NO. COA05-835

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v.

Buncombe County
Nos. 01 CRS 64343, 64399
02 CRS 12735

KEITH LAMONT HOWARD,
Defendant.

Appeal by Defendant from judgments entered 15 September 2004 by Judge James U. Downs in Superior Court, Buncombe County. Heard in the Court of Appeals 20 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi II, for the State.

Eric A. Bach for defendant-appellant.

WYNN, Judge.

Absent exigent circumstances, the search of a private dwelling must be supported by a warrant issued by a magistrate upon a finding of probable cause to believe the search will yield evidence of a crime. *See State v. Bone*, 354 N.C. 1, 9, 550 S.E.2d 482, 487 (2001). In this case, Defendant contends that the facts set out in the affidavit supporting the search warrant were insufficient to establish probable cause. As we find the affidavit was sufficient to establish probable cause, the trial court did not err in denying Defendant's motion to suppress.

In his motion and supplemental motion to suppress, Defendant sought to exclude evidence obtained by police during a search, pursuant to a warrant, "of his residence at ap[artment]t F-53 Bear Creek Apartments, Asheville, North Carolina on or about November 21, 2001." A magistrate issued the search warrant based upon an application and affidavit submitted by Sergeant Alfred F. Bottego of the Buncombe County Sheriff's Office.

At the suppression hearing, the State adduced evidence that Bottego worked as a counter-narcotics agent with the Metropolitan Enforcement Group (MEG) in October and November of 2001. On 1 October of 2001, he learned from confidential source of information -- identified at the hearing as Damion Hazel -- that Defendant was involved in a large-scale cocaine-distribution network in the Asheville area. Hazel advised Bottego that Defendant was using his "Jiggy Styles" retail clothing store in Biltmore Square Mall as a front for cocaine sales. Hazel further identified Defendant's sources for cocaine as originating in Mullins, South Carolina, and informed Bottego that Defendant lived with his girlfriend in a rented house on Debra Lane in Asheville. Bottego independently confirmed Defendant's residence at the Debra Lane address and traced the license tags on a vehicle parked in the driveway of Defendant's residence to confirm its registration in Mullins, South Carolina. Bottego also corroborated Hazel's claims of Defendant's illicit activity with a second confidential informant cultivated by State Bureau of Investigation Special Agent Paula L. Ray.

On 9 October 2001, Bottego sent Hazel into Defendant's

clothing store "to find out if he, in fact, could make a controlled purchase from [Defendant]." In a recorded conversation, Hazel and Defendant arranged "an open-ended deal" in which Hazel would buy cocaine from Defendant once Defendant received "a large shipment" expected to arrive "either that week or the beginning of the new week." Defendant gave Hazel his cellular telephone number and told "him to call first so they could decide upon the where and the when."

Bottego continued his background investigation of Defendant into November of 2001, learning that he was moving from his Debra Lane residence to an apartment. Advised by Ray that Defendant was residing at F-53 Bear Creek Apartments in Asheville, Bottego instructed Hazel to telephone Defendant "to find out if [Defendant] had cocaine ready for sale." During the phone call, Hazel arranged to purchase three ounces of cocaine from Defendant on 20 November 2001, using $3000 provided by MEG.

MEG initially planned to arrest Defendant upon his sale of cocaine to Hazel on 20 November 2001, and to search his apartment immediately thereafter. Bottego drafted an application for an anticipatory search warrant for the apartment, to trigger upon the probable cause provided by Hazel's successful purchase of cocaine from Defendant at Jiggy Styles. Consistent with the operational plan, MEG positioned surveillance units at Defendant's apartment and at Biltmore Square Mall on 20 November 2001. Hazel was placed with a member of the sheriff's department and instructed to make a controlled call to Defendant. Before Hazel could place the call,

however, a surveillance officer observed Defendant driving away from his apartment. At the agent's direction, Hazel called to Defendant to arrange the purchase. Defendant told Hazel "that he would have to go back and get the cocaine." The surveillance officer then saw Defendant turn his car around and followed him back to his apartment. Defendant went into the apartment briefly before returning to his car and proceeding toward Jiggy Styles.

Advised of these events by a fellow officer, Bottego abandoned the plan for an anticipatory search warrant and prepared a new application seeking immediate authority for the search. He presented the application to a magistrate, who signed the warrant at 4:30 p.m. on 20 November 2001. Bottego then joined the MEG unit at Biltmore Square Mall, arriving "just as the buy was taking place at Jiggy Styles." After Defendant was arrested for selling cocaine to Hazel, Bottego went to F-53 Bear Creek Apartments, where the warrant was executed at 5:15 p.m. Officers found about 460 grams of cocaine in the master bedroom closet and a kilogram of cocaine in a closet adjacent to the kitchen.

Reserving the right to appeal the denial of his motion to suppress, *see* N.C. Gen. Stat. § 15A-979(b) (2005), Defendant entered a conditional guilty plea to trafficking in at least 200 but less than 400 grams of cocaine by possession, conspiracy to traffic in cocaine, and possession of cocaine with intent to sell or deliver. The trial court sentenced him to consecutive prison terms of seventy to eighty-four months for the trafficking and conspiracy offenses and suspended an additional consecutive

sentence of six to eight months for possession with intent to sell or deliver. Defendant gave notice of appeal from the denial of his motion to suppress in open court.

On appeal, Defendant argues that the trial court erred in denying his motion to suppress the evidence seized at his residence because the affidavit supporting the search warrant did not demonstrate probable cause and contained false information.

On appeal, Defendant claims that the facts set forth in Bottego's affidavit were insufficient to establish probable cause to search the apartment. He argues that the affidavit failed to establish the reliability of the two confidential informants, who "had no track record for providing reliable information." He further avers that neither informant purported to have seen cocaine in the apartment, and that the information they provided about his alleged activities was stale.

In his affidavit, Bottego affirmed that he had seven years of law enforcement experience, which included "involve[ment] in numerous cases involving narcotics" and participation in "undercover work, surveillance, case preparation, [and] execution of search warrants[.]" Based on this experience, Bottego attested that individuals involved in drug trafficking "will utilize the[ir] residences to store . . . controlled substance[s]" as well as the records, currency and paraphernalia associated with the drug trade. As for the specific facts supporting a search of the apartment, Bottego attested, *inter alia*, to the following:

A confidential source of information from here out referred to as CSI provided information on the illegal activit[ie]s of [Defendant].

The CSI has for the past several months negotiated the sale of traffick[ing] amount[s] of coacaine [sic] a schedule[] two controlled substance . . . [.]

Within the last seventy-two hours agents of the Metropolitan Enforcement Group (MEG) have received information from a second confidential source of information (CSI-2) that [Defendant] (suspect) has purchased six to ten kilos of cocaine from an unknown source. The CSI has first hand knowledge that several co-conspirators are involved in the distr[i]bution of cocaine with the suspect.

CSI-2 stated that the suspect had moved from his residence (36 Debra Lane Asheville) to an unknown apartment.

MEG agents conducted physical surveillance on the suspect and he returned from the Buncombe County Court House, to F-53 Bear Creek Apartments. This information corroborates that provided by CSI-2.

Surveillance units followed the suspect from his residence at F-53 Bear Creek Apartment[s] in the direction of his business (Jiggy Styles, Biltmore Square Mall). During the su[r]veillance a controlled phone call from a confidential source of information that has proven to be accurate and reliable in the past was placed to the suspect. The CSI requested multiple ounces of cocaine, the suspect stated he would need to go get it (the cocaine). When the call was terminated the suspect turned about and returned to the residence. He exited his vehicle, went inside the residence. A short time later the vehicle left the area.

CSI-2 stated in an interview conducted by MEG agents that the suspect stored his controlled substance within his residence. The activity of the suspect at the time of the controlled phone call both verified and confirmed the information of CSI-2.

> It is your affiant[’s] belief that the suspect has an ongoing narcotic trafficking network . . .. The activit[ie]s of the suspect are supported by historical information dateing [sic] back to 1996.

In addition to prohibiting "unreasonable searches and seizures[,]" the Fourth Amendment to the United States Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.; *accord* N.C. CONST. Art. 1, § 20. Evidence obtained by an unconstitutional search is subject to suppression in a criminal trial. *See State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988); N.C. Gen. Stat. § 15A-974 (2005).

Absent exigent circumstances, the search of a private dwelling must be supported by a warrant issued by a magistrate upon a finding of probable cause to believe the search will yield evidence of a crime. *See Bone*, 354 N.C. at 9, 550 S.E.2d at 487. A search is justified by probable cause "if a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched." *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 462 (1988). "Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984). Moreover, "[c]ourts have accorded a preference to the warrant process because it provides an orderly procedure involving judicial impartiality

whereby 'a neutral and detached magistrate' can make 'informed and deliberate determinations' on the issue of probable cause." *Barnhardt*, 92 N.C. App. at 96, 373 S.E.2d at 462 (quoting *U.S. v. Ventresca*, 380 U.S. 102, 106, 13 L. Ed. 2d 684, 687 (1965)). Therefore, a magistrate's decision to issue a warrant "is not subject to a technical *de novo* review, but is limited to whether 'the evidence as a whole provided a substantial basis for a finding of probable cause . . ..'" *Id.* (quoting *State v. Arrington*, 311 N.C. 633, 640, 319 S.E.2d 254, 258 (1984)).

In conducting our review of the magistrate's finding of probable cause, we employ the "totality of the circumstances" test adopted by both the United States and North Carolina Supreme Courts:

> The 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.

Arrington, 311 N.C. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983). "Timely information tied to the specific premises to be searched can support a finding of probable cause." *Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 463 (citing *State v. Goforth*, 65 N.C. App. 302, 307, 309 S.E.2d 488, 492-93 (1983)). Furthermore, "[t]he direct personal observation by the officer/affiant or his fellow

officers is plainly a reliable basis for issuance of a warrant." *State v. Leonard*, 87 N.C. App. 448, 454, 361 S.E.2d 397, 400 (1987), *disc. review denied*, 321 N.C. 746, 366 S.E.2d 867 (1988) (citations omitted). Finally, "'[t]he experience and expertise of the affiant officer may be taken into account in the probable cause determination, so long as the officer can justify his belief to an objective third party.'" *State v. Rodgers*, 161 N.C. App. 311, 315, 588 S.E.2d 481, 484 (2003) (quoting *Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 462).

With these principles in mind, we find the facts contained in Bottego's affidavit sufficient to support the magistrate's finding of probable cause to search the subject apartment. While Defendant challenges the lack of a "track record of reliability" of the two informants cited in the affidavit, we believe the direct observations of Bottego and other officers in the course of their investigation both corroborated the informants' claims and provided sufficient independent evidence to justify a reasonable belief that cocaine or other evidence of Defendant's drug-related activity would be found in the apartment on the afternoon of 20 November 2001. Specifically, Bottego's affidavit alleged that an informant was involved in ongoing negotiations with Defendant to purchase "traffic[king] amounts of" cocaine. After confirming by surveillance Defendant's change of residence from Debra Lane to the subject apartment, MEG agents were privy to a "controlled phone call" between Defendant and the informant on the very day of the warrant application. When the informant requested "multiple ounces

of cocaine" from Defendant, Defendant "stated he would need to go get it[.]" At the completion of the call, Defendant was observed turning his car around and going into the apartment briefly, before resuming his trip. Under the circumstances, a reasonable person could conclude that Defendant returned to the apartment in order to retrieve the cocaine he had just agreed to provide to the informant. Bottego's affidavit further affirmed, based on his years of relevant experience, that a person involved in the sale of illegal drugs would also have additional evidence of this illicit activity at his residence. Although the events giving rise to probable cause were conveyed to Bottego by his fellow MEG agents, an affiant may rely upon the firsthand observations of other officers in his warrant application. *State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984) (citations omitted).

Defendant next faults the trial court for failing to grant his motion to suppress under the holding in *Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 672 (1978), based on the "intentionally or recklessly false statements" and omissions contained in Bottego's affidavit. However, we conclude this issue is not properly before this Court. "*Franks* holds that when a defendant makes allegations that an affidavit to support the issuance of a search warrant contains deliberate falsehood or reckless disregard for the truth and the affidavit would not be sufficient to support the issuance of a search warrant without the false or reckless statements, the defendant is entitled to a hearing on his allegations." *State v. Barnes*, 333 N.C. 666, 676,

430 S.E.2d 223, 228, *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336 (1993) (citing N.C. Gen. Stat. § 15A-978 (2005)). Here, while Defendant purports to "appeal[] the trial court's ruling from a *Franks* hearing," the record shows that he did not assert a *Franks* claim in his motion to suppress, his supplemental motion to suppress, or at the suppression hearing. *See State v. Fernandez*, 346 N.C. 1, 14, 484 S.E.2d 350, 358 (1997) ("Before a defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in his affidavit." (citing *Franks*, 438 U.S. at 155-56, 57 L. Ed. 2d at 672)). Although Defendant cross-examined Bottego about the timing and number of warrants issued by the magistrate, the duration of the search undertaken by police, the meaning of certain slang terms used by Defendant and an informant in a conversation recorded by police at Jiggy Styles on 9 October 2001, and the reliability of the informants, Defendant offered neither evidence nor argument that any facts alleged in Bottego's affidavit were intentionally or recklessly false. "[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)); *accord State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (noting that a defendant whose motion to suppress is denied "may not swap horses

after trial in order to obtain a thoroughbred upon appeal"). Accordingly, Defendant has failed to preserve his *Franks* claim for appeal.

The record on appeal includes additional assignments of error not addressed in Defendant's brief to this Court. Pursuant to N.C. R. App. P. 28(b)(6), we deem them abandoned.

Affirmed.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).