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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-60

No. COA20-57

Filed 2 March 2021

Forsyth County, No. 16 CRS 61367

STATE OF NORTH CAROLINA

v.

DONOVAN LAMAR WEST

Appeal by defendant from judgment entered 9 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 M. Shawn Maier, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant.

DIETZ, Judge.

¶ 1

Defendant Donovan Lamar West appeals from the trial court's order denying his motion to suppress. As explained below, the arresting officer had reasonable suspicion to briefly detain and frisk West for officer safety after observing West reach into his car where a gun was visible on the floorboard in circumstances where the officer suspected West was trespassing. Once the officer attempted to seize and frisk

West, West began to struggle and attempted to flee. At that point, the officer had reasonable suspicion to further detain West and search the car. We therefore hold that the trial court properly denied the motion to suppress.

Facts and Procedural History

¶ 2 On 10 December 2016, Officer Wells received a dispatch that loud music was playing at an apartment complex in Winston-Salem. When Officer Wells arrived at a little past midnight, he did not hear any music, but, as he circled the parking lot, he saw Defendant Donovan West in a parked car. West was alone in the car. The car was not running, and there were no nearby streetlights or other cars. The apartment complex had a number of posted “no trespassing” signs. Officer Wells called for backup and then waited five to ten minutes before going back to where West was parked.

¶ 3 When Officer Wells pulled up near West’s car, West got out of his car and began walking away. Officer Wells approached West and asked him what he was doing and if he lived in the complex. West answered that he did not live in the complex and that he was visiting his aunt. The officer found this suspicious because he had been observing West sitting in the car for some time and West only got out and tried to walk away as the officer approached.

¶ 4 Officer Wells then asked West for identification. West returned to his car to retrieve his license. Because his driver’s door was broken, West reached in through

the back passenger door to open the driver's door. As West was opening the door, Officer Wells saw a gun on the car's floorboard. Officer Wells then grabbed onto the driver's door and pulled West away from the car. Around the same time, another officer arrived, and Officer Wells testified that West then "tried to get away from us and run." The officers detained West and searched the car. The search revealed a baggie of crack cocaine and a second firearm in the glove box of the car.

¶ 5 West moved to suppress the evidence seized during the officers' search. The trial court denied the motion in an oral ruling at the suppression hearing with accompanying findings. West then pleaded guilty while preserving his right to appeal the suppression ruling. Although West indicated at the hearing that he intended to appeal, he did not timely file a notice of appeal from the trial court's judgment. Because West's intent to appeal is apparent from the hearing transcript, in our discretion, we issue a writ of certiorari to review the issues West asserts in this appeal. N.C. R. App. P. 21.

Analysis

¶ 6 West argues that Officer Wells did not have reasonable suspicion to detain him. Specifically, West contends that his presence in the parking lot that night did not create reasonable suspicion and that West effectively was seized when the officer asked him to provide identification because a state statute required West to comply with that request.

¶ 7

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). A trial court’s ruling on a motion to suppress “is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.” *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff’d*, 350 N.C. 630, 517 S.E.2d 128 (1999).

¶ 8

There are “three tiers of police encounters: communication between the police and citizens involving no coercion or detention and therefore outside the compass of the Fourth Amendment, brief ‘seizures’ that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause.” *State v. Sugg*, 61 N.C. App. 106, 108–09, 300 S.E.2d 248, 250 (1983).

¶ 9

Ordinary consensual encounters with police fall within the first tier. A seizure “does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citations

omitted). An officer may ask for an “individual’s identification . . . as long as the police do not convey a message that compliance with their requests is required.” *Id.* at 431 (citations omitted). Relevant circumstances in considering the consensual nature of an interaction include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of the voice indicating that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

¶ 10 Among other grounds supporting the brief seizures that fall within the second tier are those in which a law enforcement officer briefly seizes and frisks a person for the purpose of officer safety because the officer reasonably suspects that the person may be armed and presently dangerous. *State v. Johnson*, 246 N.C. App. 677, 686, 783 S.E.2d 753, 760 (2016). This reasonable suspicion standard is “less demanding” than probable cause, and the evidentiary showing required to demonstrate reasonable suspicion is “considerably less than [a] preponderance of the evidence.” *Id.* at 688, 783 S.E.2d at 761.

¶ 11 With these principles in mind, we turn to the facts. We first address West’s argument that, because West was the only person in the car, West was “in charge” of the car and thus subject to a state law requiring any person “in charge of a motor vehicle, when requested by an officer in uniform . . . to produce his license and exhibit same to such officer.” N.C. Gen. Stat. § 20-29. West contends that this statute, which

carries criminal consequences for noncompliance, meant that West was seized as soon as the officer asked to see his identification.

¶ 12 This is not the theory on which West argued his suppression motion in the trial court, and we therefore cannot address it on direct appeal. The defendant “is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below.” *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013). In the trial court, West argued that the officer did not have reasonable suspicion to handcuff and detain him after observing the firearm in plain sight on the car’s floorboard. West did not assert that he was seized when the officer approached him and asked to see his identification.

¶ 13 We therefore limit our analysis to whether the trial court properly concluded that the officer had reasonable suspicion to detain West after he reached into the car and the officer saw a gun on the car’s floorboard. We agree with the trial court that the officer had reasonable suspicion to briefly detain West at that point to ensure the officer’s safety. West was in a parked car in a lot with visible “no trespassing” signs and no nearby streetlights late at night. When the officer pulled up, West got out of his car and began walking away from the officer. When the officer asked West what he was doing in the parking lot, West replied that he was visiting his aunt. The officer found this suspicious because he had previously observed West sitting in the parked

car for five to ten minutes before the officer drove up. West only sought to leave when the officer approached. Then, when West went to his car to retrieve his identification, West reached in through a rear door to open the driver's side door. As the officer looked into the car, he saw a gun on the car's floorboard. Viewing these facts in their totality, it was reasonable for the officer to briefly detain West because he suspected that "criminal activity may be afoot" and that West may be armed with additional weapons that could be used to assault the officer. *Johnson*, 246 N.C. App. at 686, 783 S.E.2d at 760.

¶ 14 As soon as the officer detained West to conduct that brief safety frisk, West began struggling with the officer and trying to flee. Even after West was handcuffed, he "kept pulling away as though to run" and "had to be taken to the ground." At that point, the officer had reasonable suspicion to convert the initial seizure into a full investigatory stop that included a search of the car. *State v. Swift*, 105 N.C. App. 550, 555, 414 S.E.2d 65, 68 (1992). Accordingly, the trial court properly denied West's motion to suppress, and we therefore affirm the trial court's judgment.

Conclusion

¶ 15 For the reasons stated above, we affirm the trial court's judgment.

AFFIRMED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).