IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-497

Filed: 2 February 2016

Randolph County, No. 12CRS55707, 12CRS55709

STATE OF NORTH CAROLINA

v.

BENJIE TYRONE MANESS, Defendant.

Appeal by Defendant from judgment entered 11 September 2014 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Anne J. Brown, for the State.

Richard J. Costanza for the Defendant.

DILLON, Judge.

Benjie Tyrone Maness ("Defendant") appeals from a jury verdict finding him guilty of possession of a firearm by a felon and communicating threats.

I. Background

The State's evidence tended to show as follows: For much of 2012, Defendant was cohabiting with his girlfriend ("Ms. York") and her children in a house owned by Defendant's mother. On one occasion in the house, Defendant was intoxicated and

acting in a threatening manner towards Ms. York when the children were present. Ms. York contacted her sister who then called the sheriff's office to report that an armed person was acting in a threatening manner in the house. Ms. York's sister also drove to the house and picked up Ms. York and the children.

As they were driving away, deputies arrived on the scene. Ms. York got out of her sister's car, approached the police, and spoke with a deputy. She requested help to go back into the house to retrieve some personal items. While she was speaking to the deputies, Defendant came outside and began yelling threats and impeding a deputy's questioning of Ms. York. Ms. York, however, was able to inform the deputy that Defendant had a firearm in the house.

Ms. York and one deputy entered the house. Defendant, however, continued yelling at another deputy who remained outside, repeatedly protesting the entry into and search of the house. Inside the house, Ms. York led the deputy to a bedroom closet she shared with Defendant. No rifle could be seen in plain view; however, Ms. York stated that the rifle was hidden underneath some clothing. The deputy reached into the closet and retrieved a rifle.

The rifle retrieved from the house was identified as a loaded .22 rifle and was introduced into evidence.

Defendant was convicted of communicating threats and possession of a firearm by a felon. On appeal, Defendant contests his conviction for possession of a firearm

by a felon, arguing that he received ineffective assistance of counsel because his attorney did not move to suppress the admission of the rifle into evidence where its discovery was based on an unconstitutional search.

II. Analysis

A. Ineffective Assistance of Counsel

In order to successfully assert an ineffective assistance of counsel claim, a defendant must satisfy a two-prong test set forth by our Supreme Court. "First, [the defendant] must show that counsel's performance fell below an objective standard of reasonableness. Second, [the defendant] must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different." *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002) (internal marks omitted).

Generally, claims for ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, claims brought on direct review will be decided on the merits "when the cold record reveals that no further investigation is required." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). In the present case, we do not believe that the cold record before us is sufficient to make an ultimate determination regarding Defendant's ineffective assistance of counsel claim. Accordingly, we dismiss the appeal without prejudice to

allow Defendant to seek review of this issue through a motion for appropriate relief in the trial division.

1. First Prong – Counsel's Performance

Regarding the first prong, counsel's performance cannot be said to fall below an objective standard of reasonableness for failure to file a motion to suppress "where the search [] that led to the discovery of the evidence was lawful." *State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012). Here, though, it appears that the discovery of the evidence was not lawful. Specifically, Defendant argues the search was unconstitutional even though the officers entered the residence with Ms. York's consent because he was physically present and repeatedly objected to the search.

The Fourth Amendment of the United States Constitution protects the "right of the people . . . against unreasonable searches and seizures," and is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994) (citation omitted).

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain voluntary consent from an occupant with "common authority over the premises[.]" *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed.2d 148, 156 (1990). However, where a co-occupant is physically present and refuses to allow entry, this refusal *prevails against consent of the other co-occupant*, "rendering the warrantless search unreasonable and invalid as to [the

refusing co-occupant]." *Georgia v. Randolph*, 547 U.S. 103, 106, 126 S. Ct. 1515, 1516, 106, 164 L. Ed.2d 208, 217 (2003).

The *Randolph* Court specifically noted an exception to the consent requirement in the context of domestic violence, where law enforcement enters a dwelling to protect a co-tenant while he or she collects belongings from the residence. *Id.* at 118, 164 L. Ed.2d at 224. In those cases, an officer may lawfully enter a residence even if a physically present co-tenant objects. In the present case, an officer accompanied Ms. York into the residence at her request to ensure her safety and to assist her in collecting clothes and belongings for herself and her children. This entry is the precise scenario envisioned in *Randolph*, and is clearly lawful even in spite of Defendant's refusal of consent. However, during this lawful entry, the officer is limited to seizure of evidence that is in plain view and to further action supported by probable cause. *Id.* at 118, 164 L. Ed.2d at 224-25. Here, Ms. York testified that the rifle was hidden and the officer "would [not have known] it was there" if she had not pointed it out.

Accordingly, we conclude that the officer's search was not supported by any exception to the warrant requirement and, therefore, constituted a warrantless search over the express refusal of consent by a physically present resident. In order to lawfully seize the rifle based on the information provided by Ms. York, the officer would have needed to obtain a warrant. *See Randolph*, 547 U.S. at 116, 164 L.Ed.2d

at 223 ("[A] co-tenant acting on [her] own initiative may be able to deliver evidence to the police . . . and can tell the police what [she] knows, for use before a magistrate in getting a warrant.") (internal marks omitted). Therefore, as in *State v. Canty*, "[s]ince we have found that the search [of the closet] was illegal, a motion to suppress would likely succeed[.]" *Canty*, 224 N.C. App. at 520, 736 S.E.2d at 537.

The cold record in the present case does not readily reveal a strategic advantage achieved by *not* filing a motion to suppress. *Id.* However, the record does not reveal "all [] circumstances known to counsel at the time of the representation." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000). Without the transcript from an evidentiary hearing or a supporting affidavit by defense counsel, we cannot know why defense counsel did not seek to suppress this evidence,[1] and therefore we cannot determine whether defense counsel's actions fell below an objective standard of reasonableness.

2. Second Prong – Reasonable Probability

Turning to the second prong, not only must a defendant show that his attorney's performance fell below an objective standard of reasonableness, he must also show that there is a "reasonable probability" that, but for his attorney's error, whether reasonable or unreasonable, the result of the proceeding would have been

[1] This is especially true in light of the fact that defense counsel made several pre-trial motions, one of which was an unsuccessful motion to dismiss the charge of possession of a firearm by a felon under Supreme Court precedent in *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed.2d 228 (1957).

different. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). In the seminal case on the subject, the United States Supreme Court has characterized the "reasonable probability standard" as placing a burden on a defendant to show more than that "the errors had some conceivable effect on the outcome of the proceeding[,]" but "[o]n the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2068, 80 L. Ed.2d 674, 697 (1984). Our Supreme Court has characterized this standard as "a probability sufficient to undermine confidence in the outcome." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal marks omitted).

Here, Defendant must show that there is a reasonable probability that he would not have been convicted of possession of a firearm by a felon if his trial counsel had filed a motion to suppress. In other words, Defendant had the burden of showing that there is a reasonable probability that he would not have been convicted based on the *other* evidence presented by the State. For the reasons stated below, we hold that there is not enough in the record from which we can determine this issue on appeal, but rather more investigation is required. Accordingly, we dismiss Defendant's appeal without prejudice to his right to seek review through the filing of a motion for appropriate relief in the trial division.

To be guilty of possession of a firearm by a felon, a person must (1) have been previously convicted of a felony; and (2) thereafter possess a firearm. *State v. Best*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561 (2011). It is uncontested that Defendant had been convicted of a felony prior to the date in question. Therefore, the only element we must consider is possession of a firearm.

A .22 caliber rifle constitutes a "firearm" under the crime of possession of a firearm by a felon. However, the statutory definition of "firearm" does not include an "antique firearm" or any other gun which is not designed "to expel a projectile by the action of an explosion[.]" N.C. Gen. Stat. § 14-415.1 (2012). Here, the State offered the rifle itself into evidence, and Ms. York testified about Defendant's use and possession of the rifle. With the rifle itself in evidence, it would have been fruitless for Defendant's counsel to attempt to impeach Ms. York's testimony that the gun in the closet was a .22 caliber rifle. That is, it would have been fruitless to ask Ms. York about her knowledge of guns in general, her ability to discern a .22 caliber rifle from an antique gun, airsoft gun, cap gun, etc., or to ask her questions to show her bias against Defendant. The fact that the gun found in the closet was a firearm was conclusively established by its introduction into evidence.

Had the rifle been suppressed, and Ms. York's testimony was unimpeached and uncontradicted by Defendant, we do not believe that there was a "probability sufficient to undermine confidence in the outcome." *Allen,* 360 N.C. at 316, 626 S.E.2d

at 286. However, the record indicates that Ms. York saw Defendant with something which she believed was a rifle and that there was something in their closet which she believed was a rifle. Because of the lack of cross-examination on this testimony (which was rendered pointless by the introduction of the rifle into evidence), we cannot tell from the record to what extent Defendant's counsel would have been able to impeach Ms. York's knowledge about guns, generally, or otherwise impeach her testimony. It may be that Ms. York's testimony would show a level of equivocation about her confidence as to whether the gun was, in fact, a "firearm," such that it would be "reasonably probable" that there would have been a different result. Accordingly, Defendant's appeal is dismissed.[2]

III. Conclusion

In conclusion, we hold that the record on appeal is insufficient for us to determine whether Defendant received ineffective assistance of counsel. Although we acknowledge that it is likely that a motion to suppress would have been granted by the trial court, we believe that more information is necessary in order to determine (1) whether trial counsel's failure to file a motion to suppress was a result of "trial tactics and strategy or from a lack of preparation or an unfamiliarity with the legal

[2] We note that Defendant introduced evidence concerning the gun. For instance, his brother testified that the .22 caliber rifle belonged to him, and not to Defendant, therefore admitting that the gun was, indeed, a "firearm." However, we cannot say that Defendant would have called his brother to testify or introduced any other evidence concerning the gun had the gun not been introduced into evidence in the first instance.

issues;" *State v. Parmaei*, 180 N.C. App. 179, 186, 636 S.E.2d 322, 326 (2006), *disc. review denied*, 361 N.C. 366, 646 S.E.2d 537 (2007); and (2) whether it is "reasonably probable" that if the motion to suppress had been filed, there would have been a different result. Accordingly, we dismiss Defendant's appeal without prejudice to any right he may have to file a motion for appropriate relief at the trial court level.

DISMISSED.

Judges GEER and HUNTER, JR., concur.

Report per Rule 30(e).