NO. COA11-1513 TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Buncombe
	)	
JOSHUA E. HARWOOD	)	

****

BRIEF FOR THE STATE

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QUESTIONS PRESENTED

I. **WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS?**

II. **WHETHER THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING INTO EVIDENCE THE MARIJUANA, COCAINE, DIAZEPAM, AND RIFLE FOUND AT DEFENDANT'S RESIDENCE?**

III. **WHETHER DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL?**

IV. **WHETHER THE TRIAL COURT CORRECTLY ORDERED THE FORFEITURE OF THE $1,342.10 FOUND IN DEFENDANT'S POCKETS?**

STATEMENT OF THE CASE

On 2 May 2011, the defendant, Joshua E. Harwood, was indicted on one count of possession with intent to sell and deliver marijuana, one count of possession with intent to sell and deliver cocaine, one count of possession of diazepam, and one count of possession of a firearm by felon. (R pp. 8-15) The defendant entered a plea of not guilty and his case was heard during the 1 August 2011 Criminal Session of Superior Court of Buncombe County, the Honorable James U. Downs, Judge Presiding. The jury found the defendant guilty on all counts. (R pp. 28-31)

Judge Downs consolidated the charges and sentenced the defendant within the presumptive range of 12 to 15 months imprisonment.(R pp. 32-33) The defendant entered his notice of appeal in open court on 3 August 2011. (T p. 430) Appellate counsel was appointed on 8 August 2011. (R pp. 35-36)

The Record on Appeal was filed in the Court of Appeals on 9 December 2011 and docketed on 12 December 2011. (R pp. 1) Defendant's Brief was filed and served on 17 January 2012.

STATEMENT OF THE FACTS

On 15 July 2010, Agent Mitch McAbee of the Buncombe County Sheriff's Office was working with the Buncombe County Anticrime Taskforce. (T pp. 6-7) At that time, Agent McAbee had worked with the Sheriff's Office for approximately 14 years spending the last six years as part of the Taskforce working primarily narcotics cases. (T p. 7) During the morning hours of 15 July 2010, Agent McAbee received a phone call from an anonymous tipster reporting that the defendant was going to meet someone at the Mountain Energy gas station on the corner of Monticello Road and 25/70 in Weaverville to sell marijuana. (T p.10) The anonymous tipster named the defendant specifically and stated that he would be driving a white vehicle. (T pp. 13-14)

Agent McAbee was familiar with the defendant's reputation for selling illegal narcotics from his work on the Taskforce. (T p. 12) After receiving the tip, Agent McAbee pulled a photograph of the defendant and reviewed his existing local files. (T p. 15) Agent McAbee also received some information that the defendant

could possibly be armed. (T p. 47)

Agent McAbee and Agent Tim Goodridge, another member of the Buncombe County Anticrime Taskforce, then went to the defendant's residence. (T p. 47) After observing the residence for approximately 20 to 30 minutes, the agents went to the Mountain Energy gas station. (T pp. 47-48) As the agents were pulling into the Mountain Energy, they saw the defendant driving a white vehicle backing out of the gas station. (T p. 48) They proceeded to follow the defendant out 25/70 toward Madison County and onto New Stock Road. A red Jeep Cherokee came in between the defendant's vehicle and the agents. As they were traveling, the Jeep slowed as the defendant's vehicle accelerated. (T pp. 19, 48) The defendant then made a right turn onto Old Gibbs Road and the Jeep kept going straight. (T pp. 48-49)

The defendant then turned into a housing development that was under construction and pulled into a driveway. The defendant stopped his car and the agents pulled their unmarked vehicle, a Dodge Magnum with no blue lights or siren, in behind. (T p. 22) The defendant and his passenger, David White, got out of the car. (T pp. 23-24) Because the agents thought the defendant and White were going to take off running, they got out of their vehicle with their weapons drawn and identified themselves as law enforcement officers. (T p. 49) The agents placed the defendant and White in handcuffs for safety. (T p. 24)

After the scene was secure, Agent Goodridge unhandcuffed White and found a small amount of marijuana on him. (T p. 50)

White told Agent Goodridge that the marijuana belonged to the defendant and that the defendant "knew he was going to jail." (T p. 50)

While Agent Goodridge was talking to White, Agent McAbee was talking with the defendant. Agent McAbee could not specifically remember if he removed defendant's handcuffs or if he read him his Miranda rights, but it was his normal practice to do so. (T pp. 25-26) He told the defendant about the anonymous tip they were investigating. The defendant then admitted to Agent McAbee that he had gone to the Mountain Energy to sell marijuana. (T p. 25) The defendant also agreed to take the agents back to his residence at 1796 New Stock Road to look for additional marijuana. (T pp. 28-29) During the course of the conversation, Agent McAbee discovered that the defendant had an outstanding warrant for his arrest. (T p. 25)

Once the defendant and the agents arrived at the defendant's residence, the defendant gave the agents a key to open the door. (T p. 30) The agents and the defendant went inside and to the defendant's bedroom at the back of the mobile home. (T pp. 32, 39, 51) In the defendant's bedroom, the agents found two green Army ammunition cans containing marijuana, pills, and cocaine. (T p. 34) The agents also found a loaded SKS rifle in the defendant's bedroom. (T p. 34)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

Defendant contends that the search of his residence was unconstitutional and therefore the trial court erred in denying his Motion to Suppress. (Def's Br. p. 4) Specifically, defendant argues that the agents arrested him in the driveway without probable cause. Alternately, defendant argues that if he was not arrested, then the agents lacked reasonable suspicion to place him in investigative detention. Either way, defendant claims that his inculpatory statements and the evidence seized from his residence are inadmissible as "fruits of the poisonous tree." The contentions of the defendant are not supported by the facts or the applicable law.

A. Standard of Review

This Court has held that "[a]n appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." State v. Johnston, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citing State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). In addition, the North Carolina Supreme Court said that

the trial court:

> sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence.

State v. Smith, 278 N.C. 36, 41, 178 S.E.2d 597, 601, cert. denied, 403 U.S. 934, 29 L. Ed. 2d 715 (1971).

This Court has also held that the "'review of a denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct.'" State v. McLean, 120 N.C. App. 838, 840, 463 S.E.2d 826, 828 (1995) (citing State v. Trapp, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993)).

Regarding the issue of whether the findings of fact are supported by competent evidence, "[o]ur appellate courts have long held that an appellant's failure to assign error to each finding of fact and to identify in his brief which findings are challenged, will result in the presumption that the findings are supported by competent evidence." State v. Taylor, 155 N.C. App. 251, 258, 574 S.E.2d 58, 64 (2002), cert. denied, 357 N.C. 65,

579 S E.2d 572 (2003).

The trial court orally entered numerous findings of fact in this case. (R pp. 21-26) The defendant does not appear to challenge any of these findings in his brief. Therefore, the State contends all of the findings are deemed supported by competent evidence.

Where a defendant does not contest the trial court's findings of fact, the appellate court's review is limited to whether the trial court's findings of fact support its conclusions of law. State v. Cheek, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), cert. denied, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000). Thus, the issue before this Court is whether the trial court's two conclusions of law which found: (1) that the defendant was not illegally stopped, and (2) that the agents possessed sufficient articulable suspicion that the defendant was involved with the possession and sale of illegal substances are supported by the findings and are legally correct. (R p. 26)

B. The Agents Had Reasonable, Articulable Suspicion to Lawfully Detain the Defendant to Investigate Whether a Crime Had Been Committed.

It is well settled that the Fourth Amendment protects against unreasonable searches and seizures. Generally, a person may be seized for Fourth Amendment purposes either by arrest or by investigatory stop. State v. Milien, 144 N.C. App. 335, 339,

548 S.E.2d 768, 771 (2001). While a formal arrest requires probable cause, an investigatory stop only requires a showing that the "officer has reasonable, articulable suspicion that a crime may be underway." State v. Barnard, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), aff'd, 362 N.C. 244, 658 S.E.2d 643, cert. denied, ___ U.S. ___, 172 L. Ed. 2d 198, 129 S.Ct. 264 (2008).

Defendant's first argument turns on whether the agents actually arrested the defendant in the driveway or whether they simply detained defendant as part of an investigatory stop. Defendant first claims that he was illegally arrested by the agents because he was placed in handcuffs after he voluntarily stopped his car in the driveway. The defendant argues that since he was placed in handcuffs at gunpoint that he was not free to leave, and was, therefore, under arrest pursuant to the North Carolina Supreme Court's holding in State v. Wrenn, 316 N.C. 141 (1986). However, defendant's reliance on Wrenn as the controlling standard is misplaced.

In Wrenn, the defendant argued, and the State agreed, that the defendant was arrested when the officer ordered the defendant out of his car at gunpoint and told him to keep his hands visible. Wrenn, 316 N.C. at 146. The Court held that since the officers thought the defendant to be a suspect in a burglary they

were investigating, it was unlikely they were going to let him leave. Id. In Wrenn, unlike the case sub judice, there was really no question or discussion about whether the defendant's detention was a warrantless arrest or an investigative stop.

During the course of investigative or Terry stops, officers are allowed to take "such steps as reasonably necessary to protect their personal safety and to maintain the status quo" State v. Campbell, 188 N.C. App. 701, 709, 656 S.E.2d 721, 727 (2008) (citing U.S. v. Hensley, 469 U.S. 221, 226, 105 S. Ct. 675, 83 L. Ed. 2d 604, 210 (1985)).

> The permissible scope of a Terry stop has expanded in the past few decades, allowing police officers to neutralize dangerous suspects during an investigative detention using measures of force such as placing handcuffs on suspects, placing the suspect in the back of police cruisers, drawing weapons, and other forms of force typically used during an arrest.

Campbell, 188 N.C. App. at 709 (quoting Longshore v. State, 399 Md. 486, 924 A.2d 1129, 1142 (Md. 2007); see also U.S. v. Shareef, 100 F.3d 1491, 1502 (10th Cir. 1996)("use of firearms, handcuffs, and other forceful techniques does not necessarily transform a Terry detention into a full custodial arrest-for which probable cause is required-when the circumstances reasonably warrant such measures." (internal quotation marks and citation omitted)). "If the methods used by the police exceed those least intrusive means reasonably required to carry out the

stop, the encounter evolves into a de facto arrest, creating the need for the police to show probable cause to support the detention." State v. Carrouthers, 200 N.C. App. 415, 419, 683 S.E.2d 781, 784 (2009)(citing State v. Milien, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001)). "Whether a particular action on the part of the police exceeds permissible conduct is determined based on the facts and circumstances of each case." Id. As the finder of fact, the trial court is in the best position to make this determination. Id.

In State v. Carrouthers, 200 N.C. App. 415, 683 S.E.2d 781 (2009), officers observed the defendant act in a way that was consistent with a hand-to-hand drug transaction. The officers then approached the defendant, asked him whether a drug transaction had occurred, and, unsatisfied with defendant's answer, performed a pat-down of defendant. After feeling contraband in the defendant's pocket, the officer placed the defendant in handcuffs for officer safety. In granting defendant's motion to suppress, the trial court found that because the officers had placed the defendant in handcuffs, he was not free to leave and, therefore, under arrest. On review, this Court determined that the trial court "applied an incorrect standard to determine whether Defendant was under arrest at the time the contraband was discovered, concluding that, when

Defendant was 'handcuffed by [the officer], he was under arrest since a reasonable person would not have felt free to leave." Carrouthers, 200 N.C. App. at 420. "Instead the trial court must determine whether special circumstances existed that would have justified [the officer's] use of handcuffs such that they remained the least intrusive means reasonably necessary to carry out the purpose of the stop." Carrouthers, 200 N.C. App. at 420. Applying the correct standard on remand, the trial court denied defendant's motion to suppress based on the facts above and this Court affirmed. State v. Carrouthers, ___ N.C. App. ___, 714 S.E.2d 460, 784 (2011).

Similarly, in this case, the trial court concluded that,

> [b]ased on those findings and the totality of the circumstances, the court finds that, first of all, the defendant was not illegally stopped. There was no traffic stop involved. Second of all, that the officers possessed, in the court's opinion, sufficient articulable suspicion that the defendant was involved with the possession and sale and distribution of illegal substances, controlled substances, certainly to the extent of marijuana, if not others, and all the information provided to the officers from the unnamed, unknown, anonymous tipster proved to be accurate, except that they didn't actually observe a sale on the premises of the Mountain Energy, then known as Mountain Energy convenience store and gas station.

(R p. 26) Clearly, the trial court determined the defendant was the subject of an investigative stop, not an unlawful arrest. Therefore, this Court must determine if this conclusion was

supported by the evidence and legally correct.

First, the trial court's conclusion that there was no traffic stop is wholly supported by the findings of fact. It is undisputed that the defendant voluntarily stopped his car "without being provoked in any way." (R p. 24) In fact, the agents' vehicle was not equipped with blue lights or a siren. (T p. 22)

Second, the trial court's conclusion was legally correct. See State v. Williams, 201 N.C. App. 566, 686 S.E.2d 905 (2009) (officer did not initiate a traffic stop when defendant voluntarily pulled into a driveway, officer approached him and questioned him about a 30-day tag). Similarly, here the defendant pulled into a driveway absent any show of force or authority from the agents.

The trial court's second conclusion of law was that the agent's contact with the defendant escalated from a voluntary stop into an investigative stop when the agents ordered the defendant to the ground at gunpoint and then placed the defendant in handcuffs. The court found the investigatory stop lawful based on the agent's reasonable suspicion. This conclusion of law is also supported by the findings of fact and legally correct.

The record clearly establishes that at the time the agent's

approached the defendant's vehicle, they had at least reasonable suspicion that criminal activity was occurring.

> A court must consider "the totality of the circumstances--the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. U.S. v. Cortez, [449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)]. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Terry v. Ohio, [392 U.S. 1, 9, 20 L. Ed. 2d 889, 899 (1968)]; State v. Thompson [296 N.C. 703, 706, 252 S.E.2d 776 (1979)]. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch." U.S. v. Sokolow [490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)].

State v. Campbell, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (quoting State v. Watkins, 337 N.C. 437, 441-442, 446 S.E.2d 67, 70 (1994)).

In arguing that the agents lacked reasonable suspicion, the defendant claims that the anonymous tip was not sufficiently corroborated in this case. However, the facts and circumstances known to the agents at the time of the search provided reasonable suspicion to detain the defendant. The evidence at the suppression hearing, as found by the trial court in the uncontested findings of fact, demonstrated that Agent McAbee, a member of the Anticrime Taskforce dealing in narcotics with 14 and a half years' law enforcement experience received an anonymous tip that the defendant would be in a white vehicle

selling marijuana at the Mountain Energy in Weaverville later that day. (T pp. 6-7, 13-14) Agent McAbee had prior information about the defendant selling controlled substances and pulled a photograph of the defendant from his prior files. (T pp. 14-15) Agent McAbee and Agent Goodridge did some surveillance around the defendant's residence and later saw the defendant driving a white car at the Mountain Energy. (T pp. 17, 47-48) After seeing defendant at the Mountain Energy, the agents followed defendant to a driveway. While the agents were following the defendant, a Jeep got in between the agents and defendant's car. (T pp. 20-21) During the course of the encounter in the driveway, White produced some marijuana that he stated the defendant gave to him. (T p. 50) Finally, the defendant voluntarily agreed to take the agents to his residence and provided them with a key to unlock the door. (R pp. 21-25) In addition to the court's findings, there was also evidence that the agents had received information that the defendant may be armed. (T p. 47) "It is indisputable that felony drug investigations may frequently pose 'a threat of physical violence.'" Carrouthers, 714 S.E.2d at 465 (quoting Richards v. Wisconsin, 520 U.S. 385, 391, 117 S. Ct. 1416, 137 L. Ed. 2d 615, 622 (1997)). Thus, the Agents were within their right to briefly handcuff the defendant for the safety of all involved and in order to maintain the status quo while the investigation

proceeded.

In State v. Garcia, 197 N.C. App. 522, 677 S.E.2d 555 (2009), officers received an anonymous tip that the defendant was selling marijuana out of his residence. After conducting surveillance and a background investigation, officers approached the defendant who was standing near his car talking to two African American males. The two African American males fled when the officers approached. The officers placed the defendant in handcuffs and advised him he was in "investigative detention." One of the officers then smelled marijuana and searched the car. The defendant admitted that he was delivering drugs. This Court upheld the trial court's denial of defendant's motion to suppress, holding that the officer's observations sufficiently corroborated information in the anonymous tip such that the officers could reasonably suspect the defendant was selling marijuana. The Court noted that the anonymous tip, while "somewhat lacking in reliability," provided specific information of illegal activity and a specific location. Garcia, 197 N.C. App. at 529, 677 S.E.2d at 559-60.

Similarly, in this case, the anonymous tip provided the defendant's name, the specific illegal activity (selling marijuana), the color of the defendant's vehicle and a specific location (the Mountain Energy gas station). The tip information

combined with Agent McAbee's knowledge and experience of the drug trade, his knowledge of the defendant, and the surveillance performed by the agents was sufficient for the agents to reasonably suspect the defendant was selling marijuana. Accordingly, defendant's argument must be rejected.

The defendant next argues that regardless of whether defendant's initial detention was a Terry stop, his detention eventually turned into an illegal arrest for which the agents lacked probable cause. (Def's Brief, p. 17)

To the contrary, the defendant's admission during the Terry stop that he went to the Mountain Energy to sell marijuana and the fact that marijuana was found on the passenger White, who said he got the marijuana from defendant, was sufficient for probable cause. Even if this Court finds that there was insufficient probable cause to arrest the defendant based on the activities on 15 July 2010, there was already an outstanding warrant for defendant's arrest. The Agents could have lawfully taken him into custody based on that outstanding warrant.

Because he was allegedly unlawfully arrested, defendant argues that the trial court should have suppressed his inculpatory statements and the evidence found at his residence. This argument is also without merit. First, for the reasons stated above, the defendant was not unlawfully arrested. Second,

the trial court found as a fact that the defendant consented to the search of his residence. (R p. 25) This finding is binding on appeal. The trial court also found that the officers never threatened or coerced the defendant into consenting and that the defendant "simply did it voluntarily." (R p. 25) Again, these facts in the record are not challenged on appeal.

Defendant does not contend that there was no voluntary consent. "That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure per se violative of the Fourth Amendment." State v. Smith, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997). Therefore, the trial court properly denied the motion to suppress and defendant's assignment of error should be dismissed.

II. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR BY ADMITTING INTO EVIDENCE THE MARIJUANA, COCAINE, DIAZEPAM, AND RIFLE FOUND AT DEFENDANT'S RESIDENCE.

Defendant next argues that the trial court committed plain error by admitting into evidence the contraband seized at defendant's residence. (Def's Brief, p. 19)

As a preliminary matter, N.C. R. App. P. 10(c)(4) provides that "in criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the

basis of an assignment of error where the judicial action questioned is **specifically and distinctly contended to amount to plain error.**" (emphasis added). If the defendant fails to assert plain error in an assignment of error, the appellate court will not conduct plain error review. State v. Truesdale, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995). In this case, the defendant listed as his second proposed issue on appeal, "Did trial counsel err by failing to object to the admission of evidence that was obtained in violation of Mr. Harwood's constitutional rights?" (R p.42) Nowhere in this, or his other issues on appeal, did defendant ever assert plain error. Therefore, this Court should not entertain plain error review. Should this Court find that this issue has been sufficiently preserved for review, it should find that the trial court committed no error.

A. Standard of Review

In State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983), the North Carolina Supreme Court set forth the plain error standard as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial

> to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity, or public reputation of judicial proceedings' or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

(quoting United States v. McCaskill, 676 F.2d 995, 1002 (4th Cir. 1982), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

Plain error does not simply mean obvious or apparent error; to reach "plain error," the error in the trial court's admission of evidence must be so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. State v. Black, 308 N.C. 736, 303 S.E.2d 804 (1983). The appellate court must examine the entire record and determine if the error had a probable impact on the jury's finding of guilt. Odom, 307 N.C. at 661, 300 S.E.2d at 379.

B. It Was Not Plain Error For the Trial Court to Admit Evidence That the Agents Seized Marijuana, Cocaine, Diazepam, and a Loaded Firearm From Defendant's Residence.

At trial, defendant's counsel renewed the motion to suppress at the close of the evidence. However, defendant's counsel did not specifically object to the admission of defendant's consent to the search of his residence, nor did he object to the admission of the items found at defendant's residence. (T pp. 240, 250, 263, 315) It is well settled that in order to preserve

an issue for appellate review, a party must have objected to the admission of evidence during the trial. State v. Eason, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). Because defendant did not raise an objection at trial, the admission of evidence is reviewed on appeal for plain error. For all the reasons noted in Argument I above, the trial court committed no error, certainly not plain error, in admitting the drugs and firearm found after the consensual search of defendant's residence into evidence.

III. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Defendant argues that he was denied effective assistance of counsel for counsel's failure to specifically object to the admission of the contraband found at his residence. (Def's Brief, p. 20) This argument, too, must fail.

A. Standard of Review

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286, cert. denied, 549 U.S. 867, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 693 (1984)). Generally, a defendant is not entitled to relief unless he is

able to show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. There exists a strong presumption of competent assistance and our courts have stressed that "relief should be granted only when counsel's assistance is so lacking that the trial becomes a 'farce and mockery of justice'." State v. Pratt, 161 N.C. App. 161, 163, 587 S.E.2d 437, 439 (2003)(quoting State v. Montford, 137 N.C. App. 495, 502, 529 S.E.2d 247, 252 (2000)).

B. Defendant's Counsel Was Not Ineffective.

In the case sub judice, the defendant cannot meet the Strickland two prong test. First, defendant cannot show that his counsel's performance was deficient simply for failing to object to the evidence in question being admitted. Defendant's counsel filed a motion to suppress concerning the evidence which the trial court correctly denied.

Second, defendant must demonstrate he was prejudiced by his counsel's deficient performance to such a degree "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 694-695, 104 S.Ct. at 2068-2069, 80 L. Ed. 2d at 698. Again, for the reasons stated in Argument I above, the trial court correctly denied defendant's motion to suppress. Therefore, even if defendant's counsel would have

objected to the admission of the evidence, it would likely have been denied for those very same reasons.

IV. THE TRIAL COURT CORRECTLY ORDERED THE FORFEITURE OF THE $1,342.10 FOUND IN DEFENDANT'S POCKETS.

Defendant's final argument is that the trial court erred when it ordered the money found on the defendant at the time of his arrest be seized and forfeited. (Def's Brief, p. 22)

N.C. Gen. Stat. § 90-112(a)(2) provides that "all money, . . . which are acquired, used, or intended for use in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of this Article" shall be subject to forfeiture.

Defendant contends there was no temporal, proximal, or evidentiary link between the cash found in defendant's pocket and the drugs found at his residence. (Def's Brief, p. 24) Defendant relies on this Court's decisions in State v. McKinney, 36 N.C. App. 614 (1978) and State v. Fink, 92 N.C. App. 523 (1989) to support his contentions.

This Court vacated forfeitures in McKinney and Fink because there was no evidence that the money seized in those cases was acquired, used, or intended for use in violation of the Controlled Substances Act. In both those cases, this Court held that close proximity of the money to the drugs was insufficient

evidence that the money had been linked to a drug transaction.

The case sub judice differs from McKinney and Fink. In this case, there was additional evidence supporting the forfeiture of the $1,342.10 found in defendant's pockets other than its close proximity to the large amount of drugs found in defendant's residence. First, there was the tip that the defendant was selling marijuana at the Mountain Energy that day. Second, the agents discovered the cash on the defendant at the same time White, a passenger in defendant's car, admitted that defendant gave him the marijuana found in his pocket. Third, the defendant admitted to the agents that he went to the Mountain Energy specifically to sell marijuana that day.

The totality of the evidence shows that the defendant was discovered to have had over one thousand dollars in cash on his person mere minutes after he admittedly sold marijuana at the gas station. The cash found on the defendant was illicit drug money and the trial court ordered its forfeiture accordingly.

IV. THE DEFENDANT HAS ABANDONED ISSUES THREE, FOUR, FIVE, AND SIX.

Defendant raised four additional Issues for Appeal in the Record on Appeal but has failed to identify which argument, if any, in his brief with which they are associated. "Assignments of error not set out in appellant's brief and in respect to which

no reason or argument is stated or authority cited will be deemed abandoned." N.C. R. App. P. 28(b)(5); State v. Bonney, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991). Therefore, these issues must be dismissed.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the trial court did not commit reversible error in this case. Defendant's assignments of error should be overruled and his conviction and sentence affirmed.

Respectfully submitted this the 17th day of February, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

Russell J. Hollers, III
P.O. Box 1131
Carrboro, NC 27510

This the 17th day of February, 2012.

Electronically Submitted
Angel E. Gray
Special Deputy Attorney General