NO. COA10-116

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v. Caldwell County
No. 09 CRS 50465

JOEY DEAN CHESTER

Appeal by defendant from order entered 4 August 2009 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the state.

Robert W. Ewing, for defendant-appellant.

STEELMAN, Judge.

Under the totality of the circumstances test, the trial court did not err in determining that probable cause existed to conduct a warrantless search and denying defendant's motion to suppress.

I. Factual and Procedural Background

Several months prior to 19 February 2009, Hudson Police Chief David Greene (Chief Greene) arrested Josh McLean (McLean) on a drug-related charge. McLean agreed to participate in undercover work for the Hudson Police Department. McLean revealed information pertaining to possible drug transactions, but none of this information resulted in any undercover buys or arrests.

On 18 February 2009, McLean contacted Chief Greene and advised him that he could set up a purchase of marijuana from an individual named "Joey." McLean stated he had purchased drugs from Joey before, and that Joey lived at Baxter Crow Apartments off of Freezer Locker Road, near Hudson.

The following day, McLean contacted Joey Dean Chester (defendant) by telephone and made arrangements for a drug purchase to take place at the Mt. Herman Superette. Chief Greene was with McLean at the time of the phone call, and was able to hear McLean's portion of the conversation. Once the location of the drug purchase was determined, Chief Greene contacted the Caldwell County Sheriff's Department because the location was outside of the Town of Hudson. Chief Greene, along with deputies from the Caldwell County Sheriff's Department, followed McLean to the Mt. Herman Superette. However, defendant failed to appear.

Following the unconsummated drug purchase, Deputies Barbour and Ellis conducted surveillance at the Baxter Crow Apartments, focusing on an apartment identified by McLean as being occupied by defendant. Deputies Barbour and Ellis received a phone call from McLean stating that defendant called and wanted to set up another transaction. This was to take place at the Burger King on Highway 321 in Hudson.

Within three to five minutes, two white males were observed leaving the apartment and got into a blue pickup truck. Deputies Barbour and Ellis followed the truck, continuously reporting to Chief Greene. Chief Greene arrived at the Burger King off Highway

321 prior to the truck. Chief Greene observed the truck enter the Burger King parking lot, and he kept it continuously under surveillance. McLean was not present at Burger King.

After the truck arrived at Burger King, officers and deputies positioned their vehicles to prevent the truck from leaving. Officers instructed the two occupants of the truck to step out of the vehicle. The occupants and the vehicle were searched. Officers found one pound of marijuana and a .380 caliber pistol. A small amount of marijuana was found on defendant's person. The search was conducted without a search warrant.

Defendant was arrested and charged with one count of felonious possession with intent to sell or deliver marijuana, one count of felonious maintaining a vehicle used to keep and sell controlled substances, and one count of misdemeanor carrying a concealed weapon. On 15 July 2009, defendant moved to suppress the evidence found in the vehicle. On 4 August 2009, the trial court denied this motion. Defendant subsequently pled guilty to the possession with intent to sell or deliver marijuana charge and the weapon charge. Defendant was sentenced to six to eight months imprisonment. This sentence was suspended, and defendant was placed on probation for thirty-six months under regular and special conditions of probation.

Defendant appeals.

II. Denial of Defendant's Motion to Suppress Evidence

In his only argument on appeal, defendant contends that the trial court erred in denying his motion to suppress the contraband found during the search of the truck. We disagree.

A. Standard of Review

Upon a motion to suppress evidence, "the scope of appellate review . . . 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. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Defendant has not challenged the trial court's findings of fact in his brief, and therefore the scope of our review is limited to whether the findings of fact support the conclusions of law. *State v. Houston*, 169 N.C. App. 367, 370-71, 610 S.E.2d 777, 780, *disc. review denied and appeal dismissed*, 359 N.C. 639, 617 S.E.2d 281 (2005). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation omitted).

B. Probable Cause

As a general rule, a valid search warrant must accompany every search and seizure. *State v. Trull*, 153 N.C. App. 630, 638-39, 571 S.E.2d 592, 598 (2002), *disc. review denied*, 356 N.C. 691, 578 S.E.2d 596 (2003). However, an exception arises when a search based upon probable cause is conducted on a motor vehicle on public property. *Carroll v. United States*, 267 U.S. 132, 153-54, 69 L.

Ed. 543, 552 (1925); *see also State v. Isleib*, 319 N.C. 634, 636-37, 356 S.E.2d 573, 575 (1987). "[N]o exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle if there is probable cause to believe that it contains the instrumentality of a crime or evidence pertaining to a crime and the vehicle is in a public place." *Isleib*, 319 N.C. at 638, 356 S.E.2d at 576-77.

"Probable cause refers to those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985). Probable cause based on an informant's tip is determined by a totality of the circumstances analysis, which "permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip[.]" *Illinois v. Gates*, 462 U.S. 213, 234, 76 L. Ed. 2d 527, 545 (1983); *see also State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22, *cert. denied*, 353 N.C. 731, 551 S.E.2d 116 (2001).

Defendant contends the trial court erred in not concluding that McLean was an anonymous informant. In arguing that McLean should have been considered an anonymous informant, defendant relies primarily upon the case of *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000). In *Hughes*, the officers who conducted the search had never spoken to the informant. *Id.* at 204, 539 S.E.2d

at 628. In fact, the officers knew nothing of the informant other than a conclusory statement by another officer that the informant was confidential and reliable. *Id*. Our Supreme Court held that some objective proof, in addition to the conclusory statement, was required to support the officer's decision to conduct a search. *Id*. at 204, 539 S.E.2d at 628–29. The Court then analyzed probable cause under the anonymous tip standard, since there was insufficient indicia of reliability to warrant the use of the confidential and reliable informant standard. *Id*. at 205, 539 S.E.2d at 629.

Hughes, however, is readily distinguishable from the instant case. While the officers who conducted the search in *Hughes* neither knew the identity of the informant nor had any contact with the informant prior to the search, the officers conducting the search in the instant case had established direct contact with McLean. Chief Greene, the officer who worked to set up the drug buy, and who was involved in the search, knew McLean well before the search took place on 19 February 2009. Chief Greene testified at the suppression hearing that he had known McLean for most of his life. In addition, the record showed that Chief Greene had established McLean as a contact several months prior to the search. McLean had previously given information to Chief Greene and the Hudson Police Department about possible drug transactions. The fact that these transactions did not result in any undercover purchases or arrests did not detract from McLean's reliability, since the failure for the transactions to take place was due to

concerns over officer safety and not a result of the information given by McLean.

Evidence presented at the hearing also showed that the deputies from the Caldwell County Sheriff's Department, who were involved in the search, had also established contact with McLean. After the initial drug transaction at the Mt. Herman Superette failed to take place, McLean personally contacted the Caldwell County deputies and informed them of the second proposed drug transaction.

In *Hughes*, the officers never once spoke with the informant prior to conducting the search. *Id.* at 204, 539 S.E.2d at 628. The Court, therefore, analyzed probable cause under the anonymous tip standard due to insufficient indicia of reliability. *Id.* at 205, 539 S.E.2d at 629. In the instant case, both Chief Greene and the Caldwell County deputies had significantly more contact with McLean than the officers had with the informant in *Hughes*. The relationship between McLean and Chief Greene, as well as the communication between McLean and the Caldwell County deputies, demonstrates that McLean was a known, rather than an anonymous, informant. *See State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003) (noting that indicators of reliability attending an informant's tip may include whether the informant was known or anonymous), *aff'd per curiam*, 358 N.C. 135, 591 S.E.2d 518 (2004).

The deputies were also able to independently corroborate the information provided by McLean. Deputies Barbour and Ellis

observed two males exit the precise apartment identified by McLean as Joey's residence three to five minutes after the second drug transaction was set up. The deputies observed the truck, containing the two males, depart from the apartment to Burger King, the location identified as the site of the proposed drug transaction. These events corroborated McLean's information concerning the proposed drug deal and supported the officer's determination that probable cause existed. "[A]n officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge." *Gates*, 462 U.S. at 242, 76 L. Ed. 2d at 550 (quotation omitted); *see also State v. Edwards*, 185 N.C. App. 701, 705, 649 S.E.2d 646, 649, 362 N.C. 89, 656 S.E.2d 281 (2007); *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 ("[I]n making the probable cause determination, independent police corroboration of the facts given by the informant are important in evaluating the reliability of the informant's tip." (citation omitted)), *appeal dismissed*, 351 N.C. 112, 540 S.E.2d 372 (1999).

Under the totality of the circumstances test, we consider both whether the informant was known or anonymous, and whether information given by the informant could be and was independently corroborated by the police, in determining whether probable cause existed. *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); *Collins*, 160 N.C. App. at 315, 585 S.E.2d at 485. "Probable cause

exists if the facts and circumstances within the knowledge of the officer were sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense." *State v. Bowman*, 193 N.C. App. 104, 109, 666 S.E.2d 831, 834-35 (2008) (quotation omitted), *cert. denied*, 363 N.C. 657, 685 S.E.2d 509 (2009). The trial court did not err in determining that probable cause existed to search the truck without a warrant.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).