IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-131

Filed: 6 August 2019

Mecklenburg County, Nos. 16 CRS 212004-06

STATE OF NORTH CAROLINA

v.

JOHN WESLEY MIDDLETON

Appeal by defendant from judgment entered 26 April 2017 by Judge Stanley L. Allen in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Guy J. Loranger for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions of felony possession of cocaine, possession of drug paraphernalia, and misdemeanor possession of marijuana. Defendant argues the trial court committed plain error by admitting into evidence items seized by officers from defendant's home pursuant to a search warrant because the warrant was not supported by probable cause. Because we hold the affidavit submitted by the

investigating officers in support of the search warrant was sufficient to provide the magistrate with a substantial basis for determining probable cause existed, we find no error.

I. Background

On 31 March 2016, Officers Robert Henderson and Christopher Leggett of the Charlotte-Mecklenburg Police Department applied for a warrant to search the specific address of an apartment on Sharon Chase Drive, Charlotte, for cocaine, marijuana, and identified items associated with illegal drug activity. The affidavit in support of the search warrant provided the following details:

On 9 March 2016, Officer Henderson received a citizen complaint of "some unknown drug activity" occurring at the residence. On 15 March 2016, Officer Henderson conducted a knock and talk investigation at the apartment based upon the citizen complaint. Defendant's brother answered the door and told the officer he also lived at the residence. The brother stated that he did not want Officer Henderson to enter the residence to search for narcotics, but he admitted that he did "indulge," indicating to Officer Henderson that he (not defendant) smoked marijuana. Officer Henderson also briefly spoke with defendant.

Officer Henderson subsequently verified that defendant had been arrested on 25 December 2013 for possession with intent to sell or deliver cocaine and misdemeanor possession of marijuana, and that both defendant and his brother were

arrested on 8 October 2015 for possession with intent to sell or deliver cocaine. Defendant's brother also had been arrested for possession with intent to sell or deliver cocaine and possession of drug paraphernalia on 12 August 2015, and for possession with intent to sell or deliver marijuana on 28 May 2010.

On or about 29 March 2016, a "confidential and reliable informant" provided information to Officers Henderson and Leggett that the residents of defendant's apartment were "currently involved in possession of cocaine." The informant stated that he[1] observed approximately "an eight ball" of cocaine inside the apartment and that defendant and his brother were inside the residence at the time he observed the cocaine.

On 30 March 2016, Officer Henderson was conducting surveillance on the apartment and saw defendant leave the residence and open the driver's door of a white Ford Escape. Defendant did not enter the vehicle but appeared either to place an object in the vehicle or to retrieve an object. About one minute later, defendant closed the car door and went back inside the residence. Approximately five minutes later, defendant again left the residence, placed a small black duffle-type bag on the rear passenger seat, and drove out of the apartment complex at a high rate of speed.

That same day, Officer Leggett was working as part of the Hickory Grove Division Crime Reduction Unit. At approximately 2:06 p.m., Officer Leggett was in

[1] Although the affidavit refers to the confidential informant as "he or she," for ease of reading we refer to the informant only as "he" throughout the opinion.

a marked patrol vehicle and came upon defendant in the white Ford Escape. Officer Leggett conducted a traffic stop of the vehicle. Defendant appeared very nervous and told officers that he was coming from his brother's house. Officer Leggett asked defendant if he had any drugs or weapons on him or in the vehicle. Defendant stated that there was a small amount of marijuana in the vehicle, and he gave the officers consent to search the vehicle. Officers located approximately 2 grams of marijuana in the driver's side door and a digital scale in a bag located on the back seat. Officers issued defendant a citation for possession of marijuana and possession of drug paraphernalia The affidavit also detailed Officer Henderson's eight years of experience as a law enforcement officer and his hundreds of hours of training in the investigation of crimes, including narcotics violations. Officer Leggett also detailed his six years of experience as a law enforcement officer, his educational background in criminal justice, and his training in conducting narcotics investigations.

On 31 March 2016, upon issuance of the search warrant, officers entered the apartment on Sharon Chase Drive and found four individuals inside, including defendant. The officers seized 10.9 grams of crack cocaine, 5.2 grams of marijuana, and a digital scale. Officers arrested defendant for possession of the drugs and drug paraphernalia.

On 12 September 2016, a grand jury indicted defendant for possession with intent to sell or deliver cocaine, maintaining a dwelling to keep or sell controlled

substances, possession of marijuana, and possession of drug paraphernalia. Defendant filed a motion to suppress the evidence seized during the search of his apartment, contending that the search warrant did not detail sufficient probable cause. Following a hearing on 24 April 2017, the trial court orally denied defendant's motion to suppress, and defendant proceeded to trial on the charges.

The jury found defendant guilty of felony possession of cocaine, possession of drug paraphernalia, and misdemeanor possession of marijuana, but not guilty of maintaining a dwelling to keep or sell controlled substances. The trial court consolidated the convictions for judgment and sentenced defendant to a term of 4 to 14 months of imprisonment. The court suspended the sentence and placed defendant on supervised probation for a period of 18 months. Defendant timely appealed.

II. Analysis

Defendant contends the trial court committed plain error by admitting evidence at trial officers seized under the search warrant because the warrant was not supported by probable cause. He argues that the probable cause affidavit of Officers Leggett and Henderson provided vague and stale information and failed to include direct evidence that criminal activity occurred at the apartment. We disagree.

Our Supreme Court has held that a pretrial motion to suppress "is not sufficient to preserve for appeal the question of admissibility of evidence if the

defendant does not object to that evidence at the time it is offered at trial." *State v. Grooms*, 353 N.C. 50, 65, 540 S.E.2d 713, 723 (2000). Although defendant moved to suppress the evidence obtained through the execution of the search warrant, he failed to object at trial to the admission of the evidence. Defendant concedes this issue was not preserved for appellate review and argues the denial of his motion to suppress constituted plain error. N.C. R. App. P. 10(a)(4).

To establish plain error, a "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). "In conducting plain error review, we must first determine whether the trial court did, in fact, err in denying [d]efendant's motion to suppress." *State v. Lenoir*, ___ N.C. App. ___, ___, 816 S.E.2d 880, 883 (2018).

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant. *State v. Allman*, 369 N.C. 292, 296-97, 794 S.E.2d 301, 305 (2016).

In determining whether probable cause exists to issue a search warrant, "[a] magistrate 'must make a practical, common-sense decision' based on the totality of

the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citation and quotation marks omitted). This Court employs a totality of the circumstances test to determine whether probable cause existed to issue the search warrant. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). Under the totality of the circumstances test, a reviewing court must determine "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Beam,* 325 N.C. 217, 221, 381 S.E.2d 321, 329 (1989). "In adhering to this standard of review, we are cognizant that great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citation and quotation marks omitted).

In this case, the trial court did not enter a written order denying defendant's motion to suppress. *See State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (stating that the court is not required to enter a written order denying a motion to suppress "[i]f the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence"). Rather, the trial court made the following oral ruling from the bench and denied the motion:

> [T]he Court will find that the officers that applied for and received the warrant were both experienced officers with Charlotte-Mecklenburg Police Department who had extensive experience and training in the detection of

narcotics violations and the prosecution of those violations. That although the warrant did not detail their basis for relying on the confidential reliable informant, it's clear that they had received information from him before -- him or her, from the confidential informant and they felt like they could rely on that in applying for the search warrant.

In particular, in regard to the paragraph beginning within the past 48 hours, the plain meaning and plain reading of that paragraph is that the confidential informant had observed an approximate, quote, eight ball, unquote, of cocaine inside the residence. Which the plain reading of that would be within the last 48 hours. That the Defendant was a resident and person in control of the premises located at [an apartment on Sharon Chase Drive] in Charlotte. That the officers conducted a knock and talk on about March the 15th in which the Defendant's brother who was also a resident of that apartment declined for the officers to enter, but did admit that he indulged in and at least the smuggling of marijuana. That on about March the 9th, 2016, a citizen complaint was received regarding unknown drug activity at that same residence.

That based on the totality of the circumstances and their years of training and experience, the officers presented this evidence along with evidence of a vehicle stop of the Defendant's vehicle to the magistrate. That during the stop . . . although the Defendant's activity at that time may have appeared to be innocent, combined with other knowledge -- combined with other collected knowledge of the officers, there was reasonable suspicion to stop that Defendant's vehicle and that approximately two grams of marijuana was found in that vehicle along with a digital scale and possibly other paraphernalia. That the officer is not required to present evidence beyond a reasonable doubt to the magistrate. And that based on their training and experience and the totality of the circumstances, based on their own observations, the observation of the confidential reliable informant, citizen complaint and their knock and talk, that there was enough probable cause for them to present that to the magistrate.

The Court will conclude as a matter of law that there

> was probable cause to support the issuance of the search warrant.

Defendant first challenges the trial court's finding that a confidential informant observed cocaine inside defendant's apartment within 48 hours prior to the submission of the warrant application. Defendant argues that the plain meaning of the language in the affidavit states only that the officers received the information from the confidential informant within the 48 hours prior to submitting the application, not that the informant had observed the drugs within that time.

The affidavit states that "[w]ithin the past (48) forty-eight hours, a confidential and reliable informant (CRI) provided Officer Henderson and Officer Leggett with information about the occupants of [an apartment on Sharon Chase Drive] . . . who are currently involved in possession of cocaine[,]" and that he had "observed approximately 'an eight ball' of cocaine inside the residence." Defendant's argument ignores the portion of this statement indicating that the residents of the apartment were "*currently* involved in possession of cocaine." (Emphasis added.) By stating that the residents were "currently" possessing cocaine, the affidavit indicates that the residents of the apartment were possessing cocaine at the time the confidential informant provided the information to the officers, based on the informant's observation of "an eight ball" of cocaine inside the apartment. Although the wording of the affidavit was not as clear as it could be and leaves open the possibility for different interpretations of the exact meaning, the trial court's interpretation of the

affidavit is reasonable and supported by the evidence. Therefore, we hold this finding is supported by competent evidence. The remaining unchallenged findings are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Defendant next argues the affidavit supporting the warrant failed to establish probable cause because certain information was "stale" or unreliable. We disagree. Defendant first argues the information included in the warrant affidavit was stale because the citizen complaint was received three weeks prior to the search warrant application, and the affidavit failed to state when the confidential informant had observed cocaine inside the apartment.

"When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale." *State v. McCoy,* 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990). "Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred." *Id*. "[A] one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best." *Id.* "As a general rule, an interval of two or more months between the alleged criminal activity and the

affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant." *State v. Lindsey*, 58 N.C. App. 564, 566, 293 S.E.2d 833, 834 (1982).

Here, the affidavit states that on 9 March 2016, Officer Henderson received a citizen complaint "that there was some unknown drug activity occurring at" defendant's apartment. While this naked assertion of "some unknown drug activity" three weeks prior to the application of the search warrant would be insufficient on its own to support a finding of probable cause, under the totality of the circumstances test, "the question is whether the evidence *as a whole* provides a substantial basis for concluding that probable cause exists." *Beam*, 325 N.C. at 221, 381 S.E.2d at 329 (emphasis added). The affidavit also states that within the 48 hours prior to submission of the search warrant application, the officers received information from a confidential informant that the residents of the apartment were *currently* in possession of cocaine, that the confidential informant personally observed "an eight ball" of cocaine inside the apartment, and that defendant and his brother were present at the time the informant observed the cocaine. As discussed *supra*, by indicating that the residents were currently involved in the possession of cocaine at the time the officers received the information, the affidavit demonstrates that defendant had possessed cocaine inside the apartment within the 48 hours prior to the submission of the warrant application. We hold this is sufficient timely information to support a finding that there is a "fair probability that contraband or

evidence of a crime will be found" in the apartment. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

Defendant argues his case is analogous to *State v. Newcomb*, 84 N.C. App. 92, 351 S.E.2d 565 (1987). The supporting affidavit in *Newcomb* identified only that "[w]ithin the past five days" an informant contacted the officer and stated that he had been inside the defendant's residence and had "observed a room filled with marijuana plants" and that the defendant was maintaining the plants. *Id.* at 93, 351 S.E.2d at 566. In reversing the trial court's order denying the motion to suppress, this Court noted that "[t]he affidavit contain[ed] a mere naked assertion that the informant at some time saw a 'room full of marijuana' growing in [the] defendant's house" and that the informant's statement gave "no details from which one could conclude that he had current knowledge of details or that he had even been inside the defendant's premises recently." *Id.* at 95, 351 S.E.2d at 567. The Court further reasoned that the record was "devoid of any circumstances that tend to make the informant's statement credible." *Id.*

Here, the affidavit contained more than a mere naked assertion that the confidential informant had seen cocaine inside the apartment at some point in time. The affidavit states that the officers had received information from a "confidential and reliable informant" that the residents of defendant's apartment were *currently* in possession of cocaine within 48 hours of the warrant application, that the confidential

informant personally observed "an eight ball" of cocaine inside the apartment, and that defendant and his brother were present at the time the confidential informant observed the cocaine. Thus, unlike in *Newcomb*, the affidavit in this case contained timely information from the confidential informant "from which one could conclude that [the informant] had current knowledge of details" or that he had been inside defendant's apartment recently. *Id.*

Defendant next argues the affidavit supporting the warrant application failed to establish probable cause because it failed to demonstrate the credibility of the confidential informant. "The indicia of reliability of an informant's tip may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be independently corroborated by the police." *State v. Brown*, 199 N.C. App. 253, 258, 681 S.E.2d 460, 463 (citation and quotation marks omitted). "Where an unidentified informant is relied upon, the affidavit must contain some of the underlying facts and circumstances which show that the unidentified informant is credible or that the information he furnished is reliable." *State v. Estep*, 61 N.C. App. 495, 496, 301 S.E.2d 398, 399 (1983). "[T]he requirement that the informant be reliable and credible is met where the affidavit contains a statement that the informant had given this agent good and reliable information in the past that had been checked by the affiant and found to be true." *Id.* at 497, 301 S.E.2d at 399 (citation, quotation marks

and ellipsis omitted); *see also State v. McRae*, 203 N.C. App. 319, 324, 691 S.E.2d 56, 60 (2010) ("[A] tip from a reliable, confidential informant may supply probable cause[.]").

Defendant relies on *Newcomb* again to support this argument. In *Newcomb*, this Court concluded the record was "devoid of any circumstances that tend to make the informant's statement credible" because the information provided by the confidential informant was sparse, and the affidavit provided no indication that the informant was acting against his penal interest, that he previously had provided helpful information to the police, or that the officers made any attempt to corroborate the informant's statement. *Newcomb*, 84 N.C. App. at 95, 351 S.E.2d at 567. Here, the affidavit described the informant's history of providing truthful information to the officers, which established a reliable track record, as well as the informant's ability to identify drugs and the packaging of drugs for sale. Further, unlike in *Newcomb*, the allegations in the affidavit described a subsequent police investigation, including the discovery of marijuana and a digital scale in defendant's vehicle after an investigative stop. We hold this information was sufficient to establish the reliability and credibility of the confidential informant in order to support the magistrate's finding of probable cause.

Defendant next argues the affidavit did not aver sufficient facts to support a finding of probable cause because it failed to provide any direct evidence that criminal

activity actually occurred at the apartment. Defendant argues that although marijuana and a digital scale were found in defendant's car during the 30 March 2016 traffic stop, there was no evidence that either item had been in the apartment.

We review the sufficiency of a search warrant affidavit to ensure the facts and circumstances described and all reasonable inferences drawn therefrom supplied a magistrate "'reasonable cause to believe that the search will reveal the presence of the items sought on the premises described in the warrant application,' and that those items 'will aid in the apprehension or conviction of the offender.'" *Allman*, 369 N.C. at 294, 794 S.E.2d at 303 (citation, brackets, and quotation marks omitted). "Probable cause does not mean actual and positive cause nor import absolute certainty." *Arrington,* 311 N.C. at 636, 319 S.E.2d at 256.

A supporting affidavit "must establish a nexus between the [evidence] sought and the place to be searched." *State v. Parson*, ___ N.C. App. ___, ___, 791 S.E.2d 528, 536 (2016) (citation omitted).

> Ideally, this nexus is established by direct evidence showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place. Yet absent evidence directly linking criminal activity to a particular place, this nexus may be inferred by the accumulation of reasonable inferences drawn from information contained within an affidavit.

State v. Worley, ___ N.C. App. ___, ___, 803 S.E.2d 412, 417 (2017) (citation and quotation marks omitted).

Contrary to defendant's assertion, the affidavit did contain direct evidence that criminal activity occurred at defendant's apartment. The affidavit contained information from the confidential informant that the residents of the apartment were currently possessing cocaine and that he had observed "an eight ball" of cocaine inside the apartment. Additionally, the affidavit included information from which a reasonable inference could be drawn that drugs could be found inside the apartment. The affidavit stated that Officer Henderson observed defendant leave the apartment and open the driver's side door for about one minute without getting into the vehicle, and that it appeared defendant either placed an unknown object in the vehicle or retrieved an unknown object. Defendant then went back into the apartment and came out five minutes later with a black bag which he placed on the rear passenger seat of the car. The affidavit further states that during the traffic stop, marijuana was found in the driver's side door, and a digital scale was found in a bag on the rear seat of the vehicle. Thus, the magistrate could have reasonably inferred from this information that defendant had just placed the marijuana and the bag containing the scale into the car after leaving the apartment.

In this case, the evidence as a whole shows that officers received a citizen complaint of "unknown drug activity" at the apartment on 9 March 2016. During the knock and talk investigation on 15 March 2016, defendant's brother revealed that he "indulged," indicating to Officer Henderson that he smokes marijuana, and Officer

Henderson later learned that both defendant and his brother have a criminal history of possessing marijuana and cocaine and possessing cocaine with the intent to sell or deliver. The investigating officers also received information from a confidential informant within 48 hours prior to the submission of the search warrant application that the residents of defendant's apartment were currently involved in the possession of cocaine based on the informant's observation of approximately "an eight ball" of cocaine in the residence when defendant and his brother were present. Additionally, during an investigatory stop of defendant's vehicle after he left the apartment, officers found 2 grams of marijuana and a digital scale inside the vehicle.

In applying the totality of the circumstances test prescribed in *Arrington,* 311 N.C. at 638, 319 S.E.2d at 257-58, and giving proper deference to the decision of the magistrate to issue the search warrant, *see State v. McKinney,* 361 N.C. 53, 62, 637 S.E.2d 868, 875 (2006), we hold that the search warrant application provided a substantial basis for the magistrate to conclude there was sufficient probable cause to issue the search warrant. Accordingly, the trial court did not err in denying the motion to suppress.

III. Conclusion

Based on the totality of the circumstances, the affidavit was sufficient to provide the magistrate with a substantial basis to determine probable cause existed. Therefore, we hold the trial court did not err in denying the motion to suppress.

NO ERROR.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).