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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-975

Filed: 6 June 2017

Mecklenburg County, No. 15CRS216405

STATE OF NORTH CAROLINA

v.

SAMUEL SYLVESTER SIMMONS, Defendant.

Appeal by Defendant from judgment entered 9 March 2016 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 April 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Donna D. Smith, for the State.*

*Cooley Law Office, by Craig M. Cooley, for the Defendant.*

DILLON, Judge.

Samuel Sylvester Simmons (“Defendant”) appeals from a judgment convicting him of possession of a firearm by a felon. After careful review, we find no error.

I. Background

Defendant was charged with possession of a firearm by a felon. A jury convicted him of the charge, and the trial court entered judgment accordingly. Defendant timely appealed.

## II. Standard of Review

The standard of review for Defendant's ineffective assistance of counsel claim is *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

## III. Analysis

Defendant contends that his trial lawyer's failure to move to suppress certain pre-*Miranda* -warning(s)<sup>1</sup> statements he made to Charlotte police which led to his arrest constituted ineffective assistance of counsel ("IAC"). "[A] defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (internal quotation marks and citations omitted). For the reasons stated below, we conclude that Defendant's statements were admissible; and, therefore, Defendant's argument on appeal is overruled.

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege

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<sup>1</sup> Referring to *Miranda v. Arizona*, 384 U.S. 436 (1966), a United States Supreme Court decision barring the admission of certain pre- and post-arrest statements on Fifth Amendment grounds.

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against self-incrimination,” namely, *Miranda* warnings. *Miranda*, 384 U.S. at 444. However, even if a suspect is subjected to custodial interrogation, “questions asked by law enforcement officers to secure their own safety or the safety of the public[,] [which are] limited to information necessary for that purpose” are exempted from *Miranda*. *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) (applying the public safety exception to *Miranda*, which was established in *New York v. Quarles*, 467 U.S. 649 (1984)).

Here, the evidence tended to show as follows: multiple officers were positioned around Defendant’s residence, whereupon one officer instructed Defendant to exit his home peacefully. Defendant did so and was immediately detained, handcuffed, frisked, and then asked where he had hidden the victim’s gun, all before receiving *Miranda* warnings.

On these facts, we conclude that Defendant was subjected to custodial interrogation as (1) Defendant’s freedom of movement was restrained to a “degree associated with a formal arrest,” *State v. Buchanan*, 353 N.C. 353, 338, 543 S.E.2d 823, 827 (2001) (internal quotation marks and citations omitted), and (2) questioning regarding the location of the gun was “reasonably likely to elicit an incriminating response[.]” *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (internal quotation marks and citation omitted).

Nevertheless, we hold that Defendant's trial lawyer's refusal to file a motion to suppress or otherwise object to the introduction of Defendant's pre-*Miranda*-warning(s) statements did not constitute IAC because those statements were covered by the public safety exception.

Much like the police officers in *Quarles*, patrol officers here engaged with a suspect who they had reason to believe had pursued a victim while brandishing a firearm on a major, *public* road. *Quarles*, 467 U.S. at 652. Upon detaining Defendant and discovering that he was *unarmed*, it became paramount for law enforcement to determine where the firearm was hidden. *See id.* at 657. Given the allegations they had received regarding Defendant's prior felony conviction, it was reasonable for police to conclude that Defendant had discarded the firearm *outside* before going back into his house. As the area surrounding Defendant's home was heavily trafficked, asking Defendant where he had hidden the gun was reasonably necessary in order "to secure . . . [police] safety or the safety of the public." *Brooks*, 337 N.C. at 144, 446 S.E.2d at 587.

Defendant's argument that *State v. Crudup*, 157 N.C. App. 657, 580 S.E.2d 21 (2003) applies and therefore bars application of the public safety exception is misplaced. Unlike the present case, police assistance was requested in *Crudup* in response to a reported break-in. *Crudup*, 157 N.C. App. at 658, 580 S.E.2d at 23. There was no information in the original report, nor could there have been, that

suggested the defendant in *Crudup* was armed. *See id.* More importantly, the police did not ask the defendant if he was armed or if there were any dangerous items in the apartment; rather, the questioning centered on determining whether he owned the apartment. *Id.*

In contrast, the United States Supreme Court in *Quarles* held that the public safety exception applied where police “handcuffed the suspect and asked him where the gun was” *after* discovering the “suspect wore an empty shoulder holster.” *Quarles*, 467 U.S. at 652.

We conclude that the public safety exception applied to Defendant’s statement in the present case. Accordingly, trial counsel’s failure to file a motion to suppress did not constitute IAC. *See State v. Gates*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 789 S.E.2d 880, 888 (2016) (holding that there was no IAC as “the [other acts] testimony was admissible”).

#### IV. Conclusion

As Defendant’s pre-*Miranda*-warning(s) statements were admissible under the public safety exception to *Miranda*, Defendant’s trial lawyer’s failure to file a suppression motion did not constitute IAC.

NO ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).