IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-483

No. COA21-616

Filed 5 July 2022

McDowell County, Nos. 18CRS50965, 18CRS497

STATE OF NORTH CAROLINA

v.

STEVEN MICHAEL SISK, JR.

Appeal by Defendant from order entered on 6 April 2021 by Judge Athena Brooks in McDowell County Superior Court. Heard in the Court of Appeals 23 March 2022.

Stephen G. Driggers, PLLC, by Stephen G. Driggers, for Defendant-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for the State.

CARPENTER, Judge.

¶ 1 Steven Michael Sisk, Jr. ("Defendant") contends the trial court improperly denied his motion to suppress statements made during Defendant's custodial interrogation. Specifically, Defendant appeals from the trial court's finding Defendant was not so intoxicated that the waiver of his *Miranda* rights was made involuntarily or unintelligently. Because the trial court's finding was supported by

competent evidence, we find no error in the trial court's denial of Defendant's motion to suppress and dismiss Defendant's appeal.

I. Factual & Procedural Background

¶ 2 On 24 June 2018, Marion Police Officer Travis Maltba ("Officer Maltba") was driving his patrol car when he noticed Defendant pull into a gas station. Officer Maltba had obtained a warrant for Defendant's arrest earlier that week. Officer Maltba arrested Defendant, took him into custody, and transported Defendant to the Marion Police Department.

¶ 3 Prior to interrogation, Officer Maltba read Defendant his *Miranda* rights verbatim, and had Defendant sign a Statement of Rights form. Officer Maltba asked Defendant, "[d]o you understand these rights and everything and do you still want to talk to me?" Defendant nodded in agreement and signed a Statement of Rights form. After signing the Statement of Rights form, Officer Maltba read to Defendant, "knowing these rights, I do not want a lawyer at this time. I waive these rights and knowingly and willingly agree to answer questions." Officer Maltba then appeared to explain the Waiver of Rights form, stating, "[t]hat means you're ready to talk right now so we can get this over with." Defendant then signed a Waiver of Rights form.

¶ 4 Defendant admitted he had stolen from retail stores on multiple occasions. When Officer Maltba prompted Defendant for more information, Defendant asked Officer Maltba whether he would be charged if he made an admission. In response,

Officer Maltba indicated he was only handling two cases in Marion. Nevertheless, Defendant went on to admit he had committed larceny between twenty or thirty times. Defendant also admitted to using methamphetamine, but stated he did not use the drug daily. At the close of the conversation, Defendant voluntarily provided Officer Maltba the following written statement: "I go to Lowes[,] steal DeWalt power tool set[,] and take it to HD Pallets Hector Rodriguez and sell it for half price[.] I have done this at least 10 times."

¶ 5 On 18 September 2018, a McDowell County grand jury indicted Defendant on the charges of misdemeanor larceny and attaining habitual felon status. On 29 October 2018, Defendant was indicted on an additional charge of felony larceny. Defendant moved to suppress the statements he made during his interrogation, contending he was under the influence of methamphetamine during his confession, and his waiver of *Miranda* rights was not entered into knowingly and intelligently. Defendant stated it was "hard to concentrate when . . . high," because one's "brain is going 10,000 different ways." However, Defendant recalled agreeing to speak with Officer Maltba because he believed Officer Maltba would intervene on his behalf with the magistrate in an effort to obtain a lower bond.

¶ 6 Officer Maltba testified Defendant did not admit to being under the influence of methamphetamine on the day of his custodial statement or exhibit any signs of impairment. Rather, Officer Maltba indicated Defendant was able to actively

participate with him in in-depth conversations, including conversations about "people, phone numbers, [and] how he would feel about doing the things he admitted to[.] I didn't have any suspicion he was highly intoxicated that would have given me reason to stop the interview for those purposes."

¶ 7 A video of the interrogation was shown at Defendant's suppression hearing. The video tended to show Defendant exhibit fidgeting behaviors before and during the interrogation. Additionally, Defendant's eyes closed briefly before the interrogation, giving the impression Defendant was attempting to rest. After viewing the video and hearing testimony from both Defendant and Officer Maltba, the trial court made verbal findings of fact and orally denied Defendant's motion to suppress. The trial court noted Defendant waived his *Miranda* rights knowingly and intelligently. Following the denial of his motion to suppress, Defendant changed his pleas to guilty, preserved his right to appeal the court's denial of his motion to suppress, and was sentenced to 78 to 106 months in the custody of the Department of Adult Corrections.

II. Jurisdiction

¶ 8 On 6 April 2021, Defendant pleaded guilty to felony larceny and attaining habitual felon status pursuant to a plea agreement in which he expressly reserved his right to appeal the denial of his motion to suppress. On 12 April 2021, the trial court completed appellate entries and appointed the Appellate Defender to represent

Defendant. Because Defendant failed to timely appeal, however, he has lost the ability to appeal by right. Defendant petitions this Court to issue a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure to permit appellate review of the judgment. N.C. R. App. P. 21 (2021).

¶ 9 Under Rule 21, a writ of certiorari may be issued in appropriate circumstances to permit review of an order of the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1). Rule 21 "gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997). However, a "petition for [writ of certiorari] must show merit or that error was probably committed below." *State v. Killette*, 268 N.C. App. 254, 256, 834 S.E.2d 696, 698 (2019) (citation and quotation marks omitted). For the reasons described below, we find no merit in Defendant's appellate argument that his motion to suppress should have been granted, nor do we find error was probably committed in the trial court's denial of the motion to suppress. We therefore deny Defendant's petition for writ of certiorari and dismiss his appeal.

III. Issue

¶ 10 The sole issue on appeal is whether the trial court erred in admitting Defendant's custodial statements after finding Defendant understood his *Miranda* rights and knowingly and intelligently waived them.

IV. Standard of Review

¶ 11 The standard of review for a motion to suppress is "limited to determining 'whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law.'" *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (quoting *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011)). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id*. at 145, 833 S.E.2d at 786 (quoting *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (2018)). "A trial court has the benefit of [assessing] the credibility of witnesses, weigh[ing] and resolv[ing] any conflicts in the evidence, and find[ing] the facts, all of which are owed great deference by this Court." *Id*. at 145, 833 S.E.2d at 786 (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619–20 (1982)). Findings of fact not challenged on appeal are binding. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). The trial court's conclusions of law, however, are fully reviewable on appeal. *Malone*, 373 N.C. at 145, 833 S.E.2d at 786 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993)). "The trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v.*

Williams, 209 N.C. App. 255, 257, 703 S.E.2d 905, 907 (2011) (quoting *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008)).

V. Analysis

¶ 12 This Court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. *See Malone*, 373 N.C. at 145, 833 S.E.2d at 786 (citations omitted). On appeal, Defendant specifically challenges only one finding of fact, which Defendant asserts was made "in substance" on the record, and labels in his appeal as "finding 5." Defendant describes "finding 5" as follows:

> Although Sisk testified he injected one and one-half to three grams of methamphetamine daily at the time of his arrest, injected himself immediately before he was arrested, and was fidgety and found it hard to concentrate during the interview with Maltba, his statements were self-serving and not credible because they contradicted his prior statements to Maltba.

This specific language does not appear verbatim in the record or transcripts. Rather, the transcripts indicate the trial court stated the following:

> In court today, the defendant indicated that he had been using one and a half to three grams a day of injected methamphetamine. That defendant further was able to remember he got pulled over, he had used meth four or five times that day, and then injected in the Ingles bathroom. He indicated that he was fidgety and that his brain was going in different ways, hard to concentrate. The Court would notate that the Court's observations are that it is difficult to determine which self-serving statement of the

> defendant that the Court should take as credible since at the time of the interview, he indicated he had not used every day. However, in court, he indicates he did. So the Court's referring back to the totality of the circumstances.

Defendant states in his brief he "does not object to findings 1-4 [or] 6-8, but he objects to finding 5 because it dismisses outright the possibility that the injection of a substantial amount of methamphetamine could have affected [his] ability to . . . comprehend what Maltba said to him and understand the consequences of his waiver." Defendant therefore does not object to the trial court's finding, *inter alia*, Defendant "made a conscious decision to sign the waiver because he thought Maltba would ask for a low bond."

¶ 13 The narrow issue before this Court is whether the trial court should have granted Defendant's motion to suppress the statements made during his interrogation based solely on Defendant's claim he was too intoxicated to knowingly and intelligently waive his *Miranda* rights, a claim made during the hearing on his motion to suppress, not during the interrogation itself.

¶ 14 A court may properly conclude a defendant has waived his *Miranda* rights only if the totality of the circumstances surrounding the defendant's interrogation show both that he adequately understands them and that he was not coerced into waiving them. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986). "Whether a defendant has knowingly and intelligently waived his

Miranda rights therefore depends on the specific facts and circumstances of each case, including the [defendant's] background, experience, and conduct." *State v. Knight*, 369 N.C. 640, 644, 799 S.E.2d 603, 606 (2017) (internal citations and quotations omitted).

¶ 15 The State "bears a heavy burden in proving waiver"; however, the North Carolina Supreme Court has clarified the "State need prove waiver only by a preponderance of the evidence[.]" *Id.* at 644, 799 S.E.2d at 607 (quoting *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 485 (1986)). The State does not need to prove "that a defendant explicitly *said* that he understood his rights; it must simply prove under the totality of the circumstances that he *in fact* understood them." *Id.* at 648, 799 S.E.2d at 609 (emphasis in original). "[T]he fact that a defendant affirmatively denies that he understands his rights cannot, on its own, lead to suppression." *Id.* at 650, 799 S.E.2d at 610.

¶ 16 A confession may be involuntary when circumstances such as intoxication to the point of precluding understanding or the free exercise of will are present. *State v. Phillips*, 365 N.C. 103, 114, 711 S.E.2d 122, 133 (2011). Though intoxication is "critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. It is simply a factor to be considered in determining voluntariness." *Id.* at 114, 711 S.E.2d at 133 (internal quotation and citation omitted). "An inculpatory statement is admissible unless the defendant is so

intoxicated he is unconscious of the meaning of his words." *Id.* at 114, 711 S.E.2d at 133 (internal quotation and citation omitted).

¶ 17 In the past, the North Carolina Supreme Court has been presented with questions of the voluntariness of a waiver of rights when a defendant is appreciably intoxicated. *See id.* at 115–16, 711 S.E.2d at 133–34 (finding the defendant's statements were voluntary even though officers reported he was "highly excited" when arrested, potentially looked "stoned out of his mind," wiped white foam from his mouth when he arrived at the department, and vomited during his interview); *see also Knight*, 369 N.C. at 648, 651, 799 S.E.2d at 609–11 (finding defendant's claims of not understanding or being intoxicated did not outweigh the totality of the circumstances that he knowingly and intelligently waived his *Miranda* rights when the defendant admitted during the interrogation that he had been drinking, smoking pot, and stated at one point he was intoxicated).

¶ 18 Evidence presented at the hearing suggesting Defendant was intoxicated included: (1) his statement, made only at the hearing, indicating he was too intoxicated during his conversation with Officer Maltba to make a knowing and intelligent waiver of his *Miranda* rights; (2) Defendant's mumbled speech pattern; (3) Defendant's fidgeting; and (4) Defendant's eyes closing briefly before his conversation with Officer Maltba. Even taken as true, Defendant's statement alone, without more, cannot form a basis for the trial court's suppression of Defendant's statements. *See*

Knight, 369 N.C. at 650, 799 S.E.2d at 610. Furthermore, fidgeting, mumbling, and resting do not present a clear indication of intoxication.

¶ 19 Competent evidence, including evidence tending to show Defendant's ability to drive and have coherent discussions with Officer Maltba, supported the notion Defendant was not significantly intoxicated and made his waiver knowingly and voluntarily. Because competent evidence existed to support the trial court's findings of fact Defendant knowingly and intelligently waived his *Miranda* rights, the trial court's denial of Defendant's motion to suppress statements made during his custodial interrogation was proper. *See Malone*, 373 N.C. at 145, 833 S.E.2d at 786.

VI. Conclusion

¶ 20 The trial court's finding Defendant was not so intoxicated that the waiver of his *Miranda* rights was made involuntarily or unintelligently was supported by competent evidence. In turn, the trial court's conclusion Defendant knowingly and intelligently waived his *Miranda* rights was proper. Because we find no error in the trial court's denial of Defendant's motion to suppress statements made during his custodial interrogation, we deny Defendant's petition for writ of certiorari and dismiss Defendant's appeal without prejudice to any issues not raised in Defendant's appeal which may otherwise be properly brought before the trial court by motion.

DISMISSED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).