IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-381

Filed 16 January 2024

Craven County, Nos. 17 CRS 50459; 17 CRS 50507; 17 CRS 51161

STATE OF NORTH CAROLINA

v.

KENNETH GILL

Appeal by Defendant from judgments entered 13 June 2022 by Judge Phyllis M. Gorham in Craven County Superior Court. Heard in the Court of Appeals 17 October 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin T. Spangler, for the State.*

*Sarah Holladay, for the Defendant.*

WOOD, Judge.

Kenneth Gill ("Defendant") appeals from a judgment entered upon a jury verdict of guilty of trafficking opium or heroin by possession, possession with intent to sell or deliver cocaine, and two counts of possession of a firearm by a convicted felon. After careful review of the record and applicable law, we overrule Defendant's

argument that he received ineffective assistance of counsel but remand the restitution order to the trial court to correct an error regarding the Crime Lab fee.

## I. Factual and Procedural Background

On 15 February 2017, three men broke into the residence of Mr. and Mrs. McCoy. The three assailants assaulted Mr. McCoy and demanded the key to the couple's gun cabinet as well as the combination for a hidden safe. The assailants stole five to seven guns from the residence. Before the burglary, Dylan McCoy ("McCoy") had successfully stolen firearms from his grandparents' home to sell the guns for drugs on several occasions.

McCoy's father suspected his own son's involvement in the 15 February 2017 burglary and alerted the police. When the police located McCoy, he had firearms in his possession that he had stolen during a separate burglary he committed in the intervening hours. When questioned about his involvement in the home invasion of his grandparents' residence, McCoy confessed to orchestrating the crime of stealing the firearms. McCoy told officers that Defendant was involved in the burglary as he was one of the three assailants who broke into his grandparents' home and stole their firearms. McCoy told the officers that he provided to Defendant, as well as the other assailants, a detailed description of the inside of his grandparents' home and the location of the firearms and the hidden safe, and he had surveilled his grandparents' home with the three suspects. McCoy also stated he had sold stolen firearms to Defendant in the past, including guns stolen from his grandparents' home, in

exchange for cash and narcotics. McCoy further admitted that he had been on his way to sell stolen firearms to Defendant but was intercepted by Craven County Sheriff's Office Investigators before the transaction could occur.

After this information was obtained from McCoy's interview with police, Investigator Peluso sought and obtained a search warrant from Magistrate Cedric Hargett on 16 February 2017. Investigator Peluso's search warrant application is captioned "In the matter of Kenneth Gill 652 McLawhorn Ln Vanceboro NC, 28586." The premises is described as "a single wide mobile home with an attached wooden porch, in Vanceboro NC . . . mailbox . . . clearly marked 652." Items to be seized are listed as: (1) firearms; (2) illegal narcotics; and (3) paperwork, mail, or documentation supporting residence and/or vehicle ownership. The Vanceboro residence, persons located at the residence, vehicles found on the property, and outbuildings are included in the request to be searched.

In the application, paragraph 1 describes Investigator Peluso's experience and training as a law enforcement officer. Paragraph 2 details the Cove City burglary on 15 February 2017, including the alleged involvement of three male suspects appearing to have prior knowledge of the residence's interior and the location of the hidden safe and the five to seven guns stolen from the residence. Paragraph 3 references McCoy as a suspect in the investigation, and his location at a residence in Craven County when police questioned him about the home invasion. Paragraph 4 details McCoy's confession of his involvement in the Cove City burglary where

Defendant is implicated as a co-conspirator. Paragraph 5 describes McCoy, Defendant, and two other suspects as repeatedly surveilling the Cove City residence and McCoy as having provided a description of the interior of his grandparent's home and the location of the gun cabinet key to Defendant and the accomplices. Paragraph 6 reports that McCoy previously sold firearms to Defendant, including two handguns, which were traded in exchange for cash and narcotics. Paragraph 7 states that, prior to being arrested, McCoy burglarized a residence that same day and intended to sell the firearms stolen in that robbery to Defendant. Paragraph 8 states that McCoy provided Defendant with a detailed interior description of his grandparents' residence.

Finally, the bottom of the affidavit reads, "[b]ased upon the facts described above, and my training and experience, I believe that there is probable cause to believe that the items to be seized are in/at the location to be searched."

After obtaining the warrant, Investigator Peluso initiated surveillance of the Vanceboro residence listed in the warrant's application. The Craven County Narcotics Division conducted surveillance for approximately three hours before executing the search warrant. Later that day, Investigator Peluso and a line of officers attempted to execute the warrant by first, knocking and announcing themselves. After receiving no response, the officers entered the home through the back door and located Defendant in the master bedroom. Subsequently, officers seized a nine-millimeter pistol, 9.27 grams of heroin and 23.47 grams of cocaine from

the bedroom and vehicles parked outside the home.

Consequently, Defendant was arrested for trafficking heroin, possession with intent to sell or deliver cocaine, and possession of a firearm by a felon. While detained at the Craven County Jail on the above charges, Defendant made a phone call, during which he stated, "get my Draco." Officers listening to the phone call heard Defendant's reference to another firearm. Law enforcement later obtained a "Draco AK-47" pistol from the residence of Charles Bramlett, who stated he was holding the firearm for Defendant. This resulted in an additional charge of possession of a firearm by a felon and Defendant's subsequent arrest.

On 11 September 2017, Defendant was indicted for trafficking opium or heroin, possession of a controlled substance with the intent to manufacture, sell or deliver cocaine, first-degree burglary, possession of a firearm by a felon, conspiracy to break/enter building to commit a felony or larceny, possession of a stolen firearm, second-degree kidnapping, trafficking heroin, possession with intent to manufacture, sell, or deliver, seven counts of larceny of a firearm, and assault with a deadly weapon. On 9 April 2018, Defendant was indicted for possession of a firearm by a felon.

Defendant's charges came on for trial at the 6 June 2022 Criminal Session of Craven County Superior Court. Defendant's trial counsel did not file a motion to suppress the evidence seized pursuant to the search warrant. Additionally, Defendant's trial counsel did not object to the admission of the search warrant and

the application for the search warrant into evidence. At trial, Investigator Peluso testified that he executed a search warrant at Defendant's residence. On cross-examination of Investigator Peluso, Defendant's trial counsel affirmed that Investigator Peluso went to Defendant's home when conducting the search warrant on the McLawhorn Lane residence in Vanceboro. At the close of its evidence, the State voluntarily dismissed the charges of conspiracy and possession of a stolen firearm.

On 13 June 2022, a jury returned verdicts of guilty on the following charges: trafficking opium or heroin by possession, possession with intent to sell or deliver cocaine, and two counts of possession of a firearm by a felon. The jury found Defendant not guilty of first-degree burglary, second-degree kidnapping, seven counts of larceny of a firearm, and assault with a deadly weapon.

For the conviction of trafficking in heroin by possession, the trial court sentenced Defendant to 70 to 93 months in custody. For the conviction of possession with intent to sell or deliver cocaine, the trial court sentenced Defendant to 10 to 21 months to run concurrently with the 70 to 93 months sentence. For the conviction of possession of a firearm by a felon, the trial court sentenced Defendant to a minimum of 17 and a maximum of 30 months to run at the expiration of the 70 to 93 months sentence. The court also assessed the mandatory $50,000 fine for trafficking and ordered the payment of restitution to the State Crime Laboratory for services provided. Defendant gave notice of appeal in open court.

## II. Analysis

### A. Ineffective Assistance of Counsel Claim on Failure to Move to Suppress Evidence Seized Pursuant to the Search Warrant.

Defendant argues he received ineffective assistance of counsel when his defense counsel failed to move to suppress the evidence seized pursuant to the search warrant issued for the residence in Vanceboro. According to Defendant, Investigator Peluso's affidavit failed to establish probable cause as required by N.C. Gen. Stat. § 15A-244 and the Fourth Amendment because (1) it does not allege any nexus of the Vanceboro address to the Cove City burglary; (2) it does not provide an explanation of why evidence related to the burglary might be found at that location; and (3) it does not allege any connection between the Vanceboro address and Defendant. We note Defendant did not object to, and does not now assign error to, the search warrant itself or the admission of evidence discovered during the search of Defendant's property.

Generally, ineffective assistance of counsel claims should "be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018) (citation omitted). However, ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or

an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted).

We review a claim of ineffective assistance of counsel *de novo*. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). In order to establish a claim for ineffective assistance of counsel, Defendant must first show that his trial counsel's performance was deficient so that counsel's representation fell below an objective standard of reasonableness. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (cleaned up). When determining an objective standard of reasonableness, Defendant must overcome a strong presumption that the challenged action "might be considered sound trial strategy." *State v. Stroud*, 147 N.C. App. 549, 555, 557 S.E.2d 544, 548 (2001) (citation omitted).

If able to overcome this presumption, Defendant must then show that the deficiency in his trial counsel's performance was so serious that a reasonable probability exists that, but for counsel's errors, the result of the trial would have been different. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). "Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001).

"The Fourth Amendment to the United States Constitution protects the people from unreasonable searches and seizures." *State v. Kochetkov*, 280 N.C. App. 351, 353, 866 S.E.2d 804, 807 (2021) (cleaned up). "Generally, the police need a warrant

to conduct a search or seizure in a home, and a warrant may be issued only after a showing of probable cause." *Id.* Article I, Section 20 of the North Carolina Constitution similarly prohibits unreasonable searches and requires a showing of probable cause to issue a warrant. *Id.* Probable cause provides "reasonable cause to believe that" a search of the proposed premises will yield "objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Logan*, 278 N.C. App. 319, 324, 861 S.E.2d 908 (2021). *See also* N.C. Gen. Stat. § 15A-244 (2023).

Whether probable cause exists is assessed using the totality of the circumstances test. *State v. Parson*, 250 N.C. App. 142, 151, 791 S.E.2d 528, 536 (2016). Specifically, the test determines "whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *State v. Edwards*, 185 N.C. App. 701, 702-03; 649 S.E.2d 646, 648-49 (2007). The showing of probable cause is not determined by the affiant but rather by the issuing magistrate. *State v. Eddings*, 280 N.C. App. 204, 210, 866 S.E.2d 499, 502 (2021). Ultimately, the magistrate "must make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that . . . evidence of a crime will be found in a particular place." *Id.*

An application for a search warrant must include "a statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person" and "must be

supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244. The search warrant must "establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997)

An application for a search warrant must establish "a nexus between the objects sought and the place to be searched. Generally, this connection is made by 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." *Parson*, 250 N.C. App. at 152, 791 S.E.2d at 536. The nexus is subject to an identical "totality of the circumstances inquiry" as the evidence considered for probable cause. *State v. Eddings*, 280 N.C. App. 204, 210, 866 S.E.2d 499, 502 (2021). However, absent direct evidence "concerning the location of objects, reasonable inferences may be entertained concerning the likely location of those items." *Id.* (cleaned up).

We note that while the issue of the validity of the search warrant and resulting evidence is not before this court for review, the viability of a motion to suppress the evidence obtained from the search warrant forms the sole basis for Defendant's ineffective assistance of counsel claim.

In reviewing the application for the search warrant, the affidavit details: (1)

the Vanceboro address as the residence to be searched in connection with the investigation of Defendant; (2) an explanation of Defendant's connection to the burglary at Cove City and his previous connections with McCoy; (3) Defendant's alleged involvement in the burglary paired with Investigator Peluso's belief that evidence related to the burglary may be located at the Vanceboro address; and (4) belief that the search will uncover evidence that Defendant owns or rents the property that is to be searched.

A magistrate judge is permitted to "draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant." *Eddings*, 280 N.C. App at 210, 866 S.E.2d at 504. Drawing reasonable inferences from the evidence presented in Investigator Peluso's sworn affidavit, a magistrate judge could have reasonably believed evidence of the Cove City burglary would be found at the McLawhorn Lane home as it is reasonable to believe a person might keep the fruits of their crimes in or around their home. Accordingly, it was not an unreasonable trial strategy for Defendant's trial counsel to avoid seeking to have the evidence seized as a result of the search warrant excluded because the supporting affidavit contains sufficient information to establish probable cause.

The State further argues, "[d]efense counsel may have concluded that the Search Warrant and supporting affidavit were sufficient and that any Motion to Suppress would have been futile and only served to irritate the court. Likewise, defense counsel may have wanted the results of the search to come into evidence

because the absence of stolen goods supports Defendant's contention that he did not participate in the robbery he was charged with." These are compelling arguments and are not unreasonable trial strategies. In fact, Defendant's trial counsel's strategy appears to have been successful in avoiding criminal liability for the charges related to the burglary as Defense counsel relied on the search in his closing arguments to highlight the fact that none of the stolen goods were discovered at Defendant's residence and Defendant was acquitted of several charges. Because "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics," we hold that Defendant's trial counsel's performance did not fall below an objective standard of reasonableness. *State v. Taylor*, 79 N.C. App. 635, 638, 339 S.E.2d 859, 861 (1986).

**B. Restitution fees.**

Next, Defendant argues that the trial court erred in ordering Defendant to pay $600.00 in restitution to the State Crime Laboratory for its processing of evidence used at trial. The State concedes that the trial court erred in ordering Defendant to pay $600.00 in restitution to the State Crime Laboratory rather than the North Carolina Department of Justice. We agree.

This Court reviews restitution awards *de novo*. *State v. Hunt*, 250 N.C. App. 238, 253, 792 S.E.2d 552, 563 (2016). Restitution is a money award the defendant is ordered to pay to "a person directly and proximately harmed as a result of the defendant's commission of the criminal offense." N.C. Gen. Stat. § 15A-1340.34(a).

This award is intended to compensate the victim or their estate "for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b). We agree with Defendant that the trial court did not have the statutory authority to order a restitution payment to the Crime Lab.

N.C. Gen. Stat. § 7A-304(a)(7) provides that in cases where the Crime Lab has performed testing on controlled substances connected to a party, the party shall be ordered to pay $600.00 in costs "to be remitted to the Department of Justice." N.C. Gen. Stat. § 7A-304(a)(7). We agree with Defendant that the trial court probably intended to enter an order for court costs rather than restitution and also that it ordered payment of the fee to the wrong entity. We also note, however, that all court costs were waived in the judgment. We vacate the restitution award in the judgment and remand to the trial court to correct the error regarding the Crime Lab fee.

## III. Conclusion

For the foregoing reasons, we overrule Defendant's claim of ineffective assistance of counsel. We hold Defendant received a fair trial, free from error. We vacate the restitution award and remand the judgment to the trial court to correct the error regarding the Crime Lab fee.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges ZACHARY and STADING concur.

Report per Rule 30(e).