IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-254

No. COA20-631

Filed 1 June 2021

Rowan County, Nos. 18 CRS 50589–91, 50608, 50733, 50740

STATE OF NORTH CAROLINA

v.

JASON SCOTT DILLARD

Appeal by defendant by writ of certiorari from judgments entered 17 February 2020 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zach Padget, for the State.

Irons & Irons, P.A., by Ben G. Irons II, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Jason Scott Dillard appeals from the denial of his motion to suppress evidence. After careful review, we affirm.

Background

¶ 2 On 8 February 2018, Rowan County Sheriff's Detective Gerald Gordy applied for a warrant to search Defendant's residence. In the affidavit in support of the search warrant application, Det. Gordy alleged the following facts:

¶ 3 In August 2017, Det. Gordy interviewed a confidential informant regarding Defendant. The informant reported that he had been purchasing heroin from Defendant since 2015, and had sold heroin with Defendant during 18 of the past 24 months. The informant purchased heroin from Defendant between twice per month and three times per week, and had purchased heroin from Defendant at least 100 times total, in amounts ranging from 1 to 5.5 grams. According to the informant, these transactions occurred at Defendant's home or at the Gold Hill Fire Department, both of which are located on Old U.S. Highway 80 in Gold Hill, North Carolina. In addition, the informant indicated that Defendant drove a white 2005 Honda Accord with custom lights and tinted windows, and that he also had access to a dark blue two-door Honda Civic, a black 1996 Honda Accord, and a green 1988 Toyota Camry.

¶ 4 Based on this information, law enforcement officers conducted three controlled purchases of heroin from Defendant at his residence on 17 August, 25 August, and 8 September 2017. All three controlled purchases were conducted in the same manner: officers first searched the person and vehicle of the confidential informant. They then provided the informant with some cash and followed the informant to Defendant's home. In each instance, officers watched the informant enter Defendant's home and leave after approximately ten minutes. The informant then gave officers some heroin, which he stated that he had purchased from Defendant in an upstairs bedroom of Defendant's home.

¶ 5 On 6 February 2018, Det. Gordy interviewed Joseph Poole at the Rowan County Sheriff's Office. Mr. Poole told Det. Gordy that he had purchased 12 grams of heroin from Defendant in early February 2018, and that he had purchased heroin from him one other time prior to that date. He stated that the heroin purchase occurred at Defendant's house, and while he did not know the address of the house, he described it as "an old, but big country type house [that] sits across the street from a fire department" in Gold Hill.

¶ 6 Based on these facts, Det. Gordy affirmed that probable cause existed to search Defendant's residence. On 8 February 2018, a Rowan County magistrate granted the application and issued a search warrant.

¶ 7 Officers executed the search warrant at Defendant's residence the same day. They seized, *inter alia*, 17 grams of heroin, 102 dosage units of oxymorphone hydrochloride, and assorted drug paraphernalia. Officers arrested Defendant for possession with intent to distribute heroin, possession of heroin, and possession of opiates. Defendant subsequently posted bond.

¶ 8 On 13 February 2018, officers served Defendant with an additional arrest warrant charging him with conspiracy to traffic heroin. After Defendant consented to another search of his residence, officers seized, *inter alia*, 25 grams of heroin, two grams of methamphetamine, and drug paraphernalia.

¶ 9 On 14 March 2018, a Rowan County grand jury returned indictments charging

Defendant with three counts of possession with intent to sell or distribute heroin, three counts of possession of heroin, two counts of possession with intent to sell or distribute methamphetamine, one count of possession of oxycodone, and one count of possession with intent to sell or distribute oxymorphone hydrochloride.

¶ 10 Defendant filed a motion to suppress the evidence seized pursuant to the search warrant, alleging a lack of probable cause to search his house. The motion came on for hearing on 7 January 2020 in Rowan County Superior Court before the Honorable Anna Mills Wagoner.

¶ 11 On 17 February 2020, the trial court entered its order denying Defendant's motion. The trial court made, *inter alia*, the following findings of fact:

> 3. The probable cause affidavit of the search warrant includes information of three undercover purchases of narcotics from this defendant in August and September of 2017. These purchases were made by a confidential source of information who also provided a statement that he had been purchasing illegal narcotics from defendant since 2015, had purchase[d] illegal narcotics for 18 of the last 24 months, ranging from twice per month to two to three times a week, and all the transactions occurred at the defendant's residence in Gold Hill.
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> 4. The probable cause affidavit includes information obtained by Det. Gordy from a second witness, Joseph Poole, who provided a statement against his penal interest that he had purchased heroin from the defendant twice, most recently on February 6, 2018 and once at defendant's home. Poole was unable to provide an address for defendant but did provide information that was sufficient for Det. Gordy to identify the residence[.]

> 5. Based on the totality of circumstances as outlined in the probable cause affidavit of the search warrant, Det. Gordy did have sufficient probable cause to request a search of defendant's residence, and the information from August 2017 was not stale.

¶ 12 On 17 February 2020, Defendant entered an *Alford* plea[1] to all charges, reserving his right to appeal the denial of his motion to suppress. The trial court consolidated the four possession offenses into one judgment and sentenced Defendant to a term of 90 to 120 months of imprisonment in the custody of the North Carolina Division of Adult Correction. The trial court consolidated the six possession-with-intent-to-distribute offenses into a separate judgment and sentenced Defendant to a consecutive term of 10 to 21 months of imprisonment.

¶ 13 On 11 September 2020, Defendant filed a petition for writ of certiorari with this Court, acknowledging that he failed to give proper notice of appeal from the judgments.

Discussion

¶ 14 Defendant argues that the trial court erred in denying his motion to suppress evidence seized pursuant to the search warrant, contending that the affidavit did not establish probable cause because the information supplied in support of a finding of

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[1] Under *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), a criminal defendant may enter a plea admitting that the State has sufficient evidence to obtain a conviction, and agreeing to be treated as guilty, while maintaining his or her innocence.

probable cause was stale. Defendant also argues that the more recent information provided by Mr. Poole was unreliable and lacked sufficient corroboration. We conclude that the trial court did not err in denying Defendant's motion to suppress.

A. Jurisdiction

¶ 15 N.C. Gen. Stat. § 15A-979(b) (2019) permits review of an order denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea. However,

> in order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: [First,] he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order[.]

State v. Cottrell, 234 N.C. App. 736, 739, 760 S.E.2d 274, 277 (2014). Defendant did so here. Second, "he must timely and properly appeal from the final judgment." *Id.* at 739–40, 760 S.E.2d at 277. This, Defendant's attorney failed to do. As such, Defendant has waived the appeal of right granted by statute. *Id.* at 739, 760 S.E.2d at 277.

¶ 16 Defendant has filed a petition for writ of certiorari, requesting discretionary review. "[I]t is apparent that the State was aware of [D]efendant's intent to appeal the denial of the motion to suppress prior to the entry of [D]efendant's guilty pleas and [that] [D]efendant has lost his appeal through no fault of his own[.]" *Id.* at 740, 760 S.E.2d at 277. Accordingly, we exercise our discretion to allow Defendant's petition for writ of certiorari and address the merits of Defendant's appeal.

B. Standard of Review

¶ 17 We review the denial of a motion to suppress using a two-part standard of review: "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) (citation omitted). Reviewing courts should interpret probable-cause affidavits in a "commonsense[ ] manner" and give "great deference" to a magistrate's probable-cause determination. *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) (citations omitted). "In practice, the reviewing court gives deference to the magistrate's determination by ensuring that the magistrate had a substantial basis for concluding that probable cause existed." *Id.* (emphasis, citation, and internal quotation marks omitted). "The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citation and internal quotation marks omitted).

C. Analysis

¶ 18 Both the Fourth Amendment to the United States Constitution and article I, section 20 of the Constitution of North Carolina prohibit unreasonable searches and seizures, and require that warrants be issued only upon a showing of probable cause. *Allman*, 369 N.C. at 293, 794 S.E.2d at 302–03. Moreover, "the probable cause analysis under the federal and state constitutions is identical"; we review the totality

of the circumstances to determine whether probable cause exists. *Id.* at 293, 794 S.E.2d at 303.

¶ 19 "In general, a neutral and detached magistrate . . . must determine whether probable cause exists." *Id.* at 294, 794 S.E.2d at 303 (citation and internal quotation marks omitted). The "magistrate may draw reasonable inferences from the available observations" when making his or her determination. *Id.* (citation and internal quotation marks omitted). "[A]s long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant." *Id.*

¶ 20 Under North Carolina law, a warrant application must be supported by an affidavit "particularly setting forth the facts and circumstances establishing probable cause to believe that the items subject to seizure are in the place to be searched." *Id.* (citation omitted). Generally, "[a] supporting affidavit is sufficient when it gives the 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." *Id.* (citation and internal quotation marks omitted).

¶ 21 The facts tending to establish probable cause must be "so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that

time." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock[,]" and "[c]ommon sense must be used in determining the degree of evaporation of probable cause." *Id.* at 566, 293 S.E.2d at 834. In determining whether the facts used to establish probable cause are "stale," courts consider "such variable factors as the character of the crime and the criminal, the nature of the item to be seized and the place to be searched." *Id.* "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990) (citation omitted).

¶ 22 For example, in *State v. Louchheim*, our Supreme Court concluded that information gathered 14 months prior to the submission of the warrant application was not stale where the alleged crime was complex and alleged to have taken place over a number of years, the place to be searched was an ongoing business, and the incriminating items were kept in the course of business of the defendant's corporation. 296 N.C. 314, 323–24, 250 S.E.2d 630, 636–37, *cert. denied*, 444 U.S. 836, 62 L. Ed. 2d 47 (1979). On the other hand, "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." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358 (citation omitted). In sum, our courts employ common sense and reason to determine

whether, based on the information presented in the warrant application, "the evidence sought is still in [the] place" to be searched. *Louchheim*, 296 N.C. at 323, 250 S.E.2d at 636 (citation omitted).

¶ 23 Our Court in *State v. Ledbetter* noted that "drug dealing is ordinarily a regenerating activity carried on over a period of time," 120 N.C. App. 117, 125, 461 S.E.2d 341, 346 (1995) (citation and internal quotation marks omitted), and, in concluding that the facts establishing probable cause were not stale, applied *Louchheim* to "consider particularly that the 'regenerating activity' of the sale of cocaine depicted in the affidavit . . . was stated and observed to have been conducted at [the] defendant's residence, indisputably a 'secure operational base[,]' " *id.* (quoting *Louchheim*, 296 N.C. at 323, 250 S.E.2d at 636).

¶ 24 Defendant challenges the trial court's conclusion that the facts alleged in the warrant application supported a finding of probable cause because the information upon which Det. Gordy relied was "stale." The trial court found as fact that a confidential informant made three undercover purchases of heroin from Defendant at Defendant's residence in August and September of 2017. The trial court further found that this confidential informant informed law enforcement that he had been purchasing heroin from Defendant since 2015, that he had been selling heroin with Defendant during 18 of the past 24 months, and that the purchases ranged in frequency from twice per month to two to three times per week. The trial court then

concluded that, based on the totality of the circumstances, the evidence supporting a finding of probable cause was "not stale[,]" and that therefore "Det. Gordy did have sufficient probable cause to request a search of [D]efendant's residence[.]"

¶ 25 We conclude that the trial court correctly determined that "the information constituting the probable cause in the search warrant [was not] so remote from the date of the affidavit as to render it improbable that the alleged violation of law authorizing the search was extant at the time the application for the search warrant was made." *Id.* (citation and internal quotation marks omitted). Here, as in *Ledbetter*, the affidavit established that Defendant was engaged in the "regenerating activity" of the sale of heroin, and that the sales were primarily "conducted at [D]efendant's residence, indisputably a 'secure operational base.' " *Id.* (quoting *Louchheim*, 296 N.C. at 323, 250 S.E.2d at 636). It was reasonable for the magistrate to conclude that, given Defendant's history and the continuous nature of his drug-dealing business, law enforcement would find heroin and other evidence of drug-dealing at Defendant's residence approximately five months after law enforcement conducted the controlled purchases. The affidavit stated that Defendant had been continuously dealing drugs from his residence in Gold Hill, and occasionally from the fire station across the street, for approximately two to three years prior to the date that Det. Gordy applied for a search warrant. The affidavit also established that the confidential informant had purchased heroin from Defendant approximately 100 times between 2015 and

2017, no less frequently than twice per month. Common sense and reason support an inference that evidence of drug crimes would still be in his home five months after the controlled purchases.

¶ 26 "Taken as a whole, therefore, and according due deference to the [magistrate]'s determination, the affidavit contained sufficient timely information to support a finding [that] there was a fair probability that the controlled substance[s] sought w[ere] to be found in the location to be searched." *Id.* (citations and internal quotation marks omitted). In other words, the evidence, considered in a commonsense manner, does not tend to support the conclusion, as Defendant suggests, that in the five months between the controlled purchases and the submission of the warrant application, Defendant would have ceased his drug-dealing operation and removed all evidence thereof from his residence. On the contrary, a commonsense interpretation of the evidence suggests that, having continuously dealt narcotics from his home for the previous two to three years, Defendant would have continued to do so for five additional months.

¶ 27 Because we conclude that the information contained in the warrant application regarding the confidential informant's history with Defendant and the three controlled purchases from Defendant was not stale and was sufficient to establish probable cause, we need not consider Defendant's alternate argument that the more recent information provided by Mr. Poole was unreliable and insufficiently

corroborated. *See id.* at 123–24, 461 S.E.2d at 345 (determining that the portions of an affidavit concerning a controlled purchase of narcotics were, alone, sufficient to support the magistrate's finding of probable cause).

Conclusion

¶ 28 Accordingly, we conclude that the trial court did not err in denying Defendant's motion to suppress evidence.

AFFIRMED.

Judge DIETZ concurs.

Judge HAMPSON concurs in result by separate opinion.

Report per Rule 30(e).

HAMPSON, Judge, concurring in result.

¶ 29 I agree the trial court's Order denying Defendant's Motion to Suppress should be affirmed. My analysis, however, differs from the majority.

¶ 30 On appeal, Defendant attempts to isolate the different parts of the affidavit supporting issuance of the search warrant by separating allegations of drug buys in 2017 and earlier—which evidence he claims is stale—and from the alleged drug deal in 2018—which evidence he claims is insufficiently reliable—occurring just a few days prior to the application for and issuance of the search warrant. While Defendant's arguments represent strong and compelling advocacy, ultimately, they fail to reflect the proper test for determining whether probable cause exists supporting issuance of the search warrant which is reliant on the totality of the circumstances. *State v. Allman*, 369 N.C. 292, 293-94, 794 S.E.2d 301, 302-03 (2016).

¶ 31 "To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw '[r]easonable inferences from the available observations.' " *Id.* at 294, 794 S.E.2d at 303 (alterations in the original) (quoting *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991)).

> A single piece of evidence may not necessarily be conclusive; as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant.

Id. (citations omitted). "Reviewing 'courts should not invalidate warrant[s] by

interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " *Id*. (alterations in the original) (quoting *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35).

¶ 32 Here, the affidavit asserts reliable information of three controlled drug buys in August 2017 at Defendant's residence, along with apparent historical information of drug purchases occurring at Defendant's residence dating back to 2015. Additionally, the affidavit further recounts a report of a drug purchase on 5 February 2018 at Defendant's residence from a separate source. This latter information was secured during a 6 February 2018 interview and the search warrant application was issued on 8 February 2018.

¶ 33 The magistrate issuing the warrant had the totality of this information and, in turn, the trial court's findings in its Order denying the Motion to Suppress also reflect the totality of these circumstances. Indeed, the trial court ultimately concluded: "Based on the totality of the circumstances as outlined in the probable cause affidavit of the search warrant, Det. Gordy did have sufficient probable cause to request a search of [D]efendant's residence, and the information from August 2017 was not stale."

¶ 34 Reviewing the circumstances alleged in the affidavit in their entirety in a commonsense fashion: the affidavit reflects information that multiple drug purchases from Defendant had taken place at Defendant's residence as recently as 5 February

2018, with prior known controlled buys in August 2017 at Defendant's residence, with a history of drug purchases from Defendant at his residence dating back to 2015. Viewed through the lens of Defendant's issues presented on appeal, the allegations of drug purchases in August 2017 and earlier may tend to make the report of the February 2018 buy more reliable, and in turn the report of the 2018 buy may tend to refresh any staleness arising from the historical information from 2017 and before.

¶ 35 In sum, the totality of the facts alleged provided a substantial basis for the magistrate to conclude probable cause existed to issue a search warrant on 8 February 2018. *See id*. ("In practice, the reviewing court gives deference to the magistrate's determination by 'ensur[ing] that the magistrate had *a substantial basis for . . . conclud[ing]* that probable cause existed.' ") (citations omitted) (alterations and emphasis in the original). In turn, the trial court properly concluded, based on its own findings of fact, "the totality of the circumstances as outlined in the probable cause affidavit of the search warrant," established sufficient probable cause to support the issuance of the search warrant. Accordingly, I agree the trial court's Order should be affirmed.