IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-34

No. COA20-131

Filed 16 February 2021

Forsyth County, No. 17 CRS 061652

STATE OF NORTH CAROLINA

v.

MARK RONELL TABB II

Appeal by defendant from judgment entered 12 September 2019 by Judge Forrest D. Bridges in Forsyth County Superior Court. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State.

Carella Legal Services, PLLC, by John F. Carella, for defendant-appellant.

TYSON, Judge.

¶ 1 Mark Ronnell Tabb II ("Defendant") appeals from judgment entered upon his guilty plea. We affirm in part and remand for further finding of fact.

I. Background

¶ 2 Winston-Salem Police Officers, E.W. Boyles, D.T. Rose, and M.L. Dime, were patrolling the Greenway Apartment Complex ("Greenway") on foot. Greenway is a

"known area" for sales of illegal narcotics and prostitution. Police officers regularly patrolled Greenway's public areas on both foot and in their vehicles.

¶ 3 The three officers parked their vehicles and began patrolling Greenway on foot between 11:00 p.m. and 12:00 a.m. on the night of 19 December 2017. While patrolling, the three officers observed a stationary vehicle, not parked in a parking space, but stopped in the middle of the parking lot. The vehicle was not moving, but the engine appeared to be running, and its lights were illuminated. Nothing was located in front of or behind the vehicle to limit movement or to prevent the vehicle from driving away.

¶ 4 Officer Boyles had responded in the past to "various calls for . . . narcotics and sales of narcotics" in Greenway. Officer Boyles had observed people using narcotics in the Greenway parking lot areas. All three officers knew from their training and past experience that criminals routinely pulled into the Greenway's parking lot and stopped briefly to conduct illegal activities, including narcotics sales and prostitution.

¶ 5 The officers observed the stationary vehicle for a period of time before approaching it together. Officer Rose testified the officers approached the stopped vehicle because of the factors above and due to the time of the night in a residential area that is known for criminal activity. As the officers approached the vehicle, they observed multiple occupants were seated inside.

¶ 6 Officer Rose approached the stopped vehicle and knocked on the driver's side window. He testified he observed the driver move his right hand to between the seat and the center console, as if trying to reach for or conceal something. Officer Rose asked the driver to step out of the vehicle. As soon as the door opened, Officer Rose also noticed the strong odor of marijuana emanating from inside the vehicle.

¶ 7 Officers Dime and Boyles approached the passengers' side of the vehicle. As Officer Boyles approached the passengers' side front door, he observed Defendant had currency displayed on his lap and also green marijuana in the areas near his waist band.

¶ 8 As Officer Dime approached the vehicle, he smelled a strong odor of marijuana and observed Defendant with a "bag of green vegetable matter," which he recognized as marijuana.

¶ 9 Officer Boyles asked Defendant to also step out of the vehicle because of the quantity of currency and marijuana he had observed upon approaching the vehicle. Officers Boyles and Dime opened the passenger's door, reached inside, and restrained Defendant's arms to prevent him from grabbing evidence, and had him to exit from the vehicle.

¶ 10 As Officer Dime handcuffed Defendant, he noticed a bag of white powder upon the ground next to the vehicle. Officer Dime informed Officer Boyles about the bag. Officer Boyles spotted the bag and believed it to contain powdered cocaine. Officer

Boyles was concerned Defendant would attempt to kick or destroy the bag in some manner, so he moved Defendant away from the bag. Officer Boyles picked up the bag and placed it on top of the vehicle. Officer Boyles used a field kit to test the white powdery substance in the bag and it returned positive results as cocaine.

¶ 11 Officer Dime searched Defendant for additional drugs and weapons. Officer Dime found additional currency inside of Defendant's pocket. The three officers searched the vehicle. On the front passenger's floorboard, they found a marijuana pipe inside a box. In the backseat pocket they found a digital scale. On the vehicle's dashboard, the Officers found more cash. Between the front passenger's seat and console, they found loose, green marijuana.

¶ 12 Officer Boyles spoke with Naudica McCoy, the rear seat passenger. She told Officer Boyles that day was her birthday. The driver and Defendant had given her free marijuana as a birthday present. McCoy told the officers she had purchased marijuana from Defendant in the past, but not that night. McCoy lived in Greenway apartments. She was released and free to leave and went to her home after speaking with the officers.

¶ 13 Defendant was arrested and charged with possession with intent to sell and deliver marijuana, possession with the intent to sell and deliver, and possession of marijuana paraphernalia. Defendant was later indicted for possession of marijuana

up to one and a half ounces, felony possession of cocaine, and possession of marijuana paraphernalia.

¶ 14 Defendant filed a motion to suppress all evidence from the search of Defendant. The trial court denied Defendant's motion. Defendant pleaded guilty to all charges pursuant to a plea agreement, which preserved his right to appeal the trial court's denial of his motion to suppress. The trial court sentenced Defendant to a term of 6 to 17 months, suspended the sentence, and placed him on 18 months of supervised probation.

II. Jurisdiction

¶ 15 This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-979(b) (2019).

III. Issues

¶ 16 Defendant argues the trial court erred by denying Defendant's motion to suppress the evidence obtained at the scene based upon: (1) the finding that the vehicle's window(s) must have been opened as the officers approached and smelled marijuana; and, (2) the trial court failed to make a finding on when the driver became seized to determine whether Defendant's seizure was lawful.

IV. Defendant's Motion to Suppress

A. Standard of Review

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the

> trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Challenged Finding of Fact

¶ 17 Defendant argues the trial court erred in denying his motion to suppress. He asserts the officers seized the driver and occupants of the stationary vehicle without reasonable suspicion.

¶ 18 Defendant challenges the following finding of fact:

> the obvious inference to be drawn from that is, if odor was emanating from the window, as this officer testified to here in court, the window was at least cracked. Or it was at least partially opened, because the odor of marijuana is not going to emanate from a closed window, generally.

Defendant argues this finding of fact is not supported by any specific evidence. The challenged finding is an inference by the trial court based on the officers' testimonies. The remaining findings of fact are unchallenged and are binding upon this Court on appeal. *Id.* at 168, 712 S.E.2d at 878.

¶ 19 Presuming, without deciding, the sole finding of fact Defendant challenges is the trial court's inference from the officers' testimonies, the remaining unchallenged findings of fact remain binding on appeal to support the trial court's conclusions of law. The ruling to deny Defendant's motion to suppress on that challenged basis is affirmed. *Id.* at 167-68, 712 S.E.2d at 878. "Police are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot." *State v. Icard*, 363 N.C. 303, 311, 677 S.E.2d 822, 828 (2009). Defendant's challenges to the trial court's findings as made are without merit.

C. Failure to Make Finding on Seizure of Occupants

¶ 20 Defendant further argues the officers effected a suspicion-less seizure of the driver and all occupants of the car, without reasonable suspicion in violation of the Fourth Amendment.

¶ 21 The Supreme Court of the United States has held, "a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

¶ 22 "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement,

through means intentionally applied[.]" *Brendlin v. California*, 551 U.S. 249, 254, 168 L. Ed. 2d 132, 138 (2007) (citations and internal quotation marks omitted).

¶ 23 A traffic stop seizes the driver within the Fourth and Fourteenth Amendments "even though the purpose of the stop is limited and the resulting detention [is] quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979) (citations omitted). The undisputed facts before us show the officers did not initiate a stop, the motor vehicle was stationary, with its lights on and its engine running, in an open parking lot lane, in a known crime area, near midnight when the officers approached the vehicle together on foot. The officers were all on foot, and did nothing to stop, block, nor prevent the driver from driving the vehicle away.

¶ 24 Defendant asserts he was seized the instant the driver was seized. The findings do not show whether Officer Rose or the driver opened the door, and the driver stepped out of the vehicle on his own violation or in response to Officer Rose's purported show of "physical force or show of authority." *Brendlin*, 551 U.S. at 254, 168 L. Ed. 2d at 138.

¶ 25 The trial court found: "Although it seems that the evidence, . . . seemed to point to a conclusion that by the time the defendant was asked to exit the vehicle, the driver had already stepped out of the vehicle on the other side, by that time. And that would be my conclusion about that."

¶ 26 There is evidence upon which the trial court could make the requisite finding to deny or grant the motion to suppress. Where the trial court failed to make the required finding of fact, the proper remedy is to remand to the trial court for entry of an additional finding. *See State v. Kerrin*, 209 N.C. App. 72, 78, 703 S.E.2d 816, 820 (2011).

¶ 27 This matter is remanded to the trial court with instructions to make a finding of fact of the sequence when Officer Rose made a show of force and the driver was seized and whether to grant or deny Defendant's motion to suppress. The State is not prejudiced to argue any theory of admission or exception to the exclusionary rule.

V. Conclusion

¶ 28 The trial court's order denying the motion to suppress is affirmed in part and remanded. The trial court's findings of fact that Defendant failed to challenge "are deemed to be supported by competent evidence and are binding on appeal." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878. We remand for further finding of fact and conclusion of when the driver became seized and whether Defendant's seizure was lawful to grant or deny Defendant's motion to suppress.

¶ 29 The findings of fact Defendant failed to challenge in the trial court's order are affirmed. This matter is remanded for further finding of fact and conclusion of law on when the driver was seized. The parties are free to argue and present evidence on any theory of admissibility or exception to the exclusionary rule. *It is so ordered.*

AFFIRMED IN PART AND REMANDED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).