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NO. COA08-1123

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 2009

STATE OF NORTH CAROLINA

v.

Durham County
No. 07 CRS 045659

KENNETH WAYNE BARTLETT, SR.,
Defendant.

Appeal by defendant from judgment entered 26 February 2008 by Judge James C. Spencer in Superior Court, Durham County. Heard in the Court of Appeals 7 April 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery, for the State
Linda B. Weisel, for defendant-appellant.

WYNN, Judge.

Our case law establishes that a “bare bones” warrant application or conclusory affidavit is insufficient to support a magistrate’s determination of probable cause.¹ In this case, Defendant Kenneth Wayne Bartlett, Sr. argues that the affidavit supporting a search warrant for his premises lacked sufficient information to show the basis of knowledge and reliability of the informants, and failed to establish a nexus between the alleged criminal activity and the premise to be searched. We agree and

¹ See, e.g., *State v. McHone*, 158 N.C. App. 117, 122, 580 S.E.2d 80, 83 (2003).

therefore reverse the denial of his motion to suppress.

On 25 April 2007, Durham Police Investigator A. M. Cristaldi interrogated Charles McInnis and Thomas Woods regarding the theft of tools from an Advanced Auto Parts store earlier that day. During the interrogation, the two men offered to give Officer Cristaldi information relating to copper thefts from area construction sites in exchange for dropping the larceny charges against them. Ultimately, the men told Officer Cristaldi that Defendant had been "stealing copper and selling it for a profit"; their citations were voided.

Two days later, Officer Cristaldi filed an application for a warrant to search 507 Park Avenue, a blue Pinto station wagon, a white Volvo, and any other vehicles on the premise. The items to be seized from the premise included "stolen copper wire," "tools used for burglaries," firearms, and ammunition. In support of the application, Officer Cristaldi submitted an affidavit describing statements by "two independent witnesses" and a conversation she had with a representative from American Metals on 26 April 2007.² Based on this information, the magistrate signed the search warrant. Thereafter, upon executing the warrant, Officer Cristaldi

² Cristaldi testified that she spoke with the magistrate and relayed additional information to him during the search warrant application process. However, none of this information was recorded or contemporaneously summarized, as required for consideration on review for sufficiency. N.C. Gen. Stat. § 15A-245(a) (2007) ("[I]nformation other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.").

arrested Defendant at the premise and seized a number of items from the residence, including tools, copper wire, firearms, and air conditioner cores.

Defendant was charged with three counts of felony larceny, three counts of felony breaking and entering, and one count of felony conspiracy to commit breaking and entering and larceny. At trial, Defendant pled guilty to all of the charges against him, reserving his right to appeal the denial of his pretrial motion to suppress any statements and all items seized. Thereafter, the trial court entered judgment, sentenced Defendant to a suspended term of eight to ten months' imprisonment, imposed thirty months of supervised probation, and ordered restitution in the amount of \$350.00.

On appeal, Defendant argues that the trial court erred by denying his motion to suppress because the warrant application and search warrant affidavit were insufficient to establish probable cause. We agree.

To support a finding of probable cause, "[t]he facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citations omitted). When reviewing an application for a search warrant, the issuing magistrate must "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.'" *Id.* 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)). Paying proper deference to the magistrate's determination, this Court decides whether, based on the totality of the circumstances, there was a "substantial basis for the magistrate's finding of probable cause." *Id.* at 641, 319 S.E.2d at 259.

Here, the probable cause affidavit contained the following statements from Officer Cristaldi:³

On 3/25/07 I spoke with two independent witnesses that told me Timothy Weaver has been paying [Defendant] and others cash money for pipes and coil. [Defendant] goes out to new housing developments, apartment complexes and anywhere else he can find pipes and coils and steals it from these locations. [Defendant] uses one of Mr. Weavers [sic] vehicles to transport this stolen pipe and coil back to Mr. Weaver. Mr. Weaver then sells the copper wire to a scrap yard and splits the profits with [Defendant]. My independent witnesses told me that on 3/24/07 [Defendant] went into Cary driving a vehicle that Mr. Weaver gave to him to use. [Defendant] then went with his girlfriend (Kimberly Gray) to Cary where they made four trips back and forth from Cary to Durham with copper wire [Defendant] had stolen from the houses. The copper wire included the large copper pipe that had the placement location inside the house written on it. Mr. Weaver then went to American Metals in Garner North Carolina on the morning of 3/25/07 and sold it. I know from dealing with American Metals that they only buy copper on Wednesdays and Fridays.

³ Both parties concede in their briefs that the events took place in April rather than March.

My two independent witnesses also told me that Mr. Weaver is in possession of a shotgun. Mr. Weaver keeps the shotgun hidden inside 507 Park Avenue. Mr. Weaver is also a convicted felon and does not have the right to possess a firearm.

On 4/26/07 I spoke with a representative from American Metals who told me that Timothy Weaver was at that location the morning of 4/25/07 selling wire and coil. The representative said Mr. Weaver was there around 0900 hours.

"N.C.G.S. § 15A-244 requires that an application for a search warrant must contain (1) a probable cause statement that the items will be found in the place described, and (2) factual allegations supporting the probable cause statement." *State v. Taylor*, __ N.C. App. __, __, 664 S.E.2d 421, 423 (2008); N.C. Gen. Stat. § 15A-244(2), -244(3) (2007). Further, section 15A-244(3) provides that "statements must be supported by one or more affidavits *particularly* setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched" (emphasis added). "When hearsay information is a part of the foundation of the affiant's belief, such information must be sufficiently detailed in order to form a substantial basis for the magistrate's finding of probable cause." *State v. Hyleman*, 324 N.C. 506, 509, 379 S.E.2d 830, 832 (1989). The indicia of reliability of an informant's statements and information "may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *State v. Collins*,

160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003), *aff'd per curiam*, 358 N.C. 135, 591 S.E.2d 518 (2004).

Our case law establishes that a "bare bones" warrant application or conclusory affidavit is insufficient to support a magistrate's determination of probable cause. See *McHone*, 158 N.C. App. at 122, 580 S.E.2d at 83 (concluding that an affidavit's "mere conclusion that probable cause exists" is conclusory where unsupported by particular facts).

In *State v. Heath*, this Court applied the totality of the circumstance test set out by the United States Supreme Court in *Illinois v. Gates*, and concluded an affiant's reference to the reports of "concerned citizens" without more was conclusory and insufficient to establish probable cause. 73 N.C. App. 391, 397, 326 S.E.2d 640, 644 (1985). Further, this Court noted in *Heath* that, while "an informant's veracity or reliability and his or her basis of knowledge are not to be accorded independent status" under the totality of circumstances test, "a deficiency in one area may be compensated for by a strong showing in another." *Id.* at 396, 326 S.E.2d at 644. In *Hyleman*, our Supreme Court held that the application for a search warrant failed to comply with the statutory requirements of section 15A-244(3) where the probable cause affidavit stated that the informants purchased cocaine from the defendant but failed to include what information the affiant received from the informants during and after the drug buy, and failed to disclose facts that would lead to a reasonable belief that drugs were at the defendant's residence. 324 N.C. at 509, 379

S.E.2d at 832. In *State v. Roark*, this Court held that a supporting affidavit was insufficient to establish probable cause where the affidavit stated that goods were stolen from a school between 25 January and 31 January and a "reliable" and "confidential informant" told the affiant that the stolen goods were at the defendant's residence. 83 N.C. App. 425, 427, 350 S.E.2d 153, 154 (1986). This Court concluded that the "bare bones" allegation by the affiant was "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Roark*, 83 N.C. App. at 427, 350 S.E.2d at 154 (quoting *United States v. Leon*, 468 U.S. 897, 923, 82 L. Ed. 2d 677, 699 (1984)).

Here, the affiant relies on hearsay information obtained from "two independent witnesses" about general criminal activity engaged in by Defendant and Weaver. The officer's supporting affidavit fails to state the identity of the informants, the basis of their knowledge, the specific locations from which the goods were allegedly stolen, or what type of vehicle was used in the theft. While the affiant does offer corroboration of the informants' claims that the Defendant sold "wire and coil" to American Metals, she offers no corroboration for any of the information related to the alleged criminal activities.

Additionally, there is no information in the affidavit connecting the alleged activity to the premise to be searched. See *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (noting that a nexus is typically established by "showing that

criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place"). Where direct evidence is unavailable, information sufficient to give rise to a reasonable inference of a nexus between the premise and the fruits of the crime—the stolen goods—may be sufficient. *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. In *State v. Goforth*, this Court concluded that there was insufficient information to establish a nexus between the premise and the fruits of the crime where an affidavit contained statements that the premise was being used "for the storage of drugs and the furtherance of their illicit drug operation" and the defendants later appeared at the premise after allegedly purchasing drugs. 65 N.C. App. 302, 308, 309 S.E.2d 488, 493 (1983). Here, the affidavit contains no information indicating the goods were being stored on the premise or giving rise to a reasonable inference that the goods would be found on the premise. Rather, the information in the affidavit indicates that the goods were being transferred to Weaver, and there is nothing in the affidavit that directly or indirectly connects Weaver to the premise.

Because the affidavit in support of the warrant application was void of information connecting the premise to the fruits of the alleged crime, largely contained hearsay information from unidentified informants that lacked particularity, and failed to provide substantial information about the informants' basis of knowledge, past reliability, or veracity, we hold that the magistrate did not have a substantial basis for finding probable

cause.

In sum, we reverse the trial court's denial of Defendant's motion to suppress and set aside his convictions. Though we need not reach Defendant's remaining issues, we note for completeness that the State concedes that the trial court's order of restitution was not supported by sufficient evidence; we agree.

Reversed.

Judges JACKSON and HUNTER, JR. concur.

Report per Rule 30(e).