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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-705

Filed 07 March 2023

Wake County, No. 20 CRS 207865

STATE OF NORTH CAROLINA

v.

WILLIAM ELLISON, JR., Defendant.

Appeal by Defendant from judgment entered 7 April 2022 by Judge Paul Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 25 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colin Justice, for State-appellee.

Richard Croutharmel for defendant-appellant.

FLOOD, Judge.

William Ellison, Jr. (“Defendant”), asks us to conduct an independent review of the Record to determine whether prejudicial error occurred in the trial proceedings and to consider whether the trial court erred in denying his motion to suppress evidence and in accepting his guilty plea. As we explain in further detail below, the trial court did not err.

I. Facts and Procedural Background

On 16 May 2020, at approximately 7:45 p.m., Wake Forest Police Officer Joseph Simmons followed behind Defendant's vehicle as it drove northbound on Capital Boulevard in Raleigh. Officer Simmons observed Defendant's vehicle following close behind a pickup truck, making abrupt lane changes, and traveling at a speed that appeared to be above the posted speed limit of fifty-five miles per hour. Officer Simmons estimated that Defendant's vehicle was traveling in excess of sixty-five miles per hour. Officer Simmons also observed that the vehicle's rear window appeared to have a tint that was darker than what he knew to be legal tint. He followed the vehicle and paced it from sixty-six miles per hour up to approximately sixty-eight miles per hour. After pacing the vehicle for approximately a mile and a half, Officer Simmons actuated his blue lights and, after about ten to fifteen seconds, Defendant's vehicle came to a stop. Officer Simmons' vehicle had a dashboard camera that recorded a video of the incident, beginning thirty to sixty seconds prior to his initiation of the traffic stop. This video was admitted into evidence at trial.

Officer Simmons approached Defendant's stopped vehicle on the passenger side and "made contact with" Defendant, who was in the driver's seat. Simmons could barely see the edge of the back strap of a pistol under the passenger seat and could smell the odor of what he believed to be marijuana coming from the vehicle. Officer Simmons then called for backup. Sergeant Zick arrived on the scene, approached

Defendant on the driver's side of the vehicle, and asked Defendant to exit the vehicle. Sergeant Zick frisked Defendant and, during the frisk, found a bag of marijuana in the pocket of his shorts. Defendant was detained, and the officers conducted a search of the vehicle, during which the following items were located: (1) a Glock 43 9mm handgun under the passenger seat; (2) \$2,280 along with a box of fifty 9mm rounds in the center console; (3) a backpack containing 126 grams of marijuana in the back seat; and (4) a Hi-Point .40 caliber carbine and an assortment of .40 caliber and 9mm rounds in the trunk. After completion of the search, Defendant was arrested and charged with possession with intent to sell or deliver marijuana and carrying a concealed weapon.

On 10 August 2021, the Wake County Grand Jury indicted Defendant for possession with intent to sell or deliver marijuana, carrying a concealed weapon, possession of drug paraphernalia, and maintaining a vehicle for storing or distributing controlled substances. On 28 January 2022, Defendant filed a motion to suppress all evidence obtained from the search of his person and vehicle. On 21 March 2022, this motion was heard in Wake County Superior Court. The trial court found, based on Officer Simmons' testimony, the video, and arguments made by the parties, Defendant violated the speed limit under N.C. Gen. Stat. § 20-141. The trial court concluded there was insufficient evidence of the other alleged traffic infractions—following too closely under N.C. Gen. Stat. § 20-152 and window tint

under N.C. Gen. Stat. § 20-127. The trial court held that Officer Simmons' stop was lawful, and the court denied Defendant's motion to suppress evidence.

On 7 April 2022, after entering a plea agreement with the State, Defendant appeared again before the trial court. Defendant pled guilty to felony possession with intent to sell or deliver marijuana, and to misdemeanor carrying a concealed gun. The trial court accepted Defendant's plea and sentenced him to a presumptive range of five to fifteen months, but suspended the sentence and placed Defendant on eighteen months supervised probation. Defendant preserved the right to appeal the denial of his suppression motion. Defendant timely appealed.

II. Jurisdiction

"Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by . . . giving oral notice of the appeal at trial[.]" N.C.R. App. P. 4(a)(1) (2021); *see State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (citation and internal quotation marks omitted) ("[O]ral notice of appeal is proper in criminal actions, as permitted under N.C.R. App. P. 4(a)(1) . . ."). Defendant gave oral notice of appeal at trial, and we have jurisdiction to hear his appeal.

"Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). "When such a defect is present, it is well

established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.” *Id.* at 691, 497 S.E.2d at 419.

III. Analysis

As Defendant’s counsel is unable to identify any issues with sufficient merit to support relief on appeal, Defendant’s counsel requests this Court conduct an independent review of the record, pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, *reh’g denied*, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), to ascertain whether any prejudicial error occurred in the trial proceedings.¹ Defendant’s counsel refers us to two issues that “might arguably support the appeal”: (A) whether the trial court erred in denying Defendant’s motion to suppress evidence because Officer Simmons did not witness a traffic violation, and there were no exigent circumstances that would have justified the stop absent a warrant; and (B) whether the trial court erred in accepting Defendant’s guilty plea to carrying a concealed weapon, where the indictment failed to allege, and evidence failed to show, Defendant lacked a permit to do so. *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498.

¹ We note that, per *Anders*, if a defendant’s counsel finds his client’s appeal to be frivolous or unmeritorious, he should advise the court and request permission to withdraw. 386 U.S. at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498. “This request must, however, be accompanied by a brief referring to anything in the record that might arguably support appeal.” *Id.* at 744, 87 S. Ct. at 1400, L. Ed. 2d at 498.

A. Denial of Defendant's Motion to Suppress

“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.” *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011). “A trial court’s conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.” *State v. Knudsen*, 229 N.C. App. 271, 281, 747 S.E.2d 641, 649 (2013) (citation omitted). To obtain relief from a guilty verdict under a legal theory or state of facts not supported by the evidence, a defendant must demonstrate prejudicial error. *See State v. Lee*, 287 N.C. 536, 541, 215 S.E.2d 146, 149 (1975).

Our Supreme Court has held, “reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected.” *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). A police officer has a reasonable suspicion sufficient for a stop if it is “based on 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” years of experience. *State v. Watkins*, 337 N.C. 437, 441–42, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

Here, the trial court concluded that “based on Defendant’s speeding, Officer Simmons did have [a] reasonable articulable suspicion to seize defendant.” Based on

his observation, Officer Simmons estimated Defendant's vehicle was speeding between sixty-six miles per hour and sixty-eight miles per hour. Regardless of whether this traffic violation was readily observed or merely suspected, this specific and articulable fact gave Officer Simmons a reasonable suspicion that Defendant committed an infraction. *See Styles*, 362 N.C. at 415, 665 S.E.2d at 440; *see Watkins*, 337 N.C. at 441–42, 446 S.E.2d at 70. Accordingly, the trial court's conclusion of law that Officer Simmons had a reasonable suspicion sufficient to stop Defendant was supported by the court's findings of fact. *See Biber*, 365 N.C. at 167–68, 712 S.E.2d at 878. The trial court did not commit error in denying Defendant's motion to suppress evidence.

B. Acceptance of Defendant's Guilty Plea

This Court has provided,

Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment. A defect in an indictment is considered fatal if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty. When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.

State v. Wilson, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (citation and quotation marks omitted). Defendant's challenge to the carrying a concealed weapon

indictment as being fatally defective on its face, even though he failed to object to the charge at trial, preserves this issue for our review.

“A valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). “[U]nder a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

“The essential elements of carrying a concealed weapon in violation of N.C. [Gen. Stat.] § 14-269(a) are: ‘(1) The accused must be off his own premises; (2) he must carry a deadly weapon; and (3) the weapon must be concealed about his person.’” *State v. Hill*, 227 N.C. App. 371, 380, 741 S.E.2d 911, 918 (quoting *State v. Williamson*, 238 N.C. 652, 654, 78 S.E.2d 763, 765 (1953)), *disc. rev. denied*, 367 N.C. 223, 747 S.E.2d 577 (2013). This prohibition does not apply, however, to a person who has “a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under [N.C. Gen. Stat. §] 14-415.24, and the person is carrying the concealed handgun in accordance with the scope of the concealed handgun permit as set out in [N.C. Gen. Stat. §] 14-415.11(c).” N.C. Gen. Stat. § 14-269(a1)(2) (2021). In *State v. Mather*, 221 N.C. App. 593, 602, 728 S.E.2d 430, 436

(2012), we held, “[t]he State has no initial burden of producing evidence that Defendant’s action of carrying a concealed weapon does *not* fall within an exception to N.C. Gen. Stat. § 14-269(a1)[,]” and we concluded that “N.C. Gen. Stat. § 14-269(a1)(2) is a defense, not an essential element of the crime of carrying a concealed weapon”

Here, the indictment for Defendant’s carrying of a concealed gun states, “[D]efendant named above unlawfully and willfully did carry concealed about [D]efendant’s person while off [D]efendant’s own premises a gun, Glock 43 9mm handgun. This act was in violation of N.C. [Gen. Stat.] § 14-269[(a1)].” This indictment properly sets out the three essential elements of carrying a concealed weapon. *See Hill*, 227 N.C. App. at 380, 741 S.E.2d at 918. Per *Mather*, the State had no initial burden to provide evidence Defendant was not excepted from this rule by possessing a concealed handgun permit, as N.C. Gen. Stat. § 14-269(a1)(2) is a defense—not an essential element of the crime. 221 N.C. App. at 602, 728 S.E.2d at 436. The indictment was valid, and the trial court had subject matter jurisdiction to accept Defendant’s guilty plea.

IV. Conclusion

For the reasons stated above, the trial court did not err in denying Defendant’s motion to suppress evidence, and we affirm the trial court’s acceptance of Defendant’s guilty plea. Upon review of the record, there are no grounds for reversible error.

AFFIRMED.

STATE V. ELLISON

Opinion of the Court

Judges DILLON and MURPHY concur.

Report per Rule 30(e).