That said, “IAC 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.” *Fair*, 354 N.C. at 166, 557 S.E.2d at 524; *see also Oglesby*, 382 N.C. at 245, 876 S.E.2d at 258 (“[A]n appellate court’s decision to deny or dismiss an IAC claim depends in part on that court’s confidence in the record produced during the underlying proceeding.”). “[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 right to reassert them during a subsequent MAR proceeding.” *Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

A. Failure to Object—Chemical Analysis Report

Defendant first contends he received IAC because his trial counsel waived his Sixth Amendment right to confront the certified chemical analysis report. He maintains that his trial counsel’s failure to file a written objection to the State’s notice of intent under N.C. Gen. Stat. § 90-95(g)(2) amounts to deficient performance that prejudiced his defense. Since the cold record reveals that further investigation is required, we dismiss this claim without prejudice. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524.

“N.C. Gen. Stat. § 90-95(g) establishes a procedure through which the State may introduce into evidence the lab report of the chemical analysis conducted on alleged controlled substances without further authentication.” *State v. Carr*, 145 N.C. App. 335, 339, 549 S.E.2d 897, 900 (2001). Pursuant to section 90-95(g), the State may introduce a chemical analysis lab report without any further authentication if:

(1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and

(2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.

If the defendant’s attorney of record, or the defendant if that person has no attorney, fails to file a written objection as provided in this subsection, then the objection shall be deemed waived and the report shall be admitted into evidence without the testimony of the analyst. . . .

N.C. Gen. Stat. § 90-95(g)(1)–(2). If a defendant fails to file a timely written objection to the State’s notice of intent, “the objection shall be deemed waived and the report shall be admitted into evidence without the testimony of the analyst.” *Id.*

Here, in accordance with section 90-95(g), the State provided Defendant with notice of its intent to introduce the chemical analysis report more than fifteen business days before the proceeding. But since Defendant did not file a written

objection at least five business days before the proceeding, his objection was deemed waived. *See State v. Steele*, 201 N.C. App. 689, 696, 689 S.E.2d 155, 161 (2010) (“[T]he State expressly introduced the lab report at trial under [section] 90-95(g). There is no evidence that defendant objected to the admissibility of the lab report before trial Thus, defendant waived his right to confront the lab analyst under the Sixth Amendment.”); *see also Carr*, 145 N.C. App. at 341, 549 S.E.2d at 901 (“Having received notice under [section] 90-95(g)(1), defendant failed to notify the State at least five days prior to trial that defendant objected to introduction of the report into evidence. Thus, the State was permitted to introduce the report into evidence without further authentication pursuant to [section] 90-95(g), and defendant’s objection at trial was properly overruled.”).

Defendant asserts that his trial counsel’s failure to file a written objection could not have been a strategic decision in light of section 90-95(g)’s express language. That said, our precedents provide that when faced with questions of trial strategy, “an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.” *Stroud*, 147 N.C. App. at 556, 557 S.E.2d at 548; *see also State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018) (citation omitted) (“Where the claim raises ‘potential questions of trial strategy and counsel’s impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.’”).

At this juncture, we are unable to discern from the cold record whether trial counsel's failure to lodge a written objection under N.C. Gen. Stat. § 90-95(g)(2) was a matter of sound trial strategy or deficient performance. We therefore dismiss without prejudice Defendant's first IAC claim so that he may file a motion for appropriate relief. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524.

B. Failure to Raise Motion to Dismiss

Defendant also contends he received IAC because his trial counsel did not move to dismiss the charges at the close of evidence. Defendant maintains this failure by his trial counsel fell below an objective standard of reasonableness and prejudiced his defense because there was insufficient evidence of constructive possession for both offenses. Specifically, Defendant argues there is insufficient evidence of constructive possession because: (1) he did not have exclusive control over the residence; (2) there were other people inside the residence and bedroom at the time the search warrant was executed; (3) he was eighteen feet away from the dresser where the contraband was found; and, (4) no other identifying information such as a birth certificate or driver's license was found inside the bedroom. Since Defendant only challenges the sufficiency of the evidence as to constructive possession, our review is limited to that element. *See State v. Howell*, 191 N.C. App. 349, 354, 662 S.E.2d 922, 926 (2008).

"To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that defendant is the perpetrator." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). To determine whether substantial evidence exists, “the trial judge must view all the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it and resolving any contradiction in the evidence in its favor.” *Lee*, 348 N.C. at 488, 501 S.E.2d at 343 (citations and quotation marks omitted).

“[T]he offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance.” *State v. Coley*, 257 N.C. App. 780, 786, 810 S.E.2d 359, 363 (2018). Possession of drug paraphernalia “requires proof that the defendant possessed drug paraphernalia and had ‘the intent to use the [drug paraphernalia] in connection with the controlled substance.’” *State v. Garrett*, 246 N.C. App. 651, 657, 783 S.E.2d 780, 785 (2016) (citation omitted) (alteration in original). For both offenses, “[p]ossession may be either actual or constructive.” *Id.* at 655, 783 S.E.2d at 784 (citation and quotation marks omitted). “A defendant has constructive possession of contraband where, while not having actual possession, he has the intent and capability to maintain control and dominion over it.” *Id.* (citations and quotation marks omitted).

“Although it is not necessary to show that an accused has exclusive possession of the premises where contraband is found, where possession of the premises is

nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances.” *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 588–89 (1984). Incriminating circumstances relevant to constructive possession include:

(1) the defendant’s ownership and occupation of the property []; (2) the defendant’s proximity to the contraband; (3) indicia of the defendant’s control over the place where the contraband is found; (4) the defendant’s suspicious behavior at or near the time of the contraband’s discovery; and (5) other evidence found in the defendant’s possession that links the defendant to the contraband.

State v. Chekanow, 370 N.C. 488, 496, 809 S.E.2d 546, 552 (2018). In assessing the above incriminating circumstances, our courts also consider whether the defendant “possessed a large amount of cash.” *State v. Alston*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386 (2008) (citation omitted). “Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry.” *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552. “No one factor controls, and courts must consider the totality of the circumstances.” *Id.*

Defendant argues against constructive possession because he neither owned the residence in question nor resided there. But Corporal Head testified, “often drug dealers do not use their particular residence to conduct their transactions.” Rather, “they’ll use a . . . certain house, and they may only be there for a couple hours, and when they leave another dealer will come in and use that particular house for the same reason.” “Although it is not necessary to show that an accused has exclusive

possession of the premises where contraband is found, where possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances.” *See Brown*, 310 N.C. at 569, 313 S.E.2d at 588–89 (holding there was substantial evidence of constructive possession, even though the defendant was in nonexclusive possession of the apartment, since he had a key to the apartment, was within proximity to the contraband, and had over \$1,700 in cash in his pockets). We therefore consider the other incriminating circumstances.

Evidence tends to show there is sufficient evidence of constructive possession to overcome a motion to dismiss, had it been made by Defendant’s trial counsel. *See Howell*, 191 N.C. App. at 355, 662 S.E.2d at 926. In the light most favorable to the State, the evidence reflects other incriminating circumstances. Indeed, Defendant was alone in the bedroom where the contraband was found, and he possessed a large amount of cash in denominations consistent with the sale of drugs. *See Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552; *see also Alston*, 193 N.C. App. at 716, 668 S.E.2d at 386. Detective French testified that Defendant was “found in the room in which contraband was found.” Corporal Head testified there were thirty-nine \$20 bills, five \$10 bills, and two \$5 bills. He added, “often crack cocaine is sold in \$20 increments, depending on the size of the actual crack rock.” Detective French similarly testified, “crack currently is sold in \$20 to \$40” increments. He also stated possession of these denominations of cash is indicative of the “operation of a \$20, \$40 at a time crack rock

sale,” and that such a “sum of money . . . is pretty common amongst those that are handling the operation.”

Investigator Tilghman testified that upon executing the search warrant, he “entered the first bedroom on the left just inside the front door.” According to Investigator Tilghman, Defendant was in the middle of the bedroom and the only person in there. Conversely, Defendant testified that when the warrant was executed, he was in the front left bedroom with several other individuals. Although Defendant’s testimony differed from the investigator, “[c]ontradictions or discrepancies in the evidence must be resolved by the jury, and the State should be given the benefit of any reasonable inference.” *State v. Thompson*, 157 N.C. App. 638, 642, 580 S.E.2d 9, 12 (2003); *see also State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (“Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered[.]”).

Defendant also claims there was insufficient evidence of constructive possession given the absence of identifying information in the room, such as an identification card or birth certificate. But “[n]o one factor controls, and courts must consider the totality of the circumstances.” *Id.* at 496, 809 S.E.2d at 552. Finally, Defendant argues that even if he was located in the same room as the contraband, the distance which he was located from the contraband—eighteen feet—is too far to support an inference that he was within proximity of it. However, our precedents do not provide a brightline rule—a particular distance—to determine proximity. *See*

Chekanow, 370 N.C. at 497, 809 S.E.2d at 553 (“[I]n addressing a defendant’s proximity to the contraband, this Court considers proximity in terms of space and time.”). Here, the totality of the circumstances includes Defendant’s solo presence in the bedroom, proximity to contraband, and possession of large sums of cash—increments common to the sale of crack cocaine.

Defendant has “failed to demonstrate that, but for the failure of counsel to move to dismiss at the close of the State’s evidence, there would have been a reasonable probability that the outcome would have been different.” *Howell*, 191 N.C. App. at 355, 662 S.E.2d at 926–27; *see also State v. Allen*, 378 N.C. 286, 298–99, 861 S.E.2d 273, 283 (2021) (citation omitted) (“To prove prejudice, ‘[t]he 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.’”). When viewed in the light most favorable to the State, there is sufficient evidence of constructive possession “to support the denial of defendant’s motion to dismiss, had it been made.” *Howell*, 191 N.C. App. at 355, 662 S.E.2d at 926. Defendant’s second assignment of IAC is therefore overruled.

IV. Conclusion

Defendant’s first assignment of IAC is dismissed without prejudice since the cold record does not contain the requisite information permitting our review. Defendant may address this contention in a motion for appropriate relief. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524. Furthermore, Defendant’s defense was not

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prejudiced by his trial counsel's failure to move to dismiss at the close of the State's evidence. *See Howell*, 191 N.C. App. at 355, 662 S.E.2d at 926–27.

DISMISSED WITHOUT PREJUDICE IN PART; NO ERROR IN PART.

Judges TYSON and FREEMAN concur.

Report per Rule 30(e).