IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-621

Filed: 1 September 2020

Avery County, No. 17-CRS-50213

STATE OF NORTH CAROLINA

v.

ROBERT LEE MATHES

Appeal by defendant from judgment entered 6 December 2018 by Judge Peter B. Knight in Avery County Superior Court. Heard in the Court of Appeals 18 February 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Robert J. Pickett, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

BRYANT, Judge.

Where defendant Robert Lee Mathes was subjected to a warrantless search and seizure under the automobile exception when probable cause existed that he possessed contraband, the trial court did not err by denying defendant's motion to suppress. Where defendant did not receive an opportunity to be heard on the matter

of a civil judgment for attorney's fees in accordance with N.C. Gen. Stat. § 7A-455, the trial court erred.

On or about 17 March 2017, the Avery County Sheriff's Office received a tip from a confidential informant that defendant would be in possession of pills that he planned to carry from California to North Carolina. Deputy Bishop with the Avery County Sheriff's Office testified that the informant told him defendant would arrive on either 17 or 18 March 2017 in the morning by bus to the Johnson City bus station in Tennessee. Further testimony was provided that defendant's brother would pick defendant up from the bus station in Tennessee and transport him to Avery County, North Carolina. Deputy Bishop was familiar with the confidential informant who had provided tips on four prior drug cases resulting in either pleas or convictions in all four cases. Deputy Bishop testified that his previous involvement with the informant led him to believe the informant was trustworthy and reliable, and that the tip about defendant carrying pills from out of state would be accurate.

Following the informant's tip, deputies went to the bus station in Johnson City on the morning of 17 March 2017 to await defendant's arrival. Defendant did not arrive that day, and deputies learned he would arrive the following day according to the bus passenger manifest. On 18 March 2017, deputies returned to the bus station in Johnson City and observed defendant disembark the bus carrying a green duffle bag and get into his brother's car.

Deputies followed defendant across the state line back to Avery County and conducted a traffic stop and a warrantless search of the vehicle and its contents. Deputies searched the green duffle bag defendant was seen carrying off the bus and seized pill bottles containing 347 pills. The State Crime Lab analyzed the pills and discovered that 226 contained a controlled substance, an opioid derivative—hydrocodone. Defendant was arrested on 18 March 2017 by the Avery County Sheriff's Department on suspicion of drug trafficking.

On 7 August 2017, defendant was indicted by an Avery County grand jury on the following charges: (1) trafficking in 28 grams or more of opium or heroin by possession, in violation of N.C. Gen. Stat. § 90-95(h)(4); and (2) conspiracy to traffic in 28 grams or more of opium or heroin by possession, in violation of N.C. Gen. Stat. § 90-95(i). Defendant pled not guilty on both counts and filed a motion to suppress evidence on 1 December 2017, arguing that the search and seizure violated his Constitutional rights under the Fourth Amendment.

The matter proceeded to a jury trial in Avery County Superior Criminal Court on 3 December 2018 before the Honorable Peter Knight, Judge presiding. On 4 December 2018, the trial court orally denied defendant's motion to suppress the evidence gathered by the search and seizure and filed a written order denying the motion on 31 December 2018. Prior to the trial, the State dismissed the conspiracy

charge against defendant. At the close of State's evidence, defendant moved to dismiss the trafficking charge, and the court denied the motion.

On 6 December 2018, defendant was convicted of trafficking opium or heroin. Defendant again renewed his motion to dismiss the charge against him, and the court denied the motion. The trial court entered judgment the same day and sentenced defendant to 225 to 282 months imprisonment. The court also imposed court costs and fees, a minimum fine of $500,000.00, and entered a civil judgment for court-appointed attorney's fees of $4,854.00. Defendant gave notice of appeal in open court and filed a written notice of appeal in the criminal case on 7 December 2018.

Defendant did not file a written notice of appeal from the civil judgment for attorney's fees against him; however, on 9 October 2019, defendant filed a petition for writ of certiorari with this Court asking that we review the civil judgment. The State filed a response to defendant's petition for writ of certiorari asking this Court to deny defendant's petition because he failed to file a written notice of appeal. Using our discretion and pursuant to Rule 21 of our Rules of Appellate Procedure, we deny the State's request and grant defendant's petition and review that judgment as well.

On appeal, defendant argues that the trial court erred by (I) denying defendant's motion to suppress because there were no exigent circumstances to justify a warrantless search of defendant's duffel bag and (II) entering a civil judgment for

attorney's fees without providing defendant an opportunity to be heard. We consider each argument in turn.

I

Defendant first argues that the trial court erred by denying his motion to suppress because no exigent circumstances existed to justify a warrantless search. We disagree.

"Our review of a trial court's denial of a motion to suppress is limited to a determination of whether its findings are supported by competent evidence, and if so, whether the findings support the trial court's conclusions of law." *In re I.R.T.*, 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007) (quoting *State v. McRae*, 154 N.C. App. 624, 627–28, 573 S.E.2d 214, 217 (2002)). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber,* 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

The Fourth Amendment protects individuals from unreasonable search and seizure. U.S. Const. Amend. IV. Generally, a warrant is required for every search or seizure, unless an exception applies. *State v. Trull*, 153 N.C. App. 630, 638-39, 571 S.E.2d 592, 598 (2002). One exception is the automobile exception which provides that

> a search warrant is not required before a lawful search based on probable cause of a motor vehicle in a public roadway or in a public vehicular area . . . . 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.

State v. Downing, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (second and third alteration in original) (internal quotations and citations omitted). Reasonable suspicion can be established when a tip comes from a reliable, confidential informant. *State v. McRae*, 203 N.C. App. 319, 324, 691 S.E.2d 56, 60 (2010). This Court has used three factors to determine whether a tip is reliable enough to determine probable cause in the totality of the circumstances: "(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 and was independently corroborated by the police." *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003) (citations omitted).

In this case, the Avery County Sheriff's Office received information about defendant from a known confidential informant who had provided reliable information on four previous occasions: defendant would be carrying pills by bus from California to Tennessee where he would be picked up by his brother and transported to Avery County. Acting on information from the informant's tip, deputies were able to verify that defendant was arriving via bus to Tennessee from California. Deputies then observed defendant arrive at the Tennessee bus station, enter his brother's vehicle, and ride back to Avery County. Here, the trial court's findings of fact support

the conclusion that the deputies had probable cause to believe defendant was carrying illegal narcotics while riding in his brother's vehicle back to Avery County.

Defendant argues that a warrantless search requires more than probable cause and that exigent circumstances are necessary. Defendant further argues that the trial court did not make a finding of the exigent circumstances needed for a warrantless search and seizure. Defendant states that the tip provided by the informant gave the deputies advance knowledge that defendant would be carrying pills, and therefore, they had time to secure a warrant to search him. Defendant suggests that because deputies failed to obtain a search warrant, they did not have the requisite probable cause needed to conduct a search and seizure of defendant. We disagree.

Our Supreme Court has held that "no exigent circumstances other than the motor vehicle itself are required to justify a warrantless search 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." *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576–77 (1987).

In *Isleib*, law enforcement received a tip from a reliable, confidential informant that the defendant would be traveling from Oregon Inlet to Hatteras Island the following day in a vehicle while carrying drugs. *Id.* at 635, 356 S.E.2d at 574–75. Law enforcement acted on the tip without obtaining a warrant and stopped

defendant's vehicle to conduct a search. *Id.* at 635–36, 356 S.E.2d at 575. Upon the search, law enforcement found the drugs the informant said the defendant would be carrying. *Id.* This Court had held that no exigent circumstances existed to conduct a search because law enforcement had time to obtain a warrant. *State v. Isleib*, 80 N.C. App. 599, 608-09, 343 S.E.2d 234, 240–41 (1986), *overruled by* 319 N.C. 634, 356 S.E.2d 573 (1987). However, our Supreme Court overruled the Court of Appeals holding that when an officer has probable cause and time to execute a search warrant but failed to do so, it does not affect the validity of the search under the automobile exception. *Isleib*, 319 N.C. at 638, 356 S.E.2d at 576–77.

The facts in this case are similar to *Isleib*. Here, deputies did not obtain a warrant despite being given advance notice of defendant's actions and instead acted solely on the tip from a reliable, confidential informant. Defendant was stopped in a car on a public road while possessing illegal narcotics. The evidence in the record in the instant case is enough to support the trial court's findings and conclusions that deputies had probable cause to conduct a constitutional warrantless search and seizure under the automobile exception without the need for further exigent circumstances.

Accordingly, we find the trial court did not err in denying defendant's motion to suppress.

II

Next, defendant argues the trial court erred when a civil judgment imposing attorney's fees was entered against him without giving him an opportunity to be heard. We agree.

Section 7A-455 ("Partial indigency; liens; acquittals") of our General Statutes provides that a trial court may enter a civil judgment and impose attorney's fees against a convicted, indigent defendant for the costs incurred by the defendant's appointed counsel. N.C. Gen. Stat. § 7A-455 (2019). In addition, before the trial court can impose fees, it must provide the defendant with notice and an opportunity to be heard. *See State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005). Satisfaction of the requirement for the opportunity to be heard was addressed by this Court in *State v. Friend*, 257 N.C. App. 516, 809 S.E.2d 902 (2018). In *Friend*, this Court held that if the trial court does not discuss attorney's fees directly with the defendant but rather with defense counsel alone, other evidence must exist in the record to demonstrate that the defendant received an opportunity to be heard about the imposition of attorney's fees and chose not to be heard. *Id.* at 523, 809 S.E.2d at 907.

In this case, defendant was present in court when his attorney informed the court that he had worked 64.75 hours at $75.00 an hour, totaling $4,854.00 in attorney's fees. *Cf. Jacobs*, 172 N.C. App. at 235–36, 616 S.E.2d at 316–17 (reversing and remanding the trial court's order imposing attorney's fees on the defendant where

the defendant was told in open court that he would owe fees but was not informed of the exact amount of attorney's fees he would owe). However, while defendant was present for the calculation of attorney's fees and therefore had notice, there is nothing in the record to suggest that defendant was granted an opportunity to be heard. *Id.* at 236, 616 S.E.2d at 317. Immediately following defense counsel's calculation, the court informed defendant that he could "be at ease."

> [Defense Counsel]: I'm court[-]appointed and I had 64.75 hours. I calculated that as $4,854.
>
> THE COURT: All right, thank you.
>
> . . . .
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> THE COURT: [Defendant] can be at ease at least for now and he can keep his seat, too, even as we go further, but I'll leave it up to him.
>
> [Defense Counsel]: Okay, thank you. We appreciate that offer, Your Honor.

Here, the record reflects that the trial court engaged in conversation with defense counsel but did not communicate directly with defendant. Moreover, by stating that defendant could "be at ease" and keep his seat for sentencing, the court demonstrated that it did not intend to engage in conversation with defendant. There is no "other evidence in the record demonstrating that . . . defendant . . . was aware of the opportunity to be heard on the issue, and chose not to be heard." *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

Because we cannot determine from the record if defendant was personally asked if he wished to be heard or was allowed to be heard regarding attorney's fees, the "imposition of attorney's fees must be vacated, even when the transcript reveals that attorney's fees were discussed." *State v. Harris*, 255 N.C. App. 653, 664, 805 S.E.2d 729, 737 (2017) (internal quotations and citation omitted). Accordingly, we vacate the civil judgment for attorney's fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue.

CONCLUSION

For the reasons stated herein, we hold the trial court did not err in denying defendant's motion to suppress. Regarding the civil judgment for attorney's fees, we vacate and remand for further proceedings.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE and Judge HAMPSON concur.

Report per Rule 30(e).