

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-362

Filed: 5 May 2020

Forsyth County, No. 17CRS53401-02, 17CRS1397

STATE OF NORTH CAROLINA

v.

PERRY L. PITTS

Appeal by defendant from order entered 19 September 2018 by Judge Edwin G. Wilson, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 16 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kindelle McCullen, for the State.*

*Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant-appellant.*

STROUD, Judge.

Defendant appeals from the trial court's denial of his motion to suppress. Because the trial court's findings of fact are supported by competent evidence, and the findings support the conclusion of law that the officers had a reasonable suspicion to stop Defendant, we find no error by the trial court.

I. Background

The findings<sup>1</sup> in the trial court's order denying Defendant's motion to suppress summarize the events leading to Defendant's arrest on 10 April 2017:

1. On April 10, 2017 Officer Amaya and McGuire were assigned to District II which encompasses Piedmont Circle Apartments, Housing Authority property. Officer Amaya and McGuire arrived at Piedmont Circle Apartments around 1:00 am. They were looking for a subject who fled the night before from Officer McGuire. They were unsuccessful in locating the fleeing subject and decided to go on foot patrol which was a part of their assigned duties as law enforcement officers.
2. Piedmont Circle Apartments is an open area drug market and a high violent crime area. Both officers testified that they had conducted several investigations and arrest[s] for drugs and violent crimes at the Piedmont Circle Apartments.
3. Officer Amaya testified that he conducted (over 20 to 30 or more) drug arrests at the Piedmont Circle Apartments and witnessed several hand to hand drug transactions.
4. On April 10, 2017 Officer Amaya and McGuire saw the defendant talking to three females in a car. Officer Amaya for several minutes stood next to an apartment out of the eyesight of the defendant but close enough to see the interactions between the subjects in the car and the defendant. Officer Amaya saw the defendant Mr. Pitts stick his hand in the back right passenger window and exchange something hand to hand with the back seat passenger who was later identified as Tylesha Goolsby. Officer McGuire testified that he too saw the defendant stick his right hand into the vehicle and

---

<sup>1</sup> Defendant challenges portions of Findings of Fact 4, 6, 7, 8, and 18 which are addressed below.

conduct a hand to hand transaction with the back right seat passenger.

5. Due to both officer's training and experience they approached the defendant and the subjects in the vehicle.
6. As Officer Amaya approached the defendant he smelled a strong odor of burnt and unburnt marijuana. Officer Amaya stated he has received extensive training on how to detect burnt and unburnt marijuana.
7. Officer Amaya testified that when he approached the defendant from behind, the defendant turned toward [O]fficer Amaya then quickly turned away from Officer Amaya while sticking his hands down the front of his pants. This further led Officer Amaya to believe that the defendant was attempting to conceal contraband or narcotics in the defendant's underwear.
8. Officer McGuire corroborated Officer Amaya's testimony as to the defendant seeing the officers, then turning away from the officers, and defendant sticking his hands down his pants as to conceal illegal contraband.
9. The Court was able to watch both officer's body worn AXON videos that the Court found corroborated both officer's testimony.
10. Further, after commanding Mr. Pitts away from the vehicle with the three females to create some distance from the occupants of the vehicle, Mr. Pitts was told to stand next to Officer McGuire.
11. Officer McGuire testified that once the defendant stood next to him, he smelled a strong odor of marijuana coming from the defendant.

STATE V. PITTS

*Opinion of the Court*

12. Due to the concerns for officer safety from being in a high drug and violent crime area, Officer Amaya told the defendant to stop pacing. The defendant did not comply. Officer Amaya due to his training and experience told the defendant “you are making me nervous stop pacing.” The defendant continued to pace back and forth. Mr. Pitts was told due to his pacing back and forth to “take a seat” on the curb and the defendant did not comply with the officers command until after being told more than four times to take a seat.
13. The defendant in fact did not take a seat as commanded but opted to place one knee on the ground.
14. Officer Amaya instructed Officer McGuire to place handcuffs on Mr. Pitts to detain him, and as Officer McGuire attempted to do so, Mr. Pitts appeared to have a seizure.
15. Officer Amaya talked to Tylesha Goolsby who was one of the three women in the vehicle, seated in the back right rear seat.
16. The Court was able to listen to Ms. Goolsby tell Officer Amaya that in fact what Officer Amaya believed was a hand to hand drug transaction was accurate. She stated the defendant approached her in the car offering to sale [sic] her marijuana by handing her his package of marijuana.
17. Ms. Goolsby also stated that they all were smoking “weed” prior to the officer’s arrival.
18. After looking at the evidence and the totality of the circumstances, the Court found that the officer’s [sic] in fact had reasonable suspicion.

Due to his medical issue, Defendant was transported by EMS in an ambulance. Officer McGuire traveled with Defendant in the ambulance and searched Defendant. He located marijuana and cocaine in Defendant's groin area. Defendant was charged with possession with intent to sell or deliver marijuana, possession with intent to sell or deliver cocaine within 1,000 feet of a park, possession of marijuana paraphernalia, possession of drug paraphernalia, and attaining habitual felon status. Defendant filed a pretrial motion to suppress the evidence seized from him, challenging the investigatory stop as unconstitutional. After a hearing, the trial court denied Defendant's motion to suppress. The charge of possession with intent to sell or deliver cocaine within 1,000 feet of a park was dismissed. Defendant pled guilty to possession with intent to sell or deliver cocaine, possession with intent to sell or deliver marijuana, possession of marijuana paraphernalia, possession of drug paraphernalia and having attained the status of habitual felon, but Defendant reserved the right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to 58 to 82 months in prison. Defendant timely appealed the denial of his motion to suppress.

## II. 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). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

### III. Findings of Fact

Defendant challenges Findings of Fact 4, 6, 7, 8, and 18 of the trial court's order denying his motion to suppress.

#### A. Finding of Fact 4

Finding of Fact 4 states:

On April 10, 2017 Officer Amaya and McGuire saw the defendant talking to three females in a car. Officer Amaya for several minutes stood next to an apartment out of the eyesight of the defendant but close enough to see the interactions between the subjects in the car and the defendant. Officer Amaya saw the defendant Mr. Pitts stick his hand in the back right passenger window and exchange something hand to hand with the back seat passenger who was later identified as Tylesha Goolsby. Officer McGuire testified that he too saw the defendant stick his right hand into the vehicle and conduct a hand to hand transaction with the back right seat passenger.

Defendant challenges whether Officer Amaya actually observed an exchange of items and whether Officer McGuire saw a hand-to-hand transaction.

At trial Officer Amaya testified to the following:

Q. And how long did you observe the defendant talking to someone in the vehicle you indicated?

A. Just a couple minutes.

Q. Okay.

...

Q. And while you watched the defendant out of view, did you make any observations?

A. Yes. I was able to see a hand-to-hand transaction from the right rear passenger to the individual later identified as Mr. Pitts.

MS. TOOMES: Objection as to the characterization of hand-to-hand transaction, your Honor.

THE COURT: Overruled.

Q. Can you tell your Honor, in your opinion, what is a hand-to-hand -- in your training and experience, what is a hand-to-hand drug transaction?

A. Hand-to-hand drug transaction, from my training and experience, is a transaction where a currency and a narcotic are traded with a hand, hand-to-hand.

Q. How many times have you seen that transaction?

A. Over 20 or 30 times.

Q. Okay. And when you saw what you believed to be a hand-to-hand drug transaction, what happened next?

A. After I believed that that transaction had occurred, Mr. Pitts began to walk away from the vehicle.

Officer Amaya was asked in more detail about his observation of Defendant's transaction on cross-examination:

Q. And when you say that you observed a hand-to-hand transaction, what actions did you observe?

A. Him reaching inside of a vehicle and their hands touched.

Q. So you're saying that you saw her hand and his hand touch?

A. I saw their hands touch, yes.

Q. Or did you assume that their hands touched?

A. No. I saw their hands touch, which is a hand-to-hand transaction.

There is competent evidence to support the trial court's finding that Officer

Amaya witnessed a hand-to-hand drug transaction. However, Officer McGuire did not testify that he witnessed the transaction.<sup>2</sup>

Finding of fact 4 is not based on competent evidence to the extent it states Officer McGuire actually witnessed the hand-to-hand transaction or that Officer Amaya witnessed an exchange of items.

B. Finding of Fact 6

Finding of Fact 6 states:

As Officer Amaya approached the defendant he smelled a strong odor of burnt and unburnt marijuana. Officer Amaya stated he has received extensive training on how to detect burnt and unburnt marijuana.

Defendant argues, “[t]he finding of fact that odor of marijuana was particular to Mr. Pitts was not supported by competent evidence.”

Officer Amaya testified as follows regarding the odor of marijuana:

A. After I believed that that transaction had occurred, Mr. Pitts began to walk away from the vehicle.

Q. And then what happened?

A. We -- Officer McGuire and I made the decision to approach and find out what was going on.

Q. And did you make any observations? Did you detect anything when you approached?

A. As we approached the vehicle, I detected the odor of burnt and unburnt marijuana in the area.

Q. What do you mean by “burnt and unburnt marijuana,”

---

<sup>2</sup> We also note that the finding of fact regarding Officer McGuire’s testimony is a recitation of testimony and not a true finding of fact. *See State v. Travis*, 245 N.C. App. 120, 128, 781 S.E.2d 674, 679 (2016) (concluding recitations of testimony cannot substitute for findings of fact if there are material conflicts in the evidence).



sir?

A. Unburnt marijuana, that's the odor that is produced from raw marijuana that has not been burned. It has a different smell. I smelled both the raw and the burnt, as if someone had just got done smoking or inducing marijuana through the lungs through some type of device.

Q. And what kind of training and experience have you had regarding unburnt marijuana?

A. Had countless interactions with it. At work, I've had numerous cases where I've observed unburnt marijuana. I've seized unburnt marijuana. And even in training, before I became a sworn law enforcement officer, we had training as to what to look for and what it looks like.

Although Officer Amaya did not testify that he was able to localize the odor of marijuana specifically as coming from Defendant, the trial court's finding is supported by the evidence. Officer Amaya smelled marijuana as he approached defendant and the vehicle. We also note that Defendant did not challenge Finding 11 as unsupported by the evidence. Finding 11 states that "Officer McGuire testified that once the defendant stood next to him, he smelled a strong odor of marijuana coming from the defendant."<sup>3</sup> This finding is based on competent evidence.

C. Finding of Fact 7

Finding of Fact 7 states:

Officer Amaya testified that when he approached the defendant from behind, the defendant turned toward [O]fficer Amaya then quickly turned away from Officer Amaya while sticking his hands down the front of his pants. This further led Officer Amaya to believe that the

---

<sup>3</sup> Again, this finding is a recitation of testimony, *Travis*, 245 N.C. App. at 128, 781 S.E.2d at 679, but Defendant has not challenged it on this basis.

defendant was attempting to conceal contraband or narcotics in the defendant's underwear.

Defendant argues, "Officer Amaya never testified that Mr. Pitts turned away from police, nor that he stuck his hands down or into his pants."

At trial, Officer Amaya testified as follows:

Q. So after you saw what you believe to be a drug hand-to-hand transaction, and you smelled the odor of burnt and unburnt marijuana, what did you do next?

A. I then observe Mr. Pitts attempting to walk away. And he kind of fiddled with his pants, so we went ahead and detained him, and detained the others inside the vehicle.

Q. What do you believe he was doing fiddling with his pants?

A. Concealing narcotics.

Again, we note that the first sentence of Finding 7 is a recitation of testimony and not a true finding. The second sentence is a finding of fact. But the evidence supports both the trial court's recitation of testimony, as Officer Amaya did testify substantially as noted in the finding. We have reviewed Officer Amaya's body camera footage and based upon the testimony as noted in the first sentence as well as Officer Amaya's body camera footage, the finding is based on competent evidence.

D. Finding of Fact 8

Finding of Fact 8 states:

Officer McGuire corroborated Officer Amaya's testimony as to the defendant seeing the officers, then turning away from the officers, and defendant sticking his hands down his pants as to conceal illegal contraband.

Defendant argues, “Officer McGuire never specified whether he saw Mr. Pitt’s hand inside his pants, or just at his waistband as Officer Amaya had testified to.”

Officer McGuire testified to the following at the hearing:

Q. Now, I believe you had written in your report that when you rounded the building, that he turned his back toward the vehicle? Is that correct?

A. No, ma’am. I said he turned back toward the vehicle.

Q. Okay.

A. Yes, ma’am.

Q. Back towards the vehicle?

A. Yes.

Q. And you were looking at him because his hands were down around his waist. Is that correct?

A. I was looking at him because he was -- for two reasons. He was the individual Officer Amaya instructed me to keep my eyes on; and number two, when we were approaching, when he saw us coming over his left shoulder, is when he turned back and started digging in his pants with his other hand.

Q. Okay.

A. His right hand.

Q. So where were you when you saw that?

A. We had rounded the corner, started walking in maybe 25 feet, something like that.

Defendant’s argument is based upon a hypertechnical interpretation of the evidence. In the context of this testimony, there is no substantive difference between “inside his pants” and “at his waistband” and the finding that defendant was “sticking his hand down his pants” is supported by the evidence.

#### IV. Conclusion of Law

##### A. Finding of Fact 18

Finding of Fact 18 states:

After looking at the evidence and the totality of the circumstances, the Court found that the officer's [sic] in fact had reasonable suspicion.

Both parties agree that this finding is a mislabeled conclusion of law. Defendant challenges whether the officers had a reasonable suspicion to make the investigatory stop of Defendant.

“As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.” However, this Court has also held, “What is designated by the trial court as a finding of fact [] will be treated on review as a conclusion of law if essentially of that character. The label of fact put upon a conclusion of law will not defeat appellate review.”

*State v. Cobb*, 248 N.C. App. 687, 694, 789 S.E.2d 532, 537 (2016) (alterations in original) (citations omitted). We review this conclusion of law *de novo*. *State v. Hughes*, 353 N.C. at 208, 539 S.E.2d at 631.

“The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. This mandate is applicable to the states through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Evidence obtained by an unlawful search or seizure is inadmissible at trial. *See id.* Although there is no “litmus-paper test” for determining what constitutes a “seizure” for Fourth Amendment purposes, *see Florida v. Royer*, 460 U.S. 491, 506, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229, 242 (1983), it is clear that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that

person,” *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889, 903 (1968). Thus, there is no question that defendant here was “seized” for Fourth Amendment purposes.

Acts which constitute “seizures” of a person for Fourth Amendment purposes may very generally be divided into two categories: (1) arrests and (2) investigatory stops. *See Graham v. Connor*, 490 U.S. 386, 394, 104 L.Ed.2d 443, 454 (1989) (holding that excessive force claims arising in context of arrest or investigatory stop invoke protections of Fourth Amendment against unreasonable seizures); *Reid v. Georgia*, 448 U.S. 438, 440, 100, 65 L.Ed.2d 890, 893 (1980) (explaining that Fourth and Fourteenth Amendments’ prohibition of unreasonable searches and seizures governs all seizures, including traditional arrests as well as seizures involving only a brief detention short of traditional arrest); Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 22 (2d ed.1992). It is well-established that a formal arrest always requires a showing of “probable cause.” *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 111, 43 L.Ed.2d 54, 64 (1975). An investigatory stop, on the other hand, at least at its inception, does not require probable cause; rather, it is only necessary that, given the totality of the circumstances, “the detaining officers [] have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417–18, 66 L.Ed.2d 621, 629 (1981). This standard has also been described as a “reasonable suspicion of criminal activity.” *Royer*, 460 U.S. at 498, 75 L.Ed.2d at 237.

*State v. Milien*, 144 N.C. App. 335, 339-40, 548 S.E.2d 768, 771-72 (2001) (alterations in original).

Here, considering the totality of the circumstances, at approximately 1:00 AM on 10 April 2017, Officer Amaya observed Defendant lean into a vehicle and make a hand-to-hand transaction, which based on his experience and training was “a

transaction where a currency and a narcotic are traded with a hand, hand-to-hand.” This transaction took place in a high crime area where Officer Amaya estimated he had made over twenty drug arrests in the past year, and Officer Amaya smelled the odor of burnt and unburnt marijuana from the area Defendant was standing. Even disregarding the portions of Finding 4 as noted above which are not supported by the evidence, the remaining findings of fact are sufficient to create reasonable suspicion to justify the initial investigatory stop of Defendant.

B. Consideration of Facts After Defendant’s Detention

Defendant argues “Findings of Fact 11 through 17 are all facts that occurred after the detention of [Defendant],” and “Findings of Fact Regarding Occurrences After the Detention of Mr. Pitts Should Not Be Considered.” Defendant is correct that a conclusion of reasonable suspicion must be based upon the officer’s knowledge up to the time of the detention; hindsight may be 20/20, but the trial court’s conclusion of law regarding reasonable suspicion for the officer to initiate the stop cannot rely on hindsight. Defendant cites to *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982), and argues, “In determining whether there was reasonable suspicion to support an investigatory stop, the reviewing court is limited to facts that were known to the officer at the time of the stop.” In addition, “[t]he search or seizure is valid when the objective facts known to the officer meet the standard required.” *Id.* at 741, 291 S.E.2d at 641-42.

STATE V. PITTS

*Opinion of the Court*

We first note that Finding 11 does not refer to occurrences after the detention of Defendant; these facts occurred when Officer Amaya approached Defendant, but Defendant was not detained until at least Finding 12, when Officer Amaya told Defendant to sit on the curb. Thus, the trial court could properly consider the facts in Finding 11 as supporting a conclusion of reasonable suspicion. But even if we disregard Findings 12 through 17, Findings 1 through 11 (excluding the portion of Finding 4 as discussed above) were facts known to the officers up to the time they detained Defendant and these are sufficient to support the trial court's conclusion of reasonable suspicion to make the investigatory stop.

V. Conclusion

For the foregoing reasons, the trial court did not err by denying Defendant's motion to suppress.

NO ERROR.

Judges INMAN and BERGER concur.

Report per Rule 30(e).