IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1232

Filed: 17 September 2019

Forsyth County, No. 17 CRS 52872

STATE OF NORTH CAROLINA

v.

JAMES JETER YOUNG

Appeal by defendant from judgment entered 6 March 2018 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant.

ARROWOOD, Judge.

James Jeter Young ("defendant") appeals from a judgment entered upon his guilty plea to two counts of trafficking opium or heroin, possession with intent to sell or deliver heroin, and habitual felon status. After review, we determine that the trial

court did not err in denying defendant's motion to suppress. Therefore, for the following reasons, we affirm.

I. Background

On 24 March 2017, Officers L.R. Hansen and S.D. Wagoner of the Street Crimes Unit of the Winston-Salem Police Department were conducting surveillance at 2902 Trent Street when they observed a silver Altima pull into that address. After discovering the vehicle's registration and insurance had expired, the officers followed the Altima and initiated a traffic stop. The car pulled over to the side of an on-ramp to highway I-40. Five officers were on the scene and multiple officers approached the car. Defendant was the driver of the vehicle. Officers Wagoner and B.A.M. Ferguson approached defendant's side of the car, with Officer Wagoner taking the lead and Officer Ferguson standing behind him. Officer Wagoner asked defendant if he had a driver's license or other type of identification. Defendant replied that he did not, but provided the officer his full name and date of birth. He also informed Officer Wagoner that the car belonged to the passenger, Christopher Martin ("Mr. Martin").

Defendant started to use his cell phone, Officer Wagoner directed him to stop, and defendant complied. Officer Hansen approached the passenger side of the vehicle and spoke with Mr. Martin. He had Mr. Martin exit the vehicle, and Mr. Martin consented to a search of his person and the car. Officer Hansen testified that he did

not smell or find marijuana on Mr. Martin or in the car, nor did he smell marijuana on defendant.

While Officer Hansen was searching Mr. Martin, Officer Wagoner was conducting a background check on defendant, and Officer Ferguson stepped forward to engage defendant. Officer Ferguson testified that defendant appeared nervous because he was handling his cell phone and its accessories and looking around at the various officers. Officer Ferguson told Officer Hansen that he smelled marijuana on defendant and ordered defendant to leave his cell phone and exit the car. Defendant was told to put his hands on top of the car. Defendant complied with all orders. Officer Ferguson confirmed these were directives, and not requests.

When asked by Officer Ferguson if he had been smoking marijuana or been around anyone smoking marijuana, defendant responded "Black and Mild."[1] Officer Ferguson asked, "You don't have anything on you? You don't mind if I check?" Officer Ferguson testified that defendant replied, "no[.]" Officer Ferguson then searched defendant's back and front pockets. Officer Wagoner assisted Officer Ferguson with the search by standing by with a flashlight. Officer Wagoner testified that, while he had not smelled marijuana earlier when he was talking to defendant in the car, at this point he smelled burnt marijuana coming from defendant's person. Officer

[1] Defendant argues in his brief that "black and milds" refers to Black & Mild cigars, while in the transcript the trial court says, "he had been smoking Black and Mild, which is abundantly clear that it is a way that Marijuana is ingested."

Ferguson then told defendant "We're about to get a little comfortable. Spread your feet for me." Defendant responded, "what you doing, officer."

Defendant spread his feet, and Officer Ferguson patted down both sides of defendant's legs outside his pants and then proceeded to the groin and buttocks area. Officer Ferguson felt a hard rock-like substance in the buttocks and began to handcuff defendant. Defendant resisted, and Officer Ferguson pushed him up against the car and handcuffed him. A plastic baggie containing heroin fell down defendant's pants leg to the ground. Defendant was arrested at the scene. Defendant was subsequently indicted on 3 July 2017 for two counts of trafficking opium or heroin, one count of possession with intent to sell or deliver heroin, and having obtained habitual felon status.

On 25 October 2017 defendant filed a motion to suppress evidence. The motion came on for hearing before the Honorable David L. Hall in Forsyth County Superior Court on 2 November 2017. At the motion hearing, the trial court denied the motion, set forth the reasons behind its decision from the bench, and did not issue a separate written order. The trial court made a number of findings of fact as well as the following conclusions of law:

> First of all, that the stop of the vehicle, operated by [defendant] was supported by reasonable, articulable suspicion under the totality of the circumstances.
>
> That the actions of [defendant], as they appeared to these officers during the routine traffic stop, including the

fact [defendant] was operating a vehicle that was uninsured, that [defendant] admitted to having [sic] license -- that [defendant] was apparently nervous and fidgeting or manipulating a number of items in [defendant]'s lap there on the roadside during the evening hours, combined with two officers, well combined with Officer Ferguson's smell -- Officer Ferguson's detection of the smell of burnt Marijuana coming from the area where the account -- defendant as all afforded probable cause to make an arrest, should the officers -- had the officers chosen to do so, for several offenses, including operating a vehicle with no insurance, possession of Marijuana, and although unlikely -- well no operator's license.

That in addition to the existence of probable cause on the part of Officer Ferguson, Officer Ferguson gave [sic] consent from [defendant] for Officer Ferguson to search [defendant]'s person.

. . . .

Given the evidence before me, to the conclusions of law, the defendant consented to the search of his person, that consent being nonspecific, and the terms of the search having been described in a nonspecific way.

That the search of the defendant's person was not an unreasonable search under the totality of the circumstances then existing, and thus, did not offend the defendant's rights pursuant to the United States and or North Carolina constitutions, plural possessive, protection against unreasonable searches and seizures.

That the search of the defendant did not violate any statute of the State of North Carolina and was otherwise lawful. That the seizure obtained as a product of the search was a legal seizure which flowed from the lawful search of the defendant's person.

Defendant's case came on for trial at the 6 March 2018 Criminal Session of Forsyth County Superior Court, before the Honorable Todd Burke. Defendant pleaded guilty to the charges pursuant to an agreement in which he retained his right to appeal the denial of his motion to suppress. Following his plea, the court sentenced defendant to 87-117 months imprisonment. Defendant appealed in open court.

II. Discussion

Defendant contends the trial court erred in denying his motion to suppress. In support of this contention he argues: (a) that the trial court's findings of fact were not supported by competent evidence; (b) he did not consent to the officer's search of his person; (c) that even if his consent was voluntary the search exceeded the scope of consent given; and (d) that there were no exigent circumstances justifying a warrantless search. We address these contentions in turn.

1. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

2. Competent Evidence

Defendant first argues that some of the trial court's factual findings are not supported by competent evidence. Defendant claims the trial court's finding that "Officer Ferguson thereafter, asked [defendant] if Officer Ferguson could search, mind it if Officer Ferguson search[ed] [defendant] . . . (there was no specificity described in terms of what this search would be)[ ], to which the defendant replied no" was not supported because the body camera footage showed Officer Ferguson asking defendant "You don't have anything on you? You don't mind if I check?" to which defendant replied "no." Defendant also contended that the finding, "[defendant] was apparently nervous and fidgeting or manipulating a number of items in [defendant]'s lap there on the roadside during the evening hours" was not properly supported.

When determining whether the trial court's findings of fact are supported by competent evidence, "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence. A correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." *State v. Hester*, __ N.C. App. __, __, 803 S.E.2d 8, 15-16 (2017) (emphasis omitted) (citations omitted). Here, the slight differences between what was found by the trial court and what was

shown on the body camera video, and the subjective observation of the trial court that defendant appeared nervous, are not significant enough to disturb the ruling of the court.

Defendant also takes issue with the finding of fact that "consent was freely given and was knowing and voluntary[,]" as he contends that consent to a search is a conclusion of law. Likewise, defendant argues that the trial court's factual finding that "defendant's response was reasonably interpreted to mean that the defendant did not mind if the officer searched the defendant's person" should have been a conclusion of law. However, the trial court found that "[as] to the conclusions of law, the defendant consented to the search of his person." Furthermore, as will be discussed in section 3, we find that defendant did give consent to the search.

Finally, defendant takes issue with the trial court for failing to include several specific moments of the encounter between the officers and defendant in its findings of fact. "When a court conducts a hearing to determine the admissibility of evidence, it should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996) (citation omitted). In fact, the trial court does not have to make specific findings of fact on each issue so long as it is uncontroverted. *State v. Fisher*, 158 N.C. App. 133, 144, 580 S.E.2d 405, 414 (2003),

aff'd, 358 N.C. 215, 593 S.E.2d 583 (2004). Therefore the trial court did not have to make specific findings of fact on every moment of the search and arrest, particularly since the moments the defendant took issue with were included on the video of the incident, which the trial court had watched.

3. Voluntary Consent

> The Fourth Amendment protects citizens from unreasonable searches and seizures, but permits searches to which a suspect consents. . . . [B]y waiver and consent to search free from coercion, duress or fraud, and not given merely to avoid resistance, a defendant relinquishes the protection of the Fourth Amendment, against an unlawful search and seizure.

State v. Stone, 362 N.C. 50, 53, 653 S.E.2d 414, 417 (2007) (internal citations and quotation marks omitted).

"Implicit in the very nature of the term consent is the requirement of voluntariness. To be voluntary the consent must be unequivocal and specific, and freely and intelligently given." *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) (citation and internal quotation marks omitted). "The question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of the circumstances." *State v. Bartlett*, __ N.C. App. __, __, 818 S.E.2d 710, 714 (2018) (citation and internal quotation marks omitted).

"The burden of proof is upon the State to establish by clear and positive testimony that consent was so given." *Little*, 270 N.C. at 239, 154 S.E.2d at 65 (citation omitted). "[T]o determine the voluntariness of a defendant's consent . . . the weight to be given the evidence is . . . a determination for the trial court, and its findings are conclusive when supported by competent evidence." *State v. Hernandez*, 170 N.C. App. 299, 310, 612 S.E.2d 420, 427 (2005) (quotation marks and citations omitted).

At the motion hearing, among its findings of fact, the trial court found:

> Officer Ferguson instructed [defendant] to step out of the silver Altima, which [defendant] politely and appropriately complied. . . . Officer Ferguson . . . asked [defendant] if Officer Ferguson could search, mind it if Office Ferguson search [defendant]. . . . (there was no specificity described in terms of what this search would be) . . . to which the defendant replied no. That the defendant's response was reasonably interpreted to mean that the defendant did not mind if the officer searched the defendant's person. . . . I find as a fact-based opinion, the testimony and the video which illustrated the testimony, that *the consent was freely given and was knowing and voluntary*. (emphasis added)

The trial court also concluded as a matter of law that, "Officer Ferguson gave [sic] consent from [defendant] for Officer Ferguson to search [defendant]'s person" and "the defendant consented to the search of his person, that consent being nonspecific, and the terms of the search having been described in a nonspecific way."

Defendant argues that consent was not given freely because, before he was even asked if he could be searched, he had been ordered to put his hands on the car

while surrounded by five officers at night on the side of the highway. Defendant contends that a reasonable person would not feel free to decline that search request, and thus his consent was not voluntarily given.

However, defendant points to no binding case law in which a verbal confirmation of consent was held invalid. In *State v. Bartlett*, this Court found that consent was given voluntarily when the defendant was asked to get out of a vehicle and was asked "for consent to search his person," to which he replied, "Go ahead." __ N.C. App. __, __, 818 S.E.2d 710, 713, 715-16 (2018). *See also U.S. v. Drayton*, 536 U.S. 194, 153 L. Ed. 2d 242 (2002) (finding voluntary consent when three officers boarded a Greyhound bus and one of the officers asked a passenger "[d]o you mind if I check your person" and the passenger replied "[s]ure" and opened his jacket).

In the instant case, the trial court found that "consent was freely given and was knowing and voluntary." While defendant was asked to put his hands on the car, no physical contact came from the officer until the search began. *See State v. Cobb* 248 N.C. App. 687, 789 S.E.2d 532 (2016) (finding no compulsion to consent where the officers did not make physical contact with, make threats to, use harsh language with, or raise their voices at the defendant). There is no indication in the record that the officers made threats to, used harsh language with, or raised their voices at defendant.

Furthermore, this Court has ruled that five officers at the scene does not invalidate consent. Here, while five officers were present at the scene, only one officer searched defendant. This is similar to *Bartlett*, in which five officers were also involved, but only one interacted with the defendant. __ N.C. App. at __, 818 S.E.2d at 715. There were four officers present in *Cobb*, but only two spoke with defendant when he gave consent to a search. __ N.C. App. at __, 789 S.E.2d at 539.

The trial court's findings of fact are binding when supported by competent evidence. *Hernandez*, 170 N.C. App. at 310, 612 S.E.2d at 427. Officer testimony and an audiovisual recording of a verbal indication of consent are certainly competent evidence. Therefore, we find no error in the trial court's finding that defendant gave valid consent to the search.

4. The Scope of Consent

Defendant argues that, if we find that defendant gave valid consent to be searched, then Officer Ferguson's search of defendant's buttocks area exceeded the scope of that consent. We disagree.

> Voluntary consent to a search does not permit an officer to embark upon an unfettered search free from boundary or limitation. Rather, a suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant. And even when an individual gives a general consent without express limitations, the scope of a permissible search has limits. In such a case, the limit on the search is that of reasonableness—that is, what the reasonable person would expect. Our Supreme Court has clearly stipulated that the standard for measuring the

> scope of a suspect's consent . . . is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?

Bartlett, __ N.C. App. at __, 818 S.E.2d at 716 (internal quotation marks and citations omitted).

In *Bartlett*, the defendant was asked if "he was attempting to conceal something . . . on his person," which "reasonably alert[ed] Defendant to the fact that the search would likely include areas in which such items might immediately be hidden." *Id.* at __, 818 S.E.2d at 717. Defendant here argues that he was not reasonably alerted to the fact that the search would include a pat-down of his buttocks.

The trial court found the events of the search as follows:

> Just call it a frisk, an ordinary pat-down or frisk of [defendant]'s lower body. [Defendant] was clad in a dressy version or a dressy type of perhaps designer sweatpants. Officer Ferguson appropriately, and in typical fashion, patted down the outer and inner side of Mr. Ferguson's [sic] left leg, after having instructed Mr. Ferguson [sic] to spread his feet apart. Officer Ferguson's hands then past [sic] in between the two legs to the outside of the sweatpants, covering what would be the buttocks area of the defendant's body. Officer Ferguson, thereafter, had another spontaneous and sudden reaction to feeling something hard located on the defendant's bottom, his buttocks area, essentially in between the two cheeks of the buttocks.

Officer Ferguson testified that he asked defendant "did he mind if I checked. He said no[.]" Defendant contends that answering this question gave permission to

search pockets or areas where someone would have something on them, but not other areas of the body. Defendant further contends that the fact that defendant responded, "what you doing, officer?" to the officer when he started searching the inside of his legs corroborates that defendant did not know the officer would search there. The question here is whether it would be reasonable to presume this search would encompass the inner leg and buttocks area.

When an officer asks if he can check if there is anything on you, it would be reasonable to assume that means that the officer will be checking areas where something might be hidden. In *State v. Stone* our Supreme Court found that general consent did not give the officer permission to pull the defendant's pants and underwear away from his body and shine a flashlight on his genitals. 362 N.C. 50, 56, 653 S.E.2d 414, 418-19 (2007). Nothing as extreme as *Stone* occurred here. The officer did not pull defendant's clothes away from his body, but instead searched the defendant from outside his clothing. As such, the trial court did not err by holding that a search of defendant's buttocks area was within the scope of defendant's consent.

5. Probable Cause, Exigent Circumstances, and Search Incident to Arrest

Finally, regardless of whether there was consent to search by the defendant, the search was within a lawful exception to the warrant requirement, as it was incidental to arrest. "An officer may arrest without a warrant any person who the

officer has probable cause to believe has committed a criminal offense[ ] . . . in the officer's presence." N.C. Gen. Stat. § 15A-401(b)(1) (2017). "An officer may conduct a warrantless search incident to a lawful arrest. A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause." *State v. Robinson*, 221 N.C. App. 266, 276, 727 S.E.2d 712, 719 (2012) (quotation marks and citation omitted).

The trial court found that the officers had probable cause to arrest defendant "for several offenses, including operating a vehicle with no insurance, possession of Marijuana, and . . . no operator's license." While one cannot be arrested for the commission of an infraction, *see State v. Braxton*, 90 N.C. App. 204, 208, 368 S.E.2d 56, 59 (1988) (citation omitted), and driving without a license is an infraction in North Carolina, N.C. Gen. Stat. § 20-35(a2)(1) (2017) (stating that a person who "[f]ails to carry a valid license while driving a motor vehicle" is committing an infraction), there was still probable cause for arrest due to the smell of marijuana on defendant.

> Probable cause exists where the facts and circumstances within an officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed, and that evidence bearing on that offense will be found in the place to be searched.

State v. Pigford, 248 N.C. App. 797, 800, 789 S.E.2d 857, 860 (2016) (alterations omitted) (quoting *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 174 L. Ed. 2d 354 (2009)) (internal quotation marks omitted).

In *State v. Corpening*, this Court found that when an officer smelled the odor of marijuana from a car in which the defendant was sitting, "the plain smell of marijuana by the officer provided sufficient probable cause to support a search and defendant's subsequent arrest [for possession of cocaine]." 200 N.C. App. 311, 315, 683 S.E.2d 457, 460 (2009) (citation and internal quotation marks omitted). *See also United States v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004) ("[I]f an officer smells the odor of marijuana . . . [and] . . . can localize its source to a person, the officer has probable cause to believe that the person has committed or is committing the crime of possession of marijuana."). Similarly, here Officer Ferguson smelled marijuana on defendant when he was sitting in the vehicle. Officer Wagoner also smelled marijuana on defendant after he exited the vehicle. Therefore, the officers had probable cause to support a search of defendant for possession of marijuana.

Defendant next argues that exigent circumstances did not exist here to justify the search, even if it was supported by probable cause. However, this Court has found that exigent circumstances exist when there is a risk of the destructibility of the evidence. In the instant case, there were sufficient exigent circumstances because the officer smelled burnt marijuana and therefore had reasonable grounds to believe

defendant possessed evidence that could easily be destroyed. *See State v. Johnson*, 225 N.C. App. 440, 447-49, 737 S.E.2d 442, 449 (2013) (finding sufficient circumstances existed to search defendant when "there was evidence not only that defendant smelled of marijuana, but that the troopers had discovered in his car a scale of the type used to measure drugs, a drug dog had alerted in his car, including on the driver's seat, and during a pat-down the troopers had noticed a blunt object in the inseam of defendant's pants"); *State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004) (finding probable cause to search defendant without a warrant when he smelled of marijuana and exigent circumstances due to the ease of destroying or concealing narcotics). Because the officers had probable cause to believe that defendant was in possession of marijuana, which can easily be destroyed or concealed, searching defendant without a warrant was permissible under exigent circumstances.

III. Conclusion

For the reasons discussed, we hold that the trial court did not err in denying defendant's motion to suppress, and we affirm the judgment.

AFFIRMED.

Judges BERGER and COLLINS concur.

Report per Rule 30(e).