NO. COA13-116

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 12 CRS 052914-15

JEAN CARLO TOLEDO VILLANUEVA

Appeal by Defendant from judgments entered 20 September 2012 by Judge Henry W. Hight, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daphne D. Edwards, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders John F. Carella and Benjamin Dowling-Sendor, for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

On 18 May 2012, officers with the Gibsonville Police Department ("GPD") executed a search warrant for the home owned by Joel Gregory Fogleman at 734 C Burlington Avenue in

Gibsonville. The warrant application asserted that a confidential informant who had previously assisted the police had seen marijuana and firearms inside Fogleman's residence and stated that the items to be seized included firearms, marijuana, and drug paraphernalia. At the time the search warrant was executed, Defendant Jean Carlo Toledo Villanueva lived in an upstairs apartment at Fogleman's residence. During their search of the residence, GPD officers found three marijuana plants growing in buckets, plastic bags, a glass smoking device, and a sawed-off shotgun in Defendant's rooms.

Defendant was indicted on one count each of possession of drug paraphernalia, possession of marijuana with intent to sell or deliver, manufacturing marijuana, and possession of a weapon of mass destruction. On 21 August 2012, Defendant moved to suppress all evidence seized during the search, contending that the confidential informant's description of alleged criminal activity was vague, stale, and not credible. Defendant argued that the confidential informant had failed to specify the amount or form of marijuana observed or the date on which his observation occurred. Defendant also noted that the police had failed to corroborate the information provided by the

confidential informant. On 18 September 2012, the trial court denied Defendant's motion.

On 20 September 2012, Defendant pled guilty to manufacturing marijuana and possession of a weapon of mass destruction, reserving his right to appeal the denial of his motion to suppress, and the State dismissed the remaining charges. The trial court sentenced Defendant to 16 to 29 months imprisonment for the possession of a weapon of mass destruction conviction and 6 to 17 months imprisonment for the manufacturing conviction. The court suspended the sentences and placed Defendant on 36 months of supervised probation. Defendant gave notice of appeal in open court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. We agree.

In considering a defendant's motion to suppress,

> [i]t is the trial judge's responsibility to make findings of fact that are supported by the evidence, and then to derive conclusions of law based on those findings of fact. Where the evidence presented supports the trial judge's findings of fact, these findings are binding on appeal. The scope of appellate review 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. This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses. . . . [W]here the evidence is conflicting, the judge must resolve the conflict. . . . The trial court's conclusions of law, however, are fully reviewable on appeal.

State v. Hughes, 353 N.C. 200, 207-08, 539 S.E.2d 625, 630-31 (2000) (citations, quotation marks, and some ellipses omitted).

The determination of whether probable cause for a search warrant exists is based on a consideration of the totality of the circumstances. *State v. Arrington*, 311 N.C. 633, 636-37, 319 S.E.2d 254, 257-58 (1984) (citation omitted). An affidavit submitted as part of an application for a search warrant

> is sufficient if it supplies reasonable cause to believe that the proposed search for evidence 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. 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.

Id. at 636-37, 319 S.E.2d at 256-57 (citations omitted).

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, *including the veracity and basis of knowledge of persons supplying hearsay information*, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 638, 319 S.E.2d at 257-58 (citation and quotation marks omitted; emphasis added).

When the affidavit is based on information supplied by a confidential informant, factors "used to assess reliability [of the informant] includ[e]: (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *State v. Green*, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638, *affirmed*, 363 N.C. 620, 683 S.E.2d 208 (2009). In addition to assessing credibility of an informant's report, an issuing judge must determine that the evidence supporting probable cause is not stale.

> Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a reasonable time may have elapsed.

> As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant.

State v. Lindsey, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982) (citations, quotation marks, and ellipsis omitted).

A careful review of our State's case law reveals that, while there is no absolute rule for what level of information and detail in a warrant affidavit is sufficient, *some* specificity is required to suggest a "fair probability that contraband or evidence of a crime will be found in a particular place." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (citation and quotation marks omitted). In cases where we have upheld determinations of probable cause based upon informant reports, the affidavits included *several* specific details, such as when the observation had been made, the specific form or amount of illegal substance, or the informant's ability to identify the illegal substance. For example, in *State v. Walker*, the affidavit from the requesting officer stated

> that he had known this informant for five months and during this time the informant had made purchases of controlled substances under his direct supervision; that the informant had given the officer information in reference to drug dealers in the Charlotte area which the officer had found to be true through investigations concluded

> through the officer; that the informant freely admitted to the officer that he had used marijuana in the past and is familiar with how it is packaged and sold; and that the informant stated he had been in [the] defendant's house within the past 48 hours and had seen marijuana.

70 N.C. App. 403, 405, 320 S.E.2d 31, 33 (1984) (describing specific details as to the officer's familiarity with the informant, the informant's past reliability, the informant's experience with and ability to identify marijuana, and the time of the informant's observation); *see also State v. Moose*, 101 N.C. App. 59, 398 S.E.2d 898 (1990) (describing specific details about how the cocaine was packaged and the presence of cocaine paraphernalia in addition to the approximate amount of cocaine observed); *State v. King*, 92 N.C. App. 75, 373 S.E.2d 566 (1988) (describing specific details as to time of the informant's observation and that the informant also saw cocaine possessed for the purpose of sale); *State v. Graham*, 90 N.C. App. 564, 369 S.E.2d 615 (1988) (describing specific details as to time of the informant's observation and that the informant saw cocaine actually being sold by the occupants of the residence). Similarly, in *State v. Barnhardt*, we upheld a warrant issued upon an affidavit which provided several specific details:

> On August 2, 1987 a confidential informant stated they [sic] had personally observed a

> large amount of cocaine at the residence of Mark Barnhardt at 914 S. Carolina Ave., Spencer, NC. This cocaine was seen in the residence located at 914 South Carolina Ave. by the confidential informant within the past 24 hours. The confidential informer stated that Mark Barnhardt's house was a yellow wood frame house, single story residence trimmed in white and brown. The confidential informer stated that if you turn off 8th St. Spencer, NC and go south toward 11th St., Spencer, NC, that this house sits on the right back off the road approximately 50 yards.
>
> This confidential informer knows what cocaine looks like. This confidential informant has used cocaine in the past and has bought cocaine in the past.

92 N.C. App. 94, 98, 373 S.E.2d 461, 463 (1988). In *Barnhardt*, we noted that the affidavit "provided timely information, exact detail of the premises to be searched, and it described the informant's ability to identify cocaine. These circumstances, supplemented by the officer's credentials and experience, amount[ed] to a substantial basis for the magistrate's determination that probable cause existed." *Id.* at 98, 373 S.E.2d at 463. This Court contrasted the *Barnhardt* affidavit, where the totality of the circumstances supported a determination of probable cause, with the affidavit in *State v. Newcomb*, where the level of detail was insufficient. *Id.*

In *Newcomb*, the affidavit alleged, in pertinent part:

> This [confidential informant] offered his assistance to the City-county vice unit in the investigation of drug sales in the Burlington-Alamance County area. This person told myself [sic] that he had been inside the residence described herein being Rt. 8, Box 122, Lot #82 County Club Mobile Home Park, Burlington, where he observed a room filled with marijuana plants. He stated that the suspect Charles Wayne Newcomb was maintaining the plants. This applicant confirmed the identity of the suspect to be Charles Wayne Newcomb. This information obtained [sic] through D.M.V. records through vehicle registration. This applicant further checked with Duke Power Company and found this residence to have Charles Wayne Newcomb listed as the current occupant.

84 N.C. App. 92, 93, 351 S.E.2d 565, 566 (1987). Upon review, this Court observed that

> the record is devoid of any circumstances that tend to make the informant's statement credible. The information he supplied is sparse. His statement gives no details from which one could conclude that he had current knowledge of details or that he had even been inside the defendant's premises recently. The affidavit contains a mere naked assertion that the informant at some time saw a "room full of marijuana" growing in [the] defendant's house. The informant was not acting against his penal interest. Neither is there any indication that he had supplied previous information that proved helpful to the police. [The officer who submitted the affidavit] made no attempt to corroborate the informant's story. He did nothing more than verify that [the] defendant lived in the house.

Id. at 95, 351 S.E.2d at 567. As a result, "[t]he usual deference we give to a magistrate's decision [wa]s undeserved in th[e] case[,]" and we concluded the affidavit "was not sufficient information on which to find probable cause." *Id.* In sum, the evidence supporting probable cause was insufficient where the affidavit included only one specific detail (that the informant saw marijuana plants), but could only generally describe the amount ("a room full") and provided absolutely no additional details (such as information about the informant's experience with or ability to identify the marijuana, the reliability of the informant's past reports of illegal activity, or when the observation had been made).

Here, the district court judge who issued the search warrant found the following facts established probable cause:

> 1. Within the last 48 hours, a Confidential Informant ["CI"] has notified the Gibsonville Police Department that the CI has seen marijuana and firearms[1] inside the

[1] As correctly noted by Defendant, mere possession of a firearm is not an illegal act and the mere presence of firearms in a person's residence does not provide probable cause of any illegal activity. No additional facts were reported by the confidential informant or alleged in the warrant application which would make the presence of a firearm in Fogleman's home illegal or suggestive of criminal activity. The informant did not report that he knew Fogleman or anyone living in the house to be a convicted felon or specify that the "firearms" observed were sawed-off shotguns or other illegal firearms. Accordingly,

> residence of Joel Gregory Fogleman located at 734 C Burlington Avenue[,] Gibsonville, North Carolina 27249.
>
> 2. The Confidential Informant is a Confidential Reliable Informant [who] has assisted the Gibsonville Police Department in the past and has helped in obtaining charges dealing with firearms as well as dealing with narcotics.

As noted *supra*, following a suppression hearing, the trial court found, *inter alia*:

> 6. That a fair reading of the search warrant would be that the Confidential Informant had seen marijuana and firearms in the residence within the last 48 hours.
>
> 7. That there is a sufficient statement to believe that this Confidential Informant was a confidential, reliable informant who had assisted the Gibsonville Police Department on previous occasions to obtain charges dealing with firearms and narcotics.
>
> 8. That the information came from a reliable source, and that the threshold for reliability has been met.

Based upon these findings of fact, the court concluded that probable cause existed to support the search warrant and denied Defendant's motion to suppress.

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the informant's observation of "firearms" without more cannot support a determination of probable cause, and on appeal, the State does not attempt to argue that it could.

As an initial matter, Defendant contends that no competent evidence supports the court's finding of fact 6, that "a fair reading of the search warrant would be that the [c]onfidential [i]nformant had seen marijuana and firearms in the residence within the last 48 hours." Being mindful of the "great deference [that] should be paid a magistrate's determination of probable cause[,]" *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258, we must disagree. The two possible interpretations of the warrant — that the informant made his *report to police* within the last 48 hours or that the informant made his *observation of criminal activity* within the last 48 hours — are akin to a conflict in the evidence before the trial court, and "where the evidence is conflicting, the judge must resolve the conflict." *Hughes*, 353 N.C. at 207-08, 539 S.E.2d at 631. As such, because "the evidence presented supports the trial judge's finding[] of fact, [it is] binding on appeal." *Id.* at 207, 539 S.E.2d at 631.

Nonetheless, after considering the totality of the circumstances, we must conclude that the information supplied here is far too "sparse" "to make the informant's statement credible." *Newcomb*, 84 N.C. App. at 95, 351 S.E.2d at 567. Indeed, not only does the specificity of the affidavit here fall

far short of that in the cases discussed *supra*, where we concluded the affidavits supported a determination of probable cause, we conclude that this affidavit contains even less specific information than the inadequate affidavit in *Newcomb*.

The affidavit asserting probable cause stated that (1) within the last 48 hours, (2) a confidential informant who had previously helped the GPD with *narcotics and firearms* cases, (3) saw an *unknown amount and form of marijuana* (4) in Fogleman's residence. This affidavit includes only a single specific, pertinent detail: that the "observation" had been made within 48 hours. Although the affidavit asserts that the informant had "previously helped the GPD," it provides no details about the length of time or number of occasions the informant had worked with the department as did the sufficient affidavit in *Walker*. 70 N.C. App. at 405, 320 S.E.2d at 33. More problematic is that the affidavit does not "describe[] the informant's ability to identify" marijuana or assert that he or she was familiar with marijuana.[2] *Barnhardt*, 92 N.C. App. at 98, 373 S.E.2d at 463;

[2] Marijuana is not a narcotic. Our General Statutes provide that "[m]arijuana means all parts of the plant of the genus Cannabis, whether growing or not," while "[n]arcotic drug means [forms of natural or synthetic] [o]pium and opiate, and any salt, compound, derivative, or preparation of opium or opiate . . . [, a]ny salt, compound, isomer, derivative, or preparation thereof

Walker, 70 N.C. App. at 405, 320 S.E.2d at 33. Lacking some indication that an informant is familiar with the illegal substance allegedly seen, the credibility of his observation is substantially weakened.

The affidavit also lacks *any* details about the form or amount of marijuana the informant believed he saw. *See Barnhardt*, 92 N.C. App. at 97-98, 373 S.E.2d at 465-66. As noted above, in *Newcomb*, we rejected even a much more specific report of "a room filled with marijuana plants" as "a mere naked assertion" and held it insufficient to support a determination of probable cause. *Id.* at 93, 373 S.E.2d at 156. Finally, "[t]he informant was not acting against his penal interest. . . . and [the officer who submitted the affidavit] made no attempt to corroborate the informant's story." *Id.* at 95, 373 S.E.2d at 567; *see also Walker*, 70 N.C. App. at 405, 320 S.E.2d at 33 (noting that the officer's affidavit included a statement that he had conducted his own investigation of information supplied

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. . . [, o]pium poppy and poppy straw[, c]ocaine . . . or coca leaves [and their related derivatives]." N.C. Gen. Stat. § 90-87(16), (17) (2011) (quotation marks omitted); *see also* 21 U.S.C. § 802 (16), (17) (2012) (defining narcotics as a class of natural or synthesized substances derived from opiates, poppy straw, cocoa leaves, and their related derivatives). Thus, the allegation in the affidavit that the informant had helped the GPD with narcotics cases does not establish the informant's ability to identify marijuana.

by the informant in order to determine the truth of the report). In sum, the affidavit here is "devoid of any circumstances that tend to make the informant's statement credible." *Newcomb*, 84 N.C. App. at 95, 351 S.E.2d at 567.

Because the affidavit was insufficient to support a determination that probable cause existed, "[t]he usual deference [we] give to a magistrate's decision is undeserved in th[is] case." *Id.* The trial court erred in denying Defendant's motion to suppress, and accordingly, the order denying Defendant's motion to suppress is

REVERSED.

Judge BRYANT concurs.

Judge DILLON concurs in a separate opinion.

Report per Rule 30(e).

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DILLON, Judge, concurring.

I concur in the result reached by the majority that the trial court erred in denying Defendant's motion to suppress; however, I would reach this result for a different reason.

The majority indicates that the officer's affidavit essentially establishes that (1) a confidential informant had seen an unknown amount of marijuana in Defendant's residence within the past 48 hours, and that (2) the confidential informant had previously helped the police department in the past with cases involving narcotics. *State v. Singleton*, 38 N.C. App. 390, 235 S.E.2d 77 (1977), is instructive in the case *sub judice*. *Singleton* involved an affidavit supplying evidence that a reliable informant "has seen drugs" – specifically, marijuana and LSD – at the defendant's home "within the last 48 hrs."; that the affiant-officer had known the informant for

about ten years; and that the informant had provided reliable information in the past – never having lied, to the officer's knowledge. *Id.* at 391, 235 S.E.2d at 78. In holding there was no error, the *Singleton* court stated the following:

> In order to establish probable cause to search based on an informant's tip, an affidavit must contain facts showing that there is illegal activity or contraband in the place to be searched and underlying facts which indicate that the informant is credible or that the information is reliable. . . . The affidavit in the present case alleged that the informant had seen the drugs within the preceding 48 hours and that he had provided reliable information in the past. These facts, though brief, are sufficient to establish probable cause for the issuance of a warrant.

Id. at 393, 235 S.E.2d at 79 (citations omitted). According to *Singleton*, the majority's *characterization* of the facts contained in the officer's affidavit would be sufficient to establish probable cause.

However, I respectfully disagree with the majority that there was competent evidence to support the trial court's finding of fact that the informant had seen the marijuana in Defendant's residence within the last 48 hours. *See State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (stating that "[t]he standard of review in evaluating the denial of a

motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law") (internal citation omitted). The only evidence offered by the State at the hearing on Defendant's motion to suppress in support of this finding of fact was the following statement contained in the officer's affidavit:

> Within the last 48 hours, a Confidential Informant has notified the [police department] that the [informant] has seen marijuana and firearms inside [the residence occupied by Defendant].

The State argued at the suppression hearing that the trial court could interpret the sentence to mean that the informant had notified the police department *and* had seen the marijuana, all within the past 48 hours. However, I agree with Defendant that the only reasonable interpretation of the foregoing sentence in the officer's affidavit is that the introductory phrase, "[w]ithin the last 48 hours," refers only to when the informant *notified* the police department that he had seen drugs. There is no information in the affidavit stating the time frame during which the informant actually saw the drugs. Therefore, because there is no other evidence tending to show that the informant saw the drugs within the last 48 hours, and because the

foregoing statement in the officer's affidavit is susceptible to only one fair reading – a reading which supplies no information whatsoever concerning when the informant actually saw the drugs – I do not believe the foregoing sentence creates a conflict in the evidence for the trial court to resolve or supplies competent evidence to support the trial court's finding of fact number 6.

I believe this Court's opinion in *State v. Newcomb*, 84 N.C. App. 92, 351 S.E.2d 565 (1987), is analogous to the case *sub judice*. In *Newcomb*, an officer's affidavit stated the following:

> Within the past five days . . . [the informant] contacted me. [The informant] told myself [sic] that he had been inside [the defendant's residence], where he observed a room filled with marijuana plants.

Id. at 93, 351 S.E.2d at 566, 351 S.E.2d 565, 566. In *Newcomb*, we reversed the trial court, in part, because the officer's "statement gives no details from which one could conclude that he had current knowledge of details or that he had even been inside the defendant's premises recently," and because "[t]he affidavit contains a mere naked assertion that the informant at some time saw a 'room full of marijuana' growing in defendant's house." *Id.* at 95, 351 S.E.2d at 567.

The State cites four cases in its brief to support its contention that the affidavit in this case was competent evidence to support probable cause, on the basis that the informant *saw drugs* within the last 48 hours. However, I believe the State's cases are distinguishable because, unlike here, the language in the affidavits in those cases clearly recite the timeframe that the informants actually saw the drugs. For instance, in *State v.* Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988), the affidavit stated that the police had been informed by an "informant that he has been inside the [defendant's] address within the past 48 hours and has seen cocaine inside the residence[.]" *Id.* at 565, 369 S.E.2d at 616. In *State v. King*, 92 N.C. App. 75, 373 S.E.2d 566 (1988), the affidavit stated that the "informant has been to [the defendant's residence] within the past 48 hours and has observed [the defendant] possessing cocaine." *Id.* at 76, 373 S.E.2d at 567. In *State v. Walker*, 70 N.C. App. 403, 404, 320 S.E.2d 31, 32 (1984), the affidavit stated that the informant had "been in [the defendant's] house within the past 48 hours and had seen marijuana[.]" *Id.* at 405, 320 S.E.2d at 33. Finally, in *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461, *cert. denied*, 323 N.C. 626, 374 S.E.2d 593 (1988), the affidavit stated that

"cocaine was seen in the residence located at [the address] by the confidential informant within the past 24 hours." *Id.* at 97, 373 S.E.2d at 463.

By comparison, in this case, the plain and only reasonable reading of the affidavit is that it supplies information concerning the timeframe that the confidential informant told the police that he, at some time in the past, had seen drugs in Defendant's house. This, I believe, is incompetent evidence to support the trial court's finding of fact number 6 that "a fair reading . . . would be that the Confidential Informant had seen marijuana . . . in the residence within the last 48 hours." Therefore, I believe there is insufficient evidence in this case to support a determination that probable cause existed; and, accordingly, I agree with the majority's mandate to reverse and remand the trial court's order denying Defendant's motion to suppress.