NO. COA09-1512

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 213626

JOHN GRAYLON WELCH

Appeal by Defendant from judgments entered 1 and 2 June 2009 by Judge Bradley B. Letts in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Sue Genrich Berry for Defendant.

STEPHENS, Judge.

I. Procedural History

On 31 March 2008, Defendant John Graylon Welch was indicted by a grand jury on one count of unlawful, willful, and felonious possession of 400 grams or more of cocaine and one count of unlawful, willful, and felonious possession with the intent to sell or deliver cocaine. On 18 June 2008, Defendant filed a Motion to Suppress and a Motion to Compel Disclosure of Witness. The trial court denied both motions.

On 1 June 2009, a jury found Defendant guilty on both counts. On that date, the trial court entered judgment

sentencing Defendant to a prison term of 175 to 219 months for the trafficking conviction and arrested judgment on the possession conviction. Defendant gave notice of appeal in open court and filed written notice of appeal on 1 June 2009. On 2 June 2009, the trial court reversed its decision arresting judgment on the possession conviction and entered amended judgments for both convictions, sentencing Defendant to a term of 175 to 219 months for the trafficking conviction and a concurrent prison term of nine to 11 months for the possession conviction. Defendant did not enter notice of appeal from the amended judgments.

II. Factual Background

The evidence presented by the State at trial tended to show the following: On 10 March 2008, Detective Dwayne S. Spears of the Charlotte-Mecklenburg Police Department ("CMPD") received a telephone call from a "concerned citizen" who informed Detective Spears that John Graylon Welch of 7133 Covecreek Drive in Charlotte, North Carolina was selling trafficking amounts of narcotics. Detective Spears opened an investigation, and a search of the Department of Motor Vehicle records revealed that a John Welch had been issued a driver's license which listed his address as 7133 Covecreek Drive in Charlotte, North Carolina. Upon further investigation, Detective Spears discovered that Defendant had prior felony convictions for sale of cocaine and possession of cocaine, and two prior convictions for possession of a firearm by a felon. Detective Spears also found that

Defendant was on federal probation for drug conspiracy and had two probation violations.

On 20 March 2008 at 5:15 a.m., Detective Spears conducted a "trash pull" at 7133 Covecreek Drive. In the trash can located at the end of the driveway of the 7133 Covecreek Drive residence, police found 21 "corner bags"[1] and two pairs of rubber gloves. Later that day, Detective Spears applied for and was granted a warrant to search the 7133 Covecreek Drive premises.

CMPD officers maintained continuous surveillance of the Covecreek residence after the trash pull was completed. When Defendant left his home, officers followed him to an address in North Charlotte. Defendant was subsequently stopped for a traffic violation and arrested for driving without a license. Officers took Defendant back to his residence where Detective Spears was waiting. Detective Spears introduced himself and informed Defendant that he had a warrant to search the residence. Defendant allowed the officers to use his key to enter the home and provided them with the security system code.

After entering the home, Defendant told the police that there were no drugs on the premises. However, the officers found plastic bags, a pair of scissors, and crumbs of a white substance on a table in the dining room. Defendant stated that those materials belonged to his brother-in-law. When the officers opened a drawer in the table, they found bags of cocaine and three digital scales. One of the bags weighed 6.29 grams and

[1] Corner bags are plastic bags with the corners removed.

three smaller bags each weighed 5.4 grams. In response to this discovery, Defendant allegedly said, "That's my ass. It's all mine." In another drawer in the table, police found four large bags of crack cocaine weighing 123.3 grams, 109.2 grams, 123.8 grams, and 54.8 grams respectively. The police also found marijuana and rolling papers in the bathroom. A black pot containing approximately $2,000 was found in the laundry room. In total, the police found 458.27 grams of cocaine. Defendant told the officers that he had purchased the cocaine the previous day for $13,500.

II. Discussion

A. Subject Matter Jurisdiction

As a threshold issue, we must determine whether we have subject matter jurisdiction to review the trial court's judgments. Although neither party has called into question the subject matter jurisdiction of this Court, "[i]t is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008).

Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, any defendant who is entitled to appeal from a judgment of a superior court may take appeal by "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties" within the time specified by the rules. N.C. R.

App. P. 4(a). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). A jurisdictional default, moreover, precludes the appellate court from acting in any manner other than to dismiss the appeal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

In this case, on 1 June 2009, the trial court entered judgment sentencing Defendant to a prison term of 175 to 219 months for the trafficking conviction and also entered judgment arresting judgment on the possession conviction. Defendant gave immediate oral notice of appeal in open court and also filed written notice of appeal from the judgments on 1 June 2009. On 2 June 2009, the trial court called Defendant back into court and announced,

> I was doing some research yesterday afternoon and I realized that I had made an error in your sentence. There is no requirement that I arrest judgment on the possession with intent to sell or deliver which means that I have to enter judgment on that additional charge, okay, and that is why we are back.

Thereafter, the trial court entered amended judgments for both convictions, sentencing Defendant to a term of 175 to 219 months for the trafficking conviction and a concurrent prison term of nine to 11 months for the possession conviction. Defendant did not enter notice of appeal from the amended judgments.

Because Defendant did not appeal from the 2 June 2009 amended judgments, this appeal is subject to dismissal. *Id.* However, given that the amended judgment for the trafficking conviction was almost identical to the original judgment[2] entered 1 June 2009 for the trafficking conviction[3] and that Defendant's oral and written notices of appeal from the 1 June 2009 judgment were timely, we elect to treat the record on appeal and Defendant's brief as a petition for a writ of *certiorari*, allow Defendant's petition, and address the merits of his challenge to the 2 June 2009 judgment for the trafficking conviction. *See* N.C. R. App. P. 21(a)(1). However, because the amended judgment for the possession conviction was substantively different from the original judgment and Defendant failed to appeal from the amended judgment for the possession conviction, Defendant's purported appeal from the 2 June 2009 judgment for the possession conviction is dismissed. *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365.

B. Admission of the Chemical Analysis

Defendant first argues that the trial court erred in admitting into evidence a laboratory report that identifies the substances recovered from the home as cocaine. Specifically,

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[2] The amended judgment is the original judgment with the notice "amended judgment original sentence date 06-01-2009" typed on the face of the original judgment and the date "6/2/10" handwritten by Judge Letts next to his signature. The two judgments are otherwise identical.

[3] We note further that the judgment amending the 1 June 2009 order for the trafficking conviction need not have been entered in order to amend the judgment for the possession conviction.

Defendant contends that he was denied his constitutional right to confront witnesses against him because the analyst who performed the laboratory tests did not testify. Under the circumstances herein presented, we disagree.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)); *accord State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007). The United States Supreme Court has determined that forensic analyses qualify as "testimonial" statements, and forensic analysts are "witnesses" to which the Confrontation Clause applies. *Melendez-Diaz v. Massachusetts*, __ U.S. __, __, 174 L. Ed. 2d 314, 321 (2009); *see State v. Galindo*, __ N.C. App. __, 683 S.E.2d 785 (2009).

At trial, the State offered the laboratory report from the Charlotte-Mecklenburg Police Department Crime Laboratory into evidence "pursuant to 90-95(g)(1) . . . as a self-authenticated document." Defendant objected to the admission of the report "for reasons stated previously, including foundation and pursuant to [g](1) and other reasons[.]" None of the "reasons" cited by Defendant encompassed a violation of Defendant's constitutional right to confrontation. This Court does not consider constitutional issues that were not presented to the trial court

for consideration. *See* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context . . . ."); *State v. Bussey*, 321 N.C. 92, 95, 361 S.E.2d 564, 566 (1987) ("[B]ecause defendant failed to raise the alleged constitutional issues before the trial court, he has waived these arguments, and they may not be raised for the first time in this Court."). Furthermore, Defendant has failed to allege plain error on appeal. *See* N.C. R. App. P. 10(c)(4). Accordingly, we decline to consider Defendant's constitutional challenges to the trial court's order.

Moreover, in response to Defendant's argument, the State asserts that it followed the procedures set forth in N.C. Gen. Stat. § 90-95(g) and that Defendant waived his right to confront the analyst by failing to file a timely written objection with the trial court. We agree.

The United States Supreme Court has held that "[t]he right to confrontation may . . . be waived . . . by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." *Melendez-Diaz*, __ U.S. at __ n.3, 174 L. Ed. 2d at 323 n.3. The Supreme Court explained that in their "simplest form," these procedural rules, referred to as "notice-and-demand statutes[,]"

> require the prosecution to provide notice to the defendant of its intent to use an

> analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.

Id. at ___, 174 L. Ed. 2d at 331. The Supreme Court further noted that "[i]t suffices to say that what we have referred to as the 'simplest form [of] notice-and-demand statutes,' . . . is constitutional[.]" *Id.* at __ n.12, 174 L. Ed. 2d at 332 n.12.

North Carolina's relevant notice-and-demand statute provides, in pertinent part:

> (g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication and without the testimony of the analyst . . . as evidence of the identity, nature, and quantity of the matter analyzed . . . only if:
>
> > (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a copy of the report to the defendant, and
> >
> > (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g) (2009). This Court in *State v.*

Steele, __ N.C. App. __, 689 S.E.2d 155 (2010), held that the notice and demand statute in N.C. Gen. Stat. § 90-95(g) for chemical analyses in drug cases is a "simple" notice-and-demand statute which is constitutional. *Id.* at __, 689 S.E.2d at 161.

In this case, on 10 October 2008, the State filed a Notice of Intent to Introduce Evidence at Trial notifying Defendant that it intended to introduce "the report of the analysis of any evidence seized prepared by the N.C. S.B.I. Lab or the Charlotte[-]Mecklenburg Police Department Crime lab on the form approved by the North Carolina Attorney General[.]" As the trial did not commence until 27 May 2009, the notice was filed well before 15 days prior to trial, as required by N.C. Gen. Stat. § 90-95(g)(1). Defendant did not file a written objection to the evidence with the court, or a copy with the State, at least five business days before the trial. *See* N.C. Gen. Stat. § 90-95(g)(2).

The State's notice here tracked the pertinent language of the statute, but did not cite the statute. We believe the better practice would be for the State to specifically reference N.C. Gen. Stat. § 90-95(g) in its notice of intent to introduce a laboratory report into evidence under this statutory exception to the requirements of *Crawford*. Nonetheless, in this case, the language of the State's notice sufficiently tracks the language of N.C. Gen. Stat. § 90-95(g) to put Defendant on notice that the State planned to introduce the report without the testimony of the analyst who conducted the analysis. Furthermore, on appeal

Defendant has not acknowledged the notice filed by the State, much less argued that the notice was deficient.

Accordingly, Defendant's argument is overruled.

C. Motion to Suppress

Defendant next argues that the trial court erred in denying Defendant's motion to suppress the evidence obtained as a result of the search of his home. Defendant contends "[t]he officer's affidavit that provided the basis of the search warrant did not rise to the level of probable cause[.]" We disagree.

The scope of review of the denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Because Defendant does not challenge the trial court's findings of fact, we need only determine whether those findings of fact support the trial court's ultimate conclusions of law. *State v. Harris*, 145 N.C. App. 570, 580, 551 S.E.2d 499, 505 (2001) (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002).

"[W]hen addressing whether a search warrant is supported by probable cause, a reviewing court must consider the totality of the circumstances." *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citation and quotation marks omitted).

In applying the totality of the circumstances test, this Court has stated that an officer's affidavit is sufficient if it establishes

> reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty.

State v. Arrington, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (internal citation omitted). Accordingly, under the totality of the circumstances test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam*, 325 N.C. 217, 221, 381 S.E.2d 327, 329 (1989). In adhering to this standard of review, we acknowledge that "great deference should be paid a magistrate's determination of probable cause and [] after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

"[I]t is well settled that whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act." *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (citation and quotation marks omitted). "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. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984).

In this case, the "Probable Cause Affidavit" of Detective Spears in support of his application for the search warrant stated, *inter alia*:

> On March 10, 2008 this applicant received drug information from a concern[ed] citizen that John Graylon Welch aka "Little John" was selling trafficking amounts of cocaine in the Charlotte area. The concern[ed] citizen further advised that John Graylon Welch aka "Little John" was living at 7133 Covecreek Drive. After receiving this information this applicant open[ed] a drug investigation on John Graylon Welch aka "Little John". I ran John Graylon Welch with the DOB 10-06-1961 in DMV for a driver's license. The listed address for Mr. John Graylon Welch was 7133 Covecreek Drive []. On March 20, 2008 at approximately 0515 hours this applicant collected the trash that was due to be collected on that day. The trash canister was located on the curb at the end of the driveway connected to Covecreek Drive. This driveway does not connect to any other residence. An examination of the trash revealed 21 plastic baggies with the corners removed. This applicant knows that illegal drugs are routinely packaged in the corner tips of plastic baggies. The corners are then torn from the baggie and tied in a knot to secure the drugs for sale. This applicant knows this is consistent with the packaging of control[led] substances in the Charlotte area. This applicant also located two pairs of rubber gloves inside the trash. This applicant knows drug traffickers use rubber gloves when handling large amounts of narcotics.
>
> This applicant completed a criminal history of John Graylon Welch with the DOB of 10-06-1961. The following are felony convictions for John Graylon Welch:
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> Sale of Cocaine 03-20-1987
> Possession of firearm by Felon 01-31-1990
> Possession of Cocaine 10-28-1997
> Possession of firearm by Felon 10-28-1997
>
> Completing the criminal history check on John

> Graylon Welch, this applicant learned that Mr. Welch is currently on supervised release from Federal probation. John Graylon Welch[’s] release date from federal probation is September 25, 2009. ATF Agent Blacknall spoke with federal probation on 03-20-2008 and advised the listed address for John Graylon Welch is 7133 Covecreek Drive.
>
> This Applicant[] has over nine (9) years of law enforcement experience and is presently a sworn officer with the Charlotte-Mecklenburg Police Department in Charlotte, North Carolina, currently assigned to the Vice And Narcotics Division. . . . I have hundreds of hours of training in the investigation of general crimes as well as narcotics violations. . . . This Applicant is familiar with the habits, practices and methods of persons engaged in controlled substance violations.
>
> Based on this training and experience, this applicant knows that drug distributors frequently possess currency, firearms, beepers, cell phones, evidence of ownership of, access to, or control over the premises and other items of drug furtherance, including drug paraphernalia and records of illegal drug transactions.

The plastic baggies with the corners removed and the rubber gloves gathered from the garbage can, which was located in Defendant’s driveway at approximately 5:15 a.m. on the regularly scheduled garbage collection day in Defendant’s neighborhood, taken in conjunction with the information received from the concerned citizen,[4] Defendant’s drug-related criminal history,

[4] Although an anonymous tip, standing alone, is rarely sufficient to establish probable cause, the tip may be a factor considered under the totality of the circumstances test. *See State v. Green*, 194 N.C. App. 623, 627, 670 S.E.2d 635, 637 (“When probable cause is based on an informant’s tip[,] a totality of the circumstances test is used to weigh the reliability or unreliability of the informant.”), *aff’d*, 363 N.C. 620, 683 S.E.2d 208 (2009).

and Detective Spears' extensive training and experience, established "reasonable cause to believe that the proposed search . . . probably [would] reveal[,]" *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256, contraband and evidence of a crime in Defendant's residence. Thus, the information contained in Detective Spears' affidavit constituted a "substantial basis" for the magistrate to conclude that probable cause sufficient to issue a search warrant for Defendant's residence existed. Accordingly, the search warrant was properly issued, and the trial court did not err in denying Defendant's motion to suppress the evidence gathered from the 20 March 2008 search of his residence.

D. Defendant's Prior Record Level

Defendant finally argues that the trial court erred as a matter of law in determining that Defendant's prior record level was IV and, thus, in imposing the nine to 11 month prison sentence for possession with intent to sell and deliver cocaine.[5] However, because Defendant's purported appeal from the 2 June 2009 judgment for the possession conviction is dismissed, *see* discussion *supra*, we may not address this argument. The assignment of error upon which this argument is based is dismissed.

For the foregoing reasons, we conclude that Defendant received a fair trial free of error.

NO ERROR.

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[5] Defendant does not dispute the sentence imposed for trafficking cocaine as the punishment for that conviction is mandated by N.C. Gen. Stat. § 90-95(h)(3)(c), and Defendant's sentence was in accordance with that statute.

Judges HUNTER and GEER concur.

Report per Rule 30(e).