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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-369

Filed: 19 December 2017

Wake County, No. 15CRS225761

STATE OF NORTH CAROLINA

v.

TRAVIS RASHAD MITCHELL, Defendant.

Appeal by Defendant from judgment entered 9 November 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Irons & Irons, PA, by Ben G. Irons, II, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Travis Rashad Mitchell (“Defendant”) filed a motion to suppress evidence found during a traffic stop. On 15 November 2016, the trial court denied Defendant’s motion to suppress. On 9 November 2016, Defendant pleaded guilty to charges of possession of a firearm by a felon, carrying a concealed weapon, possession of a stolen firearm, possession with intent to sell or deliver cocaine, and maintaining a vehicle

for use, storage or sale of a controlled substance. On appeal, Defendant contends the indictment for carrying a concealed weapon was defective and the trial court committed error in denying his motion to suppress. We disagree.

I. Factual and Procedural Background

On 8 March 2016, a Wake County Grand Jury indicted Defendant for possession of a firearm by a convicted felon, possession of a stolen firearm, carrying a concealed weapon, possession with intent to sell and deliver cocaine, and maintaining a vehicle. On 10 June 2016, Defendant filed a motion to suppress evidence arguing the evidence was obtained pursuant to an unlawful extension of a traffic stop. On 9 November 2016, the Wake County Superior Court held a hearing on Defendant's motion to suppress.

The State first called Deputy Brandon Jenkins of the Wake County Sheriff's Department. On 22 November 2015, around 1:30 in the morning Deputy Jenkins was patrolling the interstate when he encountered Defendant driving a white Cadillac with expired tags. Deputy Jenkins turned on his blue lights, initiating a traffic stop, and Defendant pulled his vehicle over at the bottom of an exit ramp. Deputy Jenkins approached the passenger side of the vehicle, identified himself, and requested Defendant's driver's license and registration. Defendant complied with the request and stated he knew the registration and inspection had expired, but he needed to

drive the vehicle to pick up his aunt who was involved in a domestic dispute. However, Defendant did not exhibit a sense of urgency to get to his aunt.

Deputy Jenkins then returned to his patrol car with Defendant's license and registration and ran the information through a database called CJLEADS. This database contains information of individuals' previous criminal charges and any outstanding warrants. Deputy Jenkins uses this information to obtain "a general overview of what [he is] dealing with on the side of the road for [his] safety." The information indicated Defendant had previous felony convictions for drugs and weapons charges but did not have any outstanding warrants, and his driver's license was active. The database also indicated officers should approach Defendant with caution. Deputy Jenkins obtained this information in "less than a couple [of] minutes."

After reviewing the information Deputy Jenkins returned to Defendant's vehicle and asked Defendant to exit the car and sit in the patrol car while he completed the citation paperwork. Deputy Jenkins made this decision out of concern for his safety based on the isolated location and the early morning hour. He determined he could observe Defendant better if he were sitting in the passenger seat of the patrol car.

Upon exiting his car, Defendant dropped a metal box and a package fell to the ground. Deputy Jenkins testified he knew this package contained narcotics based on

his training and experience. Defendant picked up the package and tried to hide it in his palm. Deputy Jenkins then stated “[g]o ahead and hand it to me” and Defendant gave him the package. The package contained several small white rocks, appearing to be crack cocaine or cocaine.

Deputy Jenkins then secured Defendant and effectuated a search of his vehicle. He found a semi-automatic firearm covered with a knit black glove and located between the driver’s seat and the center console. In the ashtray, he found a half-smoked cigar filled with marijuana and in the center console he found a medicine bottle containing a white powder residue, and a second small package of crack cocaine. He also found two open containers of alcohol.

Upon completing the search of the vehicle, Deputy Jenkins ran the firearm information through a database and determined it was stolen. The suspected narcotics were sent to a lab for processing, and the lab analyst confirmed they were, in fact, cocaine and marijuana.

Following arguments from the State and Defendant, the trial court denied Defendant’s motion to suppress. Defendant then pleaded guilty to all charges and orally entered notice of appeal. During the plea colloquy, the Court stated “as I understand it, . . . you are reserving your right to appeal [the] ruling denying your motion to suppress; is that right?” Defendant responded “[y]es” The trial court accepted Defendant’s plea and sentenced him to a term of 14 to 26 months

imprisonment, but suspended the sentence and placed Defendant on regular supervised probation for 24 months. The court noted on the record “[D]efendant in open court gives notice of appeal [of] the [c]ourt’s ruling to the North Carolina Court of Appeals.”

II. Jurisdiction

On 11 April 2017, Defendant filed a petition for writ of *certiorari* with this Court. On 21 April 2017, the State filed a response opposing Defendant’s petition for writ of *certiorari*. On 26 April 2017, Defendant’s petition was referred to this panel.

This Court has held:

[I]n order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final judgment.

State v. Cottrell, 234 N.C. App. 736, 739-40, 760 S.E.2d 274, 277 (2014).

Here, Defendant gave notice of his intent to appeal the denial of his motion to suppress and the reservation of the right to suppress was noted in the plea transcript. However, Defendant gave notice of his intent to appeal prior to entering a plea of guilty. Defendant did not specifically appeal from the Court’s judgment following sentencing, as is required by N.C. Gen. Stat. § 15A-979(b).

On 11 April 2017, Defendant filed a petition for writ of *certiorari*, requesting discretionary review. Under North Carolina Rules of Appellate Procedure, Rule

21(a)(1) “[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action,” N.C. R. App. P. 11 (2018). We allow Defendant’s petition, issue the writ of *certiorari*, and address Defendant’s appeal on the merits.

In his petition, Defendant contends the indictment for carrying a concealed weapon was fatally defective because it did not allege the prior misdemeanor offense of carrying a concealed gun in a single indictment in accordance with N.C. Gen. Stat. § 15A-928(a). We first address this contention, prior to a discussion of the merits of Defendant’s appeal.

Defendant’s indictment for carrying a concealed weapon stated:

[T]he jurors for the State upon their oath present that on or about November 22, 2015, in Wake County, the defendant named above unlawfully, willfully and feloniously did carry concealed about the defendant’s person while off the defendant’s own premises a Glock, Model 23, .40 caliber semi-automatic pistol, The defendant had previously been convicted of carrying a concealed gun on June 27, 2007 in Alamance County District Court in file number 06CR 059806. This act was done in violation of N.C.G.S. 14.269.

N.C. Gen. Stat. § 14-269(c) provides a defendant’s first offense of carrying a concealed weapon is a Class 2 misdemeanor, while a subsequent offense is considered a Class H felony. Here, the indictment alleged this was Defendant’s second offense

of carrying a concealed weapon, thus he was charged with a Class H felony. N.C.

Gen. Stat. § 15A-928 states in pertinent part:

(a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction. If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. . . .

Here, the State did not comply with the statutory requirement and allege Defendant's prior misdemeanor conviction in a special indictment or a separate count. However, our Supreme Court recently held "the separate indictment provision contained in N.C.G.S. § 15A-928 is not a jurisdictional issue that defendant was entitled to raise on appeal without having lodged an appropriate objection or otherwise sought relief on the basis of that claim before the trial court." *State v. Brice*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Nov. 3, 2017) (No. 244PA16). Thus, because

Defendant did not challenge the sufficiency of the indictment at trial he may not raise this challenge for the first time on appeal.¹

III. Standard of Review

Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “The trial court’s conclusions of law, . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

IV. Analysis

In his principal argument on appeal, Defendant contends Officer Jenkins’ decision to conduct a criminal inquiry and to require Defendant to exit his car and sit in the patrol car without reasonable suspicion, measurably and unlawfully extended the traffic stop. Thus, the narcotics discovered thereafter were “fruit of the poisonous tree” and should have been suppressed. Defendant argues the trial court erred in denying Defendant’s motion to suppress this evidence. We disagree.

Defendant challenges the following conclusion of law: “Officer Jenkins’ decision to complete the traffic investigation and issuance of the citation while Defendant was

¹ We note counsel did not have the benefit of the Supreme Court’s opinion in *State v. Brice* at the time this appeal was filed.

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seated in the patrol vehicle for officer safety was not unreasonable and did not unreasonably delay the traffic investigation.”

The Fourth Amendment of the United States Constitution provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]” U.S. Const. amend. IV. The Fourth Amendment “is applicable to the states through the Due Process Clause of the Fourteenth Amendment.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994). The North Carolina Constitution also affords similar protections. *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citing N.C. Const. art. I, § 20).

It is well settled that “[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of [the Fourth Amendment].” *Whren v. United States*, 517 U.S. 806, 809-10, 135 L. Ed. 2d 89, 95 (1996). Such a seizure “is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *Id.* at 810, 135 L. Ed. 2d at 95. But “a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.” *Illinois v. Caballes*, 543 U.S. 405, 407, 160 L. Ed. 2d 842, 846 (2005).

In *Rodriguez v. United States*, the United States Supreme Court held

[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation.

575 U.S. ___, ___, 191 L. Ed. 2d 492, 496 (2015). The court in *Rodriguez* noted "[b]eyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Id.* at ___, 191 L. Ed. 2d. at 499 (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d at 847). Such inquiries 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 determined such inquiries are permissible because they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.*

In *State v. Bullock*, this Court examined a scenario markedly similar to the case *sub judice*. ___ N.C. App. ___, 785 S.E.2d 746 (2016) (*rev'd*, ___ N.C. ___, ___ S.E.2d ___, (Nov. 3, 2017) (No. 194A16). There an officer pulled over the defendant after he committed several traffic violations. *Id.* at ___, 785 S.E.2d at 747-48. The officer then "required defendant to exit his car, subjected him to a pat down search, and had him sit in the patrol car while the officer ran his checks." *Id.* at ___, 785 S.E.2d at 751. "Then, apart from just checking defendant's license and checking for

warrants, [the officer] ran ‘defendant’s name through various law enforcement databases’ while he questioned defendant at length about subjects unrelated to the traffic stop’s mission.” *Id.* at ___, 785 S.E.2d at 751-52. We noted the officer’s search of law enforcement databases was “for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.” *Id.* at ___, 785 S.E.2d at 752. The defendant argued the officer unlawfully prolonged the traffic stop. *Id.* at ___, 785 S.E.2d at 747. This court agreed stating “even a de minimus extension is too long if it prolongs the stop beyond the time necessary to complete the mission.” *Id.* at ___, 785 S.E.2d at 752.

On appeal, the North Carolina Supreme Court reversed the decision, holding the officer did not unlawfully prolong the traffic stop. *State v. Bullock*, ___ N.C. App. ___, ___ S.E.2d ___, (Nov. 3, 2017) (No. 194A16). Applying *Rodriguez*, the court held it is lawful for an officer to order a driver to exit his vehicle because “[a]sking a stopped driver to step out of his or her car improves an officer’s ability to observe the driver’s movements and is justified by officer safety, which is a ‘legitimate and weighty’ concern.” *Id.* at ___, ___ S.E.2d at ___ (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 54 L. Ed. 2d 331, 336 (1977) (per curiam)). In *Rodriguez*, the court stated “the government’s officer safety interest stems from the mission of the stop itself.” 575 U.S. at ___, 191 L. Ed. 2d at 500. Therefore, the court concluded “any

amount of time that the request to exit the . . . car added to the stop was simply time spent pursuing the mission of the stop.” *Bullock* at ___, ___ S.E.2d at ___.

The court determined the safety precautions which *Rodriguez* allows “appear to include conducting criminal history checks” as another measure related to officer safety. *Id.* Yet, “[s]afety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, . . . are not permitted if they extend the duration of the stop.” *Id.* In *Bullock* the officer ran the database checks while he continued to question the defendant, and conducting the checks took only “a few minutes.” *Id.* The court ultimately held the officer did not unlawfully prolong the stop. *Id.*

We are bound by the North Carolina Supreme Court’s decision in *Bullock* and therefore conclude Deputy Jenkins’ actions of running Defendant’s information through CJLEADS and subsequently asking Defendant to exit his vehicle and sit in the patrol car did not unlawfully prolong the traffic stop. The narcotics discovered when Defendant exited his vehicle provided reasonable suspicion for the officer to then search the vehicle. Therefore, the trial court properly denied Defendant’s motion to suppress evidence.

V. Conclusion

For the foregoing reasons, we affirm the trial court’s denial of Defendant’s motion to suppress.

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AFFIRMED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).