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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-123

Filed: 4 February 2020

Craven County, Nos. 15 CRS 52922, 16 CRS 387, 17 CRS 680

STATE OF NORTH CAROLINA

v.

KAREEN RAMEL ELLIOTT

Appeal by defendant from judgments entered 20 February 2018 by Judge John E. Nobles Jr. in Craven County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant.

DIETZ, Judge.

A law enforcement officer stopped and frisked Kareen Ramel Elliott, a known drug dealer, after approaching Elliott and smelling marijuana. The officer found cocaine and marijuana during the pat-down. Elliott ultimately was convicted of drug possession offenses.

On appeal, Elliott challenges the trial court's denial of his counsel's motion to withdraw; the denial of his motion to suppress evidence seized from the pat-down; and the denial of his motion to suppress based on the sufficiency of the warrant application to search his two cell phones.

As explained below, the trial court properly denied counsel's motion to withdraw after an appropriate colloquy with Elliott; the arresting officer had sufficient reasonable suspicion to frisk Elliott for weapons; and the warrant application and accompanying affidavit provided a substantial basis for a finding of probable cause. We therefore find no error in the trial court's judgments.

Facts and Procedural History

On 28 August 2015, local law enforcement in Havelock were assisting probation officers with searches of probationers and parolees. Detective Philip Kilgore and his team were looking for a probationer living in Kelly Park Apartments, where Detective Kilgore had previously made between ten to fifteen arrests for drug-related crimes.

When Detective Kilgore drove up to the apartment complex, he saw Defendant Kareen Elliott at the entrance. Kilgore knew of Elliott's reputation as a local drug dealer and member of the United Blood Nation, a street gang that sells illegal drugs. As Kilgore got out of his car, he saw two more men standing under a breezeway at the front entrance. Kilgore smelled a strong odor of marijuana coming from that area.

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Kilgore walked toward the breezeway, wearing a tactical vest with the word “Police” on the front and with his police badge clearly visible. Elliott looked over his shoulder, saw Kilgore, and “quickly” walked away. Kilgore called out to Elliott multiple times, telling him to stop, that Kilgore needed to speak to him, and that he was “not free to leave.” Elliott replied that he “had just smoked.” Elliott continued to walk away from Kilgore until both walked into a corner of the building. Kilgore ordered Elliott to place his hands on the wall and conducted a pat-down “[f]or weapons, for my safety and the safety of the other officers.”

During the pat-down, Kilgore found a bag of marijuana buds, a plastic bag of white powder resembling cocaine, \$100.00 in cash, and two cell phones on Elliott’s person. Kilgore later testified that the cash was folded together in a way that was “indicative of multiple drug transactions.” Kilgore arrested Elliott. Laboratory testing later confirmed that Elliott was carrying 13.38 grams of marijuana and 2 grams of cocaine.

After the arrest, Kilgore applied for a warrant to search Elliott’s two cell phones. The warrant was issued and law enforcement recovered data from one of the phones that included text messages Elliott sent to others discussing the sale of illegal drugs.

On 19 February 2018, Elliott was tried on charges of possession with intent to sell or deliver marijuana and cocaine. Before trial, Elliott moved to suppress evidence

from his pat-down and the search of his cellphone. After a hearing, the trial court denied both motions. At trial, the jury found Elliott guilty of both charges. Elliott then pleaded guilty to attaining habitual felon status. The court sentenced Elliott to consecutive sentences of 111 to 146 months and 44 to 65 months in prison. Elliott appealed.

Analysis

I. Defense counsel’s motion to withdraw

Before trial, Elliott’s attorney filed a motion to withdraw, stating only that Elliott asked him to do so because they had “reached an impasse.” The trial court questioned Elliott directly about the basis for the motion and then denied it. Elliott now argues that the trial court erred by failing to conduct a more thorough inquiry before denying the motion. We disagree.

A trial court may grant a motion to withdraw as counsel “upon a showing of good cause.” N.C. Gen. Stat. § 15A-144. Whether counsel may withdraw is a matter left to the trial court’s sound discretion, and appellate courts will not second-guess the trial court’s ruling absent an abuse of that discretion. *State v. Curry*, 256 N.C. App. 86, 95, 805 S.E.2d 552, 557–58 (2017).

Before ruling on a motion to withdraw, the trial court must “inquire into defendant’s reasons for wanting to discharge his attorney[]” and “determine whether those reasons [are] legally sufficient.” *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d

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788, 797 (1981). In doing so, the trial court need only satisfy itself that the “present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective.” *State v. Thacker*, 301 N.C. 348, 353, 271 S.E.2d 252, 256 (1980).

Here, the trial court heard the motion to withdraw at the beginning of Elliott’s trial, where the following colloquy occurred:

COURT: Yes, sir?

[. . .]

DEFENDANT: This is the whole situation. I do not wish to waste the Court’s time or money in pursuing this trial. It’s a simple situation, to me, that deserves a simple conclusion. But it’s like I’m being forced to – to obviously – a compromised position, you understand? In that the State nor the arresting officer neither chose – or choose to charge me with the appropriate charge for alleged trafficking. Which is forcing me to do this unnecessary – trial. But I have no rebuttal in giving the State a conviction, which they directly seek, but it’s not gonna be for that principal charge of sell and deliver, ’cause I had no intent to sell nor deliver.

[. . .]

DEFENDANT: Like I said, you know, I had no intent to sell and deliver.

COURT: Well, we’re here to try to your case.

DEFENDANT: I been stressing this to my attorney the whole time, that there was no intent – I was trying to get the intent –

COURT: Well, I mean, try your case.

DEFENDANT: Huh?

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COURT: Why don't we just try your case?

DEFENDANT: I mean he's not – he's not fighting for me. You understand? He's not fighting for me. I'm doing more fighting for myself than what he's doing. Only seen him two times the whole time since I've been – since he's been on this case. The second time was two days before the first trial date. You understand?

[. . .]

COURT: Well, we're gonna try your case this morning. You want to try it with him or without him?

DEFENDANT: I mean, I'm forced to try it with him.

COURT: All right. Light of that, your motion to withdraw is denied.

Elliott acknowledges on appeal that, in essence, his discussion with the trial court expressed two separate grounds for relieving his trial counsel and appointing new counsel: (1) that Elliott disagreed with his attorney over “strategic and tactical matters”; and (2) that Elliott’s counsel refused to assist him in pleading guilty to certain lesser offenses and avoiding an “unnecessary trial” on the more serious offenses involving “intent to sell or deliver.”

With respect to trial strategy, the complaints directed at Elliott’s counsel (many of Elliott’s complaints stemmed from prosecutorial charging decisions outside his counsel’s control) concern Elliott’s perception that his counsel was not “fighting” hard enough for him and was not focused on his case. These complaints are not grounds for granting an appointed attorney’s motion to withdraw. *Hutchins*, 303 N.C.

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at 335, 279 S.E.2d at 797. Accordingly, the trial court was not required to delve further into the reasons Elliott and his counsel had reached a purported “impasse” on this basis. The court’s colloquy with Elliott was sufficient to confirm that these disagreements did not stem from any issues requiring counsel to withdraw as a matter of law. *State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d 335, 338 (1982).

With respect to the possibility of avoiding an “unnecessary trial” by pleading guilty to lesser offenses not involving the “intent to sell or deliver,” neither Elliott’s statement to the court nor the record support this argument. First, in the context of his entire statement, Elliott’s reference to his desire to avoid an unnecessary trial indicates that it was *the State*, not his counsel, who insisted on a trial involving more serious charges. Elliott explained that “the State” and the arresting officer had not charged him with the “appropriate charge.” He then arguably suggests that he is willing to plead guilty to a lesser charge (“I have no rebuttal in giving the State a conviction”) but explains that he will not plead guilty to the more serious charges of possession with intent to sell or deliver—the charges the State chose to pursue.

Nowhere in this discussion with the court did Elliott either state or imply that his counsel was an obstacle to his desire to plead guilty. His complaint was directed at the charging decision made by the State. Moreover, nothing in the record suggests the State was willing to accept a plea to simple possession from Elliott, a man who, according to the State’s evidence, is a known drug dealer and member of a street gang

engaged in serious drug trafficking. We thus reject Elliott’s argument that the court was required to engage in a further colloquy with Elliott concerning his appointed counsel.

II. Evidence from Elliott’s pat-down

Next, Elliott appeals the denial of his motion to suppress evidence seized from his person during the pat-down. Because Elliott did not object at the time the evidence was offered at trial, our review is limited to plain error analysis. *State v. Williams*, 248 N.C. App. 112, 117–18, 786 S.E.2d 419, 424 (2016).

For error to constitute plain error, the defendant must show a “fundamental error” occurred at trial which had a “probable impact” on the jury’s verdict. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Our Supreme Court has emphasized that we should invoke the plain error doctrine “cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* For the reasons explained below, we find no error, and certainly no plain error, under this standard.

The Fourth Amendment requires an investigatory stop and frisk to be supported by reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). If, from the totality of the circumstances, a law enforcement officer reasonably suspects that criminal activity may be afoot, the officer may temporarily detain a person; then, if the officer reasonably suspects that the person may be armed and presently

dangerous, the officer may frisk the person for self-protection. *State v. Johnson*, 246 N.C. App. 677, 686, 783 S.E.2d 753, 760 (2016). Importantly, this “reasonable suspicion” standard is “less demanding” than probable cause, and the evidentiary showing required to demonstrate reasonable suspicion is “considerably less than a preponderance of the evidence.” *Id.* at 688, 783 S.E.2d at 761. Reasonable suspicion can arise in circumstances that also may have an innocent explanation. *Id.* at 688–89, 783 S.E.2d at 762.

Elliott concedes that Detective Kilgore had reasonable suspicion to stop and question him. However, he argues the trial court’s findings did not justify the frisk for weapons because there was no reason to believe Elliott was armed and dangerous at the time.

Because the purpose of *Terry* frisks is to protect officer safety, the key inquiry is whether, under the totality of the circumstances, a reasonably prudent person in Detective Kilgore’s position would be justified in believing his safety or that of others to be in danger. *Terry*, 392 U.S. at 27. This does not mean Detective Kilgore had to be “absolutely certain” that Elliott was armed. *Id.* Rather, as a law enforcement officer, Detective Kilgore was “entitled to formulate common-sense conclusions about the modes or patterns of operation of certain kinds of lawbreakers in reasoning that an individual may be armed.” *Johnson*, 246 N.C. App. at 692, 783 S.E.2d at 764.

Here, Detective Kilgore encountered Elliott in a high crime area where he had made many previous arrests for drug-related crimes. He knew of Elliott's reputation as a drug dealer and member of a street gang that sells illegal drugs. Elliott appeared to be evading the officer at first, and he walked away from a group of people to another corner of the building where it was only Elliott and Detective Kilgore before being stopped. Under the totality of the circumstances, it was reasonable for Detective Kilgore to frisk Elliott for his own safety at this point in the stop. *See State v. Butler*, 331 N.C. 227, 233–34, 415 S.E.2d 719, 722–23 (1992). Thus, the trial court's denial of the motion to suppress was not error, and certainly not the sort of "exceptional" error that calls into question the "fairness, integrity or public reputation of judicial proceedings" and thus could amount to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

III. Evidence from Elliott's cell phone

Finally, Elliott challenges the denial of his motion to suppress the evidence seized from his cell phone, arguing that the affidavit filed with the warrant application failed to establish probable cause. Again, we disagree.

We review the trial court's ruling on a motion to suppress to determine whether competent evidence supports its findings of fact and whether those findings support its conclusions of law. *State v. Wilkes*, 256 N.C. App. 385, 388, 807 S.E.2d 672, 675 (2017).

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A search warrant may not be issued without a finding of probable cause. U.S. Const. amend. IV; N.C. Const., art. I, § 20. When law enforcement seeks a search warrant, the application must contain at least one affidavit “particularly setting forth the facts and circumstances establishing probable cause” for the search. N.C. Gen. Stat. § 15A-244(3). The affidavit must establish a “nexus” between the things sought and the place to be searched. *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990).

The issuing magistrate’s task, upon reviewing the application and accompanying affidavits, is “simply to make a practical, common sense decision” of whether, under the totality of the circumstances set forth in the affidavit, “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984).

Finally, our duty as the reviewing court is to ensure that the magistrate had a “substantial basis” to conclude that probable cause existed. *Id.* at 638, 319 S.E.2d at 258.

Here, Kilgore filed one affidavit with his warrant application to search Elliott’s cell phones, which alleged that Elliott was arrested with illegal drugs and the phones in his possession; that Elliott had a history of drug trafficking; and that Elliott is a member of a street gang involved in drug trafficking:

The affiant has prior knowledge of Elliot’s [*sic*] possession and sale on narcotics charges ranging from 11/16/1999 (PWISD

marijuana) to 01/23/2009 (PWISD cocaine). Elliot has an extensive history involving the s[ale] and delivery of both marijuana and cocaine as well as violent crimes against other person[s]. Elliot is also a documented member of the United Blood Nation street gang, which is known to profit from the sale of illegal narcotics. . . . The affiant seized a clear plastic bag containing approximately 16 grams marijuana, a clear plastic bag containing approximately 3.1 grams of cocaine and 100 dollars in U.S. currency as well as Elliot's two cell phones.

Elliott argues that the affidavit fails to show a “nexus” between his cell phones and the alleged crimes because the affidavit did not connect the phones to the drugs. To be sure, there was no way for Detective Kilgore to be certain that Elliott's phones contained any information about the drugs Elliott was carrying. But probable cause deals with probabilities, not hard certainties. *United States v. Cortez*, 449 U.S. 411, 418 (1981). These probabilities are the “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Detective Kilgore's affidavit explained that Elliott was a known drug dealer, that he was arrested with drugs and with money likely from drug transactions, and that he also had two cell phones in his possession. This creates a substantial basis for the *probability* that information relating to the sale of these illegal drugs would be found in the cell phones Elliott carried with him as he engaged in this illegal drug activity. Accordingly, we reject Elliott's argument.

Conclusion

We find no error in the trial court's judgments.

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NO ERROR.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).