IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1232

Filed: 3 July 2018

Mecklenburg County, Nos. 16 CRS 205180–81, 19043

STATE OF NORTH CAROLINA

v.

MANNO HESHUMI BEAM

Appeal by defendant from judgment entered 3 May 2017 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

Mannette & Thomas, PLLC, by Kellie Mannette, for defendant.

DIETZ, Judge.

Defendant Manno Heshumi Beam appeals his convictions for felony possession of cocaine, misdemeanor possession of marijuana, and attaining habitual felon status. On appeal, Beam argues that the trial court committed plain error by denying his motion to suppress. As explained below, this argument is procedurally barred on appeal under controlling precedent from our Supreme Court. *State v. Holloway*, 311

N.C. 573, 577–78, 319 S.E.2d 261, 264 (1984); *State v. Creason*, 123 N.C. App. 495, 499, 473 S.E.2d 771, 773 (1996), *aff'd*, 346 N.C. 165, 484 S.E.2d 525 (1997). This Court has no authority to ignore that precedent and we therefore reject Beam's argument. We also dismiss Beam's ineffective assistance of counsel claim and his *pro se* motion for appropriate relief without prejudice to pursue those claims in an appropriate forum.

Facts and Procedural History

On 8 February 2016, two Charlotte-Mecklenburg police officers met with a confidential informant. The informant told the officers that a person known as "Mano" was selling cocaine from a residence located at 2723 Parkway Avenue in Charlotte. The informant stated that he had been to the residence repeatedly over the past month and as recently as 48 hours before speaking to law enforcement. During his visits, the informant observed "Mano" possessing and selling cocaine and possessing firearms. On his most recent visit, the informant observed "Mano" possessing cocaine and a handgun. The same day, the officers took the informant to Parkway Avenue and he identified the residence where he observed the criminal activity.

The next day, Officer Selogy, one of the two officers who had met with the informant, prepared an application for a search warrant for the 2723 Parkway Avenue residence, "one black male [who] goes by 'Mano', approximately 27 years old,

6'0" tall, 180 pounds with short afro hairstyle," and various electronic devices that may be located at the residence. In the warrant application, Officer Selogy identified himself and indicated that he has 28 years of experience as a law enforcement officer, including years dedicated to drug law enforcement with extensive training and use of informants. The affidavit detailed the information the informant provided to the officers the day before and also detailed Officer Selogy's past experience with the informant:

> I have known the CRI since 2014. During this time frame the CRI has given me information that has led to numerous drug related arrests and search warrants. The CRI has given me information on individuals and locations where drugs are sold . . . or used. I have proven this information reliable by my own independent investigations. The CRI knows what drugs look like and how they are packaged for sale on the streets of Charlotte, NC.

Based on the warrant application, a magistrate found probable cause and issued the warrant. Later the same day, officers executed the warrant at 2723 Parkway Avenue. No one responded to the officers' knock-and-announce so, after a waiting period, an officer forcibly opened the door. Upon entering, officers observed a male, later identified as Defendant Manno Beam, in the living room. When officers were securing Beam, an officer observed a baggie of marijuana fall out of Beam's pants. An officer conducted a pat-down of Beam and felt a bulge in the area of Beam's buttocks. The officer then found another baggie lodged between Beam's buttocks, which contained 2.59 grams of cocaine. The officers then arrested Beam.

On 27 June 2016, the State indicted Beam for possession of marijuana, possession with intent to sell or deliver cocaine, and attaining habitual felon status. On 26 April 2017, Beam moved to suppress the evidence recovered during the execution of the search warrant. By law, a motion to suppress "must be accompanied by an affidavit containing facts supporting the motion." N.C. Gen. Stat. § 15A-977(a). Beam's motion was not accompanied by an affidavit. In the motion, Beam argued that the search warrant lacked probable cause because "the [search warrant] application was supported by material misrepresentations provided by one unreliable confidential informant."

The trial court heard the motion to suppress on 1 May 2017. The court denied the motion, explaining that the facts in the affidavit were sufficient to establish the informant's reliability and to establish probable cause. The court stated that it was unnecessary to make written findings of fact because "in this scenario I haven't taken really any evidence."

At trial, Beam did not object to the introduction of the drug evidence he had sought to suppress. On 3 May 2017, the jury convicted Beam of felony possession of cocaine, misdemeanor possession of marijuana, and attaining habitual felon status. The trial court sentenced Beam to 34 to 53 months in prison. Beam timely appealed.

Analysis

I. Challenge to Denial of Motion to Suppress

Beam first argues that the trial court committed plain error by denying his motion to suppress because the search warrant affidavit was vague, nonspecific, and failed to establish that the informant was reliable. As explained below, we cannot reach this argument because we are bound by precedent holding that Beam's argument is procedurally barred.

In North Carolina, a motion to suppress evidence in a criminal case "must be accompanied by an affidavit containing facts supporting the motion." N.C. Gen. Stat. § 15A–977(a); *State v. Holloway*, 311 N.C. 573, 577, 319 S.E.2d 261, 264 (1984). In *Holloway*, our Supreme Court held that "[b]ecause the defendant failed to file an affidavit to support the general information and belief alleged in his motion, we hold that he waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant." *Id.* at 577–78, 319 S.E.2d at 264.

Importantly, the Supreme Court in *Holloway* held that failure to attach a supporting affidavit waives the right to challenge the denial of a suppression motion on appeal, regardless of whether that issue was litigated in the trial court: "We have held that defendants by failing to comply with statutory requirements set forth in N.C.G.S. 15A–977 waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds." *Id.* at 578, 319 S.E.2d at 264. The Supreme

Court explained that "[t]he State's failure to object to the form of the motion affects neither that waiver nor the authority statutorily vested in the trial court to deny summarily the motion to suppress when the defendant fails to comply with the procedural requirements of Article 53." *Id.*

The Court reaffirmed the *Holloway* rule in *State v. Creason*, 346 N.C. 165, 484 S.E.2d 525 (1997), *summarily affirming* 123 N.C. App. 495, 499, 473 S.E.2d 771, 773 (1996). In *Creason*, this Court held that the defendant "waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant" because he "failed to file an affidavit to support the motion to suppress." 123 N.C. App. at 499, 473 S.E.2d at 773. As a result, the defendant "waived his right to raise on appeal the question of sufficiency of the affidavit and search warrant" and thus "the trial court committed no error" in denying the defendant's motion to suppress. *Id.*

This case is indistinguishable from *Creason*. Beam moved to suppress, arguing that the search warrant affidavit was insufficient to establish probable cause, but did not file an affidavit in support of the motion. We acknowledge that the Supreme Court's holding in *Holloway* was later criticized by a federal district court in a habeas proceeding. *Holloway v. Woodard*, 655 F. Supp. 1245, 1249 (W.D.N.C. 1987). But our Supreme Court reaffirmed—indeed arguably broadened—the *Holloway* holding in *Creason*. We have no authority to ignore controlling precedent from our Supreme

Court simply because the result seems harsh. Because Beam's argument is procedurally barred under established Supreme Court precedent, we must find no error in the trial court's denial of the motion. *State v. Jones*, __ N.C. App. __, __, 802 S.E.2d 518, 523 (2017).

Beam also asks this Court to invoke Rule 2 of the Rules of Appellate Procedure, which permits this Court to suspend the issue preservation rules to prevent "manifest injustice." But Beam has not asserted any specific argument to satisfy the high bar for invocation of Rule 2, as our case law requires. *State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 370 (2017). Moreover, we are not convinced that Rule 2 would permit this Court to ignore the Supreme Court's holdings in *Holloway* and *Creason*, which were based on procedural rules created by statute, not by the Rules of Appellate Procedure.

Although we are unable to reach the merits of Beam's argument, we note that his argument appears meritless. "Probable cause can be established through the use of informants." *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209 (2002). When relying on an informant, "probable cause is determined using a 'totality-of-the circumstances' analysis which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Id.* "A known informant's information may establish probable cause based on a reliable track record, or an anonymous informant's information may provide probable

cause if the caller's information can be independently verified." *Id.* "The indicia of reliability of an informant's tip 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 independently corroborated by the police." *State v. Brown*, 199 N.C. App. 253, 258, 681 S.E.2d 460, 463 (2009). "The 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).

Here, the officer described his history with the particular informant and explained that the officer independently had confirmed the reliability of prior information obtained from the informant. Moreover, the officer stated that information from this informant previously had led to arrests. Under our precedent, this information was sufficient to establish the reliability of the informant and support the magistrate's probable cause determination.

Accordingly, we find no error in the trial court's denial of Beam's motion to suppress.

II. Ineffective Assistance of Counsel Claim

Beam next argues that his counsel was constitutionally ineffective for failing to include an affidavit to support the motion to suppress. We decline to address this argument because it is not suited for review on direct appeal.

The merits of an ineffective assistance of counsel claim will be decided on direct appeal only "when the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004). Here, nothing in the record indicates *why* Beam's counsel did not include an affidavit with the motion to suppress. Although it could have resulted from inadvertence or a misunderstanding of the statutory requirement, there may have been other reasons why counsel did not attest to the facts supporting the motion, such as concern about whether those facts were accurate. As our Supreme Court recently emphasized, these unanswered questions about counsel's conduct are "not something which can be hypothesized" by an appellate court. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). We therefore dismiss Beam's ineffective assistance of counsel claim without prejudice to pursue it through a motion for appropriate relief in the trial court. *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

III. *Pro Se* Motion for Appropriate Relief

In addition to the briefs filed by his appellate counsel, Beam filed a *pro se* motion for appropriate relief challenging the constitutionality of the habitual felon statute and the jurisdiction of the trial court to indict him under the habitual felon statute. When an appeal is pending in this Court, a defendant may file a motion for appropriate relief directly with the Court. N.C. Gen. Stat. § 15A-1418(a). But this rule does not override the general principle that, when a defendant is represented by

counsel, he must act through his counsel. "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *State v. Grooms*, 353 N.C. 50, 61, 540 S.E.2d 713, 721 (2000). Because Beam is represented by counsel on appeal, we dismiss Beam's *pro se* motion for appropriate relief without prejudice.

Conclusion

For the reasons discussed above, we find no error in the trial court's denial of Beam's motion to suppress and dismiss Beam's ineffective assistance of counsel claim and his *pro se* motion for appropriate relief without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).