IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-553

No. COA20-727

Filed 5 October 2021

Craven County, Nos. 17 CRS 52632-33, 18 CRS 151

STATE OF NORTH CAROLINA

v.

MILTON EUGENE LANCASTER

Appeal by defendant from judgment entered 8 January 2020 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.

Mark L. Hayes for defendant.

ARROWOOD, Judge.

¶ 1 Milton Eugene Lancaster ("defendant") appeals from judgment entered upon his conviction for felony trafficking in heroin, maintaining a dwelling for keeping and selling controlled substances, possession of cocaine, and having achieved the status of a habitual felon. Defendant contends he received ineffective assistance of counsel and that the trial court plainly erred in admitting evidence obtained from defendant's

home. For the following reasons, we hold that defendant received effective assistance of counsel and the trial court did not err in admitting evidence.

I. Background

¶ 2 On 12 March 2018, a Craven County grand jury indicted defendant on counts of trafficking in heroin, trafficking in fentanyl, maintaining a dwelling for keeping and selling controlled substances, possession of cocaine, possession of drug paraphernalia, and having achieved the status of a habitual felon.

¶ 3 On 9 May 2019, defendant filed a pre-trial motion to suppress evidence obtained during a search of his residence. On 10 October 2019, the trial court conducted a suppression hearing and denied defendant's motion to suppress by order filed 17 October 2019.

¶ 4 The matter came on for trial on 6 January 2020 in Craven County Superior Court, Judge Willey, presiding. The evidence tended to show as follows.

¶ 5 On 24 August 2017, Craven County Sheriff's Office Sergeant Michael Sawyer ("Sergeant Sawyer") responded to a stabbing incident that took place outside of defendant's trailer. Based on interviews with the victim and witnesses, Sergeant Sawyer applied for a search warrant for defendant's residence to search for a "[k]nife containing blood[; . . . b]lood evidence from assault[; . . . and a]ny paperwork, mail or documents supporting ownership of the residence and or tenant information of the residence." On 25 August 2017, a Craven County Magistrate found there was

probable cause to believe that the items sought in the application were located at the residence, and accordingly issued the search warrant.

¶ 6 When officers arrived at defendant's trailer to execute the search warrant, defendant was standing outside and began to move towards the front door of the trailer. The officers instructed defendant to stop but defendant proceeded inside the trailer. Upon entering the residence, Sergeant Sawyer identified five individuals inside and secured those individuals to prevent them from obtaining any weapons or destroying possible evidence, as well as to ensure the safety of the officers.

¶ 7 Sergeant Sawyer testified that in the process of securing the trailer, he and the other officers cleared a chair near the front door to allow one of the individuals to sit there securely. Under the seat cushion, Sergeant Sawyer found a clear plastic bag containing brown and white powdery substances, which later tested positive for heroin and crack cocaine. One of the individuals inside the trailer, Carla Kirkland, testified that she saw defendant put something under the chair cushion immediately prior to the police officers entering the residence.

¶ 8 While clearing the rest of the residence, officers seized a bag on the kitchen table containing approximately five hundred dollars in cash, defendant's social security card, and other personal documents; officers also seized a soda can containing some crack cocaine, as well as digital scales and zip lock bags. No knives or blood evidence were recovered from the residence or surrounding area.

¶ 9 Although defendant filed a pre-trial motion to suppress, defendant's trial counsel did not renew the objection at trial.

¶ 10 On 8 January 2020, defendant was found not guilty of trafficking fentanyl and possession of drug paraphernalia, and guilty of trafficking in heroin, maintaining a dwelling for keeping and selling controlled substances, possession of cocaine, and habitual felon status. The trial court consolidated the trafficking in heroin and maintaining a dwelling charges and sentenced defendant to a term of 146 to 188 months, with a consecutive sentence of 50 to 72 months for possession of cocaine.

¶ 11 Defendant entered oral notice of appeal at the conclusion of the sentencing hearing.

II. Discussion

¶ 12 Defendant contends he received ineffective assistance of counsel and that the trial court plainly erred in admitting evidence obtained from defendant's residence. We disagree.

A. Ineffective Assistance of Counsel

¶ 13 Ineffective assistance of counsel claims may be presented on direct appeal or by a motion for appropriate relief. A direct appeal is proper where the "cold record" of the case is sufficient to establish the claim without need for further investigation or evidentiary hearing. *State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012). If the cold record is inadequate to evaluate the claim, this Court shall dismiss

the claim without prejudice to allow the defendant to develop the claim in a motion for appropriate relief. *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001).

¶ 14 In the case *sub judice*, the cold record is sufficient for our review and further development of the record is unnecessary. This Court applies a *de novo* standard of review when assessing ineffective assistance of counsel claims on direct appeal. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted).

¶ 15 A defendant's right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citation omitted). When challenging a conviction on the basis that counsel was ineffective, a defendant must show that counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984); *see also Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. *Strickland* requires that a defendant first establish that counsel's performance was deficient. 466 U.S. at 687, 80 L. Ed. 2d at 693. This first prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, a defendant must demonstrate that the deficient performance prejudiced the defense, which requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Thus, both deficient performance and prejudice are

required for a successful ineffective assistance of counsel claim. *State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted).

¶ 16 In this case, defendant argues his trial counsel "inexcusably failed to preserve a meritorious issue for appeal" by failing to object at trial to any of the police's evidence obtained pursuant to the search warrant. Defendant cites *State v. Hargett*, noting that it is "now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, 241 N.C. App. 121, 124, 772 S.E.2d 115, 119 (2015) (emphasis in original) (citing *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)). *Hargett* presents a relatively similar procedural posture: a pre-trial motion to suppress was denied, and trial counsel failed to object to the admission of evidence at trial. In *Hargett*, this Court denied the defendant's motion for appropriate relief, holding that the defense was not prejudiced as there was sufficient reasonable suspicion to support the stop and frisk. *Id.* at 128, 772 S.E.2d at 121.

> [T]he trial court properly denied Hargett's motion to

> suppress because Officer Santiago had reasonable, articulable suspicion that criminal activity might be afoot. Thus, even had Hargett's trial counsel properly preserved Hargett's right to appellate review of the trial court's denial of his motion to suppress (or had his appellate counsel properly raised a plain error argument in his opening brief), Hargett would not have prevailed. Accordingly, Hargett cannot demonstrate the prejudice required to sustain his IAC claim.

Id. at 131-32, 772 S.E.2d at 123. In short, our review is directed to whether the pre-trial motion to suppress was properly denied.

¶ 17 Our review of the denial of a motion to suppress is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). "The trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (citing *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (2018)). A trial court has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts, all of which are owed great deference by this Court. *Id.* The trial court's conclusions of law are fully reviewable on appeal. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citing *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992)), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

¶ 18 Our Supreme Court adopted the "totality of the circumstances" test for determining whether information properly before the magistrate provided a sufficient basis for finding probable cause to issue a search warrant. *State v. Arrington,* 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002) (citations omitted). This deference "is not without limitation[,]" and this Court must "ensure that a magistrate does not abdicate his or her duty by 'mere[ly] ratif[ying] . . . the bare conclusions of [affiants].' " *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (citation omitted).

¶ 19 In this case, there was a sufficient basis to find probable cause to issue a search warrant. The affidavit noted that the suspect in the stabbing incident "came out of the residence" just prior to committing the assault. Additionally, the application for the search warrant was made within approximately 24 hours of the incident. Because the suspect was seen coming from defendant's residence and was not located when the officer initially responded, the magistrate had reasonable grounds to conclude that a search of defendant's property would reveal the specific evidence indicated on the warrant.

¶ 20 Additionally, "[i]f in the course of the search the officer inadvertently discovers items not specified in the warrant which are subject to seizure under G.S. 15A-242, he may also take possession of the items so discovered." N.C. Gen. Stat. § 15A-253 (2019). This Court has upheld protective searches of areas where a weapon could be concealed in order to ensure the safety of law enforcement officers. *State v. Harper*, 158 N.C. App. 595, 605, 582 S.E.2d 62, 69 (2003). Although the evidence actually seized from defendant's residence was not listed on the affidavit or search warrant, the items were discovered in the course of a protective search.

¶ 21 Accordingly, we hold the trial court properly denied defendant's pre-trial motion to suppress because there was sufficient probable cause. We further hold that defendant cannot demonstrate the prejudice required to sustain his ineffective assistance of counsel claim.

B. Plain Error

¶ 22 In a criminal case, issues that were "not preserved by objection noted at trial and . . . not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

¶ 23 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723

S.E.2d 326, 334 (2012) (citation omitted). To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error is to be "applied cautiously and only in the exceptional case," where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.*

¶ 24 As previously discussed, the magistrate was provided with a sufficient basis to find probable cause, the trial court did not err in denying defendant's pre-trial motion to suppress, and defendant was not prejudiced by his trial counsel's failure to renew his objection to the admission of evidence at trial. Defendant has failed to demonstrate that a fundamental error occurred at trial. Accordingly, we hold the trial court did not err, much less plainly err, in admitting the evidence seized from defendant's residence.

III. Conclusion

¶ 25 For the foregoing reasons, we hold the defendant received effective assistance of counsel and that the trial court did not plainly err in admitting evidence seized from defendant's residence.

NO ERROR.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).