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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-731

Filed 18 April 2023

Iredell County, No. 19CRS 53058

STATE OF NORTH CAROLINA

v.

PHILLIP EDWARD FOLSOM

Appeal by defendant from order entered 20 December 2021 by Judge Lora Christine Cabbage in Iredell County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State.

Stephen G. Driggers for defendant-appellant.

TYSON, Judge.

Phillip Edward Folsom (“Defendant”) appeals from order entered 20 December 2021 which denied his motion to suppress. We affirm.

I. Background

Iredell County Sheriff’s Deputies Caleb Rogers and Joseph Hodges were parked along West Memorial Highway across from a 7-Eleven gas station at

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approximately 2:55 a.m. on 13 June 2019. Deputy Rogers observed a vehicle pull out of the 7-Eleven's parking lot and onto West Memorial Highway. Deputy Rogers checked the status of the license plate and discovered the registration had expired. Deputy Rogers initiated a traffic stop of the vehicle.

While approaching the vehicle Deputy Rogers, based upon his law enforcement training and experience, detected what he believed to be the odor of marijuana. The vehicle was driven by Bradley Potter and Defendant was seated in the front passenger's seat. Deputy Rogers asked for and was given the vehicle's registration, Potter's driver's license, and Defendant's driver's license. Deputy Rogers also inquired whether any illegal items were present in the car, to which Potter stated there was not.

Deputy Hodges had followed Deputy Rogers' vehicle to stop Potter's vehicle to provide him with backup on his own volition. Deputy Hodges arrived at the stop while Deputy Rogers was speaking with Potter and Defendant. Deputy Hodges exited his vehicle and waited at the right rear of Deputy Rogers' vehicle. Deputy Hodges called Iredell County Sheriff's Lieutenant Gary Simpson, a canine officer, and member of the Interstate Criminal Enforcement Team.

Lt. Simpson and his canine, Abby, were located approximately one hundred yards away facing the opposite direction of travel from the traffic stop. Lt. Simpson arrived on the scene approximately fifteen seconds from receiving the call and within a few minutes after the stop was initiated. Lt. Simpson exited his vehicle with Abby

and conducted a free air sniff around the exterior of the vehicle while Deputy Rogers was inside his vehicle checking for outstanding warrants of the occupants.

Abby alerted to the odor of narcotics at the passenger's side door area. Lt. Simpson notified Deputy Hodges of the positive alert and put Abby back into the patrol car. Deputy Hodges approached the passenger's side of the vehicle, while Deputy Rogers approached the driver's side of the vehicle.

Deputy Hodges asked Defendant to step out of the vehicle. While Defendant was exiting the vehicle, Deputy Hodges observed a straw sticking out of the right-side change pocket of his pants. Deputy Hodges testified he believed the straw was an implement or paraphernalia for the use of narcotics based upon his training and experience.

Deputy Hodges performed a *Terry* frisk of Defendant and removed the straw and a small bag containing a white substance from the change pocket. Deputy Hodges believed the white substance to be cocaine. Deputy Rogers and Deputy Hodges then searched the vehicle, which revealed a pipe for marijuana in the glove box.

Defendant was charged with felony possession of cocaine, possession of marijuana paraphernalia, and possession of drug paraphernalia. Defendant filed a motion to suppress, which was denied by order following a hearing. Pursuant to a plea agreement Defendant pleaded guilty to felony possession of cocaine and possession of drug paraphernalia. Defendant reserved the right to appeal the denial

of the motion to dismiss. The trial court sentenced Defendant to a term of 4 to 14 months, which was suspended for 12 months of supervised probation. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-979(b) (2021).

III. Issue

Defendant argues the trial court erred by denying his motion to suppress the evidence obtained at the scene.

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. Analysis

1. Industrial Hemp

Defendant argues the stop was unduly and unlawfully prolonged without reasonable suspicion of further criminal activity. Defendant asserts the scent of marijuana cannot form the basis of reasonable suspicion because the smell is indistinguishable to hemp, which possession thereof has been legal in North Carolina since 2015. *See* An Act to Recognize the Importance and Legitimacy of Industrial Hemp Research, to Provide for Compliance with Portions of the Federal Agricultural Act of 2014, and to Promote Increased Agricultural Employment, S.L. 2015-299, 2015 N.C. Sess. Laws 1483. This Court stated the Industrial Hemp Act “legalized the cultivation, processing, and sale of industrial hemp within the state, subject to the oversight of the North Carolina Industrial Hemp Commission.” *State v. Parker*, 277 N.C. App. 531, 539, 860 S.E.2d 21, 28, 2021-NCCOA-217, ¶ 27, *disc. review denied*, 378 N.C. 366, 860 S.E.2d 917 (2021).

While industrial hemp may be the same plant species as marijuana and the “difference between the two substances is that industrial hemp contains very low levels of tetrahydrocannabinol (“THC”), which is the psychoactive ingredient in marijuana.” *Id.* at 540, 860 S.E.2d at 28, 2021-NCCOA-217, ¶ 27 (citation omitted).

2. Requirement of a Warrant

“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. Baublitz*, 172 N.C. App. 801, 808, 616 S.E.2d 615, 620 (2005) (citation omitted). Under the motor vehicle exception: “[A] police officer in the exercise of [their] 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.” *State v. Holmes*, 109 N.C. App. 615, 621, 428 S.E.2d 277, 280 (1993) (citation, quotation marks, and ellipses omitted). “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *United States v. Ross*, 456 U.S. 798, 825, 72 L. Ed. 2d 572, 594 (1982).

Defendant challenges the following findings of fact:

6. Deputy Rogers, immediately upon approaching the vehicle, smelled a strong odor of marijuana.

11. Upon arrival, Lieutenant Simpson took Canine Abby out of his vehicle and conducted a free-air sniff around the vehicle driven by Bradley Dewayne Potter. The Canine Abby alerted for the presence of narcotics on the passenger’s side door area of the vehicle, the defendant being a passenger of that vehicle at the time of the alert.

Unchallenged findings of fact support the trial court’s finding the canine Abby alerted to the presence of narcotics inside the vehicle. Defendant asserts the alleged smell of marijuana cannot form the part of reasonable suspicion for the search. Defendant does not argue the arrival of Deputy Hodges or Lt. Simpson, nor did allow canine Abby’s free-air sniff around the car, while Deputy Rogers waited for the results of the background checks, extended the duration of the stop.

Defendant’s argument is misplaced. Our Court has held the mere smell of an intoxicating substance is reasonable suspicion to allow the officers to inquire further.

See State v. Kitchen, __ N.C. App. __, __, 872 S.E.2d 580, 587-88, 2022-NCCOA-298, ¶ 33 (2022). Defendant was present inside of the vehicle when the odor was detected.

Furthermore, the canine, Abby's, positive alert for narcotics also provides a basis for probable cause. "[S]ince there is no legitimate interest in possessing contraband, a police officer's use of a well-trained narcotics dog [which] reveals only the p[resence] of narcotics[,] does not compromise any legitimate privacy interest and does not violate the Fourth Amendment." *State v. Washburn*, 201 N.C. App. 93, 97, 685 S.E.2d 555, 558 (2009) (citing *Illinois v. Caballes*, 543 U.S. 405, 408-09, 160 L. Ed. 2d 842, 847 (2005)).

Here, the positive alert provides the officer "with additional factors to find probable cause to conduct a warrantless search of the inside of the vehicle. [A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts." *State v. Degraphenreed*, 261 N.C. App. 235, 245-46, 820 S.E.2d 331, 338 (2018) (citation and internal quotation marks omitted).

The trial court correctly held canine Abby's positive alert for narcotics within the vehicle was "sufficient to support a reasonable belief that the automobile Carrie[d] contraband materials." *Id.* (citation omitted). The trial court's unchallenged findings of fact support the trial court's conclusion the officers had probable cause to conduct a warrantless search of the individuals and the vehicle. Defendant's arguments are overruled.

V. Conclusion

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The trial court's unchallenged findings of fact support the trial court's conclusion to deny Defendant's motion to suppress and to allow the admission of the contraband found in Defendant's possession and in the vehicle.

The trial court correctly denied Defendant's motion to suppress. The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judge DILLON and GORE concur.

Report per Rule 30(e).