IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-607

No. COA21-765

Filed 6 September 2022

Cleveland County, Nos. 19 CRS 2165, 19 CRS 54910

STATE OF NORTH CAROLINA

v.

JUSTIN LEE ABERNATHY, Defendant.

Appeal by Defendant from order entered 10 June 2021 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 10 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Sarah Holladay for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Justin Lee Abernathy appeals from the trial court's order denying his motion to suppress methamphetamine discovered during a traffic stop. Defendant argues the trial court erred because (1) it failed to consider the unreasonable duration of the police pursuit; (2) it determined there was reasonable suspicion to support the traffic stop; and (3) it made findings of fact that were

conclusive, unsupported by the evidence, or otherwise erroneous. We find no error.

I. Factual and Procedural Background

¶ 2 On 18 November 2019, a grand jury indicted Defendant on one count of trafficking in methamphetamine by transporting and one count of trafficking in methamphetamine by possession. Both charges relate to 680 grams of methamphetamine recovered from Defendant's vehicle during a traffic stop in Cleveland County. Evidence at the suppression hearing tended to show as follows:

¶ 3 On 8 October 2019, after receiving information from a Rutherford County narcotics officer, the Forest City Police Department began to follow behind a 2005 gold-colored Hyundai Elantra that was suspected to contain a large quantity of methamphetamine while it traveled on Highway 74. Defendant was the driver and only person in the vehicle. Defendant became aware he was being followed by law enforcement, and shortly thereafter pulled off the highway and into an Arby's[1] drive-thru, where he ordered food before returning to the highway.

¶ 4 Defendant traveled out of Forest City jurisdiction into Cleveland County, where Investigator Travis Glover with the Cleveland County Sheriff's Department "picked up where Forest City PD left off" in following Defendant. Investigator

[1] Arby's is a fast-food restaurant known for roast beef, curly fries, and a cowboy hat. Instead of going with a classic roast beef sandwich, Defendant opted to order "some type of Arby's chicken."

Mitchell Hinson then replaced Investigator Glover and continued following the vehicle. Investigator Hinson testified that Defendant's Hyundai was traveling in the left-hand lane at a much slower rate than other vehicles on the highway, causing several cars to switch lanes to pass Defendant on his right. Investigator Hinson followed the Hyundai for approximately one and a half miles, then initiated a traffic stop and pulled the Hyundai over onto an exit ramp for impeding the flow of traffic in violation of N.C. Gen. Stat. §§ 20-146 and 20-141(h).

¶ 5 Because Defendant would not fully roll down the window, Investigator Hinson attempted to speak to Defendant "through the crack in the window" throughout their entire interaction. When Investigator Hinson spoke to Defendant, Defendant avoided eye contact, ignored the questions, and continued to eat food.[2] When asked for his driver's license, Defendant gave a license that was faded and illegible. During the exchange, Investigator Hinson observed a pistol vault, a small locker designed to store handguns and ammunition, in the passenger floorboard. Investigator Hinson asked Defendant if any weapons were in the car. When Defendant again did not answer, Investigator Hinson opened the driver's side door. Investigator Hinson discovered a large machete in the driver's side floorboard and a large sum of money in the driver's side door.

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[2] "[S]ome kind of chicken" purchased from Arby's, as explained *supra,* note 1.

¶ 6 Investigator Hinson then pulled Defendant out of the car and placed him in handcuffs. Investigator Hinson "explained to him that he was not under arrest; he was being detained until [Investigator Hinson] could identify who [Defendant] was and figure out if there [were] any weapons on his person."

¶ 7 Investigator Hinson escorted Defendant to the guardrail by his patrol car where another deputy was located. The other deputy identified the status of Defendant's driver's license and began issuing a warning citation for impeding traffic. Meanwhile, Investigator Hinson asked Defendant for consent to search the vehicle, which Defendant denied. Investigator Hinson brought out a nationally certified drug K-9 from his patrol car and allowed it to sniff Defendant's Hyundai. The K-9 alerted to the presence of narcotics by barking, jumping on the side of the car, and trying to get into the vehicle.

¶ 8 Investigator Hinson then "began searching [the interior of] the vehicle." The search revealed a white, crystal-like substance in a bag, which Investigator Hinson believed was crystal methamphetamine based on his experience with numerous drug classes, years of training in the identification of crystal methamphetamine, and hundreds of observations of crystal methamphetamine. Two other officers searched the trunk of the vehicle, where they discovered additional methamphetamine totaling 680 grams. The officers placed Defendant under arrest for trafficking methamphetamine.

¶ 9 Defendant moved to suppress evidence gathered during the traffic stop. On 10 June 2021, after a hearing on the matter, the trial court entered a written order denying Defendant's motion. The trial court concluded as a matter of law that Investigator Hinson's stop for Defendant's low rate of speed was based on a reasonable and articulable suspicion and that Investigator Hinson's detainment of Defendant and use of the K-9 drug sniff were consistent with the scope and purpose of the stop which he was investigating.

¶ 10 Following the suppression hearing, Defendant pleaded guilty to both crimes as charged, but expressly reserved his right to appeal the denial of his motion to suppress. Defendant timely appeals.

II. Analysis

¶ 11 Defendant makes a number of challenges to the trial court's order denying his motion to suppress. Defendant argues that (1) he was unconstitutionally seized by an extended police pursuit prior to the traffic stop; (2) information given to Cleveland County police by Forest City police concerning possible drugs in Defendant's vehicle did not provide reasonable suspicion for the traffic stop; and (3) based on "several errors in the trial court's findings of fact," the trial court "failed to resolve material conflicts in the evidence." Each argument fails.

A. Standard of Review

¶ 12 During our review of a trial court's order on a motion to dismiss, "we are

'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. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation omitted). Competent evidence is "evidence that a reasonable mind might accept as adequate to support the finding." *State v. Wiles*, 270 N.C. App. 592, 597, 841 S.E.2d 321, 325 (2020). "Where the findings of fact support the conclusions of law, such findings and conclusions are binding upon us on appeal." *State v. Wynne,* 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (citations and internal quotation marks omitted). Where conclusions of law are challenged, the standard is de novo and challenged conclusions are subject to full review. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

¶ 13 "An appellate court accords great deference to the trial court . . . because it is entrusted with duty to hear testimony, weigh the evidence, and resolve any conflicts in the evidence." *State v. Williams,* 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (internal citations and quotations omitted). Even should evidence be found contrary to the trial court's findings, appellate courts are bound by the trial court's findings of fact when they are supported by competent evidence. *In re C.H.M.*, 371 N.C. 22, 38, 812 S.E.2d 804, 815 (2018).

B. Unconstitutional Seizure

¶ 14 Defendant first asserts that the trial court should have suppressed evidence found during the traffic stop because the officers seized him unconstitutionally "well before Investigator Hinson activated his blue lights." Defendant argues that the length of a pursuit before a traffic stop is "short" in most cases, and despite being "free to leave," he was still "unable to 'terminate the encounter'" because of the pursuing officers' show of authority.

¶ 15 The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution each serve to protect individuals from unreasonable searches and seizures. *State v. Garner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992). The "[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809–10 (1996); *see also State v. Bullock*, 370 N.C. 256, 257, 805 S.E.2d 671, 673 (2017).

¶ 16 A "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Jones*, 565 U.S. 400, 412 (2012). The United States Supreme Court determined in *Michigan v. Chesternut* that "allowing officers to follow as one drives one's own car does not restrict one's movement by a show of authority." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (recognizing also that a defendant may be free

to leave, and interaction with police officers may still be consensual, even when the defendant is sitting in a police car).

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be 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 voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

United States v. Mendenhall, 446 U.S. 544, 554–55 (1980) (citations omitted). Similarly, our Court considers the following factors when determining whether a defendant has been seized or is "free to leave": (1) whether the officer's patrol car physically blocks the defendant's car; (2) whether an officer's behavior or demeanor results in a show of force; (3) whether the officers presented physiological barriers to the defendant's ability to leave such as activating their siren or blue lights, removing guns from their holsters, or using threatening language; and (4) whether the encounter was nonthreatening and cooperative throughout. *See State v. Williams*, 201 N.C. App. 566, 571, 686 S.E.2d 905, 908–09 (2009).

¶ 17 Here, extended surveillance by police officers—who had not blocked Defendant's movements or obstructed his path, had not turned-on lights or sirens, and had no weapons drawn—cannot be construed to be a violation of the Fourth

Amendment. *Id.*; *see also State v. Wilson*, 250 N.C. App. 781, 786, 793 S.E.2d 737, 741 (2016). Defendant contends that, through his awareness of nearby police officers, he "was not free to ignore the police and go about his business if he was being constantly followed" by police for miles. Despite the officers' pursuit, Defendant pulled off the road into an Arby's parking lot, drove through the drive-thru, purchased food, and returned to his travels. Defendant then resumed his travels while consuming his meal, and continued to eat his food even after he was eventually stopped by the officers. Defendant was certainly able to "go about his business" prior to the traffic stop. The officers did not restrict Defendant's movement by a show of authority until they formally initiated the traffic stop and Defendant submitted.

C. Reasonable Suspicion for Traffic Stop

¶ 18 Defendant contends that the trial court erred in determining that his driving speed while under police pursuit could not be the basis for reasonable suspicion because "slow driving can be caused by any of a number of factors and standing alone does not give rise to reasonable suspicion of impairment." Defendant further contends, absent this reason for reasonable suspicion, "[t]he trial court's order fails to take into account the constitutional problems with the pursuit of [Defendant]" based on the officers' belief that Defendant's vehicle may have contained drugs.

¶ 19 This Court assesses the legality of a traffic stop by reviewing the totality of the circumstances, looking at "the whole picture in determining whether a reasonable

suspicion exists." *State v. Williams,* 209 N.C. App. 255, 262, 703 S.E.2d 905, 910 (2011). "As this Court has explained, [t]he stop must be based on [reasonable suspicion, derived from] specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Nicholson*, 371 N.C. 284, 289, 813 S.E.2d 840, 843 (2018) (citation and internal quotation marks omitted). A traffic stop is constitutionally permissible if: (1) the officer's personal observations give way to "reasonable suspicion," (2) the "officer . . . received a request to stop the defendant from another officer," or (3) the officer both received information from another officer and made personal observations that, when combined, "constitute the necessary reasonable suspicion." *See State v. Battle,* 109 N.C. App. 367, 371, 427 S.E.2d 156, 159 (1993). "Therefore, when a criminal defendant files a motion to suppress challenging an investigatory stop, the trial court can deny that motion only if it concludes, after considering the totality of the circumstances known to the officer, that the officer possessed reasonable suspicion to justify the challenged seizure." *Nicholson*, 371 N.C. at 289, 813 S.E.2d at 843–44.

¶ 20 Here, the trial court concluded that Investigator Hinson

> had an objective, reasonable, and articulable suspicion that [D]efendant was improperly traveling in the wrong lane at a very low rate of speed thereby impeding traffic and raising an objective suspicion of impaired driving in violation of the North Carolina motor vehicle law thereby

allowing him to stop [D]efendant as he did.

¶ 21 Defendant compares his case to this Court's decision in *State v. Brown*, where this Court found that officers lacked reasonable suspicion for a traffic stop after the officers followed a vehicle for over a mile and initiated a traffic stop based solely on suspicion that the occupant(s) was connected to a robbery. *State v. Brown*, 217 N.C. App. 566, 567, 720 S.E.2d 446, 448 (2011). In *Brown*, the defendant sped past the officers, "but not to a speed warranting a traffic violation." *Id.* at 572, 720 S.E.2d. at 451. *Brown* is distinguishable from the instant case because no traffic violation occurred in *Brown*. *Id.* In this case, Defendant's slow pace was a traffic violation under N.C. Gen Stat. §§ 20-146 and 20-141, and afforded Investigator Hinson reasonable suspicion to initiate the traffic stop. *See State v. Sutton*, 259 N.C. App. 891, 893, 817 S.E.2d 211, 213 (2018) (finding police officer's observation of the defendant's vehicle crossing the double yellow lines in the center of the road, in violation of N.C. Gen. Stat. § 20-146(a), as sufficient for reasonable suspicion and thus the defendant was not entitled to suppress evidence found during the traffic stop and K-9 sniff).

¶ 22 This Court has previously upheld findings of reasonable suspicion based on a defendant's slow, irregular driving observed by law enforcement officers. *See, e.g., State v. McRae,* 203 N.C. App. 319, 325, 691 S.E.2d 56, 61 (2010) (holding that defendant's failure to use a turn signal was sufficient for reasonable suspicion in an

investigative stop, and when combined with a credible informant's tip on drugs within the vehicle, the trial court did not err in denying the motion to suppress evidence from the search). Defendant insists that slow driving speed "standing alone does not give rise to reasonable suspicion of impairment," but the court did not base its finding of reasonable suspicion solely on the possibility that Defendant was driving while impaired. Defendant's prolonged travel at a reduced rate of speed in the left-hand lane of a highway gave the pursuing officers reasonable suspicion that a crime had been committed in and of itself, notwithstanding the possibility of impairment. The trial court did not err in finding that the officers had reasonable suspicion.

¶ 23 Defendant further argues that the officers' cause to begin pursuing his vehicle was based on unreliable information, because "[g]eneral information received thirdhand is not sufficient for reasonable suspicion." To support this contention, Defendant mistakenly relies on precedent concerning anonymous tips that lack police corroboration. *Compare State v. Hughes*, 353 N.C. 200, 201, 539 S.E.2d 625, 627 (2000) (holding an anonymous "tip did not have sufficient indicia of reliability nor was it buttressed by sufficient police corroboration"), *with State v. Bridges,* 35 N.C. App. 81, 85, 239 S.E.2d 856, 859 (1978) (concluding from the totality of the circumstances, information obtained by radio dispatcher, and the police officers' observations of the defendant's activities sufficiently provided reasonable suspicion).

¶ 24 Even if we were to find that the officers' suspicion of drug activity was

insufficient to support reasonable suspicion, Defendant's violation of N.C. Gen Stat. §§ 20-146 and 20-141 was alone sufficient to justify the traffic stop. And, certainly, the evidence considered together in the totality of the circumstances was "sufficient to give an experienced law enforcement officer reasonable suspicion that some illegal activity was taking place[.]" *State v. Watkins*, 220 N.C. App. 384, 390, 725 S.E.2d 400, 404 (2012) (citing *State v. Fisher*, 219 N.C. App. 498, 504, 725 S.E.2d 40, 45, (2012) (holding that the defendant's slow driving and erratic behavior justified a traffic stop and that an anonymous tip, the defendant's nervous behavior, and a K-9 drug sniff provided probable cause for a warrantless search).

D. Other Findings of Fact

¶ 25 Defendant challenges several findings of fact and conclusions of law in the trial court's order, contending each either contains factual errors, is unsupported by evidence presented at the hearing, or is unsupported by the findings of fact.

¶ 26 When resolving motions to suppress evidence, "the trial court is required to make findings of fact and conclusions of law which shall be included in the record," although a written order with the trial court's considerations is not required. *State v. Johnson*, 378 N.C. 236, 236, 861 S.E.2d 474, 478 (2021); *see* N.C. Gen Stat. §§ 15A-974(b), 15A-977(f) (2019). "[T]he general rule is that [the trial court] should make findings of fact to show the bases of [its] ruling." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). For purposes of N.C. Gen. Stat. § 15A-977(f), a material

conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected. *State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010).

¶ 27 Defendant challenges the trial court's findings of fact 4, 5, 6, 7, 8, and 10, as well as conclusions of law 13, 14, 15, 18, 19, 21, and 22. Of particular note are Defendant's arguments regarding findings 8 and 10, and conclusions 18 and 19, which read:

> 8. [Investigator Hinson] took the information given to him by [Defendant] and returned to his patrol car and ran the information through the computer system. After verifying [Defendant's] information [Investigator Hinson] returned to [Defendant] and . . . asked deputy Smith to write [Defendant] a warning ticket for impeding traffic. . . . Immediately after . . ., [Investigator Hinson] went to the back of his vehicle and brought out his drug dog. . . . This was all done while deputy Smith was writing the warning ticket in regard to the impeding of traffic.
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> . . .
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> 10. As a result of the dog[']s actions while deputy Smith was writing the warning ticket to [Defendant], and as a result of the evasive and argumentative behavior of [Defendant], the location of a weapon, the presence of a firearm box, and a large amount of currency, [Investigator Hinson] has probable cause to believe that illegal narcotics were in [Defendant's] car and probable cause then existed to search [Defendant's] car and deviate from the initial purpose and scope of the stop.

> . . .
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> 18. [Investigator Hinson's] use of his dog during the writing of the warning ticket without entry into [Defendant's] car does not constitute a warrantless search and was not an unconstitutional extension or deviation of the initial scope and purpose of the stop which at the time was still ongoing.
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> 19. Upon the dog alerting to the presence of illegal narcotics in [Defendant's] car coupled with the other observations by [Investigator Hinson] and the behavior of [Defendant], [Investigator Hinson] had sufficient probable cause to extend and deviate from the initial scope and purpose of the stop and to search [Defendant's] car for narcotics.

¶ 28 Regarding Finding 8 and conclusion 18, Defendant criticizes the officers' choice to run Defendant's information through their system after the traffic stop, instead of running the information beforehand or relying on information about Defendant's identity provided by Forest City officers. Defendant does not cite to any precedent holding that an officer's failure to be optimally efficient amounts to an error of law.

¶ 29 Defendant also asserts "Investigator Hinson delayed the writing of the [traffic warning citation] so that he could do a K-9 sniff without 'prolonging the stop' in the traditional sense." *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."). We disagree.

¶ 30 A *de minimis* analysis applies in situations where drug K-9s are already on the scene. *See generally State v. Cottrell,* 234 N.C. App. 736, 748, 760 S.E.2d 274, 282 (2014). If detention is extended for a brief period of time to complete a K-9 sniff, the intrusion upon a defendant's liberty is *de minimis* such that, "'even if the traffic stop has been effectively completed,'" there is no unreasonable prolonging of the stop. *Id.* (quoting *State v. Brimmer,* 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007)); *see also State v. Warren*, 242 N.C. App. 496, 497, 775 S.E.2d 362, 364 (2015) (finding no error in trial court's denial of motion to suppress where officers had reasonable suspicion to extend routine traffic stop to perform a K-9 sniff and the entire stop lasted under ten minutes).

¶ 31 Here, Investigator Hinson had his K-9 in his patrol car at the scene from the beginning of the stop. Investigator Hinson did not unlawfully prolong the stop to wait for the K-9 to arrive. Moreover, the illegible driver's license, machete, large amount of money in the door, and Defendant's avoidant behavior each contributed to the duration of the stop and provided sufficient reasonable suspicion to conduct a K-9 drug sniff test. *State v. Branch,* 177 N.C. App. 104, 108, 627 S.E.2d 506, 509 (2006) ("Once [the defendant] was detained to verify her driving privileges, [the police officers] needed no heightened suspicion of criminal activity before walking [the drug sniff K-9] around [the defendant's] car."). Contrary to Defendant's assertions, the evidence at the hearing supports the trial court's finding that Investigator Hinson

lawfully conducted the K-9 sniff while another deputy wrote a citation, and did not unlawfully extend the stop. Finding 8 is supported by competent evidence and conclusion 18 is supported by finding 8.

¶ 32 Regarding finding 10 and conclusion 19, Defendant challenges the trial court's finding and conclusion that Investigator Hinson had probable cause to search Defendant's car. "Probable cause exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonable 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." *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005) (quotation and internal quotation marks omitted). "A warrant is not required to perform a lawful search of a vehicle on a public road when there is probable cause for the search." *State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018). "Under the motor vehicle exception, [a] police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials." *Id.* (citation omitted).

¶ 33 Defendant reiterates his arguments that the "unconstitutionally prolonged" pursuit by officers prior to the traffic stop makes any subsequently discovered evidence inadmissible. For all the reasons discussed above, we once again reject this

argument. We further hold that the totality of the evidence of the K-9's indication of drugs, Defendant's behavior, and the presence of the knife, pistol vault, and large amount of money were sufficient for an officer to reasonably believe a crime was being committed and that Defendant's vehicle contained contraband. Competent evidence supported finding 10, and conclusion 19 is supported by finding 10.

¶ 34 Defendant's challenges to the remaining findings and conclusions each essentially dispute the trial court's weighing of the evidence presented or contend no evidence was presented to support the trial court's determinations. Our review of the record shows that each of the challenged findings is supported by competent evidence presented during the suppression hearing, and we will not reweigh the evidence on appeal. *See State v. Johnson*, 371 N.C. 870, 881, 821 S.E.2d 822, 831 (2018). Each of the challenged conclusions of law is supported by those findings, as well as the trial court's remaining unchallenged findings of fact. *See State v. Jackson*, 368 N.C. 75, 81, 772 S.E.2d 847, 851 (2015). We hold that any evidentiary errors or clerical mistakes contained within the trial court's findings are not material to the outcome of this case. *See Phillips*, 300 N.C. at 685, 268 S.E.2d at 457; *In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993).

III. Conclusion

¶ 35 For the foregoing reasons, we conclude that the trial court did not err by denying Defendant's motion to suppress.

AFFIRMED

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).