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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1223

Filed: 5 June 2018

Mecklenburg County, No. 16 CRS 10739-40

STATE OF NORTH CAROLINA

v.

FERRANTE VERMOND PERRY

Appeal by defendant from judgment entered 9 May 2017 by Judge Charles Malcolm Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Meghan Adelle Jones for defendant-appellant.

TYSON, Judge.

Ferrante Vermond Perry ("Defendant") appeals from judgments entered after a jury found him guilty of possession of cocaine and of attaining habitual felon status. We find no error.

I. Background

Early in the morning of 18 December 2015, Defendant was arrested following a traffic stop. Defendant was indicted for possession of cocaine and attaining habitual felon status on 11 April 2016. He filed a motion to suppress the cocaine that he had concealed in his hand at the time of his arrest. Two officers and Defendant testified at the hearing on the motion to suppress.

The evidence presented at the hearing for the motion to suppress included: Charlotte-Mecklenburg Police Officers Coleman and Tonsing were conducting a traffic checkpoint in an unmarked vehicle around 1:30 a.m. on 18 December 2015. While sitting at the checkpoint, the officers witnessed a blue Hummer vehicle approaching, which then abruptly turned to avoid the checkpoint, nearly collided with another vehicle, and almost ran off the road.

The officers called for backup, and followed the Hummer while awaiting a marked patrol car to arrive. Officers Banham and Zederbaum arrived in a marked patrol car and initiated a traffic stop. Defendant was seated as a passenger in the Hummer.

Officer Banham asked Defendant to produce his identification several times, but Defendant refused to comply. Officer Banham requested Defendant to exit the vehicle, and forcibly removed Defendant from therein, after Defendant had refused his third request. Defendant attempted to pull away as he was removed. The officers

requested Defendant put his hands behind his back, but he refused and kept his hands clenched.

At this point, Defendant was informed he was being placed under arrest for resisting. Defendant struggled and shouted as the officers tried to place him in handcuffs. It took over fifteen minutes for the officers to secure him inside a patrol car. During this period, Defendant kept his hands clenched and refused to open them.

Defendant's testimony presented a different situation preceding the traffic stop. He stated he and the driver had stopped in the middle of the street to look for the driver's cell phone. The vehicle was in park, the hazard lights were on, and both the driver's side and passenger's side doors were open. Defendant saw the unmarked car drive by slowly, and then do a U-turn. Defendant and the driver got back into the car, pulled in front of their friend's house, and parked.

Defendant stated he was upset during the course of the stop because he believed the officers had "pulled [them] over for nothing." Defendant admitted they had been "riding around getting high," but that was well before they had any interaction with the officers.

At the conclusion of the suppression hearing, the trial court denied Defendant's motion, stating, "The motion with regard to reasonable suspicion and the probable cause for arrest is denied." The trial court did not enter a written order.

At trial, Officer Banham testified he had found what was later determined to be crack cocaine in Defendant's hand, once he and Officer Tonsing were able to pry Defendant's hands open. Officer Zederbaum testified he was handed the crack cocaine by one of the officers while at the scene. Officers Banham and Zederbaum transported Defendant to the police station. Officer Zederbaum then delivered the crack cocaine to Property Control, where it was logged in.

On 8 May 2017, the jury returned verdicts finding Defendant guilty of possession of cocaine and attaining habitual felon status. The trial court entered judgment, sentencing Defendant to an active term of 48-70 months of imprisonment. Defendant gave oral notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the trial court erred by: (1) failing to resolve disputed issues of fact when denying his motion to suppress, and (2) admitting evidence of the crack cocaine without an established chain of custody. Defendant also argues the trial court lacked jurisdiction to impose judgment on him as a habitual felon.

IV. Motion to Suppress

A. Standard of Review

In ruling on a motion to suppress, the trial court "must set forth in the record his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017).

> [W]hen a trial court's failure to make findings of fact and conclusions of law is assigned as error, the appropriate standard of review on appeal is as follows: The trial court's ruling on the motion to suppress is fully reviewable for a determination as to . . . (1) whether the trial court provided the rationale for its ruling on the motion to suppress from the bench; and (2) whether there was a material conflict in the evidence presented at the suppression hearing.

State v. Baker, 208 N.C. App. 376, 381, 702 S.E.2d 825, 829 (2010).

Our Supreme Court has held, "the absence of factual findings alone is not error because only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Faulk*, __ N.C. App. __, __, 807 S.E.2d 623, 630 (2017) (quoting *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015)) (internal quotation marks omitted).

B. Analysis

Defendant argues the trial court failed to resolve the material conflicts presented at the suppression hearing pertaining to the sequence of events leading up to the traffic stop. We find no material conflicts in the evidence presented.

A material conflict in the evidence was present in *Bartlett*, where two expert witnesses disagreed over whether the defendant's performance on the field sobriety tests showed impairment. 368 N.C. at 312, 776 S.E.2d at 674. "[T]he two expert

opinions in this case differed from one another on a fact that is essential to the probable cause determination—defendant's apparent degree of impairment." *Id.*

Like in *Bartlett*, the testimony Defendant presented at the suppression hearing concerned an essential fact to determine whether the traffic stop was valid. However, the conflict between the officers' testimonies and Defendant's does not affect the outcome of the suppression hearing. *Faulk*, __ N.C. App. at __, 807 S.E.2d at 630.

"[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (citation omitted).

> [I]n order to have reasonable suspicion to conduct a traffic stop based on a violation that an officer allegedly observed, the officer does not need to observe an actual traffic violation. To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over. But while an actual violation is sufficient, it is not necessary. To meet the reasonable suspicion standard, it is enough for the officer to reasonably believe that a driver has violated the law.

State v. Johnson, 370 N.C. 32, 37-38, 803 S.E.2d 137, 141 (2017) (citations omitted).

The officer's testimony that the vehicle in which Defendant was travelling abruptly turned to avoid a checkpoint created reasonable suspicion for a stop. *See State v. Foreman*, 351 N.C. 627, 632-33, 527 S.E.2d 921, 924 (2000) ("it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint, and it necessarily follows that an officer . . . may pursue and stop a vehicle which has turned away from a checkpoint

within its perimeters for reasonable inquiry to determine why the vehicle turned away.")

Defendant's testimony that the vehicle was parked in the middle of the street, the officers drove by the parked vehicle, and then turned to stop the vehicle, also supports reasonable suspicion for a stop. *See* N.C. Gen. Stat. § 20-161(a) (2017) ("No person shall park or leave standing any vehicle, whether attended or unattended, upon the main-traveled portion of any highway . . . unless the vehicle is disabled[.]"). The vehicle was in violation of this statute, as it was not disabled and was parked in the main-traveled portion of the highway. Defendant's testimony supports a conclusion that the officers saw the vehicle in violation.

Even though the sequence of events presented at the suppression hearing differed between the officers' testimonies and Defendant's, both versions of events support a finding of reasonable suspicion to stop the vehicle. The stop of the vehicle while Defendant was a passenger inside was lawful in either case. No material conflicts exist. *See Faulk*, __ N.C. App. at __, 807 S.E.2d at 630. Defendant's argument is overruled.

V. Chain of Custody

A. Standard of Review

The trial court's admission of evidence when the chain of custody is questioned is reviewed for abuse of discretion. *State v. Campbell*, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984).

B. Analysis

"[A] two-pronged test must be satisfied before real evidence is properly received into evidence. The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change." *Id.* at 388, 317 S.E.2d at 392. A detailed chain of custody is not required unless "the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *Id.* at 389, 317 S.E.2d at 392 (citation omitted). "Any weak links in the chain of custody pertain only to the weight to be given to the evidence and not to its admissibility." *State v. Fleming*, 350 N.C. 109, 131, 512 S.E.2d 720, 736 (1999).

Defendant argues a missing link exists in the chain of custody, not merely a weak link. We disagree.

Officer Banham testified he took the crack cocaine from Defendant's palm with help from other officers, and that Officer Zederbaum delivered the crack cocaine to Property Control. Officer Zederbaum testified he had received the crack cocaine from another officer at the scene, and transported and delivered it to Property Control.

Nothing indicates the material obtained from Defendant may have been altered before it was handed to Officer Zederbaum, making a more detailed chain of custody unnecessary. *See Campbell*, 311 N.C. at 388-89, 317 S.E.2d at 392. Any uncertainty in the chain of custody until the crack cocaine was received by Officer Zederbaum is, at worst, a weak link, only affecting the weight of the evidence, not its admissibility. *Fleming*, 350 N.C. at 131, 512 S.E.2d at 736.

From the time the crack cocaine was taken from Defendant and in Officer Zederbaum's control, the chain of custody is unbroken and clear. The officers testified the crack cocaine removed from Defendant's hand was the same item that Officer Zederbaum logged in at Property Control. Further, on the way to intake, Defendant admitted he had "a pebble or a crumb of crack." Defendant failed to show the trial court abused its discretion in admitting the evidence of the crack cocaine found in Defendant's hand. Defendant's argument is overruled.

VI. Habitual Felon

A. Standard of Review

The question of whether a prior conviction constitutes a felony is a question of law. *State v. Northington*, 230 N.C. App. 575, 582, 749 S.E.2d 925, 930 (2013). Questions of law are reviewed *de novo*. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468 (2009).

B. Analysis

Defendant argues accessory after the fact to robbery with a dangerous weapon is not a felony offense to support habitual felon status. Defendant's argument is based on a misreading of the statutes.

General Statute section 14-7.1(a) states, "any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon[.]" N.C. Gen. Stat. § 14-7.1 (2017). Sub-section (b) goes on to define a felony offense as "[a]n offense that is a felony under the laws of this State." *Id.* Section 14-7 states, "If any person shall become an accessory after the fact to any felony . . . such person shall be guilty of a crime[.]" N.C. Gen. Stat. § 14-7 (2017).

Defendant argues that because the statute says "crime" and not "felony," accessory after the fact is not a felony offense as defined in N.C. Gen. Stat. § 14-7.1. However, N.C. Gen. Stat. § 14-7 continues in regards to sentencing, "[u]nless a different classification is expressly stated, that person shall be punished for an offense that is two classes lower than the felony the principal felon committed[.]" *Id.*

Defendant was convicted pursuant to N.C. Gen. Stat. § 14-7 of being an accessory after the fact to robbery with a dangerous weapon. Robbery with a dangerous weapon is a Class D felony. N.C. Gen. Stat. § 14-87(a) (2017). Thus, accessory after the fact, as two classes lower than the principal felony, is a Class F felony. *See* N.C. Gen. Stat. § 14-7.

Defendant's conviction for accessory after the fact to robbery with a dangerous weapon was properly considered as a predicate felony for habitual felon purposes. Defendant's argument is overruled.

VII. Conclusion

No material conflicts exist to require findings of fact after the hearing upon Defendant's motion to suppress. The trial court did not abuse its discretion to allow evidence of the crack cocaine found in Defendant's hand to be admitted at trial. Defendant was properly convicted of attaining habitual felon status.

Defendant received a fair trial, free from prejudicial error. We find no error in Defendant's trial or sentencing. *It is so ordered.*

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).