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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-172

Filed: 2 January 2018

Alamance County, Nos. 13 CRS 54383 and 13 CRS 54384

STATE OF NORTH CAROLINA

v.

CHRISTOPHER DEWAYNE SMITH and JOHN JAMES CUNNINGHAM

Appeal by defendants from judgments entered 4 May 2016 by Judge George B. Collins, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 31 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander G. Walton and Assistant Attorney General Zachary Padget, for the State.

Richard J. Costanza for defendant-appellant Christopher Dewayne Smith.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant John James Cunningham.

BRYANT, Judge.

Where law enforcement agents had reasonable suspicion to seize a package for investigative purposes by removing it from the mail stream and where the search warrant affidavit was sufficient to supply probable cause, the trial court did not err in denying defendant Cunningham's motion to suppress. Where no procedural

mechanism exists under Rule 21 to issue the discretionary writ of certiorari to review the trial court's judgment entered upon defendant Smith's guilty plea, we decline to invoke Rule 2 to suspend the requirements of the appellate rules to issue the writ of certiorari. The judgments of the trial court are affirmed.

In July 2013, a narcotics officer with the Mebane Police Department was working with a "confidential reliable source" (the "informant") who informed the officer that he had purchased marijuana from defendant Christopher Smith. The informant reported that Smith would have the marijuana shipped from a dispensary in California where it was packed as a present "on a plate with an open bag of candy to conceal the odor" and shipped to an address on Old Plantation Drive in Graham, North Carolina.

According to the informant, Smith was set to receive another package at the address on Old Plantation Drive within the next week. The narcotics officer informed his supervisor about the informant and the expected package. Based on this information, on 8 July 2013, the supervisor contacted a federal law enforcement agent with the United States Postal Inspection Service. The federal agent was told about the package set to arrive at Old Plantation Drive, and she set a "mail watch" on packages sent to that address. One week later, she was informed by the Graham Post Office that a package addressed to John Cunningham at Old Plantation Drive had arrived at the office.

On 16 July 2013, the federal agent went to the Graham Post Office, retrieved the package, and took it to the Mebane Police Department. A lineup involving the package was conducted and a K-9 drug detection officer alerted on the package, indicating it contained controlled substances. The narcotics officer obtained a search warrant for the package. Meanwhile, a person who identified himself as Christopher Smith called the post office claiming he owned the package and would pick it up the next day.

The next day, the federal agent took the package to the Graham Post Office. Cunningham, not Smith, arrived at the post office, presented the delivery notice, showed his identification, and signed for and received the package. After leaving the post office, Cunningham took the package to his car in the parking lot. Moments later, he was detained by law enforcement officers. Later that day, the search warrant for the package was executed, and the police found one pound of marijuana inside the package.

After the package was opened, one officer noticed that Cunningham's phone was repeatedly receiving calls. As a result of Cunningham's subsequent statements, Smith was also apprehended at a Wendy's restaurant nearby in Graham.

On 2 September 2014, Smith and Cunningham (collectively "defendants") were indicted in Alamance County for conspiracy to sell/deliver marijuana and felony possession of marijuana (Cunningham) and conspiracy to possess marijuana (Smith).

On 22 April and 22 May 2015, Smith and Cunningham, respectively, filed motions to suppress, which motions were heard jointly at the 7 December 2015 session of Superior Court, the Honorable Allen Baddour, Jr., Judge presiding. By written orders filed 16 December 2015, the trial court denied each defendant's motion to suppress.

On 4 May 2016, Smith pled guilty to felony possession of marijuana based on a bill of information he and his attorney executed, and Cunningham pled guilty to felony possession of marijuana, specifically reserving his right to appeal the denial of his motion to suppress.[1] The Honorable George B. Collins, Jr., accepted both defendants' guilty pleas and sentenced both defendants to respective terms of three to thirteen months incarceration, which was suspended for Smith on the condition he comply with twelve months of unsupervised probation. Both defendants entered written notice of appeal on 16 May 2016. Smith filed a petition for writ of certiorari requesting that this Court review whether Judge Collins was provided with a sufficient factual basis to enter judgment in this case. We first address Smith's petition for writ of certiorari.

Defendant Smith's Petition for Writ of Certiorari

"[T]he defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court,

[1] Smith, unlike Cunningham, did not specifically reserve the right to appeal the denial of his motion to suppress.

but he may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2015). "[O]ur Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant 'may obtain appellate review of this issue only upon grant of a writ of certiorari.' " *State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011) (citation omitted) (quoting *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987)).

In the instant case, defendant did not unequivocally object to the factual basis of his plea as presented by the State at trial, although this challenge is the basis on which he petitions this Court to issue its writ of certiorari. However, this Court has previously held that a defendant must object at the trial court to the sufficiency of the factual basis to support the convictions in order to preserve an error that can be properly raised before this Court on appeal. *See State v. Kimble*, 141 N.C. App. 144, 147, 539 S.E.2d 342, 344–45 (2000). Thus, defendant asks this Court to issue a writ of certiorari and review an issue which could not ordinarily have been heard on appeal.

Furthermore, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, this Court may, in its discretion, issue a writ of certiorari if one of the following circumstances applies: "when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial

court ruling on a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2017). "A petition for the writ must show merit or that error was probably committed below." *State v. Rouson*, 226 N.C. App. 563–64, 565, 741 S.E.2d 470, 471 (2013) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)) (denying the defendant's petition for writ of certiorari where he failed to bring forth a meritorious argument or reveal error in the trial court's denial of his motion to suppress and in the acceptance of his guilty pleas).

However,

> [u]nder the current language of Appellate Rule 21, no procedural mechanism exists under that Rule to issue the discretionary writ of certiorari to review the trial court's judgment entered upon Defendant's guilty plea under N.C. Gen. Stat. § 15A-1444(e), without further exercising our discretion to invoke Rule 2 to suspend the Rules.
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> . . . .
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> Although the statute provides jurisdiction, this Court is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

State v. Ledbetter, ___ N.C. App. ___, ___, 794 S.E.2d 551, 555 (per curiam), *stay granted*, ___ N.C. ___, 794 S.E.2d 527 (2016), rev. allowed, ___ N.C. ___, 805 S.E.2d 487 (2017). As a result, "[i]n the further exercise of our discretion under the facts before us, we decline to invoke Rule 2 to suspend the requirements of the appellate

rules to issue the writ of certiorari." *Id.* Defendant's petition for writ of certiorari is denied.

Defendant Cunningham's Appeal

On appeal, Cunningham argues that the trial court erred in denying his motion to suppress because (I) law enforcement agents did not have reasonable suspicion to seize the package for further investigation; and (II) in the absence of the canine sniff, the search warrant affidavit was insufficient to supply probable cause.

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 findings of fact on a motion to suppress 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (quoting *State v. Eason*, 366 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). "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). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear

testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Brown*, ___ N.C. App. ___, ___, 787 S.E.2d 81, 84 (2016) (quoting *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994)).

I

Defendant Cunningham first contends that the trial court's findings of fact do not support its implied conclusion that there was reasonable suspicion to seize the package when law enforcement officers removed it from the mail stream for further investigation. Specifically, defendant Cunningham argues that "the informant's anonymous tip, standing alone, was insufficient to supply reasonable suspicion to seize the package." We disagree.

"Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *United States v. Van Leeuwen*, 397 U.S. 249, 251, 25 L. Ed. 2d 282, 285 (1970) (quoting *Ex parte Jackson*, 96 U.S. 727, 733, 24 L. Ed. 877, ___ (1878)) (determining that a twenty-nine hour detention of a mailed package was reasonable based on the minimal nature of the intrusion and the unavoidable delay in obtaining a warrant). As such, "[a] package may be detained briefly for investigative purposes, but only if there is a reasonable suspicion that it contains contraband." *United States v. Kent*, 652 Fed.

App'x 161, 165 (4th Cir. 2016) (unpublished) (citations omitted); *see also United States v. Place*, 462 U.S. 696, 705–06, 77 L. Ed. 2d 110, 119–20 (1983) (holding that law enforcement officers may seize luggage if they have a reasonable suspicion that it contains contraband). "Thus, [a reviewing court] may uphold the [package's] detention . . . if the postal inspector reasonably suspected that the package contained contraband and if the detention lasted for a reasonable duration." *United States v. Dennis*, 115 F.3d 524, 532 (7th Cir. 1997) (citation omitted); *see id.* at 531–33 (concluding that the postal inspector's reasonable suspicion justified "subject[ing] [an Express Mail package] to a sniff by a drug detection dog because it possessed several characteristics which met the U.S. Postal Service's narcotics package profile and which based upon his own experience were consistent with a package containing narcotics").

"As with the detention of an individual, reasonable suspicion in this context requires a 'particularized and objective basis for suspecting legal wrongdoing' under 'the totality of the circumstances.' " *Kent*, 652 Fed. App'x at 165 (citation omitted) (quoting *United States v. Arvizu*, 534 U.S. 266, 273, 151 L. Ed. 2d 740, 749 (2002)). "All that is required is a 'minimal level of objective justification, something more than an "unparticularized suspicion or hunch." ' " *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 440 (2004) (quoting *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994)).

In the instant case, the trial court's findings were sufficient to support its conclusion that law enforcement officers had a reasonable suspicion to seize the package when it was removed from the mail stream for further investigation. The trial court found (and the evidence supported this finding (*see infra* Section II)) that "[t]he tipster in this case indicated that [1] marijuana would be shipped [2] from the west coast [3] within a certain time frame [4] to a specific address." Far from "an unparticularized suspicion or hunch," *see Jacobs*, 162 N.C. App. at 255, 590 S.E.2d at 440 (citation omitted), the trial court found that "[t]hose four allegations, when corroborated, indicate a fairly high level of information known by the informant." Accordingly, law enforcement agents had a reasonable suspicion to seize the package by briefly detaining and removing it from the mail stream. Defendant's argument is overruled.

II

Defendant Cunningham argues the trial court erred in finding the search warrant affidavit was sufficient to supply the magistrate with probable cause in the absence of the evidence of the canine sniff. We disagree.

> A search warrant may be issued only upon a finding of probable cause for the search. This means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the object sought and that such object will aid in the apprehension or conviction of the offender.

State v. Crisp, 19 N.C. App. 456, 458, 199 S.E.2d 155, 156 (1973) (citation omitted). "The 'common-sense, practical question' of whether probable cause exists must be determined by applying a 'totality of the circumstances' test." *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597–98 (2014) (citation omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983)).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (alterations in original) (quoting *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002) (citation omitted).

"[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (quoting *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005)). But "[p]robable cause cannot be shown 'by affidavits which are purely conclusory . . . .' "

State v. Campbell, 282 N.C. 125, 130–31, 191 S.E.2d 752, 756 (1972) (citation omitted). "Because [the trial court's] duty in ruling on a motion to suppress based upon an alleged lack of probable cause for a search warrant involves an evaluation of the judicial officer's decision to issue the warrant, the trial court should consider only the information before the issuing officer." *Brown*, ___ N.C. App. at ___, 787 S.E.2d at 85. Thus, "it is error for a reviewing court to 'rely[ ] upon facts elicited at the [suppression] hearing that [go] beyond the "four corners of [the] warrant." ' " *Id.* (alterations in original) (quoting *Benters*, 367 N.C. at 673, 766 S.E.2d at 603).

Here, the search warrant affidavit stated in relevant part as follows:

> According to a confidential and reliable source of information, the package was suspected of containing Marijuana and was to be delivered to 7156 Old Plantation Dr. Graham, 27253, an address within the Graham post Office's jurisdiction. Information gathered during the conversation was that the package was coming from the west coast of the United States and that it would be delivered within the next week.
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> On 7/15/13 . . . a package arrived at the Graham Post Office . . . and . . . it was addressed to 7156 Old Plantation Dr. Graham, NC 27253 Graham, NC 27253 [sic] from [the west coast], consistent with the information provided by the confidential and reliable source of information. . . . [T]he package was addressed to John Cunningham of 7156 Old Plantation Dr. Graham NC.
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> . . . .
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> [O]n 7/15/13 . . . the US Post Office in Graham was contacted by a male who identified himself as Christopher Smith inquiring about the suspected package of marijuana.

> Mr. Smith asked about the package stating that he is the owner of it and was able to provide a tracking number for the package. Mr. Smith told employees at the US Post Office that he would pick the package up on 7/16/13 between 1 and 2 p.m. the package is addressed to John Cunningham and . . . John Cunningham is a valid name of an individual residing at 7156 Old Plantation Dr. Graham, NC 27253. [The affiant], through training and experience is familiar with tactics utilized by narcotics distributors in which they use third parties to receive packages as an attempt to elude police and avoid prosecution. Narcotics traffickers often use other parties to split costs and lessen expenses by dividing the cost between several parties. Further, the affiant knows that the Western Coast of the United States is currently a source of Marijuana grown in the area and shipped using shipping media to other areas of the United States. This affiant believes that the two names provided during this investigation suggest a partnership and criminal enterprise used to distribute illegal narcotics throughout Alamance County and the State of North Carolina.

In denying defendant's motion to suppress, the trial court found as fact and concluded as a matter of law, in relevant part, as follows[2]:

> [T]he Court finds the following facts:
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> . . . .
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> 3. In July of 2013, [the officer] was working with an individual he believed to be a confidential, reliable informant[.]

[2] The trial court specifically noted certain facts which were not set out in the affidavit. For example, the trial court noted that the informant's "statement against penal interest [that Chris Smith had previously sold marijuana to him] was not included in the search warrant affidavit." The trial court also noted that the fact that "Smith regularly received marijuana through the mail from a dispensary in California, and that it was usually packaged as a present, on a plate, with an open bag of candy used to conceal the odor . . . was also not included in the search warrant affidavit."

. . . .

6. The informant told [the officer] that a package would be shipped . . . to 7156 Old Plantation Drive, Graham, NC 27253, within the next week. . . . [I]n his affidavit, [the officer] only stated that the "package was coming from the west coast."

. . . .

Based on the foregoing FINDINGS OF FACT, the Court concludes as a matter of law that:

. . . .

1. Only the Findings of Fact made above that were included in [the officer's] affidavit in support of the search warrant were considered by this Court for purposes of the analysis of the validity of the search warrant. Findings of Fact made above that are outside the four corners of the search warrant were made by the undersigned for the analysis of other legal claims by the defendants.

. . . .

12. The tipster in this case indicated that

a. marijuana would be shipped
b. from the west coast
c. within a certain time frame
d. to a specific address.

Those four allegations, when corroborated, indicate a fairly high level of information known by the informant.

13. The information provided by the informant was further corroborated by the phone call received by the post office, in which the caller identified himself as Christopher Smith, indicated he was the owner of the package, and provided the correct tracking number. This call is evidence of a claim of ownership on the undelivered package. The Court finds

> it highly material and relevant that the claim of ownership and knowledge was made prior to delivery and not merely the passive acceptance of a package on the doorstep.

In the instant case, we are faced with the rather thorny task of untangling the relevant findings in the trial court's order from the "irrelevant" ones. This is because the trial court made note of several findings in its order which it apparently did not use in its determination of whether the magistrate properly determined there was probable cause to issue the search warrant. *See supra* note 1 and accompanying text. Making note of the findings it was *not* considering has had the confusing effect of tending to contradict the trial court's ultimate conclusion of law—"that the information provided by the informant . . . was sufficiently corroborated and does supply probable cause to support [the magistrate's] issuance of the search warrant." In what was perhaps an effort to over correct and ensure this Court (the reviewing court) that it was not considering "facts elicited at the [suppression] hearing that [go] beyond the 'four corners of [the] warrant,' " *Brown*, ___ N.C. App. at ___, 787 S.E.2d at 85 (alterations in original) (citation omitted), the trial court has created a confusing order to review. However, despite this fact, we can nevertheless discern that the trial court's findings of fact support its ultimate conclusion of law that probable cause existed to support the magistrate's issuance of a search warrant.

First, the informant told the officer that the package would be shipped to 7156 Old Plantation Drive in Graham, North Carolina. Second, the informant stated "that

the package was coming from the west cost of the United States and that it would be delivered within the next week." This information was corroborated when, one week later, on 15 July 2013, a package sent from the west coast arrived at the post office addressed to 7156 Old Plantation Drive. This level of detail—that a package would arrive from the west coast in a specific time frame and addressed to a specific address—shows that the informant was relying on "something more substantial than a casual rumor." *Benters*, 367 N.C. at 669, 766 S.E.2d at 600 (quoting *State v. Edwards*, 286 N.C. 162, 168, 209 S.E.2d 758, 762 (1974)). As such, the trial court correctly determined that the informant's tip was sufficiently corroborated—even absent the evidence of the canine sniff—so as to provide the magistrate with probable cause to issue the search warrant. Defendant's argument is overruled.

Even assuming *arguendo* the trial court was correct to review the informant under the "anonymous tip standard,"[3] *see Hughes*, 353 N.C. at 205, 539 S.E.2d at 629; *see also Benters*, 367 N.C. at 666, 766 S.E.2d at 598–99 (noting that tips which are less reliable are evaluated "based on the anonymous tip standard," (citation omitted)

[3] We are not necessarily convinced that the trial court's conclusion of law—that the informant's tip is less reliable and should be evaluated based on the "anonymous tip standard," *State v. Hughes*, 353 N.C. 200, 205, 539 S.E.2d 625, 629 (2000)—is correct. As stated previously, *see supra* note 1 and accompanying text, the trial court made specific findings of fact about what was *not* included in the four corners of the search warrant, i.e., the informant's "statement against penal interest," which had those findings been included, they might have bolstered the informant's reliability. *See State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) ("[S]tatements against an informant's penal interests . . . carry greater weight for purposes of establishing reliability." (citations omitted)). However, we need not address this issue further where, as here, we have determined that even when reviewed under the "anonymous tip standard," the informant's tips were sufficiently corroborated to provide probable cause.

and "when a tip is less reliable, law enforcement officers carry a greater burden to corroborate the information" (citation omitted)), the informant's tip nevertheless "provide[d] a basis for [probable cause] [as] it [was] buttressed by sufficient police corroboration," *Benters*, 367 N.C. at 666, 766 S.E.2d at 599 (second alteration in original) (citation omitted).

Accordingly, where law enforcement agents had a reasonable suspicion to seize a package for investigative purposes by removing it from the mail stream, and where the search warrant affidavit was sufficient to supply probable cause, the trial court did not err in denying defendant Cunningham's motion to suppress.

AFFIRMED.

Judge ARROWOOD concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).