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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-828

No. COA21-707

Filed 6 December 2022

New Hanover County, Nos. 19 CRS 56950, 56952

STATE OF NORTH CAROLINA

v.

MARTY DOUGLAS ROGERS

Appeal by defendant by writ of certiorari from judgments entered 25 March 2021 by Judge Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Marty Douglas Rogers appeals from the trial court's judgments entered upon his *Alford* plea[1] to trafficking in cocaine by transportation and

[1] An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970);

possession with the intent to sell or deliver cocaine. Because the trial court erred in issuing an 18 U.S.C. § 2703(d) Order allowing the government to obtain Defendant's historic cell-site location information ("CSLI") data without probable cause, in violation of his constitutional rights, we order a new trial.

I. Background

¶ 2 This case concerns the State's constitutional and statutory authority to obtain, in the course of its investigation, the CSLI data of a particular mobile phone number that is alleged to be used in interstate drug trafficking.

¶ 3 On 2 August 2019,[2] Detective Donald Wenk of the New Hanover County Sheriff's Office submitted an application and affidavit to Judge James G. Bell for an "ORDER AUTHORIZING INSTALLATION AND MONITORING OF A PEN REGISTER AND/OR TRAP AND TRACE DEVICE, GPS AND GEO-LOCATION PURSUANT TO N.C.G.S. §§ 15A-260[–]264, AND FOR THE PRODUCTION OF RECORDS AND OTHER INFORMATION PURSUANT TO 18 U.S.C. § 2703(d)[.]"

¶ 4 Detective Wenk's application and affidavit set forth the facts that he alleged in support of the issuance of such an order:

> During the month of July 2019, Detective D. Wenk received

State v. Baskins, 260 N.C. App. 589, 592 n.1, 818 S.E.2d 381, 387 n.1 (2018), *disc. review denied*, 372 N.C. 102, 824 S.E.2d 409 (2019).

[2] Although the application, affidavit, and the trial court's order bear the printed date 1 August 2019, Judge Bell's handwritten notations suggest that he actually signed the order on 2 August 2019.

> information from a Confidential Source that a black male subject by the name of [Defendant] is responsible for Trafficking/Distributing large quantities of Cocaine in New Hanover County. The Confidential Source herein referred to as CS, stated that he/she has been to [Defendant's] residence on multiple occasion[s] and has seen large quantities of Cocaine and has had numerous conversations inquiring about purchasing Cocaine. The CS further explained that [Defendant] would make trips to Hayward, California to purchase and transport trafficking amounts of Cocaine back to Wilmington, NC on multiple occasions. Det. Wenk, utilizing a law enforcement [database], retrieved a photograph of [Defendant]. Det. Wenk showed the CS the photograph of [Defendant]. The CS identified the photograph of [Defendant] as the individual who he/she knew to possess, transport, and make trips to Hayward, California for trafficking in Cocaine. Within the last (72) hours Det. Wenk received further information from the CS who stated [Defendant] was about to make another trip to Hayward, California to purchase a trafficking amount of Cocaine and transport it back to Wilmington NC. The CS provided a phone number of (910) . . . for [Defendant]. The CS stated that this telephone number is the number that he/she has always contacted [Defendant] on. Det. Wenk researched the phone number utilizing a law enforcement database provided by the CS. The phone number listed for [Defendant] is the same number provided by the CS.

¶ 5 That same day, Judge Bell entered a sealed order ("the § 2703(d) Order") finding probable cause to believe that Defendant was using the suspected cell phone "to further and facilitate the crime(s) of **Trafficking Cocaine** and/or to maintain his status as a fugitive from justice." Judge Bell further found probable cause to believe:

> 4. That the installation and monitoring of a pen register and/or trap and trace device(s) will assist in determining the location of the TARGET TELEPHONE(s), potentially

> lead law enforcement to determine the whereabouts of [Defendant], and may provide corroborating and collateral evidence which will be of material aid in determining whether [Defendant] committed the offense(s) listed . . . above; and
>
> 5. That, in addition to authorizing the installation of a pen register and/or trap and trace device(s) and monitoring of those device(s) for the cellular telephone mentioned . . . above, there is "probable cause" to believe that "historical records or other historical information" will be sought related to the TARGET TELEPHONE(s), and other telephones, of whatever type, with which the TARGET TELEPHONE(s) communicates, and this information is "relevant and material" and will be of "material aid" to this ongoing criminal investigation . . . .

¶ 6 Once Detective Wenk gained access to the latitudinal and longitudinal coordinates of Defendant's phone, which he received from the cell-phone provider every 15 minutes, he was able to monitor the phone's location. On the morning of 17 August 2019, he noticed that Defendant's phone "start[ed] to travel from Wilmington, North Carolina, across the country." He observed that the phone went "exactly to Hayward," California, and remained there for approximately 20–30 minutes before beginning to return to Wilmington. According to Detective Wenk, the trip from Wilmington to Hayward and back took approximately "two-and-a-half to three days."

¶ 7 On 20 August 2019, a detective stationed at South of the Border on I-95 in South Carolina observed an individual whom he believed to be Defendant, based on a photograph provided by Detective Wenk. The detective followed Defendant's vehicle

as it drove toward Wilmington, with Detective Wenk remotely tracking Defendant's progress using the GPS data from Defendant's cell phone. Detective Wenk and other law enforcement officers conducted an investigatory stop of Defendant's vehicle when it reached the Cape Fear Memorial Bridge. The officers searched Defendant's vehicle and "obtain[ed] a trafficking amount of cocaine."

¶ 8 A New Hanover County grand jury returned indictments on 28 October 2019 charging Defendant with various cocaine-related offenses, including counts of trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with the intent to sell or deliver a Schedule II controlled substance, maintaining a vehicle for keeping and selling controlled substances, and possession of drug paraphernalia.[3]

¶ 9 On 28 January 2021, Defendant filed a motion to reveal the identity of the State's confidential witness, together with a motion to suppress "all evidence including but not limited to any information resulting from an unlawful GPS [t]racking of Defendant's cell phone, any data from pen registers," as well as other evidence seized in two allegedly unlawful searches. Defendant amended his motion to suppress on 16 February 2021.

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[3] The indictment for possession of drug paraphernalia (19 CRS 56953) does not appear in the record on appeal; the charge was ultimately dismissed pursuant to Defendant's plea agreement.

¶ 10 The amended motion to suppress and the motion to reveal the informant's identity came on for hearing in New Hanover County Superior Court on 26 February 2021. In addition to challenging the sufficiency of the probable cause or reasonable suspicion to support the § 2703(d) Order or the stop and search of his vehicle, Defendant argued, *inter alia*, that the trial court—as a state court—lacked jurisdiction to issue the § 2703(d) Order authorizing the installation and use of a pen register and/or trap-and-trace device outside of North Carolina.

¶ 11 After hearing Detective Wenk's testimony and the arguments of counsel, the trial court concluded that reasonable suspicion existed to support the § 2703(d) Order and the subsequent stop and search of Defendant's vehicle. As for Defendant's jurisdictional argument, the trial court concluded that "the case law supports that a person can be tracked from the state of North Carolina to any other state in the nation and back to the state of North Carolina[.]" Accordingly, the trial court denied Defendant's motion to suppress. Defendant gave oral notice of his intent to appeal the trial court's ruling at the conclusion of the suppression hearing.

¶ 12 On 25 March 2021, Defendant appeared before the trial court to enter an *Alford* plea of guilty to trafficking in cocaine and possession with the intent to sell or deliver cocaine, in exchange for the dismissal of the remaining charges against him. The trial court entered judgments that same day, sentencing Defendant to consecutive terms of 35 to 51 months' imprisonment in the custody of the North

Carolina Division of Adult Correction for the trafficking offense and 10 to 21 months for the possession offense. Defendant gave oral notice of appeal at the sentencing hearing, and the trial court noted in the possession judgment that Defendant reserved his right to appeal as part of his plea.

II. Appellate Jurisdiction

¶ 13 As a preliminary matter, we address the State's motion to dismiss the present appeal. Defendant gave oral notice of his intent to appeal the denial of his motion to suppress at both the conclusion of the suppression hearing and shortly after the trial court accepted his plea. Additionally, the trial court and the prosecutor recognized that Defendant reserved his right to appeal the denial of his motion to suppress. However, the State contends that Defendant appealed from the trial court's denial of his motion to suppress rather than the final judgment, thus depriving this Court of jurisdiction to hear the present appeal. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) ("Defendant has failed to appeal from the judgment of conviction and our Court does not have jurisdiction to consider Defendant's appeal.").

¶ 14 "In North Carolina, a defendant's right to pursue an appeal from a criminal conviction is a creation of state statute." *Id.* at 725, 696 S.E.2d at 542–43 (citation omitted). Our General Statutes provide that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b)

(2021). A defendant who seeks to appeal the denial of a motion to suppress when entering a guilty plea "must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final judgment." *State v. Crandell*, 247 N.C. App. 771, 773, 786 S.E.2d 789, 792 (citation omitted), *appeal dismissed, disc. review dismissed, and cert. denied*, 369 N.C. 73, 793 S.E.2d 239 (2016), *cert. dismissed*, 369 N.C. 568, 799 S.E.2d 39 (2017).

¶ 15 There is no dispute here that Defendant provided the trial court and the State with notice of his intent to appeal the denial of his motion to suppress prior to the finalization of his guilty plea. However, our review of the transcript of the plea hearing suggests ambiguity, at best, as to whether Defendant properly gave oral notice of appeal from the final judgment:

> [DEFENSE COUNSEL]: . . . I advised [the State] about this -- we had had a suppression hearing that was denied. We've reserved our right to appeal the hearing -- the results of the suppression hearing. He would like to go ahead and enter his notice of appeal on the suppression hearing, but he's still entering the *Alford* plea to this charge, Your Honor.
>
> THE COURT: Okay. So he is reserving -- this plea is entered with a reservation of right; is that correct?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor. He -- and I notified [the State] of this -- he had an appeal in front of Judge Gorham -- excuse me -- a suppression motion in front of Judge Gorham that was denied.

> [THE STATE]: The State would consent to that, Judge. He can appeal.
>
> THE COURT: All right. Let the record so reflect.

Based on this transcript, the State argues that "Defendant here only tendered notice as to the suppression motion, not the final judgment itself."

¶ 16 We need not decide whether Defendant failed to properly give oral notice of appeal from the final judgment, as Defendant filed a petition for writ of certiorari contemporaneously with his appellate brief. Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure provides that "[t]he writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (italics omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). "A petition for the writ must show merit or that error was probably committed below." *Id.*

¶ 17 Aware of the potential deficiency in his oral notice of appeal, Defendant argues that this Court should issue the writ because he "has lost his right to appeal for failure to take timely action . . . through no fault of his own, and the State has not been prejudiced by the deficiency in the notice of appeal." Defendant adds that

"allowing certiorari would manifestly serve the interests of justice to allow appellate review of his criminal conviction where all parties are shown to have understood his intent and desire to appeal."

¶ 18 In light not only of Defendant's showing that his argument has merit but also the State's evident assent to Defendant's intended appeal, we exercise our discretion to allow Defendant's petition for writ of certiorari. *See, e.g.*, *State v. Jackson*, 249 N.C. App. 642, 646, 791 S.E.2d 505, 509 (2016) (concluding that allowing certiorari is appropriate where "it is apparent that the State was aware of [the] defendant's intent to appeal the denial of the motion to suppress prior to the entry of [the] defendant's guilty pleas and because [the] defendant has lost his appeal through no fault of his own" (citation omitted)), *aff'd per curiam*, 370 N.C. 337, 807 S.E.2d 141 (2017).

¶ 19 Having allowed Defendant's petition for writ of certiorari, we dismiss as moot the State's motion to dismiss and proceed to the merits of Defendant's appeal.

III. Discussion

¶ 20 Defendant contends that the trial court erred by denying his motion to suppress for two reasons. First, Defendant argues that the § 2703(d) Order "was facially invalid because it allowed a type and scope of search beyond the statutory authority of the issuing superior court judge." Defendant further argues that the § 2703(d) Order "was not supported by probable cause." Because it is dispositive of this appeal, we need only reach Defendant's probable cause argument. For the

reasons that follow, we conclude that the § 2703(d) Order was not supported by probable cause.

A. Standard of Review

¶ 21 This Court's review of the denial of a motion to suppress "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. Perry*, 243 N.C. App. 156, 163, 776 S.E.2d 528, 533 (2015) (citation omitted), *appeal dismissed and disc. review denied*, 368 N.C. 683, 781 S.E.2d 622 (2016).

¶ 22 We review de novo the trial court's conclusions of law. *Id.* When conducting de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

B. Analysis

¶ 23 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend.

IV. "North Carolina appellate courts have held Article I, Section 20 of the Constitution of North Carolina provides the same protections against unreasonable search and seizure as the Fourth Amendment to the Constitution of the United States." *Perry*, 243 N.C. App. at 165, 776 S.E.2d at 535; *see* N.C. Const. art. I, § 20.

¶ 24 Defendant argues that the trial court erred by denying his motion to suppress evidence discovered as a result of searches and seizures conducted in violation of his federal and state constitutional rights. We agree.

1. Statutory Authority

¶ 25 This case does not concern a law enforcement investigation pursuant to a search warrant, but rather evidence obtained pursuant to an order issued under N.C. Gen. Stat. § 15A-263 and 18 U.S.C. § 2703(d).

¶ 26 We first note Defendant's argument that the trial court exceeded its authority to enter this order under N.C. Gen. Stat. § 15A-263. Defendant contends that "pen registers and trap and trace devices have a specific, clearly limited definition" found in N.C. Gen. Stat. § 15A-260(2)–(3), and that "[t]hese definitions do not include the retrieval of location data." Although Defendant's definitional argument is compelling, he did not advance it below and we may not entertain it for the first time here. "[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and

internal quotation marks omitted).

¶ 27 Under the federal Stored Communications Act, one method through which a governmental entity may compel the disclosure of CSLI from an electronic communications provider without notice to the subscriber or customer is a court order entered pursuant to § 2703(d), which provides, in pertinent part:

> A court order for disclosure under [§ 2703](b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.

18 U.S.C. § 2703(d). For the purposes of the Stored Communications Act, the term "court of competent jurisdiction" includes "a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants[.]" *Id.* § 2711(3)(B); *see also, e.g.*, *State v. Rose*, 330 P.3d 680, 685 (Or. Ct. App.), *review denied*, 339 P.3d 440 (Or. 2014).

2. Carpenter v. United States

¶ 28 In 2018, the Supreme Court of the United States concluded that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI[,]" rendering "[t]he location information obtained from [the

individual]'s wireless carriers . . . the product of a search" within the meaning of the Fourth Amendment. *Carpenter v. United States*, 585 U.S. ___, ___, 201 L. Ed. 2d 507, 521 (2018). Accordingly, "the Government must generally obtain a warrant supported by probable cause before acquiring" historical CSLI data. *Id.* at ___, 201 L. Ed. 2d at 525.

¶ 29 Despite 18 U.S.C. § 2703(d)'s authorization of the disclosure of CSLI records to the Government upon its demonstration of " 'reasonable grounds' for believing that the records [a]re 'relevant and material to an ongoing investigation[,]' " *id.* (quoting 18 U.S.C. § 2703(d)), the Supreme Court held that "an order issued under Section 2703(d) . . . is not a permissible mechanism for accessing historical cell-site records" because the "relevant and material" standard is less stringent than the Fourth Amendment's probable cause requirement, *id.* at ___, 201 L. Ed. 2d at 526. Consequently, "[b]efore compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." *Id.*

¶ 30 Notably, the Court cabined its holding to "historical" CSLI. *Id.* The Court declined to "express a view on . . . real-time CSLI[,]" *id.* at ___, 201 L. Ed. 2d. at 525, leaving open an already extant distinction between "historical" and "real-time" CSLI that this Court identified in the decisions of lower federal courts prior to *Carpenter*, *see Perry*, 243 N.C. App. at 164, 776 S.E.2d at 534 ("The distinguishing characteristic separating historical records from 'real-time' information is the former shows where

the cell phone has been located at some point in the past, whereas the latter shows where the phone is presently located through the use of GPS or precision location data.”).

¶ 31 The State seizes on this distinction to argue that *Carpenter* “does not have any applicability to the case at hand[,]” in which “the CSLI data was indisputably real-time.” Yet Defendant disputes this categorization, and correctly so.

¶ 32 In *Perry*, this Court determined that law enforcement officers acquired historical rather than real-time CSLI where the testimony at the suppression hearing established that a detective received “latitudinal and longitudinal coordinates of the cell towers [that the d]efendant’s cell phone ‘pinged’ when connected.” *Id.* at 165, 776 S.E.2d at 535. The detective further testified that there was “probably a five- or seven-minute delay” in his receipt of the coordinates, and this Court noted “[o]ther evidence” that showed that the provider sent law enforcement officers “delayed recorded information . . . every fifteen minutes.” *Id.* The detective explained that he and other law enforcement officers “followed [the d]efendant’s historical travel by entering the coordinates of cell tower ‘pings’ provided by AT&T into a Google Maps search engine to determine the physical location of the last tower ‘pinged.’ ” *Id.* at 166, 776 S.E.2d at 535. The defendant’s “cell phone was never contacted, ‘pinged,’ or its precise location directly tracked by the officers. The officers did not interact with [the d]efendant’s cell phone, nor was any of the information received either directly from

the cell phone or in 'real time.' " *Id.*

¶ 33 Similarly, at the suppression hearing in this case, Detective Wenk testified that he received "longitude and latitude coordinates" from the cell-phone provider, and explained how law enforcement determined the location of the suspected phone:

> Take those coordinates utilizing any mapping system, like Google or anything like that, and you can put them in there, and you can track them specifically as they go. Also in -- through the [§ 2703(d) O]rder, we can also track them and get live updates of exactly -- you can do it in a certain amount of increments, and you can set alerts to where they are and where they're traveling to to keep you updated as well.

¶ 34 Although Detective Wenk testified to CSLI "live updates[,]" the documentary evidence in the record indicates that the information he received was rather more akin to the historical CSLI described in *Perry*. State's Exhibit 1, admitted into evidence at the suppression hearing and confirmed by Detective Wenk to contain the record of coordinates to which he referred in his testimony, shows the longitudinal and latitudinal coordinates reported by the cell-phone provider approximately every 15 minutes, just as in *Perry*. *Id.* at 165, 776 S.E.2d at 535. Further, Detective Wenk's explanation of mapping the coordinates by use of a search engine is quite similar to the procedure recounted in *Perry*. *Id.* at 166, 776 S.E.2d at 535. Lastly, on cross-examination, Detective Wenk confirmed that as part of obtaining the § 2703(d) Order, he "wanted historical data from [Defendant's] phone, plus [Detective Wenk] wanted

to be able to get -- historical records, historical data, from [Defendant's] phone and any phones that communicate[d] with this target phone."

¶ 35 We conclude that the CSLI at issue in this case was historical, rather than real-time, which the State could properly obtain with a warrant supported by probable cause rather than by reasonable suspicion.

¶ 36 Here, Detective Wenk obtained the § 2703(d) Order rather than a warrant. In *Carpenter*, the Supreme Court concluded that "an order issued under Section 2703(d) . . . is not a permissible mechanism for accessing historical cell-site records" because "law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a gigantic departure from the probable cause rule[.]" 585 U.S. at ___, 201 L. Ed. 2d at 526 (citation and internal quotation marks omitted). However, this Court has determined that a court order issued pursuant to § 2703(d) may nevertheless properly authorize the disclosure of historical CSLI where "the application to obtain [an individual]'s CSLI contains all the information necessary from which the trial court could have issued a warrant supported by probable cause, and in fact, the trial court in its order specifically found that probable cause existed to obtain this information." *State v. Gore*, 272 N.C. App. 98, 104, 846 S.E.2d 295, 299, *appeal dismissed and disc. review denied*, 376 N.C. 546, 851 S.E.2d 380 (2020). Thus, we review whether the § 2703(d) Order at issue was supported by probable cause.

3. Probable Cause

¶ 37 "Probable cause requires not certainty, but only a *probability or substantial chance* of criminal activity." *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015) (citation and internal quotation marks omitted). "Thus, an affidavit is sufficient to establish probable cause if it supplies reasonable cause to believe that the proposed search for evidence *probably* will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Gore*, 272 N.C. App. at 105, 846 S.E.2d at 299 (citation and internal quotation marks omitted).

¶ 38 Defendant argues that Detective Wenk's application and affidavit contained insufficient information to establish probable cause because the confidential source "was not shown to be reliable, . . . there was no information showing how the [confidential source] knew a trip was imminent[,]" and "the information concerning the [confidential source] seeing drugs was stale." We agree.

¶ 39 Our Supreme Court has consistently reiterated that "great deference should be paid a magistrate's determination of probable cause[.]" *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (citation omitted). "This deference, however, is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by merely ratifying the bare conclusions of affiants." *Id.* (citation and internal quotation marks omitted).

¶ 40 "When probable cause is based on an informant's tip[,] a totality of the

circumstances test is used to weigh the reliability or unreliability of the informant." *State v. Green*, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638, *aff'd per curiam*, 363 N.C. 620, 683 S.E.2d 208 (2009). "Several factors are used to assess reliability[,] including: (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *Id.* (citation and internal quotation marks omitted).

¶ 41 In his application for a § 2703(d) Order authorizing disclosure of Defendant's historic CSLI, Detective Wenk alleges that there was "probable cause to believe that a felony . . . has been committed. The nature of the criminal offense(s) is as follows: **Trafficking Cocaine**[.]" He further alleges that Defendant's cell phone was "being used in the operation of a criminal enterprise, to aid in the commission of the criminal offense [of trafficking cocaine], and in a manner which would provide evidence of the criminal offense." These, and the other allegations of Detective Wenk's application and affidavit, are based almost exclusively on information received from a confidential informant, with the lone exception of Detective Wenk's corroboration that the phone number listed for Defendant in a law enforcement database "is the same number provided by" his confidential source. However, the affidavit contains no positive assertion that Detective Wenk considered his informant to be reliable, or that the informant had a history of providing accurate information. Nor does it provide

any other indicia of the informant's reliability. *Cf., e.g.*, *State v. Brody*, 251 N.C. App. 812, 818, 796 S.E.2d 384, 389 (2017) (concluding that a search-warrant affidavit provided a strong basis for probable cause where law enforcement officers averred that the confidential informant "had previously provided them with information on other persons involved in drug trafficking in the area," and the affiant-detective "considered the CI to be a 'reliable informant' ").

¶ 42 "When sufficient indicia of reliability are wanting" in an affidavit based on a confidential informant's statements, appellate courts "evaluate the information based on the anonymous tip standard." *Benters*, 367 N.C. at 666, 766 S.E.2d at 598. "An anonymous tip, standing alone, is rarely sufficient, but the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to pass constitutional muster." *Id.* at 666, 766 S.E.2d at 598–99 (citation and internal quotation marks omitted). "[A] tip that is somewhat lacking in reliability may still provide a basis for probable cause if it is buttressed by sufficient police corroboration. Under this flexible inquiry, when a tip is less reliable, law enforcement officers carry a greater burden to corroborate the information." *Id.* at 666, 766 S.E.2d at 599 (citation and internal quotation marks omitted).

¶ 43 Detective Wenk's affidavit offers scant corroboration of the informant's statements. The affidavit contains nothing to corroborate the informant's report of illegal activity at the residence, the address of the residence, or evidence that

Defendant lived there. The only information that Detective Wenk corroborated is that the phone number supplied by the informant was in fact associated with Defendant.[4] But that fact alone is insufficient to support an assertion of probable cause to believe that there exists "a *probability or substantial chance* of criminal activity." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (citation omitted).

¶ 44 The State contends that the confidential informant made statements against his or her interest. To be sure, "[s]tatements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 330 (1989). However, Detective Wenk's affidavit contains no such statement against interest from his confidential informant; the source merely stated that he or she had been to Defendant's residence, had "seen large quantities of Cocaine and has had numerous conversations inquiring about purchasing Cocaine." An admission to *having seen* "large quantities of Cocaine" and having "*numerous conversations* inquiring about purchasing Cocaine" is not the equivalent of an admission to *having purchased cocaine*, the latter being more akin

[4] The State notes that Detective Wenk testified at the suppression hearing to other details provided by the confidential informant that law enforcement officers were able to corroborate. However, Detective Wenk did not include any of this information or its corroboration in his application and affidavit, nor is it reported in the trial court's § 2703(d) Order. We thus may not consider this evidence in our appellate review of the trial court's probable cause determination, as "a trial court may not consider facts beyond the four corners of a search warrant in determining whether a search warrant was supported by probable cause at a suppression hearing." *State v. Eddings*, 280 N.C. App. 204, 2021-NCCOA-590, ¶ 18 (citation and internal quotation marks omitted).

to a statement against interest of the sort that our Supreme Court has recognized as carrying its own indicia of reliability. *See id.*; *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984).

¶ 45 We are mindful of the deference that this Court traditionally accords to the lower court's determination of probable cause. *See Benters*, 367 N.C. at 665, 766 S.E.2d at 598. Nevertheless, Detective Wenk's affidavit did not provide a sufficient factual basis to support that determination in this case. The affidavit was based on the uncorroborated information of an anonymous source whose reliability was not established, considering the totality of the circumstances. *See Green*, 194 N.C. App. at 627, 670 S.E.2d at 638. Therefore, Detective Wenk's application was not supported by probable cause, as required by the Fourth Amendment, *Carpenter*, 585 U.S. at ___, 201 L. Ed. 2d at 526; *Gore*, 272 N.C. App. at 104, 846 S.E.2d at 299, and the trial court issued its § 2703(d) Order permitting law enforcement officers to obtain Defendant's historical CSLI data in violation of his constitutional rights.

4. Good-Faith Exception

¶ 46 The State further argues that if the § 2703(d) Order was not supported by probable cause, and thus allowed the government's acquisition of Defendant's historic CSLI data in violation of his constitutional rights, then this Court should hold that the "good-faith exception" to the exclusionary rule applies to preclude the suppression of the CSLI data. We are bound by precedent to disagree.

¶ 47 In *United States v. Leon*, the United States Supreme Court announced the good-faith exception to the federal exclusionary rule to the Fourth Amendment, applicable in limited instances in which law enforcement officers obtain evidence pursuant to a search warrant that is ultimately determined to be unsupported by probable cause. 468 U.S. 897, 82 L. Ed. 2d 677 (1984). As our Supreme Court explained in *State v. Carter*, under the federal good-faith exception, "evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, although ultimately found to be unsupported by probable cause, may be admitted in the government's case in chief." 322 N.C. 709, 715, 370 S.E.2d 553, 557 (1988).

¶ 48 Presented with the opportunity in *Carter*, however, our Supreme Court declined to adopt a good-faith exception to the exclusionary rule as it exists under the North Carolina Constitution. *Id*. at 724, 370 S.E.2d at 562. North Carolina "adopted an exclusionary rule by statute rather than by judicial creation." *Id.* at 718, 370 S.E.2d at 559; *see* N.C. Gen. Stat. § 15A-974(a)(1) (providing that evidence must be suppressed upon timely motion if "[i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina"). Observing that "[t]he clearly mandated public policy of our state is to exclude evidence obtained in violation of our constitution[,]" our Supreme Court concluded that "[i]f a good faith exception is to be applied to this public policy, let it be done by the legislature, the

body politic responsible for the formation and expression of matters of public policy." *Carter*, 322 N.C. at 724, 370 S.E.2d at 562.

¶ 49 The State contends that following the *Carter* decision, our General Assembly adopted the good-faith exception by amending § 15A-974. *See* N.C. Gen. Stat. § 15A-974(a)(2) ("Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful."). Further, the State notes that "this Court has hinted that the good-faith exception is indeed alive and well[,]" although our Supreme Court has not yet applied our legislature's adopted good-faith exception. *See generally Gore*, 272 N.C. App. at 112–14, 846 S.E.2d at 303–05 (Dillon, J., concurring in part and concurring in result in part).

¶ 50 The State's reliance on these non-precedential hints is misplaced. This Court has squarely addressed the good-faith exception since our General Assembly amended § 15A-974. In *State v. Elder*, we acknowledged the statutory amendment. 232 N.C. App. 80, 92, 753 S.E.2d 504, 512 (2014), *aff'd as modified on other grounds*, 368 N.C. 70, 773 S.E.2d 51 (2015). Nevertheless, we noted that "our Supreme Court has not overruled *Carter*, and we are bound by precedent of our Supreme Court." *Id.* (citation and internal quotation marks omitted).

¶ 51 Indeed, this case could present an additional opportunity for our Supreme

Court to formally adopt the legislature's proposed good-faith exception to the exclusionary rule under the North Carolina Constitution and expressly overrule *Carter*, "but we are not permitted to anticipate or predict what the Supreme Court might do; we are bound by the existing precedent of *Carter*. Accordingly, there is no good faith exception to the exclusionary rule as to violations of the North Carolina State Constitution." *Id.* (citation omitted); *State v. Cobb*, 248 N.C. App. 687, 698, 789 S.E.2d 532, 539 (2016) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citation omitted)).

IV. Conclusion

¶ 52 The application and affidavit presented by Detective Wenk did not provide probable cause to support the trial court's § 2703(d) Order, in that the facts alleged failed to establish the reliability of the anonymous informant or corroborate the information provided by the informant. Accordingly, Detective Wenk acquired Defendant's historical CSLI data in violation of his constitutional rights.

¶ 53 "[W]hen a defendant has properly preserved the right to appeal the denial of a motion to suppress evidence at trial, then accepts a plea agreement and admits guilt, . . . the defendant is *per se* prejudiced by the improper denial of that motion to suppress." *State v. Rollins*, 200 N.C. App. 105, 109, 682 S.E.2d 411, 414 (2009). Thus, after careful consideration, we order a new trial.

NEW TRIAL.

Chief Judge STROUD and Judge DIETZ concur.

Report per Rule 30(e).