

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1187

Filed: 20 August 2019

Carteret County, No. 17 CRS 51572

STATE OF NORTH CAROLINA

v.

NICHOLAS OMAR BAILEY, Defendant.

Appeal by defendant from judgment entered 10 July 2018 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 11 April 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.*

*Richard Croutharmel for defendant-appellant.*

BERGER, Judge.

Nicholas Omar Bailey (“Defendant”) appeals from a judgment entered upon his guilty plea to trafficking in cocaine, following the trial court’s denial of his motion to suppress. Because the magistrate had a substantial basis to find probable cause, we affirm the trial court’s order denying Defendant’s motion to suppress.

Factual and Procedural Background

On April 25, 2017, Detective Dallas Rose (“Detective Rose”) with the Carteret County Sheriff’s Department applied to a magistrate for a warrant to search the

residence belonging to Brittany Tommasone (“Tommasone”) and James White (“White”) located at 146 E. Chatham Street, Apartment #1, Newport, North Carolina; any individual located at that location during the execution of the search warrant; and any vehicle at that location, including a blue Jeep Compass. Detective Rose, after being duly sworn, stated in his application that there was probable cause to believe “[h]eroin, scales, paraphernalia, packaging equipment, videos, photos, ledgers and documents” related to illegal narcotics would be found at the named location.

Detective Rose provided information concerning his training and experience as a law enforcement officer for twelve years. Specifically, Detective Rose swore that he

has been a Deputy Sheriff for 9 years and has been a Police K-9 Handler for 6 years with the Carteret County Sheriff's Office. The affiant also was a Police Officer for the Morehead City Police Department for 3 years. The affiant is currently assigned as a Detective with the Carteret County Sheriff's Office Narcotics Unit. The Affiant has been employed with the Carteret County Sheriff's Office since January 2006. The Affiant has received training in the field of Narcotics Investigations and Criminal Interdiction Enforcement from Carteret and Craven Community College and other private and public training conferences and seminars. The Affiant has conducted and assisted in numerous criminal and narcotic investigations leading to arrests and convictions in [ ] trafficking different types of illegal narcotics, as well as crimes against persons, property crimes, both felony and misdemeanor.

Detective Rose then provided a statement of facts establishing probable cause as follows:<sup>1</sup>

On 04/25/2017 at approximately 5:35 pm Detectives with the Carteret County Sheriff's Office, Jones County Sheriff's Office, and Havelock Police Department were conducting visual surveillance of a parking lot area located at 900 Old Fashioned Way in Newport, North Carolina. The name of the Apartment Complex is Compass Landing Apartments. During surveillance of the parking lot area Affiant of the Carteret County Sheriff's Office observed a blue in color Jeep Compass bearing a North Carolina Registration of "BRITCP" arrive in the parking lot area and park.

Affiant observed the occupants of the vehicle to be Brittany Elizabeth Tommasone as the driver and James Edward White Jr. as the front seat passenger of the vehicle. Affiant is familiar with Brittany Tommasone and James White Jr. from past dealings related to drug activity[,] including the sale of [i]llegal [n]arcotics. Affiant also had recent knowledge from 04/24/2017 that Britt[an]y Tommasone and James White Jr. were not residing at Compass Landing Apartments and have established a residence at 146. E. Chatham Street in Newport, North Carolina according to Brittany Tommaso[n]e and James White Jr.

Once the vehicle parked, Affiant observed a white female exit the passenger seat of a white in color Mercury Milan bearing a North Carolina Registration of "DCP-1384." Once the white female exited the vehicle the female walked and entered the blue in color Jeep. After approximately thirty seconds the same female that recently entered the blue in color [J]eep exited the blue in color [J]eep and walked back to the original vehicle the female subject exited from which was the white in color Mercury passenger vehicle. Once the female subject entered the white in color Mercury passenger vehicle the

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<sup>1</sup> Text has been modified to include paragraph breaks for ease of reading.

vehicle began exiting the parking lot area along with the blue Jeep Compass that was occupied by Brittany Tommasone and James White Jr. There were no other occupants in the Jeep that were observed by Affiant. In Affiant's training and experience the actions observed by the occupants of the two vehicles were consistent with that of a [d]rug [d]eal.

The facts that support the observation are the secluded location where the subjects met, previous knowledge of James White Jr. and Brittany Tommasone as participants in the active selling of illegal [n]arcotics, drug complaints the Carteret County Sheriff's Office had received about James White Jr. and Britt[an]y Tommaso[n]e, and the duration of time spent inside of the Jeep once the female subject entered the Jeep from the time the female subject exited the Jeep. The two vehicles were traveling at a high rate of speed as the two vehicles were trailering one another out of the parking lot area.

Once exiting the parking lot area both vehicles made a left hand turn near the Dollar General and began traveling towards US-70. Once approaching US-70 both vehicles turned right onto US-70 and began traveling east bound on US-70 still trailering one another. As both vehicles approached the intersection of US-70 and 9 Foot Road both vehicles merged into the left hand turning lane which merges from US-70 to Howard Blvd. Once the directional signal turned green the Jeep continued onto Howard Blvd. as the white in color Mercury made a U-Turn and began traveling west bound on US-70 towards Havelock.

Affiant followed the white in color Mercury car on US-70 into Havelock where the vehicle made several lane changes without giving a turn signal. Detective Corey radioed to Affiant stating that the blue in color Jeep had driven back to 146 E. Chatham Street [A]partment 1[,] and that both occupants had exited the vehicle and entered the residence.

Detective Moots had caught up to Affiant by this time and also observed several traffic violations made by the white Mercury vehicle and activated his emergency

equipment on US-70 near McDonald's pva. The Mercury put on brakes as Detective Moots had activated his emergency equipment and slowly began to stop but continued rolling forward. Once the vehicle came to a complete stop on Webb Blvd just west of McDonald[']s Restaurant[,] Detective Moots, Henderson[,] and Affiant approached the vehicle and Affiant came into contact with the passenger later identified as Autumn Lynn Taylor as the front seat passenger and Allen Dellacava as the driver of the vehicle.

Affiant requested Autumn Taylor to exit the vehicle in which she complied. Once Autumn Taylor exited the vehicle Affiant asked who she had just met with in which Autumn Taylor replied James White. Affiant then asked Autumn Taylor if she had just recently purchased Heroin from James White due to the recent observations observed in the Compass Landing parking lot area. Autumn Taylor responded that she purchased a twenty dollar bag of Heroin and snorted while traveling down the road and once finished she threw the Heroin baggie out the window. Detective Henderson was speaking with Dellacava during this time along with Detective Moots as Dellacava had already been requested to exit the vehicle and was explained the reasoning for the stop. Verbal consent was given by Dellacava to search Dellacava's person and Dellacava's vehicle in the presence of Detective Moots and Detective Henderson. During the duration of search of the vehicle[,] a Springfield XD 45 Caliber was located in the glove compartment area of the vehicle and was secured. After a short roadside inquiry[,] both occupants were released with strong reprimand and warning from Detective Henderson. Detective Henderson also informed Dellacava of the concealed weapon violation and the custody of the handgun was given back to Dellacava.

The search warrant was issued, and the search was conducted that same night.

Tommasone, White, and Defendant were in the residence at that time. More than 41

grams of cocaine were seized from Defendant, along with drug paraphernalia, and approximately \$900 in US Currency.

Defendant was indicted on October 9, 2017 for trafficking in cocaine. On July 3, 2018, Defendant filed a motion to suppress in which he argued the facts alleged in the affidavit were insufficient to support a finding of probable cause to obtain a search warrant for the Chatham Street Apartment. The trial court denied Defendant's motion to suppress, concluding the facts alleged in the affidavit were sufficient to support a finding of probable cause to issue a search warrant for the Chatham Street residence.

Defendant pleaded guilty to trafficking in cocaine while preserving his right to appeal the trial court's denial of his motion to suppress. The trial court sentenced Defendant to 35 to 51 months in prison and ordered him to pay a \$50,000.00 fine. Defendant appeals, arguing that the trial court erred in denying his motion to suppress. Specifically, Defendant contends that the sworn affidavit provided by Detective Rose did not provide probable cause to issue the search warrant. We disagree.

#### Standard of Review

A reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed. Our Supreme Court has stated, "the applicable test is whether, given all the circumstances set forth in the affidavit before the

magistrate, . . . there is a fair probability that contraband . . . will be found in a particular place.”

*State v. Frederick*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 814 S.E.2d 855, 858 (*purgandum*), *aff’d*, \_\_\_ N.C. \_\_\_, 819 S.E.2d 346 (2018).

Analysis

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Probable cause does not require absolute certainty. *State v. Campbell*, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972). Rather, “[p]robable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender.” *Id.* at 128-29, 191 S.E.2d at 755 (citation omitted).

However, the allegations made in an affidavit supporting issuance of a search warrant requires only that the magistrate determine “there is a ‘fair probability’ that contraband will be found in the place being searched.” *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citations omitted). “The quantum of proof required to establish probable cause is different than that required to establish guilt.” *Frederick*, \_\_\_ N.C. App. at \_\_\_, 814 S.E.2d at 858 (citing *Draper v. United States*, 358

U.S. 307, 311-12 (1959)). “Probable cause requires . . . only *a probability or substantial chance* of criminal activity.” *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (citation and quotation marks omitted). Probable cause is a flexible standard that is based upon the totality of the circumstances. *State v. Zuniga*, 312 N.C. 251, 260-62, 322 S.E.2d 140, 146 (1984).

Moreover, determination of probable cause permits a “magistrate to draw ‘reasonable inferences’ from the evidence . . . .” *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824 (citation omitted). An inference of criminal activity is to be based upon “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). The facts alleged in the affidavit need only “fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched . . . .” *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016).

When reviewing an affidavit for a search warrant, a reviewing court should accord “great deference . . . [to] a magistrate’s determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review.” *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citing *Gates*, 462 U.S. at 236). The role of this court “is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Arrington*, 311 N.C. at 638,



319 S.E.2d at 258 (alteration in original) (quoting *Gates*, 462 U.S. at 238). Reviewing “courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.” *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35 (alterations in original) (quoting *Gates*, 462 U.S. at 236). Moreover, “[t]he resolution of *doubtful or marginal cases* in this area should be largely determined by the preference to be accorded to warrants.” *Id.*, 400 S.E.2d at 435 (emphasis added).

Here, the statements alleged in the affidavit yield more than a fair probability that officers executing a search warrant would find evidence of an illegal drug transaction or illegal drug activity at the Chatham Street address. Detective Rose’s affidavit stated that the officers observed the drug transaction in which Taylor purchased heroin from White. Taylor was then stopped by Detective Rose shortly after leaving the scene of the drug transaction. When asked, Taylor confirmed to Detective Rose that she had purchased “a twenty dollar bag of heroin” from White. At this point, officers had witnessed what they believed was a crime involving the sale of illegal drugs, and confirmed that a sale of heroin had occurred through Taylor’s statement.

At the same time, Detective Corey followed the blue Jeep Compass to the residence at 146 E. Chatham Street. Based on the chronology set forth in the affidavit, before the traffic stop was initiated against Taylor, Detective Corey radioed

Detective Rose and informed him that he observed Tommasone and White go into the apartment at that address.

From this information in the affidavit, the magistrate could reasonably infer that Tommasone and White traveled directly from the scene of the drug transaction to the Chatham Street residence.<sup>2</sup> In addition, it is reasonable to infer that Tommasone and White went to the residence with the twenty dollars Taylor admitted she used to obtain the heroin. This money was evidence of the drug transaction, and the magistrate could reasonably infer that this evidence would be present at the Chatham Street address. Thus, contrary to our dissenting colleague's assertion, there was a direct connection between the crime observed and the location to be searched.

Even if we were to assume that money obtained from an illegal drug transaction was not evidence of a crime, there still existed sufficient inferences to establish a nexus. *See Allman*, 369 N.C. at 297, 794 S.E.2d at 305 (nexus may be inferred to support a finding of probable cause even absent evidence “directly link[ing] defendant’s home with evidence of drug dealing.”).

Here, it would also be reasonable to infer that the two drug dealers whom investigators had just observed sell heroin, and who were known by detectives to be

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<sup>2</sup> The trial court found in its order denying the motion to suppress that Detective Corey followed the blue Jeep Compass “directly to the residence at 146 E. Chatham Street, Newport.”

involved in drug activity, would have other additional drugs or paraphernalia stored in their residence or vehicle. The practical considerations involved in selling quantities of heroin require that the product be cut, weighed, and packaged at some location. Common sense suggests that the blue Jeep Compass is not the ideal location for such activity, and that a residence is where this type of preparation would take place. Moreover, it is highly unlikely that individuals who are involved in the sale of illegal drugs would trust others in the business to hold their product. Even though not stated in the affidavit, it is also common sense “that drug dealers typically keep evidence of drug dealing at their homes.” *Allman*, 369 N.C. at 295-96, 794 S.E.2d at 304. The dissent’s assertion that there is no nexus here ignores the totality of the evidence and the inferences which could be reasonably drawn from the facts set forth in the affidavit.

Thus, there was a fair probability that evidence of the illegal drug transaction with Taylor, or other contraband, would be found at the Chatham Street address. There is no question that the affidavit here could have been more specific and provided more facts. But, the dissent would ignore the “great deference” that should be afforded to the magistrate’s determination in favor of “after-the-fact scrutiny” in the form of *de novo* review. This is not permitted. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (citing *Gates*, 462 U.S. at 236).

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*Opinion of the Court*

Here, the facts alleged in Detective Rose's affidavit, when taken together with the reasonable inferences that could be drawn therefrom, yield a fair probability that the officers would find contraband or evidence at the drug dealers' residence. Claiming there is no "link" between the drug deal and the Chatman Street Apartment runs counter to a " 'practical, common-sense decision,' based on the totality of circumstances . . . ." *McKinney*, 268 N.C. at 164, 775 S.E.2d at 824 (quoting *Gates*, 462 U.S. at 238).

The magistrate had a substantial basis for determining that probable cause existed. The trial court's order denying Defendant's motion to suppress should be affirmed.

AFFIRMED.

Judge DIETZ concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting.

In that the search warrant application in the instant case sought to search Defendant’s home based solely upon an allegation that his two roommates had recently sold narcotics from a different location, I agree with Defendant that this case is indistinguishable from *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972). Because that crime had been completed—and the evidence for its prosecution already obtained—and because the search warrant application did not allege that narcotics had otherwise been possessed or sold in or about the premises, I believe *Campbell* compels this Court to hold that the magistrate did not have a substantial basis for concluding that probable cause existed to search the home. Accordingly, I respectfully dissent, and would reverse the trial court’s order denying Defendant’s motion to suppress.

On 25 April 2017, officers with the Carteret County Sheriff’s Office applied for a warrant to search Defendant’s three-bedroom apartment located on E. Chatham Street in Newport (“Defendant’s Apartment” or “the Chatham Street Apartment”). Defendant was not named as the target of the search warrant application, although he was the only individual listed on the lease for the Chatham Street Apartment. The search warrant application instead sought to search the Chatham Street Apartment for “violations of possession of illegal narcotics” by Brittany Tommasone and James White, Defendant’s roommates at the time.

As the majority notes, the facts alleged in the search warrant application to support a finding of probable cause to search the Chatham Street Apartment were (1) that Defendant's roommates were seen selling narcotics to an individual at a different apartment complex, and (2) that they thereafter returned to the Chatham Street Apartment.

In his motion to suppress, Defendant argued that these allegations were insufficient to support a finding of probable cause that evidence of narcotics would also be found inside the *Chatham Street Apartment*. Specifically, Defendant noted that the affidavit "included no information indicating that drugs had been possessed in or sold from [the Chatham Street Apartment], and failed to establish a nexus between his residence and the narcotics being sought." I agree that these circumstances warrant reversal of the trial court's denial of Defendant's motion to suppress.

"Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place." *United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011) (quotation marks omitted); accord *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016). Thus, in seeking authorization to search a particular location for contraband, the affidavit must include allegations of some facts or circumstances establishing a nexus between the identified premises and the

presence of contraband; an affidavit that “implicates [the] premises *solely as a conclusion of the affiant*” is insufficient. *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. “The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 535 (1978). Neither our Supreme Court nor the United States Supreme Court has “approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched.” *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757.

In *State v. Campbell*, officers applied for a warrant to search a home upon obtaining arrest warrants for its residents after they had each sold narcotics to an undercover officer. *Id.* at 130, 191 S.E.2d at 756. The affidavit, however, provided no information from which it could be gleaned that those sales were, in fact, conducted from within the home, nor did the affidavit otherwise indicate “that narcotic drugs were ever possessed or sold in or about the dwelling.” *Id.* at 131, 191 S.E.2d at 757. The affidavit therefore “implicate[d] those premises *solely as a conclusion of the affiant*,” having “detail[ed] no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described*.” *Id.* Quite simply, an inference that narcotics would be found in the premises did “not reasonably arise” from the mere fact that it was the known residence of narcotics

dealers. *Id.* Accordingly, our Supreme Court reversed the trial court’s denial of the defendant’s motion to suppress, in that the search warrant application did not detail “any underlying circumstances . . . from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling.” *Id.*

I am unable to discern any factor which practically distinguishes the case at bar from *Campbell*,<sup>3</sup> which the majority altogether neglects to discuss.

Just as in *Campbell*, the affidavit in the instant case “details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described.*” *Id.* The affidavit here did not contain “any statement that narcotic drugs were ever possessed or sold in or about” the residence. *Id.* Moreover, it is important to note that the officers had already obtained the evidence of the crime for which the search warrant was sought; no facts or circumstances were alleged that suggested the presence of additional narcotics within the Chatham Street Apartment, such as evidence that Defendant’s roommates were observed carrying contraband or other related items from their vehicle into the residence following their alleged street-sale. *See id.* at 132, 191 S.E.2d at 757 (“[T]he United States Supreme Court [has] said that there must be ‘reasonable grounds at

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<sup>3</sup> It is of no meaningful distinction that the suspects in *Campbell* were *known* to live in the house identified in the search warrant application, whereas the detectives here observed the suspects “go into the apartment at that address.” *Majority* at 10. (Emphasis added).



the time of issuance of the warrant for the belief that the law was being violated *on the premises to be searched.*’ ” (alterations and citation omitted)). Also absent from the affidavit was any insight from the affiant’s “training and experience” which might have helped to link the single occurrence of a narcotics transaction with the presence of additional narcotics inside the suspected dealer’s home, in light of other suspicious factors. *See Allman*, 369 N.C. at 295-97, 794 S.E.2d at 304-05 (distinguishing the facts from *Campbell* because the search warrant application in *Allman* included both insight from the affiant’s training and experience “that drug dealers typically keep evidence of drug dealing at their homes,” *as well as the fact* that the suspect had initially “lied to [the officer] about his true address”).

The affidavit instead purported to connect Defendant’s Apartment to suspected criminal activity on the basis of Defendant’s roommates having returned there after allegedly selling narcotics to an individual from their vehicle at a different apartment complex. *See Campbell*, 282 N.C. at 132, 191 S.E.2d at 757 (explaining the “uniformly held” understanding that observing an individual selling narcotics does “not in any way link such activities to [his] apartment,” and is therefore insufficient “to establish probable cause for a search of his apartment”). Having only identified Defendant’s Apartment as the current residence of two suspected narcotics dealers, the affidavit thus sought to implicate the residence in the harboring of narcotics “*solely as a*

*conclusion of the affiant.” Id. at 131, 191 S.E.2d at 757. As our Supreme Court has explained:*

Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant’s or an informer’s belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant’s mere conclusion.

*Id. at 130-31, 191 S.E.2d at 756 (quotation marks and citations omitted).*

Accordingly, I would necessarily hold that the search warrant application in the instant case failed to provide the issuing magistrate with a substantial basis from which to conclude that the proposed search of Defendant’s Apartment would reveal the presence of illegal narcotics. I would therefore reverse the trial court’s order denying Defendant’s motion to suppress the evidence recovered from that search and the judgment entered upon his guilty plea.<sup>4</sup>

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<sup>4</sup> Defendant also notes that the written judgment entered in the instant case indicates that he pleaded guilty to a Class F offense, whereas the transcript of plea and Defendant’s sentence reveal that the trafficking in cocaine offense to which he pleaded guilty was, in fact, a Class G offense. However, because I would reverse the judgment entered against Defendant upon reversing the order denying his motion to suppress, I do not believe it necessary to further remand the case to the trial court for correction of this clerical error.