IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-401

Filed: 19 May 2020

Durham County, Nos. 13 CRS 53804, 53806; 16 CRS 2274–75

STATE OF NORTH CAROLINA

v.

THOMAS ANTWAN CLAYTON

Appeal by defendant from judgments entered 2 April 2018 by Judge W. Osmond Smith III in Durham County Superior Court. Heard in the Court of Appeals 4 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Paul F. Herzog for defendant.*

DIETZ, Judge.

Defendant Thomas Antwan Clayton appeals his convictions for first degree murder and related offenses. Clayton argues that the trial court erred by denying his motion to suppress evidence of his cell phone records but acknowledges that his trial counsel failed to preserve this issue with a timely objection at trial. He therefore asserts a claim for ineffective assistance of counsel.

As explained below, we agree that Clayton failed to preserve his suppression argument and we therefore cannot reach the merits of that issue on direct appeal. Because Clayton's ineffective assistance claim requires consideration of fact-driven questions concerning his trial counsel's strategic decisions at trial, we dismiss that claim without prejudice to pursue it in a motion for appropriate relief in the trial court.

**Facts and Procedural History**

In 2013, JeJuan Taylor was shot and killed during an attempted robbery. During the investigation of that killing, law enforcement officers arrested Defendant Thomas Antwan Clayton and seized his cell phone. The officers later obtained a warrant to search the phone.

The State charged Clayton with first degree murder, conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, two counts of discharging a firearm into an occupied vehicle while in operation, and possession of a firearm by a felon. Before trial, Clayton moved to suppress the evidence obtained from the search of his cell phone, arguing that the search of his phone was unconstitutional because the search warrant "was without sufficient probable cause" due to the warrant application's failure to include specific "facts . . . that implicate Defendant's use or possession of a cell phone" during the crime. After hearing arguments, the trial court denied Clayton's motion to suppress in a written order.

At trial, the State introduced Clayton's cell phone records, which included various text messages and internet searches from before and after the time of the robbery and shooting. Clayton did not object to the admission of this evidence at trial.

The jury found Clayton guilty of first degree murder and all the accompanying charges, or a corresponding, lesser included offense. The court sentenced Clayton to life in prison without parole for the murder conviction and consecutive, lesser sentences for the other convictions. Clayton appealed.

## Analysis

### I. Denial of Motion to Suppress

Clayton first argues that the trial court erred by denying his motion to suppress evidence of his cell phone records because the affidavit included with the search warrant application failed to establish probable cause. We do not reach the merits of this argument because it is not preserved.

Our review of a trial court's denial of 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). "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).

There is, however, another layer of review on this issue, which concerns preservation at trial. Our Supreme Court repeatedly has held that "a pretrial motion to suppress evidence is not sufficient to preserve for appellate review the issue of whether the evidence was properly admitted if the defendant fails to object at the time the evidence is introduced at trial." *See*, *e.g.*, *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120 (2002). This can be a frustrating result in cases like this one, where the trial court carefully considered the issue in a pre-trial proceeding and entered a written order that includes detailed findings of fact and conclusions of law. Absent an indication that anything changed between the pre-trial proceeding and the trial, there is no need for that additional trial ruling to provide this Court with a sufficient record for appellate review. But this Court must follow these procedural waiver rules from our Supreme Court uniformly, not only because we always must follow Supreme Court precedent, but also because uniformly applying these procedural rules is necessary for the fairness of the criminal justice system. *See State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

In many similar cases, the defendant who failed to preserve this issue requests plain error review. *See*, *e.g.*, *State v. Harwood*, 221 N.C. App. 451, 455, 727 S.E.2d 891, 896 (2012). "In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless 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). But this Court will not review unpreserved arguments for plain error when the appellant's brief "contains no specific argument that there is plain error." *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198–99 (2000); *see also* N.C. R. App. P. 10(a)(4).

Here, Clayton does not request plain error review but instead focuses on the alleged ineffective assistance of his trial counsel, who failed to renew the objection to the challenged evidence at trial, thereby waiving it. Thus, our precedent does not permit us to examine the issue *sua sponte* and we instead turn to Clayton's ineffective assistance claim. *State v. Hargett*, 241 N.C. App. 121, 128, 772 S.E.2d 115, 121 (2015).

## II. Ineffective Assistance of Counsel

Much of Clayton's brief focuses on his claim that he received ineffective assistance of counsel because his trial counsel failed to object to the admission of the challenged evidence at trial. This claim is not suited for review on direct appeal.

"The merits of an ineffective assistance of counsel claim will be decided on direct appeal only when the cold record reveals that no further investigation is required. Where the claim raises potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018) (citations omitted). "[W]hether defense

counsel made a particular strategic decision remains a question of fact, and is not something which can be hypothesized by an appellate court on direct appeal." *Id.*

Here, the "cold record" of the trial proceedings is insufficient to determine as a matter of law that counsel's performance was deficient. In light of the trial court's findings in the suppression order, there are plausible strategic reasons for counsel not to object to the evidence in the heat of trial and instead focus on other aspects of Clayton's defense. These fact-driven "potential questions of trial strategy and counsel's impressions" are properly addressed through a motion for appropriate relief in the trial court, which is the only court equipped to "conclusively determine these issues." *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001). Accordingly, we dismiss this ineffective assistance of counsel claim without prejudice, "allowing defendant to bring [it] pursuant to a subsequent motion for appropriate relief in the trial court." *State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004).

**Conclusion**

We find no error in the trial court's judgment on direct appeal but dismiss the ineffective assistance of counsel claim without prejudice to pursue it through a motion for appropriate relief in the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges BERGER and BROOK concur.

Report per Rule 30(e).