IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1009

Filed: 19 July 2016

Forsyth County, Nos. 12 CRS 17241, 54990

STATE OF NORTH CAROLINA

v.

TERRILL JARONN LAMPKINS

Appeal by defendant from judgment entered 29 January 2015 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 10 February 2016.

Roy Cooper, Attorney General, by Adren L. Harris, Special Deputy Attorney General, for the State.

Kimberly P. Hoppin for defendant-appellant.

DAVIS, Judge.

Terrill Jaronn Lampkins ("Defendant") appeals from his convictions for felony possession of cocaine and attaining habitual felon status. On appeal, he contends that (1) the trial court erred by denying his motion to suppress; and (2) he received ineffective assistance of counsel. After careful review, we conclude that the trial court did not err in denying Defendant's motion to suppress, and we dismiss his ineffective assistance of counsel claim without prejudice.

Factual Background

On 11 March 2013, Defendant was indicted for felony possession of cocaine, possession with intent to sell and deliver cocaine, and attaining the status of an habitual felon. Defendant filed a motion to suppress evidence obtained during a search incident to his arrest. Following a hearing on 27 January 2015 in Forsyth County Superior Court before the Honorable John O. Craig III, the trial court denied Defendant's motion.

A trial began the same day, and the jury found Defendant guilty of felony possession of cocaine and attaining the status of an habitual felon. Defendant was found not guilty of possession with intent to sell and deliver cocaine. The trial court sentenced Defendant to 31 to 50 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

I. Motion to Suppress

Defendant's first argument on appeal is that the trial court erred by denying his motion to suppress. Our review of a trial court's 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. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

"Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. Miller*, __ N.C. App. __, __, 777 S.E.2d 337, 340 (2015) (citation and quotation marks omitted).

At the suppression hearing, Corporal Jason Swaim ("Corporal Swaim") testified that on 21 May 2012 he was contacted by a confidential informant ("the CI") who told him that a man called "Teeley" was "involved in selling crack cocaine in Winston-Salem." The CI informed Corporal Swaim that "Teeley" was a black male in his thirties who was wearing a khaki-colored polo shirt with orange and brown stripes and could be found sitting on the tailgate of a tan pickup truck parked in the driveway of 313 South Green Street in Winston-Salem, North Carolina.

Since 2010, the CI had assisted Corporal Swaim with at least 30 investigations — from revealing where fugitives were located to participating in controlled buys of illegal drugs. Corporal Swaim testified that the information he received from the CI in the past had been reliable.

Because he was not familiar with "Teeley," Corporal Swaim asked Detective Christopher Navy ("Detective Navy") for help in identifying him. From his time patrolling the neighborhood in question, Detective Navy knew that "Teeley" was actually Terrill Lampkins. Detective Navy had also received "information from confidential informants in the past that [Defendant] had been selling drugs," and

Detective Navy's foot patrol unit had previously investigated Defendant for illegal drug sales. Detective Navy had also arrested Defendant in 2006 on a warrant for failing to appear in connection with a charge of selling a controlled substance.

On the day the CI's tip was received, several officers — including Detective Navy and Corporal Swaim — went to 313 South Green Street in Winston-Salem. Corporal Swaim observed a black male who matched the description provided by the CI and was sitting on the back of a tan pickup truck in the driveway. Detective Navy confirmed to Corporal Swaim that this man was, in fact, Defendant.

Corporal Swaim ordered Defendant to put his hands up and lie on the ground. Defendant was then handcuffed and brought to a standing position at which point Detective Navy conducted a search of his person.

In addition to finding $91 in Defendant's pocket, Detective Navy retrieved "a clear plastic [b]aggie that was tucked into the knot of his [hair] braids . . . and that contained an off-white rock-like substance[,]" which Detective Navy believed to be cocaine base. Laboratory testing later established that the substance was 2.76 grams of cocaine base. After being read his *Miranda* rights, Defendant admitted to Corporal Swaim that he had sold drugs most of his adult life and that he was currently selling them to support his own drug habit.

At the end of the suppression hearing, the trial court made the following oral findings of facts and conclusions of law:

THE COURT: Well the Court will deny the Motion to Suppress. I will make findings of fact that there was testimony during the probable cause hearing from Corporal Swaim, that he had dealt with the confidential informant on approximately 30 occasions and found him to be reliable in each instance. On this particular occasion, he received a phone call in which the informant said that a Black male with the street name of Teeley was going to be sitting in a driveway on Green Street, was currently sitting there on the tailgate of this tan pickup truck, wearing a striped shirt, and that he was selling drugs from that location. While it is not quite the number of indicators, or information in the *State v. Chadwick* case, the Court feels that it is a sufficient amount of information and indicia that were in fact confirmed in every respect when the officers arrived at the scene.

In addition, the Court will find that they independently arrived at the name of the defendant by checking among other . . . officers, specifically in this instance by Detective Swaim along with Detective Navy and learned that Teeley was the street name for the defendant, and that Teeley was known to those officers in the police force who had seen and observed him before to be a drug dealer, and that based upon *State v. Chadwick*, the search that was incident to the arrest did have sufficient indicia of proof, so that there was probable cause that met the tests elaborated in the *Chadwick case*, namely:

The officers had facts and circumstances within their knowledge and of which they had reasonable trustworthy information sufficient in themselves to warrant a person of reasonable cautions [sic] in the belief that an offense has been, or is being committed and that that constituted probable cause, using a totality of the circumstances test, and the indicia of reliability that accompanied the informant's tip.[1]

[1] The trial court did not make any written findings of fact and conclusions of law.

Defendant's primary argument on appeal is his challenge to the trial court's conclusion of law that there was probable cause to arrest and search him. Both the United States and North Carolina Constitutions protect individuals against unreasonable searches and seizures by government officials. *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012). Although "warrantless searches are presumed to be unreasonable," a law enforcement officer is permitted to conduct a warrantless search of an arrestee's person incident to a constitutionally valid arrest. *State v. Carter*, 200 N.C. App. 47, 50-51, 682 S.E.2d 416, 419 (2009) (citation omitted). "An arrest is constitutionally valid whenever there exists probable cause to make it." *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (citation, quotation marks, and emphasis omitted), *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002). "If there is no probable cause to arrest, evidence obtained as a result of that arrest and any evidence resulting from the defendant's having been placed in custody, should be suppressed." *State v. Tappe*, 139 N.C. App. 33, 36-37, 533 S.E.2d 262, 264 (2000).

> Probable cause for an arrest is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed. The existence of such grounds is determined by the practical and factual considerations of everyday life on which reasonable and prudent people act.

Id. at 36, 533 S.E.2d at 264 (internal citations and quotation marks omitted).

Probable cause may be established through the use of information provided by informants. *State v. Brown*, 199 N.C. App. 253, 257, 681 S.E.2d 460, 463 (2009). "In utilizing an informant's tip, probable cause is determined using 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." *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (citation and quotation marks omitted).

> The indicia of reliability of an informant's tip may include (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 independently corroborated by the police.

Brown, 199 N.C. App. at 258, 681 S.E.2d at 463 (citation and quotation marks omitted).

"A known informant's information may establish probable cause based upon a reliable track record in assisting the police." *State v. Leach*, 166 N.C. App. 711, 716, 603 S.E.2d 831, 835 (2004), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005); *see also State v. McRae*, 203 N.C. App. 319, 324, 691 S.E.2d 56, 60 (2010) ("[A] tip from a reliable, confidential informant may supply probable cause[.]").

Our caselaw emphasizes the importance of distinguishing between anonymous informants and informants who are known to the officers and have provided reliable

information in the past. "[T]he difference in evaluating an anonymous tip as opposed to a reliable, confidential informant's tip is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary." *McRae*, 203 N.C. App. at 325, 691 S.E.2d at 61 (citation and quotation marks omitted); *see also State v. Crowell*, 204 N.C. App. 362, 366, 693 S.E.2d 370, 373 (2010) (concluding that corroboration by police was not required to establish reliability of tip provided by known informer who had demonstrated past reliability); *Chadwick*, 149 N.C. App. at 203, 560 S.E.2d at 209 ("A known informant's information may establish probable cause based on a reliable track record, or an anonymous informant's information may provide probable cause if the caller's information can be independently verified.").

In the present case, we conclude that competent evidence supported the trial court's finding that the CI's tip was reliable. Rather than being an anonymous tipster, the CI was well known to Corporal Swaim. Indeed, the trial court found that the CI had a track record of reliability established over at least 30 prior cases in which he had assisted Corporal Swaim.[2] Moreover, the trial court found that the CI told

[2] Defendant argues that the trial court's denial of his motion to reveal the identity of the CI left him with no effective method of challenging Corporal Swaim's testimony that the CI had been reliable in the past. The State's "privilege of nondisclosure, however, ordinarily applies where the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers." *State v. Mack*, 214 N.C. App. 169, 171, 718 S.E.2d 637, 638 (2011) (citation and quotation marks omitted). Here, the CI was, in fact, "a mere tipster who only suppl[ied] a lead to law enforcement officers," *id.*, and Defendant cites no legal authority supporting his contention that the trial court was required to reveal the CI's identity.

Corporal Swaim that

> a Black male with the street name of Teeley was going to be sitting in a driveway on Green Street, was *currently* sitting there on the tailgate of [a] tan pickup truck, wearing a striped shirt, and *that he was selling drugs from that location*. . . .

(Emphasis added). As Defendant does not challenge these findings by the trial court, they are "presumed to be supported by competent evidence and [are] binding on appeal." *Miller*, __ N.C. App. at __, 777 S.E.2d at 340 (citation and quotation marks omitted).

Furthermore, upon arriving at the address provided by the CI, (1) the officers observed that Defendant matched the detailed description provided by the CI and was sitting on the back of a tan pickup truck — consistent with the CI's information; and (2) Detective Navy was able to independently identify Defendant.[3]

We find instructive our decision in *State v. Stanley*, 175 N.C. App. 171, 622 S.E.2d 680 (2005). In *Stanley*, a confidential informant, whose tips had proven reliable in the past and led to at least 100 arrests and convictions over more than 14 years, provided police officers with a tip that "a black male wearing blue jeans, a dark blue jacket, and a blue toboggan (or ski cap) was selling crack cocaine" near a particular gas station. *Id.* at 175, 622 S.E.2d at 683.

[3] As noted above, Detective Navy testified at the suppression hearing that he knew "Teeley" to be Terrill Lampkins; had previously arrested him in 2006 in relation to a warrant for failing to appear in connection with a drug charge; and had previously received information from confidential informants that Defendant had been selling drugs.

Approximately 45 minutes after receiving this tip, police officers met the informant a short distance from the gas station, and the informant verified that the defendant was still selling drugs there. Officers observed several men outside the gas station but only one matched the description provided by the informant. When the officers approached, one man ran away. One of the officers told the defendant that he had information that the defendant was dealing drugs. The defendant consented to a pat down search and placed his hands on top of his head. However, as the officer's hands got close to the defendant's pockets during the pat down, the defendant twice lowered his hands. When the officer attempted to put handcuffs on the defendant to control the situation and the defendant pulled away, the officer took defendant to the ground and handcuffed him. The officer then found a bag of crack cocaine in the defendant's front pocket. *Id.* at 173, 622 S.E.2d at 682.

After holding a suppression hearing, the trial court determined that the defendant did not consent to the search but that "[g]iven the informant's long history of reliability, once the officers matched the informant's description to the Defendant and confirmed his presence at the named location, they had reasonable grounds to believe a felony was being committed . . . ." *Id* at 176, 622 S.E.2d at 683 (quotation marks omitted).

We affirmed the trial court's conclusion, explaining as follows:

> [T]he information upon which the officers acted came from an informant with over fourteen years of personal dealings

> with Sgt. Boger whose past information consistently had been corroborated by officers and had led to over 100 arrests and numerous convictions. This past history would seem to satisfy virtually any conceivable test of reliability. Accordingly, we hold that the officers had sufficient probable cause to believe defendant was committing, or had committed, a felony.

Id. at 177, 622 S.E.2d at 684.

Despite some factual differences, the key elements of the present case are remarkably similar to those in *Stanley*. In both cases, probable cause was based on a tip from an informant who had proven reliable in the past and who informed police that a person was selling drugs at a particular location. In both cases, the informant gave a detailed description of the defendant and, on the day the tip was received, officers went to the given location and found an individual matching the description that had been provided by the informant.

Stanley is in accord with a number of other cases in which this Court has determined that a known confidential informant's tip was reliable and provided the basis for a finding of probable cause. In *State v. Nixon*, 160 N.C. App. 31, 584 S.E.2d 820 (2003), a confidential informant, whose information given to law enforcement had proven reliable numerous times over the prior two years, told police that the defendant was going to meet a man at a particular restaurant in order to purchase marijuana. The informant further stated that after the transaction, the defendant would "possibly" return to his home in Jacksonville, driving a burgundy Ford sport

utility vehicle. *Id.* at 32-33, 36, 584 S.E.2d at 822, 824.

An officer who knew the defendant's address from a previous traffic stop went to perform surveillance on the residence. When the defendant pulled up to his home — at a time consistent with him having come from the restaurant — the officer searched his person and vehicle and found marijuana and cocaine. *Id.* at 33, 584 S.E.2d at 822. We held that "[o]nce the [arresting] officer corroborated the description of the defendant and his presence at the named location, he had reasonable grounds to believe a felony was being committed in his presence which in turn created probable cause to stop and search defendant." *Id.* at 40, 584 S.E.2d at 826.

In *Leach*, an informant who had previously given information to the police that led to the confiscation of multiple kilograms of cocaine alerted police to an impending drug sale between him and the defendant. The informant stated that

> [t]he drug sale was to be between the informant and defendant. The informant described the defendant and his vehicle, accurately described when and where the defendant would arrive to deliver the cocaine to the informant, and made a contemporaneous identification as defendant pulled into the parking lot.

Leach, 166 N.C. App. at 716, 603 S.E.2d at 835. We determined that these facts were sufficient to provide probable cause to stop and search the defendant. *Id.*

In *Chadwick*, a sheriff's deputy was contacted by an informant who had demonstrated reliability in the past and related that, in approximately fifty minutes, the

> defendant was about to (1) deliver a large amount of cocaine to a specific location, (2) be driven by a black female in an older model four-door black Nissan Sentra, because defendant did not have a driver's license, (3) be taken to a Texaco station at the corner of Highway 17 North and Piney Green Road, (4) be traveling from a certain direction, (5) park next to a telephone booth in the parking lot, (6) act like he was there to use the telephone, and (7) conduct a drug transaction there.

Chadwick, 149 N.C. App. at 203-04, 560 S.E.2d at 210.

Based on this information, and after setting up surveillance on the location and verifying all of the information as the transaction was unfolding, deputies arrested and searched the defendant. We held that "these facts and circumstances sufficiently established an indicia of reliability that defendant was engaged in criminal activity to provide the officers with probable cause to seize and arrest defendant based on a known reliable informant's tip independently corroborated and verified by the officers in minute detail." *Id.*, 149 N.C. App. at 204, 560 S.E.2d at 210.

While admittedly the information provided by the informant in some of the cases discussed above described *future* activity of the defendant that demonstrated the informant possessed special knowledge that would not generally be known by members of the public, we have never held that such predictive information is required in *every* case in order for a reliable informant's tip to establish probable cause. Rather, such future predictions by informants are merely one factor to be taken into account when analyzing a tip's reliability under the totality of the

circumstances test. Indeed, the opinion in *Stanley* does not indicate that the informant provided any details regarding anticipated future actions of the defendant.[4]

Accordingly, based on the totality of the circumstances here, we conclude that there were "circumstances sufficiently strong in themselves to warrant a cautious man in believing [Defendant] to be guilty" of possession with the intent to sell and deliver cocaine, which provided probable cause to arrest Defendant. *Tappe*, 139 N.C. App. at 36, 533 S.E.2d at 264 (citation omitted). The search of Defendant's person, which uncovered the baggie in Defendant's hair, was permissible as a search incident to a lawful arrest.[5] *See Carter*, 200 N.C. App. at 51, 682 S.E.2d at 419.

In his sole challenge to the trial court's findings of fact, Defendant contests the finding that Defendant "was known to those officers in the police force who had seen and observed him before to be a drug dealer." Detective Navy testified that in

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[4] We also note that — as in the present case — there was no indication that the informant in *Stanley* revealed to law enforcement officers the basis for his knowledge that the defendant was selling drugs. Although such information would certainly be relevant in analyzing a tip's reliability for purposes of establishing probable cause, its presence or absence is "not determinative in the totality of circumstances test." *Crowell*, 204 N.C. App. at 366, 693 S.E.2d at 373.

[5] It is irrelevant whether Defendant had been formally placed under arrest at the time the baggie was found given that probable cause for the arrest existed before the drugs were located. *See State v. Fizovic*, __ N.C. App. __, __, 770 S.E.2d 717, 721 (2015) ("Where a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as incident to the arrest provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause." (citation, quotation marks, and brackets omitted)).

addition to having arrested Defendant in 2006 on a warrant for failure to appear in relation to a charge for the sale of illegal drugs, he also had received "information from confidential informants in the past that [Defendant] had been selling drugs." Detective Navy also stated that officers in his foot patrol unit had previously investigated Defendant for illegal drug sales.

Moreover, even assuming *arguendo* that this evidence did not fully support the challenged finding, we are satisfied that probable cause existed to support the arrest of Defendant even without taking into account this portion of the trial court's findings. Accordingly, Defendant's challenge to the trial court's denial of his motion to suppress is overruled.

II. Ineffective Assistance of Counsel

Defendant's final argument on appeal is that he was deprived of effective assistance of counsel when his trial counsel conceded during closing arguments that Defendant was, in fact, in possession of cocaine at the time of his arrest. In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, __ U.S. __, 132 S.Ct. 1541, 182 L.Ed.2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of

> reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because on direct appeal, review is limited to the cold record, and the court is "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Id.* at 554-55, 557 S.E.2d at 547 (internal citation and quotation marks omitted). Only 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" should an ineffective assistance of counsel claim be decided on the merits on direct appeal. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

During his closing argument in the present case, Defendant's counsel stated, in pertinent part, that (1) "They got a guy on the back of a pickup truck that had some cocaine in his hair"; (2) "All they got is a guy with stuff in his hair"; and (3) "Search[ed] a man. Found the cocaine in his hair."

Defendant contends that these statements constitute ineffective assistance of counsel under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed.2d 672 (1986). In *Harbison*, our Supreme Court determined that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08.

We do not believe that the cold record before us enables us to adjudicate Defendant's ineffective assistance of counsel claim. Accordingly, we dismiss this claim without prejudice to his right to reassert it in a motion for appropriate relief. *See State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (holding that when reviewing court determines that ineffective assistance of counsel claim has been prematurely asserted on direct appeal, it shall dismiss that claim without prejudice to defendant's right to reassert it during subsequent motion for appropriate relief in trial court), *cert. denied*, 535 U.S. 1114, 153 L.Ed.2d 162 (2002).

Conclusion

For the reasons stated above, we (1) conclude that the trial court did not err in denying Defendant's motion to suppress; and (2) dismiss without prejudice Defendant's ineffective assistance of counsel claim.

NO ERROR IN PART; DISMISSED IN PART.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).