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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1

Filed: 7 May 2019

New Hanover County, Nos. 16 CRS 051705-06

STATE OF NORTH CAROLINA

v.

BENNIE LEE GRAHAM, Defendant.

Appeal by Defendant from judgments entered 19 July 2017 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

MURPHY, Judge.

Where the indictment clearly and positively identifies Defendant as the perpetrator of a charged offense, an error in the indictment will not render the indictment facially invalid. Additionally, where a reasonable person would feel free to decline to answer questions posed by law enforcement officers and terminate an encounter with those officers, there is no seizure under the Fourth Amendment of the

U.S. Constitution. However, when such an encounter loses its consensual nature, a seizure occurs and must be supported by a reasonable, articulable suspicion. While the trial court erroneously found the entire encounter between law enforcement officers and Defendant to be consensual, we hold that the encounter elevated to a seizure that was supported by an objectively reasonable, articulable suspicion. Accordingly, we affirm the trial court's order.

BACKGROUND

In February 2016, Detective Evan Luther ("Detective Luther") with the Vice and Narcotics Division of the New Hanover County Sheriff's Office received information from a confidential informant regarding an individual who went by the name of "King." The informant reported to Detective Luther that King was involved in the sale of firearms and provided Detective Luther with King's physical description and phone number. Upon investigating this information, Detective Luther believed Defendant matched the description of King.

Approximately one month later, the informant reported to Detective Luther that King was staying at an Extended Stay hotel with a female and possessed a large quantity of heroin that he was packaging for sale. Believing the information to be truthful based upon the informant's previous history of providing accurate information, Detective Luther contacted his supervisor, Sergeant Sorg, to organize surveillance of the hotel. Detective Luther parked his vehicle that night at a BMW

dealership across the street from the hotel that enabled him to view the hotel's parking lot. Three officers, including Sergeant Sorg, joined Detective Luther in the BMW parking lot. The officers used binoculars to view the hotel and had a generally unobstructed view. Due to intermittent rain, the officers alternated surveilling from their vehicles and standing under an awning.

After 30 to 45 minutes of surveillance, the officers observed a male matching the description of Defendant exit the hotel's side door and begin smoking outside. The officers then drove across the street to the hotel in Detective Luther's vehicle. As Detective Luther parked his vehicle and walked around the front of the vehicle, Sergeant Sorg had already made contact with Defendant approximately 3 to 5 seconds earlier. Detective Luther immediately smelled the lingering odor of burnt marijuana as he walked up to Defendant and the other officers. When Detective Luther commented on the smell of marijuana, Defendant told the officers, "Yeah, somebody was out here smoking before me." Detective Luther testified that he knew this not to be true, as he had been surveilling that area for 30 to 45 minutes immediately before approaching Defendant.

At this time, Detective Luther told Defendant that he "wanted to pat him down for [Detective Luther's] safety and asked him if he had anything illegal on his person." Defendant stated that he did. While patting Defendant's back pocket, Detective Luther felt the bulge of "a plastic bag that contained a handful of items." When asked

again whether the bulge was illegal items, Defendant again replied in the affirmative. Detective Luther removed the bag and observed what he believed to be heroin packaged for sale, marijuana packaged for sale, and pills in a separate plastic bag. A container filled with "off-white, brownish powder" that Detective Luther suspected to be raw heroin was found in Defendant's front jacket pocket. Defendant and the female accompanying him gave officers consent to search their hotel room. Officers found empty plastic bags, small rubber bands, a syringe, diet pills known to be used as a cutting agent for narcotics, digital scales, and multiple cell phones, all of which Defendant admitted to owning.

Defendant was indicted on charges including trafficking heroin; possession with intent to manufacture, sell, and deliver heroin; and attaining habitual felon status. Defendant filed a motion to suppress evidence, which was denied after a hearing. Pursuant to an agreement with the State, Defendant pled guilty to these charges and received two active sentences of 90 to 120 months to run concurrently. Defendant reserved his right to appeal by giving notice prior to entering the plea and timely appeals the denial of his motion to suppress.

ANALYSIS

A. Indictment

Defendant first contends that his indictment for attaining habitual felon status was facially invalid as the indictment nonsensically listed Defendant's name as

"Dontae Tyrell Riley" in the first paragraph of the body of the indictment. We disagree.

"We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. E. 2d 498 (2000).

It is well established that a "valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony . . . ." *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002). "An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution of the same offense." *State v. Stroud*, ___ N.C. App. ___, ___, 815 S.E.2d 705, 709 (2018) (citation and internal quotation marks omitted). With respect to naming a defendant in an indictment, our Supreme Court has held that "[a]n indictment must clearly and positively identify the person charged with the commission of the offense." *State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981). Specifically, "[t]he name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of

his name, or a sufficient description if his name is unknown, is a fatal and incurable defect." *Id.*

We find *State v. Sisk*, 123 N.C. App. 361, 473 S.E.2d 348 (1996), instructive here. In *Sisk*, the defendant argued there was a fatal variance between the indictment and the State's proof, as the name "Janette Marsh Cook," rather than the defendant's name, was listed in the body of the indictment. *Sisk*, 123 N.C. App. at 365, 473 S.E.2d at 351. We held there was no fatal variance, as "[t]he caption of the indictment correctly stated defendant's name as the person charged, and the indictment incorporated that identification by reference in the body of the indictment." *Id.*

Here, the indictment charging Defendant with attaining habitual felon status is correctly captioned, "State Versus Bennie Lee Graham." The first paragraph in the body of the indictment, however, states, "The jurors for the State upon their oath present that the defendant *Dontae Tyrell Riley* is a habitual felon, in that the defendant was previously convicted of at least three (3) successive felony offenses, to wit: . . . ." (emphasis added). The three felony offenses subsequently listed in the body of the indictment all correctly list "Bennie Lee Graham" as the defendant.

We recognize, as we did in *Sisk*, that "the indictment was carelessly drafted" by including such an error. *Sisk*, 123 N.C. App. at 365, 473 S.E.2d at 351. However, this error is not automatically fatal so as to render the indictment invalid. We must

examine the body of the indictment[1] as a whole to determine whether Defendant's name was correctly alleged in the body of the indictment and whether the indictment "clearly and positively" identifies Defendant as "the person charged with the commission of the offense." *Simpson*, 302 N.C. at 616, 276 S.E.2d at 363. Such an examination leads to the conclusion that the variance in the indictment was not fatal. The caption of the indictment correctly identifies Defendant's name, Bennie Lee Graham. While Defendant's name is listed incorrectly in the first sentence in the body of the indictment, the rest of the indictment correctly lists Defendant's name. The remaining text of the body of the indictment lists the three underlying felonies Defendant had been convicted of, each of them correctly naming Defendant as "Bennie Lee Graham" and providing descriptions and dates of the convictions. Given the correct identification of Defendant in the caption of the indictment and the subsequent references to the correct name in the body of the indictment, the variance was not fatal, and the indictment is therefore not invalid.

B. Motion to Suppress

Defendant also contends the trial court erroneously denied his motion to suppress evidence and offers two arguments in support of this contention: (1) that

[1] Defendant cites *State v. Phelps*, 65 N.C. 450, 1871 WL 2231 (1871), for the proposition that a defendant must be correctly identified "in the commencement of the statement of the offence . . . ." However, our Supreme Court has made clear in *Simpson* that "the name of the defendant, or a sufficient description if his name is unknown, must be alleged *in the body of the indictment* . . . ." *Simpson*, 302 N.C. at 616, 276 S.E.2d at 363 (emphasis added).

Sergeant Sorg initially seized Defendant before Detective Luther arrived and that the State failed to introduce evidence to justify this seizure; and (2) in the alternative, Detective Luther "converted the encounter into a detention" that was unsupported by reasonable suspicion. We discuss each in turn.

1. Legal Principles

"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*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (citation, internal quotation marks, and alterations omitted). While not without limitation, we accord "great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Brown*, ___ N.C. App. ___, ___, 787 S.E.2d 81, 84 (2016) (quoting *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994)). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The Fourth Amendment to the United States Constitution protects individuals' right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. Not every encounter between a

citizen and a police officer, however, will implicate the Fourth Amendment. Indeed, "[l]aw enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *U.S. v. Drayton*, 536 U.S. 194, 200, 153 L. Ed. 2d 242, 251 (2002). Rather, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (citation and internal quotation marks omitted).

In determining whether an encounter between an individual and a law enforcement officer has lost its consensual nature so as to constitute a seizure, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his [or her] business." *Id.* at 437, 115 L. E. 2d at 400 (citation and internal quotation marks omitted). "The totality of circumstances 'test is necessarily imprecise, because it 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.'" *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 826 (2009) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 573, 100 L. Ed. 2d 565, 572 (1988)). Our Supreme Court has held:

> 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.

When an encounter loses its consensual nature, an individual's rights under the Fourth Amendment are implicated and an officer is required to have reasonable suspicion that the individual is engaged in criminal activity in order to conduct the brief investigatory stop. *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398. "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." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (citation and internal quotation marks omitted). In describing the reasonable suspicion standard, the U.S. Supreme Court has stated:

> The reasonable suspicion necessary to justify [a brief investigatory stop] is dependent upon both the content of information possessed by police and its degree of reliability. The standard takes into account the totality of the circumstances – the whole picture. Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.

Navarette v. California, 572 U.S. 393, 397, 188 L. Ed. 2d 680, 686 (2014) (citations and internal quotation marks omitted).

2. Sergeant Sorg

In denying Defendant's motion to suppress, the trial court made the following conclusions of law:

> 1. The Defendant was standing outside in a public area where he has no expectation of privacy;
>
> 2. Law enforcement officers had a consensual encounter with [Defendant], as they are entitled to do;

In support of these conclusions, the trial court made the following relevant findings of fact:

> 10. The detectives got into one vehicle and drove across the street to the side entrance of the . . . hotel;
>
> 11. Once they were closer to the individuals [sic][2], the detectives were able to confirm it was [Defendant];
>
> 12. All detectives exited the car and approached [Defendant] outside the hotel in a public area;
>
> 13. Detective Luther testified he smelled an odor of burnt marijuana in the Defendant's area;
>
> 14. In his training and experience as a law enforcement officer he had smelled burnt marijuana hundreds of times and was familiar with the odor;

[2] The trial court's typographical error in using the term "individuals" instead of "individual" is clear from both the context of the trial court's findings and the testimony presented at the motion to suppress hearing. Preceding Finding of Fact 11, the trial court exclusively used the singular term "the man." Moreover, within Finding of Fact 11, the trial court stated the detectives confirmed "*it*" was Defendant, indicating it was referring to a single individual.

> 15. Detective Luther asked [Defendant] about the odor of marijuana and [Defendant] responded someone else was smoking marijuana earlier out there;
>
> . . .
>
> 18. Detective Luther began a pat down of the defendant and felt a bulge in his back pocket that felt like a plastic bag;

Here, Defendant does not contest any finding of fact as unsupported by competent evidence. Rather, Defendant argues that he was seized by Sergeant Sorg in the three to five seconds between Sergeant Sorg's initial approach and Detective Luther's arrival and interaction with Defendant. The only support Defendant offers for this position is Detective Luther's testimony that when he approached Defendant after walking around the front of his vehicle, "Sergeant Sorg was starting to detain [Defendant]." However, this statement does not necessarily transform the encounter into a seizure under the Fourth Amendment nor is it dispositive in our analysis of the consensual nature of the encounter. As stated, we must "tak[e] into account *all* of the circumstances surrounding the encounter" to determine if a reasonable person believed he or she was at liberty to ignore police presence and walk away from the encounter. *Bostick*, 501 U.S. at 437, 115 L. Ed. 2d at 400.

Here, the evidence before the trial court indicates that, when Detective Luther walked around his vehicle and began his interaction with Defendant, a reasonable person would have felt free to leave or terminate the encounter. There was no

evidence that Sergeant Sorg or any of the other officers made a physical application of force or that the officers physically blocked Defendant from leaving during the 3 to 5 seconds before Detective Luther joined the encounter. There similarly was no evidence that Defendant had submitted to any show of force. Moreover, the officers did not create any psychological barriers to Defendant's leaving, such as activating blue lights or sirens on the vehicle. *See State v. Williams*, 201 N.C. App. 566, 571, 686 S.E.2d 905, 908-09 (2009). The evidence tended to show that when Detective Luther arrived, the encounter was cooperative and non-confrontational. *See Drayton*, 536 U.S. at 204, 153 L. Ed. 2d at 253. Viewing these circumstances in their totality, Defendant's encounter with officers during the 3 to 5 seconds before Detective Luther arrived did not go beyond merely approaching Defendant to ask him questions. Accordingly, the trial court did not err in concluding that this encounter was consensual and not a detention under the Fourth Amendment requiring reasonable suspicion.

3. Detective Luther

Having determined that Sergeant Sorg did not seize Defendant before Detective Luther's arrival, we reach Defendant's alternative argument that Detective Luther "elevated the encounter to an investigatory detention" when Detective Luther spoke with Defendant about the smell of marijuana and asked about any illegal items on Defendant's person. We disagree with Defendant that he was seized when

Detective Luther spoke with him regarding the smell of marijuana, but we agree that Defendant was seized when Detective Luther told Defendant he wanted to pat him down and asked Defendant about any illegal items on Defendant's person. However, because we find that an objectively reasonable, articulable suspicion supported the seizure, we affirm.

The trial court made the following findings of fact:

> 13. Detective Luther testified he smelled an odor of burnt marijuana in the Defendant's area;
>
> 14. In his training and experience as a law enforcement officer he had smelled burnt marijuana hundreds of times and was familiar with the odor;
>
> 15. Detective Luther asked [Defendant] about the odor of marijuana and [Defendant] responded someone else was smoking marijuana earlier out there;
>
> 16. Detective Luther testified that during the time he had been doing surveillance no one else had been smoking or lingering in the area;
>
> 17. Detective Luther asked [Defendant] if he had anything illegal on his person and [Defendant] replied that he did;
>
> 18. Detective Luther began a pat down of the defendant and felt a bulge in his back pocket that felt like a plastic bag;

From these findings of fact, the trial court made the following conclusions of law:

> 2. Law enforcement officers had a consensual encounter with [Defendant], as they are entitled to do;

> 3. Upon approaching [Defendant], law enforcement recognized an odor of marijuana and through the conversation [Defendant] admitted to having something illegal on his person;
>
> 4. Based upon the odor of marijuana and [Defendant's] admission to having illegal items on him, law enforcement was justified in conducting a search of his person;

Defendant cites *State v. Knudsen*, 229 N.C. App. 271, 747 S.E.2d 641 (2013), in support of his argument that he was seized when Detective Luther began discussing the marijuana odor. In *Knudsen*, an officer blocked the defendant's movement on a sidewalk and "demanded of [d]efendant, 'what do you have in the cup[?]'" *Id.* at 283, 747 S.E.2d at 650. We held that, in the context of the entire encounter, this conduct would have communicated to a reasonable person that he or she was not free to leave the encounter. *Id.*

Here, there was no evidence that Defendant's movements were blocked by the officers. Moreover, Detective Luther made no "demand." Indeed, he did not even pose a formal question to Defendant. Detective Luther simply stated, "Man it smells like marijuana out here." Such a statement would not lead a reasonable person to believe that he or she had to reply, much less that he or she was not at liberty to end the encounter. *See Williams*, 201 N.C. App. at 571, 686 S.E.2d at 909 (noting the absence of evidence that the officer "used any language or displayed a demeanor suggesting that [the defendant] was not free to leave"). This conduct does not rise to

the level of that in *Knudsen* which rendered that encounter nonconsensual. The trial court did not err in failing to find a seizure based on this statement.

While we reject Defendant's argument that he was seized when Detective Luther spoke with Defendant about the smell of marijuana, we agree with Defendant he was subsequently seized at the moment when Detective Luther stated to Defendant that he "wanted to pat him down for [Detective Luther's] safety and asked him if he had anything illegal on his person . . . ." It is well established that a law enforcement officer may pose a question to an individual if he or she is a willing listener, and the individual is free to either answer the question or decline and leave the encounter. *Drayton*, 536 U.S. at 200-01, 153 L. Ed. 2d at 251. Merely posing such a question does not necessarily equate with a seizure under the Fourth Amendment. *Id.* Detective Luther did not simply pose a question to Defendant asking him if he had illegal items on his person. *See e.g. State v. Price*, 233 N.C. App. 386, 757 S.E.2d 309 (2014) (finding no seizure when law enforcement merely asked the defendant whether he was a convicted felon). Preceding the question, Detective Luther told Defendant that he wanted to pat Defendant down for Detective Luther's safety. Detective Luther did not ask Defendant for his consent to conduct the pat-down or pose this statement as a question. Indeed, Defendant did not even have an opportunity to consent or decline before Detective Luther proceeded to asking Defendant whether he had any illegal items on his person. Detective Luther's

statement was akin to a demand that a reasonable person, considering the totality of the circumstances, would not feel free to decline or otherwise terminate the encounter. As such, we hold that a seizure occurred when Detective Luther stated to Defendant that he wanted to conduct a pat-down of Defendant.

The remainder of our review is limited. Defendant's sole remaining argument on appeal is that the seizure at this moment was unsupported by a reasonable, articulable suspicion. Specifically, Defendant claims the "general smell of marijuana in the air" is insufficient to create an objectively reasonable, articulable suspicion that he was engaging in unlawful conduct. He further contends his admission to possessing illegal items occurred after the seizure, and thus cannot retroactively justify the seizure. We hold there was an objectively reasonable, articulable suspicion to support this seizure.

At this moment in the encounter, Detective Luther had approached Defendant and "smelled the odor of burnt marijuana in the air[.]" The smell of burnt marijuana was linked to Defendant, as Detective Luther observed Defendant smoking and testified that, based on the preceding surveillance of the area, he knew no one else was out there smoking. *See State v. Rivens*, 198 N.C. App. 130, 134, 679 S.E.2d 145, 149 (2009) ("In this case, the smell of marijuana, bolstered by defendant's nervousness, was sufficient to create a reasonable and articulable suspicion of criminal activity."). Defendant contends that, since Detective Luther did not testify

that he smelled marijuana coming from Defendant's *person*, this cannot be considered in determining whether reasonable suspicion existed. Defendant cites *State v. Malunda*, 230 N.C. App. 355, 749 S.E.2d 280 (2013), where we held there was no probable cause to support the search of the defendant, a passenger in a vehicle, where the officer smelled no odor of marijuana on the passenger side of the vehicle or on the defendant's person. *Id.* at 360, 749 S.E.2d at 284. *Malunda* is distinguishable in two ways. First, "[r]easonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. E. 2d 570, 576 (2000)). Additionally, here, Detective Luther had been surveilling the area where the burnt marijuana was smelled and testified that Defendant had been the only one in that area.

In addition to the smell of burnt marijuana, Defendant stated to Detective Luther, "Yeah, somebody was out here smoking before me." As previously stated, Detective Luther personally knew this statement to be a lie from his surveillance of the area for the 30 to 45 minutes preceding his encounter with Defendant. We have held that even bizarre or inconsistent statements made to law enforcement officers that do not rise to the level of a "proven lie" can be considered in determining whether reasonable suspicion existed. *See State v. Castillo*, 247 N.C. App. 327, 338-39, 787 S.E.2d 48, 55-56 (2016).

The totality of the circumstances, including objective facts such as the smell of burnt marijuana linked to Defendant and the lie made to Detective Luther, would provide a reasonable officer with the belief that criminal activity – the possession of illegal narcotics – was afoot. *See State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) ("The only requirement [for reasonable, articulable suspicion] is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'"). Accordingly, Detective Luther's seizure of Defendant was supported by an objectively reasonable, articulable suspicion and did not violate Defendant's Fourth Amendment rights.

As previously stated, Defendant argued that he was seized when Detective Luther stated he "wanted to pat [Defendant] down for my safety and asked [Defendant] if [Defendant] had anything illegal on [Defendant's] person . . . ." Defendant further argued that, without his subsequent admission to having illegal items on his person, the seizure was unjustified. In making this argument, Defendant did not challenge or raise the issue of the validity of the frisk or subsequent search of Defendant's person. Accordingly, we do not reach those issues. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

CONCLUSION

The indictment, while containing an error, clearly and positively identified Defendant as the person charged with the commission of the charged offense and is valid. While the trial court erroneously found the entire encounter between Defendant and the law enforcement officers to be consensual, we find the seizure challenged by Defendant to be supported by an objectively reasonable, articulable suspicion. The trial court, therefore, did not err in denying the motion to suppress, and the order of the trial court is affirmed.

AFFIRMED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).