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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-544

Filed: 7 March 2017

Mecklenburg County, No. 14CRS247482, 14CRS247478, 15CRS016966

STATE OF NORTH CAROLINA

v.

TARDRA ETERELL BOUKNIGHT, Defendant.

Appeal by Defendant from judgment entered 17 February 2016 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2016.

*Attorney General Joshua H. Stein, by Assistant Attorney General Colin A. Justice, for the State.*

*Robinson Bradshaw & Hinson, P.A., by Andrew A. Kasper, for the Defendant.*

DILLON, Judge.

Tardra Eterell Bouknight (“Defendant”) appeals from an order denying his motion to suppress. For the following reasons, we affirm.

I. Background

On 5 December 2014, Defendant was stopped by two Charlotte-Mecklenburg police officers for driving with an inoperable tag light and a “limited expired” license

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plate. Both Defendant and his vehicle were *Terry* frisked.<sup>1</sup> Police discovered cocaine and a firearm inside the vehicle.

Defendant was charged with several drug crimes, weapon crimes, and habitual felon status. Defendant moved to suppress the evidence obtained from the vehicle. The trial court denied his motion to suppress in open court. Defendant pleaded guilty to a number of the charged crimes and preserved his right to appeal.

## II. Standard of Review

We review the trial court's conclusions of law in an order denying a motion to suppress *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Accordingly, this court “considers the matter anew and freely substitutes its own judgment[] for that of the lower tribunal.” *Id.*<sup>2</sup> (internal quotation marks omitted).

## III. Analysis

Defendant contends that the trial court erred in denying his motion to suppress as the police lacked reasonable suspicion. We disagree.

### A. Frisk Searches Are Permissible

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<sup>1</sup> Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), an officer may conduct a *Terry frisk* – a “limited search of the outer clothing of such person[] in an attempt to discover weapons” –if he or she has reasonable suspicion that the suspect is armed and dangerous. *Id.* at 30.

<sup>2</sup> As the order denying the motion to suppress was issued from the bench, we “determine the propriety of the ruling on the undisputed facts which the evidence shows.” *State v. Toney*, 187 N.C. App. 465, 469, 653 S.E.2d 187, 190 (2007) (internal quotation marks omitted) (permitting review of an oral order denying a motion to suppress where there is no material conflict in the evidence).

Pursuant to the Fourth Amendment, a police officer may *Terry* frisk a suspect if the officer “reasonably believes that the person is armed and dangerous . . . .” *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998). This “reasonable suspicion” standard requires that “[t]he stop . . . 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.” *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (alterations in original) (internal quotation marks omitted).

Similarly, a police officer may *Terry* frisk “the passenger compartment of a vehicle . . . when the officer has an objectively reasonable and articulable belief that the suspect is dangerous” and may obtain immediate access to weapons. *State v. Minor*, 132 N.C. App. 478, 481, 512 S.E.2d 483, 485 (1999).

In assessing the propriety of a *Terry* frisk, we “must consider *the totality of the circumstances*—the whole picture in determining whether . . . reasonable suspicion exists.” *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008) (emphasis added) (internal quotation marks omitted). “[F]actors supporting reasonable suspicion are not to be viewed in isolation.” *State v. Campbell*, 188 N.C. App. 701, 706, 656 S.E.2d 721, 725 (2008).

## B. Totality of Circumstances Supported Frisk Searches

### 1. The Nature of the Traffic Stop and Defendant’s Conduct Were Relevant Factors

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Defendant was stopped at 1:45 AM for driving with an inoperable tag light and a “limited expired” license plate. Defendant was stopped in an area that had “a high number of armed robberies . . . [,] drug and weapons-related offenses,” a relevant factor for police to consider. *See State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (stating that a suspect’s presence in a high crime area is “among the relevant contextual considerations in a *Terry* analysis.” (alteration in original) (internal quotation marks omitted)).

Additionally, when police initiated the stop, Defendant “rolled [his car] window down approximately three inches, just barely far enough down to where” he could communicate. One of the officers testified that this was unusual behavior as “[t]ypically [during] 95 percent of my traffic stops, the window goes completely down so that we can engage in conversation and conduct the traffic stop.” It was reasonable for police to deem Defendant’s behavior as incriminating, and even evasive. *See Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (reinforcing general principle that police are entitled to use their common sense judgment when stopping and frisking suspects).

Our Court has specifically held that a “defendant’s presence in [a high crime] area coupled with some sort of *evasive* behavior may constitute reasonable suspicion.” *State v. Warren*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 775 S.E.2d 362, 366 (2015) (emphasis added), *aff’d*, 368 N.C. 756, 782 S.E.2d 509 (2016) (per curiam).

Moreover, at the suppression hearing, one of the officers testified that the Defendant “appeared extremely nervous,” noting that:

He avoided eye contact for the duration of the traffic stop.

While seated in the vehicle, I could see -- he was wearing a shirt and I could see his heart beating, indicative of when people are extremely nervous. I could see the beat through the chest, or through the shirt. He was kind of shaking or vibrating.

A suspect’s nervousness is a proper factor for law enforcement to consider when deciding whether to *Terry* frisk. *See State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992). In *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), our Supreme Court found that there was reasonable suspicion as “defendant was extremely nervous, sweating, breathing rapidly, sighing heavily, and chuckling nervously in response to questions,” behavior similar to that at issue here. *Id.* at 637, 517 S.E.2d at 133.

While Defendant attempts to explain his seemingly nervous and evasive behavior through speculation about the cold weather at the time of the stop, he fails to explain why, even in light of the cold weather, he chose to wear only a shirt. We hold that the time and location of the *initial traffic* stop, along with Defendant’s nervous and evasive behavior, were relevant factors for law enforcement to consider for the purposes of the frisk searches.

## 2. Defendant’s Prior Arrests, Along with Other Factors, Warranted Frisk Searches

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A routine background check of Defendant revealed that he had been arrested: (1) eight times for burglary offenses; (2) four times for drug related offenses; (3) twice for possession of a firearm by a felon; and (4) once for assault with a deadly weapon with intent to kill and inflict serious injury and once for shooting into occupied property.<sup>3</sup> Immediately following the background check, the police searched Defendant and his vehicle.

We have held that an officer's knowledge of a suspect's prior arrests may inform his or her decision to frisk search the suspect. *See State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995). In *State v. Briggs*, 140 N.C. App. 484, 536 S.E.2d 858 (2000), we held reasonable suspicion existed for police to *Terry* frisk the defendant, where defendant was stopped in a high crime area late at night, had at least one trafficking arrest and conviction, appeared to be under the influence of drugs, and was smoking cigars, which the arresting officer knew from experience was used to mask the smell of illegal drugs. *Id.* at 486, 488, 536 S.E.2d at 859, 860.

Defendant cites a number of cases in his defense that center around two propositions: (1) Defendant's prior arrests did not support reasonable suspicion; and (2) the additional factors "found" by the trial court<sup>4</sup> did not support reasonable suspicion. At the outset, we note that "factors supporting reasonable suspicion *are*

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<sup>3</sup> The record is silent on Defendant's felony conviction(s).

<sup>4</sup> As indicated in footnote 2, the trial court denied Defendant's motion to suppress in an *oral* ruling.

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*not to be viewed in isolation.*” *Campbell*, 188 N.C. App. at 706, 656 S.E.2d at 725. To contend that Defendant’s prior arrests did not provide law enforcement reasonable suspicion without first considering the other circumstances surrounding the traffic stop is impermissible.<sup>5</sup> *See, e.g., id.* To further suggest that the State’s burden is raised by law enforcement’s partial reliance on a suspect’s prior arrests when making a stop is to misapprehend the caselaw.<sup>6</sup>

We note that many of the decisions cited by Defendant are from lower federal courts. These decisions are not binding upon this Court. *See State v. Berryman*, 360 N.C. 209, 212, 624 S.E.2d 350, 353 (2006) (stating that our state appellate courts “should exercise and apply [their] own *independent judgment*,” and accord lower federal court decisions “such *persuasiveness* as these decisions *might reasonably command*” (emphasis added)).

We also conclude that the dissenting opinion in *State v. Odum*, 119 N.C. App. 676, 681, 459 S.E.2d 826, 829 (1995) (Greene, J., dissenting), which was adopted by our Supreme Court, *State v. Odum*, 343 N.C. 116, 468 S.E.2d 826 (1996), does not

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<sup>5</sup> Accordingly, Defendant’s reliance on *United States v. Foster*, 634 F.3d 243 (4th Cir. 2011), *United States v. Laughrin*, 438 F.3d 1245 (10th Cir. 2006), *United States v. Walden*, 146 F.3d 487 (7th Cir. 1998), and *State v. Odum*, 343 N.C. 116, 468 S.E.2d 826 (1995), *adopting dissent in* 119 N.C. App. 676, 681, 459 S.E.2d 826, 829 (1995) (Greene, J., dissenting) is misplaced.

<sup>6</sup> Defendant cites *Laughrin* (a Tenth Circuit decision) in support of this principle—namely that the “State must pair a suspect’s criminal history with even stronger concrete evidence” if the suspect has no convictions. (internal quotation marks omitted). This is incorrect. Rather, *Laughrin* reaffirms the general rule that reasonable suspicion cannot rest on the basis of prior criminal activity *alone*. *Laughrin*, 438 F.3d at 1247 (clarifying that “knowledge of a person’s prior criminal involvement [] is *alone* insufficient to give rise to the requisite reasonable suspicion.” (emphasis added) (internal quotation marks omitted)).

compel reversal in the present case. In *Odum*, Judge Greene concluded that there was no reasonable suspicion to detain a defendant for suspected drug activity where the only suspicious factor was that the defendant had once been arrested for robbery. *Odum*, 119 N.C. App. at 681, 459 S.E.2d at 829. This robbery arrest was *not* sufficiently predictive of potential *drug trafficking* as the two, robbery and drug trafficking, constitute separate and distinct offenses. *See id.* In the present case, Defendant's prior arrests included four drug-related offenses and were accompanied by other suspicious factors.

While we are mindful of the potential dangers of permitting law enforcement to detain individuals in part due to prior criminal activity, Defendant's reliance on *United States v. Powell*, 666 F.3d 180 (4th Cir. 2011) is misplaced, as the police there detained defendant *solely* on the basis of prior robbery arrests and defendant's purported misrepresentation about his driver's license. *Id.* at 185. Here, the evidence supporting the frisk searches was much more robust, as it was premised on the time and location of the stop, and Defendant's nervous *and evasive* behavior, in addition to his *fifteen* confirmed arrests.

The remaining decisions cited by Defendant are all factually distinguishable. Unlike the present case, *United States v. Castle*, 825 F.3d 625 (D.C. Circ. 2016) hinged on a finding later discredited by the United States Court of Appeals for the D.C. Circuit, namely that defendant *fled* from an unmarked police car. *See id.* at 641.



Specifically, the *Castle* court held that the District Court “erred in equating the awareness of people in the neighborhood that the unmarked truck the officers drove was a police vehicle with a determination that the officers could reasonably believe that Appellant was aware of the officers['] truck on the evening in question.” *Id.* at 637 (internal quotation marks omitted). There is no such factual or logical gap here. Here, the State has adequately tied the location of the stop, the time of the stop, Defendant’s behavior, and his extensive criminal record to the justification for the frisk searches.

*Huff v. Reichert*, 744 F.3d 999 (7th Cir. 2014) is similarly inapplicable, as plaintiff’s license and temporary insurance card, both of which law enforcement cited as justification for the subsequent detention, were valid. *Id.* at 1007. Moreover, given the procedural posture of the case,<sup>7</sup> the *Huff* court was required to disregard law enforcement’s characterization of Huff’s behavior as “nervous.” *See id.* Here, police did not stop Defendant on the basis of documentation erroneously believed to be invalid. Nor is this Court required to accept Defendant’s version of the facts.

Lastly, Defendant, unlike the suspects in *United States v. Sprinkle*, 106 F.3d 613 (4th Cir. 1997), exhibited evasive and nervous behavior that is not reasonably susceptible to an innocent explanation. While the suspects in *Sprinkle* were observed

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<sup>7</sup> The defendant in *Huff* sought appeal of the District Court’s denial of his motion for *summary judgment*, which was filed on the basis of qualified immunity. *Id.* at 1003. Therefore, the *Huff* court was required to “accept the plaintiffs’ (or the district court’s) version of the facts and ask whether the defendant is nevertheless entitled to qualified immunity.” *Id.* at 1004.

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“huddl[ing] toward the center console with their hands close together,” no “drugs, no money, no weapons and no drug paraphernalia” were seen passing hands. *Id.* at 617. Indeed, the proximity of the suspects was no different than that typically seen between friends or relatives holding a conversation. *See id.* at 617. Similarly, the “flight” of one of the suspects from the scene was unremarkable. The defendant in *Sprinkle* “had just gotten into the car, so a prompt departure could be expected.” *Id.* at 618. In light of the circumstances of time, place, and manner, and the information available to the police, the frisk searches of Defendant and his vehicle were supported by reasonable suspicion.

IV. Conclusion

As there was reasonable suspicion to detain Defendant and frisk search him and his vehicle, we affirm the trial court’s order denying the motion to suppress.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).