In re S.J.E.

667 S.E.2d 340 (2008) | Cited 1 times | Court of Appeals of North Carolina | October 21, 2008

Unpublished opinion

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

After S.J.E. was adjudicated delinquent based upon possession of crack cocaine, the trial court ordered a level two disposition. On appeal from that disposition, the juvenile primarily argues that once the trial court excluded from evidence a lab report identifying the seized substance as cocaine, the court should then have allowed his motion to dismiss. The record, however, also contains evidence of a positive field test for cocaine and the expert testimony of the arresting officers identifying the substance as crack cocaine. This evidence was sufficient to defeat the motion to dismiss. We agree with the juvenile, however, that the trial court's disposition order must be remanded based on In re Hartsock, 158 N.C. App. 287, 580 S.E.2d 395 (2003), for furtherfindings regarding the requirement that the juvenile cooperate with treatment programs "as recommended."

Facts

The State presented evidence tending to show the following facts. After receiving a tip from a confidential informant, Investigators Nicholas Schneider and Robert Schwartz of the Durham City Police Department knocked on the door of an apartment and were invited inside by Kendrick Lewis. S.J.E. was the only other occupant of the apartment. Schneider noticed photographs of Lewis wearing gang-related clothing and holding a handgun, but Lewis denied having any weapons in the apartment and gave Schneider permission to search the apartment.

In Lewis' bedroom, Schneider saw in plain view a burned marijuana cigar and numerous plastic baggies with the corners cut out. Based on his training and experience, Schneider considered the baggies to be evidence of the packaging of illegal drugs for sale. Schneider then obtained a search warrant and conducted a full search of the apartment and of Lewis and S.J.E.

During the search, the officers seized, among other items, $311.00 in cash from Lewis, marijuana, numerous items of drug paraphernalia, the plastic baggies from the bedroom, a razor blade with white residue, and nine gang-related photographs. When the officers searched S.J.E., they found five individually-wrapped packages of an off-white block substance. A field test conducted on the substance in the packages produced a positive result for crack cocaine. On 13 November 2006, the

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State filed a juvenile petition alleging that S.J.E. was a delinquent juvenile in that he had possessed with the intent to sell crack cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1) (2007). On 11 April 2007, the trial court entered an adjudication order, adjudicating S.J.E. delinquent based on its finding that S.J.E. had committed the lesser included offense of possession of crack cocaine.

The trial court entered its disposition order on the same day. The court found that the juvenile's delinquency history was low, that the juvenile was in a residence occupied by Lewis, that the juvenile had in his possession five individually-wrapped rocks of crack cocaine, and that the juvenile was a known gang member. The court chose to impose a level 2 disposition, placing the juvenile on 12 months probation and imposing various conditions including the requirement that the juvenile cooperate in all recommended treatment programs. S.J.E. timely appealed to this Court.

I.

S.J.E. first contends that the trial court erred in denying his motion to dismiss at the close of the State's evidence. As with adults, when considering a juvenile's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) of the juvenile's being the perpetrator of the offense. In re Heil, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" State v. Matias, 354N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." State v. Rose, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), cert denied, 515 U.S. 1135, 132 L.Ed. 2d 818, 115 S.Ct. 2565 (1995).

With respect to the offense of possession of a controlled substance, "the State bears the burden of proving two elements beyond a reasonable doubt: (1) defendant possessed the substance; and (2) the substance was a controlled substance." State v. Harris, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007); see also N.C. Gen. Stat. § 90-95(a). On appeal, S.J.E. challenges the sufficiency of the evidence to prove that the substance retrieved from his pocket was crack cocaine, a controlled substance.

The juvenile points to the fact that when the State attempted to introduce a State Bureau of Investigation lab report, the trial court excluded the report because no expert witness was present to authenticate the report. In the absence of the report, the sole evidence regarding the nature of the seized substance was the testimony of the law enforcement officers that the substance appeared to be crack cocaine and that a "field test resulted in a positive result for crack cocaine."

The trial court accepted Schneider and Schwartz as expert witnesses in narcotics investigation and identification, based on their experience with the Durham Police Department's SpecialOperations Division and their specialized training in identification of drugs and drug paraphernalia and narcotics investigations. The juvenile has not challenged the trial court's expert witness

determinations. In addition, Officer Schwartz testified that he had performed field tests 1,000 times and had testified at trial regarding narcotics violations 30 to 40 times.

In State v. Fletcher, 92 N.C. App. 50, 56, 373 S.E.2d 681, 685 (1988), this Court addressed the question whether a motion to dismiss a charge of possession of a controlled substance should be allowed when the State relies solely upon the testimony of law enforcement officers, qualified as expert witnesses, to identify the substance rather than laboratory analysis. This Court held that even though "it would have been better for the State to have introduced evidence of chemical analysis of the substance, especially in light of the fact that testimony indicated the State Bureau of Investigation had conducted an analysis[,] . . . the absence of such direct evidence does not, as the appellant suggests, prove fatal. Though direct evidence may be entitled to much greater weight with the jury, the absence of such evidence does not render the opinion testimony insufficient to show the substance was marijuana." Id. at 57, 373 S.E.2d at 686. See also State v. Llamas-Hernandez, __ N.C. App. __, __, 659 S.E.2d 79, 85 (2008) (upholding denial of motion to dismiss trafficking in cocaine charge because of detectives' lay testimony identifying substance as powder cocaine based on their training and experience). In this case, both officers were accepted as expert witnesses, and their identification of the substance as crack cocaine was confirmed by a field test performed by a person experienced in such testing. This evidence was sufficient to allow the charge to go to the jury. Compare id. at __, 659 S.E.2d at 83 (although acknowledging that Court was bound by precedent, noting that "[i]t seems to us that to allow a lay witness, even a police officer with extensive training and experience, to render an opinion that white powder is cocaine based solely upon the witness's visual examination, is little more than speculation, and is not based on perception, for the visual characteristics of cocaine in powder form are not unique to that substance alone"); id. at __, 659 S.E.2d at 87 (Steelman, J., dissenting) (contending that lay opinion testimony might be sufficient to identify crack cocaine because it has "a distinctive color, texture, and appearance"). We, therefore, overrule this assignment of error.

II.

S.J.E. next contends that the trial court's order improperly delegated its authority to the juvenile court counselor to decide whether he should be required to attend a treatment program. The trial court's disposition order, a form order, provided in pertinent part:

6. Cooperate with any and all Recommended Treatment Programs [N.C.G.S. § 7B- 2506(3)] specifically the following:

. Attend regularly scheduled child and family team meetings

. Other: as recommended(Bracketed material original.) Both boxes were checked, and the "as recommended" was added in handwriting.

N.C. Gen. Stat. § 7B-2506 (2007) "specifically provides the court with the power and discretion to order appropriate dispositional alternatives." In re Hartsock, 158 N.C. App. at 291, 580 S.E.2d at 398. The statute "does not state, or even indicate, that the court may delegate its discretion. The statute does not contemplate the court vesting its discretion in another person or entity, therefore, the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." Id. at 292, 580 S.E.2d at 399.

In Hartsock, the trial court ordered the juvenile to "cooperate with placement in a residential treatment facility if deemed necessary by MAJORS counselor or Juvenile Court Counselor." Id. at 291, 580 S.E.2d at 398. This Court held that this portion of the order improperly delegated the trial court's authority to direct placement in a residential treatment facility to the "MAJORS counselor or Juvenile Court Counselor." Id. at 292, 580 S.E.2d at 399. The Court, therefore, reversed that portion of the order.

This Court distinguished Hartsock in In re M.A.B., 170 N.C. App. 192, 193, 611 S.E.2d 886, 887 (2005), in which the trial court ordered the juvenile to "cooperate and participate in a residential treatment program as directed by court counselor or mental health agency." The Court held that "[t]he determination of whether M.A.B. would participate in a residential treatment program was made by the trial court, but the specifics of the day-to-dayprogram were to be directed by the Juvenile Court Counselor or Mental Health Agency." Id. at 194-95, 611 S.E.2d at 888. The Court, therefore, concluded that no improper delegation had occurred and upheld the trial court's dispositional order. Id. at 195, 611 S.E.2d at 888.

We hold that this case more closely resembles Hartsock than M.A.B. The trial court made no determination whether the juvenile should attend any treatment programs other than regularly scheduled child and family team meetings, but rather left that question to be decided by some other unspecified person or entity. In contrast to M.A.B., where the trial court specifically required a "residential treatment program," id. at 194-95, 611 S.E.2d at 888, the trial court here never decided what type of treatment programs should be required _ such as residential treatment, medical treatment, substance abuse treatment, anger management, or mental health treatment. An unnamed person, perhaps the juvenile counselor, was left to decide what types of treatment programs should be required, as well as the details. The question of "treatment programs" has been wholly delegated by the trial court to another decisionmaker. As a result, we must vacate the portion of the disposition order relating to treatment programs and remand for further findings of fact.

III.

Lastly, S.J.E. contends the trial court failed to exercise its discretion in imposing a level two disposition. On the disposition order, the trial court checked the box indicating: "The Court isrequired to order a Level 2 disposition (and may also order any Level 1 disposition)." S.J.E. argues, based on the form's language, that the trial court was under the erroneous impression that it was

required to impose a level two disposition.

It is, however, apparent from the transcript that the court was aware that it had the discretion to order either a level one or a level two disposition. During the disposition phase hearing, the court noted that S.J.E.'s offense was serious, but that this was his first adjudication. The trial court then stated: "It is the Court's discretion to authorize a level one or a level two." Thus, the court understood that it had discretion, but simply checked the wrong box on the disposition order. The court should have checked the box indicating: "The Court is required to order a Level 1 or a Level 2 disposition, or both, and orders a Level __ disposition."

We believe, given the transcript, that the trial court merely committed a clerical error. Clerical errors have been defined as "'an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.'" State v. Taylor, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (quoting State v. Jarman, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). Clerical errors can include inadvertently checking the wrong box on pre-printed forms. See In re D.D.J., D.M.J., 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006) ("Generally, clerical errors include mistakes such as inadvertent checking of boxes on forms."). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" State v. Smith, __ N.C. App. __, __, 656 S.E.2d 695, 696 (2008) (quoting State v. Linemann, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Accordingly, we also remand for correction of the clerical error found on the disposition order.

Affirmed in part; vacated in part and remanded.

Judges TYSON and STROUD concur.

Report per Rule 30(e).