NO. COA12-508
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Wilkes County
No. 09 CRS 1501-1536

FREDERICK WELLS BRASON, III

Upon writ of certiorari from judgment entered 15 November 2010 by Judge Anderson D. Cromer in Wilkes County Superior Court. Heard in the Court of Appeals 26 September 2012.

Attorney General Roy Cooper by Assistant Attorney General Derrick C. Mertz for the State.

Charlotte Gail Blake for defendant-appellant.

STEELMAN, Judge.

The trial court did not err in concluding that the affidavit supported a finding of probable cause by the magistrate in issuing the search warrant. The trial court did not err in denying defendant's motion to suppress based on alleged statutory violations.

I. Factual and Procedural Background

On 5 May 2009, Detective Nancy Graybeal (Detective Graybeal) applied to a magistrate for the issuance of a search warrant. The affidavit alleged that A.M. reported that her daughter, R.M., "may have been sexually assaulted." The application further averred that R.M. "stated that the suspect had engaged in sexual activity with her, short of intercourse and he was in possession of sexually explicit pictures of her." The magistrate issued a warrant to search 5368 Hwy 16 South, Moravian Falls, N.C. 28654 and the vehicle of Frederick Wells Brason, III (defendant).

On 27 July 2009, defendant was indicted for one count of dissemination of obscenity to a minor under 13, five counts of first-degree sex offense with a child, five counts of indecent liberties with a minor, and thirty counts of second-degree sexual exploitation of a minor. Defendant filed a motion to suppress on 2 November 2010 seeking to suppress all items seized pursuant to the search warrant. On 10 November 2010, Judge Richard L. Doughton denied the motion at a pretrial hearing. On 10 November 2010, the trial court filed a written order denying the motion to suppress. On 15 November 2010, defendant pled guilty to all charges, reserving his right to appeal the denial

of his motion to suppress.

The charges were consolidated into four judgments. The first imposed an active prison sentence of 125-159 months. The remaining three judgments each imposed suspended sentences of 25-39 months, which ran consecutive to the first judgment, and to each other.

Defendant initially gave notice of appeal only from the denial of his motion to suppress. This appeal was dismissed on 15 November 2011. *State v. Brason*, ___ N.C. App. ___, 719 S.E.2d 257 (2011) (unpublished). On 28 December 2011, this Court granted defendant's petition for writ of certiorari to review the judgments.

Preliminarily, we note that defendant's brief is rambling, mixing constitutional and statutory arguments without any real structure or organization.

II. Standard of Review

"In reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal." *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997).

III. Probable Cause

Defendant contends that the trial court erred by denying the motion to suppress because the affidavit failed to allege sufficient facts to support a finding of probable cause by the magistrate. We disagree.

"It is axiomatic that probable cause serve as the basis for the issuance of search warrants, *see* U.S. Const. amend IV[.]" *State v. Peterson*, 179 N.C. App. 437, 445, 634 S.E.2d 594, 603 (2006), *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007). "[T]he affidavit upon which a search warrant is issued is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Riddick*, 291 N.C. 399, 406, 230 S.E.2d 506, 511 (1976) (internal quotation marks omitted).

"Probable cause does not mean actual and positive cause nor import absolute certainty. The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search

warrant." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (internal citations omitted).

Defendant challenges the sufficiency of the affidavit on several grounds, but fails to provide authority for the challenges. Defendant argues that the detective had no personal knowledge of defendant's criminal activity and that the affidavit does not allege that conduct between the victim and defendant took place in defendant's home. Defendant also argues that the description of the "silver laptop" and the "Honda registered to Frederick Wells Brason II and Frederick Wells Brason III" was insufficient. Our research reveals no authority for defendant's arguments.

In *State v. Pickard*, 178 N.C. App. 330, 331, 631 S.E.2d 203, 204-05 (2006), the affidavit provided information about sexual conduct between the defendant and minors. The warrant sought "computers, computer equipment and accessories, cassette videos or DVDs, video cameras, digital cameras, film cameras and accessories[.]" *Pickard*, 178 N.C. App. at 336, 631 S.E.2d at 207. This Court held that "a practical assessment of this information would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were probably located in Defendant's home." *Pickard*,

178 N.C. App. at 336, 631 S.E.2d at 208.

In the instant case, the affidavit recited that:

> the juvenile victim stated that the suspect had engaged in sexual activity with her, short of intercourse and he was in possession of sexually explicit pictures of her. The victim and defendant have been in a relationship from Oct 2008 until May 2009. The pictures may be electronically stored on the defendant's computer since they were sent and received over the internet.

The affidavit included the substance of the victim's statements and indicated that a search of defendant's computer would lead to discovery of sexually explicit photographs of the victim. As in *Pickard*, the magistrate could have reasonably concluded that the laptop and accessories were probably located in defendant's home or vehicle. The affidavit recited sufficient particular facts to support a finding of probable cause.

This argument is without merit.

IV. Findings of Fact

Defendant further argues that the trial court's findings of fact were not supported by evidence in the affidavit. We agree.

In reviewing the magistrate's finding of probable cause, the trial court is limited to information that was before the magistrate. *See, e.g.*, *State v. Riggs*, 328 N.C. 213, 214, 400 S.E.2d 429, 430 (1991) (the "central issue before us in this

case is whether an application for a search warrant provided a sufficient showing of probable cause to support the magistrate's finding"); *State v. Logan*, 18 N.C. App. 557, 559, 197 S.E.2d 238, 240 (1973) (the "proper inquiry is whether there were sufficient facts before the magistrate at the time of issuing the search warrant to justify the magistrate's finding of probable cause").

In the instant case, the trial court made findings of fact that were not contained in the affidavit or otherwise before the magistrate. The search warrant application and the detective's testimony, excerpted below, reveal that the magistrate had no information about how the detective obtained defendant's name or address.

> [Defense Counsel]: But you didn't include any of the specific information from your interview with [A.M.] or your interview with [R.M.] that you had done earlier that day in your affidavit, did you?
>
> There wasn't any other specifics included in your affidavit, were there?
>
> [Detective Graybeal]: Just what was on here. I didn't include anything that -- anything else.

However, this "Court has previously held that an order will not be disturbed because of . . . erroneous findings which do not affect the conclusions." *State v. Hernandez*, 170 N.C. App.

299, 305, 612 S.E.2d 420, 424 (2005) (internal quotation marks omitted) (alteration in original).

The findings of the trial court that are unsupported by competent evidence in the record were not necessary to conclude, based on the affidavit, that the magistrate had probable cause to issue the search warrant.

The trial court did not err in denying defendant's motion to suppress the items seized pursuant to the search warrant.

V. Failure to Read Warrant

Defendant next argues that the trial court erred in denying the motion to suppress based upon the failure of the officer to read the search warrant at the time that defendant's residence was searched. We disagree.

Evidence must be suppressed if:

> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful;
>
> d. The extent to which exclusion will tend

> to deter future violations of this Chapter.

N.C. Gen. Stat. § 15A-974 (2009).[1]

"Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched, or the person in apparent control of the premises or vehicle to be searched." N.C. Gen. Stat. § 15A-252 (2011).

In *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978), this Court analyzed a statute requiring the officer to leave a copy of the search warrant affixed to the premises. The Court concluded that the violation "had no adverse impact whatever" on the primary interest ("the individual's reasonable expectation of privacy"). *Fruitt*, 35 N.C. App. at 181, 241 S.E.2d at 127.

> The extent of the officer's deviation from strict compliance with the statute was minimal, and nothing in the record indicates that his violations were willful. It is questionable whether exclusion of the evidence in this case would have any appreciable tendency to deter future non-willful minimal violations of the provisions of G.S. Ch. 15A of the nature of those shown by this record.

---

[1] The General Assembly amended this statute in 2011. The amendments apply to "hearings or trials commencing on or after July 1, 2011." 2011 N.C. Sess. Laws ch. 6 § 3. Since the hearing took place on 8 November 2010, the amendments are not applicable to the instant case.

Fruitt, 35 N.C. App. at 181, 241 S.E.2d at 127-28.

In the instant case, the trial court found that "the officers did not read the warrant to the defendant or the other occupants of the house[.]" The trial court also found "that even though the officer did not read the warrant to the defendant or the other occupants of the house that the officers did go to his room; didn't search the entire house, just went to his room[.]" Detective Graybeal testified that she gave the search warrant to defendant's mother, who read the warrant.

We consider the four factors laid out in N.C. Gen. Stat. § 15A-974(2) to determine whether there was a substantial violation of N.C. Gen. Stat. § 15A-252. First, the violation of the statute requiring the warrant to be read had no adverse impact on defendant's reasonable expectation of privacy. Second, the extent of the officer's deviation from strict compliance with the statute was minimal. The detective provided the warrant to defendant's mother. Third, nothing in the record indicates that the violation was willful. Finally, as in *Fruitt*, it is questionable whether exclusion of the evidence in this case "would have any appreciable tendency to deter future non-willful minimal violations of the provisions of G.S. Ch. 15A[.]" *Fruitt*, 35 N.C. App. at 181, 241 S.E.2d at 128.

Even assuming *arguendo* that the officer substantially violated the statute, the evidence was not obtained "as a result of" the officer's failure to comply strictly with N.C. Gen. Stat. § 15A-252. *See, e.g.*, *State v. Vick*, 130 N.C. App. 207, 219, 502 S.E.2d 871, 879 (1998).

This argument is without merit.

VI. Incorrect Address in Warrant

Defendant next argues that the trial court erred in denying the motion to suppress on the basis of an incorrect address on the warrant. We disagree.

A search warrant must contain a "designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched[.]" N.C. Gen. Stat. § 15A-246(4) (2011). "[T]he address described in the search warrant may differ from the address of the residence actually searched." *State v. Moore*, 152 N.C. App. 156, 160, 566 S.E.2d 713, 715 (2002).

The trial court found that there was a common driveway leading from N.C. Highway 16 to two houses, which were later determined to be 5350 Highway 16 South and 5368 Highway 16 South. The houses were about a hundred yards apart.

The search warrant described a "[b]rick and tan siding house with white trim and wood railing" with an address of "5368

Hwy 16 South Moravian Falls, N.C. 28654." The actual address of this house was 5350, not 5368. The house actually searched "met the description as shown on the application for the search warrant[.]" The warrant did not violate N.C. Gen. Stat. § 15A-246(4).

This argument is without merit.

VII. Conclusion

Detective Graybeal's affidavit recited sufficient particular facts to support a finding of probable cause by the magistrate. Although the trial court made findings that were unsupported by competent evidence in the record, those findings were not necessary to conclude that the magistrate had probable cause to issue the search warrant. The detective's conduct did not constitute a substantial violation of N.C. Gen. Stat. § 15A-252. Assuming *arguendo* that it was a substantial violation, the evidence was not obtained as a result of the detective's failure to comply with the statute. The warrant did not violate N.C. Gen. Stat. § 15A-246(4).

AFFIRMED.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).