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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-650

Filed: 15 May 2018

Forsyth County, No. 15 CRS 54023

STATE OF NORTH CAROLINA

v.

KINDRICK JAROD PAYNE

Appeal by defendant from judgment entered 17 November 2016 by Judge Edwin G. Wilson, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 23 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael Bulleri, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BRYANT, Judge.

Where there was competent evidence to support the trial court's findings of fact and the findings support the conclusion of law, the trial court did not err in denying defendant's motion to suppress. Where the State's witness provided evidence of the methods used to calibrate the scale and to weigh the heroin defendant possessed, the trial court did not commit plain error in admitting the evidence. Where

defendant failed to raise a constitutional challenge to the testimony of the State's witness, we dismiss the argument raised for the first time on appeal.

Defendant Kindrick Jarod Payne was indicted by a Forsyth County grand jury on two counts of trafficking opium or heroin (one count for possession, one count for transporting). Before trial, the State gave notice to defendant that the North Carolina State Crime Laboratory had analyzed the contents of two plastic bags. Each bag was found to contain heroin—a Schedule I narcotic—with a combined net weight of 28.80 (+/- 0.03) grams. Defendant filed a motion to suppress all evidence obtained as a result of the stop, search of his vehicle, and arrest. A hearing on defendant's motion to suppress was heard in Forsyth County Criminal Superior Court on 14 November 2016, the Honorable Edwin G. Wilson, Jr., Judge presiding.

The evidence admitted during the suppression hearing tended to show that on 30 April 2015, Corporal Jennifer Lowman, working with the Forsyth County Sheriff's Department, was contacted by a detective working in Stokes County who provided that a reliable confidential informant (hereinafter "CI") had information about heroin coming into Forsyth County. Cpl. Lowman testified that the CI had also been used in Forsyth County. The CI provided that two black males known as "Ice" and "Wop" were in Winston-Salem, driving an older model white Infiniti, and had approximately two ounces of heroin. Ice was a heroin supplier to another investigation suspect, Zachary Gravely, who lived at 800 Bundaberg Lane. Law enforcement officers drove

down Bundaberg Lane and observed a white Infiniti pull into the garage at 800 Bundaberg Lane. Two people appeared to be in the car. Cpl. Lowman observed part of the vehicle license plate number, CJE. An hour later, the vehicle left the residence and the officers initiated a traffic stop. Cpl. Lowman testified that the vehicle was stopped based on probable cause as provided by the CI. Following the presentation of evidence, the trial court concluded that "looking at all the circumstances, the confidential informant, the corroboration that occurred from their information that heroin was being sold, there was a reasonable articulable suspicion to make the stop." Thus, the trial court denied defendant's motion to suppress.

At trial before jury, the evidence tended to show that law enforcement officers conducted a traffic stop of defendant's vehicle on 30 April 2015. Cpl. Lowman approached the vehicle and requested defendant's license and registration. She also noted the presence of a small child in the backseat. Upon the officer's request, defendant exited the vehicle and a K-9 unit conducted a "free-air sniff" around the vehicle. Standing next to the passenger door, the K-9 unit alerted to the presence of narcotics. A search of the vehicle revealed the presence of a substance the officers believed to be heroin. The State presented testimony from Brittnee Meyers, a forensic scientist working in the drug chemistry section of the State Crime Lab, who was admitted without objection as an expert in forensic chemistry specializing in chemical analysis to determine the presence of controlled substances. Defendant objected to

Meyers' testimony regarding her laboratory report on the substance seized during the search of defendant's vehicle. "The results of my examination were that item one was two plastic bags that were individually analyzed and were each found to contain heroin, [a] schedule one [narcotic], with a total net weight of material being 28.80 plus or minus 0.03 grams." Following the presentation of all the evidence, the jury found defendant guilty of trafficking heroin by possession of 28 grams or more and trafficking heroin by transportation of 28 grams or more. The trial court entered a consolidated judgment in accordance with the jury verdict and sentenced defendant to a term of 225 to 282 months. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) denying his motion to suppress and (II) admitting evidence that the heroin seized weighed 28.80 (+/- 0.03) grams.

I

Defendant argues that the trial court erred by denying his motion to suppress. Defendant contends that the trial court's written order contained a finding of fact that was not supported by the evidence and that the court's conclusion based on that finding was thus not supported. We disagree.

> When reviewing a trial judge's ruling on a motion to suppress, the appellate court determines only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the

> court's conclusions of law. The trial court's findings of fact are binding if such findings are supported by competent evidence in the record, but the trial court's conclusions of law are fully reviewable on appeal.

State v. Cobb, ___ N.C. App. ___, ___, 789 S.E.2d 532, 536 (2016) (citations omitted).

In its written order denying defendant's motion to suppress, the trial court made the following findings of fact:

> 1) Cpl. J.E. Lowman had been a sworn deputy for seven years and had specialized in narcotics for four years at the time of this case. Det. J.D. Webster had been with the Forsyth County Sheriff's Office for six years and also worked in narcotics at the time.
>
> 2) On April 30, 2015 [Cpl.] Lowman and [Det.] Webster acted on a tip from a confidential informant relayed by Det. Wade White of the Stokes County Sheriff's [D]epartment.
>
> 3) Cpl. Lowman and Det. Webster both knew independently that this confidential informant was reliable. They had used this confidential informant to buy heroin in January of 2015 from Shannon Lovette and Zachary Gravely.
>
> 4) The confidential informant gave information that "Ice" and "Wop" were coming to Winston-Salem with two ounces of heroin, driving a white older model Infiniti and would be in the area of Northwest Boulevard at a barbershop near an ABC [s]tore.
>
> 5) The confidential informant had also previously informed [Sgt.] Webster [with the Forsyth County Sheriff's Department] that "Ice" and "Wop" had made sales at 800 Bundaberg Ln, the residence of Zachary Gravely, as well as Todd Nelson's house nearby. The confidential informant also told Det.

> Webster that "Ice" was Gravely's supplier.
>
> 6) After receiving the tip [Cpl.] Lowman and [Det.] Webster first went to the Civilized Barbershop, it was located on Northwest Boulevard near and ABC store. They did not see the vehicle at the barbershop so they went to Todd Nelson's house, another location they had information about but did not see anything.
>
> 7) [Det.] Webster and [Cpl.] Lowman then went to Zachary Gravely's residence at 800 Bundaberg Ln. They saw a white older model Infiniti matching the description given by the informant going into the garage. They also noticed other people at the residence, other activity and other cars in the driveway coming and going.
>
> 8) When the Infiniti left 800 Bundaberg Ln. [Det.] Webester and [Cpl.] Lowman followed it and along with Deputy Rae, . . . initiated a traffic stop on the vehicle.
>
> 9) [Det.] Webster and [Cpl.] Lowman were in an unmarked car behind the Infiniti. [Deputy] Rae was in a marked patrol car behind them. Both cars turned on their blue lights and the vehicle stopped at a gas station.

Based on these findings, the trial court concluded that "[b]ased on the totality of the circumstances, including the reliable confidential informant's tip and the corroboration that occurred from their information that heroin was being sold there, there was a reasonable articulable suspicion to stop the defendant's vehicle."

A. Finding of Fact #5

Defendant contests finding of fact #5.

> The confidential informant had also previously informed [Sgt.] Webster [with the Forsyth County Sheriff's Department] that "Ice" and "Wop" had made sales at 800 Bundaberg Ln, the residence of Zachary Gravely, as well as Todd Nelson's house nearby. The confidential informant also told Det. Webster that "Ice" was Gravely's supplier.

Cpl. Lowman testified that the CI previously informed Det. Webster that Ice supplied heroin to Zachary Gravely (a suspect in another narcotics investigation) who resided at 800 Bundaberg Lane. Moreover, law enforcement had purchased or had someone who purchased heroin from Zachary Gravely and were aware that "they sold heroin at Bundaberg Lane."

> Q. And that this CI had said something about Ice and Zachary Gravely being at 800 Bundaberg; correct?
>
> A. Yes. That Ice was the supplier.

Cpl. Lowman further testified that Nelson was a drug user who lived in "close proximity" on University Parkway.

We hold the evidence presented during the suppression hearing was sufficient to support the trial court's finding of fact number 5. Therefore, on this point, defendant's argument is overruled.

B. Conclusion of Law

Defendant contends that the trial court's conclusion of law contains a mixed question of law and fact not supported by competent evidence: The findings or conclusions stating 1) the CI was reliable, 2) Cpl. Lowman and Det. Webster's

investigation corroborated the CI's tip, and 3) the heroin had been sold somewhere, were not supported by competent evidence.

1) Reliability of the CI

Defendant contends that because Cpl. Lowman referred to the CI as "her" and Det. Webster referred to the CI as "he," the officers could not have known the identity of the CI; thus, the CI could not have been reliable.

Notwithstanding defendant's contention regarding a possible mistake as to the reference to gender, the trial court's finding of fact #3, that both Det. Webster and Cpl. Lowman knew and had recently used the CI to buy heroin, was unchallenged. *See State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) ("Unchallenged findings of fact, [w]here no exceptions have been taken[,] . . . are presumed to be supported by competent evidence and binding on appeal." (alteration in original) (citation omitted)). Therefore, we overrule this portion of defendant's argument.

2) Corroboration of the CI's Tip

Defendant contends that the CI's tip was not corroborated where the trial court never identified what aspects of the CI's tip were corroborated. Defendant argues that most aspects of the CI's tip were not corroborated: the identities of Ice and Wop were never confirmed; there was no indication that Ice or Wop travelled from Greensboro to Winston-Salem; the phone number the CI gave as belonging to Ice or

Wop was never confirmed to belong to a black male going by the name Ice or Wop. Moreover, when defendant was seized, only one black male was inside the Infiniti, an infant child was in the car, no one was identified as Ice or Wop, one ounce of heroin was recovered rather than two, and there is no indication that Ice or Wop were at Gravely's.

We note that when law enforcement officers stopped defendant, it was for the purpose of conducting an investigatory stop. *See State v. Mello*, 200 N.C. App. 437, 444, 684 S.E.2d 483, 488 (2009) ("The only requirement [to conduct an investigatory stop] is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." (citations omitted)).

> When an informant's tip is involved, . . . the search is evaluated by a totality of the circumstances test. [*State v. Collins*, 160 N.C. App. 310, 314–15, 585 S.E.2d 481, 485 (2003)] (establishing totality of the circumstances as the test under North Carolina Constitution); *see also Illinois v. Gates*, 462 U.S. 213, 233, 76 L. Ed. 2d 527, 545 (1983) (setting out the same test for the United States Constitution). Specifically, the reliability of that tip must be weighed. *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209 (2002). "[I]ndicia of reliability may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *Collins*, 160 N.C. App. at 315, 585 S.E.2d at 485. Further, "[t]he fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants." *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) (citing *State v. Hayes*, 291 N.C. 293, 230 S.E.2d 146 (1976)).

State v. Crowell, 204 N.C. App. 362, 365, 693 S.E.2d 370, 373 (2010).

Here, the trial court made the unchallenged finding that the CI was known to be reliable to both Cpl. Lowman and Det. Webster. Both Cpl. Lowman and Det. Webster had used the CI in the past. The CI described and law enforcement officers were able to corroborate the description of the vehicle being used, the time the vehicle would arrive in Winston-Salem, and that the vehicle occupant was a heroin supplier to the resident of 800 Bundaberg Lane. Based on the totality of the circumstances, law enforcement officers had a sufficient basis to form the reasonable suspicion needed to conduct an investigatory stop of the vehicle and allow a K-9 officer to conduct a free-air sniff around the vehicle. *See United States v. Place*, 462 U.S. 696, 707, 77 L. Ed. 2d 110, 121 (1983) (holding that the exposure of luggage in a public place to a trained law enforcement canine did not constitute a "search" within the meaning of the Fourth Amendment); *Mello*, 200 N.C. App. at 444, 684 S.E.2d at 488 ("the only requirement [to conduct an investigatory stop] is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." (citations omitted)). After the K-9 officer alerted to the presence of narcotics, the law enforcement officers had probable cause to search the vehicle for narcotics. *See State v. Smith*, 222 N.C. App. 253, 259, 729 S.E.2d 120, 125, (2012) (acknowledging the precedent that an alert by a drug dog that drugs are present in a vehicle gives rise to the probable cause necessary to conduct a search of the vehicle). As Cpl. Lowman

and Det. Webster were able to corroborate the CI's tip sufficiently to give rise to reasonable suspicion needed to conduct an investigatory stop of defendant's vehicle where a K-9 officer alerted to the presence of narcotics and supplied the probable cause necessary to search the vehicle, we overrule defendant's argument.

3) Heroin

Defendant contends that the trial court's conclusion stating that "heroin was being sold there" fails to identify the place of the sale: the barbershop, where the CI said that Ice and Wop would be found; Gravely's residence at 800 Bundaberg Ln.; or Nelson's residence on University Parkway. And as there was no corroboration of the CI's tip that heroin was being sold in any place, the trial court erred in denying defendant's motion to suppress.

However, the fact that the CI's tip regarding the vehicle being used—a white Infinity sedan—and prior sales being made at 800 Bundaberg Lane were corroborated by the officer's observation of the vehicle at the residence, coupled with activity of cars coming and going from the residence, was sufficient to support the trial court's conclusion that heroin was being sold at the residence. Defendant's arguments are overruled.

II

Defendant argues that the trial court erred by admitting evidence that the heroin weighed 28.80 (+/- 0.03) grams.

During Meyer's testimony, defendant raised a general objection to the proffer of evidence that the heroin in the bags seized during the search of defendant's vehicle weighed 28.80 (0.03 +/-) grams. Now on appeal, defendant contends that (1) the State Crime Laboratory's scale was not properly calibrated, (2) forensic chemist Meyers was not qualified to identify and discuss the error rate of the scale she used at the State Crime Laboratory, and (3) Meyer's error rate testimony violated defendant's confrontation rights. Acknowledging he did not preserve this issue at trial, defendant now argues that the trial court's admission of Meyer's testimony regarding the scale used to weigh the heroin amounted to plain error. We disagree in part and dismiss in part.

Standard of Review

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted).

(1) and (2)

As to defendant's arguments that there was insufficient evidence to establish that the State Crime Laboratory's scale was not properly calibrated and that Forensic

Chemist Meyers was not qualified to identify and discuss the error rate of the scale that she used, we are guided by an observation made by this Court in *State v. Diaz*, 88 N.C. App. 699, 365 S.E.2d 7 (1988), wherein the defendant also challenged the calibration of the scale the State used to measure the weight of marijuana the defendant was charged with trafficking. This Court recognized that

> the State bears the burden of proving beyond a reasonable doubt . . . the weight of the marijuana . . . . N.C. Gen. Stat. Sec. 90-95(h)(1)(d) (1985); *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982). [However,] [u]nlike tests that are prescribed by statute such as the breathalyzer test, the criminal statutes do not provide specific procedures for obtaining weights of contraband. Thus ordinary scales, common procedures, and reasonable steps to ensure accuracy must suffice.

Id. at 701–02, 365 S.E.2d at 9.

Here, Meyers gave the following pertinent testimony:

> Q. Can you tell the Court, tell the members of the jury how you were aware that the balancing mechanism you're using, or the weighing mechanism, is accurate?
>
> A. Yes. Our balances that we use in the laboratory have multiple quality control checks that are performed on them. Every year they get calibrated by an iso-accredited vendor and they come and calibrate the balances, make sure they are working correctly and provide us certificates. Then every month we perform a five-point weight check on the balance using weights that are certified, to make sure that the weights match what the weight is supposed to be and that there's no fluctuation and the balances are working correctly. Then everyday [sic] before I use my balance in the morning I place a one-gram weight on it and write down the weight to make sure it is working correctly.

> . . . .
>
> Q. As a result of your chemical analysis were you able to form an opinion about what the substance that you examined is?
>
> . . . .
>
> A. Based on both item 1A and 1B, I was able to identify heroin, schedule 1 substance, ...
>
> . . . .
>
> [w]ith a combined weight of 28.80 plus or minus .03 grams.

On this review, it is clear the trial court did not commit plain error by admitting Meyers's testimony as to the calibration and error rate of the crime lab scales. Thus, defendants arguments that there was insufficient evidence to establish the calibration of the State Crime Laboratory's scale and that Forensic Chemist Meyers was not qualified to identify and discuss the error rate of the scale that she used are overruled. Further, where defendant's challenge to the trial court's admission of evidence regarding the weight of the heroin was based on his unsuccessful plain error argument regarding the crime lab scales, we find no error in the trial court's ruling.

(3)

Defendant also contends that Meyer's testimony discussing the error rate of the scale violated defendant's confrontation rights.

"Constitutional arguments not raised at trial are not preserved for appellate review." *State v. Roache*, 358 N.C. 243, 291, 595 S.E.2d 381, 412 (2004) (citations omitted). *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]").

As defendant did not raise his argument of a constitutional violation before the trial court, we do not address it for the first time on appeal. Accordingly, this argument is dismissed.

NO ERROR IN PART; DISMISSED IN PART.

Judges BERGER and MURPHY concur.

Report per Rule 30(e).