NO. COA14-483
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Johnston County
No. 13 CRS 52186

ANTHONY DOMINICK A. FIGURELLI

STATE OF NORTH CAROLINA

v. Johnston County
No. 13 CRS 52188

STEPHEN MARSHALL SARDAY

Appeal by defendants from judgments entered 15 November 2013 by Judge William R. Pittman in Johnston County Superior Court. Heard in the Court of Appeals 7 October 2014.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, and Joseph L. Hyde, Assistant Attorney General, for the State.

Gilda C. Rodriguez for defendant-appellant Anthony Dominick A. Figurelli.

Michele Goldman for defendant-appellant Stephen Marshall Sarday.

DAVIS, Judge.

Anthony Dominick A. Figurelli ("Figurelli") and Stephen Marshall Sarday ("Sarday") (collectively "Defendants") appeal from their respective convictions for manufacturing marijuana. On appeal, Defendants contend that the trial court erred in denying their motions to suppress evidence obtained during a search of their home. After careful review, we affirm.

Factual Background

On 3 May 2013, Officers K. Lunger ("Officer Lunger") and A. Jernigan ("Officer Jernigan") of the Clayton Police Department were dispatched to the scene of a two-vehicle accident at the intersection of North Oneil Street and Wilson Street. One of the vehicles involved in the accident was a red Toyota Celica driven by Sarday. Officer Lunger approached Sarday's vehicle and "immediately noticed the strong odor of marijuana coming from the interior of the vehicle." Through the window of the car, Officer Lunger observed a grow tent, an item typically used for growing plants indoors. Upon searching the vehicle, Officers Lunger and Jernigan found an assault rifle, three growing lights, chemical plant food, an exhaust fan, metal exhaust ducting, and a small salt shaker containing marijuana flakes and residue.

Detective P.D. Medlin ("Detective Medlin") of the Clayton Police Department arrived on the scene as Sarday was being loaded into an ambulance for transport to the hospital for treatment. Detective Medlin asked Sarday where he was traveling to when the accident occurred, and Sarday responded that he was "just headed home." Detective Medlin then inquired about the purpose of the horticultural equipment the officers had observed in the vehicle, and Sarday replied that "it was none of [his] business."

Based on this exchange, Detective Medlin obtained a search warrant to search 63 Herndon Court, the Clayton residence shared by Sarday and his roommate, Figurelli. Upon executing the search warrant, law enforcement officers found fertilizer, a venting system, marijuana plants, and hallucinogenic mushrooms. Defendants were subsequently arrested and indicted by a Johnston County grand jury on 1 July 2013 on charges of (1) manufacturing marijuana; (2) possession of marijuana with intent to manufacture, sell or deliver; and (3) possession of hallucinogenic mushrooms with intent to manufacture, sell or deliver.

Sarday and Figurelli each filed motions to suppress the evidence obtained during the search of their residence.

Defendants' motions both alleged that the search warrant obtained by Detective Medlin was not supported by probable cause. The trial court heard Defendants' motions to suppress on 12 November 2013 and entered an order denying their motions on 15 November 2013. Defendants subsequently pled guilty to manufacturing marijuana. The trial court sentenced Defendants to 4 to 14 months imprisonment, suspended the sentences, and placed Defendants on supervised probation for a period of 18 months. Defendants appealed to this Court.

Analysis

I. Appellate Jurisdiction

Defendants have filed petitions for writ of certiorari requesting appellate review in the event that their notices of appeal are deemed insufficient to confer jurisdiction upon this Court. It is well established that in order to plead guilty to an offense and also maintain the right to appeal a denial of a motion to suppress, a defendant must both (1) give notice of his intent to appeal the denial of the motion; and (2) appeal from the final judgment of conviction. *State v. Miller*, 205 N.C. App. 724, 725-26, 696 S.E.2d 542, 542-43 (2010).

Here, in their plea arrangements, Defendants clearly reserved their right to appeal the denial of their suppression

motions, thereby giving the State notice of their intent to appeal. *See State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 405 (1995) (explaining that "[n]otice of intent to appeal prior to plea bargain finalization is a rule designed to promote a fair posture for appeal from a guilty plea" (citation, internal quotation marks, and emphasis omitted)), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996). The transcript from the plea hearing also indicates that following the trial court's acceptance of Defendants' guilty pleas, it specifically noted that "[n]otice of appeal is given in open court." The record shows that the trial court proceeded to enter appellate entries and assign Defendants' appeals to the Appellate Defender's Office. Thus, the trial court proceeded as if notice of appeal had properly been given from Defendants' final judgments.

This Court "presume[s] the regularity and correctness of the actions of the trial court unless the record proves otherwise." *State v. Williams*, 215 N.C. App. 1, 4, 714 S.E.2d 835, 837 (2011) (citation and internal quotation marks omitted), *aff'd*, 366 N.C. 110, 726 S.E.2d 161 (2012). As in *Williams*, a case where the defendant gave notice of her intent to appeal from the denial of her motion to suppress and the parties all

proceeded as if proper notice of appeal from the final judgment had been given, we do not believe that on the facts of this case "the trial court's finding that Defendant[s] gave notice of appeal is sufficiently contradicted by the record." *Id.* at 4, 714 S.E.2d at 837. As such, we conclude that Defendants' appeal is properly before us as an appeal of right. We therefore dismiss Defendants' petitions for writ of certiorari as moot and proceed to address the merits of the appeal.

II. Probable Cause

Defendants' sole argument on appeal is that the trial court erred in denying their motions to suppress evidence found during the search of their home because the search warrant obtained by Detective Medlin was not supported by probable cause. We disagree.

An application for a search warrant must include (1) a probable cause statement that the items specified in the application will be found in the place described; and (2) "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 (2013); *State v. Taylor*, 191 N.C. App. 587, 589, 664 S.E.2d 421, 423 (2008).

In determining whether to issue a warrant, the magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . 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) (citation omitted).

Our review of an order denying a motion to suppress "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." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). When the motion to suppress is based upon a defendant's contention that the search warrant obtained was not supported by probable cause, the trial court must determine whether, based on the totality of the circumstances, "the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005); *see also State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) ("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." (citation and internal quotation marks omitted)).

> Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause, nor does it import absolute certainty. . . . If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Campbell, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (internal citations and quotation marks omitted).

Here, the supporting affidavit of Detective Medlin stated that (1) Clayton Police Department officers responded to the scene of a vehicle accident; (2) Sarday's vehicle was one of the two vehicles involved in the accident; (3) when one of the officers approached Sarday's vehicle, he "immediately noticed the strong odor of marijuana coming from the interior of the vehicle"; (4) inside Sarday's vehicle, the officers found a grow tent, growing lights, chemical plant food, metal exhaust ducting, and an exhaust fan — items that are used to grow plants

indoors and are "commonly used in the act of growing marijuana;" (5) a small container of marijuana residue and marijuana flakes was also discovered in the car; (6) Sarday informed Detective Medlin that he was on his way home when the accident occurred; and (7) when asked about the purpose of the indoor growing equipment found in his vehicle, Sarday told Detective Medlin it was "none of [his] business."

In its order denying Defendants' motions to suppress, the trial court concluded that the evidence before the magistrate was sufficient to establish a fair probability that contraband was located at Defendants' residence because (1) the magistrate could "make a practical, common sense inference that the items in the car were intended to be used in manufacturing marijuana" based on the strong odor of marijuana and the characterization of the items by a trained, experienced law enforcement officer; (2) the magistrate could infer that the equipment was being transported to Sarday's home for the purpose of manufacturing marijuana based on the fact that the equipment was in transit at the time of the accident and the fact that Sarday said he was headed home; and (3) the magistrate "making a practical, common sense determination could reasonably infer that there was a fair probability that the place to which the marijuana manufacturing

equipment was being transported contained other contraband used for manufacturing marijuana."

Our Supreme Court has made clear that in determining whether probable cause exists to support the issuance of a search warrant "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant" and that "a magistrate's reasonable inferences from the available observations, particularly when coupled with common or specialized experience, long have been approved in establishing probable cause." *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365-66 (citation and quotation marks omitted). In *Sinapi*, this Court affirmed the trial court's suppression of all evidence obtained in a search of the defendant's home. *State v. Sinapi*, 164 N.C. App. 56, 596 S.E.2d 822 (2004), *rev'd*, 359 N.C. 394, 610 S.E.2d 362 (2005). We reasoned that the supporting affidavit failed to establish probable cause to search the defendant's residence because the affiant did not set forth facts and circumstances showing a connection between the defendant's home and a trash bag, which contained dried up marijuana plants, found on a curb near the defendant's home. *Id.* at 63-64, 596 S.E.2d at 827. The affidavit "did not state that any written documents were found in the trash bag

connecting it with either defendant or his residence" and "contain[ed] no assertions that [the affiant] observed defendant or anyone else connected to the residence . . . place the bag where it was found." *Id.* at 64, 596 S.E.2d at 827. We therefore concluded that there was not a substantial basis upon which the magistrate could issue the search warrant for the defendant's house. *Id.*

Our Supreme Court reversed, emphasizing that "probable cause is a flexible, common-sense standard" and "whether probable cause has been established is based on factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (citations, quotation marks, brackets, and emphasis omitted). The Court explained that

> the magistrate was entitled to rely on his personal experience and knowledge related to residential refuse collection to make a practical, threshold determination of probable cause. Based on the facts before him, the magistrate was entitled to infer that the garbage bag in question came from defendant's residence and that items found inside that bag were probably also associated with that residence. This conclusion is particularly bolstered by the location of the garbage bag and the fact that [the affiant] retrieved it from defendant's yard at approximately 8:00 a.m. on the regularly scheduled garbage collection day in defendant's neighborhood.

Id. at 399, 610 S.E.2d at 365-66.

We believe that the magistrate in the present case was likewise permitted to make reasonable inferences from the materials before him in determining that there was a fair probability that contraband would be discovered at Defendants' residence. Law enforcement officers observed various equipment associated with the indoor growing of plants — often marijuana plants — in Sarday's car and smelled a strong odor of marijuana coming from the vehicle. When asked the purpose of this equipment, Sarday responded evasively, stating that "it was none of [Detective Medlin's] business."

While Defendants contend that there was an insufficient nexus between the location where the growing equipment and marijuana residue were found and the premises to be searched, Sarday's own statement that he was headed — in the vehicle containing the growing equipment and marijuana residue — to his home provided the basis for an inference by the magistrate that a growing operation was located at the residence. *See McCoy*, 100 N.C. App. at 576-77, 397 S.E.2d at 357 (explaining that supporting affidavits in search warrant application "must establish a nexus between the objects sought and the place to be searched" and that firsthand information of contraband seen in

one location may sustain search of second location when based on "reasonable inferences . . . concerning the likely location of those items").

This Court noted in *McCoy* that a nexus between the objects sought and the premises to be searched is generally established "by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place" and that "[d]ifficult problems can arise . . . where such direct information concerning the location of the objects is not available[.]" *Id.* at 576, 397 S.E.2d at 357. However, we believe that Sarday's own statements supported the reasonable inference that contraband and items used in the manufacturing of marijuana would be found in his home.

Moreover, it is well established that "'resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.'" *State v. Crawford*, 104 N.C. App. 591, 595, 410 S.E.2d 499, 501 (1991) (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 13 L.Ed.2d 684, 689 (1965)). "[G]reat deference should be paid [to] a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo*

review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

We therefore conclude that the magistrate had a sufficient basis for determining that probable cause existed based on the information before him and the permissible inferences that could be drawn from that information. *See Taylor*, 191 N.C. App. at 590, 664 S.E.2d at 423 ("[T]he duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." (citation, quotation marks, brackets, and ellipses omitted)).

Finally, Defendants argue that even if there was probable cause to believe that Sarday was manufacturing marijuana at his home, the search warrant was nevertheless invalid because Detective Medlin failed to specifically attest within the probable cause affidavit that Sarday's home address was 63 Herndon Court. However, on each page of the four-page attachment to the search warrant application — including the pages containing Detective Medlin's sworn statements supporting probable cause — there is a caption stating "IN THE MATTER OF: STEPHEN MARSHALL SARDAY, 63 HERNDON COURT . . . ." The attached document first provides directions from the Clayton Police Department to 63 Herndon Court, a description of the property, and a photograph of the residence under the heading of

"Description of Premises to be Searched." The subsequent pages, which also include the caption listing Sarday's name and his street address as 63 Herndon Court, contain factual allegations discussing "his address" and "his home" as the premises to be searched.

We are of the view that this information, taken together, adequately identified 63 Herndon Court as the premises to be searched and as Sarday's residence. As our Supreme Court and the United States Supreme Court have repeatedly stated, "[a] grudging or negative attitude by reviewing courts towards warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434 (1991) (citation, quotation marks, and brackets omitted). Accordingly, we conclude that the trial court properly denied Defendants' motions to suppress.

Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendants' motions to suppress.

AFFIRMED.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).