NO. COA10-156

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Wake County
Nos. 08 CRS 39416, 065975

AVIAS LASHON ARNOLD

Appeal by defendant from judgment entered 21 August 2009 by Judge James E. Hardin, Jr. in Wake County Superior Court. Heard in the Court of Appeals 31 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Kathleen Mary Barry, for the State.

William D. Spence, for defendant-appellant.

STEELMAN, Judge.

Where uncontradicted evidence showed defendant gave verbal consent to search his hotel room, the trial court did not err in failing to make a specific finding that his consent was given voluntarily, since such a finding was implicit in its denial of the motion to suppress. *Miranda* warnings are not required for a defendant to give a valid consent search. Defendant waived any argument as to the admission of the contraband collected as a result of the search because he failed to object to its admission at trial and has not argued plain error on appeal. Where the trial court's unchallenged findings of fact show that defendant knowingly

and voluntarily waived his *Miranda* rights, the trial court did not err in concluding that his post-*Miranda* confession was admissible at trial.

I. Factual and Procedural Background

On 5 September 2008, Avias Arnold (defendant) sold cocaine to two confidential informants for the Raleigh Police Department at the Lodge America Motel on Capital Boulevard. Detective Eric Emser and several other officers conducted surveillance while the transaction occurred and maintained surveillance after the purchase. Once the detectives determined that additional sales of cocaine would not occur, the detectives prepared to arrest defendant. Defendant walked out of the room and down the center stairwell, and was standing near the building. Detective Emser approached defendant, identified himself, and placed him under arrest. Detective Emser searched defendant and found approximately $200.00 in cash on his person. Detective Emser then requested consent to search defendant's room. Defendant replied, "you can do it, go ahead." Detective Emser entered the room and found defendant's girlfriend sitting on the edge of the bed. He identified himself and told her that this was a drug investigation. Detective Emser and two other plain clothes officers searched the room. Small Ziploc baggies and a marijuana sifter were in plain view on the kitchen table. A small bag of cocaine was retrieved from the freezer.

Defendant was transported to the Raleigh Police Department where defendant was taken to an interview room and read his *Miranda*

rights. Defendant refused to sign the *Miranda* form, but waived his rights verbally. Defendant confessed to the sale and delivery of cocaine to the confidential informants.

On 2 April 2009, defendant filed a motion to suppress any statement made to police after he was handcuffed and "any and all evidence of any kind or character that was obtained as fruit of the aforesaid illegal and invalid interrogation of the Defendant." On 18 April 2009, the trial court conducted a hearing on the motion. The trial court found that defendant was not properly advised of his *Miranda* rights at the time of his arrest and suppressed any statement that defendant made after his arrest and before his *Miranda* rights were read to him at the police station. The trial court also found that defendant gave valid consent to search his room, that the contraband found there was admissible, and that his subsequent confession to the sale of cocaine was admissible.

On 21 August 2009, a jury found defendant guilty of possession with the intent to sell and deliver cocaine. Defendant pled guilty to the charge of being an habitual felon. The trial court determined that defendant was a prior record level V and sentenced defendant to a minimum of 90 months and a maximum of 117 months imprisonment. Defendant appeals.

II. Motion to Suppress

A. Standard of Review

"This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by

competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citations omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003).

B. Voluntary Consent

In his first argument, defendant contends the trial court erred in failing to find as fact that defendant freely and voluntarily consented to the search of his hotel room. We disagree.

In its order, the trial court made the following finding of fact: "8. That the Defendant was asked by Detective Emser for consent to search his room, to which he replied 'yes'." However, the trial court did not include a specific finding that defendant gave his consent voluntarily. This omission does not necessarily require remand. *In State v. Cobb*, 295 N.C. 1, 243 S.E.2d 759 (1978), our Supreme Court held that if "the evidence is uncontradicted, a specific finding that a consent to search was voluntarily given is not required and such a finding is implicit in the court's denial of a motion to suppress . . . ." *Id.* at 18-19, 243 S.E.2d at 769; *but see State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999) (holding that where conflicting evidence was presented on whether the defendant gave officers permission to search his room, the trial court was required to make a specific finding as to this issue and the case was remanded to the trial court for further consideration). In the instant case, Detective

Emser testified that when he requested permission to search defendant's hotel room, defendant replied "you can do it, go ahead." This evidence was uncontradicted. Based upon *Cobb*, the trial court was not required to make a specific finding of fact as to the voluntariness of defendant's consent.

Defendant argues in the alternative that the evidence presented at the suppression hearing did not support an explicit or implicit finding that defendant's consent was given voluntarily. Defendant contends that once defendant was placed under arrest and was in handcuffs, he was not advised of his *Miranda* rights nor was he advised of his right to refuse the officer's request. However, neither warning must be provided to a person prior to obtaining consent to search in order for the consent to be valid. *See State v. Houston*, 169 N.C. App. 367, 371, 610 S.E.2d 777, 780, *disc. review denied and appeal dismissed*, 359 N.C. 639, 617 S.E.2d 281 (2005) ("Neither our state law nor federal law requires that any specific warning be provided to the party whose property is to be searched prior to obtaining consent . . . ."); *State v. Frank*, 284 N.C. 137, 142, 200 S.E.2d 169, 173 (1973) ("Warnings required by *Miranda* are inapplicable to searches and seizures, and a search by consent is valid despite failure to give such warnings prior to obtaining consent." (quotation omitted)).

In *Houston*, the defendant was handcuffed and placed under arrest after a confidential informant made a controlled purchase of cocaine from the defendant. 169 N.C. App. at 369, 610 S.E.2d at 779. Officers then requested permission to search his apartment.

Id. The defendant was not advised of his *Miranda* rights nor was he advised that he could refuse to give consent. *Id.* The defendant consented to the search. *Id.*

On appeal, the defendant challenged the validity of the search. *Id.* at 371, 610 S.E.2d at 780. This Court held:

> In determining whether consent was given voluntarily this Court must look at the totality of the circumstances. Here, there is ample competent evidence in the record to show defendant, *although obviously in custody at the time consent was requested, voluntarily consented to the search of the bedroom.* In fact, defendant does not contest the fact he gave verbal consent to search the bedroom and the safe contained therein. There is no evidence in the record, and defendant makes no argument, that the consent was not made voluntarily. The evidence presented tended to show defendant did not appear nervous or scared, was "cooperative," led the officers to the bedroom, provided the combination to the safe at their request, was not threatened by the officers and was present throughout the search and gave no indication he wished to revoke his consent.

Id. at 371, 610 at 781 (internal citations omitted) (emphasis added). The facts of this case are materially indistinguishable from *Houston*. Defendant was placed under arrest after he sold cocaine to confidential informants. Detective Emser requested permission to search defendant's hotel room. Defendant gave verbal consent and was present during the search. At no time did defendant revoke his consent. Further, defendant does not assert that the officers intimidated or coerced him into giving consent. Plenary evidence in the record establishes that defendant freely and voluntarily consented to the search of the hotel room.

This argument is without merit.

C. Admission of Physical Evidence

Defendant also argues that the trial court erred by admitting the contraband found as a result of the search of the hotel room. Defendant has waived his right to argue this on appeal.

Motions to suppress are characterized as a type of motion *in limine*. *State v. McNeill*, 170 N.C. App. 574, 579, 613 S.E.2d 43, 46, *disc. review denied*, 360 N.C. 73, 622 S.E.2d 626 (2005). "A ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." *State v. Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988). In *State v. Oglesby*, our Supreme Court held that a 2003 amendment to Rule 103 of the Rules of Evidence did not change the appellate rule that "a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted). In the instant case, defendant failed to object at trial to the admission of the following contraband collected from his hotel room: (1) a marijuana sifter; (2) Ziploc plastic baggies; and (3) cocaine seized from the freezer. Defendant also failed to argue that the trial court committed plain error. *See id.* at 555, 648 S.E.2d at 821; *State v. Martin*, 191 N.C. App. 462, 471, 665 S.E.2d 471, 477 (2008) ("[D]efendant failed to object at trial and has not specifically argued that the trial court committed plain error. Under such circumstances, this Court will not review whether the alleged error rises to the level of

plain error." (citation omitted)), *disc. review denied*, 363 N.C. 135, 676 S.E.2d 49 (2009).

Defendant's argument is dismissed.

D. Admission of Post-*Miranda* Confession

In his last argument, defendant contends the trial court erred in denying his motion to suppress his post-*Miranda* confession. We disagree.

> When a person is subjected to custodial interrogation by law enforcement officers, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently*."

State v. Cummings, 346 N.C. 291, 317, 488 S.E.2d 550, 565 (1997) (quotation omitted) (emphasis added), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

In the instant case, the trial court made the following unchallenged findings of fact:

> 15. That Detective Emser formally read Defendant his Miranda Warnings from a Raleigh Police Department form and offered said form to the Defendant for his signature after the reading it [sic].
>
> 16. That Defendant chose not to sign the Miranda Warnings form, but agreed to speak to Detective Emser in an interview.
>
> 17. That during the interview, the Defendant "confessed" to the sale of cocaine to the Raleigh Police Department informants.

These unchallenged findings are binding on appeal. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc.*

review denied, 358 N.C. 240, 594 S.E.2d 199 (2004). Although it is not found in its written order, the trial court also stated the following when he announced his findings in open court:

> As to the defendant's statement described by the officer in essence in shorthand as a confession as to the sales made to the undercover confidential informant, those statements were made after the defendant received valid Miranda warnings and *voluntarily and knowingly waived his rights* as it relates to those warnings. . . .

(Emphasis added.) Defendant only argues that there was no evidence presented that established defendant had voluntarily and knowingly waived his rights. However, Detective Emser testified and the trial court found that he had formally read these rights to defendant from a Raleigh Police Department form and requested that defendant sign the form. Defendant refused. An examination of the *Miranda* form shows that defendant was read the following language:

> WAIVER OF RIGHTS
>
> I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone. I *have read or had read to me this statement of my rights and the above waiver of rights and I understand what my rights are*.

(Emphasis added.) It is undisputed that defendant verbally agreed to waive his rights. The record supports the trial court's finding that defendant voluntarily and knowingly waived his *Miranda* rights. *See State v. Connley*, 297 N.C. 584, 587-88, 256 S.E.2d 234, 236-37 (holding that the defendant verbally waiving his rights and stating that he "understood" what that meant was sufficient to establish a

voluntary waiver), *cert. denied*, 444 U.S. 954, 62 L. Ed. 2d 327 (1979). The above findings of fact support the trial court's conclusion that defendant's post-*Miranda* confession was admissible at trial.

NO ERROR.

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

Report per Rule 30(e).