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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-449

Filed 6 February 2024

Avery County,[1] Nos. 20-CRS-50445; 22-CRS-29

STATE OF NORTH CAROLINA

v.

SHANNON KIRKPATRICK

Appeal by defendant from judgments entered 13 April 2022 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 10 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for State-appellee.

Shawn R. Evans for defendant-appellant.

THOMPSON, Judge.

Defendant Shannon Kirkpatrick appeals from judgments entered upon her

[1] We observe that the record on appeal—filed by defendant—and the brief of the State—appellee in this matter—each indicate that this appeal reaches the Court from Cabarrus County, which is in Superior Court District 19A, while every document in the record, as well as the amended brief of defendant, correctly denotes the case as originating in Avery County (Superior Court District 24). The Court notes that, following the record, every other filing by defendant has noted the correct county.

convictions for possession with intent to sell or distribute methamphetamine and attaining habitual felon status for which she was sentenced to an active sentence of a minimum of 84 months and a maximum of 113 months. Defendant contends that the trial court erred by denying defendant's motion to continue when she had been unable to meet with her retained counsel prior to trial due to health reasons to discuss trial preparation and the filing of pre-trial motions, and that defense counsel provided ineffective assistance of counsel by failing to make a motion to suppress the search warrant in the case. After careful consideration, we find no error in the denial of the motion to continue and no merit in defendant's ineffective assistance of counsel claim.

I. Factual Background and Procedural History

When this matter was called for trial on 11 April 2022, the evidence presented tended to show the following: On 17 June 2020, Detective Casey Lee of the Avery County Sheriff's Office was notified by a confidential informant that defendant was traveling "off the mountain" to purchase $3000 of methamphetamine which she would then transport to her residence, a white mobile home located at 55 Claude Pyatte Road. Detective Lee had worked with the confidential informant for approximately nine years and during that time, the confidential informant had provided Lee with information that led to the arrest and conviction of multiple defendants. Detective Lee asked the confidential informant to alert him when

defendant returned to her residence.[2] Upon being advised by the informant later that same day that defendant had returned, Detective Lee applied for and received a search warrant based on the facts supplied by the confidential informant along with additional information from Lee, an experienced narcotics officer who was familiar with defendant from prior narcotics investigations involving methamphetamine. Around 5:20 p.m. on 17 June 2020, a magistrate issued the warrant which allowed a search of defendant's residence and the seizure of any methamphetamine found at the property.

At 10:11 p.m. on 17 June 2020, Detective Lee and a special response team executed the warrant. Defendant and several other people whom Lee knew to be methamphetamine users were present at the residence during the search. Deputy Sheriff Cody Carpenter and Detective Ridge Phillips, two members of the response team, conducted a search of the property and encountered defendant as she emerged from a camper located near the driveway. While talking with defendant, Carpenter and Phillips noticed defendant's attention was repeatedly drawn toward the corner of an outbuilding close to the camper. After moving several items and some trash, Carpenter found a package with a white, crystal-like substance located within three feet of defendant. Detective Lee determined that the package likely contained

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[2] At trial, Detective Lee testified that the confidential informant was at defendant's residence both when defendant left to purchase the methamphetamine as well as when she returned with the drugs.

methamphetamine in an amount consistent with the sale reported by the confidential informant. At the scene of its discovery, the suspected methamphetamine was determined to weigh 18 grams.

The substance recovered from defendant's property was confirmed to be methamphetamine weighing approximately 17 grams, and as a result, on 26 October 2020 defendant was charged with trafficking narcotics. Defendant was initially represented by court-appointed counsel but later hired a private attorney to represent her on the drug-related charges in September 2021.

In November 2021 and again in January 2022, defendant tested positive for COVID-19 and was hospitalized for a suppressed immune system. On 11 April 2022, the case was called for trial in the Superior Court, Avery County. Defense counsel requested a continuance, citing defendant's medical issues as a basis for his inability to meet with defendant in order to prepare for trial. The trial court denied the motion to continue. During opening statements, defense counsel made some remarks which the trial court interpreted as an oral motion to suppress the evidence recovered during the search of defendant's property. After dismissing the jury and hearing brief arguments from the parties, the trial court summarily denied the motion to suppress, and the trial then proceeded. The charge of trafficking in methamphetamine was dismissed due to insufficient evidence, while defendant was found guilty of possession with intent to sell or distribute methamphetamine and then pled guilty to attaining habitual felon status. Defendant was sentenced to 84 to 113 months of active time,

and she gave oral notice of appeal on 11 April 2022.

II. Analysis

Before this Court, defendant presents two arguments on appeal: (1) the trial court erred in denying her motion to continue and (2) her trial counsel failed to provide the effective legal assistance to which defendant is constitutionally entitled. We discern no error in the trial court's denial of defendant's motion to continue, and no prejudice to defendant in the challenged acts of her trial counsel.

A. Motion to continue

> The standard of review utilized by an appellate court in reviewing a trial court's denial of a party's motion to continue varies depending on the reason the party sought the continuance. Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable de novo.

In re C.A.B., 381 N.C. 105, 112, 871 S.E.2d 468, 474 (2022) (citations and quotation marks omitted). Defendant contends that her case presents constitutional questions, and therefore de novo review is appropriate. Although the transcript reveals that defendant never cited any constitutional provision or explicitly cited either the federal or state constitution in the trial court when seeking the continuance—as discussed in more detail below—out of an abundance of caution, we nonetheless

consider the motion to continue de novo. In any event, here the result would not differ regardless of the standard of review employed.

" 'Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.' " *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). *See also State v. Gibson*, 229 N.C. 497, 501, 50 S.E.2d 520, 523 (1948) ("As a general rule, continuances are not favored, and ought not to be granted unless the reasons therefor are fully established."). "Moreover, because "[c]ontinuances should not be granted unless the reasons therefore are fully established[,] . . . *a motion for continuance should be supported by an affidavit* showing sufficient grounds." *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984) (emphasis added) (citations omitted).

"To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, [a] defendant must show how [her] case would have been better prepared had the continuance been granted or that [she] was materially prejudiced by the denial of [her] motion." *State v. McCullers*, 341 N.C. 19, 31–32, 460 S.E.2d 163, 170 (1995) (citation and quotation marks omitted). Specifically, a defendant is entitled to relief where she can establish that she did not have ample time to confer with counsel and to investigate, prepare, and present her defense. *State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976). "However, no

set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case." *Id.* (citations omitted).

When this case was called, trial counsel for defendant stated to the trial court:

> Your honor, if I may say, this would be my motion to continue. I know this has previously been on the trial calendar back in February. If you look in the court record, there should be some medical records in there. [Defendant] has been diagnosed with COVID on two separate occasions in November and then again in February. She has extensive health issues with it, was in isolation for a long period of time. I was not able to get her into my office to even really start preparing for trial until this past week. I would hate for this to come back on MAR for ineffective assistance since, due to her health issues that had been ongoing since really November. If we proceed under these circumstances that, I'm afraid, you know, we might be coming back on MAR.
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> I discussed this with [the prosecutor], I know, at the last court date. I had supplied him with several medical records for [defendant] which showed that she was having severe reactions, was in isolation, uh, that due to her COVID-positive test and some autoimmune disorders that she does have, that it was, it very adversely affected her health. And again, like I said, up until last week I was unable to even meet with [defendant] in person.
>
> But based upon those circumstances, the State would not be prejudiced if we were to do one last continuance, and even if we were to set this over for the next term and give [defendant] and I an opportunity to fully sit down—there are some motions that would need to be filed pretrial in this, and I would need to get affidavits from [defendant], and, again, I was unable to do due to the fact that she could not come into my office due to her health.

> Secondly, my office was served with a motion to amend the indictment this past week. I would like an opportunity to be able to review the case law on that that's been cited by [the prosecutor]. I definitely don't doubt [the prosecutor's] arguments in it, but I would also at least like to have an opportunity to fully review that, review the case law. I believe we were served that last Thursday afternoon. And based upon that as well, I feel like this one last time of continuance would be warranted.

Nothing in the record indicates that defendant submitted an affidavit in support of this oral request.

Thereafter, upon inquiry by the trial court, the prosecutor clarified that the State's motion to amend the indictment in defendant's case concerned a minimal clerical correction—to wit: to change the listed case file number from "181 CRS 50536" to "18 CRS 50536." Defense counsel then acknowledged that this "amendment" would not change the substance of the charge alleged. Defense counsel also conceded, upon questioning by the trial court, that he had received full discovery in the matter by "late December," some three and one-half months before the calling of the case and his request for more time to prepare. Following that admission, the trial court denied defendant's motion to continue.

We find the circumstances surrounding the denial of defendant's continuance request indistinguishable in any meaningful way from those in *Horner*, where the defendant filed a motion to continue, along with a motion for additional discovery, five days before trial was set to begin. 310 N.C. at 277, 311 S.E.2d at 284. The trial

court held that the State had fully complied with the discovery motion and denied the continuance. *Id.* As here, the defendant did not file an affidavit in support of his motion for a continuance and only

> told the trial court in a general way that he had not had sufficient time to examine the discovery material, he did not give specific reasons to support the assertion. Furthermore, [the] defendant failed to introduce into evidence the discovery materials he allegedly needed additional time to review. Absent these materials, the reviewing court is left with only the naked assertion of [the] defendant that he required additional time to review the materials.

Id. at 277–78, 311 S.E.2d at 284. The Supreme Court, therefore, held that the "[d]efendant has failed to present us with adequate and specific circumstances of the case to support his claim of constitutional violation." *Id.* at 278, 311 S.E.2d at 284 (citation omitted).

Here, defendant (1) had received full discovery—albeit months before trial rather than mere days before as was the case in *Horner*, (2) failed to submit an affidavit in support of her motion, (3) made only general claims about the need for additional time to prepare, and (4) did not specify what materials, witnesses, or other potential evidence would need to be developed or reviewed. Moreover, while we certainly appreciate the difficulties presented by defendant's bouts with COVID and her medical vulnerabilities, she has failed to explain why she could not meet with her counsel either prior to or after her February illness or why remote communication technologies could not have been utilized to protect defendant's compromised immune

system while allowing defense counsel to adequately prepare for trial. As the moving party, it was defendant's burden to establish her entitlement to a continuance, *McCullers*, 341 N.C. at 31–32, 460 S.E.2d at 170 (citation and quotation marks omitted), but because she made only a "naked assertion of [her need for] additional time," she "has failed to present us with adequate and specific circumstances of the case to support [her] claim of constitutional violation." *Horner*, 310 N.C. at 278, 311 S.E.2d at 284 (citation omitted). Accordingly, defendant's argument that the trial court erred in denying her motion for a continuance is overruled.

B. Ineffective assistance of counsel

Defendant also argues that she received ineffective assistance from her trial counsel in that he failed to file a written pretrial motion, accompanied by an affidavit, to suppress the evidence obtained upon the execution of the search warrant for defendant's property. We disagree.

> This Court has expressly adopted the two-part test articulated in *Strickland v. Washington*, as the uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution and the Sixth Amendment to the Constitution of the United States. Under the first prong of the *Strickland* test, a defendant must establish that counsel's performance was deficient. To prove deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Under the second prong of the *Strickland* test, the defendant must demonstrate that the deficient performance prejudiced his defense. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

> have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 378 N.C. 286, 298–99, 861 S.E.2d 273, 282–83 (2021) (citations, quotation marks, and brackets omitted).

While "[i]n general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal," *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002), "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. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted), *cert. denied sub nom. Fair v. North Carolina*, 535 U.S. 1114 (2002).

Both defendant and the State contend that the "cold record" in this case is sufficient to permit our review of defendant's ineffective assistance of counsel claim, although each side strenuously disagrees about the result we should reach upon such consideration. After careful consideration, we agree and conclude that, even assuming *arguendo* defendant's trial "counsel's performance was deficient," defendant cannot establish that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Allen*, 378 N.C. at 298–99, 861 S.E.2d at 283 (citations and quotation marks omitted).

The transcript reveals that defense counsel only moved to suppress the evidence in question on the day of trial and that he did so orally and without submitting a supporting affidavit, in violation of our General Statutes. N.C. Gen. Stat. § 15A-975 (2021) (specifying that, in the absence of certain situations not pertinent in defendant's case, "[i]n superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial"); N.C. Gen. Stat. § 15A-977 (2021) ("A motion to suppress evidence in superior court made before trial must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made. The motion must be accompanied by an affidavit containing facts supporting the motion. . . ."). Given defense counsel's apparent failure to understand even these basic requirements and the options for properly moving to suppress evidence—that his client did not need to give or sign an affidavit in support of a motion; that counsel himself could have drafted and signed an affidavit based upon his review of the search warrant and controlling legal authorities; that such a motion could be made in a timely fashion and in writing to preserve the option to proceed upon it, even if counsel later elected to withdraw the motion, points made by the trial court itself in open court—defense counsel's choices could potentially be considered deficient if they did not result from some strategic decision not openly apparent. *But see State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001) (stating that "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"), *cert. denied sub nom. Fletcher v. North Carolina*, 537 U.S. 846 (2002).

However, we need not venture down that line of inquiry or dismiss this argument so that it might be raised via motion for appropriate relief in the superior court. "Under *Strickland*, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,' we need not determine whether counsel's performance was deficient." *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (quoting *Strickland*, 466 U.S. at 697), *cert. denied sub nom. Phillips v. North Carolina*, 565 U.S. 1204 (2012). Here, the record on appeal is entirely sufficient for this Court to determine that defendant cannot establish prejudice by any deficient performance by her trial counsel, given that the search warrant was supported by probable cause and thus constitutionally valid.[3]

As our Supreme Court has summarized:

> Under North Carolina law, an application for a search warrant must be supported by an affidavit detailing the facts and circumstances establishing probable cause to believe that the items are in the places to be searched. 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

[3] We infer from the transcript that defense counsel referenced a motion to suppress or made some remark during his opening statement which the trial court interpreted as making such a motion. Opening statements were not recorded, but it appears that the trial court halted defendant's opening statement, and after dismissing the jury for the day, the discussion of defendant's motion to suppress ensued.

> place to be searched. This standard for determining probable cause is flexible, permitting the magistrate to draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant. That evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience.
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> Probable cause requires not certainty, but only a probability or substantial chance of criminal activity. The magistrate's determination of probable cause is given great deference and after-the-fact scrutiny should not take the form of a de novo review. Instead, a reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed.

State v. McKinney, 368 N.C. 161, 164–65, 775 S.E.2d 821, 824–25 (2015) (citations, quotation marks, brackets, and ellipses omitted).

The search warrant here was issued "In the Matter of 55 Claude Pyatte Rd, Newland, NC 28657" and permitted a search of those premises, including a white mobile home, along with any person or vehicle present at the address. In his affidavit, Detective Lee first provided a detailed list of specific items potentially related to methamphetamine possession, sale, and distribution and explained his training and experience in controlled substance investigations. Lee then stated that, (1) on the day the search warrant was requested, issued, and executed, a confidential informant (2) who had provided information to the detective "multiple times over several years" leading to convictions in connection with methamphetamine contacted Lee to report

(3) "that Shannon Trice[4] was in possession of [m]ethamphetamine" worth $3000 which Trice had picked up and was bringing to the named search location where Trice was residing. Lee also stated that he was (4) familiar with Trice from past investigations involving methamphetamine.

While, as noted above, defendant's opening statement was not recorded and thus we cannot know exactly what was argued in connection to the motion to suppress at that point, during the hearing on the "motion" conducted between the trial court and the parties, defense counsel mentioned his inability to meet with defendant in person until the week prior to trial in order to discuss the potential for filing a motion to suppress with her. As already observed, that circumstance does not explain why counsel (1) could not have had this "strategy" discussion with defendant by telephone, secure email exchange, or some other method; (2) could not have found a time over the three and one-half months between receipt of full discovery and the date of trial to discuss the motion with defendant—whether in person or otherwise; or (3) could not have reviewed the search warrant himself and filed a motion to suppress accompanied by his own affidavit, given that the search warrant itself would have provided most if not all of the information required for an assessment of its legal sufficiency.

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[4] Evidence at trial indicated that defendant was sometimes known as "Shannon Trice" and that she was residing at 55 Claude Pyatte Road in Newland at the time the search warrant was executed.

Moreover, on appeal, defendant argues that "[t]he search warrant in this case is bare bones and does not contain sufficient information from the confidential informant for the issuing magistrate to find probable cause to issue a search warrant," further specifying that "[t]he application fails to indicate when Shannon Trice was in possession of methamphetamine, where she was when she possessed the methamphetamine, the quantity of methamphetamine, or the location of the methamphetamine" and no link was made between "Shannon Trice" and defendant. The warrant, however, was issued for a specific location and authorized a search of "[a]ny and all [persons] present at the residence," explicitly stated that "[o]n June 17, 2020[, Detective Lee] was contacted by a confidential informant" with whom Lee, a detective with experience in methamphetamine investigations, had worked successfully to develop multiple past leads which resulted in methamphetamine convictions; that the confidential informant reported that "Shannon Trice" had "pick[ed] up over $3000 worth of [m]ethamphetamine" and would be returning to the address listed in possession of said controlled substance, where she was residing; and noted that "Shannon Trice" lived in a white mobile home on the property.

This information was not stale as Lee received the tip on the same day he sought, received, and executed the search warrant. It was specific, providing a specific address and describing the residence located there—which proved to be accurate—along with the amount of methamphetamine and an assertion that "Shannon Trice" would be possessing that controlled substance at the listed address. Defendant,

regardless of what name she was using, was present at the named address at the time of the warrant's execution and thus was subject to search. When questioned, she was seen looking repeatedly at a pile of debris three feet from her location, near the white mobile home, thus drawing the attention of investigating officers and leading to the discovery of the methamphetamine hidden there. In seeking the warrant, Lee also provided his own experience and credentials and emphasized that the confidential informant had been a reliable source in multiple past investigations into methamphetamine.

Far from being "bare bones," the application and resulting warrant in this matter easily demonstrate that "the issuing magistrate had a substantial basis for concluding that probable cause existed." *Id.* at 165, 775 S.E.2d at 825 (citations and internal quotation marks omitted). Thus, even had defense counsel timely moved to suppress in writing and with the inclusion of an affidavit, the trial court would have properly denied the motion. Accordingly, defendant was not prejudiced by any deficient performance by her trial counsel in this regard, and her argument that she received constitutionally ineffective assistance of counsel must be overruled.

III. Conclusion

In sum, we affirm the trial court's denial of defendant's motion to continue because we discern no error in that decision, and as to defendant's ineffective assistance claim, we conclude that she was not prejudiced by her trial counsel's

failure to properly move to suppress the evidence obtained as a result of the search warrant.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).