

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1359

Filed: 4 August 2015

Johnston County, No. 13 CRS 053875

STATE OF NORTH CAROLINA

v.

CHARLES DIONE WARREN, Defendant.

Appeal by Defendant from judgment entered 3 July 2014 and order entered 3 September 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General James A. Wellons, for the State.

Bryan Gates for Defendant-appellant.

DILLON, Judge.

Charles Dione Warren (“Defendant”) appeals from the trial court’s order denying in part his motion to suppress and from a conviction for felony possession of cocaine and attaining the status of habitual felon. For the following reasons, we affirm the trial court’s order.

I. Background

Defendant was indicted for various drug offenses in connection with the discovery of illegal drugs and drug paraphernalia in his car during a traffic stop and

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for attaining the status of habitual felon. Defendant filed motions to suppress certain evidence collected during warrantless searches by the police.

Prior to trial on the matter, the trial court conducted an evidentiary hearing on Defendant's motions. After the hearing, the trial court entered an order granting Defendant's motion to suppress information retrieved from cell phones seized from Defendant's car but denied his motion as to anything else seized by police.

The case was tried before a jury, and Defendant was found guilty of felonious possession of cocaine and possession of drug paraphernalia. Defendant pleaded guilty to attaining the status of habitual felon. The trial court arrested judgment on the possession of drug paraphernalia conviction and sentenced Defendant as an habitual felon to 38 to 58 months of imprisonment for the felony possession of cocaine conviction. Defendant gave notice of appeal in open court.

II. Analysis

On appeal, Defendant challenges the trial court's partial denial of his motion to suppress certain evidence found during a routine traffic stop. Defendant does not contest the validity of the stop itself. Rather, Defendant contends that the court erred in concluding that the officer had reasonable suspicion *to extend* the scope and length of time of a routine traffic stop to allow a police dog to perform a drug sniff outside his vehicle, which led to the discovery of contraband in Defendant's vehicle. Specifically, Defendant challenges the trial court's conclusion "[t]hat [the officer] had reasonable articulable suspicion to extend the scope of the initial stop and subject the

Defendant's vehicle to the canine search and that the Defendant was not unreasonably detained nor the scope of the initial stop unreasonably extended for the purpose of that canine sniff search."

This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (marks omitted).

We believe that based on the trial court's unchallenged findings, the officer had reasonable suspicion to extend the routine traffic stop to perform a dog sniff; and, accordingly, we hold that the trial court did not err in partially denying Defendant's motion to suppress.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008). "[A]n officer may

stop a vehicle on the basis of a reasonable, articulable suspicion that criminal activity is afoot.” *State v. Styles*, 362 N.C. 412, 427, 665 S.E.2d 438, 447 (2008).

As the United States Supreme Court recently explained, during the course of a stop for a traffic violation, an officer may – in addition to writing out a traffic citation - perform checks which “serve the same objective as enforcement of the traffic code[.]” *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L.Ed. 2d 492, 499 (2015). These checks typically include “checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance.” *Id.* The Court further held that under the Fourth Amendment an officer “may conduct certain unrelated checks during an otherwise lawful traffic stop, [but] . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded” to justify detaining an individual. *Id.* The Court specifically held that the performance of a dog sniff is *not* a type of check which is related to an officer’s traffic mission. *Id.* Therefore, under *Rodriguez*, an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop.

We note that prior to *Rodriguez*, many jurisdictions – including North Carolina – applied a *de minimis* rule, which allowed police officers to prolong a traffic stop “for a very short period of time” to investigate for other criminal activity unrelated to the traffic stop – for example, to execute a dog sniff – though the officer has no reasonable

suspicion of other criminal activity. *State v. Sellars*, 222 N.C. App. 245, 249-50, 730 S.E.2d 208, 211 (2012). *See also State v. Brimmer*, 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007). However, the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*.

In the present case, it is unclear from the trial court's findings whether the execution of the dog sniff prolonged the traffic stop. Specifically, the trial court found that the officer stopped Defendant for a traffic offense; that the officer called for backup during the stop; that the backup arrived; that the officer performed the dog sniff while his backup completed writing out Defendant's traffic citation; and that the entire stop lasted less than ten minutes. What is unclear is whether the officer's call for backup or waiting for backup to arrive prolonged the stop beyond that which was necessary to complete the traffic stop.

Notwithstanding, unlike in *Rodriguez*, the trial court's findings support the conclusion that the officer had developed *reasonable suspicion* of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. We note that the State does not need to show that the officer had "probable cause" of illegal drug activity but that he merely had "reasonable suspicion" to extend the stop. *See Rodriguez v. United States*, ___ U.S. at ___, 191 L.Ed. 2d at 499. And as our Supreme Court has pointed out "[r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some

minimal level of objective justification is required.” *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (marks omitted). In determining whether an officer had a reasonable suspicion of criminal activity, the court must examine both the facts known to the officer at the time he decided to approach the defendant and the rational inferences that may be drawn from those facts. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979). Also, “the reviewing court must take into account an officer’s training and experience.” *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997). In making this determination, “the court must view the totality of the circumstances through the eyes of a reasonable and cautious police officer at the scene.” *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993).

In the context of a traffic stop, a Defendant’s proximity to a high crime area alone does not constitute reasonable suspicion; however, a defendant’s presence in such area coupled with some sort of evasive behavior may constitute reasonable suspicion. *See, e.g., State v. Jackson*, ___ N.C. ___, ___ S.E.2d ___ 2015 N.C. LEXIS 446 (N.C., June 11, 2015) (holding that officer had reasonable suspicion where the defendant was in a high crime area and took evasive action in the presence of the officer); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (stating that “when an individual’s presence at a suspected drug area is *coupled* with evasive action, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop”).

In the context of the present case, we note that this Court has held that an officer had reasonable suspicion to detain an individual based on facts similar to those here. Specifically, in *In re I.R.T.*, officers approached a group of individuals, including a juvenile, in an area known for drug activity. 184 N.C. App. 579, 581, 647 S.E.2d 129, 132 (2007). When one officer approached the juvenile, he looked at the officer and quickly turned his head; it appeared to the officer that the juvenile had something in his mouth. *Id.* The officer explained “that he had previously encountered individuals acting evasive and hiding crack-cocaine in their mouths, and those experiences made him suspect [the juvenile] might be hiding drugs in his mouth.” *Id.* The officer detained the juvenile which eventually led to the discovery of a crack-cocaine rock that was in the juvenile’s mouth. *Id.* On appeal from his adjudication and the denial of his motion to suppress, this Court held that “the juvenile’s conduct, his presence in a high crime area, and the police officer’s knowledge, experience, and training [was] sufficient to establish” that the officer had a reasonable suspicion to justify an investigatory seizure of the juvenile. *Id.* at 581-82, 585, 647 S.E.2d at 132-33, 135.

Likewise, here, in support of its conclusion that reasonable suspicion to extend the scope of the stop, the trial court found that Defendant was observed and stopped “in an area [the officer] knew to be a high crime/high drug activity area[;]” that while writing the warning citation, the officer observed that Defendant “appeared to have something in his mouth which he was not chewing and which affected his speech[;]”

that “during his six years of experience [the officer] who has specific training in narcotics detection, has made numerous ‘drug stops’ and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]” and that during their conversation Defendant denied being involved in drug activity “any longer.” We hold that based on the totality of the facts the trial court’s unchallenged findings establish the “minimal level of objective justification” to show that the officer had reasonable suspicion to believe that criminal activity was occurring to justify the extension of the traffic stop.¹

Accordingly, we hold that the trial court did not err in concluding the same and in denying Defendant’s motion to suppress.

AFFIRMED.

Judge GEER concurs.

Judge ELMORE dissents in a separate opinion.

¹ The dissenting Judge argues that the officer’s reasonable suspicion to justify prolonging the traffic stop cannot be based in this case on the officer’s observance of an object in Defendant’s mouth. Specifically, the dissenting Judge points out that the present case differs from *I.R.T.* in that in the present case the officer never asked Defendant about the object in his mouth nor asked Defendant for consent to search his mouth. We recognize that the lack of any evidence that the officer specifically inquired about the object makes the question of whether the officer had reasonable suspicion closer. However, notwithstanding a lack of evidence that the officer inquired about the object in Defendant’s mouth, we believe that Defendant’s act of speaking with the officer for a period of time without removing or chewing on an object which was affecting his speech – when coupled with the other factors cited above – is sufficient to establish reasonable suspicion.

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ELMORE, Judge, dissenting.

I respectfully disagree with the majority’s conclusions that the trial court did not err in denying defendant’s motion to suppress. As a result, I would reverse the trial court’s order denying defendant’s motion to suppress, vacate the judgment, and remand to the trial court.

The majority concludes that the facts in defendant’s case support the trial court’s finding that the officer had a reasonable articulable suspicion to extend the scope of the initial stop to allow a canine search of defendant’s vehicle. I disagree. The majority recognizes that when an individual’s presence in a suspected high crime area is coupled with evasive action, law enforcement may form reasonable suspicion from the evasive actions. *Willis, supra*. As such, the majority concludes that the facts in *In re I.R.T.*, are analogous to those facts in the case at hand. *In re I.R.T.*, 184 N.C. App. 579, 581-83, 647 S.E.2d 129, 132-33 (2007). I disagree.

In *I.R.T.*, the officer testified that when he approached the juvenile in a high crime area, he witnessed the juvenile “quickly turned his head away” from him. *Id.* at 585, 647 S.E.2d at 135. Further, the officer testified that the juvenile “kept his head turned away from [him] and . . . [the officer] could tell that he was not moving

his mouth [while responding to the officer's questions] as though he had something inside of his mouth." *Id.* at 585-86, 647 S.E.2d at 135. The officer alleged that "individuals that have exhibited those characteristics have generally kept crack-cocaine in their mouths." *Id.* at 586, 647 S.E.2d at 135. Importantly, suspecting the juvenile of hiding drugs in his mouth, the officer requested that the juvenile spit out what was in his mouth. *Id.* at 581, 647 S.E.2d 132. The juvenile spit out crack cocaine wrapped in cellophane. *Id.* This Court discerned that the juvenile's "turning away from the officer and not opening his mouth while speaking constituted evasive actions", and we accordingly held that the juvenile's evasive conduct, presence in a high crime area, and the officer's training was sufficient to establish reasonable suspicion. *Id.* at 586, 647 S.E.2d at 135.

The *I.R.T.* Court relied, in part, on *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995). In *Watson*, this Court found reasonable suspicion to justify an investigatory seizure when police approached a convenience store located in a high crime area and witnessed the defendant make "evasive maneuvers to avoid detection, i.e., putting the drugs in his mouth, attempting to swallow the drugs by drinking Coca-Cola and attempting to go into the store." *Id.* at 398, 458 S.E.2d at 522. The defendant "was ordered to spit out the objects in his mouth[.]" *Id.* at 396-97, 458 S.E.2d at 521. When the defendant refused, the officer applied pressure to the

defendant's throat and he spit out three baggies of crack cocaine. *Id* at 397, 458 S.E.2d at 519.

I agree with this Court's holdings in both *I.R.T.* and *Watson*. Not only were the defendants present in high crime areas, each acted evasively when confronted by law enforcement. However, the facts in *I.R.T.* and *Watson* are markedly different from the facts in the case before us.

Here, there is no question that the officer stopped defendant in a high crime area for a traffic violation. Upon finding defendant's license and registration to be valid and that the car was registered to defendant, the officer issued defendant a warning ticket. The officer began writing the warning ticket while standing at defendant's driver side door. The officer talked to defendant when he wrote the ticket. In speaking with defendant, the officer alleged that he thought defendant had something in his mouth. The following colloquy occurred at trial:

DEFENSE COUNSEL: You said [defendant] had something in his mouth and he wasn't chewing on it?

OFFICER: Correct.

DEFENSE COUNSEL: Was it peppermint?

OFFICER: I don't know.

DEFENSE COUNSEL: Well, was there some other type of hard candy?

OFFICER: I don't know.

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DEFENSE COUSEL: Did you see any type of plastic or anything coming out the corner of [defendant's] mouth that would indicate that it was some type of packaging[?]

OFFICER: No. . . . Just something in his mouth. I couldn't tell.

DEFENSE COUNSEL: Okay. And that caused you concern?

OFFICER: I notated.

Defense counsel asked the officer, “[w]hile you’re writing the warning ticket, you are engaged in conversation with [defendant]?” The officer replied, “[y]es, sir.” Defense Counsel asked, “[h]e engages in conversation back with you?” The officer replied, “[h]e does.” The record shows that during their conversation, the officer informed defendant that he was stopped in a high crime area and pointed out to defendant that the Berkshire Apartments were known for their drug activity. The officer asked defendant if he was on probation, and defendant answered that he was not. The officer asked if defendant had any prior drug offenses, and defendant said “he wasn’t involved in that type of stuff anymore.” Defendant informed the officer that he was self-employed in landscaping. Defense counsel asked the officer whether the object remained in defendant’s mouth during the conversation, and the officer answered in the affirmative. Defense counsel questioned, “[y]ou don’t ask him about [the object]?” The officer replied, “[t]hat’s correct.”

The officer admitted that the traffic stop turned into a drug investigation solely because defendant was in a known drug area and because defendant had an unidentified object in his mouth. Defense counsel questioned, “the only thing that concerned you was some object that was in [defendant’s] mouth that you were unable to identify?” The officer replied, “[a]lso, the area that he was coming from of course.” While the officer was writing the warning citation, he asked defendant if there was anything illegal in his vehicle. The officer asked defendant if he could check his vehicle for narcotics, and defendant said no. The officer then asked defendant to step out of his vehicle so he could search defendant’s person for “guns, drugs, or other weapons.” The officer testified that defendant consented to the search—he “didn’t . . . resist the search at all.” Further, the search yielded nothing illegal or suspicious.

Notably, defense counsel asked, “[y]ou have consent to search his entire person, do you believe that?” The officer replied, “[y]es, I do.” Defense counsel questioned, “[b]ut you do not search his mouth?” The officer admitted, “[t]hat’s correct.” After finding no evidence of contraband on defendant’s person, and not searching defendant’s mouth, the officer continued to detain defendant as he called for backup. When a second officer arrived, he was instructed to finish writing the warning citation while the first officer conducted the canine sniff of defendant’s vehicle. It was not until after the canine sniff test was completed that the officer searched

defendant's mouth. The officer alleged that defendant appeared to swallow something.

These facts, taken in totality and viewed through the eyes of a reasonable, cautious officer, do not support the trial court's finding that the officer had reasonable suspicion to justify extending the traffic stop. Unlike in *I.R.T.* and *Watson*, where the defendants took evasive actions to avoid law enforcement, the record here shows that defendant did not act evasively. Specifically, defendant engaged in a conversation with the officer during which he was able to speak clearly enough to inform the officer that he was not on probation and worked in landscaping. Additionally, defendant "didn't . . . resist the search [of his person] at all." Further, defendant allowed the officer to check his license and registration, which were in good standing. In doing so, the officer returned to his patrol vehicle, and defendant would have had an opportunity to spit out what was allegedly in his mouth. Finally, the officer testified that defendant was "polite" and there were no "issues" with the traffic stop.

Of utmost importance in this case, the officer *did not* search defendant's mouth during the search of his person. Moreover, the officer admittedly never questioned defendant about the alleged unknown item in his mouth until after the canine sniff. Nonetheless, the majority points to the officer's six years of experience in narcotics detection as well as his belief that defendant was concealing something in his mouth to support a finding of reasonable suspicion. Arguably, an experienced officer would

take steps to determine what, if anything, was in a person's mouth at the outset of a stop when such a suspicion was the basis for the search of that person.

Because the officer neither questioned defendant about having an item in his mouth nor did he search defendant's mouth, I find it highly objectionable that the purported evasive conduct that essentially tipped the scale in favor of finding reasonable suspicion was the officer's mere alleged suspicion that defendant had an unknown object in his mouth. Had the officer taken any steps to confirm his suspicion, a canine search of defendant's vehicle would debatably have been permissible based upon reasonable suspicion. Egregiously, the officer neglected to investigate his suspicion, yet still felt justified in prolonging the stop to conduct a canine sniff of the outside of defendant's vehicle. Notably, the officers in *I.R.T.* and *Watson* both demanded that the defendants spit out what was hidden in their mouths as part of the investigatory stop.

To me, these facts suggest that the officer was acting on no more than an "unparticularized suspicion or hunch" that defendant's vehicle contained contraband based on defendant's presence in a high crime area. *State v. Brown*, 217 N.C. App. 566, 572, 720 S.E.2d 446, 450 (2011) *writ denied, review denied*, 365 N.C. 541, 742 S.E.2d 187 (2012) (citation and quotation omitted). It is well established that a suspicion or hunch is insufficient to form the basis of reasonable suspicion. *Id.* Because the facts of this case do not support a finding that the officer had reasonable

suspicion to believe that criminal activity was afoot to justify the extension of the traffic stop, I respectfully disagree with the majority's opinion.

Because the officer lacked reasonable suspicion, under *Rodriguez*, the question for this Court becomes whether the officer unlawfully prolonged an otherwise completed traffic stop in order to conduct a canine sniff outside of defendant's vehicle. Again, an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, so long as he does so in a way that does not prolong the stop. *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L.Ed. 2d 492, 499 (2015). The unrelated checks include: checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Id.* "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* However, "[l]acking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." *Id.*

In *Rodriguez*, the Supreme Court framed the "critical" question as "not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop" *Id.* at ___, 191 L.Ed. 2d at 496. As the Supreme Court opined, "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete [the

stop's] mission.” *Id.* at ___, 191 L.Ed. 2d at 499 (citation and quotation omitted) (alteration in original). A traffic stop prolonged beyond that point is unlawful. *Id.*

The majority contends that “it is unclear from the trial court’s findings whether the execution of the dog sniff prolonged the traffic stop.” I disagree. In the instant case, the officer’s actions inevitably prolonged the traffic stop beyond the amount of time reasonably required to complete the stop’s mission. After checking defendant’s license and registration and confirming that the vehicle was registered to defendant, the officer stood by defendant’s door and began issuing him a warning ticket. The officer could have reasonably completed writing the citation in a matter of one to two minutes. However, the officer struck up a conversation with defendant, which led to the officer having defendant exit the vehicle, searching defendant’s pockets, calling a backup officer, explaining the situation to the new officer, requesting that the new officer complete the warning ticket, and finally getting the canine from the patrol vehicle and conducting the sniff test. While this string of events may have only extended the stop for minutes, the stop was nonetheless extended beyond the amount of time required to reasonably complete the stop’s mission. I am of the impression that the time it took for the officer to complete the traffic-based inquiries of checking defendant’s license and registration constituted the reasonable amount of time for the stop—any holdover thereafter was unreasonable because the officer lacked reasonable suspicion. I recognize that past precedent has held that any delay in this

case was *de minimis*. However, in light of the Supreme Court's holding in *Rodriguez*, we are no longer bound to follow the *de minimis* rule.

Because the officer had (1) finished completing the traffic-based inquiries of checking defendant's license and registration, (2) was in the middle of issuing the warning ticket, and (3) the additional time defendant was detained was used to conduct a check that was unrelated to the officer's otherwise lawful traffic stop, I am of the opinion that the officer unreasonably extended the duration of the stop in order to conduct a canine sniff of the outside of defendant's vehicle. Further, by prolonging the traffic stop, defendant's Fourth Amendment rights were violated. Therefore, I conclude that the trial court erred in denying defendant's motion to suppress evidence.