NO. COA05-1272

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Edgecombe County
Nos. 02 CRS 2937
02 CRS 50268
02 CRS 50269

ROBERT TOBY WHITE,
Defendant.

Appeal by defendant from judgments entered 2 March 2005 by Judge W. Russell Duke, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Rudy Renfer, for the State.

The Law Office of Gregory B. Thompson, by Gregory B. Thompson, for defendant-appellant.

GEER, Judge.

Defendant Robert Toby White appeals from his convictions for failure to heed a light and siren, possession of drug paraphernalia, and trafficking in cocaine. He argues on appeal primarily that the trial court erred in denying his motion to suppress evidence obtained as a result of a search of his residence pursuant to a search warrant. According to defendant, the affidavit submitted in support of the application for a search warrant was inadequate to establish probable cause. We hold that the magistrate properly concluded that the totality of

circumstances supported a finding of probable cause sufficient to support a search of defendant's residence. With respect to defendant's second argument that the trial court should have excluded testimony regarding a prior arrest of defendant, we hold that any error was harmless in light of other overwhelming evidence of defendant's guilt.

Facts and Procedural History

The State's evidence tended to show the following facts. On 29 January 2002, Detective William Heath of the Edgecombe County Sheriff's Department arrested a person in Princeville, North Carolina for possession of marijuana. Detective Heath was transporting the individual ("the informant") for processing when the informant offered to provide information in order "to help himself out." The informant then identified defendant as being in the business of selling cocaine. The detective was already familiar with defendant. The informant indicated that defendant drove a green Chevrolet Tahoe that he commonly used to deliver cocaine to a neighborhood known as Southern Terrace. The informant also gave a physical description of defendant that the detective knew to be accurate.

The informant agreed to call defendant and order a half ounce of cocaine to be delivered to Southern Terrace. Detective Heath spoke with two other detectives, Joe Scott and Steve Bailey, to inform them of the plan. Detective Heath and the informant then changed to an unmarked car and proceeded to a service station in Tarboro, where Detective Heath provided the informant with enough

money to make a pay phone call to defendant. Detective Heath noted that the number of the pay phone at the service station was 641-1589. He watched the informant dial the number 266-3553 and heard him tell the person who answered, "I need a half," and "I got five." According to Detective Heath, the informant was asking for a half an ounce of crack cocaine and promising to pay $500.00. The informant hung up the phone and told the detective that defendant would arrive at Southern Terrace with the cocaine at 6:45 p.m.

As it was already 6:40 p.m., Detective Heath and the informant left immediately for Southern Terrace. On the way, they passed 504 Geddie Avenue, which the informant pointed out to the detective as defendant's house. A green Chevrolet Tahoe was parked in front. Based on the detective's prior knowledge of defendant, he was able to confirm that the informant had accurately identified defendant's home and that the car belonged to defendant.

Detective Heath concealed his car near the house, waited until the Tahoe left in the direction of Southern Terrace, and then began to follow it. He radioed ahead to Detectives Scott and Bailey, who had already arrived at Southern Terrace, to let them know that the Tahoe was on its way. Scott and Bailey, who were together in an unmarked police car, caught sight of the Tahoe as it turned off Strickland Drive onto Russell Drive in the Southern Terrace neighborhood. Detective Scott activated his blue lights and pulled in front of the Tahoe, driven by defendant, in order to stop the car. Defendant stopped momentarily, but as Detective Bailey

approached the Tahoe and ordered defendant to stop, defendant pulled around the detectives' car and continued down Russell Drive.

Detective Scott activated his siren as well as his blue lights and chased after the Tahoe. When defendant stopped his car again, at the end of Russell Drive, Scott and Bailey exited their car with weapons drawn and shouted at defendant to get out of the car. After defendant did not obey the order, the detectives pulled defendant out of the Tahoe and placed him under arrest while defendant struggled.

Meanwhile, Detective Heath parked several blocks away to protect the informant's identity and walked up the street to where defendant was in custody. The officers searched defendant's vehicle, but found nothing illegal. Detectives Heath and Scott then walked down Russell Drive for several blocks. After about two and a half blocks, they found seven plastic bags on the side of the road, containing an off-white, rock-like substance that was later determined to be crack cocaine. Detective Heath testified that between the time defendant first turned onto one end of Russell Drive and the time he was taken into custody at the other end of Russell Drive, no other cars had traveled along that stretch of road.

Although defendant, at the police station, initially orally consented to a search of 504 Geddie Avenue, where he lived with his parents, he subsequently refused to sign a written consent form. The detectives, therefore, proceeded to obtain a search warrant instead. When they searched the residence, the detectives found

the following items in defendant's bedroom: aluminum foil packaging containing cocaine, green plastic bags containing cocaine that were identical to green bags found on the side of Russell Drive, electronic scales, a box of sandwich bags, and a razor blade. The detectives also found a cell phone. The last call received by that phone was from 641-1589, the phone number of the pay phone at the service station from which the informant had called defendant.

Defendant was indicted for failure to heed a blue light and siren, possession of drug paraphernalia, and trafficking in cocaine by possession. Defendant was convicted of all three charges, and the trial judge sentenced him to consecutive sentences as follows: 45 days for the failure to heed a light and siren, 45 days for possession of drug paraphernalia, and 35 to 42 months for trafficking in cocaine. Defendant has timely appealed to this Court.

Motion to Suppress

Defendant first assigns error to the trial court's denial of his motion to suppress the evidence obtained during the search of his residence on the grounds that the application for the search warrant failed to establish probable cause.[1] According to defendant, (1) facts were improperly omitted from the affidavit, (2) the assertions in the affidavit were insufficient to support a finding of probable cause, and (3) the affidavit failed to

[1]At trial, defendant's motion to suppress challenged both (1) whether his stop and arrest were constitutional, and (2) whether the search warrant was properly issued. On appeal, defendant limits his argument only to the issuance of the search warrant.

establish any nexus between defendant's home and the objects specified in the search warrant. We disagree with each of defendant's contentions.

Specifically, defendant objects that the affidavit submitted by Detective Heath in support of the search warrant did not contain underlying facts and circumstances indicating that the informant was credible and the information supplied reliable.[2] Defendant relies upon *State v. Craver*, 70 N.C. App. 555, 558, 320 S.E.2d 431, 433 (1984), in which this Court held: "[I]f an unidentified informant has supplied all or part of the information contained in the affidavit supplementing the application for a search warrant, some of the underlying facts and circumstances which show the informant is credible or that the information is reliable must be set forth before the issuing officer." This principle, however, was part of a test that has since been overruled by *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548, 103 S. Ct. 2317, 2332 (1983).

Prior to *Gates*, courts applied a two-prong test in reviewing the issuance of a search warrant, the second prong of which specified in language identical to that of *Craver*: "[I]f an unidentified informant has supplied all or a part of the information contained in the affidavit, some of the underlying facts and circumstances which show that the informant is credible

---

[2]Defendant also argues that certain facts were willfully omitted in violation of *State v. Hyleman*, 324 N.C. 506, 379 S.E.2d 830 (1989). Since this argument was not first made to the trial court as a basis for the motion to suppress, we do not address it on appeal.

or that the information is reliable must be set forth before the issuing officer." *State v. Hayes*, 291 N.C. 293, 299, 230 S.E.2d 146, 150 (1976). In *Gates*, however, the Supreme Court rejected the two-prong approach and adopted instead a totality of the circumstances test. 462 U.S. at 238, 76 L. Ed. 2d at 548, 103 S. Ct. at 2332. *See also State v. Arrington*, 311 N.C. 633, 637, 319 S.E.2d 254, 257 (1984) ("In [*Gates*,] the Court expressly abandoned the two-pronged test of *Aguilar* and *Spinelli* and adopted a 'totality of circumstances test.'").

Applying *Gates*, our Supreme Court has held that "[u]nder the totality of circumstances test, the two prongs of *Aguilar* and *Spinelli* — veracity and basis of knowledge — are still relevant, but are not to be accorded independent status." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257. Instead,

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.

Gates, 462 U.S. at 238-39, 76 L. Ed. 2d at 548, 103 S. Ct. at 2332 (quoting *Jones v. United States*, 362 U.S. 257, 271, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725, 736 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980)). Our Supreme Court has stressed, regarding the *Gates* test, that "great deference should be paid a magistrate's

determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

In the affidavit submitted in this case, Detective Heath stated:

> Within the past 48 hours a cooperating source of infromation [sic], acting under my direction and supervision, contacted Mr. White. This source spoke with Mr. White about the purchase of crack cocaine. During the course of their conversation[,] Mr. White agreed to deliver a quantity of crack cocaine to this source. I observed the source dialing Mr. White's cell phone number, prior to their conversation[.] Afterwards I was instructed that Mr. White was going to deliver the crack cocaine to the area of Southern Terrace.

Detective Heath then stated that he went to 504 Geddie Street, where he personally saw Mr. White's vehicle. He explained that he was "familiar with Mr. White's vehicle after having seen it on numerous occasions at this residence."

Detective Heath reported that he observed defendant's vehicle leave the residence, travel toward Southern Terrace, and then turn onto a road in Southern Terrace. According to the affidavit, Detective Heath ordered other officers to perform a traffic stop, but defendant refused to stop, resulting in a chase. When defendant's car finally stopped, defendant had to be forcefully taken to the ground and placed in handcuffs. The affidavit then stated that Detective Heath and a second detective "walked back in the direction in which Mr. White had driven" and "located a quantity of crack cocaine" along that route. The affidavit not only noted that defendant was, at that time, placed under arrest

for possession with intent to sell and deliver crack cocaine, but also reported that defendant had previously been arrested for drug-related charges, although he had not been convicted.

In arguing that this affidavit was insufficient, defendant focuses primarily on the reliability of the informant and the lack of any "track record" for that informant. In *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991), however, our Supreme Court stressed that "[w]hat is popularly termed a 'track record' is only one method by which a confidential source of information can be shown to be reliable for purposes of establishing probable cause." Here, the magistrate had before him information indicating that a controlled purchase had been arranged under the supervision of the detective, although not completed, and the informant's information that the cocaine would be delivered to Southern Terrace was corroborated by the detective's own observations of defendant's movements. *See State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003) (informant's tip is more reliable if it contains "'a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted'" (quoting *Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301, 310, 110 S. Ct. 2412, 2417 (1990))), *aff'd per curiam*, 358 N.C. 135, 591 S.E.2d 518 (2004).

A magistrate "is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant" and may base his or her determination of probable cause on practical

considerations of everyday life. *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005). Here, the magistrate could reasonably infer based on the informant's supervised telephone call seeking to buy crack cocaine for delivery at Southern Terrace, defendant's immediate departure for Southern Terrace, his attempt to evade the police, and the discovery of cocaine along his escape route that there was probable cause to believe defendant was essentially operating a cocaine delivery service. *See Riggs*, 328 N.C. at 221, 400 S.E.2d at 434 (concluding that when "information before a magistrate indicates that suspects are operating, in essence, a short-order marijuana drive-through," probable cause existed for a warrant to search the premises); *State v. Robinson*, 148 N.C. App. 422, 427, 560 S.E.2d 154, 158 (2002) (probable cause existed when affidavit stated that suspect had previous arrest on drug charges, an anonymous tip connected the suspect with a marijuana growing operation, the suspect refused consent to search, and officers detected the odor of marijuana emanating from the house).

Defendant argues, however, that the affidavit established no nexus between the house and the objects sought by the search warrant, including cocaine, packing materials, and proceeds from illegal controlled substances. Detective Heath's affidavit stated that he believed that there was a fair probability that those objects were being stored at defendant's residence. In *Riggs*, our Supreme Court observed that "many other decisions of this Court and the Court of Appeals have found expressly that it is reasonable to

infer that readily mobile contraband is kept at hand, whether in a dwelling, an outbuilding, or a vehicle." 328 N.C. at 221, 400 S.E.2d at 434. The Court in *Riggs* held that the fact that the suspects were "operating, in essence, a short-order marijuana drive-through" in their driveway led to the "logical inference . . . that a cache of marijuana is located somewhere on those premises," which in turn supported a warrant to search the house. *Id.*

Here, since defendant left from his home to deliver drugs to Southern Terrace, the magistrate could logically infer that defendant was likely storing cocaine and packaging materials in his home, especially since nothing was found in his car. *See State v. Rodgers*, 161 N.C. App. 311, 315, 588 S.E.2d 481, 484 (2003) ("Further, not finding the cocaine in the vehicle, as reported by the informant, provided probable cause to believe that it was still in defendant's home."). The magistrate, therefore, had "reasonable cause to believe that" a search of defendant's home would "probably . . . reveal the presence upon the described premises of the items sought." *State v. Taylor*, __ N.C. App. __, __, 632 S.E.2d 218, 224-25 (2006). *See also State v. Boyd*, __ N.C. App. __, __, 628 S.E.2d 796, 801 (2006) (totality of the circumstances showed probable cause to search defendant's house when informant made controlled buy and was able to identify defendant to the police). In sum, we hold that the affidavit was sufficient to support issuance of the search warrant, and therefore the trial court did not err in denying defendant's motion to suppress.

Evidence of Prior Arrest

Defendant next argues that the trial court erred in admitting the following testimony from Detective Heath, over defendant's objections:

> Q. Could you tell us what you know about that prior drug arrest which is mentioned in your application for the search warrant which defense attorney asked you about[?]
>
> A. I was aware that Tarboro P.D. had arrested the defendant, prior to this case.
>
> . . . .
>
> Q. Do you recall if it was December 13th, 2001?
>
> A. I believe it was in December.

Defendant contends this exchange contained an impermissible reference to his prior arrest in violation of Rule 404(b) of the Rules of Evidence.

Assuming, without deciding, that admission of this testimony was error, defendant has failed to meet his burden under N.C. Gen. Stat. § 15A-1443(a) (2005): "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." *See also State v. Fluker*, 139 N.C. App. 768, 776, 535 S.E.2d 68, 73 (2000) (holding that error at trial is not grounds

for reversal when there is no reasonable possibility that, absent the error, the trial would have had a different result).

On appeal, defendant has failed to make any specific argument as to how the testimony made a difference in the jury's verdict. In light of our ruling upholding the denial of defendant's motion to suppress the drugs and trafficking paraphernalia found in his bedroom, the jury was presented with overwhelming evidence of defendant's guilt, and any error that may have ensued from the trial court's admission of the prior arrest was not prejudicial. This assignment of error is, therefore, overruled.

Affirmed in part; no error in part.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).