

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1252

Filed: 19 May 2015

Craven County, Nos. 13 CRS 1247, 52109

STATE OF NORTH CAROLINA

v.

RAYMOND L. HARGETT

Appeal by Defendant from order entered 7 April 2014 and judgments entered 9 April 2014 by Judge Jack W. Jenkins in Craven County Superior Court. Heard in the Court of Appeals 8 April 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.*

*Appellate Defendant Staples Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.*

STEPHENS, Judge.

*Evidence and Procedural Background*

Defendant Raymond L. Hargett appeals from the denial of a pretrial motion to suppress evidence and from the judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to

habitual felon status. Because Hargett failed to preserve the error he alleges in this appeal, we must dismiss.

The charges against Hargett arose from the events of 23 May 2013. On that morning, the New Bern Police Department (“NBPD”) received a call from a citizen who requested a security check on a residence at 708 A Street in New Bern. The caller stated that the owner of the residence was incarcerated, but that he had driven past that morning and noticed that “the window shades had been pushed back.” Officer Edwin D. Santiago, Jr., and Detective David Upchurch of the NBPD responded to the residence, and, upon arriving, Officer Santiago saw “that the shade had been — the screen had been pushed to the side. [It l]ooked like it had been pulled back. . . . and that the window was up.” Concerned that someone might have broken into the residence, Officer Santiago knocked on the front door and got no response. Officer Santiago knocked several more times before finally getting a response. After Officer Santiago identified himself as a police officer, Hargett opened the door. At the suppression hearing, Officer Santiago testified as follows about what happened next:

I asked him if he was the homeowner of the residence, and he hesitated to answer that question, didn’t come out and immediately say no. He finally did answer the question and said no. And then I asked him for his name, in which he hesitated giving me his name, but then he initially gave me his name as Raymond Hargett.

. . . .

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He finally told me his name was Raymond Hargett, and then I asked him if he was the — if he was the owner of the residence, and he stated no. Then I asked him for ID. He didn't have any ID on him.

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While talking to him, at that point I asked him to step out of his residence and I detained him. I told him he was — I told him he was not under arrest, but because he couldn't tell me who he was and who the homeowner is at the residence, that he was being detained so that I could find out who the actual homeowner of the house was.

....

While I was talking to him, he kept putting his hands in his pocket, and I asked him, "Don't put your hands in your pocket." He kept putting his hands in his pocket. So when he came out, and based on, you know, not knowing who he was at the time because he couldn't produce any ID, and he hesitated to tell me who his name was and he hesitated on telling me he wasn't — you know, who the homeowner was and everything, I detained him.

Officer Santiago testified that he was concerned for his safety and unsure whether Hargett might have a weapon. As a result, he handcuffed Hargett and

patted him down from the top up, from the waist and then down towards his legs, you know, his pocket area, his groin area, then down his legs. When I patted down towards his left leg, I could smell an odor of marijuana, and I felt two bulges in his left — left pant leg. When I lifted it up, there was two bulges in his sock. He had his socks up.

....

The smaller bulge felt to me as a small baggy of marijuana, through my training and experience. And then the large bag had just — had several but, I mean, I couldn't tell what that was. But when I rolled down the sock — when I rolled his sock down, of course, the small bag came out and it was marijuana. And when I opened the other bag, what came out was a brown paper bag. When I opened that up, there was several other baggies of marijuana inside.

When asked about his training and experience in identifying controlled substances such as marijuana, Officer Santiago explained:

Through, of course, basic law enforcement training, they teach us and they show us what — you know, they put it in your pocket so you can feel what it feels like when you're patting somebody down. Also, the odor of marijuana. We do controlled burns and stuff like that. And I have arrested numerous individuals with marijuana in their pocket, based on the odor of marijuana, and it felt the same way.

Officer Santiago then arrested Hargett, and, shortly thereafter, two other NBPB officers arrived at the residence. Officer Santiago had the other officers conduct a security sweep of the residence to determine whether anyone else was inside. The officers did not find any other person in the home, but did discover more plastic baggies and a smoking pipe made from a soda bottle. In addition, as Hargett was being placed into a patrol car after his arrest, Officer Santiago frisked him again and discovered a small baggie containing at least twenty smaller baggies of cocaine in Hargett's sock.

On 14 October 2013, Hargett was indicted on one count each of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute,

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possession of drug paraphernalia, and having attained the status of an habitual felon. On 2 February 2014, Hargett moved to suppress the cocaine, marijuana, and drug paraphernalia discovered by officers on 23 May 2013. Hargett's case came on for trial at the 7 April 2014 session of Craven County Superior Court. Following a hearing on his motion, Hargett's motion to suppress was denied by the trial court. The jury returned guilty verdicts on all three possession offenses, and Hargett then entered a plea of guilty on the habitual felon charge. The trial court consolidated certain convictions and entered two judgments with concurrent sentences, the greater of which imposed 90-120 months imprisonment. Hargett gave notice of appeal from those judgments in open court.

*Preservation of Hargett's Appellate Issue*

The law in this State is now well settled that “a trial court’s evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.” *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original). In *Oglesby*, our Supreme Court considered the exact question presented in this appeal: whether a “defendant should be barred from raising this issue [error in the denial of a motion to suppress evidence] on appeal since he did not renew his objection at trial and has not argued, alternatively, that the trial court committed plain error by allowing the [challenged evidence] entered into evidence.” *Id.* at 553-

54, 648 S.E.2d at 821 (citations omitted). The Court noted that, in failing to object to the challenged evidence at his trial in May 2004, the

defendant may have relied to his detriment on a 2003 amendment to [] North Carolina Rule[] of Evidence [103(a)(2)], which provides in pertinent part: Once the [trial] court makes a definitive ruling on the record admitting or excluding evidence, *either at or before trial*, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. There is a direct conflict between this evidentiary rule and North Carolina Rule of Appellate Procedure 10(b)(1),<sup>1</sup> which this Court has consistently interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.

*Id.* at 554, 648 S.E.2d at 821 (citations and internal quotation marks omitted; emphasis in original). *Oglesby* was the first Supreme Court case to address the conflict between the amended evidentiary rule and Rule of Appellate Procedure.<sup>2</sup> The Court held Rule 103(a)(2) unconstitutional because

[t]he Constitution of North Carolina expressly vests in this Court the exclusive authority to make rules of procedure and practice for the Appellate Division. Although Rule 103(a)(2) is contained in the Rules of Evidence, it is manifestly an attempt to govern the procedure and practice of the Appellate Division as it purports to determine which issues are preserved for appellate review. Accordingly, we hold that, to the extent it conflicts with Rule of Appellate Procedure 10(b)(1), Rule of Evidence 103(a)(2) must fail.

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<sup>1</sup> Former North Carolina Rule of Appellate Procedure 10(b)(1) is now Rule 10(a)(1). See N.C.R. App. P. 10(a)(1).

<sup>2</sup> As the Supreme Court noted in *Oglesby*, a panel of this Court had already addressed the issue and reached the same holding in *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005).

*Id.* (citations and internal quotation marks omitted). However, because “the amendment to Rule 103(a)(2) was presumed constitutional at the time of [the] defendant’s trial, which was held before the Court of Appeals decision in *Tutt* [and g]iven the harsh consequences of barring review when a defendant has relied to his detriment on existing law,” the Supreme Court elected to exercise its “discretion under Appellate Procedure Rule 2 to prevent manifest injustice to [the] defendant and to review his contention on the merits.” *Id.* at 555, 648 S.E.2d at 821-22. Those circumstances are not present in this case.

Here, at trial, Hargett objected to admission of two out of five bags of cocaine, but did not object to the other three bags of cocaine, the eight bags of marijuana, or drug paraphernalia introduced at trial. Hargett did not object to any testimony from the officers about their discovery of the drugs and drug paraphernalia. On appeal, in his opening brief, Hargett did not acknowledge his failure to object to the majority of the evidence he contends should have been suppressed, did not cite *Oglesby*, and did not argue plain error or request that this Court review his argument under Rule 2 of our Rules of Appellate Procedure.

In response to the State’s discussion of Hargett’s failure on these grounds, Hargett has filed a reply brief with this Court, in which for the first time he acknowledges the actual procedural posture of his appeal and that “[t]here is some support for the State’s position in the authorities cited.” This is an understatement

to the point of inaccuracy. The authorities cited by the State, including *Oglesby*, are straightforward and clear that the denial of a motion to suppress does not preserve that issue for appellate review in the absence of a timely objection when the evidence is introduced at trial. Almost three dozen appellate opinions in our State cite *Oglesby* for this very proposition. Unlike the defendant in *Oglesby*, Hargett was not relying on a recent amendment to a rule of evidence in failing to object to the challenged evidence when it was introduced at trial. Thus, unlike the defendant in *Oglesby*, who might have relied to his detriment on the then-existing law, Defendant here went to trial seven years after the filing of our Supreme Court's decision in *Oglesby* and without the possibility of being misled by a lack of clarity in the pertinent case law.

Hargett's contentions in the reply brief regarding his right to appellate review are largely an argument that *Oglesby* was either wrongly decided or should not apply to Hargett because his trial counsel may have been confused by apparent conflicts between the holding of that case and certain sections of our State's Criminal Procedure Act. In support of this position, Hargett contends that provisions of Chapter 15A "did not allow . . . Hargett to assert a meaningful Fourth Amendment objection to Officer Santiago's substantive testimony at trial." For example, Chapter 15A provides that "[a] motion to suppress evidence made pursuant to this Article is the *exclusive method of challenging the admissibility of evidence* upon [constitutional] grounds," N.C. Gen. Stat. § 15A-979(d) (2013) (emphasis added), but limits renewal

of a previously denied pretrial motion to suppress during trial to circumstances where the defendant can show “that additional pertinent facts have been discovered” since the original ruling. N.C. Gen. Stat. § 15A-975(c) (2013). Further, section 15A-979 states that “[a]n order finally denying a motion to suppress evidence *may be reviewed upon an appeal from a judgment of conviction*, including a judgment entered upon a plea of guilty.” N.C. Gen. Stat. § 15A-979(b) (emphasis added); *see also* N.C. Gen. Stat. § 15A-1446(a) (2013) (“No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.”). In sum, Hargett characterizes his trial counsel’s failure to object to much of the evidence he sought to suppress as understandable and excusable.<sup>3</sup>

These arguments are neither appropriate nor persuasive. As noted *supra*, our Supreme Court has held that “a trial court’s evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.” *Oglesby*, 361 N.C. at 554, 648 S.E.2d at 821 (citations omitted; emphasis in original). This Court “has no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court.” *Dunn v. Pate*, 334 N.C.

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<sup>3</sup> The sincere and thoughtful argument made by Hargett’s appellate counsel on this point is undercut by the fact that Hargett’s trial counsel did, in fact, object at trial to admission of two out of five bags of cocaine the State sought to admit.

115, 118, 431 S.E.2d 178, 180 (1993) (citations, internal quotation marks, and brackets omitted). We are bound by *Oglesby*: Hargett has not preserved his right to appellate review of the denial of his motion to suppress.

Hargett also acknowledges that he is not *entitled* to plain error review because he did not assert plain error in his opening brief. See *State v. Dinan*, \_\_ N.C. App. \_\_, 757 S.E.2d 481, *disc. review denied*, \_\_ N.C. \_\_, 762 S.E.2d 203 (2014) (holding that assertion of plain error for the first time in a reply brief is insufficient to obtain such review). However, Hargett cites *State v. Miller*, 198 N.C. App. 196, 197-99, 678 S.E.2d 802, 804-05 (2009), as an example of a case where we elected to review for plain error in circumstances similar to his own, to wit, the defendant's pretrial motion to suppress was denied, he failed to object to admission of the evidence at trial, failed to argue plain error in his primary brief, and made an argument of plain error only in his reply brief. We find *Miller* distinguishable on several bases. First, although *Miller* did not argue plain error in his primary brief, he did request discretionary review under Rule 2 in the event that "this Court find[s] that the argument presented in this brief [is] not properly preserved or presented for appellate review[.]" In addition, the Court noted that the "defendant properly assigned plain error on appeal." *Id.* at 198, 678 S.E.2d at 805. Finally, that case involved a trial held in July 2008, less than a year after the filing of the Supreme Court's opinion in *Oglesby* in August 2007, while Hargett's trial took place some seven years after *Oglesby* when

the law on the pertinent point was well settled. In sum, we find *Miller* inapplicable here.

We are mindful of the harsh consequences of our holding on Hargett and sympathetic to his appellate counsel's predicament as well. However, to address the merits of Hargett's appeal, despite his failure to recognize and comply with long-standing case law both at trial and in his brief to this Court, would not prevent manifest injustice. Rather, we believe it would be an injustice to the numerous other defendants who have had their appeals dismissed by application of the holding of *Oglesby*. See, e.g., *State v. Bryant*, \_\_ N.C. App. \_\_, 753 S.E.2d 397 (2013) (unpublished); *State v. Berrier*, 217 N.C. App. 641, 720 S.E.2d 459 (2011) (unpublished); *State v. Black*, 217 N.C. App. 196, 719 S.E.2d 255 (2011) (unpublished); *State v. Gause*, \_\_ N.C. App. \_\_, 688 S.E.2d 550 (2009) (unpublished); *State v. Toler*, \_\_ N.C. App. \_\_, 657 S.E.2d 446 (2008) (unpublished); *State v. Sullivan*, \_\_ N.C. App. \_\_, 652 S.E.2d 71 (2007) (unpublished). Hargett has not convinced this panel that invocation of Rule 2 is appropriate here. Accordingly, his appeal is dismissed.

*Hargett's Motion for Appropriate Relief*

On 9 February 2015, Hargett filed a motion for appropriate relief ("MAR") pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(3) and 15A-1418(a), which was referred to this panel by order entered 20 February 2015. In his MAR, Hargett raises an

ineffective assistance of counsel (“IAC”) claim based upon his trial counsel’s failure to preserve his right to appellate review of the denial of his motion to suppress by objecting at trial to the admission of evidence of the drugs and drug paraphernalia seized from him. We deny Hargett’s MAR.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a 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.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). “[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel’s performance was actually deficient.” *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Hargett contends that his defense was prejudiced because, had his trial counsel preserved his right to appeal the denial of his motion to suppress, this Court would have reversed that order and granted Hargett a new trial. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Here, Hargett does not challenge any of the trial court's factual findings, but contends only that the findings of fact do not support the conclusion that Officer Santiago's investigatory seizure and search of Hargett's person were constitutional because he had "a reasonable, articulable suspicion that criminal activity [might] be afoot."

The trial court correctly applied our State's search and seizure case law in denying Hargett's motion to suppress.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, protects the right of people to be free from unreasonable searches and seizures. This protection applies to seizures of the person, including brief investigatory detentions. As our Supreme Court has explained, only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as

the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch. It is well-settled that the standard for reasonable suspicion is less demanding than that for probable cause.

*State v. Campbell*, 188 N.C. App. 701, 704-05, 656 S.E.2d 721, 724-25 (citations, internal quotation marks, brackets, and ellipsis omitted), *appeal dismissed*, \_\_ N.C. \_\_, 664 S.E.2d 311 (2008). Further, in the context of an investigatory stop, a law enforcement officer may perform a pat down or frisk of the outer clothing to check for weapons if the officer has reasonable suspicion that the suspect may be armed. *State v. Briggs*, 140 N.C. App. 484, 488, 536 S.E.2d 858, 861 (2000). To conduct such a frisk, “the officer need not be absolutely certain that the individual is armed. Rather, the officer is entitled to formulate common-sense conclusions about the modes or patterns of operation of certain kinds of lawbreakers in reasoning that an individual may be armed.” *State v. King*, 206 N.C. App. 585, 589, 696 S.E.2d 913, 915 (2010) (citations, internal quotations marks, and brackets omitted). In addition, under

the plain feel doctrine, when conducting a . . . frisk for weapons, if a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect’s privacy beyond that already authorized by the officer’s search for weapons. The officer may seize the object if he or she has probable cause to believe it is contraband. Probable cause exists if the facts and circumstances within the knowledge of the officer were

sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense.

*State v. Reid*, \_\_ N.C. App. \_\_, \_\_, 735 S.E.2d 389, 399 (2012) (citations and internal quotation marks omitted).

Here, the unchallenged evidence reveals that a police officer received a report from a tipster, for whom a first name, street address, and telephone number were provided. The tip was that a residence whose owner was incarcerated had a front window that appeared to have been tampered with. The officer confirmed that a window screen at the home had been pushed aside and the window was open, suggesting the possibility of a breaking and entering. When the officer repeatedly knocked on the door of the residence, there was initially no response. Then, as the trial court found,

[f]inally, there was a response; it was a slow response. That essentially, the individual inside asked, “Who’s there?” The officer responded, “It’s the police.” The individual inside indicated, “Okay,” and did come to the door, did open the door, and they engaged in some limited conversation. Essentially, the officer asked the identity of the person inside. The individual gave a very long, slow response, finally indicated his name was Raymond Hargett. There was a slow response. He did not provide any ID, could not provide any ID. He was asked who the owner of the house is. He either would not or could not give the name of the owner, at least at that time.

....

[Hargett] was asked repeatedly to keep his hands, you know, in a visible place and not have them in his pockets.

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[Hargett], according to the testimony, several times continued to put his hands in his pockets, was asked to take them out. [Hargett] would take them out and then put them right back in.

The tip that the home's owner was incarcerated, the pried-open screen and open window, and Hargett's inability to identify the owner of the home were sufficient to create reasonable suspicion in Officer Santiago that Hargett might have broken into the home through the window. *See Campbell*, 188 N.C. App. at 704, 656 S.E.2d at 725. These circumstances, along with Hargett's refusal to comply with the officer's instructions to keep his hands out of his pockets, further supported Officer Santiago's "common-sense conclusion" that Hargett might be armed and thus justified his frisk of Hargett. *See King*, 206 N.C. App. at 589, 696 S.E.2d at 915. In turn, during that frisk, the officer discovered and identified the baggies of marijuana in Hargett's sock by plain feel. *See Reid*, \_\_ N.C. App. at \_\_, 735 S.E.2d at 399. In sum, the trial court properly denied Hargett's motion to suppress because Officer Santiago had reasonable, articulable suspicion that criminal activity might be afoot. Thus, even had Hargett's trial counsel properly preserved Hargett's right to appellate review of the trial court's denial of his motion to suppress (or had his appellate counsel properly raised a plain error argument in his opening brief), Hargett would not have prevailed. Accordingly, Hargett cannot demonstrate the prejudice required to sustain his IAC claim.

Appeal DISMISSED; motion DENIED.

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Judges STEELMAN and MCCULLOUGH concur.