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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-612

Filed 16 May 2023

Nash County, Nos. 20 CRS 52740, 21 CRS 656

STATE OF NORTH CAROLINA

v.

ANTHONY LAMONTE LUCAS, JR.

Appeal by Defendant from Judgment entered 7 December 2021 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 30 November 2022.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

HAMPSON, Judge.

Anthony Lamonte Lucas, Jr. (Defendant) appeals from a Judgment entered upon his *Alford* plea to one count of Felony Carrying a Concealed Gun in violation of N.C. Gen. Stat. § 14-269(a1) (2019). Defendant's *Alford* plea was entered as part of a plea agreement in which the State agreed to dismiss an additional charge of

Possession of a Firearm by a Felon. As a further part of the plea agreement, Defendant reserved his right to appeal the denial of a Motion to Suppress evidence seized at the time of his arrest. In its written Order on the Motion to Suppress, the trial court included a Conclusion of Law, which indicated the trial court viewed the evidence presented at the suppression hearing in the light most favorable to the State. This was error. As a result, and for reasons that follow, we allow Defendant's Petition for Writ of Certiorari for purposes of vacating the Judgment entered upon the plea, including the dismissal of the Possession of a Firearm by a Felon charge, and remand this matter to the trial court for further proceedings.

Background

Following a traffic stop, which resulted in a vehicle search and Defendant's arrest on an outstanding warrant, Defendant was charged with Felony Carrying a Concealed Gun and Possession of a Firearm by a Felon.¹ Defendant filed a Motion to Suppress evidence seized at the time of his arrest. The trial court heard evidence and entered a written Order making Findings of Fact and Conclusions of Law denying Defendant's Motion to Suppress. In its written Conclusions of Law, the trial court expressly stated: "The Court viewed the evidence presented in the light most favorable to the State."

¹ The charge(s) in the outstanding warrant are apparently not at issue in this case.

Following the denial of the Motion to Suppress, Defendant entered his *Alford* plea. In exchange for Defendant's plea, the State agreed to dismiss the charge of Possession of a Firearm by a Felon. As further part of the plea, Defendant reserved his right to appeal the denial of the Motion to Suppress. The trial court accepted Defendant's plea and rendered its Judgment. Trial counsel for Defendant then stated: "Judge, I guess for the record purposes, we would enter notice of appeal . . . from the denial of his – the Motion to Suppress that was filed and heard on [28 October 2021]."

Petition for Writ of Certiorari

As an initial matter, Defendant has filed a Petition for Writ of Certiorari in this Court in the event we deem his oral Notice of Appeal insufficient to preserve his appeal from the trial court's Judgment. "An order . . . denying a motion to suppress evidence may be reviewed upon an appeal from . . . a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2021). However, a defendant must (1) notify the prosecutor and the trial court of his intention to appeal during plea negotiations and (2) provide notice of appeal from the final judgment. *State v. McBride*, 120 N.C. App. 623, 625-26, 463 S.E.2d 403, 404-05 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

Here, Defendant, through trial counsel, complied with only one of the two required steps to preserve his appeal from his guilty plea. Defendant complied with step 1 by notifying the prosecutor and trial court of his intent to appeal the denial of

the Motion to Suppress prior to his plea being accepted. However, after Judgment was entered, trial counsel gave oral Notice of Appeal but specified the appeal was from the denial of the Motion to Suppress and failed to state the appeal was from the Judgment rendered by the trial court. As such, Defendant has lost his right to appeal from the Judgment entered by the trial court. *See State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542 (2010) (dismissing appeal where defendant gave written notice of appeal “from the denial of Defendant’s motion to suppress,” but did not specify the judgment itself).

However, in this case, we discern a meritorious argument and error by the trial court appear on the face of the Order denying the Motion to Suppress. In our discretion, and in aid of our jurisdiction, we allow Defendant’s Petition and issue our Writ of Certiorari. *See* N.C. Gen. Stat. § 7A-32(c) (2021).

Analysis

On appeal to this Court, Defendant first contends the trial court’s Findings of Fact are not supported by competent evidence in the Record and, in turn, do not support the trial court’s Conclusions of Law. “Our review of a trial court’s denial of a motion to suppress is strictly limited to a determination of whether [the trial court’s] findings are supported by competent evidence, and in turn, whether the findings support the trial court’s ultimate conclusion.” *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court’s conclusions of law, however, are reviewed de novo. *See State v. Fernandez*,

346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). In this case, we need not address Defendant's specific contentions regarding the trial court's Findings or, even more specifically, the inferences the trial court drew from the evidence. This is so because, in our de novo review of the trial court's Conclusions of Law, we observe the trial court stated it was viewing the evidence in the light most favorable to the State. This is error.

"Initially the burden is on the defendant to show that the motion to suppress is timely and in proper form." *State v. Williams*, 225 N.C. App. 636, 637, 738 S.E.2d 211, 213 (2013). "Once the defendant has done so, 'the burden is upon the [S]tate to demonstrate the admissibility of the challenged evidence[.]'" *Id.* at 638, 738 S.E.2d at 213 (quoting *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 636-37 (1983)). "To do this the [S]tate must persuade the trial judge, sitting as the trier of fact, by a preponderance of the evidence that the facts upon which it relies to sustain admissibility and which are at issue are true.'" *Id.* (quoting *Cheek*, 307 N.C. at 557, 299 S.E.2d at 636-37).

Here, there is no contention by the State that Defendant's Motion was untimely or procedurally deficient. As such, the burden of proof was on the State to demonstrate the admissibility of the evidence. The trial court's Order does not identify the preponderance of the evidence standard or otherwise indicate the State met its burden of proof. *Id.* at 638, 738 S.E.2d at 214 ("The order should also clearly state the applicable burden of proof and whether it was met by the State."). To the

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contrary, the trial court's Order removes the burden of proof from the State by taking the evidence presented in the light most favorable to the State. Indeed, it appears the trial court erroneously applied the more deferential appellate standard of review to the evidence. *See, e.g., State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) ("In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" (citations omitted)). Consistent with Defendant's arguments on appeal to this Court, this apparent failure to hold the State to its burden of proof, at a minimum, raises the possibility the trial court drew inferences from the evidence in favor of the State when crafting its written Findings of Fact.

Therefore, the trial court failed to apply the correct burden of proof in its written Order. Thus, where the trial court failed to hold the State to its burden of proof, the trial court's denial of the Motion to Suppress was entered upon an improper legal standard. Consequently, we vacate the trial court's Order denying the Motion to Suppress and the Judgment subsequently entered and remand this matter to the trial court for application of the correct legal standard and burden of proof to the evidence presented in opposition to the Motion to Suppress. *See State v. McKinney*, 361 N.C. 53, 65, 637 S.E.2d 868, 876 (2006) (remanding to "afford the trial court an opportunity to evaluate" a motion to suppress "using the appropriate legal standard."). We express no opinion on the ultimate merits. *See id.* Furthermore, because the Judgment was imposed as part of a plea agreement, the plea agreement

must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments. *See, e.g., State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding judgment should be vacated, guilty plea set aside, and the case remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on the defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

Accordingly, for the foregoing reasons, we vacate the Judgment against Defendant and set aside the plea agreement in its entirety. We remand to the trial court for further proceedings on the charges contained in the indictments, including new proceedings on Defendant's Motion to Suppress and, if necessary, a new trial.² We further note: "if the judge who conducted the hearing is not available to enter a new order on remand, a new evidentiary hearing on the motion to suppress is required[.]" *State v. Swain*, 276 N.C. App. 394, 399, 857 S.E.2d 724, 727 (2021).

VACATED AND REMANDED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).

² We acknowledge Defendant's argument regarding the sentence imposed by the trial court. However, because we vacate the Judgment, we do not reach any argument regarding sentencing.