IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-197

No. COA20-327

Filed 4 May 2021

Alamance County, No. 16CRS54509

STATE OF NORTH CAROLINA

v.

YAW HARRISON, Defendant.

Appeal by Defendant from judgment entered 15 November 2019 by Judge David T. Lambeth, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 24 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

Mark L. Hayes, for Defendant-Appellant.

WOOD, Judge.

¶ 1 On November 15, 2009, Yaw Harrison ("Defendant") was convicted of trafficking in and possession of heroin. Defendant was acquitted of possession with the intent to sell and deliver heroin and of resisting, delaying, and obstructing a public officer. Prior to trial, Defendant moved to suppress evidence obtained during a search of his vehicle incident to his arrest. The trial court denied the motion, finding

probable cause. On appeal, Defendant contends the arresting officer lacked probable cause for his arrest. We disagree.

I. Factual and Procedural Background

¶ 2 In August 2016, Detective Rodney King ("Detective King") of the Graham Police Department was a member of the Alamance Narcotics Enforcement Team (the "ANET"). Detective King was investigating drug crimes in Alamance County. Detective King conducted surveillance of Frank and Traci Buero's residence. Frank Buero ("Buero") was acting as an informant at the time and informed Detective King that he purchased heroin from Defendant.

¶ 3 While conducting surveillance of Buero's residence, Detective King observed Defendant at the residence on more than one occasion. Detective King observed that Defendant drove a black Mercedes SUV and noted its license plate number. On August 24, 2016, Detective King saw Defendant at Buero's residence. After Defendant left, Detective King requested that an officer with the Mebane Police Department stop Defendant's black Mercedes SUV if he observed a traffic violation. An officer did as requested and identified Defendant as the driver of the Mercedes when the officer issued Defendant a traffic citation.

¶ 4 On August 31, 2016, Traci Buero contacted Detective King and informed him that Defendant delivered 3 grams of heroin to the residence. Detective King later met with Traci Buero to obtain the contraband Defendant delivered. On September

2, 2016, Buero informed Detective King that Defendant was planning to deliver 5 to 7 grams of heroin that day. Thereafter, Detective King arranged a controlled purchase operation. Several local police departments worked with Detective King and the ANET to conduct the operation. Specifically, Officers Snow, Scotton, and Coggins, and Lieutenant Long of the Burlington Police Department; Officers Wilborn and Martin, and Sergeant Kernodle of the Alamance Sheriff's Department; and Agent Bill Marsh of the State Bureau of Investigation aided Detective King in the operation. Detective King testified that "the purpose of working with so many people like that . . . [was] primarily for safety and to conduct . . . successful surveillance." On the same day, Detective King met with Buero to arrange the controlled purchase operation.

¶ 5 In Detective King's presence, Buero called Defendant to confirm the scheduled heroin delivery. Detective King listened to the call via speakerphone. Officer Scotton watched Defendant's residence in Durham. He observed Defendant leaving his residence in a black Mercedes SUV. Officer Scotton followed Defendant's Mercedes, but quickly lost the vehicle in traffic.

¶ 6 Detective King testified the members of the ANET stayed in communication via radio for this operation. Agent Marsh of the SBI witnessed Defendant's Mercedes exit I-40/85 onto Maple Avenue in Burlington. Agent Marsh followed the vehicle. Detective King, who was waiting at a location approximately a mile and a half from Buero's residence, observed Defendant's Mercedes, followed by Agent Marsh, driving

in the direction of Buero's residence. The officers following the vehicle did not observe a traffic violation that would allow them to stop the Mercedes, so Detective King instructed Officers Snow and Martin to stop the vehicle. Detective King testified it was his opinion, based on the information received from his informant and the call to arrange the heroin purchase he had heard, that the driver and the vehicle were involved in the illegal distribution of heroin.

¶ 7 Officers Snow and Martin stopped the Mercedes and approached the vehicle. Officer Martin approached the driver's side, and Officer Snow approached the passenger side. Officer Snow witnessed the driver trying to tear open a plastic bag and believed it to contain narcotics. Officer Snow was concerned that Defendant was destroying evidence. While Officer Snow was making these observations, Officer Martin was instructing the driver to unlock the door and exit the vehicle. When Defendant did not do so, Officer Snow attempted to break the passenger side window with a pair of handcuffs. Afterwards, Defendant unlocked the door, and Officer Martin promptly handcuffed him. Once Defendant was handcuffed, Officer Snow retrieved the plastic bag from the vehicle. It was later determined the bag contained approximately 4.81 grams of heroin.

¶ 8 Defendant filed a pre-trial motion to suppress the evidence obtained from the search of his vehicle incident to arrest, arguing law enforcement lacked probable cause to effectuate the arrest. This motion was denied. On November 15, 2019, a

jury found Defendant guilty of trafficking in and possession of heroin and acquitted him of possession with the intent to sell, and resisting, delaying, and obstructing a public officer.

II. Standards of Review

¶ 9 After Defendant's pre-trial motion to suppress was denied, defense counsel did not object at trial to the admission of the evidence obtained from the search of Defendant's vehicle. Issues not preserved by objection at trial may be raised on appeal if the challenged action amounts to plain error. *See* N.C. R. App. P. 10(a)(4); *State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 631 (2010). "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 . . . the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted).

¶ 10 "[T]he scope of appellate review of an order such as this is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citation omitted). Where a defendant fails to specify which findings of facts are not supported by the

evidence, our review is limited to whether the trial court's findings of fact support its conclusions of law. *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000). Here, Defendant does not contest the trial court's findings of fact, so our review is limited accordingly. The trial court concluded there was reasonable suspicion to justify the stop. Defendant does not challenge there was reasonable articulable suspicion for the stop, only the probable cause for his arrest.

¶ 11 Defendant also contends he received ineffective assistance of counsel. This Court reviews *de novo* whether a defendant was denied effective assistance of counsel at trial. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted).

A. Probable Cause and Searches Incident to Arrest

¶ 12 Defendant first contends the search of his vehicle incident to arrest was improper as the arresting officer lacked probable cause. We disagree.

¶ 13 Warrantless searches are presumed to be "unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967). A search incident to a lawful arrest is one such exception. *State v. Mbacke*, 365 N.C. 403, 409-10, 721 S.E.2d 218, 222 (2012). Officers without a warrant can search a vehicle incident to arrest when they have reason to believe the search

will yield evidence of the crime for which the defendant is being arrested. *State v. Foy*, 208 N.C. App. 562, 565, 703 S.E.2d 741, 742 (2010). Searches incident to arrest are limited to valid arrests. If the arresting officer lacked probable cause to arrest the driver, then the subsequent search incident to that arrest is unlawful and unconstitutional. *See State v. Fuller*, 257 N.C. App. 181, 185, 809 S.E.2d 157, 161 (2017). As the search of Defendant's vehicle was "incident to his arrest," it will only stand if Defendant was lawfully arrested.

¶ 14 Probable cause is necessary to effectuate a lawful arrest. *See State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977) ("An arrest is *constitutionally* valid whenever there exists probable cause to make it." (emphasis in original)). "Probable cause exists where the facts and circumstances within the knowledge of the officer, when objectively viewed through the eyes of a reasonable, cautious officer, guided by his experience and training, are sufficient to warrant a prudent man's belief that the suspect has committed or is committing an offense." *State v. McRae*, 154 N.C. App. 624, 628, 573 S.E.2d 214, 218 (2002) (citations omitted).

¶ 15 "Probable cause can be established through the use of informants." *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 210 (2002) (citing *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). "In utilizing an informant's tip, 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.' " *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (*quoting State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)). "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." *Chadwick*, 149 N.C. App. at 203, 560 S.E.2d at 209 (citations omitted).

¶ 16 In *State v. Chadwick*, 149 N.C. App. 200, 560 S.E.2d 207 (2002), this Court addressed probable cause established by an informant. This Court noted probable cause existed where a known and reliable informant furnished law enforcement with information concerning a recreational drug sale. *Id.* at 204, 560 S.E.2d at 210. As law enforcement was able to verify the informant's information, "probable cause to arrest and search defendant existed on the basis of the minute particularity with which the informant described defendant and the physical and independent verification of this description by the officer." *Id.* at 204, 560 S.E.2d at 210 (alterations, internal quotation marks, and citation omitted).

¶ 17 "A second officer who lacks probable cause to effectuate an arrest may justifiably arrest a defendant based on a first officer's request only when the first officer has probable cause to arrest the defendant." *State v. Fields*, 268 N.C. App. 561, 569, 836 S.E.2d 886, 892 (2019) (citing *State v. Tilley*, 44 N.C. App. 313, 317, 260

S.E.2d 794, 797 (1979)).

¶ 18 Here, the trial court's findings of fact affirm that Officers Martin and Snow were working with Detective King and the ANET to perform a controlled purchase operation. Law enforcement had knowledge Defendant had been to Buero's residence, had previously sold heroin to Buero, and that Buero had called to arrange the sale with him. Defendant was scheduled to deliver heroin to the Buero's that day and was on his way to their house. Officers Martin and Snow stopped and detained Defendant at Detective King's direction. As they approached the vehicle to do an investigatory stop, Officer Snow observed Defendant trying to tear open a plastic bag that Officer Snow believed contained narcotics, and Defendant refused to unlock the vehicle door or otherwise interact with the officers. Based on the trial court's findings of fact, we hold there was an "indicia of reliability that [D]efendant was engaged in criminal activity to provide the officers with probable cause to seize and arrest [D]efendant based on a known reliable informant's tip independently corroborated and verified by the officers in minute detail." *Chadwick*, 149 N.C. App. at 204, 560 S.E.2d at 210. Accordingly, the trial court's findings of fact support its conclusion of law that "officers did, in fact, have reasonable articulable suspicion to pull the vehicle over for an investigative stop and officers did also have probable cause, upon stopping the vehicle and observing the defendant's actions, to then arrest the defendant."

¶ 19 "Police officers may arrest without a warrant any person who they have

probable cause to believe has committed a felony." *State v. Hunter*, 299 N.C. 29, 34, 261 S.E.2d 189, 193 (1980) (citation omitted). A warrantless arrest is valid if probable cause existed, and the arrest was permitted by state law. *See State v. Phillips*, 300 N.C. 678, 683-84, 268 S.E.2d 452, 456 (1980); *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991); *Wooten*, 34 N.C. App. at 88, 237 S.E.2d at 304.

¶ 20 "An officer may conduct a warrantless search incident to a lawful arrest." *Mills*, 104 N.C. App. at 728, 411 S.E.2d at 195 (citing *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980)). "[W]hen investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured," a search of the vehicle is lawful. *Mbacke*, 365 N.C. at 409-10, 721 S.E.2d at 222.

¶ 21 "Transporting large amounts of [heroin] is felonious criminal activity." *Chadwick*, 149 N.C. App. at 205, 560 S.E.2d at 210 (citing N.C. Gen. Stat. § 90-95 (2001)); *see* N.C. Gen. Stat. § 90-95(H)(4) (2020). Law enforcement, based on their interactions with the Bueros and Detective King's and Officer Snow's observations of Defendant, had probable cause to believe Defendant possessed and was transporting heroin. As Defendant was arrested for possessing and trafficking in heroin, law enforcement had a "reasonable and articulable basis" that contraband related to the arrest could be found in his vehicle. We hold the trial court properly denied Defendant's motion to suppress the evidence obtained in the search incident to his

arrest.

B. Ineffective Assistance of Counsel

¶ 22 Next, Defendant contends he received ineffective assistance of counsel. We disagree.

¶ 23 Claims alleging ineffective assistance of counsel are presented to this Court in two ways. "Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018) (citation omitted). " 'A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel' at a full evidentiary hearing on the merits of the ineffective assistance of counsel claim." *Id.* The claim can be raised on direct appeal if the "cold record reveals that no further investigation is required." *State v. McNeill*, 371 N.C. 198, 216-17, 813 S.E.2d 797, 811 (2018) (citation and internal quotation marks omitted). If an ineffective assistance of counsel claim is not demonstrated by the "cold record," then the claim will be dismissed without prejudice, so the defendant can reassert it during a motion for appropriate relief proceeding. *Id.*; *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004).

¶ 24 If further investigation is not required,

> [A] defendant must satisfy a two part test. 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

¶ 25 "[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2068, 80 L. Ed. 2d at 297. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* 466 U.S. at 694, 104 S. Ct. 2068, L. Ed. 2d at 698. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

¶ 26 Defendant contends his counsel was ineffective and provided deficient representation because counsel did not object at trial to the evidence obtained during the search of his vehicle. Presuming counsel had timely objected at trial, his objection likely would have been overruled as the trial court properly denied the motion to

suppress the evidence seized incident to Defendant's arrest. Thus, there was not a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286. Since Defendant was not prejudiced by his trial counsel's actions, this Court need not address whether counsel's performance was actually deficient. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

III. Conclusion

¶ 27 The trial court properly denied Defendant's pre-trial motion to suppress on the basis of probable cause. All evidence seized and statements made as a result of the lawful seizure, arrest and search of Defendant were properly and legally obtained. Defendant did not receive ineffective assistance of counsel. Therefore, we find no error.

NO ERROR.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).