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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-952

Filed 21 May 2024

Cabarrus County, No. 21 CRS 052380

STATE OF NORTH CAROLINA

v.

KENYON LAMAR YOUNG

Appeal by defendant from judgment entered 19 May 2023 by Judge Nathaniel J. Poovey in Superior Court, Cabarrus County. Heard in the Court of Appeals 1 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Everson Law Office, PLLC, by Cynthia E. Everson, for defendant-appellant.

ARROWOOD, Judge.

Kenyon Lamar Young (“defendant”) appeals from the trial court’s judgment entered on 19 May 2023 upon a jury verdict finding defendant guilty of possession of eutylone and drug paraphernalia. On appeal, defendant argues the trial court erred by denying his motion to suppress, allowing testimony regarding prior bad acts in violation of the Rules of Evidence, permitting the State to call an undisclosed witness,

and failing to consider defendant's eligibility for a conditional discharge under N.C.G.S. § 90-96. For the following reasons, we find no error.

I. Background

On 24 June 2021, defendant was arrested and charged with one count of possession of a controlled substance (MDMA) and one count of possession of drug paraphernalia. Defendant was indicted on the charges on 3 August 2021. On 6 March 2023, a superseding indictment was entered charging defendant with one count of possession of a controlled substance (eutylone) and one count of possession of drug paraphernalia.

On 18 May 2023, defendant filed a motion to suppress, arguing that the search of his car exceeded the scope of the search warrant and was not supported by independent probable cause. Defendant also filed a motion to suppress statements he made to the arresting officer arguing the statements were obtained in violation of his constitutional rights. At the motion hearing on 18 May 2023, the State called Detective Angel Gonzalez ("Detective Gonzalez"), the officer who conducted the search and interview, to testify.

Detective Gonzalez stated that he obtained a search warrant for 110 Brown Street Southwest in Concord, North Carolina on 23 June 2021. He testified that as he was conducting surveillance on the property with binoculars, he witnessed a vehicle pull into the driveway and observed "a hand-to-hand exchange" between Stevie Mingo ("Mingo") and the driver of the car, later determined to be defendant.

Detective Gonzalez testified that he asked his supervisors about “the legalities of searching the vehicle that’s on the curtilage during the execution of a drug warrant” and decided to search the vehicle.

Detective Gonzalez also testified that he read defendant his *Miranda* rights after his arrest and interviewed him. The State introduced video evidence of defendant’s interview with the detective, and defendant’s counsel argued that because defendant stated he did not want to speak with the officers before being read his *Miranda* rights, the officers’ communication should have ceased. The trial court denied defendant’s motion to suppress in open court, stating that it did not believe any of defendant’s statements after he was read his *Miranda* rights should be suppressed. The trial court also found that the search warrant of the 110 Brown Street home included the search of defendant’s vehicle, and his constitutional rights were not violated.

Trial began immediately after the hearing, and Detective Gonzalez testified to the information regarding the hand-to-hand exchange he witnessed with binoculars before the jury. He explained that he saw

Mr. Mingo come out of the house. He’s looking up the road. He’s looking up toward the road. He’s kind of scanning the area. He walks up to the driver’s window of the vehicle. He puts his elbow in the vehicle, sticks his hand in the vehicle, and then comes out, looks around, and walks away from the car within, I don’t know, less than 10 seconds. That, based on my training and experience, is [] consistent with other illegal hand-to-hand transactions that I’ve seen[.]

The State introduced Detective Gonzalez’s body camera footage from the arrest into evidence, and defendant’s counsel objected “to [Detective Gonzalez] identifying Mr. Young in the matter as it appears that he has been placed in custody and has not yet been Mirandized.” Detective Gonzalez testified that when he searched defendant’s vehicle, he found a plastic bag with tan powder inside of a cigarette box as well as a set of scales.

Detective Gonzalez stated that he transported defendant to the police station and interviewed him. Detective Gonzalez testified defendant had stated he did not want to speak with police, and Detective Gonzalez read defendant his *Miranda* rights. Following a brief conversation, defendant repeated that he did not want to speak to Detective Gonzalez; the State then introduced video evidence of this conversation. Detective Gonzalez asked defendant if he sold crack, and defendant responded that he didn’t know. Defendant also admitted to previously using MDMA before repeating that he did not wish to speak to officers.

After examination of the State’s witnesses, the State requested to amend the witness list to include one additional witness Officer Ronald Dorsey (“Officer Dorsey”) with the Concord Police Department. Defendant’s counsel objected, but the trial court stated that the State initially did not have to provide a witness list and did not view “any real prejudice to the defendant” by having an additional witness testify.

The jury found defendant guilty of both charges, and the trial court sentenced him to 6 to 17 months imprisonment suspended for 24 months of supervised probation. Defendant entered timely notice of appeal on 30 May 2023.

II. Discussion

On appeal, defendant argues that the trial court erred by (1) denying the motion to suppress regarding evidence found from the search of his car, (2) denying the motion to suppress with respect to defendant's statements regarding his drug use, (3) allowing Officer Dorsey to testify, and (4) failing to consider his eligibility for conditional discharge under N.C.G.S. § 90-96. We disagree.

A. Search of Defendant's Vehicle

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Duncan*, 272 N.C. App. 341, 348 (2020) (quoting *State v. Biber*, 365 N.C. 162, 167–68 (2011)). However, defendant did not object to the introduction of the challenged evidence, and thus, the plain error standard of review applies. *See State v. Lawrence*, 365 N.C. 506, 516 (2012). Under this standard, a defendant must show that a fundamental error occurred at trial—"that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518 (citations and internal quotation marks omitted).

Defendant argues that the search of his vehicle was improper because it did not fall in the curtilage of the home subject to the search warrant. Even assuming *arguendo* that defendant's car was not within the curtilage of the home, we hold that Detective Gonzalez had independent probable cause to search defendant's vehicle.

A warrant is typically required to conduct a search, but a police officer can conduct a search of a vehicle without a warrant "as long as probable cause exists for the search." *State v. Parker*, 277 N.C. App. 531, 539 (2021) (quoting *State v. Earhart*, 134 N.C. App. 130, 133 (1999)). Probable cause is defined as " 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty' of an unlawful act." *Id.* (quoting *State v. Yates*, 162 N.C. App. 118, 122 (2004)). "The existence of probable cause is a commonsense, practical question that should be answered using a totality-of-the-circumstances approach." *State v. Degraphenreed*, 261 N.C. App. 235, 241 (2018) (citations and internal quotation marks omitted).

Here, Detective Gonzalez had probable cause to search defendant's car based on the totality of the circumstances. Officers had obtained a search warrant for the house at 110 Brown Street Southwest based on investigation determining "a crack cocaine sale-and-delivery operation" was maintained at the residence. While surveilling the property before executing the search warrant, Detective Gonzalez noticed defendant's gray SUV pull into the driveway of the residence. Detective Gonzalez observed Mingo, a subject of his investigation of the drug operation at the

residence, walk to the SUV and conduct a hand-to-hand exchange with the driver. Detective Gonzalez testified that Mingo scanned the area, walked up to the vehicle, put his elbow and hand inside the driver's side window, and within less than ten seconds later, walked away from the car. Detective Gonzalez further stated that based on his training and experience, that interaction was consistent with other hand-to-hand illegal transactions he had seen "thousands of times" in his career. Based on these circumstances, a cautious person would believe an illegal exchange had occurred, and Detective Gonzalez had probable cause to search defendant's vehicle based on his observations. *See Degraphenreed*, 261 N.C. App. at 242 (holding that based on an informant's information that suspect was selling drugs from his residence, controlled purchases of heroin were made at the residence, and officers observed the suspect at the trunk of the vehicle, probable cause existed to search the vehicle). Accordingly, the trial court did not err in denying defendant's motion to suppress with respect to the drugs found in defendant's car.

B. Statements Regarding Drug Use

Defendant also argues that the trial court erred in allowing statements defendant made regarding his drug use after he was read his *Miranda* rights. As defendant did not object to the statements at trial, the standard is plain error.

North Carolina's Rules of Evidence prohibit the admission of evidence of other crimes, wrongs, or acts "in order to show that he acted in conformity therewith." N.C.G.S. § 8C-1, Rule 404(b). Additionally, the rules provide that "evidence may be

excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” *Id.* at § 8C-1, Rule 403.

Even assuming *arguendo* that the admission of defendant’s statement that he previously used MDMA was error, it did not amount to plain error. A search of defendant’s car yielded a cigarette box containing what was later determined to be eutylone. Though defendant’s counsel argued it could have belonged to someone else, both Detective Gonzalez and Officer Dorsey testified that they saw no one else inside or around defendant’s vehicle at the time they arrived on the scene. Thus, defendant’s statement that he had previously used MDMA is unlikely to have a probable impact on the jury’s determination that defendant was in possession of the drugs found in his car. Thus, defendant is unable to meet the plain error standard.

C. State’s Additional Witness

We review a trial court’s decision to allow an undisclosed witness to testify for an abuse of discretion. *See State v. Taylor*, 178 N.C. App. 395, 412 (2006). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Roache*, 358 N.C. 243, 284 (2004) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

“In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State’s witnesses who are to testify against him.” *State v. Hoffman*, 281 N.C. 727, 734 (1972) (citations omitted). Our statutes require the prosecuting attorney to provide a “written list of all other

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witnesses whom the State reasonably expects to call during the trial” *only upon* motion by the defendant. N.C.G.S. § 15A-903(a)(3) (2023). However, when the State voluntarily provides disclosure pursuant to discovery procedure in § 15A-902(a), the disclosure must meet the requirements of § 15A-903(a). *Id.* at § 15A-903(b). That section provides that “[i]f there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called.” § 15A-903(a)(3). “Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.” *Id.*

Defendant mischaracterizes the statutory requirement to provide a witness list in two ways. First, defendant mistakenly asserts that § 15A-903(a)(3) requires the State to provide a witness list. Our courts have long held that defendants are not entitled to a witness list before trial. *See State v. Harris*, 323 N.C. 112, 122 (1988); *State v. Parker*, 140 N.C. App. 169, 176 (2000). As explained above, the statute requires this list only when a defendant moves for the trial court to order it. Here, there is no evidence in the record that defendant requested the State provide him a witness list, meaning (1) § 15A-903(a)(3) does not apply, and (2) the State was not required to provide notice that it would call Officer Dorsey.

Second, defendant mischaracterizes the requirements of the statute by asserting the State was required to show good cause. This assertion is incorrect as the statute plainly states “the court *upon a good faith* showing shall allow the

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witnesses to be called.” § 15A-903(a)(3) (emphasis added). Even assuming defendant had moved to receive a witness list and the State provided it voluntarily, defendant does not show that the State did not act in good faith. At trial, the State explained in its request to amend the witness list that “some third person [] has been presented as an individual in [defendant’s] vehicle[,]” and Officer Dorsey’s testimony would show that “there was no one else walking in that driveway, not a single person, not from the defendant’s car, not coming from the back of the house, not getting out of the defendant’s car.”

The State provided defense counsel with the witness list when the trial began, only one day prior to their request to call Officer Dorsey. The State argued that Officer Dorsey was visible in the body camera footage and could have reasonably been called in the case, and the trial court determined that defendant would not be prejudiced by the State calling Officer Dorsey. Defendant has not presented any evidence of bad faith on the part of the State, and defendant did not show how he was prejudiced at trial other than a bare-bones assertion that this practice “flies in the face of Due Process.” Officer Dorsey’s presence at the scene of defendant’s arrest reasonably supports the trial court’s decision to allow the State to call him as a witness, and defendant has failed to show the trial court abused its discretion in doing so.

D. Conditional Discharge

“When this Court is confronted with a statutory error regarding a sentencing issue, such error is reviewed de novo.” *State v. Essick*, 282 N.C. App. 150, 153 (2022) (cleaned up).

Our General Statutes provide that

Whenever any person who has not previously been convicted of (i) any felony offense under any state or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance . . . or by possessing drug paraphernalia . . . or (ii) a felony under G.S. 90-95(a)(3), the court shall, without entering a judgment of guilt and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require[.] . . . Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings.

N.C.G.S. § 90-96(a) (2023).

Here, defendant argues that the trial court erred in failing to consider his eligibility for this conditional discharge. However, defendant previously was convicted of possession of marijuana in 2014 and possession of drug paraphernalia in 2006. We hold that defendant was not eligible for conditional discharge under § 90-96(a) due to his prior convictions.

We also believe defendant was ineligible for conditional discharge because he was convicted in the present case with both possession of a controlled substance and

drug paraphernalia. Section 90-96(a) provides that when a person who has no prior convictions as listed above is found guilty of “a misdemeanor under this Article by possessing a controlled substance . . . *or* by possessing drug paraphernalia[,]” the court shall conditionally discharge the conviction. § 90-96(a) (emphasis added). Here, defendant was found guilty of possession of a controlled substance *and* possession of drug paraphernalia. Because the statute applies to a person’s conviction of only one of those offenses, defendant was not eligible for conditional discharge.

Defendant argues that § 90-96(a1) provides that we only consider prior offenses occurring less than seven years before the date of the current offense. However, section (a1) applies not to a defendant’s prior convictions but to a conviction eligible for discharge under section (a). The statute further states that this seven-year limitation applies “[f]or the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal.” § 90-96(a1). Defendant misinterprets § 90-96(a1), and we hold the trial court did not err in failing to consider defendant for conditional discharge.

III. Conclusion

For all the foregoing reasons, we hold that the trial court committed no prejudicial error.

NO ERROR.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).