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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-690

Filed: 6 June 2017

Mecklenburg County, Nos. 14 CRS 206346, 15 CRS 20293

STATE OF NORTH CAROLINA

v.

COREY MONTREZ McCREE

Appeal by Defendant from judgment entered 18 December 2015 by Judge Jeffrey P. Hunt in Superior Court, Mecklenburg County. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General June S. Ferrell, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant.

McGEE, Chief Judge.

Shortly before 1:30 p.m., Charlotte-Mecklenburg Police Officer Paul Ensminger (“Officer Ensminger”) was in a police substation (“the station”) on Beatties Ford Road, on 17 February 2014, monitoring a security camera (“the camera”) positioned on the roof of a building at the corner of Beatties Ford Road and LaSalle Street. Charlotte-Mecklenburg Police Officers Christopher Greene (“Officer Greene”)

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and Bodenstein (“Officer Bodenstein”) were also in the station at that time. According to Officer Ensminger, this area had been known for drugs his “whole career” and he had made drug-related arrests in this area. The camera Officer Ensminger was monitoring could be controlled from the station and Officer Ensminger had directed the camera north along Beatties Ford Road and the camera was focused on the parking lot (“parking lot”) of Queens Mini-Mart (“the store” or “Mini-Mart”). A car wash was located between the camera and the store, and the car wash partially blocked parts of the store and the parking lot from the camera’s view.

The video captured by the camera was played for the trial court during the suppression hearing that is the subject of this appeal. As Officer Ensminger watched the camera in real time, he saw a man in a maroon hooded jacket talking to another man in a black “Crown Royal” jacket in the parking lot. Officer Ensminger did not know either man, but the man in the maroon jacket was later identified as Corey Montrez McCree (“Defendant”). A few minutes later, Officer Ensminger saw a third man in a blue jacket approach the two men. The three men then spoke briefly before Defendant walked off to the right of the camera’s view.

Officer Ensminger panned the camera, following Defendant. Very briefly, only Defendant’s feet were visible, walking toward a gap between the car wash and the store. The camera then lost all visual contact with Defendant for a short period of time; then, Defendant’s head appeared over the roof of the car wash as he walked

behind the store toward a dumpster encircled by a wooden fence. Defendant disappeared behind the store in the area of the dumpster. Defendant re-appeared from behind the store approximately twenty seconds later, walked back between the buildings, and rejoined the two other men. Immediately upon re-joining the two men at approximately 1:30 p.m., Defendant dropped a small object or parcel, whitish in color, into the outstretched right hand of the man in the blue jacket. The man in the blue jacket then immediately used his left hand to place both paper money and change into Defendant's hand. Officer Ensminger's testimony was that, once Defendant joined the two men,

the person in the blue jacket held out his hand, and [Defendant] placed something small and white in the palm of his hand, very small. And in return, the subject in the blue jacket handed [Defendant] money. And you could see the money, the paper bills fell in his hand and some change fall to the ground.

The person in the blue jacket picked up the change for [Defendant] and handed it to him.

Officer Ensminger testified that, in his judgment, he had just witnessed a drug transaction because of "[t]he exchange of money, small item, appeared to be cocaine to me – well, a white substance, it could be cocaine at the time, and it's what I see routinely throughout my whole career."

The video showed a woman approach Defendant in the parking lot just after 1:38 p.m. She appeared to say something to Defendant and then she immediately

walked out of the right side of the frame. Approximately forty seconds later, Defendant walked out of the frame in the same direction the woman had gone. After a short pause, Officer Ensminger panned the camera to the right, back to the same fence-enclosed dumpster behind the store, and Defendant was seen by the dumpster at approximately 1:40:20 p.m. A couple of seconds later, the woman's head appeared in the frame next to Defendant, having walked from behind the store, next to the dumpster. Because of the roof of the car wash, only heads and upper torsos were visible. Defendant turned to face the rear of the building at approximately 1:40:25 p.m. and looked down in the direction of his midsection as the woman stood a few feet behind him, Defendant then turned toward the woman at approximately 1:40:31 p.m., they faced each other, both looking down in the space between them, and they made movements that suggested some kind of exchange. The two then separated, and the woman walked off behind the dumpster and Defendant turned around, walked back between the buildings, and re-entered the parking lot at approximately 1:40:50 p.m. Officer Ensminger instructed Officers Greene and Bodenstein to go to the parking lot and investigate.

Defendant then joined the man in the "Crown Royal" jacket, who was standing with a woman at the time. The three of them walked toward the store and entered it. They eventually exited the store and walked across the parking lot, in the direction of the car wash and Beatties Ford Road, until they disappeared out of the left side of

the frame. Officer Ensminger then panned the camera in all directions for a while, apparently in an attempt to relocate Defendant. As Officer Ensminger continued searching, the parking lot showed no sign of Defendant or police at 1:47:55 p.m. The camera was again aimed away from the parking lot for a few minutes. Officer Greene testified that, at about this time, he and Officer Bodenstein arrived at the store and “[j]ust walked up and asked to talk to [Defendant], kind of explained . . . that we wanted to talk to him, and at that point asked for consent to search his person based on our observations.”

However, the camera was pointed away from the parking lot for over three minutes, and did not capture the officers pulling into the parking lot or their initial contact with Defendant. When the camera returned focus to the parking lot at 1:51:26 p.m., both Officer Greene’s and Officer Bodenstein’s marked police vehicles were parked in the parking lot, and Officer Bodenstein, with his left hand, was holding Defendant’s left wrist to the hood of Officer Greene’s vehicle. Officer Green was not in the frame at this time.

Officer Bodenstein and Defendant remained in this position until Officer Greene walked up to them at 1:53:28 p.m. Officer Greene testified that, while Defendant was with Officer Bodenstein, he searched behind the store to see if he could locate any contraband, but he did not find any. Immediately upon approaching Defendant after his unsuccessful search, Officer Green asked Defendant if he would

consent to a search, and Officer Greene testified that Defendant did consent. Officer Green then searched Defendant, including removing items from Defendant's pockets and using his hands to thoroughly feel around Defendant's genitals and buttocks. Officer Greene testified that

we will utilize our hand and forearm to check between the insides of their legs, checking the groin area as well as the buttocks area because we know people to conceal narcotics, as well as weapons, in these areas. Normally, in a normal situation when searching somebody, there's not tension. When searching [Defendant], he was – it was noticeably uncomfortable that his – you could tell that his buttocks was clinched tightly which indicated to me that he was attempting to conceal something in the area of his buttocks.

Immediately following his search, at approximately 1:56 p.m., Officer Greene returned to his vehicle to run Defendant's information while Defendant and Officer Bodenstein remained by the hood of the vehicle. Officer Greene exited his vehicle at approximately 2:05 p.m. The officers continued to speak with Defendant for a minute, then Officer Green walked Defendant toward the store, and eventually took Defendant into the store. Officer Greene testified

I told [Defendant] that I noticed that he was clinching his butt cheeks. While we were engaging in conversation, [Defendant] asked me if we could step inside the store to speak privately. While we were walking to the store, I asked him if there is anything I need to know about. Initially, before this point, he had said no. While we were walking to the store, he states he may have some crumbs of marijuana. That's when we go inside the convenience store to conduct a more thorough search at which point he

says, “I have something on me.” I said, “Is it cocaine?” He said, “Yeah, a hard.” And I know a hard to be street terminology for crack cocaine.

Officer Greene took Defendant into the bathroom and instructed him to remove the cocaine, and Defendant “retrieved a bag that was determined to be, I believe, 1.3 grams of crack cocaine.”

Defendant was arrested and indicted for possession with intent to sell or deliver (“PWISD”) cocaine, and for having attained habitual felon status. Defendant filed a motion to suppress the evidence obtained at the store and the parking lot because it was the product of an “unlawful search and seizure of [Defendant.]” Defendant’s pretrial motion to suppress was heard 16 December 2015, and the trial court denied Defendant’s motion to dismiss by reading its order into the record on 17 December 2015. The matter then proceeded to trial that same day, but Defendant failed to object when the evidence that had been the subject of Defendant’s motion to suppress was admitted at trial. The jury returned a verdict of guilty of the lesser included offense of possession of cocaine on 18 December 2015. Defendant then pled guilty to a habitual felon charge, and was sentenced to an active term of twenty-seven to forty-five months. Defendant appeals.

Defendant’s sole argument on appeal is that the trial court erred in denying Defendant’s motion to suppress. We hold Defendant has abandoned his argument and we dismiss his appeal.

As this Court has regularly noted:

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, 240 N.C. App. 77, 83–84, 770 S.E.2d 99, 104 (2015) (citations omitted).

In the present case, the trial court made the following relevant findings and conclusions:

2. The officers used a surveillance camera to observe an area with a known history of drug transactions and violent crime near Beatties Ford Road in Charlotte, North Carolina, and the Court viewed the said video.
3. Officer Ensminger, who I will refer to as Officer E. hereafter, testified that he’s had 27 years of experience and training at State, Federal, and local levels on drug transactions and drug identification as well as drug surveillance.
4. Officer E. has been employed with the Charlotte Mecklenburg Police Department for 27 years.
5. Officer E. has been involved in approximately 1,500 to 2,000 drug arrests in his career and has conducted drug surveillance throughout his entire career.
6. The video shows occurrences on the afternoon of February 17, 2014 at the above said location. It appears to

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reveal two males at the location involved in what reasonably appeared to be one, and probably more, drug transactions involving possible cocaine in a packet.

7. Officer E. concluded, based on said training and experience, that the substance involved was cocaine in some form and not the other substance often sold in this area to wit, marijuana, because marijuana is usually transacted in a larger packet than the one he observed on the surveillance.

8. That Officer E. called in Officer Greene who observed the surveillance video also and who was ultimately sent to the scene.

9. The subject on the video in a burgundy or brown sweatshirt was unknown to these officers at the time but turned out to be [Defendant] who was identified in court by Officer Greene as the subject with whom he spoke at the scene and who he observed on surveillance video allegedly involved in the apparent drug transactions.

10. In the video it appears [Defendant] leaves the plain of view on several occasions and goes in a direction towards the back of the store where there is a dumpster located, and then returns on each occasion.

11. In these officer's opinions, [Defendant] had some sort of drug stashed in the dumpster area; no drugs were found in that area.

12. Officer Greene arrived at the scene and spoke with [Defendant] explaining why he was there and obtained [Defendant]'s permission to search him at the cruiser in the parking area.

13. Officer Greene has now been with the Charlotte Mecklenburg Police Department for 5 1/2 years approximately and has received training in drug recognition and how drugs are normally packaged here in

Charlotte and in the U.S. and has received training in drug cases at the state and local level.

14. Officer Greene is on the Metro Focus Mission Team involved with drug surveillance and interdiction and has made approximately 100 drug arrests.

15. After speaking with [Defendant] at the scene, Officer Greene searched [Defendant] thoroughly including his feet and shoes.

16. The search included patting [Defendant]'s arms, legs, hip area, and placing officer's hand inside the waistband but revealed no contraband.

17. [Defendant] allowed the officers[] request to search him and never rescinded his permission to do so.

18. During his search at the cruiser, Officer Greene noticed [Defendant] engaged in clenching his buttocks each time the officer patted his leg, hip, and groin area.

19. In this Officer's experience and training, this unusual clenching of the buttocks often is indicative of subject retaining contraband in his rectum in order to conceal it.

20. Officer Greene concluded that [Defendant] was probably concealing contraband by retaining it in his rectum and informed [Defendant] that they would need to go into the adjacent store's bathroom and conduct a strip search of [Defendant].

21. As [Defendant] and Greene were walking the few yards to the store across the parking area, [Defendant] admitted he may have crumbs of hard cocaine in his rectum which indicated to Greene that [Defendant] had rock cocaine in this officer's experience and training.

22. In the bathroom, Greene directed [Defendant] to remove the bag from his rectum which was ultimately

found to contain the cocaine which is the subject of this case.

BASED UPON THE ABOVE FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:

. . . .

2. That Officer E. and Officer Greene had sufficient material evidence, experience and training to form a reasonable suspicion that criminal illegality was afoot and that [Defendant] was involved at this location.

3. The initial search of [Defendant] at the cruiser was done with [Defendant]'s permission.

4. The totality of circumstances including [Defendant]'s conduct during the extended search at the cruiser coupled with Officer Greene's training and experience justified this officer in forming the conclusion that there was probable cause; that [Defendant] was illegally concealing some sort of contraband in his rectum and sufficient to conduct a strip search of [Defendant] in a private area within the nearby store.

5. [Defendant] was not in the custody of the officers nor under arrest until after he admitted possessing crumbs of hard cocaine in his rectum, and [Defendant] was not cuffed until his arrest.

6. The evidence resulting therefrom is not the product of an illegal search or seizure and is admissible herein.

Defendant fails to apply the appropriate standard of review in his argument.

Specifically, Defendant does not challenge any of the trial court's findings of fact, and

does not argue that those findings fail to support the trial court's conclusions of law.¹ *Wainwright*, 240 N.C. App. at 83–84, 770 S.E.2d at 104. The trial court's findings are therefore presumed to be supported by competent evidence. *King v. Bryant*, __ N.C. __, __, 795 S.E.2d 340, 348 (2017). Instead, Defendant argues that the evidence presented, including evidence presented at trial, which is irrelevant to our review, did not support the trial court's decision to deny Defendant's pretrial motion to suppress. Defendant makes no argument that the facts actually found by the trial court do not support its conclusions and ruling. In effect, Defendant does not make any reviewable challenge to the trial court's order denying his motion to suppress and, therefore, Defendant has abandoned any such argument. *Bryant*, __ N.C. at __, 795 S.E.2d at 350-51; N.C. R. App. P. 28(a), (b)(6). We therefore dismiss Defendant's appeal.

Assuming *arguendo* Defendant had appropriately challenged the trial court's order, his argument on appeal would still fail. Defendant makes the following argument in his brief:

[Defendant] was arrested without a warrant when, following a coordinated police drug investigation, and decision to stop and search [Defendant] near the Mini-Mart, two *uniformed* police officers, Greene and Bodenstein, arrived to the Mini-Mart in *two marked* patrol cars, accosted [Defendant], *detained* him, and instructed him to stand beside a patrol car as Bodenstein held his

¹ Defendant does quote certain findings and conclusions in the “fact” portion of his brief, and suggests by the way they are presented that he might disagree with some of them, but he does not actually challenge any findings or conclusions in his argument on appeal.

wrist while Greene spent 20 minutes searching the Mini-Mart's perimeter for contraband. As such, Greene and Bodenstein were required to have probable cause to effectuate the warrantless arrest. Because they lacked probable cause, [Defendant]'s warrantless arrest violated the Fourth Amendment to the United States Constitution and Article I, sections 19 and 20 of the North Carolina Constitution, and all statements and evidence arising from the illegal arrest must be suppressed.

....

[Defendant's] 20 minute detention – *where Bodenstein held his wrist the “whole time”* – constituted a warrantless arrest.

We first address Defendant's misrepresentation of the facts. According to the video and Officer Greene's testimony, Defendant gave Officer Greene consent to search his person at approximately 1:53 p.m. We deduce from the video that Defendant was initially detained by the officers between approximately 1:48 p.m. and 1:51 p.m. Therefore, the time between Defendant's detention and the initiation of the consent search was at most five minutes and potentially as brief as two minutes, not the “20 minutes” claimed by Defendant. Defendant apparently relies on testimony from Officer Green to establish initial contact with Defendant at 1:30 p.m. At the suppression hearing, Officer Greene testified that “[i]t would have been shortly after 13:30” when he first made contact with Defendant in the parking lot. This general statement does not serve to establish 1:30 p.m. as the time of Defendant's initial

detention. More importantly, the video had a running time stamp, and it clearly shows that the officers arrived at the scene, at the earliest, by 1:48 p.m.

Defendant appears to be making selective use of Officer Greene's ambiguous statement to argue that Defendant was detained for over twenty minutes, when the clear video evidence shows that Defendant could have only been detained between two and five minutes prior to initiation of the consent search. Defendant's arguments on appeal are all predicated on his erroneous assertion that he was detained for twenty minutes before he was searched. For example, Defendant argues:

To assess whether a *Terry* stop is excessive, "the court must decide whether the police could have 'minimized the intrusion' by more diligently pursuing their investigation through other means." *State v. Thorpe*, 232 N.C. App. at 480, 754 S.E.2d at 222. Consequently, "it is only when the police unnecessarily prolong the seizure that an otherwise valid investigative stop becomes a *de facto* arrest." *Id.*

In *State v. Thorpe*, 232 N.C. App. at 481, 754 S.E.2d at 223, when this Court discussed the time it "normally" takes to perform a *Terry* stop, the Court cited *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001), which had a five-minute detention, and *State v. Cornelius*, 104 N.C. App. 583, 590, 410 S.E.2d 504, 509 (1991), which had a ten-minute detention.

....

Greene and Bodenstein initially detained [Defendant] because they believed he was selling cocaine. Yet, despite this specific belief, Greene and Bodenstein did not frisk or pat down [Defendant] when they initially detained him. Instead, Greene spent *the next 20 minutes* searching the Mini-Mart's perimeter looking for [Defendant]'s "stash"

and “look-outs,” while Bodenstein physically detained [Defendant].

. . . .

[A] perimeter search of the Mini-Mart could not have possibly taken *more than 20 minutes*. Indeed, the very reason it is called a Mini-Mart is because it is quite small compared to other food markets. A simple Google Earth search of 2161 Beatties Ford Road clearly shows how small the Mini-Mart is and it clearly demonstrates it should not have taken *20 minutes* to search the perimeter. (Emphasis added).

Defendant’s argument is that a twenty minute detention was unreasonable and constituted a *de facto* arrest that required probable cause, and that probable cause was lacking. Defendant makes no argument that the two to five minute detention of Defendant that actually occurred constituted a *de facto* arrest and, in fact, cites cases in which detention times of five and ten minutes were found reasonable for the purposes of a *Terry* stop. *Sanchez*, 147 N.C. App. at 626, 556 S.E.2d at 608; *Cornelius*, 104 N.C. App. at 590, 410 S.E.2d at 509. Therefore, Defendant has abandoned any argument that Defendant’s two to five minute detention was unreasonable on the facts of this case and has also abandoned any arguments that his detention was not a proper *Terry* stop, that the State was required to show probable cause existed, and that it failed to do so. *Bryant*, __ N.C. at __, 795 S.E.2d at 350-51; N.C. R. App. P. 28(a), (b)(6).

APPEAL DISMISSED.

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Judges DAVIS and BERGER concur.

Report per Rule 30(e).