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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-45

Filed: 6 September 2016

Wake County, No. 11CRS228622

STATE OF NORTH CAROLINA

v.

MICHAEL JOHN CERASI

Appeal by defendant from judgment entered 31 August 2015 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Page Law, P.A., Raleigh, by Glenn R. Page, for defendant.

DIETZ, Judge.

Defendant Michael Cerasi appeals the denial of his motion to suppress, which challenged the constitutionality of the traffic checkpoint where law enforcement arrested Cerasi for driving while impaired. As explained below, Cerasi's argument is waived on appeal. Under longstanding 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 Cerasi's argument as procedurally barred. We note, however, that the trial court's order establishes both the appropriate programmatic purpose of the checkpoint and its reasonableness as required by applicable Supreme Court precedent, and those findings are supported by competent evidence in the record. Thus, even if we could reach the merits in this appeal, we would reject Cerasi's arguments.

Facts and Procedural History

On 10 December 2011, law enforcement stopped Defendant Michael Cerasi's SUV at a traffic checkpoint. While verifying his license and registration—the purpose of the checkpoint—the officer smelled alcohol on Cerasi's breath and asked him how much he had to drink. Cerasi responded, "two drinks." The officer then asked Cerasi to step out of his vehicle and perform a series of standardized field sobriety tests. Those tests indicated that Cerasi was appreciably impaired. The officer arrested him for driving while impaired.

Before trial, Cerasi moved to suppress the evidence resulting from his traffic stop on the ground that the checkpoint violated his Fourth Amendment rights. The trial court denied the motion and Cerasi pleaded guilty after providing notice of intent to appeal the suppression ruling. Importantly, Cerasi's motion to suppress was not accompanied by an affidavit or verification by counsel, as the law requires. In its order denying the motion to suppress, the trial court stated that "[t]he Motion to

Suppress was not supported by an affidavit and did not allege facts verified by counsel upon which this Court could grant the relief requested . . . [a] motion to suppress may be summarily denied when it is not accompanied by an affidavit . . . [h]owever, the State of North Carolina has not objected to the Court considering the motion on its merits, and the Court has done so in its discretion."

The day before the suppression hearing, Cerasi filed a new motion to suppress which included an affidavit, but the trial court refused to consider that motion at the hearing and Cerasi never noticed that second motion for a hearing. As a result, the trial court never ruled on it.

Analysis

Cerasi's sole argument on appeal is that the trial court erred in denying his motion to suppress. For the reasons explained below, we cannot reach the merits of this argument because Cerasi failed to include a supporting affidavit with his motion to suppress.

As the trial court observed in its order, 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 the 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).

Importantly, the Supreme Court in *Holloway* reached this result even though the State did not raise the lack of an affidavit in opposing the motion to suppress, and even though the trial court did not rely on the lack of a supporting affidavit to deny the motion. *Id.* Indeed, the Court specifically noted that the defendant's failure to attach a supporting affidavit to the motion barred appellate review despite the trial court's decision to address the merits, and despite the State's decision not to oppose the appeal based on the lack of an affidavit. *Id.* The Supreme Court has reaffirmed the *Holloway* holding in more recent cases. *See State v. Creason*, 123 N.C. App. 495, 499, 473 S.E.2d 771, 773 (1996) (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"), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997).

Under *Holloway*, Cerasi's argument is procedurally barred. Cerasi's motion to suppress was not accompanied by a supporting affidavit—a fact specifically noted by the trial court, which observed in its order denying the motion that "[t]he Motion to

Suppress was not supported by an affidavit and not did [sic] allege facts verified by counsel upon which this Court could grant the relief requested." Indeed, the trial court referred to the lack of an affidavit or verification by counsel as "profound and material deficiencies." Cerasi filed a new motion to suppress with an accompanying affidavit the day before the suppression hearing, but the trial court refused to consider that motion at the hearing and never ruled on it afterwards, meaning our review is limited to the order based on the original motion, which contained no affidavit. Because the motion to suppress challenged various facts about the procedure for and conduct during the challenged checkpoint, and because that motion was not accompanied by an affidavit, this Court is not permitted to consider it on appeal. *Holloway*, 311 N.C. at 578, 319 S.E.2d at 264.

This is an arguably harsh result, but it is one compelled by controlling Supreme Court precedent, and it has resulted in rejection of challenges to suppression motions in a number of cases before this Court. *See*, *e.g.*, *State v. Harrell*, ___ N.C. App. ___, 780 S.E.2d 890 (2015) (unpublished). Regardless of this Court's view of the wisdom of *Holloway*, we are bound to follow it; if Cerasi wishes to challenges that holding, he must take the issue up with our Supreme Court.

We note, however, that although we are unable to reach the merits here, Cerasi's argument appears meritless. The trial court's fact findings established both the appropriate primary programmatic purpose of the checkpoint and its

reasonableness, as required by applicable Supreme Court precedent, and those findings are supported by competent evidence in the record. *See State v. Jarrett*, 203 N.C. App. 675, 692 S.E.2d 420 (2010). Thus, even if we were permitted to reach the merits of Cerasi's argument, we would affirm the trial court's judgment.

Conclusion

We affirm the trial court's judgment.

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).