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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-412

Filed: 6 February 2018

Cabarrus County, Nos. 14 CRS 51159, 51844

STATE OF NORTH CAROLINA

v.

JEROME JOHNSON

Appeal by defendant from judgment entered 5 October 2016 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jarrett W. McGowan, for the State.

Morgan & Carter PLLC, by Michelle FormyDuval Lynch, for defendant-appellant.

ELMORE, Judge.

Jerome Johnson (defendant) appeals from an order denying his motion to suppress crack cocaine that dropped from his right sweatpants leg after officers removed packing tape wrapped around the ankle cuffs of his sweatpants. Two police officers were on patrol investigating reports of narcotics sales in Concord. The officers

were in a nearby neighborhood when they observed a car drive by them twice and then park in the middle of a cul-de-sac. They observed the driver exit the car, approach a house, and appear nervous as he repeatedly knocked on the door. When his knocks went unanswered, the driver started back toward his car. One of the officers exited his vehicle and approached the driver before he entered the car, questioned him, and discovered that he had outstanding warrants out for his arrest.

After the officers arrested the driver, one officer placed him into her patrol car, while the other officer approached defendant, who was sitting in the passenger seat. After briefly questioning defendant and then asking him to exit the vehicle, that officer asked defendant if he could pat him down and defendant consented. During the search, the officer observed that defendant was wearing a pair of jeans over a pair of sweatpants and that the ankle cuffs of his sweatpants were wrapped shut with packing tape, and then the officer felt a bulge near defendant's right ankle that he immediately recognized as narcotics. After defendant refused to remove the packing tape from his sweatpants, he attempted to flee but was quickly apprehended. Once detained, the officers unwrapped the packing tape and out dropped crack cocaine.

Defendant moved to suppress the crack cocaine. After a hearing, the trial court denied the motion. The trial court concluded the police encounter leading to defendant's consent to search was consensual and thus the officer's warrantless pat-down search was a valid consent search, justifying admission of the crack cocaine.

The trial court also concluded, alternatively, that the crack cocaine was admissible because the officers had reasonable suspicion to briefly seize defendant for investigative purposes, which ultimately yielded the crack cocaine.

On appeal, defendant contends the trial court erroneously concluded that the officers had reasonable suspicion to briefly seize and question him for investigative purposes. Defendant also contends the trial court erroneously concluded that he was not "seized" for Fourth Amendment purposes before he consented to the search. Thus, defendant argues, his consent was not given voluntarily, and the crack cocaine should have been suppressed as tainted fruit obtained from the unlawful consent search. Under the totality of the circumstances, we conclude that reasonable suspicion existed to justify the brief investigatory stop, and that defendant's consent to search was given voluntarily. Accordingly, we affirm the trial court's order.

I. Background

During the evening of 13 March 2014, Captain Jimmy Hughes of the Concord Police Department was on patrol, in uniform and driving an unmarked police car, when he received numerous reports about potential narcotics sales occurring in an apartment complex in Concord. Upon arriving at the apartment building where the activity was reportedly occurring, Captain Hughes saw and then approached by car four individuals standing in the apartment building stairwell. Two men immediately fled into nearby woods that separated the apartment complex and an adjacent

neighborhood; two men stayed and spoke with Captain Hughes. Those two men gave Captain Hughes a home address located in the general area. After ending the conversation, Captain Hughes decided to drive through the adjacent neighborhood to search for the two men who fled.

Officer Tracy Law of the Concord Police Department, also on patrol that night, decided to join forces with Captain Hughes. Officer Law was in uniform and driving a marked patrol car. After the two officers had patrolled the neighborhood for about an hour, they were parked on a street talking at around 12:00 a.m. when they saw a Chevrolet Impala drive past them. About a minute after the Impala turned onto a side street, it returned and passed the officers again, driving back toward the way it came. The Impala then turned down another side street and parked near the middle of its cul-de-sac.

As Captain Hughes watched from his unmarked police car, he observed the driver of the Impala, later identified as Roderia Hopper, exit the car and approach the front door of a nearby house. Captain Hughes drove down the cul-de-sac and backed into a driveway directly opposite that house. Captain Hughes watched as Hopper "continuously knock[ed] on the door to the house," "appear[ing] nervous and anxious, constantly looking over his shoulder while at the door." When no one answered, Hopper walked back toward the Impala. Captain Hughes exited his unmarked patrol car and met Hopper at the rear of the car. When Captain Hughes

asked Hopper why he was at the house, Hopper replied that he was there to pick up a brother's friend, but he was unable to give the name of that friend or brother. After Captain Hughes asked for and received Hopper's driver's license, he ran a check for pending arrest warrants.

Around the same time, Officer Law pulled up in her patrol car, without activating her blue lights, and parked behind the Impala. After Officer Law exited her vehicle, she approached the passenger side door to watch the passenger, defendant, and the two spoke briefly, but defendant did not say much. After learning that Hopper had outstanding arrest warrants, Officer Law left the passenger side of the car to assist Captain Hughes in arresting Hopper. After Hopper was arrested without incident and searched, the officers found $1,500 in his pocket. As Officer Law was detaining Hopper in her patrol car, Captain Hughes approached the car's passenger side to speak with defendant, who had remained seated in the passenger seat during the entire encounter.

When Captain Hughes approached defendant and asked for his identification, defendant stated his name but explained that he was not carrying any identification. After a brief exchange, Captain Hughes asked defendant to exit the vehicle and for his consent to conduct a pat-down search, and defendant agreed. During his search, Captain Hughes felt a bulge near defendant's right ankle that he immediately recognized as narcotics. But based on his experience that immediately reporting that

he found drugs on a person typically leads to unnecessary physical altercation, he decided to wait for a more opportune time to recover the drugs. Captain Hughes also noticed that defendant was wearing a pair of jeans over a pair of sweatpants, and that the ankle cuffs of his sweatpants had been wrapped shut with packing tape. When Captain Hughes asked about the tape, defendant replied that he had been walking through the woods earlier and "wanted to keep the bugs out of his pants." Captain Hughes asked defendant to sit back in the passenger seat and remove the tape. When defendant refused, Captain Hughes asked defendant to raise his leg so that Captain Hughes could remove the packing tape himself. But realizing that his current position left him venerable for an attack, Captain Hughes stood back up and asked defendant to exit the car again and face the vehicle so that Captain Hughes could remove the packing tape from his sweatpants ankle cuffs. After Captain Hughes told defendant he was going to handcuff him while he removed the tape, defendant immediately turned and tried to run.

Captain Hughes quickly grabbed defendant's jacket, but he slipped free. Captain Hughes then grabbed defendant's shirt, which began to rip. Captain Hughes continued chasing after defendant and quickly tackled him. After Officer Law helped Captain Hughes handcuff and detain defendant, they unwrapped the packing tape around his sweatpants ankle cuffs and a large amount of crack cocaine dropped from

his right sweatpants leg, consistent with what Captain Hughes felt during the pat-down consent search. Defendant was then arrested and charged.

Defendant moved to suppress the crack cocaine. He alleged that Captain Hughes had illegally seized him without reasonable suspicion. He alleged further that Captain Hughes had illegally searched him because his consent to search was not voluntarily given. Defendant's motion was denied. The trial court concluded that the entire police encounter leading to the moment of the search was consensual and thus defendant's consent to search was freely and voluntarily given. The trial court concluded, alternatively, that Captain Hughes had reasonable suspicion to briefly seize defendant at the moment he encountered him sitting in the car, which would have also justified the pat-down search that yielded the crack cocaine. The trial court further concluded, alternatively, that Captain Hughes had probable cause to search defendant further when he felt the contraband near defendant's ankle during the pat-down search.

After his suppression motion was denied, defendant entered into a plea arrangement. He pled guilty to attempted trafficking in cocaine, possession of drug paraphernalia, possession of stolen goods (alleged to have occurred on another date), possession with intent to sell and/or deliver cocaine within 1000 feet of a school, two counts of resisting an officer, and attaining habitual felon status, reserving his right to appeal the suppression ruling. In accordance with the plea arrangement, the trial

court consolidated the offenses into one Class C Felony sentence at the bottom of the mitigated range and imposed a sentence of 87 to 117 months in prison. On 30 August 2016, the trial court entered a written suppression order. Defendant appeals from this order.

II. Analysis

On appeal, defendant contends the trial court erred by denying his motion to suppress the crack cocaine seized from his right sweatpants leg. Defendant contends the trial court improperly concluded that his consent to search was given freely and voluntarily because a reasonable person would not have felt free to leave or decline the officer's request. According to defendant, he was "seized" for Fourth Amendment purposes when Captain Hughes asked him to exit the car and thus his subsequent consent to search was not given voluntarily. Therefore, defendant argues, Captain Hughes' pat-down search was illegal and the crack cocaine should be suppressed as tainted fruit. Defendant also contends the trial court improperly concluded, in the alternative, that the officers had reasonable suspicion to briefly seize him for investigative purposes. We address defendant's reasonable-suspicion argument first.

A. Review Standard

"When reviewing a ruling on a motion to suppress, we analyze whether the trial court's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the trial court's ultimate conclusions

of law." *State v. Bullock*, ___ N.C. ___, ___, 805 S.E.2d 671, 674 (2017) (citation, quotation marks, and brackets omitted). Legal conclusions are reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted). If one of the trial court's legal conclusions supports its suppression ruling, its alternative legal conclusions are immaterial. *See State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (upholding suppression ruling despite one of the trial court's alternative legal conclusions being erroneous, noting: "The question for review is whether the ruling of the trial court was correct and not whether the reason given therefore is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." (citation and quotation mark omitted)).

B. Reasonable Suspicion

Defendant first contends the trial court erred by concluding that the officers had reasonable suspicion that he was engaged in illegal conduct when they briefly seized him. We disagree.

We review *de novo* whether a trial court's factual findings support its legal conclusion that an officer had reasonable suspicion to conduct a brief investigatory stop. *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). In determining whether adequate reasonable suspicion existed, "[a] reviewing court must consider

'the totality of the circumstances—the whole picture.' " *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (citation omitted).

"[T]he United States and North Carolina Constitution protect against unreasonable . . . seizures," *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20), but permit brief investigatory stops when an officer has "reasonable suspicion"—that is, "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, ___ U.S. ___, ___, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014) (citations and quotation marks omitted). Reasonable suspicion demands merely "a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 441–42, 446 S.E.2d 67, 70 (1994) (citation omitted). "An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *Williams*, 366 N.C. at 116, 726 S.E.2d at 167 (citations and internal quotation marks omitted).

In its suppression order, the trial court made the following relevant factual findings supporting its reasonable-suspicion conclusion:

> 1. Captain Jimmy Hughes is a law enforcement officer with the Concord Police Department. He has been employed with them for the past 17 years. His long history of training includes street level narcotics investigations. He

has also been involved in at least 400 to 500 street level narcotics cases in his career.

2. Officer Tracy Law is also a law enforcement officer with the Concord Police Department. She has been employed with them for the past seven years. She has likewise had training in street level narcotics investigations, and has been involved in at least 100 street level narcotics cases in her career.

3. Captain Hughes was on patrol on March 13, 2014, at about 11:00 p.m. He had just received several complaints about possible narcotic sales occurring in an apartment complex on Ray Suggs Place, Northwest, in Concord, Cabarrus County, North Carolina. He was driving an unmarked white Dodge Durango SUV, but was wearing his standard police uniform.

4. Captain Hughes arrived at the apartment complex, and drove to the last apartment building at the rear, where the narcotics activity was reported to be occurring. He saw a group of at least four individuals in a stairwell of that building. As Captain Hughes turned around in his police SUV and approached the group, two of the individuals stopped, and one or two other individuals fled into some trees between the apartment complex and a neighborhood immediately behind it. Captain Hughes spoke with the two individuals who remained. They gave a home address that was in the general area.

5. Ray Suggs Place connects through to the neighborhood immediately behind the apartment complex. The road is blocked by a gate that prevents vehicle traffic from passing through, but allows one to easily walk around it. The neighborhood is very close to the apartment complex[.] . . .

6. Captain Hughes decided to drive through the neighborhood to see if he could find the other individuals who earlier ran off. He was joined by Officer Tracy Law, who was also on patrol in a marked police car and wearing

her standard police uniform. Both Captain Hughes and Officer Law drove through the neighborhood . . . .

7. [A]t 12:00 am, Captain Hughes and Officer Law were both parked in the street talking to each other, when they saw a Chevrolet Impala drive between the two of them. The Impala then turned onto a side street and reemerged about a minute later, heading back the way it had just come. The Impala then turned right onto Sinai Place Northwest, and stopped toward[ ] the middle of the cul-de-sac and away from the curb, in a place where it would be unusual for a car to park. Captain Hughes remained in his car and continued to watch the Impala.

8. The driver of the Impala got out and walked to the front door of a house on the [e]ast side of the cul-de-sac. Captain Hughes drove down into the cul-de-sac, and backed into the driveway of the house directly opposite from the house the driver went to. Captain Hughes saw the driver continuously knocking on the door to the house. The driver appeared nervous and anxious, constantly looking over his shoulder while at the door. No one ever answered the door.

9. The driver then left the door and started to walk back to the Impala. Captain Hughes got out of his SUV and started walking toward the driver. They met each other at the rear of the Impala. Captain Hughes asked the driver if he would speak with Captain Hughes, and the driver agreed. Captain Hughes asked the driver why he was at the house, and the driver said he was there to pick up a friend of a brother. The driver was unable to give Captain Hughes the name of that friend or the brother. Captain Hughes asked the driver for his license, and the driver handed over an identification card. Captain Hughes did a check for pending warrants on the driver, whose name was Roderia Hopper.

10. At approximately the same time, Officer Law pulled up and parked behind the Impala in her patrol car. . . . Officer Law got out of her car and approached the passenger side

of the Impala to watch the passenger, who was still sitting in the passenger seat. There was no one else other than the driver and passenger inside the Impala. Officer Law briefly spoke with the passenger[.] . . . The passenger did not say much to Officer Law.

11. Captain Hughes learned over the radio that the driver had outstanding warrants for his arrest. Upon also hearing this same information, Officer Law left the passenger in the car, and went to assist Captain Hughes with arresting the driver. Captain Hughes arrested the driver without incident, and searched him. Captain Hughes found $1,500 in his pocket, but did not find any controlled substances nor weapons on him. Officer Law then took the driver and detained him inside her patrol car. . . .

12. Captain Hughes next went to speak with the passenger in the Impala, who had been sitting in the front passenger seat the entire time. The passenger had given his name as Jerome Jackson, but was unable to provide any identification. Captain Hughes wanted to confirm the passenger's identity to check for any outstanding warrants. Captain Hughes asked the passenger to step out of the Impala, which he did. Captain Hughes asked the passenger if he had anything illegal on him, which he replied that he did not. Captain Hughes asked the passenger for permission to search him for anything illegal. The passenger replied, "yes."

13. Captain Hughes had the passenger step out of the car, and searched him while the passenger was standing next to the passenger side of the car. During his search, Captain Hughes felt an object he immediately recognized to be illegal narcotics in the passenger's right lower leg, just above his ankle. The object felt about the size of a silver dollar. Captain Hughes also felt plastic material inside the sweatpants leg, near the illegal narcotics.

> 14. Captain Hughes also noticed that the defendant was wearing sweatpants, the bottoms of which were wrapped shut around both his ankles with packing tape. The passenger also was wearing a pair of jeans over the top of the sweatpants. . . .

Based on these findings, the trial court concluded:

> 3. . . . Captain Hughes had reasonable suspicion to detain the passenger at the first time he encountered him sitting in the car based on the totality of the circumstances at that time. The reports of drug activity happening approximately an hour earlier at a nearby apartment building, the fact that one or two unknown individuals fled from Captain Hughes at that earlier interaction toward[ ] the direction of the neighborhood where the Impala was found, the unusual driving of the Impala when Captain Hughes initially saw it, including the location where it was ultimately parked by the driver, the driver's suspicious knocking at the door, the $1,500 in the driver's pocket, and the fact that the passenger was with the driver the entire time this happened all clearly provide a reasonable suspicion that illegal activity involving both the driver and passenger may be afoot.

Under the totality of the circumstances established by the trial court's factual findings, and as aptly reasoned by the trial court in its order, the officers had reasonable suspicion to believe that defendant may have been involved in the reported drug selling activity, justifying the brief investigatory stop and questioning. Because the trial court's findings support this conclusion, the trial court properly denied defendant's suppression motion on this basis.

C. Consent to Search

Defendant also argues that the trial court erred by concluding that his consent to search was given voluntarily, since he was effectively "seized" for Fourth Amendment purposes when he gave his consent to search. Although the trial court's reasonable-suspicion conclusion would be sufficient to affirm its order, we address this argument.

Defendant challenges the following factual finding concerning the alleged consensual nature of the police encounter before he gave his consent to search:

> 12. Captain Hughes next went to speak with the passenger in the Impala, who had been sitting in the front passenger seat the entire time. The passenger had given his name as Jerome Jackson, but was unable to provide any identification. Captain Hughes wanted to confirm the passenger's identity to check for any outstanding warrants. Captain Hughes asked the passenger to step out of the Impala, which he did. Captain Hughes asked the passenger if he had anything illegal on him, which he replied that he did not. Captain Hughes asked the passenger for permission to search him for anything illegal. The passenger replied, "yes."

Defendant challenges this finding to the extent it implies that Captain Hughes asked defendant to exit the car before questioning him about whether he had anything illegal on him. He contends that because Captain Hughes questioned him first, he was "seized" for Fourth Amendment purposes when Captain Hughes asked him to exit the car on the ground that a reasonable person would not have felt free to leave, ignore his request, or leave the scene.

Relevant here, a Fourth Amendment "seizure" occurs "when the officer's conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Icard,* 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (citations and internal quotation marks omitted). "A reviewing court determines whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter by examining the totality of circumstances." *Id.* at 308–09, 677 S.E.2d at 826 (citations omitted).

> Relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path.

Id. at 309, 677 S.E.2d at 827 (citations omitted).

The crux of defendant's argument on appeal is that because he had just witnessed Officer Law and Captain Hughes arrest Hopper, and Captain Hughes questioned him about whether he had anything illegal on him before asking him to exit the car, the officers' actions amounted to a show of authority that compelled his consent to search and it was therefore not given voluntarily. Defendant cites to *Icard* to support his position that he was seized under the Fourth Amendment when Captain Hughes asked him to exit the car. *Icard* is distinguishable.

In *Icard*, our Supreme Court held that a seizure occurred when an officer asked the defendant to exit a parked vehicle because the circumstances showed that immediately before that request, "the officers mounted [the following] show of authority . . . :"

> (1) Officer Moore, who was armed and in uniform, initiated the encounter, telling the occupants of the truck that the area was known for drug crimes and prostitution; (2) Officer Moore called for backup assistance; (3) Officer Moore initially illuminated the truck with blue lights; (4) Officer Hedrick illuminated defendant's side of the truck with his take-down lights; (5) Officer Moore opened defendant's door, giving her no choice but to respond to him; and (6) Officer Moore instructed defendant to exit the truck and bring her purse.

Id. at 310, 677 S.E.2d at 827. Under these circumstances, our Supreme Court concluded that "[b]y the time defendant stepped out of the truck at Officer Moore's request, a reasonable person in defendant's place would have shared the officer's belief that she was not free to leave or otherwise terminate the encounter." *Id.* at 310, 677 S.E.2d at 827–28 (citation omitted).

Here, contrarily, neither officer activated their blue lights, take-down lights, or called for backup; nor did the evidence indicate that Captain Hughes told defendant they were investigating the area for reported drug sales, that Captain Hughes opened the car door, or that he instructed defendant to bring any personal belongings with him before asking him to exit the car. That Hopper had been arrested in defendant's presence, and that Captain Hughes asked defendant whether he was

carrying anything illegal on him immediately before asking him to exit the car, are certainly significant considerations in determining whether the police encounter was voluntary or whether defendant was submitting to police authority. But the totality-of-the-circumstances test "is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Icard,* 363 N.C. at 309, 677 S.E.2d at 826 (citation and internal quotation marks omitted); *see also United States v. Drayton*, 536 U.S. 194, 206, 122 S. Ct. 2105, 2113, 153 L. Ed. 2d 242 (2002) ("The arrest of one person does not mean that everyone around him has been seized by police.").

Considering the totality of the circumstances, we conclude that a reasonable person would not have felt compelled to consent to Captain Hughes' request to search. The evidence showed that only two uniformed officers were present. While their sidearms were likely visible, no evidence suggests that they were brandished. *See Drayton*, 536 U.S. at 205, 122 S. Ct. at 2112 ("That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."). No evidence suggested that the officers' language or tone was anything but polite; that they used threats, harsh language, or raised their voices; or that they physically contacted defendant before Captain Hughes obtained his consent to search. Because defendant was not carrying identification, it was not retained, nor

was any other item of his personal property. While defendant was sitting in a parked car during the encounter, it was not the result of a traffic stop, and it occurred on a public street. Finally, no evidence suggests the officers blocked defendant's path in any way. While Officer Law parked her patrol car behind the Impala, the officers left defendant alone for several minutes while attending to other matters relating to the driver, did not instruct defendant he was not free to leave, and did not obstruct him from opening the car door any time during the encounter.

Because the officers' actions did not amount to a show of authority under the totality of the circumstances as in *Icard*, defendant was not "seized" for Fourth Amendment purposes when he was asked to exit the car and consented to the search. Therefore, the trial court properly concluded that his consent to search was given freely and voluntarily. Because that search eventually yielded the crack cocaine, that evidence was admissible, and the trial court properly denied defendant's suppression motion on this basis.

III. Conclusion

The trial court properly concluded that the officers had reasonable suspicion under the circumstances to justify briefly stopping and questioning defendant for investigative purposes, and, therefore, properly denied defendant's suppression motion on this basis. Additionally, under the totality of the circumstances and applicable case law, defendant was not "seized" under the Fourth Amendment when

he consented to Captain Hughes' request to search his person. Thus, the trial court properly determined that defendant's consent to search was given freely and voluntarily, and that the crack cocaine seized from that search was admissible on this basis. Accordingly, we affirm the trial court's order denying defendant's suppression motion.

AFFIRMED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).