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NO. COA09-1133

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Catawba County  
No. 08 CRS 10003

EMMANUEL LEE BLACKBURN

Appeal by defendant from judgments entered 23 April 2009 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2010.

*Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.*

*Irving Joyner, for defendant-appellant.*

CALABRIA, Judge.

Emmanuel Lee Blackburn ("defendant") appeals judgments entered upon a jury verdict finding him guilty of felony possession of cocaine and possession of marijuana. We find no error, but remand for correction of a clerical error.

#### I. BACKGROUND

On 9 January 2008, Investigator Justin Roberts ("Investigator Roberts") of the Long View Police Department ("LVPD") along with the Hickory Police Department ("HPD") learned that controlled substances were allegedly stored at a residence located at 402 Second Street Place Southwest ("the residence") in Hickory, North

Carolina. On 10 January 2008, at 4:34 p.m., officers executed a search warrant to search the residence and Jason Dula ("Dula"), one of the residents. The warrant authorized officers to search for and seize contraband, specifically crack cocaine. Investigator Rodney Harris ("Investigator Harris") of the HPD and Investigator Roberts entered the residence. Investigator Harris read the warrant and searched Dula. Investigator Roberts went to the back rear bedroom where he found defendant lying on a bed, wearing boxer shorts and a t-shirt. Several times, Investigator Roberts told defendant to get down on the floor and show his hands. Defendant refused, slid both hands under a pillow and kept them there for an extended period of time. Defendant eventually removed his hands from beneath the pillow but refused to get out of the bed. Investigator Roberts then removed defendant from the bed, stood him upright, and restrained him in handcuffs.

Defendant asked to put on some clothes and pointed to a pair of pants lying on the floor. Investigator Roberts briefly squeezed the pants to check for weapons before defendant put on the pants. After defendant put on the pants, another officer told Investigator Roberts that he should perform a thorough check of the pants since they were similar to painter's pants in that they had numerous pockets on the sides. Investigator Roberts then performed a pat-down of defendant and felt a bulge in the right front watch pocket ("the pocket"). Investigator Roberts asked defendant, "what is this," but defendant mumbled an incoherent response. Investigator Roberts then asked if he could check the pocket and defendant

replied, "go ahead." Investigator Roberts retrieved a clear, plastic bag from the pocket containing fifteen to twenty off-white rock-type substances and placed the substances on the bed for Investigator Harris to photograph. Investigator Roberts then searched under defendant's pillow where he found another plastic bag. This second bag also contained a similar off-white substance. The North Carolina State Bureau of Investigation's ("SBI") crime laboratory performed a chemical analysis of the substances which Investigator Roberts suspected were crack cocaine. The results from the SBI analysis revealed that the substances found on defendant and under his pillow were crack cocaine.

Investigator Roberts continued his investigation and observed ammunition near defendant's bed. He also observed a bag containing a green leafy substance sitting in an ash tray, and small, clear plastic bags with the corners cut off that were on the night stand next to the bed. Investigator Roberts concluded that marijuana was the substance in the bag that was found in the ash tray and that the small bags were the type used to facilitate the storage of controlled substances. Once officers secured the occupants of the residence, Investigator Harris entered the back rear bedroom to photograph and collect the evidence.

Defendant was arrested and indicted for possession with intent to sell and deliver cocaine, possession of cocaine, and possession of marijuana. On 21 April 2009, in Catawba County Superior Court, defendant moved to suppress the evidence found in his pants pocket, and the trial court denied the motion. The trial court made

findings of fact and concluded that the search of defendant's pants was within the scope of the search warrant that was issued and "did not violate any of Defendant's constitutional or statutory rights." Defendant also moved to dismiss all charges at the close of the State's evidence, and the trial court denied the motion. However, defendant did not renew his motion to dismiss after presenting evidence.

On 23 April 2009, the jury returned a verdict finding defendant guilty of possession of cocaine and possession of marijuana.<sup>1</sup> On both charges, the trial court imposed intermediate punishments. On the charge of possession of marijuana, defendant was sentenced to a term of 20 days in the custody of the North Carolina Department of Correction ("DOC"). On the charge of felony possession of cocaine, defendant was sentenced to a minimum term of six months to a maximum term of eight months in the custody of the DOC. Both sentences were suspended, defendant was placed on supervised probation for 18 months, and ordered to serve "special probation" pursuant to N.C. Gen. Stat. § 15A-1351. As a condition of "special probation," the trial court ordered defendant to serve an active term of eight days in the custody of the Catawba County Sheriff and a split sentence in the Catawba County Jail "at the discretion of PPO." The trial court also ordered defendant to pay attorneys' fees and restitution. Defendant appeals.

## II. MOTION TO SUPPRESS

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<sup>1</sup>On 23 April 2009, the State dismissed the charge of possession with intent to sell or deliver cocaine.

Defendant argues that the trial court erred in denying his motion to suppress evidence discovered and seized because the officers' actions were not supported by probable cause or any other exigency. We disagree.

When reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced. However, conclusions of law regarding admissibility are reviewed de novo.

*State v. Wilkerson*, 363 N.C. 382, 433-34, 683 S.E.2d 174, 205 (2009) (internal citations omitted).

In the instant case, defendant challenges the trial court's conclusions contending that the search of the pants was not within the scope of the search warrant and violated his constitutional rights. However, defendant does not challenge the sufficiency of the trial court's findings, stated in pertinent part:

18. [Investigator] Roberts patted down the pants and at the watch pocket felt what appeared to be a plastic bag containing a rock-like substance.
19. Roberts asked Defendant what the item was. Defendant mumbled a response that Roberts did not understand.
20. Roberts then asked Defendant if Roberts could remove the item from the watch pocket. Defendant told Roberts to go ahead.
21. Roberts removed a small plastic bag from the watch pocket containing a white, rock-like substance.

Since the trial court's findings of fact are not challenged, they are deemed to be supported by competent evidence and are

binding on appeal. See *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). Accordingly, we review the trial court's order to determine whether the findings of fact support the conclusions that the search of the pants was within the scope of the warrant and that defendant's constitutional rights were not violated.

"In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . [] In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity."

*State v. Smith*, 346 N.C. 794, 799, 488 S.E.2d 210, 213 (1997) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28, 36 L. Ed. 2d 854, 863, 93 S. Ct. 2041, 2048 (1973)). "'Consent to search, freely and intelligently given, renders competent the evidence thus obtained.'" *State v. Smith*, 135 N.C. App. 377, 379, 520 S.E.2d 310, 311 (1999) (quoting *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973) (citations omitted)).

In the instant case, the trial court's uncontested findings of fact show that defendant consented to the search of the pants, and "[n]o evidence was presented to suggest coercion or intimidation by the [law enforcement officers] in obtaining defendant's consent to search." *Id.* at 380, 520 S.E.2d at 312. Since defendant does not dispute that his consent was "freely and intelligently given," Investigator Roberts' search of the pants was within the scope of

the search warrant and was "constitutionally permissible." *Smith*, 346 N.C. at 799, 488 S.E.2d at 213 (quoting *Schneckloth*, 412 U.S. at 228, 36 L. Ed. 2d at 863, 93 S. Ct. at 2048). Therefore, the trial court properly denied defendant's motion to suppress. Even assuming *arguendo* that the search of the pants was outside the scope of the search warrant, "North Carolina recognizes consent searches as an exception to the general warrant requirement." *State v. Hagin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 691 S.E.2d 429, 432 (2010). Therefore, the trial court's uncontested findings support the conclusion that the search of the pants did not violate defendant's constitutional or statutory rights. Defendant's assignment of error is overruled.

### III. MOTION TO DISMISS

Defendant argues the trial court erred by denying his motion to dismiss the charge of possession of marijuana at the conclusion of the State's case. We disagree.

"[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C.R. App. P. 10(b)(3) (2009); *see also State v. Farmer*, 177 N.C. App. 710, 717-18, 630 S.E.2d 244, 249 (2006) ("Defendant failed to preserve for appellate review his assignment of error regarding the sufficiency of the evidence by failing to renew his motion to dismiss after offering evidence.").

In the instant case, defendant moved to dismiss all charges at the close of the State's evidence, but failed to renew his motion

at the close of all the evidence. Therefore, he has failed to preserve this question for appellate review. Defendant's assignment of error is overruled.

IV. ORDER OF RESTITUTION

Defendant argues the trial court erred by imposing restitution which was not supported by the evidence justifying its imposition as a condition of supervised probation. Although restitution was proper, we remand to correct the amount of restitution.

Generally, "[a] trial court's award of restitution must be supported by competent evidence in the record." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997) (citations omitted). N.C. Gen. Stat. § 7A-304 (2007) states in pertinent part:

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, . . . the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides . . . .

...

(7) For the services of the State Bureau of Investigation laboratory facilities, the district or superior court judge shall, upon conviction, order payment of the sum of three hundred dollars (\$300.00) to be remitted to the Department of Justice for support of the State Bureau of Investigation. This cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratories have performed DNA analysis of the crime, tests of

bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent.

*Id.* (emphases added).<sup>2</sup> "It is well established that 'the word 'shall' is generally imperative or mandatory.'" *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)).

In the instant case, defendant was found guilty of possession of cocaine. Lori Knops, a forensic chemist for the SBI crime laboratory, performed a chemical analysis indicating the items seized from defendant's pants pocket and underneath the pillow were cocaine. Therefore, under N.C. Gen. Stat. § 7A-304, the trial court orally announced defendant was to "[r]eimburse the State for the lab fee in the amount of . . . \$300. [Defendant] is jointly and severally liable for that amount with Jason Dula. And he's to reimburse the State [\$1,500.00] for his court-appointed counsel." However, in the trial court's written judgment, the amount of restitution and the amount of attorneys' fees indicated each fee was \$1,500.00. "A clerical error is '[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination.'" *State v. Lark*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 678 S.E.2d

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<sup>2</sup>The current version of N.C. Gen. Stat. § 7A-304 increases the amount of the SBI laboratory fee to \$600.00. N.C. Gen. Stat. § 7A-304 (2009).

693, 702 (2009) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)) (internal quotations and citation omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (internal quotations and citation omitted).

In the instant case, the trial court clearly ordered defendant in open court to pay the SBI laboratory fee of \$300.00. However, on the written judgment, under Monetary Conditions, the trial court entered "pay restitution first J & S w/Jason Dula" and placed the number "\$1,500.00" in the space designated "Restitution." On the written judgment, the space designated for the amount of restitution immediately precedes the entry for attorneys' fees. Therefore, the trial court's entry of \$1,500.00 for the SBI laboratory fee was a clerical error. We remand the judgment to the trial court to substitute \$300.00, the SBI laboratory fee, for the \$1,500.00 as restitution.

#### V. CONCLUSION

Assignments of error not argued in defendant's brief are abandoned. N.C.R. App. P. 28(b)(6) (2009). Defendant received a fair trial free from error. We remand for correction of a clerical error.

No error; remanded for correction of a clerical error.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N., concur.

Report per Rule 30(e).