

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-33-2

Filed: 16 January 2018

Johnston County, No. 14 CRS 54773, 14 CRS 54776

STATE OF NORTH CAROLINA

v.

DAVID MICHAEL REED, Defendant.

Appeal by Defendant from judgment entered 20 July 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Originally heard in the Court of Appeals 6 June 2016. By opinion issued 20 September 2016, a divided panel of this Court reversed the decision of the trial court denying Defendant's motion to suppress evidence. Upon discretionary review granted by the Supreme Court and by judgment dated 27 November 2017, the Supreme Court of North Carolina vacated and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *State v. Bullock*, \_\_\_, N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2017) (194A16).

*Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.*

*Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.*

HUNTER, JR., Robert N., Judge.

David Michael Reed ("Defendant") filed a motion to suppress evidence found during a traffic stop. On 14 July 2015, the trial court entered an order denying

Defendant's motion to suppress. On 21 July 2015, Defendant pleaded guilty to trafficking more than 200 grams but less than 400 grams of cocaine by transportation, and trafficking more than 200 grams but less than 400 grams of cocaine by possession. The trial court sentenced Defendant to 70 to 93 months imprisonment and imposed a \$100,000.00 fine and \$3,494.50 in court costs. On appeal, this Court held the trial court committed reversible error by denying Defendant's motion to suppress.

On 5 October 2016, the State filed a petition for writ of *supersedeas* and a motion for temporary stay with the Supreme Court of North Carolina. The same day, the Supreme Court allowed the State's motion for temporary stay. On 25 October 2016, the State filed notice of appeal, pursuant to the dissenting opinion. On 2 November 2016, the court allowed Defendant's petition for writ of *supersedeas*. In an opinion filed 3 November 2017, the court vacated the opinion of this Court and remanded for reconsideration in light of the Supreme Court's recent decision in *State v. Bullock*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2017) (194A16). On remand, after reviewing *Bullock* and the arguments advanced by the parties, we reverse the decision of the trial court.

### **I. Factual and Procedural Background**

At 8:18 a.m. on 9 September 2014, Defendant drove a rented Nissan Altima faster than the posted sixty-five miles per hour speed limit on Interstate 95 ("I-95")

in Johnston County, North Carolina. His fiancée, Usha Peart, rode in the front passenger seat and held a female pit bull in her lap. Trooper John W. Lamm, of the North Carolina State Highway Patrol, was parked in the median of I-95. Trooper Lamm used his radar to determine Defendant was traveling seventy-eight miles per hour, and performed a traffic stop for Defendant's speeding infraction. Trooper Lamm's patrol car had a camera that faced forwards towards the hood of the vehicle, and recorded audio inside and outside of the patrol car.

Defendant pulled over on the right shoulder of I-95, Trooper Lamm pulled behind him, and Trooper Lamm approached the passenger side of the Nissan. Trooper Lamm saw energy drinks, trash, air fresheners, and dog food scattered on the floor of the vehicle. He asked if the dog in Peart's lap was friendly and Defendant and Peart said the dog was friendly.

Trooper Lamm stuck his arm inside the vehicle to pet the dog and asked Defendant for his driver's license and the rental agreement. Defendant gave Trooper Lamm his New York driver's license, a registration card, and an Enterprise rental car agreement. The rental agreement listed Peart as the renter and Defendant as an authorized driver. Trooper Lamm told Defendant "come on back here with me" motioning towards his patrol car.

Defendant exited the Nissan and Trooper Lamm asked if he had any guns or knives on his person. Defendant asked Trooper Lamm why the frisk was necessary,

and Trooper Lamm replied, “I’m just going to pat you down for weapons because you’re going to have a seat with me in the car.” Trooper Lamm found a pocket knife, said it was “no big deal,” and put it on the hood of the Nissan.

Trooper Lamm opened the passenger door of his patrol car. His K-9 was in the back seat of the patrol car at that time. Defendant sat in the front passenger seat with the door open and one leg outside of the car. Trooper Lamm told Defendant to close the door. Defendant hesitated and said he was “scared” to close the door; Lamm replied, “Shut the door. I’m not asking you, I’m telling you to shut the door. I mean you’re not trapped, the door [is] unlocked. Last time I checked we were the good guys.” Defendant said, “I’m not saying you’re not,” and Trooper Lamm said, “You don’t know me, don’t judge me.” Defendant said he was stopped before in North Carolina, but he was never taken to the front passenger seat of a patrol car during a stop. Following Trooper Lamm’s orders, Defendant closed the front passenger door.

Trooper Lamm ran Defendant’s New York license through record checks on his mobile computer. While doing so, Trooper Lamm asked Defendant about New York, and “where are y’all heading to?” Defendant said he was visiting family in Fayetteville, North Carolina. Trooper Lamm noted the rental agreement restricted travel to New York, New Jersey, and Connecticut, but told Defendant the matter could likely be resolved with a phone call to the rental company.

Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past, when he was in the military. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan. Trooper Lamm noticed the rental agreement was drafted for a Kia Rio not a Nissan Altima. Trooper Lamm exited the patrol car to ask Peart for the correct rental agreement, and told Defendant to “sit tight.”

Trooper Lamm approached the front passenger side of the Nissan Altima and asked Peart for the correct rental agreement. He asked about her travel plans with Defendant and the nature of their trip. She said they were visiting family in Fayetteville but might also travel to Tennessee or Georgia. She explained the first rental car they had, the Kia Rio, was struck by another car and the rental company gave them the Nissan Altima as a replacement. She could not find the rental agreement for the Nissan Altima and continued to look for it. Trooper Lamm told Peart he was going to issue Defendant a speeding ticket and the two would “be on [their] way.”

Trooper Lamm returned to the patrol car, explained Peart could not locate the correct rental agreement, and continued to question Defendant about the purpose of the trip to Fayetteville. Then, Trooper Lamm called the rental company and the rental company confirmed everything was fine with the Nissan Altima rental, but

informed Trooper Lamm that Peart still needed to call the company to correct the restricted travel condition concerning use of the car in New York, New Jersey, and Connecticut. After the call, Trooper Lamm told Defendant his driver's license was okay and he was going to receive a warning ticket for speeding. Trooper Lamm issued a warning ticket, returned all of Defendant's paperwork including his license and asked Defendant if he had any questions.

Then, Trooper Lamm told Defendant he was "completely done with the traffic stop," but wanted to ask Defendant additional questions. Defendant did not make an audible response, but at the suppressing hearing, Trooper Lamm testified Defendant nodded his head. Trooper Lamm did not tell Defendant he was free to leave. At this point, an additional officer, Trooper Ellerbe, was present on the scene. Trooper Ellerbe parked his patrol car behind Trooper Lamm's and left his blue lights on. He stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat.

Trooper Lamm asked Defendant if he was carrying a number of controlled substances, firearms, or illegal cigarettes in the Nissan Altima. Defendant responded, "No liquor, no nothing, you can break the car down." Trooper Lamm continued questioning Defendant and said, "I want to search your car, is that okay with you?" Defendant hesitated, mumbled, and told Trooper Lamm to ask Peart. Defendant stated, "I'm just saying, I've got to go to the bathroom, I want to smoke a

cigarette, we're real close to getting to the hotel so that we can see our family, like, I don't, I don't see a reason why." Trooper Lamm responded, "[W]ell let me go talk to her then, sit tight," and walked to the front passenger side of the Nissan Altima. By this time, two additional officers were present at the scene.

Trooper Lamm told Peart everything was fine with the rental agreement and asked her the same series of questions he asked Defendant, whether the two were carrying controlled substances, firearms, or illegal cigarettes. Trooper Lamm asked Peart if he could search the car. Peart hesitated, expressed confusion, and stated, "No. There's nothing in my car, I mean . . . ." Trooper Lamm continued to ask for consent, Peart acquiesced and agreed to sign a written consent form. Trooper Lamm searched the Nissan Altima and found cocaine under the back passenger seat.

## **II. Analysis**

Defendant originally argued before this Court the trial court erred in denying his motion to suppress evidence discovered pursuant to an unlawful traffic stop. Specifically, Defendant argued the trial court made findings of fact which were not supported by competent evidence because his "initial investigatory detention was not properly tailored to address a speeding violation." He also contended Trooper Lamm seized him without reasonable suspicion of criminal activity, when the trooper told him to exit his vehicle and sit in the patrol car. Defendant further argued the officer

unlawfully seized items from the car during the search, and these items are fruit of the poisonous tree, which must be suppressed. This Court agreed.

Relying on the United States Supreme Court’s guidance in *Rodriguez v. United States* and our prior decision in *State v. Bullock* we held:

[A]n officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle. The same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down. It is also possible for an officer to unlawfully extend a traffic stop by telling a driver to close the patrol car's front passenger door, while the officer questions the driver about matters unrelated to the traffic stop.

*State v. Reed*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 791 S.E.2d 486, 492 (2016) (citations and footnotes omitted). We determined the trooper’s authority to seize Defendant for speeding ended “when tasks tied to the traffic infraction [were]—*or reasonably should have been*—completed.” *Id.* (quoting *Rodriguez v. United States*, \_\_\_ U.S. \_\_\_, \_\_\_, 191 L. Ed. 2d 492, 498 (2015) (emphasis added) (citation omitted)). We determined at the very latest, the authority to seize ended when the officer told Defendant he was going to issue a warning ticket, and gave him a copy of the ticket. *Id.*

We ultimately held Trooper Lamm did not have reasonable suspicion to search the vehicle after the traffic stop concluded, because the evidence the trial court relied upon in support of a finding of reasonable suspicion constituted legal behavior, consistent with innocent travel. *Id.* at \_\_\_, 791 S.E.2d at 493. Therefore, we reversed



the decision of the trial court denying Defendant's motion to suppress. *Id.*

In *State v. Bullock*, our Supreme Court addressed a similar factual scenario. There, the Supreme Court held an officer may require a driver to exit his vehicle, without unlawfully extending the traffic stop. \_\_\_ N.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (Nov. 3, 2017) (No. 194A16). In *Bullock*, after the officer required the driver to exit his vehicle, he frisked the driver for weapons. *Id.* The Supreme Court held this frisk was lawful, due to concerns of officer safety, and the very brief duration of the frisk. *Id.* The officer then required the driver to sit in the patrol car, while he ran database checks. *Id.* The court determined this did not unlawfully extend the stop either. *Id.* The court then held the officer had reasonable suspicion to thereafter extend the stop and search the defendant's vehicle. *Id.* The defendant's nervous demeanor, as well as his contradictory and illogical statements provided evidence of drug activity. *Id.* Additionally, he possessed a large amount of cash and multiple cell phones, and he drove a rental car registered in another person's name. *Id.* The court determined these observations provided reasonable suspicion of criminal activity, allowing the officer to lawfully extend the traffic stop and conduct a dog sniff. *Id.*

In reconsideration of our decision, we are bound by the Supreme Court's holdings in *Bullock*. Therefore, we must conclude Trooper Lamm's actions of requiring Defendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned Defendant, did not unlawfully extend

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the traffic stop. Yet, this case is distinguishable from *Bullock* because after Trooper Lamm returned Defendant's paperwork and issued the warning ticket, Defendant remained unlawfully seized in the patrol car.

Ordinarily, "an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009); *see also State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (stating "[a] reasonable person, under the circumstances, would have felt free to leave when the documents were returned. Therefore, the first seizure concluded when [the officer] returned the documents to defendant."). Yet, the governing inquiry is whether under the totality of the circumstances a reasonable person in the detainee's position "would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

Here, a reasonable person in Defendant's position would not believe he was permitted to leave. When Trooper Lamm returned Defendant's paperwork, Defendant was sitting in the patrol car. Trooper Lamm continued to question Defendant as he sat in the patrol car. When the trooper left the patrol car to seek Peart's consent to search the rental car, he told Defendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger

door of Trooper Lamm's vehicle where Defendant sat. Moreover, at trial Trooper Lamm admitted at this point Defendant was not allowed to leave the patrol car.

A reasonable person in Defendant's position would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door. Therefore, even after Trooper Lamm returned Defendant's paperwork, Defendant remained seized. To detain a driver by prolonging the traffic stop, an officer must have "reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166-67 (2012).

As we concluded in our first opinion, Trooper Lamm did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop. The facts suggest Defendant appeared nervous, Peart held a dog in her lap, dog food was scattered across the floorboard of the vehicle, the car contained air fresheners, trash, and energy drinks—all of which constitute legal activity consistent with lawful travel. While Trooper Lamm initially had suspicions concerning the rental car agreement, the rental company confirmed everything was fine.

These facts are distinguishable from *Bullock* in which the officer observed the defendant "speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road." *Bullock* at \_\_\_, \_\_\_ S.E.2d at \_\_\_. Then the defendant's hand trembled as he handed over his license. *Id.* Additionally, the defendant was not the authorized driver on his rental agreement, he had two cell

phones, and a substantial amount of cash on his person. *Id.* He failed to maintain eye contact, and made several contradictory, illogical statements. *Id.*

We therefore conclude, after reconsideration of our prior opinion in light of *Bullock*, the trial court erred in denying Defendant's motion to suppress because after the lawful duration of the traffic stop concluded Trooper Lamm unlawfully detained Defendant without reasonable suspicion of criminal activity.

### **III. Conclusion**

For the foregoing reasons, we reverse the trial court's order.

REVERSE.

Chief Judge McGEE concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Because I agree with the State that Judge Adams’s findings support a conclusion that Trooper Lamm obtained Defendant’s consent to search the rental vehicle *after* the traffic stop had concluded, and that Defendant was otherwise free to leave, I respectfully dissent.

Even assuming, *arguendo*, that Trooper Lamm’s exchange with Defendant following the conclusion of the traffic stop was non-consensual, Trooper Lamm had *reasonable suspicion* of separate, independent criminal activity to support an extension of the traffic stop beyond the time necessary to complete the mission of citing Defendant for the traffic violation.

I. The Seizure Had Ended Because the Traffic Stop Had Concluded and Defendant was Free to Leave.

The majority contends that the stop was unconstitutionally extended when Defendant was sitting in the patrol car and his companion, Ms. Peart, had returned to the rental car. The majority concluded that a person in Defendant’s position would not feel free to leave at the point of the encounter when Trooper Lamm told Defendant to “sit tight” in the patrol car while Trooper Lamm returned to the rental vehicle to seek to Ms. Peart’s consent to search the rental vehicle. However, I disagree with this analysis: As explained below, the findings of Judge Adams show that Defendant gave his consent to Trooper Lamm to search the rental vehicle (or ask Ms. Peart for consent) at a point during the encounter when Defendant was no longer seized, well

before Trooper Lamm told Defendant to “sit tight.” And once Defendant gave his consent to the search, it was certainly reasonable for Trooper Lamm to direct Defendant to “sit tight” for officer safety while he returned to the rental vehicle, which Ms. Peart was seated inside.

I agree with the majority that while Trooper Lamm held Defendant’s paperwork and “issued the warning ticket for speeding as Defendant was sitting in the patrol car, Defendant was still seized.

However, based on controlling jurisprudence, the seizure ended when, as the trial court found, Trooper Lamm gave the warning ticket, along with Defendant’s paperwork, to Defendant and told Defendant that the traffic stop was completed. Indeed, our Court and the Fourth Circuit Court of Appeals have held on a number of occasions that “[g]enerally, an initial traffic stop concludes and the encounter becomes consensual . . . after an officer returns the detainee’s driver’s license and registration.” *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009).<sup>1</sup> *United States v. Sullivan*, 138 F.3d 126, 133-34 (4th Cir. 1998)<sup>2</sup>. Further, as Judge Adams found, Trooper Lamm did not seek Defendant’s consent to search the rental

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<sup>1</sup> See also *State v. Henry*, 237 N.C. App. 311, 324, 765 S.E.2d 94, 104 (2014) (recognizing that “a traffic stop is not terminated until after the officer returns the driver’s license or other documents to the driver”); *State v. Cottrell*, 234 N.C. App. 736, 742-43, 760 S.E.2d 274, 279 (2014) (restating the general principle that the return of motorist documentation typically renders any subsequent exchanges between motorist and law enforcement consensual). In *State v. Kincaid*, we recognized that “subject to a totality of the circumstances test, that once an officer returns the license and registration, the stop is over and the person is free to leave.” 147 N.C. App. 94, 99, 555 S.E.2d 294, 298 (2001).

<sup>2</sup> See also *United States v. Whitney*, 391 F. App’x. 277, 280-81 (4th Cir. 2010); *United States v. Meikle*, 407 F.3d 670, 673-74 (4th Cir. 2005).

car until *after* returning Defendant’s paperwork to him and informing Defendant that the traffic stop had concluded. There is no finding to suggest any restraint or compulsion by Trooper Lamm when he obtained Defendant’s consent to search the rental vehicle. That is, Trooper Lamm did not simply launch into an interrogation after returning to Defendant his license and other paperwork. Rather, as Judge Adams found, Trooper Lamm took the extra step of first *asking* Defendant for his consent to question him further. *See Kincaid*, 147 N.C. App. at 102, 555 S.E.2d at 300 (holding in a similar situation when the officer “asked if he could question defendant . . . [,] [he] did not deprive defendant of freedom of action in any significant way. After [the officer] handed back defendant’s license and registration, defendant was free to leave and free to refuse to answer questions”). Judge Adams also found that Trooper Lamm “was at all times casual and conversational in his words and manner.”<sup>3</sup> *See Sullivan*, 138 F.3d at 133 (finding relevant that “there is no indication that [the officer] employed any physical force or engaged in any outward displays of authority”). Also significant is that the questioning occurred on a public highway during the daytime.

It is true that there is no indication (or finding) that Trooper Lamm ever expressly told Defendant that he “was free to leave.” The United States Supreme

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<sup>3</sup> Defendant challenges the finding regarding the casualness of the conversation; however, he does not challenge this finding with regards to any portion of the encounter occurring after Trooper Lamm informed Defendant that the traffic stop was completed.

Court, however, has held that an officer is *not required* to inform a detainee that he is free to leave in order to transform a traffic stop into a consensual encounter. *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (concluding that it would be “unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”). The Fourth Circuit has reached this same conclusion. *See Sullivan*, 138 F.3d at 133 (“While [the officer] never told [the defendant] that he was free to go, that fact alone is not dispositive.”) And our Court has also reached this same conclusion. *See Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297 (affirming the trial court’s conclusion that the defendant was free to leave “although the officer never told defendant that he was free to leave”).

Judge Adams further found that *after* Defendant gave Trooper Lamm consent to search the rental vehicle (subject to Ms. Peart’s consent), Trooper Lamm directed Defendant to “sit tight” in the unlocked patrol car while he returned to the rental vehicle to ask Ms. Peart for her consent to the search. I conclude that it was constitutionally permissible for Trooper Lamm, for purposes of officer safety, to direct Defendant to remain in the patrol car while he carried out the search to which Defendant had voluntarily consented.<sup>4</sup> Certainly, where an individual has consented

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<sup>4</sup> Defendant does not make any argument concerning whether *Ms. Peart* would not have felt free to leave when *she* gave *her* consent to search the vehicle or any argument about the impact the validity of Ms. Peart’s consent should have on our analysis in this prosecution of Defendant. Therefore, any issue concerning Ms. Peart’s consent is not before us.



to a search, an officer can direct that individual away from the place being searched and away from other companions for purposes of officer safety.

In conclusion, since Defendant gave his consent to search the car *after* the traffic stop had concluded and the encounter between Defendant and Trooper Lamm became consensual, I would affirm Judge Adams' order.

II. Trooper Lamm Otherwise Had Reasonable Suspicion to Extend the Stop.

Assuming, *arguendo*, that the traffic stop did not become consensual after Trooper Lamm returned all of the paperwork to Defendant, informed Defendant that the traffic stop had concluded, and asked Defendant for his consent to question him further, I believe that Judge Adams's findings support her conclusion that Trooper Lamm had reasonable suspicion that Defendant was transporting illegal drugs. I so conclude based on the holding of our Supreme Court in *State v. Bullock*, \_\_\_ N.C. \_\_\_, 805 S.E.2d 671 (2017), and for the reasons stated in my dissent in the first opinion filed in the present case, *State v. Reed*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 791 S.E.2d 486, 493-96 (2016).