NO. COA13-99
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Cleveland County
Nos. 07 CRS 51155-56

MICHAEL KENNETH MORRIS

Appeal by defendant from order entered 28 June 2012 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 28 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Michael Bulleri, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

BRYANT, Judge.

Where, based on the totality of the circumstances as reflected in the affidavit, the magistrate could determine there was probable cause necessary to grant the application for a search warrant, we affirm the trial court order denying defendant's motion to suppress.

On 21 February 2007, law enforcement officers in the Cleveland County Sheriff's Office executed a search warrant naming defendant Michael Morris and his residence located at 1404 Burke Road in Shelby. The warrant described evidence to be seized as that relating to obtaining, transporting, ordering, purchasing, and distributing any controlled substance. Following the search, defendant was arrested and later indicted on charges of manufacturing a schedule VI controlled substance – growing and cultivating sixteen marijuana plants, felony possession of a schedule VI controlled substance – more than one and one-half ounces of marijuana, possession of drug paraphernalia, and felony possession of a schedule II controlled substance – cocaine.

On 9 August 2011, defendant filed a motion to suppress evidence seized from his residence. Defendant's motion was brought for a hearing during the 28 June 2012 criminal session of Cleveland County Superior Court, the Honorable Robert C. Ervin, Judge presiding. During the hearing, the trial court acknowledged that at the time the search warrant was issued, no evidence beyond the application for the warrant had been presented to the magistrate. Following the arguments of the

parties, the trial court announced its ruling denying defendant's motion to suppress.

On 9 October 2012, defendant entered into a plea agreement with the State to plead guilty to felony possession of a schedule VI controlled substance, possession of drug paraphernalia, and felony possession of cocaine while preserving his right to appeal from the trial court's order denying his motion to suppress. The charge of manufacturing a schedule VI controlled substance was dismissed. Defendant's guilty plea was accepted 9 October 2012 in Superior Court, the Honorable Robert T. Sumner, Judge presiding. The trial court sentenced defendant to an active term of six to eight months, suspended the sentence and placed defendant on supervised probation for a period of thirty months. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by failing to grant his motion to suppress. Defendant contends that the affidavit included in the application for the 21 February 2007 search warrant fails to provide probable cause to support a search. Specifically, defendant argues that the first three paragraphs of the affidavit either individually or collectively do not support a finding of probable cause and that the averment in the fourth paragraph describing a law

enforcement officer's observation of a clear plastic baggie containing a white powder along with a straw inside defendant's residence does not provide probable cause that contraband existed within the residence. We disagree.

> 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.

State v. Veazey, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009) (citation omitted). As here, where the motion to suppress seeks to preclude the admission of evidence obtained by execution of a search warrant and where a defendant challenges only the sufficiency of the affidavit supporting the search warrant, a trial court's failure to make findings of fact in its order is not error. *See State v. Rutledge*, 62 N.C. App. 124, 125, 302 S.E.2d 12, 13 (1983) ("Since the defendant's only challenge is to the sufficiency of the affidavit supporting the search warrant, the trial judge could have summarily denied the motion without a hearing. . . . Even though [the trial court] conducted a hearing it was not necessary under these

circumstances that he do so; therefore, he committed no error in failing to make findings of fact.").

"The general rule, pursuant to the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution, is that issuance of a warrant based upon probable cause is required for a valid search warrant." *State v. Washburn*, 201 N.C. App. 93, 100, 685 S.E.2d 555, 560 (2009) (citation omitted). Pursuant to North Carolina General Statutes, section 15A-244, an application for a search warrant must contain a statement that there is probable cause to believe items subject to seizure may be found in a designated place. "The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244(3) (2011).

"Our Supreme Court has adopted a totality of the circumstances test for magistrates to determine whether probable cause exists in a search warrant application." *State v. Taylor*, 191 N.C. App. 587, 589, 664 S.E.2d 421, 423 (2008) (citation 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.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citing *Illinois v. Gates*, 462 U.S. 213, ___, 76 L.Ed.2d 527, 548 (1983)). "The standard for a court reviewing the issuance of a search warrant is 'whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.'" *State v. Ledbetter*, 120 N.C. App. 117, 121, 461 S.E.2d 341, 343 (1995) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L.Ed.2d 721, 724 (1984)) (quoted by *State v. Torres-Gonzalez*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA12-831 (2013)). "[W]e are cognizant that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citation and quotations omitted).

Our Supreme Court has acknowledged a strong preference for searches conducted pursuant to a warrant. *See id.* at 398, 610 S.E.2d at 365. "[C]ourts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a

commonsense, manner. The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* (citation, quotations, and brackets omitted).

On 21 February 2007, Investigator J.W. Humphries with the Cleveland County Sheriff's Office submitted to a Cleveland County magistrate an application for a search warrant. The application identified defendant along with his residence located at 1404 Burke Road in Shelby as the person and area to be searched. The evidence to be seized included any controlled substance and related drug paraphernalia, as well as books, records, receipts, notes, ledgers, and other documents relating to the transportation, ordering, purchasing and distribution of any controlled substance. With the search warrant application, Investigator Humphries filed a probable cause affidavit giving his background as well as reported conduct at the property to be searched.

Investigator Humphries provided extensive information including the number of years he spent with the Vice / Narcotics Division of the Cleveland County Sheriff's Department and that his current duties as a Narcotics Investigator included the application for and execution of drug search warrants.

Investigator Humphries noted his almost 1,000 hours of training in state and federal drug investigation, and that he was certified as a field training officer. As to the observations giving rise to the probable cause that a controlled substance could be found on defendant and / or at his residence, Investigator Humphries provided the following:

> On August 21, 2005 the Cleveland County Sheriff's Office Vice/Narcotics Unit executed a search warrant at the residence of [defendant] located at 1404 Burke Rd. The search of the residence and premises revealed 16 growing Marijuana plants and various bags of Marijuana. Also found in the residence were various drug paraphernalia, including equipment used in growing Marijuana along with a 12 gauge shotgun.
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> On February 14, 2007 [a deputy] arrested a "Billy Fay Smith" from the residence located at 1404 Burke Rd. "Billy Fay Smith" was wanted by the Sheriff's Office for multiple Felony charges including Trafficking in Methamphetamine, and 3-counts of Possession with Intent to Sell and Deliver Methamphetamine and Sell and Deliver Methamphetamine.
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> On February 19, 2007 [a lieutenant], who is the supervisor over the Narcotics Unit received information from a concerned citizen that "Michael Morris" along wit[h] his girl friend [sic] a "Bianica Spizzo" was involved in the use of Methamphetamine. The concerned citizen did not want his or her identity revealed for fear of their safety.
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> On February 20, 2007 Deputies from the Sheriff's Office went to the residence

> located at 1404 Burke Rd. in an attempt to locate a "Bianica Spizzo", who has outstanding child support warrants. While [one deputy] was talking to [defendant] at the back door (glass sliding door) [a lieutenant and a deputy] were looking through the door at several objects inside the residence. While looking through the door [the deputy] noticed a clear baggie filled with white powder and a straw lying on a table where a white male was sitting. When the white male subject noticed [the deputy] looking at the bag, he removed it from the table. Deputies asked [defendant] for consent to enter the residence, however, [defendant] would not allow Deputies in the house. [A lieutenant] advised the applicant that while conducting surveillance on the residence he noticed some male subjects making several trips to one of the outbuildings on the property, this was about 1:00 am on February 20, 2007.

Given the totality of the circumstances as reflected in the affidavit, particularly the history of drug activity taking place on defendant's property, the officer's current observation of a clear plastic baggie containing a white powder along with a straw, and the immediate removal of the bag and straw from the officer's view, there was substantial evidence in support of the magistrate's decision that there existed probable cause to believe a controlled substance would be found on defendant or on the premises of his residence. *See United States v. Bynum*, 293 F.3d 192, 197 (4th Cir. 2002) ("An officer's report in his affidavit of the target's prior criminal activity or record is

clearly material to the probable cause determination[.]" (citation and quotations omitted)); *see also, State v. Carter*, 200 N.C. App. 47, 55, 682 S.E.2d 416, 422 (2009) ("[W]hen [the] defendant made an obvious attempt to conceal the contents of the papers, [the law enforcement officer] became suspicious that the papers were evidence of criminal activity."). Thus, the affidavit establishes the probable cause to support the issuance of the search warrant. Therefore, we affirm the trial court's denial of defendant's motion to suppress evidence obtained as a result of the search, and accordingly, we overrule defendant's argument.

Affirmed.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).