

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-478

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Durham County
No. 10 CRS 51613

DEVIN DASHAWN HUNTER,
Defendant.

Appeal by defendant from judgment entered 15 September 2010 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 25 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, Robert C., Judge.

Devin Dashawn Hunter ("defendant") appeals from the judgment entered after he pled guilty to one count of possession with intent to sell or deliver marijuana, one count of maintaining a vehicle for the purpose of keeping or selling marijuana, and one count of felonious possession of marijuana.

Defendant argues that the trial court erred by denying his motion to suppress the statements he made to the police after he was handcuffed but before being read his *Miranda* rights. Defendant also argues the trial court erred by denying his motion to suppress the marijuana and other evidence found on his person and in his car as the result of a warrantless search. After careful review, we affirm.

Background

The State's evidence tended to establish the following facts: In the early morning hours of 16 February 2010, defendant drove to the townhouse complex where he lived with his parents. Defendant parked his car in an unmarked area of the parking lot, as his parents' cars occupied the family's two assigned parking spaces. Because defendant had lost his key to the townhouse, he was unable to enter his home, and he slept in his car.

At approximately 2:45 a.m., Durham Police Officer Corry Cook drove into the townhouse complex via Colchester Street. Colchester Street is marked "private" and is the only entry into the complex. Officer Cook was dispatched to patrol the general area due to a report of a suspicious vehicle, as well as recent break-ins and drug arrests in the area. Officer Cook noticed defendant's car with its windows fogged and, upon shining a spotlight through the windshield, noticed defendant sleeping

inside the car. After Officer Cook knocked on the driver's side window numerous times, defendant awoke.

Officer Cook initially asked defendant, through the car window, if he was okay. Defendant acted "as if he was incoherent." The officer then instructed defendant to roll down his window. Instead, defendant opened the car door, whereupon Officer Cook noticed a "very strong" odor of marijuana. When defendant began to exit the car, the officer, out of concern for his own safety, placed defendant in handcuffs.

Officer Cook asked defendant if he possessed anything the officer should be aware of, and defendant stated that he had some marijuana in his left front pocket. After this admission, Officer Cook reached into defendant's pocket and seized a plastic bag containing other, smaller bags, which contained 44 grams of marijuana. Officer Cook then asked defendant if the car contained additional drugs, and defendant stated that a black bag on the floorboard contained more marijuana. Officer Cook searched the area of the car that was within defendant's reach and seized the black bag, which contained 74 grams of marijuana, a scale, and a box of small plastic bags.

Defendant was arrested and indicted for possession with intent to sell or deliver marijuana, maintaining a vehicle for the purpose of keeping or selling marijuana, and felonious possession of marijuana. Defendant filed a pre-trial motion to

suppress the statements he made to Officer Cook and the evidence seized from his person and car. The trial court denied the motion and concluded that: Officer Cook's conduct was reasonable under the totality of the circumstances; Officer Cook had probable cause to search defendant and his vehicle; and the officer lawfully seized the marijuana and other evidence.

On 14 September 2010, defendant, after notifying the trial court of his intent to appeal the denial of his motion to suppress, pled guilty to one count of possession with intent to sell or deliver marijuana, one count of maintaining a vehicle for the purpose of keeping or selling marijuana, and one count of felonious possession of marijuana. The trial court sentenced defendant to six to eight months imprisonment suspended on 36 months of supervised probation. Defendant gave timely notice of appeal.

Discussion

Defendant claims that Officer Cook subjected him to custodial interrogation without the protection of *Miranda* warnings and that the trial court should have suppressed his statements that led to the seizure of the marijuana.

Our review of a trial court's denial of a motion to suppress is limited to whether competent evidence supports the trial court's findings of fact, and whether the findings of fact support its conclusions of law. *State v. Corpening*, 109 N.C.

App. 586, 587-88, 427 S.E.2d 892, 893 (1993). We review the trial court's conclusions of law *de novo*. *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209, *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002). A trial court's determination of whether a defendant was in custody is a conclusion of law. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001).

Miranda warnings are only required when a person is subjected to "custodial interrogation," defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966). Statements made during a custodial interrogation without *Miranda* warnings are excluded from trial. *Buchanan*, 353 N.C. at 336-37, 543 S.E.2d at 826.

Upon *de novo* review, our determination of whether defendant was in custody requires an examination of the totality of the circumstances, "but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997). In certain situations, however, police officers may detain and question suspects without

implicating *Miranda*. We have previously held that "to effectuate an investigatory stop police officers may use means of restraint often associated with an arrest when such means are necessary to 'maintain the status quo' or to ensure officer safety." *State v. White*, __ N.C. App. __, __, 712 S.E.2d 921, 926 (2011) (citation omitted). More specifically, the United States Court of Appeals for the Fourth Circuit has affirmed "that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes." *United States v. Leshuk*, 65 F.3d 1105, 1109-10 (4th Cir. 1995); *State v. Carrouthers*, __ N.C. App. __, __, 714 S.E.2d 460, 465 (concluding officer's use of handcuffs to secure the defendant prior to formal arrest was not an unlawful stop or arrest where officer had reason to be concerned for his own safety due to being alone, his belief that the defendant had been involved in a drug sale, and the presence of other individuals in the defendant's car), *disc. review denied*, __ N.C. __, 718 S.E.2d 392 (2011).

In this case, Officer Cook approached defendant's car at approximately 2:45 a.m. after noticing it was parked in a suspicious manner and it appeared that someone was in the car. Defendant attempted to exit his vehicle, contrary to Officer

Cook's orders, at which point Officer Cook smelled a strong odor of marijuana. Officer Cook also testified that when defendant attempted to exit the vehicle, the officer "didn't know what exactly [defendant] was going to do" so he secured defendant with handcuffs. Given that the United States Supreme Court has recognized the link "between drugs and violence," Officer Cook's handcuffing of defendant was a reasonable means of safeguarding his personal safety during the stop. *See Richards v. Wisconsin*, 117 S. Ct. 1416, 1420 n.2, 137 L. Ed. 2d 615, 622 n.2 (1997) (recognizing that drug investigations and arrests often require officers to employ heightened safety standards).

After handcuffing defendant, Officer Cook asked if defendant possessed anything on his person or in his vehicle that the officer should know about. Because we conclude defendant was not under arrest when Officer Cook handcuffed defendant to safely execute the investigatory stop, we conclude the defendant was not in custody when he told the officer about the drugs on his person and in his car. Defendant's argument is overruled.

Defendant next argues that evidence seized during the stop should be suppressed because Officer Cook searched his car without a warrant and no exception to the requirement for a search warrant existed. Defendant is correct in stating that, generally, warrantless searches are unconstitutional absent

probable cause and exigent circumstances. *State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67, *appeal dismissed and disc. review denied*, 357 N.C. 509, 588 S.E.2d 372 (2003). Our review of the record, however, leads us to conclude that both requirements for a lawful warrantless search were met.

First, as clearly established by our case law, the odor of marijuana emanating from a vehicle may provide probable cause to search the vehicle for the illegal substance. *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981); *State v. Smith*, 192 N.C. App. 690, 694, 666 S.E.2d 191, 194 (2008) (applying *Greenwood* to conclude police officer had probable cause to search the defendant's vehicle after officer smelled marijuana emanating from the vehicle), *cert. denied*, 363 N.C. 380, 680 S.E.2d 206 (2009) and 130 S. Ct. 3325, 176 L. Ed. 2d 1221 (2010). Here, we conclude that when defendant opened the door to his car and Officer Cook smelled a strong odor of marijuana, the officer had probable cause to search defendant's car.

Second, having established that probable cause existed, we must determine whether an exigent circumstance existed that justified a warrantless search of the vehicle. Since the United States Supreme Court's decision in *Carroll v. United States*, 45 S. Ct. 280, 69 L. Ed. 543 (1925), our courts have recognized that a suspect's use of a motor vehicle in a public area can

provide the exigent circumstance necessary for a warrantless probable cause search of that vehicle. See *State v. Isleib*, 319 N.C. 634, 636-37, 356 S.E.2d 573, 575-76 (1987) (citing numerous United States Supreme Court decisions that have upheld warrantless probable cause searches of motor vehicles in public areas). Defendant argues that because the trial court did not make a finding that his car was in a public area, the automobile exception does not justify Officer Cook's warrantless search.

Defendant's reliance on *State v. Hopper* for support of this argument is misplaced. ___ N.C. App. ___, ___, 695 S.E.2d 801, 807 (2010). The public or private nature of the roadway in *Hopper* did not relate to the automobile exception and was only used to determine if the police officer was justified in stopping the defendant's car. *Id.* Here, defendant's vehicle was parked and the officer approached the vehicle because there were reports of a suspicious vehicle and break-ins in the area, the vehicle was parked in an unusual location, and there appeared to be one or more persons inside. Thus, *Hopper* does not control.

We find the facts of this case similar to the facts of *State v. White*, in which this Court upheld the police officers' warrantless probable cause search of the defendant's automobile in a private parking lot. 82 N.C. App. 358, 363, 346 S.E.2d 243, 247 (1986), *cert. denied*, 323 N.C. 179, 373 S.E.2d 124

(1988). The police were patrolling the neighborhood after a report of crime in the area and saw stolen goods inside the defendant's car. *Id.* at 360-61, 346 S.E.2d at 245. As in this case, the defendant's automobile in *White* was parked in the parking lot of the apartment complex in which he lived, directly in front of the defendant's apartment. *Id.* The *White* Court reasoned that, while the defendant's car was parked in the parking lot of the apartment complex, the police officers' warrantless search did not violate the Fourth Amendment because the car was "parked in a parking lot generally accessible to the public" and the stolen goods were in plain sight to anyone passing by the car, providing the officers with probable cause. *Id.* at 362-63, 346 S.E.2d at 246. Although the police officers in *White* impounded the car and searched it hours later at the police station, the Court concluded that the officers would have been justified in an immediate warrantless search of the automobile in the parking lot. *Id.* at 363, 346 S.E.2d at 247 (noting that the defendant's automobile was "apparently capable of being driven," the defendant was aware of the officers' suspicions, and he could have had the car removed in the time it would take the officers to obtain a warrant).

Here, Officer Cook was on patrol in the townhome complex due to crimes reported in the area. Once defendant opened the door to his car, the officer immediately smelled a strong odor

of marijuana providing the officer probable cause for the search. Defendant's vehicle was apparently capable of being driven and the officer testified defendant's vehicle was in a position from which he could easily exit the parking lot. Once defendant was aware of the officer's suspicion that there was marijuana inside the car, an exigent circumstance existed to justify an immediate search of the car without a warrant.

Because this case presents no meaningful distinction from the facts of *White*, we conclude the trial court did not err in concluding the evidence taken from defendant's person and vehicle were lawfully seized. Defendant's motion to suppress was properly denied and his argument to the contrary is overruled.

Conclusion

In sum, we conclude the trial court did not err in denying defendant's motion to suppress. We affirm the trial court's order.

Affirmed.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).