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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-329

Filed 6 February 2024

Brunswick County, No. 20 CRS 52125

STATE OF NORTH CAROLINA

v.

JASON ADAM MCCOY

Appeal by defendant from judgment entered 11 August 2022 by Judge Clint D. Rowe in Superior Court, Brunswick County. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

The Carolina Law Group, by Kirby H. Smith, III, for defendant-appellant.

ARROWOOD, Judge.

Jason Adam McCoy ("defendant") appeals from judgment entered upon his conviction for felony death by vehicle and driving while license was revoked ("DWLR"). For the following reasons, we dismiss defendant's ineffective assistance of counsel ("IAC") claim without prejudice to defendant's right to file a motion for

appropriate relief ("MAR") in superior court.

I. Background

On the evening of 18 April 2020, a black sedan was traveling at a high speed on Royal Oak Road in Supply, North Carolina, when nearby residents heard the sedan crash into a tree. When residents arrived at the crash site, they found defendant unresponsive in the backseat. The sedan's airbags had been deployed and the front passenger-side window "had been knocked out." Another person, Carter Mulligan ("Mr. Mulligan") was discovered lying several feet from the sedan. When emergency medical services ("EMS") arrived, they removed defendant from the vehicle and transported him to New Hanover Regional Medical Center ("NHRMC"). Mr. Mulligan was pronounced dead at the crash site. Neither defendant nor Mr. Mulligan had been wearing seatbelts.

Trooper Jacob Justice ("Trooper Justice") from the North Carolina State Highway Patrol arrived at the crash site shortly after EMS had left with defendant. Because the sedan had "ran off the road[,]" Trooper Justice initially suspected the crash was due to "bad driving" and not "impairment." However, Trooper Justice testified that his suspicion of impairment arose after finding an open box of alcoholic beverages in the passenger area.[1] Trooper Justice provided somewhat inconsistent

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[1] Trooper Justice could not recall whether the open box was empty or had alcoholic beverages inside it, nor whether any beverages were opened or unopened. No other alcohol-related substance or paraphernalia was found in the sedan at or at the crash site.

testimony as to the odor of alcohol at the crash site. Specifically, he testified that "the odor of alcohol wasn't detected inside the vehicle[,]" but when asked who detected the alcohol, Trooper Justice stated, "I did."[2]

After part of his investigation that evening, Trooper Justice met with Magistrate Kennedy Gilly ("Magistrate Gilly") at the Brunswick County Jail to apply for a search warrant to obtain defendant's blood sample. On the warrant application, Trooper Justice specified (1) his law enforcement experience, (2) the approximate time and location of the vehicle crash, and (3) that he had "ascertained that [defendant] was operating the [sedan] at the time" of the accident. Trooper Justice's application concluded that, based on this information, "and on [his] training in detecting impaired driving violations and experience as a law enforcement officer, [he had] formed an opinion satisfactory to [himself] that" defendant was "appreciably impair[ed]" and that defendant drove the sedan while impaired. The application provided no additional facts or details as to defendant's alleged impairment and included no attachments.

Magistrate Gilly approved the warrant application and issued a search warrant to Trooper Justice, which concluded there was probable cause to seize defendant's blood. With the warrant in hand, Trooper Justice went to NHRMC and

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[2] The transcript is thus unclear as to where Trooper Justice smelled the alcohol, if at all. Although no resident testified to smelling alcohol at the crash site, one resident testified to seeing unopened beer in the front seat while another resident testified to seeing beer cans in the backseat.

obtained a blood sample from defendant who was being seen in NHRMC's intensive care unit. Defendant's blood tested positive for cocaine and marijuana.

The following day, Trooper Justice requested assistance from North Carolina Highway Patrol's Crash Reconstruction Unit. Trooper Matthew Strangman ("Trooper Strangman") from the Reconstruction Unit later accompanied Trooper Justice to the crash site to investigate further. As the State's expert witness, Trooper Strangman testified that defendant was driving the sedan when it collided with the tree, and that following the collision, defendant was ejected into the backseat. On 23 April 2020, Trooper Strangman applied for and was issued a search warrant for defendant's medical records, which were subsequently obtained from NHRMC.

On 24 April 2020, Trooper Justice obtained a statement from defendant at defendant's home. The statement read

> [I] [defendant] was coming (driving) down Royal Oak rd[.] [I] came thru the last set of "S" curves before Monster buck estate's[.] [I] came up on a little old man on a bike when [I] realized [I] came up on him [I] sna[t]ched the steering wheel and over corrected throwing a bottle under the brake. [A]t that point [I] tried to figure out what was happening. [T]he last thing [I] remember was t[r]ying not to freak out or get scared. [I] woke up in the hospital confused and scared[.]

On 29 May 2020, defendant was charged with felony death by motor vehicle for unintentionally causing the death of Mr. Mulligan while engaging in the offense of impaired driving. Defendant was indicted by a grand jury on that charge and for DWLR on 6 July 2020. A notice of aggravating factors was filed by the State on

27 January 2022.

The case came on for jury trial on 9 August 2022 in Brunswick County, Superior Court. Defendant moved to dismiss the charges at the close of the State's evidence, but the motion was denied. After electing not to present evidence, defendant renewed the motion, but it was again denied. The jury found defendant guilty of felony death by motor vehicle and DWLR on 11 August 2022.[3] The trial court consolidated the charges and sentenced defendant to no less than 73 months and no more than 100 months in the North Carolina Department of Adult Correction.

Immediately following the sentence, defendant moved orally for appropriate relief on the grounds that the verdict was contrary to the weight of the evidence. Specifically, defense counsel stated that the motion was based on a question of "mixed law and fact" and that defendant was entitled to an evidentiary hearing. Defendant's motion was denied. Defendant then gave an oral notice of appeal.

II. Discussion

On appeal, defendant argues that he received IAC because his attorney did not file a motion to suppress the blood draw evidence that resulted from a search warrant application not supported by probable cause. Because the record before us is insufficient to determine the IAC claim, the appeal is dismissed without prejudice.

A. Ineffective Assistance of Counsel

[3] The jury did not find that any aggravating factors existed.

In *State v. Braswell*, our Supreme Court adopted the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), as the "uniform standard" to measure IAC claims. 312 N.C. 553, 562 (1985). Under the *Strickland* test, the defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced their defense. *State v. Allen*, 378 N.C. 286, 298 (2021) (citations omitted). Deficient performance means that "counsel's representation fell below an objective standard of reasonableness[,]" whereas prejudice means "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694.

Generally, IAC claims should be considered through MARs rather than on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553 (2001), *cert. denied*, 356 N.C. 623 (2002) (citations omitted); *see also State v. Dockery*, 78 N.C. App. 190, 192 (1985) ("The accepted practice is to raise claims of [IAC] in post-conviction proceedings[.]"). In *State v. Buckner*, our Supreme Court explained that a MAR is the preferred mechanism for IAC claims vis-à-vis direct appeal because

> to defend against IAC allegation, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance. Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.

351 N.C. 401, 412 (2000) (cleaned up). Therefore—as instructed by our Supreme Court—when an IAC claim is prematurely asserted on direct appeal, this Court shall dismiss the claim without prejudice "to the defendant's right to reassert [the claim] during a subsequent MAR proceeding." *State v. Fair*, 354 N.C. 131, 167 (2001), *cert. denied*, 535 U.S. 1114 (2002) (citation omitted).

In *State v. Rivera*, this Court explained that it is *rarely appropriate* to review IAC claims on direct appeal when a defense counsel fails to file a motion to suppress because "to hold that defendant has met his burden of showing prejudice, we would have to hold, at least implicitly, that there was no legitimate possibility that additional relevant evidence would have been elicited had a suppression hearing been conducted." 264 N.C. App. 525, 536–41 (2019) (cleaned up). Consequently, it is "difficult, if not impossible, to conduct meaningful prejudicial review" when we "can only surmise who might have testified at the suppression hearing and what evidence that testimony would have elicited." *Id.* at 539. Because we do not know what evidence might have been introduced in a suppression hearing that never happened, our direct review is thus inadequate "unless it is clear that an MAR proceeding would not result in additional evidence that could influence our decision on appellate review." *Id.* at 541; *see also State v. Allen*, 262 N.C. App. 284, 286 (2018) ("Defendant's [IAC] claim is premature in that the record before this Court is inadequate and precludes our review of whether . . . counsel's errors, if any, were prejudicial."); *State v. Yates*, 895 S.E.2d 484, 2023 WL 8754407, at *3 (2023) (unpublished) ("[I]n the

absence of a developed record on a motion to suppress, we are unable to decide [d]efendant's IAC based on the cold record on appeal.").

Here, we agree defendant has made a cognizable Fourth Amendment claim. Because Trooper Justice's search warrant application was bare boned at best, we can see how a potential suppression claim might have been advanced. *See State v. Eddings*, 280 N.C. App. 204, 210 (2021) (explaining that warrant applications "must contain some of the underlying circumstances to support the officer's belief that probable cause existed" and that "the issuing magistrate may not rely on an officer's mere belief that probable cause existed." (cleaned up)); *see also* N.C.G.S. § 15A-244 (requiring that search warrant applications contain a statement that probable cause exists and "allegations of fact supporting the statement" that "set forth the facts and circumstances establishing probable cause." (cleaned up)). Thus, moving to suppress the State's blood evidence could have potentially removed key evidence supporting defendant's alleged impairment.[4]

However, assuming arguendo defense counsel's performance was deficient, the record before us is not adequate to measure the prejudice prong of the *Strickland* test. Specifically, defendant must show "that there is a reasonable probability that, but for

[4] The State contends that defense counsel's decision not to move to suppress the blood evidence "could have been a likely strategy for establishing [d]efendant's arguments during trial"—e.g., allowing defense counsel to "attack[ ] the toxicologist's qualifications in order to limit her ability to describe or detect impairment." We need not reach this argument.

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. 668, 694. Defendant argues that "[b]ut for the erroneous issuance" of the warrant for defendant's blood, "the State would have had no evidence of impairment to offer at trial and [defendant] could not have been convicted[.]"

Yet, because defendant did not move to suppress, the State did not get the opportunity to develop a record vis-à-vis defendant's Fourth Amendment claims, which "is one of the main purposes of a suppression hearing." *State v. Miller*, 371 N.C. 266, 270 (2018); *see also Rivera*, 264 N.C. App. at 538 ("At a suppression hearing, both the defendant and the State can proffer testimony and any other admissible evidence that they deem relevant to the trial court's suppression determination."). Like in *Rivera*, "[t]his Court can only surmise who might have testified at the suppression hearing and what evidence that testimony would have elicited." *Rivera*, 264 N.C. App. 525, 539. Consequently, it is "difficult, if not impossible, to conduct meaningful prejudice review." *Id.*

Accordingly, this Court is unable to determine defendant's claim on the record's face and it must be dismissed "without prejudice to defendant's right to file a [MAR] in the superior court based upon an allegation of [IAC]." *Fair*, 354 N.C. 131 at 167 (quoting *State v. Kinch*, 314 N.C. 99, 106 (1985)). In addition, we do not reach the issue of whether any effort was prejudicial in view of the State later obtaining the medical record.

III. Conclusion

For the foregoing reasons, we dismiss defendant's IAC claim without prejudice.

DISMISSED WITHOUT PREJUDICE.

Judges COLLINS and FLOOD concur.

Report per Rule 30(e).