NO. COA01-523

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

MICHAEL BERRY VALENTINE

Forsyth County
No. 00 CRS 25310, 51409, 51410, 13025, 51403, 51404, 51406, 51407, 51408

Appeal by defendant from judgments entered 8 December 2000 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 21 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

J. Clark Fischer for defendant-appellant.

MARTIN, Judge.

Defendant was convicted by a jury of two counts of felonious breaking or entering, six counts of felonious larceny after breaking or entering, felonious possession of stolen goods, financial transaction card theft, and being an habitual felon. He appeals from the judgments entered upon the verdicts.

Briefly summarized, the evidence at trial tended to show that several witnesses observed defendant in offices located in the BB&T Financial Center Building in Winston-Salem on 16 March 2000. Shortly thereafter, wallets, credit cards, and cash were discovered to be missing. Defendant was confronted by security personnel and,

after showing his identification, fled from the building. Police Officer George Reavis testified that he went to the BB&T Building and, after receiving information from various persons who had observed defendant, radioed other officers to be on the lookout for a suspect and provided some general information, including a description of the automobile the suspect was driving. Police Officer R.D. Fenimore testified that he received the radio broadcast and subsequently noticed a vehicle matching the description in the broadcast driving towards him in the wrong direction on a one-way street. The driver of the vehicle turned onto Poplar Street, and Fenimore followed. Fenimore testified that the vehicle was traveling at a speed of 35 to 45 miles per hour down Poplar Street, and made an illegal left turn from Poplar onto Holly Street. Fenimore activated his blue light and siren and pulled the vehicle over for making the illegal left turn onto Holly Street. Fenimore asked defendant to step out of the car and conducted a pat-down search for weapons, where he discovered in defendant's pockets several denominations of currency and the credit card of Gerald Malmo, who worked in the BB&T Building. The officer placed defendant under arrest for making an illegal left turn and held him at the scene, awaiting the arrival of other officers with an eye-witness to the alleged larcenies. Angela Bailey arrived shortly thereafter with Officer Reavis and identified defendant as the man she had seen in the BB&T Building.

Prior to trial defendant filed, pursuant to Article 53 of

Chapter 15A of the General Statutes, an unverified motion to suppress the evidence seized by Officer Fenimore as a result of the search incident to defendant's arrest following the traffic stop. He did not, however, file an affidavit in support of the motion to suppress as required by G.S. § 15A-977. After hearing the motion, the trial court found that defendant's motion was not proper in that it "failed to include an affidavit containing facts to support [the motion]." The trial court concluded that by his failure to comply with G.S. § 15A-977, the defendant had "waived the right to seek suppression of evidence seized pursuant to any search in question." The trial court summarily denied and dismissed the motion to suppress. Defendant's subsequent objection to the evidence at trial was overruled. Defendant assigns error.

In his brief, defendant argues that the evidence should have been suppressed because it was seized during an illegal arrest. Citing *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 538 S.E.2d 601 (2000), defendant argues Officer Fenimore had no authority to arrest him for a non-criminal traffic infraction. As properly concluded by the trial court, however, by his failure to comply with the provisions of G.S. § 15A-977 he has waived his right to seek suppression of the evidence.

Motions to suppress evidence are governed by Article 53 of Chapter 15A of the General Statutes. G.S. § 15A-974 requires the exclusion of evidence obtained in violation of the State or Federal constitutions, or in violation of statutory law, upon a timely motion. G.S. § 15A-975(a) and § 15A-976 require, subject to

exceptions not applicable here, that motions to suppress evidence in the superior court be filed prior to trial. G.S. § 15A-977(a) requires that the motion "be accompanied by an affidavit containing facts supporting the motion." Subsection (c) of the same statute provides for summary denial of the motion if "[t]he affidavit does not as a matter of law support the ground alleged." N.C. Gen. Stat. § 15A-977(c). A defendant has the burden of showing compliance with these procedural requirements, and a failure to comply with the requirements of Article 53 constitutes a waiver of the right to seek suppression of evidence on statutory or constitutional grounds. *State v. Holloway,* 311 N.C. 573, 319 S.E.2d 261 (1984); *State v. Creason,* 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed,* 346 N.C. 165, 484 S.E.2d 525 (1997). Having failed to show his compliance with the statutory requirements for a motion to suppress, defendant has waived his right to seek suppression of the evidence and the trial court acted well within its sound discretion in summarily denying and dismissing the motion. Defendant's first assignment of error is overruled.

Defendant next contends the trial court committed plain error by permitting the prosecutor to disclose to the court at the sentencing hearing that the State had offered, and defendant had rejected, an earlier plea arrangement. Because defendant did not object to the statements by the prosecutor regarding the plea offer, we employ a plain error standard of review. N.C.R. App. P. 10(c)(4). Plain error is "'*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have

been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused . . . .'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). In order to prevail under a plain error analysis, the defendant must show not only the existence of error, but also the probability of a different result had the error not occurred. *State v. Najewicz*, 112 N.C. App. 280, 436 S.E.2d 132 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994). The burden is on defendant to prove the existence of plain error. *State v. Jordan*, 333 N.C. 431, 426 S.E.2d 692 (1993).

Pursuant to G.S. § 15A-1025

> [t]he fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement *may not be received in evidence* against or in favor of the defendant in any criminal or civil action or administrative proceedings. (emphasis added).

In the present case, defendant's rejection of the plea agreement was disclosed to the trial court only after verdict and during the sentencing hearing. A trial judge is presumed to disregard incompetent evidence and consider only proper evidence in reaching a decision. *State v. Davis,* 290 N.C. 511, 227 S.E.2d 97 (1976). Moreover, after defense counsel stated that the court should not punish defendant for requesting a trial, the trial court responded:

> No, I never have ever punished somebody for challenging the State's case or exercising their legal right, but I do reserve the right to punish him appropriately for his many crimes.

Thus, even assuming, without deciding, that disclosure of the existence of the earlier plea offer was improper, defendant has not

shown the existence of plain error inasmuch as he has not shown a probability that a different result would have been reached had the plea offer not been disclosed. This assignment of error is overruled.

Because defendant has presented no argument in support of his remaining assignments of error, they are deemed abandoned. N.C.R. App. P. 28(b)(5).

No error.

Judges HUDSON and CAMPBELL concur.

Report per Rule 30(e).