An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-831

Filed: 15 May 2018

Guilford County, Nos. 14 CRS 087645, 14 CRS 023273

STATE OF NORTH CAROLINA

v.

FRANK GLADNEY, III

Appeal by defendant from judgment entered 15 February 2017 by Judge Angela B. Puckett in Guilford County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John A. Payne, for the State.

Michael E. Casterline for defendant.

ELMORE, Judge.

Defendant Frank Gladney, III was convicted by jury of firearm possession by a felon and of attaining habitual felon status. He appeals the resulting judgment and asserts the trial court erred by denying his motion to suppress the loaded handgun found in his vehicle's center console during a warrantless police search for marijuana evidence after an officer detected its odor while attempting to serve him with an

arrest warrant for an unrelated crime. Defendant's sole argument on appeal is that the trial court's dispositive factual finding that the officer smelled marijuana emanating from the vehicle was "inherently incredible" because it was closed and parked ten feet away in a parking lot. Therefore, defendant argues, the trial court's conclusion that the officers had probable cause to search the vehicle for marijuana evidence, which yielded the handgun in plain view, was unsupported. Because this dispositive finding was supported by competent evidence that was not inherently incredible, it supported the trial court's conclusion that the officers had probable cause to search the vehicle. We thus affirm the suppression order.

I. Background

On 23 September 2014, officers of High Point Police Department's Street Crimes Unit were surveilling defendant's girlfriend's apartment in order to locate defendant and serve him with an arrest warrant. After officers observed defendant and his girlfriend leave the residence in a red BMW, Officer Z. Wilkins followed the vehicle in his patrol car as it drove to Carolina Diner and parked in the parking lot. After defendant and his girlfriend exited the vehicle, Officer Wilkins followed behind on foot as they started toward the diner's door. As Officer Wilkins was approaching, he passed by the red BMW and detected an odor of marijuana emanating from the vehicle. Officer Wilkins then served the arrest warrant and detained defendant. Meantime, other officers, including Officer R. Rene, arrived on the scene to assist.

Officer Wilkins informed Officer Rene of the marijuana odor he detected from the BMW. Officer Rene then searched the BMW for marijuana evidence and found a loaded firearm in the center console.

On 3 November 2014, defendant was indicted for firearm possession by a felon and for attaining habitual felon status. On 10 February 2016, defendant moved to suppress the handgun recovered from the warrantless search of the BMW on the basis that it was obtained in violation of his Fourth Amendment rights. After a pretrial suppression hearing, the trial court denied the motion by written order entered 18 February 2016. In its order, the trial court found in relevant part that (1) "Officer Wilkins noticed a strong odor of marijuana coming from [d]efendant's BMW as he walked by the vehicle[,]" (2) Officer Wilkins "smelled the odor on [d]efendant's person[,]" (3) Officer Wilkins "communicated this information to . . . [Officer] R. Rene[,]" and (4) "Officer Rene searched the vehicle and found a loaded firearm in the console." The trial court thus concluded that "the officers, under the totality of the circumstances, had probable cause to search the red BMW for evidence of the crime of marijuana possession," which yielded the loaded handgun in plain view, and denied defendant's suppression motion.

Subsequently, at defendant's trial, evidence that the handgun was found in the console during the police search of the red BMW for marijuana evidence was admitted without objection. On 15 February 2017, a jury found defendant guilty of possession

of a firearm by a felon and of attaining habitual felon status. The trial court entered a consolidated judgment and imposed a sentence of 92 to 123 months in prison. Defendant appeals.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress the handgun because its conclusion that the officers had probable cause to search the BMW "was based on evidence which was inherently incredible: Officer Wilkins' phenomenal olfactory ability to smell marijuana in a locked car at a distance of ten feet." We disagree.

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).

B. Discussion

Defendant concedes that an officer's detection of marijuana odor emanating from a vehicle provides probable cause to search that vehicle for marijuana evidence, *see, e.g., State v. Smith*, 192 N.C. App. 690, 694, 666 S.E.2d 191, 193 (2008) ("When an officer detects the odor of marijuana emanating from a vehicle, probable cause

exists for a warrantless search of the vehicle for marijuana." (citation omitted)), including the console where the handgun was found. But defendant asserts that the trial court's dispositive factual finding—that "Officer Wilkins noticed a strong odor of marijuana coming from Defendant's BMW as he walked by the vehicle on his way to confront Defendant at the diner's door"—which was supported by Officer Wilkins' suppression hearing testimony, was nonetheless unsupported by competent evidence because it was "inherently incredible" under our Supreme Court's decision in *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967) (holding that the rule providing for jury assessment of witness credibility and the weight of the evidence does not apply "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the state's evidence, as to the physical conditions under which the alleged observation occurred"). We disagree.

In *Miller*, a state witness identified the defendant as a man he saw running from the scene of a crime. The witness's testimony showed that he did not previously know the defendant and "that he was never closer than 286 feet from the man whom he saw running[.]" 270 N.C. at 732, 154 S.E.2d at 905. "Thus, his testimony [was] not that he recognized at that distance a man previously known to him, but that he saw for the first time a stranger." *Id.* "Some six hours later, he saw [the defendant] in a police 'lineup,' so arranged that the identification of [the defendant] with the man

seen earlier would naturally be suggested to the witness." *Id.* Accordingly, our Supreme Court concluded that "the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the guilt of such person to the jury" and thus held that the trial court erred in denying the motion for nonsuit. *Id.* at 732, 154 S.E.2d at 905–06.

Here, at the suppression hearing, Officer Wilkins testified that immediately after defendant and his girlfriend exited the BMW, he followed them on foot toward the diner's door and "[a]s [he] was walking by the car, [Officer Wilkins] smelled . . . a[n] odor of marijuana." Officer Wilkins testified that he observed the BMW doors open and then shut as defendant and his girlfriend exited the vehicle, that he was only "10 feet away as [he] passed by the vehicle," that "nothing was between [him] and the vehicle," and that in his police report he described "a very strong odor of marijuana coming from that vehicle that [defendant] exited." Officer Wilkins later confirmed that he had "no doubt at all" he smelled marijuana.

Unlike the inherently incredible eyewitness identification of a stranger running away at a distance of no closer than 286 feet, Officer Wilkins' testimony that he smelled marijuana emanating from a vehicle at a distance of ten feet after its doors had just opened is entirely credible. *Cf. State v. Stover*, 200 N.C. App. 506, 512, 685 S.E.2d 127, 132 (2009) (holding that officers' testimony they "perceived a 'strong odor

of marijuana' " after arriving at a residence was not "inherently incredible" even though the marijuana "was not burning" and "the majority of the substance was in sealed containers"). The trial court's dispositive finding was thus supported by competent, not inherently incredible, evidence, which in turn supported its conclusion that probable cause existed to search the BMW for marijuana. Because that search uncovered a loaded handgun in the console, a reasonable place where marijuana evidence might be found in a vehicle, the trial court properly denied the suppression motion. We therefore affirm the suppression order. In light of our holding, we need not address defendant's remaining argument that the trial court plainly erred by admitting the loaded handgun into evidence absent a trial objection.

III. Conclusion

Because the trial court's dispositive finding that Officer Wilkins detected the odor of marijuana emanating from the BMW was supported by competent, not inherently incredible, evidence, which in turn supported its conclusion that the officers had probable cause to search the BMW for marijuana evidence, Officer Rene's search of its console that yielded the handgun in plain view was lawful and the handgun was thus admissible. The trial court properly denied the suppression motion. In light of this conclusion, we need not address defendant's argument that the trial court plainly erred by admitting the handgun into evidence.

NO ERROR.

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).