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NO. COA08-262

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 06 CRS 18114-16

EVERTON AUSTIN BERRY

Court of Appeals

Appeal by defendant from judgment entered 4 June 2007 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars E. Nance, for the State

Nora Henry Hargrove, Assistant Public Defender, for defendant-appellant.

BRYANT, Judge.

Everton Austin Berry (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of two counts of trafficking cocaine and one count of possession with intent to sell or deliver marijuana. We find no error.

Facts

On 17 April 2006, the grand jury returned two indictments against defendant for trafficking in cocaine, and one indictment for possession of marijuana with intent to sell or deliver. On 3 April 2007, defendant filed a pretrial motion to suppress physical

evidence and inculpatory statements. Defendant argued that police were required to obtain a search warrant because they lacked exigent circumstances to justify a warrantless search of his car. Defendant further argued that his subsequent waiver of his *Miranda* rights and consent to search his two apartments was rendered ineffective by the unconstitutional search of his car.

The trial court held a suppression hearing on 31 May 2007. The only witness for the State was Detective James Hobby. A confidential informant had told Detective Hobby that defendant would sell him one kilogram of cocaine. Detective Hobby had spoken to the informant a dozen times since his arrest on other charges and considered the informant reliable. Detective Hobby also listened to telephone conversations between defendant and the informant in which defendant agreed to sell the informant one kilogram of cocaine. Detective Hobby arranged to have defendant meet the informant in a store parking lot on 7 March 2006.

Two detectives followed defendant from his apartment to the parking lot. Defendant and his car, a black Lexus, matched the informant's description. Defendant and the informant met in the parking lot and went inside the store. Using an electronic listening device, the officers could monitor the conversation when defendant and the informant were outside, but not while they were inside the store. When defendant and the informant came out of the store, they got into defendant's car with a plastic bag. When the informant gave a pre-arranged signal, officers pulled alongside defendant's car.

The officers handcuffed defendant and put him in the back of a patrol car. When the officers searched defendant's car, they found a white, plastic bag with a "plastic block object" sitting in the passenger area. Based on his training and experience in drug investigations, Detective Hobby believed that the block was a kilogram of cocaine. Detective Hobby advised defendant that he was under arrest for drug trafficking and administered *Miranda* warnings. Defendant agreed to talk to Detective Hobby.

The informant had described defendant as Jamaican, and Detective Hobby believed that defendant spoke with a Jamaican accent. As they searched defendant's car, the officers found defendant's address. Detective Hobby asked defendant if that was his current address. Defendant told Detective Hobby that he was in the process of moving between two apartments in the same complex. Detective Hobby asked defendant for permission to search both apartments, and defendant signed a consent to search form. The form was admitted into evidence at the hearing. In defendant's old apartment, the officers found about 750 grams of cocaine in three separate packages. In the new apartment, the officers found ten compressed bags of marijuana.

In an interview room at the Raleigh police department, Detective Hobby read defendant his *Miranda* rights for a second time. Defendant told Detective Hobby that he was willing to speak without an attorney present and executed a written waiver of his rights. Defendant was not handcuffed at the time, and Detective Hobby was the only officer in the room. The written waiver form

was introduced into evidence at the suppression hearing. Defendant, however, testified that the signatures on the consent to search and the waiver of rights forms were not his.

In its oral order denying the motion to suppress, the trial court concluded that the officers were not required to demonstrate exigent circumstances to conduct a warrantless search of defendant's car because they had probable cause to believe that there was evidence of a crime in the car. The trial court also concluded that defendant voluntarily consented to the searches of his apartments.

The testimony at trial regarding the search of defendant's car and apartments was substantially the same as the testimony at the suppression hearing. At trial, however, Detective Hobby also testified that when he interviewed defendant at the sheriff's office, defendant told him that he had received two kilograms of cocaine from a man named, "Lucky." Defendant had sold about 250 grams of the cocaine earlier the same day for \$5,000.00. Defendant said he was supposed to meet a friend in the store parking lot to sell him a kilogram of cocaine. Defendant also told Detective Hobby that officers had missed \$7,500.00 in cash that he had in a closet in his first apartment.

Defendant did not present any evidence at trial, and the trial court denied defendant's motion to dismiss. The jury found defendant guilty of trafficking in more than 400 grams of cocaine by possession and transportation and possession of marijuana with intent to sell and deliver. The trial court consolidated all three

convictions into one judgment of 175 to 219 months in prison. Defendant appeals.

Defendant presents one argument on appeal: Whether the trial court erred in denying his motion to suppress the evidence seized after the officers searched his car because the officers lacked exigent circumstances to conduct a warrantless search.

Defendant has not challenged any of the trial court's findings of fact, and those findings are binding on appeal. The only remaining question is whether the findings of fact support the trial court's conclusions of law. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006).

Although the Fourth Amendment generally protects individuals against warrantless searches, "[a] search of a vehicle on a public roadway or public vehicular area is properly conducted without a warrant as long as probable cause exists for the search." *State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886, *appeal dismissed*, 351 N.C. 112, 540 S.E.2d 372 (1999) (citing *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987)). "Probable cause requires that the existing facts and circumstances be sufficient to support a fair probability or reasonable belief that contraband will be found in the automobile." *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993). "In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced

assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.'" *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (quoting *Earhart*, 134 N.C. App. at 133, 516 S.E.2d at 886).

Here, the trial court properly concluded the officers had probable cause to search defendant's car based on their observations and the informant's tip. The evidence shows that Detective Hobby listened to telephone conversations between the informant and defendant in which defendant agreed to sell the informant one kilogram of cocaine. Detective Hobby had spoken to the informant a dozen times and found him to be reliable. The informant knew defendant as a drug dealer. Detective Hobby arranged a sale between defendant and the informant in a store parking lot. On the day of the sale, two officers followed defendant from his home to the site of the proposed sale. Defendant met the informant in the parking lot as planned. Defendant and his car matched the description given by the informant. Detective Hobby listened to the conversation between defendant and the informant when they were in the parking lot. After the informant gave the pre-arranged signals, the officers took defendant into custody. Given the totality of all the circumstances, we agree with the trial court that officers had probable cause to expect to find contraband in defendant's car.

Because we disagree with defendant's contention that the initial warrantless search of his car was unconstitutional, we also disagree with his contention that the search nullified his consent

to the searches of his apartments, and we find no error in the admission of the evidence obtained as a result of those searches at trial.

No error.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).