IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-171

No. COA20-539

Filed 20 April 2021

New Hanover County, No. 17 CRS 057941-42

STATE OF NORTH CAROLINA

v.

TOMMY LOVETT, Defendant.

Appeal by Defendant from judgment entered 2 July 2019 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard Bradford, for the State.

Benjamin J. Kull, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Tommy Lovett ("Defendant") appeals from the trial court's denial of his motion to suppress evidence obtained from a search of his hotel room for drugs, arguing that the search warrant was issued without probable cause, in violation of his constitutional rights. He contends that (1) the affidavit supporting the application for the warrant does not establish the informant's reliability and (2) the affidavit fails to provide a nexus between Defendant's hotel room and the illegal activity. After

careful review, we hold the trial court did not err in denying Defendant's motion to suppress.

I. FACTS & PROCEDURAL HISTORY

¶ 2 On 13 September 2017, Detectives JD Kistler ("Kistler") and W. Morris ("Morris") of the City of Wilmington Police Department applied for a warrant to search room 141 at America's Best Inn, located at 2929 Market Street in Wilmington, based on events that occurred earlier that day. In the affidavit supporting the application, the detectives alleged the following:

¶ 3 Detectives Kistler and Morris observed Defendant getting off a commercial bus from New York with Michael Beaton ("Mr. Beaton"), a drug dealer previously known to them. The detectives had been investigating Mr. Beaton for about a month based on information from a confidential informant that he was selling narcotics. They had completed, with the aid of the informant, two controlled buys from Mr. Beaton, on 21 and 28 August.

¶ 4 Following the controlled buys, the detectives obtained a court order to "trap and trace" data associated with the phone number the confidential informant had used to arrange the transactions with Mr. Beaton. The data showed that the phone had been in New York earlier in August.

¶ 5 The week of 4 September, the confidential informant reported that Mr. Beaton would be traveling to New York to obtain drugs and returning to Wilmington by bus

on 13 or 14 September. On 5 September 2017, the phone was turned off in the area of Jacksonville. It was turned on again in New York, where it remained for several days, and then turned off again after leaving New York on 12 September.

¶ 6 On 13 September 2017, Wilmington detectives set up surveillance of the Walmart parking lot that served as the drop-off point for the bus Mr. Beaton was expected to be on. They identified Mr. Beaton getting off the bus, accompanied by another Black male, later identified as Defendant. Both men had several bags of luggage and "were walking around as if they were waiting for a ride." The men went into the Walmart, where they were recorded on surveillance video. They then exited the store and got into a cab. Detective Morris learned from the taxi dispatcher that the men were taken to the America's Best Inn at 2929 Market Street and that, a short time later, the two men called another cab to take them to 1010 S. 14th Street, a residential address.

¶ 7 Detectives set up surveillance of the motel and observed Defendant arrive as a passenger in a white Honda Odyssey minivan and enter room 141 using a key. The minivan left and later returned to the motel to pick up Defendant. Detectives then followed the minivan to 1010 S. 14th Street. Defendant knocked on the door of the house, and Mr. Beaton let him inside. The minivan was registered to Marquitta Hall, who lived at 1012 S. 14th Street, next door to 1010 S. 14th Street.

¶ 8 Detectives Morris and Kistler arranged for the confidential informant to make a third controlled buy from Mr. Beaton later that day[1] at 1010 South 14th Street. The informant reported to the detectives that Defendant "observed" the transaction and "spoke about the recent trip to New York, and also talked about narcotics dealings in New York."

¶ 9 Immediately after the controlled buy, the detectives applied for a search warrant for room 141 at the America's Best Inn. A Superior Court judge issued the warrant at 8:50 pm. The detectives executed the warrant early in the morning of the next day, 14 September 2017. In the room, they found a crack pipe in a cigarette package, a bottle of lidocaine, Defendant's New Jersey identification, a white mobile phone, and a plastic bag containing 81 grams of a heroin and fentanyl mixture. The plastic bag was found wrapped in a sweatshirt inside a black bag Defendant had been seen carrying the previous day. Defendant was arrested based on this evidence. He was indicted on 4 December 2017 on charges of trafficking by possession of twenty-eight grams or more of heroin/opium, maintaining a dwelling for keeping and storing heroin, possession with intent to sell and deliver heroin, possession of heroin within 1,000 feet of a public park, and conspiracy to commit trafficking by possession of twenty-eight grams or more of heroin.

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[1] The trial court acknowledged that the affidavit contained a typo and that 13 September, not 13 August, was the accurate date of the third transaction.

¶ 10 Defendant moved to suppress the evidence obtained in the search. The trial court denied the motion in a pretrial hearing.

¶ 11 On 28 October 2019, Defendant entered an *Alford* plea in New Hanover Superior Court. Defendant pleaded guilty to trafficking in heroin/opium and possession of heroin within 1,000 feet of a park. He was sentenced to prison for 90 to 120 months on the first count and a consecutive term of 25 to 42 months, suspended for twelve months of supervised probation, on the second count. He received credit for 775 days that he had already spent in confinement. Civil judgments for costs totaling $9,225 and a fine of $100,000 were also entered against Defendant.

¶ 12 As part of his plea agreement, Defendant preserved his right to appeal the denial of his motion to suppress. He timely filed notice of appeal.

II. ANALYSIS

A. Standard of Review

¶ 13 We review a trial court's denial of a motion to suppress evidence to determine "whether the trial judge's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge's conclusions of law." *State v. McKinney*, 368 N.C. 161, 163, 775 S.E.2d 821, 824 (2015) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Findings of fact that are supported by competent evidence are conclusive; we review the trial court's conclusions of law stemming from a motion to suppress *de novo*. *Id.*

¶ 14 In deciding whether to issue a search warrant, a magistrate must consider the totality of the circumstances to determine whether probable cause exists. *State v. Arrington*, 311 N.C. 633, 637, 641, 319 S.E.2d 254, 257, 259 (1984). The issuing magistrate must

> 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.

Id. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 527, 548 (1983)). To uphold a search warrant, the reviewing court must determine only that the record or the face of the warrant application provides sufficient evidence for "a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (quoting *Gates*, 462 U.S. at 244 n.13, 76 L. Ed. at 552 n.13).

¶ 15 Our Supreme Court has described this as a "common-sense, practical inquiry . . . based upon the factual and practical considerations of everyday life on which reasonable and prudent [people], not legal technicians, act." *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (citation and quotation marks omitted). In considering the totality of the circumstances, a magistrate may draw reasonable

inferences from the evidence provided, *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824-25, and a magistrate's determination is entitled to "great deference," *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002). However, the reviewing court must "ensure that a magistrate does not abdicate his or her duty" by "merely ratifying" bare conclusions in the affidavits. *Benters*, 367 N.C. at 665, 766 S.E.2d at 598.

¶ 16 An affidavit accompanying a warrant application must provide "a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the object sought." *Hunt*, 150 N.C. App. at 104, 562 S.E.2d at 600. When the target of the warrant is a residence, "[o]ur case law makes clear that . . . the facts set out in the supporting affidavit must show some connection or *nexus* linking the residence to illegal activity." *State v. Bailey*, 374 N.C. 332, 335, 841 S.E.2d 277, 280 (2020) (emphasis added). That nexus may be based on inference, but it cannot be "purely conclusory." *Id.*

¶ 17 Defendant argues that the affidavit supporting the warrant does not provide probable cause because (1) the reliability of the confidential informant is not sufficiently explained, and (2) the affidavit does not establish a nexus between the place to be searched—Defendant's hotel room—and criminal activity or contraband. We address these arguments in turn.

1. The Reliability of the Informant

¶ 18 Defendant first argues that the affidavit supporting the warrant does not establish the reliability of the confidential informant because it provides insufficient information about the informant's "track record" and police corroboration of the information.

¶ 19 Defendant is correct that anonymous tips and tips from informants whose reliability has not been established must be more fully corroborated than those from informants who have been proven reliable. *See State v. McRae*, 203 N.C. App. 319, 325, 691 S.E.2d 56, 61 (2010). However, in this case, the affidavit establishes that the confidential informant who identified Defendant had previously demonstrated his reliability by conducting several successful controlled purchases at the direction of the detectives and by providing accurate and timely information that the detectives corroborated from independent sources.

¶ 20 The detectives arranged two controlled buys from Mr. Beaton during the month prior to Defendant's arrest, using the informant as the buyer.[2] The detectives also obtained a "trap and trace" order to collect cellphone data for a number provided by the informant; that data confirmed that Mr. Beaton's travel matched the informant's report.

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[2] Defendant argues that the controlled buys could not provide corroboration because the affidavit does not include enough information about the procedures the detectives used to monitor the buys. However, "controlled buy" is a widely used and understood term of art in law enforcement practice; the magistrate could reasonably infer the measures involved.

¶ 21 Defendant argues that police never confirmed the illicit purpose of the trip to New York, and that the details of Mr. Beaton's travel are the kind of "mundane matter" that cannot provide corroboration. Yet, in *Illinois v. Gates*, the United States Supreme Court held that this exact kind of corroboration was sufficient to support probable cause. 462 U.S. at 243, 76 L. Ed. at 551. In *Gates*, the suspect's travel to Florida—a known drug trafficking corridor—supported the warrant. *Id.* Officers confirmed the travel described in an anonymous letter and obtained a warrant based on that information alone. *Id.* at 226-27, 76 L. Ed. at 541. In this case, officers confirmed Mr. Beaton's travel on a North Carolina–New York bus route known to police as popular with drug traffickers in the area. The information regarding his return date was corroborated via surveillance.

¶ 22 Furthermore, this information came from a confidential informant already known to police, requiring a lower level of corroboration than the anonymous tip that provided the basis for the investigation in *Gates*. *See Benters*, 367 N.C. at 665-66, 766 S.E.2d at 598. In *Gates*, the search was law enforcement's first contact with the suspect, whereas here, the officers had knowledge of Mr. Beaton from two controlled sales to the informant before he traveled to New York and a third after he returned––this one in the presence of the Defendant.

¶ 23 Thus, the detectives' confirmation of the travel predicted by the informant and execution of three controlled buys provide sufficient corroboration to bolster the informant's reliability.

2. The Nexus Between Room 141 and Illegal Activity

¶ 24 Next, Defendant argues that the affidavit fails to establish the required nexus between the motel room and any illegal activity or contraband.

¶ 25 A warrant application must "be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items [subject to seizure] are in the place . . . to be searched." N.C. Gen. Stat. § 15A-244(3) (2019). Interpreting this statutory requirement in *State v. McCoy*, this Court held that the warrant application must "establish a *nexus between the objects sought and the place to be searched*." 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (emphasis added). The connection "need not be direct, but it cannot be purely conclusory." *Bailey*, 374 N.C. at 335, 841 S.E.2d at 280. The existence, or not, of a nexus is subject to the same totality of the circumstances inquiry as any other evidence establishing probable cause. *See McCoy*, 100 N.C. at 577, 578, 394 S.E.2d at 357, 358.

¶ 26 Ideally, the nexus is established directly—the illegal activity takes place in the place to be searched. *See State v. Worley*, 254 N.C. App. 572, 577, 803 S.E.2d 412, 417 (2017). However, our courts have held a nexus exists when the connection is

indirect. For example, in *State v. Bailey*, officers observed the defendant engage in a drug transaction in an apartment complex parking lot and then followed him to his residence. 374 N.C. at 333-34, 841 S.E.2d at 279. That drug transaction and the subsequent movement to the suspect's home established the required nexus between the home and the illegal activity, supplying the probable cause required to issue a search warrant for the residence. *Id.* at 334, 841 S.E.2d at 279.

¶ 27 The connection was much further attenuated in *State v. Allman*, 369 N.C. 292, 794 S.E.2d 301 (2016). In that case, a search warrant for a residence was issued after a traffic stop of the defendant's roommates culminated in the discovery of eight ounces of marijuana, apparently packaged for sale, and more than $1,600 in cash in the vehicle. *Id.* at 295, 704 S.E.2d at 304. The affidavit detailed the traffic stop, noted that the occupants of the car had lied about their home address, and alleged that the detective's training and experience indicated that drug dealers usually keep drugs in their home. *Id.* at 296-97, 704 S.E.2d at 304-05. After police found drugs, drug paraphernalia, and a shotgun in the home, the defendant—who was not involved in the traffic stop—was arrested and charged. *Id.* Our Supreme Court held that the inference drawn from the presence of drugs and cash in the car—that further evidence of drug dealing would be found in the home—was "just the sort of commonsense inference[] that a magistrate is permitted to make when determining whether probable cause exists." *Id.* at 297, 704 S.E.2d at 305.

¶ 28 This case is analogous to *Allman*. Here, the affidavit presented enough evidence to allow the magistrate to reasonably infer the required nexus between the Defendant's residence—the hotel room—and the illegal drug activity at the house on 14th Street. Defendant was observed getting off the bus with Mr. Beaton as he returned from a trip to New York, a trip that police had reliable information was taken for the purpose of purchasing drugs for distribution. Police surveilled Defendant going to and from his hotel room to visit Mr. Beaton at the house on 14th Street, and Defendant was present during a drug transaction at that house that same afternoon. During that transaction—a controlled buy made by the confidential informant under police supervision—Defendant spoke about the trip to New York and "narcotics dealings in New York."

¶ 29 These facts support a number of reasonable, "common sense" inferences: (1) Mr. Beaton and Defendant were, at a minimum, acquaintances; (2) Defendant was from out of town, based on his stay in a motel room; (3) room 141 was Defendant's room; (4) Mr. Beaton was a drug dealer; and (5) Defendant was aware of Mr. Beaton's drug activity and himself had knowledge of drug dealing.

¶ 30 Taken together, these inferences suggest a connection between the drug transaction and Defendant's hotel room. Our Supreme Court's analysis in *Allman* suggests that these inferences may be combined with the affiant officer's assertion in this case, based on his training and experience, that "it is common for persons

involved in the illegal drug trade to secrete contraband . . . in secure locations within their residences, businesses and automobiles" to satisfy the nexus requirement. *See Allman*, 369 N.C. at 296-97, 794 S.E.2d at 305.

¶ 31 Because the warrant application provided sufficient evidence to allow the issuing judge to reasonably infer a connection between the Defendant and the drug transaction at 1010 S. 14th Street, we hold it established a sufficient nexus between the drug transaction and Defendant's hotel room to constitute probable cause to issue the search warrant.

¶ 32 Defendant further argues that an officer's experience and training may not establish a "missing nexus." Our Supreme Court rejected this argument in *Allman*, holding that allegations based on an officer's experience and training may be combined with evidence from an investigation to provide a nexus between suspected criminal activity and the location of a search. *Id.*

¶ 33 Finally, Defendant contends that the State's misrepresentation of certain facts at the motion hearing amount to an implied concession that the affidavit did not establish probable cause for the warrant to issue. Whether or not the prosecutor mischaracterized some details from the affidavit at the hearing, Defendant cites no authority to support his assertion that any misstatements should affect the ultimate outcome of this case. In the absence of a citation to any supporting authority, Defendant has abandoned this argument. N.C. R. App. P. 28(b)(6) (2021) ("Issues . . .

in support of which no reason or argument is stated will be taken as abandoned."); *Thompson v. Bass*, 261 N.C App. 285, 292, 819 S.E.2d 621, 627 (2018) ("[I]f an argument contains no citation of authority in support of an issue, the issue will be deemed abandoned.") (citing *State v. Sullivan*, 201 N.C. App. 540, 550, 687 S.E.2d 504, 511 (2009)).

III. CONCLUSION

¶ 34 Based on the foregoing reasons, we hold the trial court did not err in denying Defendant's motion to suppress evidence.

NO ERROR.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).