IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-550

Filed: 1 December 2015

Forsyth County, Nos. 12 CRS 052050; 13 CRS 10671

STATE OF NORTH CAROLINA

v.

BILLY LEE HARRELL JR., Defendant.

Appeal by defendant from judgment entered 21 August 2014 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 22 October 2015.

Attorney General Roy Cooper, by Associate Attorney General Alexander G. Walton, for the State.

Michelle FormyDuval Lynch, for defendant.

DIETZ, Judge.

After orchestrating two controlled purchases of cocaine on the porch of a Winston-Salem residence in a high-crime area, police obtained a warrant to search the home. As they approached the porch to begin the search, an officer stopped Defendant Billy Lee Harrell, Jr. and patted him down to ensure that he did not possess any weapons. While patting Harrell down, the officer felt what he knew from experience to be two plastic baggies of crack cocaine in the crotch pocket of Harrell's

thermal underwear. The officer then searched Harrell, discovered the cocaine, and arrested him.

Harrell moved to suppress the cocaine on the ground that the pat down was improper and that the officer could not have known the lump in his crotch was two baggies of cocaine. The trial court denied the motion, and a jury later convicted Harrell of possession of cocaine. Harrell then appealed the denial of his motion to suppress.

As explained below, Harrell's argument is waived on appeal. Under long-standing precedent from our Supreme Court, we cannot consider arguments challenging the denial of a motion to suppress unless the defendant properly included a supporting affidavit with his initial motion in the trial court. Thus, we are constrained to reject Harrell's argument as procedurally barred. We note in passing, however, that on the facts before us, the search appears to be constitutional and thus, even if we were permitted to address the merits of Harrell's argument, he would not prevail.

Facts and Procedural History

On 29 February 2012, Winston-Salem police executed a search warrant at a residence in a high-crime area of Winston-Salem in search of illegal drugs and other evidence of drug trafficking. As police approached the residence, Defendant Billy Lee Harrell, Jr. began to step away from the front porch—an area where police previously

had orchestrated two controlled crack cocaine purchases. He then froze when he saw armed members of the SWAT team. An officer ordered Harrell to the ground, informed him that he was "going to perform a frisk of his person for weapons," and then patted down the outside of Harrell's clothing. The officer felt what he recognized as baggies of cocaine in Harrell's thermal underwear and removed the drugs. Police then arrested Harrell.

Harrell moved to suppress the cocaine, arguing that the officer's pat-down search violated his Fourth Amendment rights. At the hearing on the motion to suppress, the officer testified that he had earned approximately twenty years of training and experience in narcotics investigations, and that he had felt approximately 40 to 50 baggies of cocaine in individuals' crotch areas while performing pat-down searches. Based on this experience, the officer testified that, when he patted down Harrell's crotch area, "he immediately recognized an object" that "felt like baggies of cocaine." The officer clarified that in addition to feeling the baggy, he felt a "hard, rock-like substance" within the baggy which he recognized as cocaine.

Based on this testimony, the trial court found that the officer "immediately felt an object that he recognized to be consistent with a baggy of narcotics." The court also concluded that the pat down was constitutionally justified because executing the

warrant at a known drug trafficking location in a high-crime area posed serious safety risks to the officers involved. The court therefore denied the motion to suppress.

A jury later convicted Harrell of possession of cocaine, and the trial court sentenced him to 30 to 48 months in prison. Harrell timely appealed.

Analysis

Harrell challenges the trial court's suppression ruling on several grounds but, for the reasons explained below, we cannot reach the merits of these arguments because Harrell failed to include a supporting affidavit with his motion to suppress.

In North Carolina, a motion to suppress evidence in a criminal case "must be accompanied by an affidavit containing facts supporting the motion." N.C. Gen. Stat. § 15A-977(a); *State v. Holloway,* 311 N.C. 573, 577, 319 S.E.2d 261, 264 (1984). In *Holloway*, our Supreme Court held that "[b]ecause the defendant failed to file an affidavit to support the general information and belief alleged in his motion, we hold that he waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant." *Id.* at 577-78, 319 S.E.2d at 264.

Importantly, the Supreme Court in *Holloway* held that failure to attach a supporting affidavit waives the right to challenge the denial of a suppression motion on appeal, regardless of whether that issue was litigated in the trial court: "We have held that defendants by failing to comply with statutory requirements set forth in N.C.G.S. 15A–977 waive their rights to contest *on appeal* the admission of evidence

on constitutional or statutory grounds." *Id.* at 578, 319 S.E.2d at 264 (emphasis added).

As a result, even if the State did not argue the absence of the supporting affidavit in opposing the motion to suppress, and even if the trial court did not rely on the lack of a supporting affidavit to deny the motion, the failure to attach a supporting affidavit waives any arguments challenging the suppression ruling on appeal, thus precluding this Court from addressing them. *Id.*; *see also State v. Creason*, 123 N.C. App. 495, 499, 473 S.E.2d 771, 773, (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997) (rejecting challenge to suppression ruling on appeal because "defendant failed to file an affidavit to support the motion to suppress" and "[t]herefore, he has waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant."). Indeed, that is precisely what occurred in *Holloway*, where the Supreme Court acknowledged that the State did not challenge the lack of a supporting affidavit in the trial court. *Holloway,* 311 N.C. at 578, 319 S.E.2d at 264.

Under *Holloway*, Harrell's arguments are procedurally barred. Harrell's one-page "Notice of Intent to Suppress Evidence," which functioned as his motion to suppress, was not accompanied by a supporting affidavit, even though Harrell's argument plainly required him to establish various facts concerning the officer's decision to pat down Harrell and the officer's determination that the object he felt in

Harrell's crotch area was one or more baggies of cocaine. Accordingly, under long-standing precedent from our Supreme Court, we must reject Harrell's argument on procedural grounds.

We note, however, that although we are unable to reach the merits here, Harrell's arguments appear to lack merit. The trial court's undisputed fact findings established that police obtained a warrant to search a residence in a high-crime area for illegal drugs. The court also found that the officers conducting the search knew that occupants of residences used for drug trafficking often are armed with weapons. Police saw Harrell on the porch of the residence to be searched, near an area where they previously had arranged two controlled drug purchases. These facts are sufficient to justify the officer's decision to stop and pat-down Harrell as they initiated their search of the residence. *See Minnesota v. Dickerson*, 508 U.S. 366, 373, 124 L.Ed.2d 334, 344 (1993).

In addition, the officer who conducted the pat down testified that he immediately felt an object he recognized as a baggy of cocaine based on his experience discovering approximately 40 to 50 baggies of cocaine in individuals' crotch areas while performing other pat-down searches. The trial court found this testimony credible and adopted it in its findings. When an "officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent" the officer may search the suspect and recover the contraband

without the need for a warrant. *Id.* at 375, 124 L.Ed.2d at 346. Thus, it appears to the Court that, even if we were permitted to reach the merits of Harrell's argument, he would not prevail.

Conclusion

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).