IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-274

Filed: 20 November 2018

Onslow County, No. 15CRS 53596-97

STATE OF NORTH CAROLINA

v.

JAMES WILLIAM DUKES, Defendant.

Appeal by Defendant from judgment entered 2 August 2017 by Judge Joshua W. Willey, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 4 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael E. Bulleri, for the State.

W. Michael Spivey, for defendant-appellant.

HUNTER JR., Robert N., Judge.

James William Dukes ("Defendant") appeals following jury verdicts finding him guilty of the following: (1) possession of drug paraphernalia; (2) manufacturing methamphetamine; (3) conspiracy to manufacture methamphetamine; (4) possession with the intent to manufacture, sell, or deliver methamphetamine; and (5) two counts of possession of a methamphetamine precursor chemical. On appeal, Defendant

argues the trial court committed plain error by denying his motion to suppress evidence seen during officers' searches of his ex-girlfriend's, Crystal Hylton's, home. We find no plain error.

I. Factual and Procedural Background

On 10 May 2016, an Onslow County Grand Jury indicted Defendant for the following: (1) maintaining a dwelling for keeping and selling methamphetamine; (2) manufacturing methamphetamine; (3) possession of drug paraphernalia; (4) conspiracy to manufacture methamphetamine; (5) possession with the intent to manufacture, sell, or deliver methamphetamine; and (6) two counts of possession of a methamphetamine precursor with the intent to manufacture methamphetamine.

On 31 July 2017, Defendant filed a motion to suppress. In his motion, Defendant asserted officers violated his Fourth Amendment rights by entering Crystal Hylton's home in Jacksonville, North Carolina. Accordingly, Defendant sought to exclude all evidence obtained during officers' searches of the home.

On 31 July 2017, the court called Defendant's case for trial. Prior to trial beginning, the court heard Defendant's motion to suppress.[1] The State and Defendant stipulated to the following facts:

> The defendant was on probation on June 11, 2015, the date of the subject search. Brittany Mercer was his probation officer. The defendant had been released from prison in May of 2015, and following his release had not

[1] Defendant and defense counsel failed to support the written motion with an affidavit. Nonetheless, in its discretion, the trial court heard Defendant's motion.

> reported in to his probation officer. As a result of that, Brittany Mercer filed a violation report. And on June 11, 2015, she went to the residence located at 531 Harris Creek Road, Lot 16, Jacksonville, looking for the defendant with the intent of serving him with that violation report, if he were home. At that time she was accompanied by one or more officers from the Onslow County Sheriff's Department.
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> The defendant had been an overnight guest at the residence on the evening of June -- June 1[0]th.
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> ....
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> Officer Mercer's violation report alleged that he was an absconder because he didn't stay at his official residence, 131 Horizon Lane, Jacksonville, North Carolina.

The State called Jack Springs, a captain with the Onslow County Sheriff's Department. In June 2015, Springs was in charge of the Crime Reduction Team, whose "mission was to hunt fugitive warrants, felony warrants." On 11 June 2015, probation officer Brittany Mercer informed the Crime Reduction Team she was going to Hylton's home to locate Defendant. Mercer asked for the Crime Reduction Team's assistance because Defendant "had a history of evading her."

When "[i]t had just become dark[,]" Springs, Mercer, Larry Johnson, Deputy Noel, and two other officers arrived "in a quick manner" at Hylton's home. Outside, officers "[e]ncountered a couple of people"[2] and "saw movement in the house." Officers entered the home through the open rear door. Noel went into the home first, and

[2] On cross examination, Springs clarified the people he encountered outside were Deanna Bargemen and Mary Welker, also known as Mary Gibson. Deanna Bargemen is Hylton's aunt.

Springs followed him. Upon entering, Noel went to the left, and Springs went to the right.

Noel found Defendant in a bedroom to the left and "started giving directions, put him to the floor, and [Springs's] attention was focused up the hallway." Noel handcuffed Defendant and brought him outside. Hylton came out the bedroom Noel found Defendant in, and Hylton "put hands on" Johnson. Johnson "subdued her and took her out."

"Minutes" later, Springs did a "secondary search." During this second search, Springs looked "for any other people, weapons, or anything like that laying in plain view." He scanned the rooms for a possibility of methamphetamine because "[i]f there's a cook going on, or anything like that, just for the hazard of that. Cooking of methamphetamine is very volatile. If not taken care of, it can explode, cause fires, cause injury." Springs also searched for other people in the home, because he did not know if anyone else was there. While doing the "secondary search," Springs saw "a one-pot meth cook" in the bedroom officers found Defendant and Hylton. Because of the pot, Springs left the home, moved people away from the home, and called the Narcotics Unit for assistance.

Sergeant Gerardo Gonzalez with the Narcotics Unit arrived, and he called the fire department. Gonzalez spoke with Hylton, who rented the home. Hylton gave

written consent for officers to enter the home. Officers went back in the home and did a "more thorough" search.

The State rested. The court made the following oral findings and conclusions:

> The defendant was on probation on June 11, 2015.
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> Defendant had been released from prison in May, 2015.
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> Following his release from prison, he had not reported to his probation officer as required. And he was not to be found at his approved residence of 107 Horizon Lane, Jacksonville. So as a result of this, his probation officer Brittany Mercer prepared and filed a violation report. She received information that the defendant may be at 531 Harris Creek Road, Lot 16, Jacksonville, N. C. And also she was aware of his history in the manufacturing of methamphetamine and received information that that activity may be going on at that residence. She called on the assistance of the Onslow County Sheriff's Department Crime Reduction Team to assist her in going to the subject residence and searching for the defendant and for evidence as a condition of probation violation.
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> The defendant had spent the preceding night, the night of June 10, 2015, in that residence. In the early evening hours of June 11, 2015, probation officer Mercer, Captain Springs, Sergeant Johnson, and three other deputies who worked in the Crime Reduction Team went to the residence.
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> Upon arriving at the residence, Captain Springs and Deputy Noel initially entered the residence, as did Sergeant Johnson. When they entered the residence, they found the defendant, ordered him to the floor, cuffed him, and escorted him out of the premises. While this was going on, the -- Crystal Hylton grabbed Sergeant Johnson. She was therefore also taken into custody. Both Dukes and

Hylton were removed from the residence and they were placed in separate vehicles. After they were removed from the residence, Captain Springs conducted a secondary search. The purpose for this secondary search was to determine were there other individuals in the residence, [whether] there [were] weapons in plain view, or meth cooking materials in plain view.

In the bedroom, he did find evidence of a one-pot meth cook. This evidence was in plain view. At that point, he exited the residence and called Detective Gonzalez with the Narcotics Division. After Gonzalez arrived, he consulted with Crystal Hylton and obtained a written consent to search from her.

The defendant's probation judgment contained the following standard condition: That -- condition 11 -- he not use, possess, control any illegal substance -- controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed; not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

Further, standard provision 9 required that he submit at reasonable times to warrantless searches by a probation officer of the defendant's person and of the defendant's vehicle and the premises while the defendant is present for purposes directly related to probation supervision.

The defendant was present at the premises at the time of the protective or secondary search.

As conclusions of law, the Court concludes that the defendant's motion to suppress was properly filed and served upon the State. The fact that the defendant was on probation justified a warrantless search at reasonable times by the probation officer of the defendant's person and his vehicle and premises while he was present. The

> residence at 513 Harris Creek Road, Lot 16, was a premises at while he was present. This provision of probation judgment gave the probation officer and those assisting her the right to conduct a warrantless search to determine whether there were any further violations of his probation judgment, such as possession of controlled or illegal substances, or whether this premises was a place where illegal drugs or controlled substances were sold, kept, or used.
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> Further, the secondary protective search was justified under the circumstances in that the nature of methamphetamine cooking leads to a volatile chemical mixture. And it was necessary to at least do a protective or secondary search of the premises to determine whether a meth cook was underway. The evidence of meth cook observed by the officers during this secondary search was in plain view.
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> Further, the renter of the premises, Crystal Hylton, did sign a consent-to-search, which would have authorized a search of the premises. In the event that the earlier secondary search was not justified under the circumstances or under the provisions of the probation judgment, the contraband would have inevitably been discovered pursuant to this consent to search.

The court denied Defendant's motion to suppress.[3]

The court proceeded to trial. The State called Springs. Springs's trial testimony substantially matched his testimony at the motion to suppress hearing, and included the following additional details. During the secondary search, Defendant went into the master bedroom, where he "saw a clear soda bottle on the

[3] The court directed the State to draft a written order, but the record is devoid of a written order.

floor, at the corner of the mattress, which the mattress was sitting directly on the floor." The bottle "had like a white sludge in it with -- in that white sludge, it had like black flakes." Springs also saw "a trash bag on the other side of the room with clear tubing extending out of the top of it." The sludge with black flakes is a "telltale sign[ ]" of methamphetamine.[4] Defendant objected when Springs testified about the secondary search.

The State called Gerardo Gonzalez, a sergeant with the Onslow County Sheriff's Department. On 11 June 2015, "late at night[,]" Springs called Gonzalez and asked him to come to Hylton's home. When Gonzalez arrived at Hylton's home, officers had both Defendant and Hylton secured. Gonzalez spoke with Springs, who "brief[ed him] with the details of his initial investigation." Without objection, Gonzalez testified Springs told him "of the items he had located."[5]

Gonzalez talked to Hylton and "explained to her what [officers] had[.]" Hylton signed a consent form, "allowing [officers] to go into the residence and view the actual items that were located by Captain Springs in the residence." Based on Springs's briefing, Gonzalez advised Springs to wear protective gear before reentering the home. Specifically, Gonzalez was concerned about certain items used in the

[4] The State asked if the sludge was a "telltale sign[,]" and Springs answered affirmatively.

[5] Defense counsel also asked Gonzalez about all the specific items found in Hylton's home.

manufacture of methamphetamine that "can be violent" and can "produce gases that can . . . damage your health."

Gonzalez and Springs went into Hylton's home, the third entry by officers. In a bedroom, Gonzalez saw items "that were . . . basically used and associated with the manufacture of methamphetamines based on [his] training and experience." Defendant did not object during this portion of Gonzalez's testimony. Based on the items found in the mobile home, Gonzalez thought "that was not an active cook." Gonzalez did not see "any violent procedure or process or chemicals spinning in any of th[e] bottles[.]"[6] Gonzalez contacted Agent Tanner, with the State Bureau of Investigation.

The State called Christopher Tanner, a special agent with the State Bureau of Investigation. The State tendered Tanner as an expert in "methamphetamine manufacturing and response." On 11 June 2015, Gonzalez called Tanner, requesting assistance at Hylton's home. Tanner arrived at 8:55 the next morning. Tanner entered Hylton's home. Without objection, Tanner described the twelve items he seized from the master bedroom, all ingredients or items used in the manufacture of methamphetamine.[7] Tanner also found a cold pack, plastic straws, and a "[b]aggie" containing white residue in a truck outside the home. Tanner submitted the following

[6] This wording is from counsel's question on cross-examination, to which Gonzalez answered affirmatively.

[7] The only objection during this portion of testimony was about a question already being asked and answered.

items to the State Crime Lab for testing: (1) liquid in a Sunkist bottle; (2) "granulated material" in a Minute Maid bottle; (3) a coffee filter containing white powder officers found in the bedroom; and (4) another coffee filter containing white powder officers found in the truck. Tanner performed a field test on the white powder in the coffee filter he found in the truck. The powder tested positive for methamphetamine.

The State called Alicia Matkowsky, a drug chemist at the State Crime Lab. The State tendered her as an expert in the field of forensic chemistry. On 20 August 2015, Matkowsky tested two of the items Tanner submitted to the Lab, liquid in a bottle and a coffee filter containing white powder.[8] Both tested positive for methamphetamine. Through Matkowsky's testimony, the State admitted her lab report into evidence.

The State called Deanna Bargemen, Hylton's aunt. Bargemen lived two doors down from Hylton and visited Hylton's home "every day, pretty much." In 2015,[9] Bargemen saw Defendant "with pseudoephedrine, shaking process, and the burping, and the filtering out of the methamphetamine." She also saw him go through "some of the process of making the methamphetamine."

On 11 June 2015, Bargemen visited Hylton and Defendant at Hylton's home. Bargeman saw Hylton hand Defendant a box. While sitting at the kitchen table,

[8] Matkowsky did not test the other two items Tanner submitted because "there was no evidentiary value in the weight" for those two items.

[9] Bargemen testified she saw Defendant do this in 2015, "[f]rom November to May, 2015[.]"

Bargemen "started smelling a very strong chemical smell" from the bedroom at the back of the home. Bargemen went outside and hid behind a truck, because she knew Defendant's "probation officer was going over to make a home visit." When officers arrived, Bargemen said, "He's in there. Get him."

The State rested. Defendant moved to dismiss all the charges. The court dismissed the felony maintaining a dwelling for keeping and selling methamphetamine charge. The court denied Defendant's motion as to the other charges. Defendant did not present evidence and renewed his motion to dismiss. The court denied Defendant's motion.

The jury found Defendant guilty of: (1) two counts of possession of a methamphetamine precursor; (2) possession of drug paraphernalia; (3) manufacturing methamphetamine; (4) conspiracy to commit the manufacture of methamphetamine; and (5) possession with the intent to manufacture, sell, or deliver methamphetamine. The court consolidated all the charges and sentenced Defendant to 83 to 112 months imprisonment. On 11 August 2017, Defendant filed timely notice of appeal.

II. Jurisdiction

Defendant has an appeal of right to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Standard of Review

Our review of an order deciding 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) (citations omitted). "When findings of fact are not challenged on appeal, such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Washington*, 193 N.C. App. 670, 672, 668 S.E.2d 622, 624 (2008) (quotation marks and citation omitted). However, for rulings on motions to suppress, findings of fact are only necessary when there is a "material conflict in the evidence[.]" *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citations omitted). "When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *Id.* at 312, 776 S.E.2d at 674 (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"[A]n issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a

similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citations omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

IV. Analysis

Defendant argues the trial court erred in denying his motion to suppress because the searches of Hylton's home violated his constitutional rights.[10] We disagree.

The Fourth Amendments of the United States Constitution and Article I, section 20 of the North Carolina Constitution protect against unreasonable searches and seizures. U.S. CONST. amend. IV; N.C. CONST. art. I, § 20. When determining reasonableness of a search, a defendant's probationary status "significantly" diminishes his reasonable expectation of privacy. *State v. Robinson*, 148 N.C. App.

[10] On appeal, Defendant lodges arguments against each of the searches: (1) officers' initial entry into Hylton's home; (2) Springs's "secondary search"; and (3) Springs and Tanner's entry to the home, pursuant to Hylton's consent. Although challenged on appeal, Defendant did not challenge the initial search at the motion to suppress hearing. At the hearing, defense counsel stated, "We have no issues about Captain Springs and other deputies coming in and grabbing him without a search warrant. We have no issues about them making entry into the residence where he was at that time momentarily as an overnight guest. We have no issues about that." Thus, this issue is not properly before us on appeal, and we only address the second and third entries.

422, 428, 560 S.E.2d 154, 158-59 (2002). "[A] governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement . . . ." *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620 (citations omitted). One exception to the warrant requirement exists where there are exigent circumstances present. *State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67 (2003) (citation omitted). An exigent circumstance may exist in the "presence of an emergency or dangerous situation." *State v. Stover*, 200 N.C. App. 506, 511, 685 S.E.2d 127, 131 (2009) (quotation marks and citation omitted). Officers may properly seize evidence seen in plain view during the course of a legitimate search. *State v. Phillips*, 151 N.C. App. 185, 192, 565 S.E.2d 697, 702 (2002). The determination of whether exigent circumstances existed is determined by considering the totality of the circumstances. *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001).

The question is whether the trial court's findings of fact, explicit and inferred, support the conclusion the secondary sweep was necessary due to the exigent circumstance of methamphetamine manufacturing.[11] We note Defendant did not

[11] The State argues Springs properly searched Hylton's home the second time because the second entry was a protective sweep to see if any dangerous individuals were still inside the home. However, the trial court did not conclude Captain Springs constitutionally entered Hylton's home as a protective sweep to see if an individual who would pose a threat to those nearby was inside. Instead, when ruling on the "secondary protective sweep," the trial court concluded the "search was justified

argue in his principal brief Springs's secondary search was an impermissible sweep to see if there were dangerous conditions due to the manufacture of methamphetamine. Although Defendant brings forth argument on this ground in his reply brief, "a reply brief is not an avenue to correct the deficiencies contained in the original brief." *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (citations omitted). Assuming Defendant properly challenged Springs's second entry on this ground, we would still find no plain error in the judgment. At the suppression hearing, Springs testified during the secondary search he looked for the "cooking" of methamphetamine, because Officer Mercer "had mentioned the possibility of being methamphetamines within the house or cooking." He specifically looked for "a cook going on" because of the potential hazards due to the volatility of the manufacture of methamphetamine. Springs explained, "[i]f not taken care of, it can explode, cause fires, cause injury."

The trial court explicitly found: (1) Officer Mercer "was aware of [Defendant's] history in the manufacturing of methamphetamine[;]" and (2) "[t]he purpose for this secondary search was to determine [whether] there [was] . . . meth cooking materials in plain view." Although labeled as a conclusion, the court also found "the nature of methamphetamine cooking leads to a volatile chemical mixture." Defendant argues,

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under the circumstances in that the nature of methamphetamine cooking leads to a volatile chemical mixture. And it was necessary to at least do a protective or secondary search of the premises to determine whether a meth cook was underway."

"[t]he trial court erred by finding that even if the search was illegal, the fruits of the search were admissible because they were obtained during a lawful 'protective sweep' or were admissible under the doctrine of 'inevitable discovery.' " Defendant does not challenge any other findings.

We conclude there is sufficient evidence to support the findings challenged by Defendant. Moreover, we note there is no material conflict in the evidence.[12] We further conclude the trial court's findings, explicit and inferred, support the conclusions "the secondary protective search was justified under the circumstances" and "it was necessary to do at least a protective or secondary search of the premises to determine whether a meth cook was underway." Accordingly, we hold, under this standard of review—and in light of Defendant's probationary status—the trial court did not plainly err in determining the secondary search did not violate Defendant's Fourth Amendment rights and denying Defendant's motion to suppress. Because we conclude the trial court did not err in its determination about the secondary search, we need not analyze officers' third entry into Hylton's home.

Additionally, assuming the trial court did err in denying Defendant's motion to suppress, this error would not amount to plain error. Even without the evidence obtained from Hylton's home, given other witnesses' testimonies about Defendant manufacturing methamphetamine in Hylton's home, we cannot say "the jury

[12] We can find no material conflict in the evidence at the suppression hearing. Only Springs testified, and he did not materially contradict himself.

probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697 (citation omitted).

V. Conclusion

For the foregoing reasons, we conclude the trial court properly denied Defendant's motion to suppress and find no plain error in the judgment.

NO PLAIN ERROR.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).