NO. COA05-1506

NORTH CAROLINA COURT OF APPEALS

Filed: 20 February 2007

STATE OF NORTH CAROLINA

v.

ROY EDWARD DAVIS,
Defendant.

Gaston County
Nos. 03 CRS 25828
03 CRS 64192-93
03 CRS 67709

Appeal by defendant from judgment entered 28 April 2005 by Judge W. Robert Bell in Gaston County Superior Court. Heard in the Court of Appeals 16 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Mercedes O. Chut for defendant-appellant.

GEER, Judge.

Defendant Roy Edward Davis appeals his convictions for the sale of cocaine, delivery of cocaine, and two counts of possession with the intent to sell and deliver cocaine. On appeal, defendant primarily argues that the trial court erred in denying his motion to suppress evidence seized during a search of his residence. We hold that the trial court properly concluded that the affidavit submitted in support of the application for a search warrant was sufficient to establish probable cause and that, contrary to defendant's contention, no hearing was necessary in light of the arguments asserted in defendant's motion to suppress. We find

defendant's remaining arguments to be without merit with the exception of defendant's contention that he could not be sentenced for both the sale of cocaine and the delivery of cocaine arising out of a single transaction. As the State concedes, defendant's sentencing for both sale and delivery is precluded by *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990). We, therefore, hold that defendant received a trial free of prejudicial error, but remand for resentencing.

Facts

The State's evidence tended to show the following facts. Between March and September 2003, detectives of the Mount Holly Police Department carried out a series of six controlled drug purchases from defendant with the help of informants. With respect to each controlled purchase, Detective Kenny Brooks would search the informant prior to providing the informant with the money for the purchase of cocaine. In each instance, the informant returned with a plastic bag containing a substance that resembled illegal narcotics. The informants were then searched a second time. The purpose of the searches was to ensure that the informants did not have contraband or money in their possession before the drug buy and that they did not retain any drugs or money after the buy. Testing by the State Bureau of Investigation ("SBI") determined that the substances in the bags were cocaine on five occasions and marijuana on one occasion.

The first controlled purchase was conducted on 27 March 2003. Detective Brooks and another officer, Fred Tindall, drove the

informant, Samuel Reid, to a location on North Lee Street in Mount Holly known for drug dealing. The officers dropped off Reid and set up a surveillance position about 75 to 100 yards away. From that position, Detective Brooks, who was using binoculars, observed defendant pull a plastic bag from his pocket. Reid then gave defendant money in exchange for the plastic bag. According to the SBI report, the bag contained .60 grams of cocaine.

Following five more purchases — four by Reid and one by a second informant, Patricia Bishop — Detective Brooks obtained a search warrant authorizing a search of defendant's person; his residence at 421 Dutch Avenue, Mount Holly, North Carolina; and a white metal building in the back yard of defendant's residence. On 19 September 2003, officers executed the search warrant and found cocaine, totaling 1.5 grams, inside defendant's backyard shed and inside his house in a basket of yarn. After waiving his Miranda rights, defendant told the police that he obtained his drugs from different people, that he was only the middle man, and that "if you'll work with me, I can get you who you need, because I know I'm going to jail, but hopefully I can reduce my time."

On 15 December 2003, defendant was indicted for selling cocaine on 27 March 2003, delivering cocaine on 27 March 2003, possession with intent to sell or deliver cocaine on 27 March 2003, and possession with intent to sell or deliver cocaine on 19 September 2003.[1] Defendant was also indicted for attaining the

[1]The transcript indicates that defendant was also charged with respect to the transactions on 16 May 2003, 27 August 2003, 5 September 2003, and 8 September 2003. The indictments for these

status of habitual felon. Defendant filed a motion to suppress the evidence seized from his property. Following denial of his motion to suppress, he pled not guilty. A jury convicted him of all the charges stemming from both the 27 March 2003 controlled purchase and from the 19 September 2003 search and seizure. After pleading guilty to attaining the status of a habitual felon, defendant was sentenced on all the charges to a single term of 168 to 211 months imprisonment.

Motion to Suppress Evidence

Defendant argues that the trial court erred in summarily denying his motion to suppress. N.C. Gen. Stat. § 15A-977(c) (2005) provides that:

> The judge may summarily deny the motion to suppress evidence if:
>
> (1) The motion does not allege a legal basis for the motion; or
>
> (2) The affidavit does not as a matter of law support the ground alleged.

Construing N.C. Gen. Stat. § 15A-977, our Supreme Court had held that "a motion to suppress . . . should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion. If the motion fails to allege a legal or factual basis for suppressing the evidence, it may be summarily dismissed by the trial judge." *State v.*

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charges are not included in the record on appeal. The transcript, however, establishes that defendant was found not guilty of those charges.

Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) (internal citations omitted).

Defendant's motion to suppress asserted two grounds: (1) "That Detective M.K. Brooks and other officers searched locations not specified in the application for a search warrant"; and (2) "That the affidavit in support of the search warrant application was insufficient to establish probable cause in issuance of said search warrant." In support of this motion, defendant's counsel submitted an affidavit that stated in its entirety:

> 1. That I am an attorney at law, licensed to practice law in the State of North Carolina and am the Court appointed counsel for the above-named Defendant in the above-captioned case.
>
> 2. Counsel for the Defendant is informed, believes and therefore alleges that the State intends to introduce evidence allegedly obtained as a result of a search warrant issued on September 19, 2003.
>
> 3. That the undersigned is informed, believes and therefore alleges that officers executing the search warrant searched locations on the premises not named in the search warrant.
>
> 4. That the undersigned is informed and believes and therefore alleges that the supporting affidavit for the search warrant application did not contain credible, reliable and sufficient information to establish probable cause.
>
> 5. That the evidence allegedly obtained as a result of the execution of the search warrant issued on September 19, 2003, was obtained in substantial violation of Chapter 15A of the North Carolina General Statutes.

The trial court summarily denied the motion on the grounds that the supporting affidavit was inadequate.

N.C. Gen. Stat. § 15A-977(a) provides that a motion to suppress "must be accompanied by an affidavit containing facts supporting the motion." It further provides that the affidavit "may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated." *Id.* Thus, the affidavit (1) must contain facts to support the motion and (2) if based upon information and belief, must include the source of the information and the basis for the belief.

Here, counsel's affidavit stated no facts supporting defendant's contention that the search warrant application did not contain credible or reliable information. Moreover, any facts set forth in the affidavit — such as the general statement that the officers searched locations not named in the search warrant — were asserted only upon information and belief. Yet, the affidavit does not contain either the source of the information or the basis for the belief. Accordingly, the affidavit submitted in support of the motion to suppress did not comply with N.C. Gen. Stat. § 15A-977(a). The trial court, therefore, was not required to hold a hearing with respect to defendant's claims that the information in the search warrant application was not credible or reliable and that locations outside the scope of the warrant were searched. *See State v. Langdon*, 94 N.C. App. 354, 357, 380 S.E.2d 388, 390 (1989) (where defendant's affidavit contained no facts to support her allegation of bad faith, the motion to suppress was subject to summary denial); *State v. Blackwood,* 60 N.C. App. 150, 151-52, 298

S.E.2d 196, 198 (1982) (recognizing summary denial of suppression motion as proper when defendant's affidavit alleged no facts relevant to disputed seizure).

The only ground left for the motion to suppress is whether the information contained in the affidavit was sufficient to establish probable cause for the search. This Court has stated that when "the defendant's only challenge is to the sufficiency of the affidavit supporting the search warrant, the trial judge [may] summarily den[y] the motion without a hearing." *State v. Rutledge*, 62 N.C. App. 124, 125, 302 S.E.2d 12, 13 (1983). Since, in this case, the only issue properly before the trial court was the sufficiency of the search warrant affidavit, the court did not err in summarily denying defendant's motion to suppress.

With respect to defendant's argument that the search warrant application did not contain information sufficient to establish probable cause, the existence of probable cause is determined using a "totality of the circumstances" test. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984). As this Court set forth in *State v. Reid*, 151 N.C. App. 420, 566 S.E.2d 186 (2002):

> "The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.
>
> . . .
>
> Whether an applicant has submitted sufficient evidence to establish probable cause to issue a search warrant is a nontechnical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings. The

> affidavit [in support of an application for a search warrant] is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender."

Id. at 423-24, 566 S.E.2d at 189 (first alteration and internal quotation marks omitted) (quoting *State v. Ledbetter*, 120 N.C. App. 117, 121-22, 461 S.E.2d 341, 343-44 (1995)).

In this case, Detective Brooks set out in his affidavit that he had initiated or participated in more than 100 drug cases and was familiar with the typical activities and practices of drug dealers in the area. He reported that he had received information that defendant was selling drugs from his residence at 421 Dutch Avenue and that there was "a large amount of vehicle and foot traffic that goes to the house, stays approximately five minutes and leaves," a pattern that Detective Brooks described as "typical of people selling drugs." The affidavit then asserted that Detective Brooks arranged for controlled purchases of drugs by confidential informants on 27 August 2003 and 18 September 2003 (the day before the application for a search warrant). According to the affidavit, on 27 August 2003, the informant purchased $80.00 of cocaine from defendant at 421 Dutch Avenue, while on 18 September 2003, the informant purchased marijuana from defendant who was, on that occasion, in a homemade shed in the yard of 421 Dutch Avenue. The affidavit also noted that Detective Brooks had "other controlled substance buys from [defendant]" on four other occasions.

This information is more than adequate to support the existence of probable cause in this case. *See State v. Boyd*, ___ N.C. App. ___, ___, 628 S.E.2d 796, 801 (2006) (probable cause to search existed when there was an unusual amount of traffic to and from house, confidential informant succeeded in making a controlled buy, and informant identified defendant as the seller of the drugs); *State v. Collins*, 56 N.C. App. 352, 355, 289 S.E.2d 37, 39 (1982) (probable cause to search existed when officer watched informant enter house and return several minutes later with LSD that he gave to officer); *State v. McLeod*, 36 N.C. App. 469, 472, 244 S.E.2d 716, 719 (probable cause to search existed when officer watched informant enter building and return with marijuana that he gave to officer), *disc. review denied*, 295 N.C. 555, 248 S.E.2d 733 (1978). While defendant contends that the affidavit was required to establish the credibility and reliability of the informant, this Court has rejected that argument in the context of controlled purchases. *See Boyd*, __ N.C. App. at __, 628 S.E.2d at 801 (no showing of credibility or reliability required where informant succeeded in making controlled buy, promptly returned to officers with drugs, and identified defendant as seller). Accordingly, the trial court properly denied defendant's motion to suppress.

Hearsay Evidence

Defendant contends that the trial court erred in allowing testimony by the officers regarding the confidential informants' communications with the police. Defendant argues that the testimony was not only inadmissible hearsay, but also violated

defendant's Sixth Amendment right to confront and cross-examine witnesses for the State.

Defendant, however, failed to object to this testimony on any basis at trial. As to the Sixth Amendment argument, it is well settled that this Court will not review constitutional questions that "are not raised or passed upon in the trial court . . . ." *State v. Elam,* 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981). We also note that defendant's assignment of error relating to the Sixth Amendment Confrontation Clause violates N.C.R. App. P. 10(c)(1) by citing to a block of more than 70 pages of the trial transcript. N.C.R. App. P. 10(c)(1) explains that "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." A citation to a 70-page section of the transcript is hardly "clear and specific." *See State v. Roache*, 358 N.C. 243, 288, 595 S.E.2d 381, 411 (2004) ("meaningful review" frustrated where defendant's assignment of error referenced entirety of witness' testimony rather than specific portions).

With respect to defendant's hearsay argument, he listed only three pages of transcript in support of his assignment of error that "[t]he Trial Court erred in allowing hearsay testimony about confidential informants' communications to police where the informants never testified." In his brief, however, defendant fails to distinguish between his hearsay argument and his Sixth Amendment argument and does not cite to or quote from the

transcript in arguing that inadmissible hearsay was allowed to be heard by the jury. The brief contains no indication as to which specific testimony defendant considers to be inadmissible hearsay.

Similarly, in *State v. Cheek*, 351 N.C. 48, 71, 520 S.E.2d 545, 558 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965, 120 S. Ct. 2694 (2000), "defendant fail[ed] to refer to any specific ruling made by the trial court. Additionally, defendant [did] not provide any citations to the record or transcript." The Court held: "Because defendant does not present this portion of this assignment of error in a way for this Court to give it meaningful review, we conclude defendant has abandoned his argument under this assignment of error." *Id.*

Even if we did not deem this argument abandoned, a review of the three pages cited under the pertinent assignment of error indicates that, on one occasion, defense counsel did not clearly object on hearsay grounds and, in any event, did not again object when the same information was subsequently admitted. On a second occasion, the objection was sustained, but, even so, a page later, the same information was admitted without objection. Under those circumstances, review would only be available under the doctrine of plain error, yet defendant's assignment of error relating to hearsay does not refer to plain error. *See State v. Robinson*, 355 N.C. 320, 339, 561 S.E.2d 245, 257-58 (refusing to review for plain error under N.C.R. App. P. 10(c)(4) when plain error was not alleged in the assignments of error), *cert. denied*, 537 U.S. 1006,

154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). Only on one occasion was the hearsay objection properly made and overruled.

In any event, the testimony on these three pages related to transactions occurring on 16 May 2003 and 8 September 2003. Since defendant acknowledges in his brief that he was acquitted of the charges relating to those transactions, defendant has failed to demonstrate that he was prejudiced by the admission of that testimony. *See* N.C. Gen. Stat. § 15A-1443(a) (2005) (placing the burden on the defendant to establish 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"). We, therefore, overrule this assignment of error.

Defendant also argues on appeal that the trial court erred in denying his motion to dismiss made after the close of the State's evidence. Defendant's position is based on the State's use of hearsay evidence. He does not challenge the evidence concerning possession of the cocaine or the transfer of money for cocaine during the 27 March transaction when Officer Brooks visually observed the transaction taking place. Nor does defendant argue that the State failed to offer substantial evidence on any of the elements of the crimes of which defendant was convicted. Instead, his argument for dismissal raises the same hearsay objections just addressed. We therefore hold that the trial court did not err in denying the motion to dismiss.

Sentencing

Finally, defendant asserts that the trial court erred in sentencing him for both the sale and delivery of a controlled substance in a single transaction as two separate offenses. The State agrees that this was error under *Moore*, 327 N.C. at 382, 395 S.E.2d at 127. According to our Supreme Court, "[t]he transfer by sale or delivery of a controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug." *Id.* at 383, 395 S.E.2d at 127.

The State argues that we should not remand for new sentencing. The Supreme Court in *Moore*, however, stated: "Because the three convictions on each indictment were consolidated into one judgment per indictment, and because of the lengths of the prison terms imposed, we are unable to determine what weight, if any, the trial court gave each of the separate convictions for sale and for delivery in calculating the sentences imposed upon the defendant. *This case must thus be remanded for resentencing*." *Id.*, 395 S.E.2d at 127-28 (emphasis added). We see no meaningful distinction between this case and *Moore*. Although the State suggests that we should disregard this aspect of *Moore* because it was decided before the Structured Sentencing Act became effective, it is for the Supreme Court — and not this Court — to decide whether to overrule *Moore*.

No error; remanded for resentencing.

Judge JACKSON concurs.

Judge CALABRIA concurs in the result only.

Report per Rule 30(e).