IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-194

Filed: 16 February 2016

Cabarrus County, No. 11CRS052074-76, 11CRS0001365

STATE OF NORTH CAROLINA,

v.

LAKWAN RAYSHAUN NELSON, Defendant.

Appeal by defendant from judgment entered on or about 25 June 2014 by Judge Christopher W. Bragg in Superior Court, Cabarrus County. Heard in the Court of Appeals 9 September 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General J. Rick Brown, for the State.

Guy J. Loranger, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of impaired driving, felony possession of a Schedule II controlled substance, speeding, and driving while license revoked. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that on 21 April 2011, Officer Denan Sabanija of the Concord Police Department was performing his patrol duties when he

noticed defendant speeding approximately 20 miles per hour over the posted speed limit. Though Officer Sabanija had activated both his blue lights and siren, defendant drove approximately another half to three-quarters of a mile before he stopped.

Once stopped, defendant got out of his vehicle. Officer Sabanija told defendant to get back in his vehicle, but instead defendant ran behind the apartment complex where he had parked. Officer Sabanija caught up with defendant and ordered defendant to get down on the ground. Defendant reached for his pocket; Officer Sabanija also reached for defendant's pocket and found cocaine. After a search, more cocaine was found in defendant's vehicle. Officer Sabanija also smelled alcohol on defendant's breath and took defendant to Northeast Medical Center for a blood draw. Cocaine and other substances were detected in defendant's blood. A jury convicted defendant of speeding, driving while impaired, and possession of cocaine. Defendant appeals.

II. Motion to Suppress

Defendant argues on appeal that the results of the warrantless blood draw should have been suppressed. At trial, defendant's attorney attempted to argue the illegality of the warrantless blood draw, but the trial court found that his counsel's motion was untimely. The denial of a motion to suppress based on untimeliness is reviewed *de novo*. *See State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646,

648 ("Our review of a trial court's conclusions of law on a motion to suppress is *de novo*." (citation and quotation marks omitted)), *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

North Carolina General Statute § 15A-976 provides,

> (a) A motion to suppress evidence in superior court may be made at any time prior to trial except as provided in subsection (b).
>
> (b) If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), *the defendant may move to suppress the evidence only if its motion is made not later than 10 working days following receipt of the notice from the State.*

N.C. Gen. Stat. § 15A-976 (2013) (emphasis added). North Carolina General Statute § 15A-975 provides,

> (a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).
>
> (b) A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is:
>
> . . . .
>
> (2) Evidence obtained by virtue of a search without a search warrant[.]

N.C. Gen. Stat. § 15A-975 (2013).

Defendant's trial began on 24 June 2014. In 2011 and in March of 2014, the

State filed a "NOTICE OF INTENT TO INTRODUCE CERTAIN EVIDENCE" which noted the State intended to introduce "[e]vidence obtained by virtue of a search without a search warrant." In 2012 the State filed the blood test report, and in 2013 the State filed notice of its intent to call an expert witness, Mr. Wayne Lewellan, the chemical analysist who analyzed defendant's blood. Defendant's brief acknowledges his counsel received all three notices and the report.

Defendant contends the State's notice was not sufficient to comply with North Carolina General Statute § 15A-975(b) because he had new counsel at the time of trial who had not personally been informed of the State's intent. Defendant cites no legal authority for the proposition that the State must reissue notices or evidence whenever a defendant obtains new counsel. On a similar issue, in *State v. Carr*, defendant filed a motion *in limine* moving to suppress a lab report due to insufficient notice. 145 N.C. App. 335, 338, 549 S.E.2d 897, 899 (2001). The Court noted:

> after holding an evidentiary hearing, the trial court made the following findings of fact:
>
> > the Court would find as a fact that the Defendant was originally represented by Attorney Steve Grossman; that when he entered the case in January of 1999, he was given a copy of the file, a copy of the lab report, and a copy of the notice of intent to use the lab report without calling the SBI laboratory personnel; and that since that time Mr. Grossman[, the former attorney,] has been permitted to withdraw from the case and Mr. White now represents the Defendant; that there is no copy of the notice of intent in the

> file; that Mr. Grossman[, the former attorney,] does not remember whether or not he got the notice of intent but that it was not in his file that he turned over to Mr. White[, the current attorney]; and that no objection has been made before trial, five days before trial, that the Defendant objects to the introduction of the report; and that Mr. White, who is now the attorney, has not seen the notice of intent.
>
> Based on its findings of fact, the trial court concluded that the State had complied with

the applicable statute and allowed the lab report into evidence, and this Court agreed. *Id.* at 340-41, 549 S.E.2d 897, 900-01.

We find the logic in *Carr* persuasive and determine that because defendant's counsel had received notice of the State's intent to use evidence obtained without a search warrant, the blood draw lab report, and notice of the State's intent to call an expert witness regarding the report, the State properly informed defendant of its intent to use the results from the blood draw. *See id.* Furthermore, the State has no duty to reissue its notices or the lab report due to defendant's change of counsel. *See generally id.* As the State complied with North Carolina General Statute § 15A-975(b), we conclude that the trial court properly denied defendant's untimely motion to suppress. *See* N.C. Gen. Stat. § 15A-976. This argument is overruled.

III. Ineffective Assistance of Counsel

Defendant next contends that if we determine that his counsel's motion to suppress was untimely, then he received ineffective assistance of counsel due to his counsel's failure to make a timely motion. In *State v. Johnson*, the

> [d]efendant contend[ed] that he received ineffective assistance of counsel due to his trial attorney's failure to file a timely written motion to suppress pursuant to N.C. Gen. Stat. § 15A–975(b) . . . .
>
> . . . . .
>
> Generally, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. A motion for appropriate relief is preferable to direct appeal, because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to his trial counsel, as well as defendant's thoughts, concerns, and demeanor.
>
> In the instant case, we cannot properly evaluate defendant's claim of ineffective assistance of counsel on direct appeal because no evidentiary hearing was held on defendant's motion to suppress. . . .
>
> Based upon this record, it is simply not possible for this Court to adjudge whether defendant was prejudiced by counsel's failure to file the motion to suppress within the allotted time. Therefore, we dismiss this appeal without prejudice to defendant's right to file a motion for appropriate relief in superior court based upon an allegation of ineffective assistance of trial counsel.

State v. Johnson, 203 N.C. App. 718, 721-23, 693 S.E.2d 145, 146-47 (2010) (citations and quotation marks omitted). As in *Johnson*, "we dismiss this appeal without prejudice to defendant's right to file a motion for appropriate relief in superior court based upon an allegation of ineffective assistance of trial counsel." *Id.* at 722-23, 693 S.E.2d at 147.

IV. Conclusion

For the foregoing reasons, we find no error as to the trial court's denial of defendant's motion to suppress and dismiss defendant's ineffective assistance of counsel claim.

NO ERROR.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).