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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-564

Filed: 21 February 2017

Cabarrus County, No. 13 CRS 54149, 54151

STATE OF NORTH CAROLINA

v.

DARRYLL DOUGLAS CLAY

Appeal by Defendant from judgment entered 9 December 2015, and orders entered 11 December 2015, by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 2 November 2016.

*Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.*

*Law Office of Linda B. Weisel, by Linda B. Weisel; and Daniel Rutledge Politt, for Defendant.*

McGEE, Chief Judge.

Darryll Douglas Clay (“Defendant”) was arrested on 30 August 2013 and charged with possession of a firearm by a felon, trafficking in opioids, possession with intent to manufacture, sell, or deliver a schedule IV controlled substance, resisting a public officer, and misdemeanor larceny. According to the unchallenged findings of fact made in two orders denying Defendant’s motions to suppress entered 11 December 2015, Concord Police Officer Brian Pizzino (“Officer Pizzino”) responded to

the parking lot outside Saks Fifth Avenue (“the store”) in Concord Mills Mall on 30 August 2013. Officer Pizzino had received information from the store’s loss prevention officer, Darren Monsanto about a possible larceny from the store. Upon arrival, Officer Pizzino “witnessed two suspects matching the description he was given exiting the store with stolen merchandise” and attempted to stop them. Concord Police Officer V. Clayton joined Officer Pizzino at the scene. One of the two men confronted by Officer Pizzino was Defendant. Defendant was carrying a large amount of merchandise. Officer Pizzino testified that

Defendant did not obey commands and was not cooperative with officers. In the struggle to get control of [D]efendant, [D]efendant was tased two times and dry stunned two times. The taser appeared to have little effect on Defendant. While the two officers struggled to gain control of . . . Defendant, . . . Defendant dug into his pockets and his waist area. Officer Pizzino had concerns that . . . Defendant was attempting to gain access to a weapon.

Eventually it became clear to the officers that Defendant did not have a weapon on him, but as Defendant was being handcuffed, he was clutching something in his hands. Officer Pizzino pried open Defendant’s hands and discovered a set of car keys. Due to a barcode on the key fob, Officer Pizzino believed the keys belonged to a rental vehicle. In order to quickly locate the vehicle, Officer Pizzino pressed the panic button on the key fob, and a Ford truck (“the truck”) two spaces away responded by flashing its lights and honking its horn. The trial court found that “Officer Pizzino testified convincingly as to his reasons to attempt to locate the truck as follows:”

I knew it was a rental car. One of the reasons for activating that is I wanted, Number 1, see where he was trying to get to. Because we had just gotten done fighting two fairly large individuals, Mr. Boyce (the other defendant) is equally as large, if not bigger. And I wanted to make sure that there was nobody sitting behind me in a vehicle that would then – because at this point it’s still me and Officer Clayton only – to come to me from behind in any way, shape or form to attack me or anything like that.

Additional officers arrived, and Officer Pizzino gave the keys to Concord Police Captain Greene (“Captain Greene”). Officer Pizzino then continued to assist in securing the two defendants. Defendant asked Officer Pizzino “if he would get [Defendant’s] cell phone out of the truck, which he indicated was in the center console.” Captain Greene reached the truck first, and observed through the windows “a lot” of stolen property in the back of the truck “with anti-theft sensors on some of the property.” Officer Pizzino also saw the property through the window of the truck, and “testified convincingly that he observed[:.]”

[The] back seat was mounded with clothes, shoes, cologne, hats. All of these things were still new in the packaging. There were several sensors that I could see just by looking through the window. And I could see [Defendant’s] cell phone on the truck center console.

At this time, Officer Pizzino unlocked the truck and opened the front door to access Defendant’s phone.

As [Officer Pizzino] pushed down the seat to lift himself up to reach the phone, he saw a pistol grip of a Glock firearm . . . in between the seat. Also, at that time, a bag fell over spilling out its contents into the driver’s floorboard.

[Officer Pizzino] then observed “[n]umerous controlled substances, all types of different pills, different types of drug paraphernalia. Just a large amount of narcotics.”

Defendant was arrested, taken to the police station, and held for questioning. Defendant began yelling that he wanted to talk to the officers about his case. Officer Pizzino and Concord Police Sergeant McGhee (“Sergeant McGhee”) were, at that time, logging in evidence seized from the truck, and Defendant’s cell phone was face up on the table near them. Although Defendant’s phone was locked, as it received texts while sitting on the table near the officers, the officers could read those texts on the screen of the cell phone. Officer Pizzino and Sergeant McGhee eventually joined Defendant in the interview room and read Defendant his *Miranda* rights, which Defendant waived. The officers then began questioning Defendant. “[D]efendant gave an initial statement, made changes to his statement, and then initially refused to sign the statement. Officer Pizzino left the interview room but was then called back in by [D]efendant so that he could sign his statement.” “At the end of the interview, Sgt. McGhee told [D]efendant that they knew he was selling drugs. When confronted about selling drugs, [D]efendant responded, ‘What about my privacy?’”

Officer Pizzino admitted that, at the time he and Sergeant McGhee initiated the interview with Defendant, they were aware of certain texts that Defendant received on his phone indicating that people were contacting Defendant for illegal drug transactions. Officer Pizzino testified that one message said something akin to:

“I need five Hydros. Can you give them to me for \$30?” However, Officer Pizzino testified that “we didn’t bring [the texts the officers read on Defendant’s phone] to [Defendant’s] attention until the end [of the interview].”

Defendant filed two motions to suppress: the first on 23 January 2015, which was heard 9 July 2015, and the second on 24 November 2015, which was heard 8 December 2015. At the end of each hearing the trial court made oral pronouncements denying each of these motions, and entered written orders denying Defendant’s motions on 11 December 2015. Following the oral pronouncements of the denial of his motions to suppress, Defendant pleaded guilty to all charges on 9 December 2015, specifically reserving his right to appeal the denials of his motions to suppress.

### *I. Standard of Review*

This Court has stated the appropriate standard of review for a trial court’s denial of a motion to suppress as follows:

The standard of review for a motion to suppress “is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” “The court’s findings ‘are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.’” “[T]he trial court’s ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.”

*State v. Wainwright*, \_\_ N.C. App. \_\_, \_\_, 770 S.E.2d 99, 104 (2015) (citations omitted).

### *II. Seizure of Cell Phone*

In Defendant's first argument, he contends the trial court erred in concluding that "police lawfully seized [Defendant's] cell phone from his truck[.]" and therefore further erred by denying Defendant's first motion to suppress. We disagree.

Officer Pizzino's testimony in the 9 July 2015 suppression hearing was that, when he retrieved the keys to the truck from Defendant's hands after a vigorous struggle, he recognized the fob as coming from a vehicle rental agency. Officer Pizzino further testified that, in light of the large quantity of merchandise being carried by Defendant and the co-defendant, he reasonably assumed that the rental automobile would be nearby. Finally, Officer Pizzino testified he had no way of knowing if other associates of Defendant were nearby, possibly in the rental vehicle itself. Officer Pizzino testified that unknown associates of Defendant in a nearby vehicle could pose a risk to the officers on scene, or to others. With these concerns in mind, Officer Pizzino pressed the panic button on the key fob, and thereby located the truck parked just a couple of spaces away. This allowed officers to confirm that the truck did not contain any additional suspects and, therefore, did not present a current danger. Defendant does not argue that use of the key fob to locate the truck constituted any unconstitutional search or seizure. Defendant does argue that Officer Pizzino unconstitutionally seized Defendant's phone from inside the truck.

However, Officer Pizzino testified, and the trial court found that: "Defendant . . . asked Officer Pizzino if he would get . . . Defendant[s] cell phone out of the truck,

which [Defendant] indicated was in the center console.” Officer Pizzino therefore had Defendant’s consent to enter the truck and retrieve Defendant’s phone. Anything that Officer Pizzino saw in plain view as he entered the truck to retrieve Defendant’s phone did not violate Defendant’s rights. *See State v. Wynn*, 45 N.C. App. 267, 270, 262 S.E.2d 689, 692 (1980) (“[A]fter defendant and the other three occupants of the car were frisked by Officer Dickerson and Officer Roberts and a wad of bills amounting to \$50.00 was found in defendant’s pocket, Officer Dickerson then went to defendant’s car; he shined a flashlight into the car and saw a .22 caliber pistol on the floor of the front seat. He seized the gun. In *State v. Whitley*, 33 N.C. App. 753, 236 S.E.2d 720 (1977), it was held that a rifle, jewelry box and pocketbook, which were on the backseat of the accused’s automobile and which were visible to officers when they shined a flashlight into the automobile were in ‘plain view.’”). In the present case, we hold that the items seized from the truck, including the illegal drugs, the handgun, and the stolen merchandise, were properly seized pursuant to the plain view doctrine.

Defendant also argues that his phone was improperly seized. We disagree. Defendant requested that Officer Pizzino retrieve his phone, and Officer Pizzino did so. There is testimony that Officer Pizzino gave Defendant the phone for some period of time but, following Defendant’s arrest, Defendant’s phone was seized and held with the other evidence collected from the scene. Seizure of objects in possession of an arrested subject does not generally violate the Fourth Amendment.

“[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.”

*United States v. Edwards*, 415 U.S. 800, 807, 39 L. Ed. 2d 771, 778 (1974). “Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial.” Similarly, in the case at bar, the seizure and the search of the telephone were properly accomplished pursuant to a lawful arrest.

*State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205–06 (2009) (citations omitted). We affirm the trial court’s denial of Defendant’s 23 January 2015 motion to suppress.

### III. “Search” of Cell Phone

In Defendant’s second argument, he contends the trial court erred because the officers conducted an illegal search of his cell phone and, therefore, Defendant’s subsequent statement should have been suppressed. We disagree.

In Defendant’s 24 November 2015 motion to suppress, Defendant argued that he did not give officers his consent to search his cell phone by reading texts off the cell phone screen as the texts were received, and that the officers obtained no warrant justifying any search of Defendant’s cell phone on 30 August 2013. Because we can



resolve this issue without addressing Defendant’s argument that reading incoming texts to Defendant’s phone – even without manipulating the operation or data of the phone itself – constituted an unconstitutional search, we do not address that portion of Defendant’s argument. *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) (“[A] constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided.”).

In Defendant’s 24 November 2015 motion to suppress, which is the only one related to the alleged “search” of Defendant’s phone by reading his incoming text messages, Defendant argued the following:

4. That prior to an interrogation of Defendant, Officers read text messages from Defendant’s cell phone, such messages leading officers to question him regarding contraband in the rental vehicle, and that Defendant did not give his consent for any Officers to search his cell phone, nor was any search warrant obtained to search Defendant’s cell phone.

5. Defendant was then interrogated, and had a statement taken by [the officers.]

. . . .

10. That Officers may have tailored their questions to Defendant during such interrogation based upon a nonconsensual search of Defendant’s Cell Phone in violation of *Riley v. California* and *United States v. Wurie*, . . . as there was no exigency to search the contents of the cell phone.

12. That statements made prior to and thereafter are a substantial violation of [state and federal law].

Defendant then requested:

2. That any written statement made by . . . Defendant be suppressed[.]

At the suppression hearing, Defendant limited his arguments to suppression of his statement, based upon the allegedly unconstitutional search of his cell phone (officers reading his incoming text messages):

THE COURT: I think it's a stretch to say it's a search of a cell phone as I understand it, given it's something that's simply being displayed.

The other thing that makes it difficult is, if you're right, there may be reasons why that information may not be told to the jury, the best evidence rules. There may be reasons that that might be suppressed, or at least that will not be what the actual message was that may not go to the jury. But let's say we kept that out, I mean and they find a big 'ol bag of drugs in there, and the officer says you got two people that regularly deals with this, then it doesn't seem to me that that would really add much to it. I mean they're going to ask him about the drugs, given how many drugs there are.

So I don't understand. Even if you're right about this, what do you want me to do if you're right about this? You're not saying that everything that he said to the officer after they found all these drugs should be suppressed simply because they found what was on his phone, are you? Or maybe you are. I don't know.

[DEFENDANT'S COUNSEL]: Well, that's what – I would contend that it's fruit of a poisonous tree, Your Honor, as soon as they read the text messages learning about him

specifically selling the drugs.

THE COURT: Well, let me say, if that's the only evidence we had, if we had no other evidence, there's no evidence there was any drugs or anything, and then there's this the statement, that's one thing. But they found a bunch of drugs in the car. Not personal-use drugs, the officer just testified.

[DEFENDANT'S COUNSEL]: True.

THE COURT: And it seems to me that – I can't imagine there's any officer in the world that's not going to think that, hey, maybe he's selling these, maybe we ought to ask him about that. So if you got this other track, even if you're right about the cell phone, why would it matter?

[DEFENDANT'S COUNSEL]: It would matter, Your Honor, because in the officer's testimony, I believe I listed – he essentially said that either himself or Sergeant McGee asked him – or basically told Mr. Clay, we know you're selling drugs, at which point, he said, what about my privacy.

At the end of the hearing, the trial court rendered the following ruling:

I would also find that looking at the cell phone by the evidence before the Court, it was locked. There was no manipulation by the officers. It was simply laying on a table. The messages were displayed for them to see in plain view. At that point I would not find that that is a search of the cell phone. *I would find if that is indeed a search, that the statement of [D]efendant would not be the fruit of a poisonous tree of that information the officer obtained.* And I would find that he knowingly and voluntarily waived his rights and gave a voluntary statement.

With regard to whether or not what the officer observed on the screen is admissible before the jury, that's another issue for another day. I have ruled on this motion, ruled

on the prior motion. I'll be preparing a written motion to give to you all to file with the Court. (Emphasis added).

In the written order denying Defendant's motion to suppress, the trial court included the following finding of fact:

6. [The officers] went to interview [D]efendant. [D]efendant waived his Miranda rights and gave a statement. At the end of the interview, Sgt. McGhee told [D]efendant that they knew he was selling drugs. When confronted about selling drugs, [D]efendant responded "What about my privacy?"

In the written order denying Defendant's motion the trial court concluded:

2. Based upon the evidence presented and found above, the Court finds that there was no search of the cell phone. Furthermore, even if it was considered a search, the statement would not be fruit of the poisonous tree based on *State v. Graves*, . . . and the fact that there was other evidence indicating to officers [D]efendant was selling drugs.

There are essentially three bases for denying Defendant's motion to suppress in the above conclusion: (1) reading the incoming texts did not constitute a search and, therefore, no consent, warrant, nor exigent circumstances were required; (2) assuming *arguendo* reading the texts constituted an unconstitutional search, Defendant's statement to the officers was not the fruit of that search because the only thing the officers said to Defendant in the interview that might have been related to what they had read was "that they knew he was selling drugs," and this occurred at the end of the interview; and (3) assuming *arguendo* reading the texts constituted an

unconstitutional search, Defendant's statement to the officers was not the fruit of that search because the officers had found a large quantity of individually packaged drugs in the truck and they would have asked the same questions/made the same statements even had they not seen the incoming texts on Defendant's phone.

Defendant almost exclusively argues the trial court erred in denying his motion based upon the first basis. In fact, the relevant argument presented by Defendant is:

Judgment and commitment must be vacated because the trial court's conclusion of law police did not search [Defendant's] cell phone and ruling denying [Defendant's] motion to suppress evidence violated *Riley v. California* and were erroneous as a matter of constitutional law.

Initially, Defendant's brief cites no case law in support of his contention that Defendant's statement was the fruit of the allegedly unconstitutional search of his phone. For this reason, Defendant's arguments related to the fruit of the poisonous tree doctrine are deemed abandoned. *State v. Wright*, 200 N.C. App. 578, 585, 685 S.E.2d 109, 114–15 (2009).

Further, concerning Defendant's "fruit of the poisonous tree" argument, this entire argument is as follows:

The [t]rial [c]ourt's ruling denying [Defendant's] motion to suppress evidence of text messages obtained as a result of the unconstitutional search of his cell phone was error. That evidence was not admissible because 1) of the unconstitutionality of the search of the phone in the police station and 2) because it was the fruit of the prior

unconstitutional seizure of the phone from [Defendant's] truck in the parking lot. On this ground alone, [Defendant's] judgment must be vacated.

The State's evidence about [Defendant's] custodial statement taken after police unconstitutionally searched [Defendant's] cell phone was inadmissible under the fruit of the poisonous tree doctrine. Thus [Officer] Pizzino readily admitted that at the start of the interrogation he "had knowledge" of the text messages in [Defendant's] cell phone. During the interrogation, apparently relying on this knowledge, an officer told [Defendant's] "we know you're selling the pills". [Officer] Pizzino testified after reading one "very vivid" text message before the interrogation started, it was not hard "to put two and two together." As defense counsel argued, officers were "armed with information" from the earlier unconstitutional cell phone search and "tailored" their questions of [Defendant] during the interrogation based on that information. Accordingly, the evidence of [Defendant's] statement was fruit of the poisonous tree and inadmissible and should have been suppressed as well.

Defendant does not challenge any of the findings of fact, nor argue that additional findings should have been made by the trial court. The trial court's findings state that the contested statement by the police occurred at the end of the interview, and thus (impliedly) would not have impacted Defendant's statement. Defendant makes no argument concerning the trial court's conclusion that the officers would have questioned Defendant in the same manner even without having read the texts because of the large quantity of individually packaged drugs found in the truck. Because Defendant has only appropriately challenged one of three bases given by the

trial court for its denial of Defendant's 24 November 2015 motion to suppress, Defendant has waived challenge of the additional two bases. The trial court needed only to set forth one valid basis for its decision to deny Defendant's motion. Defendant has failed entirely to challenge the trial court's third basis, and has not properly challenged the trial court's second basis. For these reasons, any challenges to the trial court's second and third bases in support of the denial of the 24 November 2015 motion to suppress have been waived, and we affirm the 11 December 2015 order denying Defendant's 24 November 2015 motion to suppress.

*IV. Voluntariness of Statement*

In Defendant's final argument, he contends the trial court erred in failing to suppress his statement because he was under the influence of narcotics and, therefore, his statement was not voluntary. We disagree.

The trial court made the following findings of fact relevant to the issue of voluntariness:

4. [Subsequent to having been subdued with the partial help of multiple shocks from a stun gun] [D]efendant was taken to the . . . district office. At the office [D]efendant was cleared by EMS and refused transportation to the hospital and further medical treatment. . . .

5. While officers were logging in evidence, [D]efendant began yelling that he wanted to talk about his case for about 15 to 20 minutes. . . .

. . . .

8. While [D]efendant was being interviewed, [D]efendant was coherent and relaxed. [D]efendant was capable of walking and not staggering. [D]efendant was able to respond to questions and his answers made sense.

9. As part of Officer Pizzino's patrol duties, he regularly deals with impaired people. Officer Pizzino's opinion was that [D]efendant was not impaired at the time he gave a statement.

10. At least fifteen to twenty minutes later, [D]efendant was transported to the Cabarrus County Jail. While on the way, [D]efendant's demeanor completely changed. [D]efendant began nodding off and Officer Pizzino formed the opinion that [D]efendant had taken some sort of impairing substance. [D]efendant was then transported to CMC Northeast.

11. Defendant was not impaired at the time he knowingly and voluntarily waived his rights and at the time he gave his statement.

We consider finding of fact eleven to be a mixed finding of fact and conclusion of law, and treat it as such. *Lamm v. Lamm*, 210 N.C. App. 181, 189, 707 S.E.2d 685, 691 (2011) (citation omitted) ("A finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal."). We hold that the trial court *found as fact* that "Defendant was not impaired at the time" he gave his statement. The trial court further *concluded* that Defendant "knowingly and voluntarily waived his rights and . . . gave his statement."

We hold, giving the trial court the required deference, that the trial court's unchallenged findings of fact related to the voluntariness of Defendant's statement



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support the trial court's conclusion that Defendant's statement was voluntary. *Wainwright*, \_\_ N.C. App. at \_\_, 770 S.E.2d at 104 (citations and quotation marks omitted) ("The [trial] court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. [T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence."). This argument is without merit.

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).