NO. COA06-582

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Wake County
No. 02 CRS 20301-03

BARTOLA HERRERA HERNANDEZ

Appeal by defendant from judgment entered 24 July 2002 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 26 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Michael J. Reece, for defendant-appellant.

ELMORE, Judge.

While reserving the right to appeal the denial of his motion to suppress, defendant pled guilty to trafficking in cocaine by transportation, trafficking in cocaine by possession, and conspiracy to traffic in cocaine. *See* N.C. Gen. Stat. § 15A-979(b) (2006). By judgment entered 24 July 2002, the trial court consolidated the offenses for judgment and sentenced defendant to an active prison term of 175 to 219 months. Because the assignments of error in the instant appeal address only the suppression issue, we confine our review to the order denying

defendant's motion to suppress entered by Judge Evelyn Werth Hill on 22 July 2002.

Because they are not assigned as error in the record on appeal, we are bound by the following findings of fact entered by Judge Hill based upon the evidence adduced at the 24 June 2002 motion hearing:

> 1. Several days prior to March 11, 2002, S[ergeant] B.L. Kennon (Kennon), a fifteen-year veteran of the Raleigh Police Department and supervisor of one of the drug units within that department, interviewed [Michael Moore,] who had been arrested by his squad on drug trafficking charges. [Moore] stated that he had obtained the cocaine, which was in his possession at the time of his arrest[,] from an individual who[m] he knew as "Hernandez". Further, Moore stated it was routine business for him to order drugs from Hernandez in that he had done so 65 or 70 times previously. Moore stated that he knew Hernandez by sight . . . .
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> 2. Moore agreed to contact Hernandez by phone for the purpose of arranging for a delivery of cocaine. With Moore's knowledge and consent, the calls were monitored and taped by Sgt. Kennon and his squad. During these conversations, it was agreed that Hernandez would deliver 250 grams of cocaine to Pope's Car Wash in Raleigh around 6:00 pm on March 11, 2002 and that Moore would pay then Hernandez for the five ounces of cocaine that he obtained from Hernandez earlier. Although the parties did not explicitly discuss the terms of the deal by using words such as cocaine or ounces, it was clear to Sgt. Kennon as a result of his training and experience with those involved in the narcotics trade that Moore and Hernandez had arranged for a "drop" or an exchange of cocaine for money at the car wash.
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> 3. Moore informed Kennon that he expected Hernandez to be driving a white car and to have one or two other Hispanic males with him when he arrived to deliver the drugs. This

> information was based on Moore's prior dealings with Hernandez.
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> . . .
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> 5. Kennon, Moore, and another detective . . . were in position at Pope's Car Wash in an unmarked van at approximately 6:00 pm on March 11, 2002. . . .
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> 6. Shortly after 6:00 pm, a red Honda Prelude occupied by three Hispanic males arrived at the car wash. Moroe immediately told Kennon, "that's them." Kennon asked "who?" and Moore replied, "that's Hernandez driving the vehicle."
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> 7. . . . [T]he driver of the car, the person that Moore had identified as Hernandez, got out of the car. The front seat passenger (later identified as Perez) and backseat passenger (later identified as Noyola) also got out of the car. Hernandez then began dialing a number on the cellular phone which he held in his hand. At that instant, Moore's phone rang. [Kennon] was able to identify the call as coming from Hernandez by the information displayed on his phone.
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> 8. Kevin signaled the officers to move in for the take down. As the officers approached, Hernandez threw down his phone and ran. The officers apprehended him a short distance away. . . .
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> 9. Kennon approached the Honda Prelude and saw a white Food Lion bag on the front passenger seat. Inside the bag he discovered three separate packages wrapped in red or orange tissue or cellophane. Kennon recognized this packaging as consistent with the way that Hispanic drug dealers package their drugs. These packages were later found to contain the more than 400 grams of cocaine that is the subject of the defendant's motion to suppress.

See Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent

evidence and is binding on appeal.") (citations omitted). Judge Hill expressly found Kennon's testimony at the hearing to be "credible and reliable[,] and the testimony of defendant's co-defendant Perez to be "unbelievable, evasive[,] inconsistent . . . [and] patently absurd at best."

Based on these findings, Judge Hill concluded, *inter alia*, that "Kennon had probable cause to arrest Hernandez for violations of the Controlled Substances Act based on [Kennon']s observations, his experience and training . . . to detain Hernandez[,]" and that the officers had probable cause to search the Prelude that defendant drove to the car wash. Judge Hill further concluded that defendant's arrest and the search of the vehicle were "lawful and without any violation of any statute or constitution, Federal or State."

On appeal, defendant claims the trial court erred in concluding that the officers had probable cause to search the vehicle in which the cocaine was found. Specifically, he asserts that "[t]he officers placed too much weight on what Moore said without taking any steps to confirm his information." Absent independent corroboration of Moore's claimed drug transactions with defendant, police had no reasonable basis to conclude that defendant had probably committed a crime. Defendant further avers that there was no probable cause to arrest him and, alternatively, that the search of the red Prelude exceeded the scope of a valid search incident to arrest, since he "had left the vehicle even prior to being confronted by police and was almost thirty feet away

from it" when apprehended.

This Court reviews the denial of a motion to suppress to determine if (1) the trial court's findings of fact are supported by competent evidence, and (2) its findings support its conclusions of law. *See State v. Nixon*, 160 N.C. App. 31, 33, 584 S.E.2d 820, 822 (2003). As noted above, "[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (citations omitted). We review the trial court's ultimate conclusions of law *de novo*. *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citing *State v. Payne*, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991)).

The trial court concluded that police had probable cause to arrest defendant at the car wash. "Police officers may arrest without a warrant any person who they have probable cause to believe has committed a felony." *State v. Martinez*, 150 N.C. App. 364, 368, 562 S.E.2d 914, 916 (quoting *State v. Hunter*, 299 N.C. 29, 34, 261 S.E.2d 189, 193 (1980)), *appeal dismissed and disc. review denied*, 356 N.C. 172, 568 S.E.2d 859 (2002). "'A warrantless arrest is based on probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon.'" *State v. Mathis*, 295 N.C. 623, 247 S.E.2d 919 (1978) (quoting *State v. Shore*, 285 N.C. 328, 335, 204 S.E.2d 682, 686 (1974)). "'*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. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (quoting *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984)).

Where probable cause is grounded in information provided by an informant, we must consider the totality of the circumstances, assessing "the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003) (quotations omitted). Reliability is gauged, *inter alia*, by the informant's history of providing correct information to police, the specificity and accuracy of the informant's information about the instant defendant, and the degree of independent corroboration of the informant's claims about the defendant by police. *Id.* (citations omitted).

In *Martinez*, sheriff's department officers found illegal drugs and other contraband in the residence of Michael Goff. *Martinez*, 150 N.C. App. at 367, 562 S.E.2d at 916. Although he had not previously served as an informant, Goff told an officer "that normally he purchased his marijuana from two Hispanic males . . . [and] that the two Mexican males were currently en route to deliver a twenty-five pound shipment of marijuana to his house." *See id.* Goff further stated that the two men would arrive at his residence within an hour in a small white four-door car, "which would 'come right to [his] door.'" *Id.* An officer witnessed Goff's receipt of

a cellular phone call, "overheard the conversation and verified that two Hispanic men would be arriving at Goff's residence in approximately twenty minutes." *Id.* Approximately twenty minutes later, Martinez and Zavala arrived at Goff's residence in a white four-door car and "parked next to Goff's front door." *Id.* Officers took the men into custody, searched the vehicle, and found bags of marijuana in the trunk. *See id.* In denying Martinez's motion to suppress the marijuana, this Court found the information provided by Goff to be sufficiently reliable to support a finding of probable cause:

> Although Goff was not a known informant, the officers independently verified the information that he provided to them. Based on Goff's information and the officers' independent verification of that information, the officers had probable cause to believe that defendant and Zavala were committing a felony in their presence.

Martinez, 150 N.C. App. at 369 562 S.E.2d at 917. In support of our ruling, we emphasized the officer's independent verification of Goff's "(1) description of the transporting automobile, (2) a description of the two occupants, (3) the proximity of the automobile's position to the front door, and (4) the arrival time of the automobile." *Id.*

The informant in this case, Moore, was arrested while in possession of five ounces of cocaine. He had not previously served as an informant but told Officer Kennon that his supplier was named "Hernandez" and that they had transacted on dozens of prior occasions. Moore allowed Kennon to record his telephone conversations with the supplier in which they arranged to meet at

a car wash at a specific date and time. The recorded conversations revealed that the purpose of the meeting was for Moore to pay his supplier for the cocaine found in his possession by Kennon and to receive additional cocaine from the supplier. Moore predicted that Hernandez would arrive at the car wash with one or two Hispanic males in a white car. Defendant arrived at the car wash at the appointed time driving a red car and accompanied by two Hispanic males. Moore immediately identified defendant to police as his supplier. Defendant exited the vehicle and placed a call to Moore's cellular phone, which Kennon had in his possession. When police appeared, defendant threw the phone in the air and ran.

We conclude that the totality of the circumstances surrounding Moore's tip to Kennon established probable cause to arrest defendant for the possession with intent to sell or deliver cocaine, a felony. *See* N.C. Gen. Stat. § 90-95(a), (d)(2) (2006). Here, as in *Martinez*, the informant had no track record with police but was arrested in possession of drugs and provided accurate predictive information regarding a future meeting with his supplier. Although the description of each supplier was general, both Moore and Goff provided specific and accurate information regarding the time and place of the future meeting. Defendant notes that he arrived at the car wash in a red car, rather than a white car as Moore predicted. However, Moore immediately identified defendant by sight as his supplier. Moreover, any inaccuracy as to the color of defendant's vehicle was outweighed by Kennon's independent verification of the purpose of Moore's

rendezvous with "Hernandez" at the car wash. By monitoring their telephone calls, Kennon learned that the two men were meeting in order for Moore to pay Hernandez for the cocaine which Moore possessed at the time of his arrest, and for Moore to receive an additional quantity of cocaine from Hernandez. In light of the independent verification of the illicit purpose of the meeting, a fact not shown in *Martinez*, police had probable cause to believe defendant would be delivering cocaine to Moore at the car wash. Defendant's sudden flight when police appeared provided additional support for this conclusion. *See State v. Whitted*, 112 N.C. App. 640, 642, 436 S.E.2d 275, 276 (1993) (citing *State v. Mills*, 104 N.C. App. 724, 729-30, 411 S.E.2d 193, 196 (1991)); *State v. Harrington*, 17 N.C. App. 221, 225, 193 S.E.2d 294, 297 (1972).

Because police had probable cause to arrest defendant for a felony drug offense, we further conclude that the search of the red Prelude that he drove to the car wash was a lawful search incident to his arrest. In *New York v. Belton*, the United States Supreme Court held that police who undertake a lawful arrest of a driver or passenger of a vehicle may search incident to the arrest "inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested." *Belton*, 453 U.S. 454, 462, 69 L. Ed. 2d 768, 776 (1981). Addressing the circumstance presented here, the Supreme Court subsequently upheld the search of a vehicle's passenger compartment incident to the arrest of a "recent occupant" of the vehicle. *Thornton v. United States*, 541 U.S. 615, 617, 158 L. Ed. 2d 905, 911 (2004)

("conclud[ing] that *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle"). Thus, the fact that defendant ran from the red Prelude before his arrest does not affect the constitutionality of the search of the car's interior. Moreover, the scope of a search incident to arrest under *Belton* extends to "all containers found within the interior" of the vehicle, including the plastic grocery bag full of cocaine found by Kennon on the Prelude's front passenger seat. *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) (citations omitted). Accordingly, we hold that the trial court properly denied defendant's motion to suppress. The judgment entered upon defendant's guilty plea is affirmed.

Affirmed

Judges WYNN and GEER concur.

Report per Rule 30(e).