NO. COA10-502

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Johnston County
No. 08 CRS 052307

WILLIAM THOMAS PERRY,
Defendant.

Appeal by defendant from judgment entered 22 July 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 October 2010.

Roy Cooper, Attorney General, by Douglas A. Johnston, Special Deputy Attorney General, for the State.

Kimberly P. Hoppin for defendant-appellant.

THIGPEN, Judge.

In 2009, a jury convicted William Thomas Perry ("defendant") of possession of cocaine with intent to sell or deliver. Defendant appeals and raises two issues: (1) whether the trial court committed reversible error by denying defense counsel's request to review the suppression hearing transcript, even though an order had been entered allowing a transcript to be prepared at the State's expense; and (2) whether the trial court erred by overruling a prior order allowing the transcript of the suppression hearing to be prepared at the State's expense. After careful review, we find no error in the jury's verdict, because the transcript was not

necessary to prepare an effective defense and the trial court did not overrule its prior order.

BACKGROUND

On 28 March 2008, Lieutenant Jack Coats and Detective Donald Pate observed defendant driving a black Cadillac on U.S. Highway 70 near Clayton, North Carolina. Defendant was passing other traffic on the road, and the officers decided to follow defendant in their unmarked police vehicle. Immediately after the officers came up behind defendant's vehicle, defendant slowed down and moved to the right lane. Defendant then threw something that looked like a cigarette out of the driver's side window, exited off the highway, turned onto a street, parked in the first available driveway, and turned to watch as the officers drove past on Highway 70.

The officers had run defendant's vehicle tags through a computer search as they were driving, and the address on the vehicle registration did not match the residence where defendant parked his car. The officers continued driving on Highway 70 until they were out of defendant's sight, and then the officers turned around to continue their surveillance. When the officers passed the driveway a second time, defendant was in the process of turning his car around to re-enter the roadway. The officers continued out of sight a second time before turning their car around again. The officers situated their vehicle so that they could observe the intersection of Highway 70 and the street where defendant had parked. After approximately one minute, the officers saw defendant turn onto Highway 70 to continue his previous route. The officers

drove up and followed directly behind defendant's Cadillac before initiating a traffic stop.

Detective Coats approached the passenger side of the vehicle, and asked for defendant's license and registration. Defendant was the only occupant of the vehicle, and he told the officers that his name was Thomas Lamont Jacobs. Defendant informed the officers that he had left his license at home. The officers then asked defendant to come back to their vehicle, and defendant sat in the passenger seat of the police car. As Detective Pate called dispatch to ascertain whether "Mr. Jacobs" had any outstanding warrants, he noticed that defendant appeared very nervous and that his hands were trembling. Detective Pate asked defendant if "everything was okay," and defendant replied that he was fine. Detective Pate then asked defendant if he had anything in the Cadillac, and defendant responded by saying, "I'm good," and he told the officers that they could search his vehicle.

Lieutenant Coats searched the Cadillac, and he discovered a shotgun shell, a razor blade, and a small amount of white powder that he suspected to be cocaine behind the passenger seat. A presumptive field test confirmed the possible presence of cocaine base in the white powder. The officers then searched defendant's person, and discovered 35 individual bags of crack cocaine in defendant's shoe.

On 6 October 2008, defendant was indicted for possession of cocaine with the intent to sell or deliver.[1] Prior to trial,

[1] N.C. Gen. Stat. § 90-95(a)(1) (2009).

defendant filed a motion to suppress claiming that the search was in violation of the Fourth Amendment of the United States Constitution. After a hearing on the motion, the trial court denied defendant's motion to suppress and made detailed findings of fact. The trial court then concluded as a matter of law that the officers had reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968) to conduct an investigatory stop. After the hearing, defendant's counsel filed a motion to receive a copy of the verbatim transcript; the motion was granted on 4 February 2009.

At trial, it was discovered that a copy of the suppression hearing transcript had not been prepared or delivered to defendant's new trial counsel. Defendant's new counsel stated he "certainly would like to see the transcript and have an opportunity to spend some time with it." However, when the trial court inquired whether defendant's new counsel was ready to proceed without the transcript, the following exchange took place:

> THE COURT: Have you reviewed the State's discovery materials in the case, [defense counsel]?
>
> [DEFENSE COUNSEL]: I have, Your Honor.
>
> THE COURT: Have you discussed the case with your client?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Are you ready to go forward today?
>
> [DEFENSE COUNSEL]: I think I am; yes.

In responding to defendant's new counsel's motion to withdraw from the case, the trial court further stated:

> There is a written order denying defendant's motion to suppress that appears of record and that order does contain very detailed findings of fact upon which I assume [defense counsel] has relied in his preparation for trial in this case. [Defense counsel] further represented to the Court that he has fully reviewed the State's discovery materials in this case and believes that he is familiar with the facts and able to proceed to trial at this point.
>
> So are we ready to proceed? State ready?
>
> [PROSECUTOR]: Yes, sir.
>
> THE COURT: Defendant ready?
>
> [DEFENSE COUNSEL]: Defendant's ready, yes.

On 21 July 2009, a jury convicted defendant of possessing cocaine with the intent to sell or deliver under N.C.G.S. § 90-95(a)(1). Defendant gave notice of appeal in open court following the verdict. The next day the trial court entered judgment on the jury's verdict, and sentenced defendant to a minimum term of eight (8) months and a maximum term of ten (10) months in the North Carolina Department of Correction.

On appeal, defendant argues that he is entitled to a new trial because: (1) the trial court committed reversible error by denying defense counsel's request to review the suppression hearing transcript, even though an order had been entered allowing a transcript to be prepared at the State's expense; and (2) the trial court erred by overruling the prior order allowing a copy of the

transcript of the suppression hearing to be prepared at the State's expense.

ANALYSIS

As a preliminary matter, we note that Rule 10 of our Rules of Appellate Procedure provides:

> In order to preserve an issue 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1). The record shows that defendant's counsel did not object or make a motion regarding whether the trial should proceed without his having opportunity to read the missing transcript. Moreover, even if we were to construe defense counsel's statement that he "certainly would like" to obtain a copy and "spend some time with it" as a "request" under Rule 10, the record shows that the trial court did not make a specific ruling concerning this request. Thus, it appears neither of defendant's arguments are preserved for our review. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal."). However, even assuming defendant's arguments are preserved for appeal, the record shows the trial court did not err.

Defendant first contends the trial court erred by denying his request to review the transcript under the holding of *Britt v. North Carolina*, 404 U.S. 226, 30 L. Ed. 2d 400 (1971). We disagree.

In *State v. Britt*, the defendant was indicted and tried for first degree murder, and a mistrial was declared after the jury failed to reach a verdict. 8 N.C. App. 262, 263-64, 174 S.E.2d 69, 70-71 (1970). Before the start of the second trial, the defendant filed a motion to have a transcript of the first trial furnished at the State's expense due to his indigent status. *Id.* at 263, 174 S.E.2d at 71. Chief Judge Mallard, writing for this Court, upheld the trial court's denial of the motion to have the transcript prepared, and wrote that "the factual situation here does not reveal such a need for the transcript of the evidence at the first trial that the denial thereof was a deprivation of a basic essential of the defendant's defense." *Id.* at 265, 174 S.E.2d at 71.

The defendant appealed this Court's decision to the United States Supreme Court. *Britt*, 404 U.S. 226, 30 L. Ed. 2d 400. In addressing whether a transcript must be furnished at the expense of the State, the Supreme Court observed:

> In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.

Id. at 227, 30 L. Ed. 2d at 403-04. In affirming the decision from this Court under the second prong, the Supreme Court held that the defendant's ability to have the court reporter "read back to counsel his notes of the mistrial," upon informal request, was a sufficient substitute for a transcript. *Id.* at 229, 30 L. Ed. 2d at 405.

The factual circumstances in *Britt* differ significantly with the case *sub judice*. Here, defendant's first counsel made a motion to have the suppression hearing transcript prepared at the State's expense; and on 4 February 2009, almost six months before trial commenced, the motion was granted. Defendant's replacement counsel was appointed the same day, and the record shows that defendant's new counsel was unaware the motion for a transcript had been made and granted, even though the trial court appointed him to the case in the same order allowing the transcript. At trial, the prosecution, and not defendant's counsel, mentioned that the transcript did not appear to be in the record despite the existence of the order. When the trial court asked defense counsel if he was prepared to proceed despite the absence of the suppression hearing transcript, he answered in the affirmative.

In this case, unlike *Britt*, there is no showing that defendant's trial counsel desired the suppression hearing transcript in order to prepare a defense. Had the testimony in the suppression hearing been essential to preparing for trial, defendant's counsel had ample time to acquire a transcript that had already been allowed by the trial court. When the absence of the

transcript was brought to defense counsel's attention, he did not make a motion to forestall the proceedings pending his ability to acquire and read a copy of the suppression hearing testimony. Instead, he indicated he was ready to proceed based on the knowledge of the suppression hearing he had obtained through his reading of the motion to suppress and the trial court's order denying the motion.

Under *Britt*, these facts show that: (1) the suppression hearing transcript was not valuable to defendant's trial counsel in preparing a defense; and (2) alternate devices, i.e., the motion to suppress and the trial court's detailed correlating order, were sufficient substitutes for the suppression hearing transcript in this case. With respect to the second prong in particular, the trial court made detailed findings of fact regarding the officers' observations supporting the *Terry* stop, and both of the officers testified at trial regarding the same issues. If counsel for defendant needed further information about the facts supporting reasonable suspicion, he could have pursued the order allowing the suppression hearing transcript to be prepared at the State's expense. The record indicates instead that counsel for defendant took no such action in preparing a defense for trial.

Based on the foregoing, we conclude the trial court did not err in conducting the hearing without the suppression hearing transcript having been prepared. The State offered to pay for the transcript, but defendant's counsel had no need for it to prepare

an "effective defense or appeal." *Britt*, 404 U.S. at 227, 30 L. Ed. 2d at 403. This assignment of error is overruled.

Defendant also argues the trial court erred by overruling the prior order to have the suppression hearing transcript prepared at the State's expense. We disagree.

As noted above, defense counsel stated he "certainly would like" to spend some time with the suppression hearing transcript. However, when the trial court inquired whether he was ready to proceed without the transcript, he answered in the affirmative. The trial court made no mention of the prior order other than to note that it existed and that the transcript did not appear to have been prepared. The trial court did not deny defendant's counsel's "request," nor did the trial court announce a ruling abrogating its prior order that the State "shall pay for defendant's transcript." Rather, the record shows that counsel for defendant did not seek a copy of the suppression hearing transcript in preparing a defense, and he was willing to have the trial proceed without its existence. This assignment of error is overruled.

CONCLUSION

The trial court did not err in allowing the trial to proceed without the existence of the suppression hearing transcript. The trial court did not overrule its prior order that the State would pay for the costs, and defendant's counsel did not seek to have a copy of the suppression hearing transcript prepared in organizing a defense for trial. As a result, we conclude that there was no error in the jury's verdict.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).