IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-434

No. COA21-203

Filed 21 June 2022

Alamance County, Nos. 16 CRS 52715–16, 52723–24

STATE OF NORTH CAROLINA

v.

KHAKIM HARVEY and KYLE LAVAR MCNEIL

Appeal by defendants from judgments entered 15 June 2018 by Judge David T. Lambeth Jr. in Alamance County Superior Court. Heard in the Court of Appeals 25 January 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant Khakim Harvey.

Mark Hayes for defendant-appellant Kyle McNeil.

DIETZ, Judge.

¶ 1 Khakim Harvey and Kyle McNeil appeal their convictions for first degree murder and robbery with a dangerous weapon. On appeal, Harvey argues that the trial court erred by denying his motion to suppress the contents of his cell phone. Both Harvey and McNeil contend that the trial court erred by prohibiting them from

presenting evidence of self-defense as a discovery sanction. Finally, McNeil argues that this discovery sanction also created an unconstitutional "Hobson's choice" with respect to his defense to the armed robbery charge.

¶ 2 As explained below, we reject these arguments. The trial court properly denied Harvey's motion to suppress and was within its sound discretion to preclude the eleventh-hour self-defense evidence as a discovery violation. We thus find no error in the trial court's judgments.

Facts and Procedural History

¶ 3 In May 2016, Defendants Khakim Harvey and Kyle McNeil participated in a robbery in which two women lured victims into a park bathroom where Harvey and McNeil were waiting rob them.

¶ 4 As the robbery took place, an employee at Burlington's Police and Fire Communications Center was monitoring surveillance cameras at the park, became suspicious of activity around the bathroom, and dispatched law enforcement officers. The responding officers activated their police sirens as they approached the park.

¶ 5 After hearing the sirens of the arriving law enforcement vehicles, witnesses testified that they saw McNeil shooting or attempting to shoot at the robbery victims. Witnesses also saw Harvey robbing one of the victims, who was lying on the ground after being shot. One victim died from gunshot wounds.

¶ 6 The State charged McNeil and Harvey with first degree murder and robbery

with a dangerous weapon. The jury found both defendants guilty. The trial court sentenced both McNeil and Harvey to life in prison without parole for first degree murder and lengthy terms in prison for robbery with a dangerous weapon. Both defendants timely appealed.

Analysis

I. Motion to suppress

¶ 7 Harvey first argues that the trial court erred by denying his motion to suppress. He contends that the search warrant affidavit did not establish sufficient probable cause to justify the search of his cell phone.

¶ 8 We begin by addressing a preservation issue with this argument. By statute, a motion to suppress evidence in a criminal case "must be in writing," "must state the grounds upon which it is made," and "must be accompanied by an affidavit containing facts supporting the motion." N.C. Gen. Stat. § 15A-977(a). These statutory requirements are mandatory prerequisites to preserving a suppression issue for appellate review. *State v. Holloway*, 311 N.C. 573, 577, 319 S.E.2d 261, 264 (1984). In *Holloway*, our Supreme Court held that defendants who fail to comply with the requirements of Section 15A-977 "waive their rights to contest on appeal the admission of evidence on constitutional or statutory grounds." *Id.* at 578, 319 S.E.2d at 264.

¶ 9 These strict procedural rules exist because the State has the burden on a

suppression motion. The defendant's written motion, containing the grounds on which it is made and the facts supporting it, ensures that the State understands the arguments to be raised at the suppression hearing and has an opportunity to develop a record to rebut them. *State v. Miller*, 371 N.C. 266, 270, 814 S.E.2d 81, 84 (2018).

¶ 10 Here, Harvey's motion to suppress asserted that the magistrate lacked a substantial basis to find probable cause because it was based on "information gained from the co-defendant . . . approximately two years removed from the date of the search warrant." The motion then cites to criminal law treatises and case law addressing the "staleness" of information and the requirement that only a "reasonable" amount of time can elapse between the State's acquisition of the information and the issuance of the warrant.

¶ 11 The motion concludes by stating that "[b]ased on an analysis of the totality of the circumstances in this case and taking into consideration the 'staleness' of the information used to acquire the search warrant in this case must be suppressed as there are no reliable facts to produce probable cause." The affidavit accompanying the motion did not contain any additional facts and instead stated that the facts supporting the motion "are set forth in the motion to which this affidavit is attached and are incorporated herein as if fully set forth."

¶ 12 Harvey's primary argument on appeal is that the "information contained within the four corners of the search warrant affidavit did not establish: [(1)] that

police seized the phone; [(2)] that, if it was seized, it was in their custody between Mr. Harvey's arrest and when police applied for the warrant; or [(3)] that if the phone was seized, the information in the phone had been preserved."

¶ 13 This argument is not one that Harvey asserted in the motion to suppress and accompanying affidavit. In reading that motion and affidavit, it cannot reasonably be inferred that, in addition to the staleness argument expressly argued in the motion, Harvey also sought to raise this second, unrelated argument concerning the seizure and chain of custody of the phone. Accordingly, under *Holloway*, this argument is waived on appeal. 311 N.C. at 578, 319 S.E.2d at 264.

¶ 14 In any event, this argument is meritless. In the search warrant affidavit, the applying officer testified that Brittany Nicole Slade, a witness who allegedly participated in the robbery by luring the victims into the park bathroom, and who was now cooperating with investigators, explained that "she texted Khakim Harvey at the number 336-804-4505" to let Harvey and other participants in the planned robbery know "where they were at, and when they were ready for this robbery to take place." The officer also testified in the affidavit that law enforcement arrested Harvey and that "[l]ocated on his person was LG phone assigned phone number 336-804-4505." The officer concludes the affidavit by stating that "I believe that probable cause exists to conclude that a search of LG Model H343 assigned phone number 336-804-4505 will aid in the investigation" and requested a search warrant "directing a search

of LG Model H343 assigned phone number 336-804-4505."

¶ 15 "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him there is a fair probability that contraband or evidence of a crime will be found" in the place or item to be searched. *State v. Lewis*, 372 N.C. 576, 583, 831 S.E.2d 37, 43 (2019) (cleaned up). In this analysis, "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *Id.* at 584, 831 S.E.2d at 43. Thus, "as long as the pieces 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, a magistrate has probable cause to issue a warrant." *Id.*

¶ 16 Applying this standard here, the warrant application and accompanying affidavit provided sufficient information from which a reasonable magistrate could infer that there was probable cause. Specifically, the affidavit sufficiently described a basis for believing that evidence concerning the alleged robbery was contained on the phone that law enforcement officers recovered from Harvey during his arrest—a cell phone that was assigned a phone number to which a key State witness allegedly sent incriminating text messages. We therefore reject Harvey's challenge on this ground.

¶ 17 Harvey also argues, in two sentences in his brief without any supporting legal

authority, that the information supporting the search warrant was indeed stale, as Harvey argued in his written motion to suppress. We reject this argument as well. As the trial court properly concluded, a reasonable magistrate readily could determine that there was probable cause to believe the information sought, which existed in digital form on a cell phone, was present despite the applicable passage of time. *See State v. Rayfield*, 231 N.C. App. 632, 641, 752 S.E.2d 745, 753 (2014).

II. Evidence of self-defense

¶ 18 Harvey and McNeil next challenge the trial court's ruling prohibiting them from presenting evidence of self-defense. This ruling was a discovery sanction against both defendants for failing to provide timely notice of the intent to pursue a self-defense theory.

¶ 19 In December 2017, the parties signed and filed trial scheduling orders that incorporated a statutory notice provision requiring Harvey and McNeil to provide the State with notice of their intent to raise a self-defense argument no later than twenty days after the case was set for trial. *See* N.C. Gen. Stat. § 15A-905(c)(1). The case was set for trial the first week of April 2018 and later continued to the first week of May 2018.

¶ 20 Harvey and McNeil did not provide notice within the time required by the statute and the trial scheduling order. After the State rested its case-in-chief in mid-June 2018, the two defendants, for the first time, asked for permission to put on

evidence of self-defense. The State objected, explaining that this violated the trial scheduling order and would prejudice the State—which had already rested its case—in various ways. The trial court heard lengthy argument from the parties on the issue before ruling that the self-defense evidence would be excluded as a sanction for violating the trial scheduling order and N.C. Gen. Stat. § 15A-905(c)(1).

¶ 21 The trial court later memorialized its ruling in a written order with findings. Among those findings, the trial court found that the "violation of N.C. Gen. Stat. § 15A-905(c)(1) constituted willful misconduct on the part of Defendants. The theory of self-defense is not based on newly discovered evidence. The Defendants would have known about the facts supporting the theory from the date of the offense of May 30, 2016."

¶ 22 The court also found that "Defendants had personal involvement in the discovery violation, since they declined to tell their attorneys of the 'self-defense' evidence until three days prior to the State having rested." The court further found that the "violation was made to gain a tactical advantage in the trial. The facts supporting the theory of self-defense were withheld until after the State rested, thereby denying the State the opportunity to rebut the theory of self-defense in its case-in-chief, examine or develop additional evidence prior to trial; vet potential jurors on the affirmative defense of self-defense, or in any other way present evidence to the jury in response to Defendants' theory." Based on its findings, the trial court

determined that the "exclusion of self-defense evidence is appropriate."

¶ 23 Under N.C. Gen. Stat. § 15A-910, the trial court is authorized to fashion an appropriate sanction for violation of discovery rules applicable to the proceeding. The choice of what sanctions to impose under Section 15A-910 rests in the trial court's sound discretion and is reviewed on appeal for abuse of that discretion. *State v. Pender*, 218 N.C. App. 233, 240, 242, 720 S.E.2d 836, 842 (2012). This Court can find an abuse of discretion only when the trial court's ruling is so manifestly arbitrary that it could not be the result of a reasoned decision. *Id.* at 240, 720 S.E.2d at 841.

¶ 24 Importantly, although criminal defendants have a constitutional right to present a defense in a criminal trial, this constitutional right can be forfeited as a sanction in extreme cases where a discovery violation "was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence." *Taylor v. Illinois*, 484 U.S. 400, 415 (1988).

¶ 25 Here, the trial court's written order demonstrates that the court properly evaluated the violations of the agreed-upon trial scheduling order and statutory notice timelines, carefully weighed the seriousness of the violation and potential prejudicial impact on the State, and made a reasoned decision to exclude evidence of self-defense as the only appropriate sanction. The court's ruling included lengthy, accompanying justifications with findings of fact and citations to the applicable law.

In sum, the trial court's ruling complied with N.C. Gen. Stat. § 15A-910(a) and was within the trial court's sound discretion. We therefore find no error in the trial court's ruling.

III. Hobson's choice dilemma

¶ 26 Finally, McNeil argues that the trial court's ruling excluding any self-defense evidence on the murder charges created an unconstitutional "Hobson's choice" with respect to McNeil's defense of the armed robbery conviction. Specifically, McNeil contends that he desired to testify with respect to the robbery charge but could not do so without exposing himself to cross-examination on the murder charge, where his own testimony was hamstrung by the discovery sanction.

¶ 27 McNeil did not raise this constitutional argument in the trial court—although he readily could have done so—and it is therefore waived on appeal. *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001). In any event, this case is distinguishable from cases concerning the unconstitutional "Hobson's choice," which is characterized as "a dilemma involving the relinquishment of one constitutional right in order to assert another." *State v. Colson*, 186 N.C. App. 281, 285, 650 S.E.2d 656, 658 (2007). Here, McNeil retained his right to testify if he chose, but would be precluded from presenting certain evidence during that testimony because of his willful violation of the discovery rules. This scenario does not present the sort of unconstitutional dilemma identified in our case law. We therefore reject this

argument as well.

Conclusion

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

NO ERROR.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).