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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-520

Filed 3 September 2024

Forsyth County, Nos. 19 CRS 51876-79

STATE OF NORTH CAROLINA

v.

ALEXANDER O'SHAE VALENTINE, Defendant.

Appeal by defendant from judgment entered 14 November 2022 by Judge William Anderson Long, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 14 May 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Grace R. Linthicum, for the State.*

*John W. Moss for defendant-appellant.*

THOMPSON, Judge.

Defendant Alexander Valentine entered an *Alford* plea on the following charges: (1) trafficking opium or heroin by possession, (2) trafficking opium or heroin by transportation, (3) possession with intent to sell or distribute (PWISD) heroin, (4) PWISD marijuana, (5) possession of marijuana paraphernalia, (6) possession of drug paraphernalia, (7) carrying a concealed gun, and (8) possession of a firearm by a felon.

On appeal, defendant contends that his Fourth Amendment and Fourteenth Amendment rights were violated when a Kernersville Police Officer conducted a warrantless search of defendant's person. We disagree. Defendant also raised an ineffective assistance of counsel claim on appeal. However, we decline to review such a claim as it is not properly before us. For the reasons discussed below, we affirm the trial court's decision denying defendant's motion to suppress.

### **I. Factual Background and Procedural History**

On 13 April 2021, defendant filed a motion to suppress, which came on for hearing on 16 November 2021 before Judge William A. Long. Based on the evidence presented during this hearing, the case facts are as follows. On 23 February 2019 at approximately 3 a.m., Captain Eric Pittman (Pittman) of the Kernersville Police Department (KPD) merged onto Highway 421, headed southbound toward Kernersville, and observed a silver vehicle traveling in the left-hand lane—in the same direction as Pittman—at a “normal rate of speed[.]” Pittman observed the silver vehicle pass him, reduce its speed by “an obvious amount,” and move into the right-hand lane behind a tractor-trailer truck. Pittman testified that he observed the silver vehicle's speed to be between thirty and forty miles per hour (mph) (in a sixty-mph zone) and that the car was following very closely behind the tractor-trailer truck. Because of the significant reduction in speed and following the truck too closely, Pittman initiated a traffic stop of the silver car. Once the vehicles stopped on the right-hand side of the highway, Pittman exited his patrol car and approached the

passenger side of the silver vehicle. Pittman identified himself as a law enforcement officer with KPD to the driver and defendant, who was the passenger, and requested the registration and license of the driver. While at the passenger side of the vehicle, Pittman detected the odor of marijuana. Pittman testified that due to the odor, he asked defendant for his identification, which defendant provided.

Officers Kline (Kline) and Houle (Houle) of the KPD subsequently arrived on the scene, and after Pittman informed Kline of the odor of marijuana emanating from the vehicle, defendant and the driver were asked to step out of the car. At defendant's request, Pittman informed defendant that he was being detained "because the odor of marijuana [was] present in the vehicle." During this process, Pittman detected the odor of marijuana emanating from defendant's person and asked if defendant had smoked marijuana that day; defendant indicated that he had. Pittman informed defendant that Houle would conduct a "probable cause search" of defendant's person. Pittman, Houle, and defendant moved to the side of Pittman's patrol car.<sup>1</sup> Pittman had Houle take control of defendant so that Pittman could run a warrant check on the driver and defendant.

Before Houle began searching defendant's person, he removed a cross-body bag from defendant's upper body, which contained a firearm. Simultaneous to the discovery of the firearm, Pittman informed Houle that both the driver and defendant

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<sup>1</sup> The silver car in which defendant was a passenger was a four-door sedan, and Pittman's patrol car was a four-door SUV.

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had outstanding warrants for their arrest, and that defendant was a convicted felon. During the search of defendant's person, Houle observed a bulge in defendant's pants near defendant's groin area. Houle pulled defendant's waistband out far enough to reach into defendant's underwear and retrieved two bags of contraband; one bag was identified as marijuana, and the other bag was suspected to be heroin. Following Houle's search of defendant, he requested that Pittman conduct a secondary search to ensure all contraband was retrieved.

On 2 March 2020, a Forsyth County Grand Jury indicted defendant on the following charges: (1) trafficking opium or heroin by possession, (2) trafficking opium or heroin by transportation, (3) possession with intent to sell or distribute (PWISD) heroin, (4) PWISD marijuana, (5) possession of marijuana paraphernalia, (6) possession of drug paraphernalia, (7) carrying a concealed gun, and (8) possession of a firearm by a felon.

After hearing and reviewing the evidence presented at the motion to suppress hearing, the trial court denied defendant's motion to suppress, and on 14 November 2022 defendant's case came on for trial. At the trial, defendant entered into an *Alford* plea agreement<sup>2</sup> as to all charges and explicitly reserved the right to appeal his motion to suppress. Pursuant to his plea agreement, Judge Long sentenced defendant

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<sup>2</sup> An *Alford* plea is a plea wherein a defendant maintains his innocence but still pleads guilty because he "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

to imprisonment for a minimum of seventy months and a maximum of ninety-three months in the North Carolina Department of Adult Correction.

Defendant gave timely oral notice of appeal.

## **II. Discussion**

### **A. Petition for Writ of Certiorari**

As an initial matter, defendant filed a Petition for Writ of Certiorari (petition) contemporaneously with his appeal. Defendant stated that he filed his petition so that this Court could exercise its discretion to review his appeal if his appeal was deemed untimely filed. However, defendant's appeal was deemed timely filed by Order of the Clerk of Court. Thus, defendant's petition is dismissed as moot.

### **B. Appellate Jurisdiction**

This Court has jurisdiction over defendant's appeal. Generally, when a defendant enters into a plea agreement, his rights to appeal are limited. However, pursuant to N.C. Gen. Stat § 15A-979(b), this Court may review an order denying a defendant's motion to suppress evidence on appeal from a final judgment of conviction, including a judgment entered on a guilty plea. *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995). In such instances, the defendant must (1) notify the State and the trial court of his intention to appeal during plea negotiations, and (2) provide notice of appeal from the final judgment. *Id.* at 625–26, 463 S.E.2d at 404–05.

Here, the trial court had notice because it stated that all defendant's objections were preserved for any potential appeal. Moreover, defendant explicitly reserved the right to appeal the trial court's denial of his motion to suppress in his *Alford* plea and gave timely notice of appeal from his conviction. Thus, defendant's appeal is properly before this Court.

### **C. Motion to Suppress**

On appeal, defendant contends that the trial court should have granted his motion to suppress the marijuana and heroin found in his underwear because the search "was without probable cause, was not justified by any exigent circumstances and was objectively unreasonable." More specifically, defendant argues that the search of his "groin and buttocks areas while standing on the side of Highway 421 with only the patrol car blocking the view from oncoming traffic was unreasonable [.]" and the "facts and circumstances did not justify an immediate search of this scope without additional privacy measures." We do not agree.

#### **a. Standard of Review**

This Court's review of a trial court's denial of a defendant's 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. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citation omitted). Moreover, this Court "accords great deference to the trial

court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *Id.* Finally, this Court reviews a trial court's conclusions of law de novo. *State v. Steele*, 277 N.C. App. 124, 129, 858 S.E.2d 325, 330 (2021).

**b. Search Based on Probable Cause and Exigent Circumstances**

"Upon timely motion, evidence must be suppressed if: [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina[.]" N.C. Gen. Stat. § 15A-974(a)(1) (2023). Under the Fourth Amendment of the United States Constitution, individuals are protected from unreasonable searches and seizures, U.S. Const. amend. IV., and the North Carolina Constitution also protects individuals from unreasonable searches and seizures. N.C. Const. art. I, § 20. Thus, evidence that is obtained as a result of an unreasonable search must be suppressed.

"A warrantless search is lawful if probable cause exists to search and the exigencies of the situation make search without a warrant necessary." *State v. Stover*, 200 N.C. App. 506, 511, 685 S.E.2d 127, 131 (2009) (citation omitted). "Probable cause exists where the facts and circumstances within [ ] the officers' knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.* (brackets and citation omitted). Moreover, the "[p]lain smell of drugs

by an officer is evidence to conclude there is probable cause for a search.” *Id.* “Exigent circumstances sufficient to make search without a warrant necessary include, but are not limited to, the probable destruction or disappearance of a controlled substance.” *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001).

In the instant case, probable cause existed because Pittman observed the strong odor of marijuana emanating from defendant’s person and questioned defendant about it. Therefore, the “plain smell of [marijuana] by [Pittman] [was] evidence to conclude there was probable cause for a search.” *Stover*, 200 N.C. App. at 511, 685 S.E.2d at 131. Additionally, exigent circumstances existed for Houle to remove the contraband from defendant’s underwear because of the possibility of “probable destruction or disappearance of a controlled substance.” *Nowell*, 144 N.C. App. at 643, 550 S.E.2d at 812. Therefore, the warrantless search of defendant was reasonable.

Having determined that the search was reasonable, we must now determine whether the conduct of the search was reasonable. Defendant challenges two findings of fact. First, defendant contends that the trial court’s finding that “[n]o one from the highway could observe [defendant]” while he was being searched was not supported by competent evidence. As the basis for his argument, defendant contends that Pittman’s testimony that the flashing emergency lights atop the several police vehicles—as seen in State’s Exhibit 1 footage—were so bright that passersby on the highway would have been unable “to actually see people or actions that [were] being



conducted close[ ] to those lights[,]” is not competent evidence because “[Pittman] was not in a car passing the scene on 421 during the stop.” Additionally, defendant contends that Pittman’s testimony regarding the inability of the passersby to witness the search of defendant’s person “was speculative.” However, we are not persuaded.

Defendant’s contentions lack merit. The evidence presented during the motion to suppress hearing showed that Houle relocated defendant so that defendant was shielded by Pittman’s SUV patrol car. Furthermore, the video footage from the search shows that Houle never removed any article of defendant’s clothing. Rather, after noticing the bulge in defendant’s undergarments, Houle pulled defendant’s waistband out far enough to look inside and retrieve the bags of contraband, keeping defendant’s waistband at waist level. Additionally, defendant’s genital area was not visible in Houle’s body camera footage; therefore, it would be totally inconceivable that passersby in vehicles traveling on the other side of the patrol car from where defendant was located could have observed defendant’s genital area.

Second, defendant contends that “[t]he trial court’s finding that it would not be safe to transport [defendant] without conducting an intrusive search was not supported by competent evidence.” However, “because narcotics can be easily and quickly hidden or destroyed, especially after defendant received notice of the officer’s intent to discover whether defendant was in possession of marijuana[,] there were sufficient exigent circumstances justifying an immediate warrantless search.” *State v. Johnson*, 225 N.C. App. 440, 448–49, 737 S.E.2d 442, 447 (2013) (brackets, ellipsis,

and citation omitted). Thus, the record evidence supports the trial court's findings of fact, that the warrantless search of defendant's person was not unreasonable and, therefore, defendant's constitutional rights were not violated. As such, we hold that the trial court properly denied defendant's motion to suppress the marijuana and heroin obtained during the search of his person.

**D. Ineffective Assistance of Counsel**

Defendant also raised an ineffective assistance of counsel claim on appeal. However, we decline to review this issue and dismiss without prejudice for the trial court's post-conviction proceedings if so moved by defendant.

"Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Rivera*, 264 N.C. App. 525, 535, 826 S.E.2d 511, 518 (2019) (citation omitted). However, this Court will consider a defendant's IAC claims brought on direct appeal "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.* (internal quotation marks and citation omitted). Furthermore, when this Court determines that an IAC claim—brought on direct appeal—is premature, the claim is dismissed "without prejudice, allowing defendant to bring [the claim] pursuant to a subsequent motion for appropriate relief in the trial court." *Id.* (citation omitted).

After careful review, we conclude, and defendant concedes, that defendant's IAC claims are premature and the record on appeal demonstrates that further investigation into these IAC claims is required. Therefore, defendant's IAC claims are dismissed without prejudice.

### **III. Conclusion**

For the foregoing reasons, we affirm the trial court's decision denying defendant's motion to suppress. We dismiss defendant's IAC claim without prejudice.

**AFFIRMED.**

Judges STROUD and CARPENTER concur.

Report per Rule 30(e).