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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-211

Filed: 15 December 2015

Wake County, No. 13 CRS 223181

STATE OF NORTH CAROLINA

v.

FERNANDO HURTADO, Defendant.

Appeal by defendant from judgment entered 22 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 27 August 2015.

The Law Office of Bruce T. Cunningham, Jr., by Amanda S. Zimmer, for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Whitney Hendrix Belich, for the State.

DIETZ, Judge.

Law enforcement arrested defendant Fernando Hurtado on 19 September 2013 after discovering a large amount of heroin in his car at a Raleigh hotel. Officers located Hurtado after learning from a reliable source that drugs were being transported from Atlanta through Raleigh. The source also gave officers the cell phone number for the alleged drug runner.

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Law enforcement obtained a court order for historical cell records that put the phone in a general area (within 20 to 3000 meters) the night before. Based on this information, officers searched the parking lots of nearby hotels, found Hurtado's car, which had Georgia plates, and then deployed a K-9 unit which alerted to the presence of drugs in the car. A search of the car revealed a large amount of heroin.

The State charged Hurtado with two counts of trafficking in heroin and one count of maintaining a vehicle for the keeping of a controlled substance. Hurtado moved to suppress the heroin, arguing that the warrantless acquisition of his cell phone records violated the Fourth Amendment. The trial court denied this motion.

During deliberations, the jury sent out a note stating, "As written for count #3 [maintaining a vehicle for the keeping of a controlled substance]: 'a person knows of an activity if he is aware of a high probability of its existence.' Does this statement apply to count #1 and #2 [the heroin trafficking charges]?" Over Hurtado's objection, the trial court answered yes.

On appeal, Hurtado challenges the denial of his motion to suppress. He also challenges the trial court's response to the jury's question about knowledge for the heroin trafficking charges.

As explained below, we must reject Hurtado's Fourth Amendment argument because, on the record before us, this case is indistinguishable from *State v. Perry*, ___ N.C. App. ___, 776 S.E.2d 528 (2015). In *Perry*, this Court held that the

warrantless acquisition of a defendant's historical cell tower ping data from a third-party cell phone provider is not a search under the Fourth Amendment. *Id.* at ___, 776 S.E.2d at 540. Under *Perry*, the acquisition of Hurtado's historical cell phone location records from AT&T was not a search, and thus we reject his Fourth Amendment claim.

But we agree with Hurtado that the trial court's instruction concerning knowledge was erroneous. Our Supreme Court addressed this precise issue in *State v. Bogle*, and held that knowledge with respect to the drug trafficking statutes cannot be proven merely by evidence that the defendant was aware of a high probability that he was committing the crime. 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989). Thus, we reverse the two heroin trafficking convictions and remand for a new trial on those charges.

Facts and Procedural History

On the morning of 19 September 2013, law enforcement in Raleigh learned through a reliable source that a drug shipment from Atlanta had arrived somewhere in Raleigh the day before. Law enforcement also obtained a cell phone number sworn by the informant to belong to the transporter of the drugs.

On 19 September 2013, after identifying this number as an AT&T phone, law enforcement submitted an application for cell phone records, seeking permission to obtain records from AT&T. The trial court granted the application the same day and

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ordered AT&T to provide the subscriber information associated with the cell number pursuant to 18 U.S.C. § 2703(d), a provision of the Stored Communications Act. The court order required AT&T to disclose cell site information, tower azimuth, GPS precision location, historical GPS, distance from tower, and live trace. As explained in more detail below, although law enforcement requested all of these forms of information in the application, the record does not indicate that law enforcement acquired or relied upon any information other than historical location data. Indeed, at the suppression hearing, Hurtado conceded that the only cell data relied upon by law enforcement was historical GPS location information.

Law enforcement first received information from AT&T around 2:30 p.m. to 3:00 p.m. on 19 September 2013. They received a historical GPS location putting the phone in the area of South Saunders Street and Interstate 440 on the previous night. This historical GPS location was approximate, indicating that the phone was located anywhere from 20 to 3000 meters from the designated location on that previous night. Based entirely on this single piece of historical GPS information, officers drove to the area indicated to perform further investigation.

Once they arrived, the officers began searching for vehicles with Georgia license plates because, according to their reliable source, the drug shipment originated in the Atlanta area. The officers focused their search on two hotels located near the intersection of South Saunders Street and Interstate 440.

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While in the parking lot of a Comfort Inn, the investigators noticed a BMW with Georgia plates. A tag inspection revealed that the car was registered to Hurtado. The officers then deployed a K-9 unit around the outside of Hurtado's car, which alerted to the presence of narcotics. After officers found Hurtado's hotel room based on the hotel registry and informed him of the alert, Hurtado accompanied the officers to the parking lot.

Once in the parking lot, Hurtado consented to a search of the inside of his car by the same K-9 unit. After the K-9 alerted on the inside of the car, the K-9 officer conducted a hand search and found a black cloth bag under the front passenger seat. Officers found black block-like items inside this bag, which were later determined to contain heroin. Hurtado was arrested and charged with trafficking in heroin by transportation under N.C. Gen. Stat. § 90-95(h)(4), trafficking in heroin by possession under N.C. Gen. Stat. § 90-95(h)(4), and intentionally maintaining a vehicle for the keeping of controlled substances under N.C. Gen. Stat. § 90-108(a)(7).

After waiving his Miranda rights, Hurtado explained his role in the drug transport to law enforcement. He referred to himself as a "runner" and stated that he was to receive \$3,000 for making the trip from Atlanta to Raleigh. He also stated that he knew he was transporting drugs, but did not know what kind.

On 14 August 2014, Hurtado moved to suppress all evidence obtained from his cell phone records, arguing that the warrantless acquisition of that data by law

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enforcement was an unreasonable search under the Fourth Amendment. The trial court denied this motion. At trial, Hurtado moved to dismiss the trafficking charges, arguing that the State had failed to produce any evidence showing that Hurtado actually knew that heroin was inside the black bag. The court also denied this motion, concluding that a jury could reasonably infer that Hurtado knew there was heroin in the black bag in his car.

During jury deliberations, the jury sent out a note stating, “As written for count #3 [maintaining a vehicle for the keeping of a controlled substance]: ‘a person knows of an activity if he is aware of a high probability of its existence.’ Does this statement apply to count #1 and #2 [the heroin trafficking charges]?” Over Hurtado’s objection, the trial court answered yes. The jury found Hurtado guilty of all counts. Hurtado timely appealed.

Analysis

I. Motion to Suppress

Hurtado first challenges the denial of his motion to suppress based on law enforcement’s warrantless acquisition of historical cellular location data from his phone. As explained below, we must reject this argument under recent, controlling precedent from this Court.

“Subject to ‘a few specifically established and well-delineated exceptions,’ the Fourth Amendment protects privacy interests by prohibiting officers from conducting

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a search without a valid warrant based on probable cause.” *State v. Perry*, ___ N.C. App. at ___, 776 S.E.2d at 535-36.

In *Perry*, this Court addressed whether a warrant was required to obtain historical cell tower site location information from a third party such as a wireless service provider. *Id.* at ___, 776 S.E.2d at 536. We held that the acquisition of historical cellular information—meaning information first obtained and stored by the cellular carrier and then later transmitted to law enforcement under court order—was not a “search” under the Fourth Amendment. *Id.* at ___, 776 S.E.2d at 540.

This case is controlled by *Perry*. The trial court found that police relied solely on “historical GPS location data”¹ to determine the location of Hurtado’s cell phone the previous night. Hurtado concedes that the information relied upon by law enforcement was historical tracking data. In his appellate brief, Hurtado asserts that “on September 19th, the police were first informed that a shipment of drugs had come into Raleigh the night before. Using cell phone records, police were able to show that

¹ *Perry* involved the acquisition of location data acquired through “pings” between the cell phone and nearby cell towers. Hurtado’s brief describes the State’s tracking of his phone as “GPS” tracking. *Perry* did not address GPS tracking, and we are not prepared to hold that acquiring historical GPS location data from a GPS-enabled phone is, in all cases, the same as acquiring cell tower ping data. But here, Hurtado did not present any evidence concerning the differences between these two forms of tracking, did not explain how GPS tracking works, and, most importantly, did not provide any reason why he would have a greater expectation of privacy in historical GPS location data than in historical cell tower location data. As a result, we cannot distinguish this case from *Perry*. See *Jones v. United States*, 362 U.S. 257, 261, 4 L.Ed.2d 697, 702 (1960) (party challenging the constitutionality of a search bears the burden of proving an invasion of privacy) *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 65 L.Ed.2d 619 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 104, 65 L.Ed.2d 633, 641 (1980).

Mr. Hurtado's phone traveled through Charlotte to Raleigh *on September 18th*. . . . GPS data effectively allowed them *to go back in time* to get incriminating data by using Mr. Hurtado's personal property against him." In other words, Hurtado concedes that law enforcement used historical cell phone data to determine where his phone had been in the past, not to track his current whereabouts using real-time data.

Under *Perry*, law enforcement's acquisition of this historical, third-party data from Hurtado's cell phone provider was not a search and therefore did not implicate the Fourth Amendment. *Perry*, at ___, 776 S.E.2d at 540. We are bound to follow *Perry* and therefore must reject Hurtado's argument that the warrantless acquisition of historical data from his cellular phone provider violated his Fourth Amendment rights. Accordingly, we hold that the trial court did not err in denying Hurtado's motion to suppress.

II. Motion to Dismiss

Hurtado next argues that the trial court erred in failing to dismiss the drug trafficking charges because the State produced no evidence that Hurtado knew the black bag in his car contained heroin. We disagree.

"In determining whether to grant a motion to dismiss, the court must determine, in the light most favorable to the State, if there is substantial evidence of each essential element of the offense charged. Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003) (citations and quotations omitted). “The evidence can be direct or circumstantial, but must give rise to a reasonable inference of guilt in order to withstand the motion to dismiss.” *Id.*

“The crime of trafficking in heroin has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin.” *State v. Lopez*, 176 N.C. App. 538, 541, 626 S.E.2d 736, 739 (2006) (quotations omitted). “Possession can be actual or constructive. When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession.” *Baldwin*, 161 N.C. App. at 391, 588 S.E.2d at 504-05 (citations omitted).

In *Baldwin*, the defendant moved to dismiss charges of trafficking in cocaine by possession and transportation, arguing that the State failed to prove he knew that cocaine was in a sealed, non-transparent package. This Court held that the motion to dismiss was properly denied because, viewing the evidence in the light most favorable to the state, a jury could infer his knowledge of the cocaine from his capability and intent to control the package by accepting delivery of the package, taking it into a residence, placing it in a car, then moving it to another car. *Id.* This Court also reasoned that evidence of other incriminating circumstances including surveillance equipment, guns, and plastic bags with traces of cocaine found in the

residence where the defendant was arrested allowed a reasonable inference that the defendant knew the contents of the package. *Id.*

Under *Baldwin*, the trial court properly denied Hurtado’s motion to dismiss the trafficking charges. Hurtado’s argument is nearly identical to the defendant’s argument in *Baldwin*—namely, that he did not know the non-transparent black bag contained a specific type of drug (here, heroin). However, as in *Baldwin*, a jury could infer Hurtado’s actual knowledge of the contents of the black bag based on his constructive possession of the bag, because the bag was found under the seat of a car registered to Hurtado and Hurtado unlocked the car for law enforcement. Moreover, as in *Baldwin*, other incriminating circumstances support an inference that Hurtado actually knew the bag contained heroin. Hurtado admitted that he was a “runner” in a drug operation and that he knew he was transporting drugs. These facts, when viewed in the light most favorable to the State, allow a jury to reasonably infer that Hurtado knowingly possessed heroin. Accordingly, the trial court did not err in denying Hurtado’s motion to dismiss.

III. Jury Instructions Concerning Knowledge

Hurtado next argues that the trial court erred when it instructed the jury, in response to a question during deliberations, about the meaning of the term “knowledge” for purposes of the drug trafficking statutes. Specifically, the jury asked the following: “As written for count #3 [maintaining a vehicle for the keeping of a

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controlled substance]: ‘a person knows of an activity if he is aware of a high probability of its existence.’ Does this statement apply to count #1 and #2 [heroin trafficking charges]?” Over Hurtado’s objection, the trial court answered yes.

Hurtado argues that the trial court’s response was error because a conviction for trafficking in heroin under N.C. Gen. Stat. § 90-95(h)(4) requires proof that Hurtado had actual knowledge that the drugs were heroin and not merely awareness of “a high probability” that the bag in his car contained heroin. As explained below, under controlling precedent from our Supreme Court, we agree with Hurtado and order a new trial.

“Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). In *State v. Bogle*, our Supreme Court addressed a nearly identical argument concerning trafficking in marijuana under N.C. Gen. Stat. § 90-95(h)(1), the same section of the drug statutes that governs trafficking in heroin. 324 N.C. at 194, 376 S.E.2d at 747. The Supreme Court specifically rejected a knowledge instruction that imputes knowledge of a fact because “the defendant is aware of the high probability of the existence of [that] fact.” *Id.* at 194, n.2, 376 S.E.2d at 747, n.2. The Court held that this standard, “failed to adequately address the material element of knowledge” that applies to drug trafficking crimes. *Id.* at 196, 376 S.E.2d at 748.

We are unable to distinguish the instruction given in response to the jury's question from the instruction disapproved by our Supreme Court in *Bogle*. We therefore hold that the instruction was error.

We also conclude that the error was prejudicial because, without it, there is a reasonable possibility that the jury would not have convicted Hurtado of the heroin trafficking charges. *See* N.C. Gen. Stat. § 15A-1443(a) (2013). The very fact that the jury sought clarification of the standard for knowledge suggests the jury was focused on this issue. Moreover, Hurtado told law enforcement he was a drug runner but did not know what type of drugs he was transporting. And the State did not present any evidence concerning the types of drugs that Hurtado had transported in the past, if any. Without additional circumstantial evidence of knowledge, we believe there is a reasonable possibility that, without the court's instruction, the jury would not have convicted Hurtado on the heroin trafficking charges. Accordingly, we are constrained to vacate Hurtado's convictions on these charges and remand for a new trial.

IV. Acting in Concert Instruction

Hurtado also argues that he is entitled to a new trial because the trial court erred in instructing the jury on acting in concert with regard to the heroin trafficking charges. Because we order a new trial based on the erroneous knowledge instruction, we need not address this argument, as it can be addressed by the trial court, if necessary, in the new trial.

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Conclusion

We find no error in the trial court's denial of Hurtado's motions to suppress and dismiss, as well as his conviction for intentionally maintaining a vehicle for the keeping of controlled substances. We vacate Hurtado's conviction on the heroin trafficking charges and remand for a new trial for the reasons discussed above.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).