NO. COA08-826

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

STATE OF NORTH CAROLINA

v.

Buncombe County
Nos. 07 CRS 51493-94,
07 CRS 51827-28

JAMES MELBURN MURRAY

Appeal by defendant from judgments entered 26 July 2007 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 14 January 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

CALABRIA, Judge.

James Melburn Murray ("defendant") appeals judgments entered upon jury verdicts finding him guilty of manufacturing, possessing and trafficking precursor chemicals and Schedule II controlled substances. We vacate and remand in part and find no error in part.

On 7 February 2007, Officers Mitch McAbee ("Officer McAbee") and Tim Goodrich ("Officer Goodrich"), members of the narcotics investigation unit of the Buncombe County Sheriff's Department, visited defendant's residence after receiving a tip that a methamphetamine ("meth") lab was being maintained at defendant's

residence. Upon their arrival, the officers found the defendant standing in the driveway behind his residence. Outside and around the residence, the officers not only detected an odor associated with the manufacture of meth, but also saw, in plain view, containers of items frequently used to manufacture meth.

The officers asked defendant for his consent to search the residence and defendant denied their request. Based on observations at the residence, the officers informed defendant that they were securing the residence and seeking a search warrant. Defendant was also warned not to reenter the residence unless accompanied by an officer. When defendant reentered the residence, the officers followed him. Upon his reentry, the defendant grabbed a jar of brown liquid and proceeded toward the back bedroom of the residence. The officers arrested the defendant and restrained him with handcuffs. The defendant later admitted that he was attempting to hide the evidence of a meth lab in the residence.

The officers obtained a search warrant for defendant's residence. Agents from the State Bureau of Investigation found immediate precursor chemicals used in the production of meth, including pseudoephedrine, iodine, and red phosphorous, as well as 2.5 grams of meth and four jars containing a bi-layered liquid weighing a total of 2,625 grams. The liquid was in the final stage in the meth production cycle.

Defendant was charged and indicted for manufacturing meth, possession of meth, two counts of possession of an immediate

precursor chemical with the intent to manufacture meth, trafficking by manufacture of 400 grams or more of meth, and trafficking by possession of 400 grams or more of meth. Defendant was tried in Buncombe County Superior Court in July 2007. At trial, the defendant admitted his residence was used for the manufacture of meth, but denied any involvement in its operation. The jury returned verdicts finding defendant guilty of all charges. The trial court arrested judgment for the manufacture and possession of meth offenses and consolidated for judgment one of the trafficking offenses with the possession of precursor chemical offenses. The sentence for the remaining trafficking offense was to run at the expiration of the consolidated sentence. Defendant's two consecutive sentences, for a minimum term of 225 months to a maximum term of 279 months, were to be served in the North Carolina Department of Correction. Defendant appeals.

I. Warrantless Seizure

Defendant argues the trial court erred in failing to suppress evidence seized pursuant to an unconstitutional warrantless seizure of his residence. Defendant also argues the officers did not have probable cause to secure the residence prior to obtaining a search warrant. We disagree.

On a motion to suppress evidence, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. *State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996). Defendant has not assigned error to any specific finding of fact. Therefore, the findings of fact are not reviewable, and

the only issue is whether the conclusions of law are supported by the findings, a question of law fully reviewable on appeal. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005).

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). Article I, Section 20 of the North Carolina Constitution provides similar protection against unreasonable seizures. N.C. Const. art. I, § 20; *Campbell*, 359 N.C. at 659, 617 S.E.2d at 11.

Typically, a warrant is required before law enforcement may engage in a search or seizure of private property. "The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). However, as indicated above, our Courts have recognized exceptions to the warrant requirement. *Id.* "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, 531 U.S. 326, 330, 148 L. Ed.

2d 838, 847 (2001). In *McArthur*, the United States Supreme Court was faced with similar facts. McArthur's wife requested the presence of law enforcement to maintain peace while she removed her items from the couple's residence. *Id.* at 328-29, 148 L. Ed. 2d at 846. Upon exiting the residence, she informed the officers that she had seen her husband place marijuana beneath the couch. The officers knocked on the door and asked McArthur for permission to search the residence. He denied their request, and the officers prevented him from reentering the residence unaccompanied for a period of two hours while they obtained a search warrant for the residence. *Id.*

The *McArthur* Court held that the restriction was reasonable under the exigent circumstances exception to the warrant requirement because: (1) the officers had probable cause to suspect the residence contained evidence of a crime; (2) the officers had good reason to fear evidence would be destroyed if defendant were allowed to reenter the residence; (3) the officers made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy, preventing defendant from entering the premises unattended; and (4) the officers imposed the restraint for a limited period of time. *Id.* at 331-32, 148 L. Ed. 2d at 848.

Probable cause, in this context, is defined as "a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the object sought and that such object will aid in the apprehension or conviction of the

offender." *State v. Hunt*, 150 N.C. App. 101, 104, 562 S.E.2d 597, 600 (2002) (citing *State v. Crisp*, 19 N.C. App. 456, 458, 199 S.E.2d 155, 156 (1973)). Furthermore, in *State v. Arrington*, North Carolina adopted the "totality of the circumstances" test. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). This standard, first employed by the United States Supreme Court in *Illinois v. Gates*, requires a "practical, common sense decision whether, given all the circumstances[,] . . .there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 637-38, 319 S.E.2d at 257-58 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983)).

The findings of fact show that Officers McAbee and Goodrich visited defendant's residence upon receiving information from an individual who had recently purchased meth and witnessed evidence of a meth lab in defendant's residence. Upon their arrival at defendant's residence, the officers detected an odor associated with the operation of a meth lab. Defendant was standing in his driveway and the officers noted that his actions resembled those commonly associated with the effects of meth. While outside the residence, the officers also observed, in plain view, ingredients they recognized as the type used in the production of meth.

Considering the informant's tip, the defendant's behavior in the officers' presence, the odor emanating from defendant's residence, and the incriminating evidence observed in plain view,

the totality of the circumstances provides probable cause to believe that a search of the residence would reveal a meth lab.

As in *McArthur*, the officers had good reason to fear evidence would be destroyed if defendant reentered the residence. Because the officers had probable cause to believe that meth was being produced in the residence, and since they had specifically asked the defendant whether meth was being produced in the residence, the officers had good reason to fear that defendant would destroy evidence of meth production if he had been allowed to reenter the residence unaccompanied.

Next, the officers warned defendant not to reenter the residence unattended. The officers did not conduct a warrantless search of the residence. They only entered the house briefly to escort the defendant from the residence since he defied their warning. The officers' limited purpose for entering the residence illustrates a reasonable effort to reconcile their law enforcement needs with the demands of personal privacy.

Finally, it was the intent of the officers to restrain defendant for the limited period of time required to obtain a search warrant. It appears from the record that approximately four hours elapsed from the time the officers told defendant he could not enter the residence until the search warrant was obtained. Defendant would have been prevented from reentering his residence unaccompanied by law enforcement for this four-hour period if he had obeyed the officers' instructions.

The reasonableness of the officers' actions under the totality of the circumstances is the vital part of this inquiry. *McArthur,* 531 U.S. at 332, 148 L. Ed. 2d at 848. The Court is to consider whether the time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant. *Id.* In making this determination we must consider the nature of the intrusion, coupled with the diligence and time taken by the officers. In *McArthur*, on similar facts, a restraint of two hours was determined to be reasonable based on the diligence of the officers. 531 U.S. at 331-32, 148 L. Ed. 2d at 848. In *United States v. Place*, a 90-minute detention of luggage was determined to be unreasonable based on the nature of the interference with the defendant's travels, as well as the lack of diligence by the police. 462 U.S. 696, 77 L. Ed. 2d 110 (1983). In *United States v. Van Leeuwen*, a 29-hour detention of a mailed package was determined to be reasonable based on the minimal nature of the intrusion and the unavoidable delay in obtaining a warrant. 397 U.S. 249, 25 L. Ed. 2d 282 (1970).

In the present case, the trial court correctly considered the officers' efforts to minimize the nature of the intrusion into defendant's privacy, while diligently seeking and obtaining a valid search warrant within approximately a four-hour period. This was no longer than necessary for the officers to obtain a warrant. The findings of fact demonstrate the officers met all the requirements of *McArthur* and therefore the trial court's conclusions of law that the officers had exigent circumstances to

justify an exception to the warrant requirement are adequately supported. The trial court did not err in denying defendant's motion to suppress evidence based on an alleged warrantless seizure of defendant's residence.

II. Quantity of Methamphetamine

Defendant next argues that his convictions for trafficking by possession and trafficking by manufacture of 400 grams or more of meth were not supported by sufficient evidence of weight and should accordingly be vacated. Defendant contends the State's evidence failed to show how much meth was found in the 2,625 grams of "bi-layer liquid" which, according to defendant, contained toxic chemicals, poisonous waste, and some undetermined amount of meth. We agree.

As an initial matter, we note that the defendant failed to renew his motion to dismiss at the close of all the evidence and has therefore waived appellate review of the issue of the sufficiency of the evidence to support his conviction. However, we will review this assignment of error pursuant to Appellate Rule 2 "to prevent manifest injustice to a party" in light of this Court's recent decision in *State v. Conway*, __ N.C. App. __, 669 S.E.2d 40 (2008). N.C.R. App. P. 2 (2007).

This Court in *Conway* faced a set of similar facts. At trial, the State introduced evidence of samples taken from three glass jars containing a bi-layered liquid. Tests found each jar contained a "detectable amount of methamphetamine." *Id.* at ___, 669 S.E.2d at 42. The total weight of the liquids in the jars

amounted to approximately 530 grams, but the exact amount of meth remained undetermined. *Id.* Conway was convicted of trafficking by possession of 400 grams or more of meth and trafficking by manufacture of 400 grams or more of meth. Conway appealed his conviction, and this Court addressed the issue of "whether the entire weight of a liquid containing a detectable, but undetermined, amount of methamphetamine establishe[d] a violation of N.C. Gen. Stat. § 90-95(h)(3b)." *Id.* at __, 669 S.E.2d at 44.

The North Carolina trafficking statute provides, in relevant part:

> Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony, which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture is involved:
>
> ....
>
> c. Is 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

N.C. Gen. Stat. § 90-95(h)(3b) (2007). "The preceding statute is silent on whether the weight of a liquid mixture containing, but undetermined, amounts of methamphetamine is sufficient to meet the requirements set forth within the statute to constitute 'trafficking.'" *Conway*, __ N.C. App. at __, 669 S.E.2d at 44.

The Court determined that the actual amount of meth must be calculated to meet the weight requirement for trafficking:

> The omission or exclusion of the coordinating and disjunctive clause "or any mixture containing such substance" in N.C. Gen. Stat. § 90-95(h)(3b) indicates the General Assembly did not envision the use of the total weight of a "mixture" containing a detectable, but undetermined, amount of methamphetamine to establish the quantity required to convict a defendant of "trafficking."

Conway, __ N.C. App. at __, 669 S.E.2d at 47.

In the present case, the State presented evidence as to the weight of the bi-layered mixture but did not present evidence as to the weight of the meth it contained, which is necessary to sustain a conviction for violating N.C. Gen. Stat. § 90-95(h)(b)(3), as explained in *Conway*. Pursuant to *Conway*, we vacate the convictions in 07 CRS 51827 for trafficking in meth by manufacture of more than 400 grams and in 07 CRS 51828 for trafficking in meth by possession of more than 400 grams. This case is remanded to the trial court for resentencing in light of our holding.

III. Evidence of the Guns

Defendant next argues the trial court erred when it admitted into evidence a sawed-off shotgun found in the defendant's residence. Defendant argues that the evidence of the sawed-off shotgun was irrelevant under Rules 401-403 of the Rules of Evidence.

We first note that N.C.R. App. P. Rule 28(b)(6) requires the appellant to set forth the standard of review for each argument. N.C.R. App. P. 28(b)(6) (2007) ("The argument shall contain a concise statement of the applicable standard(s) of review for each

question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented."). Neither the defendant nor the State identifies the standard of review applicable to this issue. But both agree that where the defendant has objected to the admission of evidence, the trial court's rulings are reviewed for abuse of discretion and "given great deference on appeal," while if the defendant failed to object at trial, the standard of review is plain error. These general statements of the law as to standards of review are true, but not helpful in our consideration of this particular case. Rule 28 requires that the parties state the "*applicable* standard(s) of review," but not all of the standards which might apply. N.C.R. App. P. 28(b)(6) (2007)(emphasis added). Neither the defendant nor the State identify which standard of review actually applies to this argument. Thus, our first inquiry must be whether the defendant objected to admission of the shotgun into evidence so that we may determine the proper standard of review.

In the course of his description of the residence and the items of evidence the agents seized, Agent McAbee of the Buncombe County Sheriff's Department testified, without objection by defendant, that "several long guns and a sawed-off shotgun" were found inside the defendant's residence. He identified State's Exhibit 34, a photograph of the sawed-off shotgun, without objection from defendant. He then testified regarding a gun

cabinet in defendant's residence "with some long guns in it" and identified State's Exhibit 35, a photograph of the gun cabinet, still without objection from defendant. He then testified as to State's Exhibit 37, an evidence bag containing the sawed-off shotgun, which was shown in the photograph marked State's Exhibit 34. At this point, defendant finally objected, on the basis that "this is the first that we've seen of this exhibit and, I believe, if this was to be introduced in this trial, this is an important matter in this trial. It should have been presented to the Defendant long before now." The trial court overruled defendant's objection. Agent McAbee continued to testify that he secured the shotgun and maintained it in the custody of the Sheriff's Department after it was seized from the residence. The State then moved to introduce Exhibit 37, the bag, and 37A, the shotgun. The defendant objected to the admission of Exhibits 37 and 37A on the basis that "this isn't relevant to this particular charge." The State responded that the evidence "goes to the crime scene. . . to show what was inside the residence that was found that day." The trial court overruled defendant's objection.

Therefore, based upon the transcript, the defendant did not object to the photograph of the sawed-off shotgun (Exhibit 34), nor to testimony regarding the shotgun. Defendant also did not object to testimony regarding the gun cabinet and long guns, nor to the photograph of the gun cabinet (Exhibit 35). Defendant objected only to the introduction of the sawed-off shotgun itself (Exhibit 37A) and its evidence bag (Exhibit 37). Yet defendant

argues in his brief that "the State's evidence – McAbee's testimony there were long guns and a sawed-off shotgun inside defendant's house on February 8, State exhibits 34 and 35 showing the long guns and shotgun, State exhibit 37A the shotgun itself, and McAbee's testimony about those exhibits – was irrelevant and inadmissible under Evidence Rules 401-403."

Although defendant mentions the term "plain error" in his argument, he fails to identify the proper standard for plain error and fails to apply this standard to the facts of this case. Plain error review requires defendant to demonstrate clearly a serious error which has fundamentally denied defendant justice. "Plain error is a fundamental error, so lacking in its elements that justice cannot be done. Plain error amounts to a denial of a fundamental right of the accused such as denial of a fair trial or the error seriously impacted the fairness, integrity or public reputation of the judicial proceedings. . ." *State v. Bass*, 190 N.C. App. 339, 345-46, 660 S.E.2d 123, 127 (2008). "A plain error is one so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002). Therefore, the test for "plain error" places a much heavier burden upon the defendant than the burden imposed by N.C. Gen. Stat. § 15A-1443 upon defendants who have preserved their rights by timely objection. *State v. Morgan*, 315 N.C. 626, 645, 340 S.E.2d 84, 96 (1986).

As to his mention of the term "plain error," defendant cites only to *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982), but plain error review was not used in *Patterson*. Simply mentioning the term "plain error" in his argument does not meet the "heavier burden" upon defendant to demonstrate why the admission of evidence regarding guns in defendant's home "tilted the scales" of justice against defendant. Upon review of the entire record, even aside from the State's substantial evidence of the meth lab operations in defendant's home, defendant himself admitted that he knew that Rene Day and Andy Sprinkle were making meth in his house; that he purchased pseudoephedrine for Day and Sprinkle on several occasions to be used to make meth; that meth or various items used in the manufacture of meth were found in his living room, his laundry room, under his bookshelf, in his gun cabinet, and in his shed; that he used meth himself; and that, after the officers arrived, he went into the house to hide the iodine because it was "evidence of meth - meth lab."

Defendant failed to object to the testimony about the shotgun, the photograph of the shotgun, and the testimony and photograph as to the gun cabinet and long guns in the cabinet. Therefore, he has waived review as to these issues, except for review for plain error. Yet he has failed to argue plain error, despite the mention of the term. *State v. Mitchell*, __ N.C. App. at __, 671 S.E.2d 340, 344 (2009). In addition, even if we were to assume that admission of the shotgun itself was error because it was not relevant to the crime charged, as argued by defendant,

we cannot discern how the admission of the shotgun prejudiced the defendant in any way, when a photograph of the very same gun with accompanying testimony, as well as photographs and testimony regarding several other guns had already been admitted without objection. This assignment of error is overruled.

IV. Admission of Consent

Defendant next argues that the trial court erred when it admitted evidence that the defendant exercised his constitutional right to refuse consent to a police search of his residence. Counsel did not object at trial to the admission of the testimony regarding the refusal of consent. Therefore, the standard of review is again plain error.

The State's initial two witnesses, Officers McAbee and Goodrich of the Buncombe County Sheriff's Department, testified they asked the defendant for consent to search his residence, and the defendant refused to grant consent for the search. The defendant contends this testimony violates the Fourth and Fourteenth Amendments to the United States Constitution, Article 1, Section 20 of the North Carolina Constitution, and N.C. Gen. Stat. § 15A-221.

It is error to allow police officers to testify that a defendant refused to allow a search of his residence as evidence of guilt. *See State v. Jennings*, 333 N.C. 579, 604-05, 430 S.E.2d 188, 200 (1993). "Just as a criminal suspect may validly invoke his Fifth Amendment privilege . . . so one may withhold consent to a warrantless search." Both acts are "privileged conduct which

cannot be considered as evidence of criminal wrongdoing." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978). However, as indicated in the preceding section, the remaining evidence, including the substantial physical evidence and the defendant's own admissions, was so overwhelming that the decision to permit testimony regarding defendant's refusal to permit a warrantless search, if error, was not plain error.

V. Ineffective Assistance of Counsel

Defendant argues that trial counsel provided ineffective assistance by (1) not moving to dismiss at the close of the State's evidence; (2) not objecting to the court's "and/or any mixture containing methamphetamine" jury instruction; (3) not objecting to the testimony regarding defendant not consenting to the search of his residence; and (4) not objecting to the testimony regarding the presence of "long guns" in the defendant's home. We have found for the defendant substantively on the issue of the quantity of meth. Therefore, the only remaining claims of ineffective assistance are the failure of trial counsel to object to the introduction of evidence regarding defendant's refusal to consent to a warrantless search and the failure of trial counsel to object to the introduction of evidence regarding the guns found in the gun cabinet in the residence.

In order to prevail in an ineffective assistance of counsel claim the defendant must:

> show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the

> Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed 2d 674, 693 (1984). An error by trial counsel, even a serious error, "does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985).

We have considered the merits of defendant's claims in the preceding two sections. The evidence against the defendant was overwhelming, as discussed above, and much of that evidence was a result of the defendant's own testimony. In light of this substantial evidence, defendant has not met his burden of showing that trial counsel's alleged deficient performance prejudiced his defense.

Vacated and remanded in part; no error in part.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).