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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-745

Filed 7 May 2024

Mecklenburg County, Nos. 19 CRS 204328, 19 CRS 24814

STATE OF NORTH CAROLINA, Plaintiff,

v.

MYKA EL, Defendant.

Appeal by defendant from order entered 12 July 2022 and judgment by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 March 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles G. Whitehead, for the State.*

*Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.*

DILLON, Chief Judge.

Defendant was convicted of trafficking in cocaine by possession after law enforcement officers conducted a search incident to an arrest for an unrelated charge and discovered cocaine under the clothes Defendant was wearing. Defendant was also convicted of being a habitual felon. Defendant appeals, challenging the lawfulness of the search.

I. Background

On the night of 1 February 2019, law enforcement officers arrested Defendant for drug crimes unrelated to this present matter. Defendant injured his leg during the arrest when he was attempting to flee the officers. Once Defendant was caught, however, the officers conducted a search of Defendant incident to the arrest. During the search, officers found cocaine under the clothes Defendant was wearing.

Defendant was convicted by a jury for trafficking in cocaine by possession and for obtaining the status of a habitual felon. The trial court entered judgment consistent with the jury's verdict and sentenced him to an active term of imprisonment. Defendant appeals.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress the cocaine found during the search, contending that the search was conducted in an unreasonable manner and was, therefore, unconstitutional. Specifically, Defendant characterizes the search as a strip search conducted in a public place.

We note that Defendant failed to preserve his objection to the discovery of cocaine being offered into evidence. Before the trial, Defendant did move to have the cocaine found during the search suppressed. This motion was denied. However, Defendant failed to renew his objection at trial when the State introduced evidence

concerning the cocaine found on Defendant during the search. On appeal, Defendant “specifically and distinctly” contends the denial of the motion to suppress amounts to plain error. N.C. R. App. P. 10(a)(4).

Our Supreme Court instructs that where a defendant’s motion to suppress evidence is denied, but the defendant otherwise fails to object to admission of the evidence at trial, the reviewing court may apply plain error review. *See State v. Miller*, 371 N.C. 266, 272, 814 S.E.2d 81, 85 (2018). An error only rises to the level of plain error if, “absent the error[,] the jury probably would have reached a different verdict.” *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

We review a trial court’s denial of a suppression motion to determine whether competent evidence supports the trial court’s findings and whether the findings support the trial court’s conclusions of law. *See State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011). And when findings of fact are not challenged on appeal, “such findings are presumed to be supported by competent evidence and are binding on appeal.” *See Schloss v. Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962).

For the reasoning below, we conclude that the trial court did not err, much less commit plain error, when it denied Defendant’s motion to suppress.

The evidence at the suppression hearing tended to show as follows:

Officers were in the process of arresting Defendant on charges unrelated to this matter when Defendant attempted to flee on foot. During the subsequent chase, Defendant injured his leg and was apprehended. Officers began conducting a search

of Defendant incident to the arrest on the side of a road around 10:00 at night. During the pat down, one of the officers felt a hard, “golf ball-sized” foreign object under Defendant’s two pairs of pants and underwear on Defendant’s backside. Once the other officers were alerted to the object, Defendant “refused to stand on his own.” Medics then arrived on scene due to Defendant’s leg injury.

Officers continued attempting to ascertain the identity of the hard object under Defendant’s clothing; however, Defendant continued resisting, such that officers could not retrieve the object. The lead officer determined that it would be better to retrieve the object at the scene rather than allowing Defendant to retain possession during any transport from the scene. Officers then directed one of the medics on the scene to cut a small hole with shears through Defendant’s underwear, just big enough for the object to fall out. That object fell out and was later confirmed to be cocaine. The lead officer indicated that part of Defendant’s upper thigh below his buttocks was temporarily exposed. The lead officer was a large man, larger than Defendant, and stood behind Defendant as the cocaine was removed.

The trial court did find that due to the cutting of a small hole through Defendant’s clothing during the retrieval of the cocaine, “part of [Defendant’s] buttocks was, in fact, exposed.”

Here, Defendant contests the following specific findings made by the trial court:

- There were several CMPD officers, medics, and firefighters at the scene,

but the court “question[ed] their ability to view what was going on in light of (a) Officer Preston’s body size and height” – 6’4” – and (b) the fact Defendant had on an “oversized” red plaid shirt or jacket.

- The trial court “could not tell whether” the two closest females on the scene “had the ability to see Mr. El’s buttocks . . . because his shirt kept falling[.]” And, that even if the two females saw El’s buttocks, said viewing was “a nonissue” based on “their role at being at the scene” and based on “their professional duties[.]”
- The search occurred around 10:00pm – when “it was dark outside . . . so the ability to see Mr. El [was] hampered even more[.]”
- Preston took “reasonable measures . . . to protect [El’s] privacy.”

However, we conclude that these findings were supported by the evidence.

Defendant, though, contends that the search was not reasonable, essentially contending that the search could have been conducted in a more private setting.

It *may* be true that there may have been more private venues where officers could have searched Defendant. However, the test here is simply whether the search was reasonable. And the test of reasonableness under the Fourth Amendment “requires a balancing of the need for the particular search against invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” *State v. Battle*, 202 N.C. App. 376, 383, 688 S.E.2d 805, 812 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 99 S. Ct. 1861 (1979)).

In contesting the reasonableness of the search, Defendant argues that the

search location was “public,” there were over ten people on scene when the scissor cutting search was conducted, and the officer “didn’t ask any of these people to move back or turn away as he and the medic pulled down [Defendant’s] pants” and cut into his underwear. The trial judge’s findings show that the court considered the roadside location of the search but found that the darkness, Defendant’s big red shirt, Defendant’s need for medical attention, Defendant’s continued resistance that posed a danger to the officers, the tinted nature of the officer’s car windows, and the lead officer’s stature were contributing, overriding factors amounting to reasonable privacy under the circumstances. Furthermore, the fact that there were multiple medical “professionals” nearby did not sway the court’s opinion because those individuals, including the females, were there for legitimate professional reasons.

Defendant further argues that trial counsel identified three less intrusive avenues to retrieve the object. However, the United States Supreme Court has instructed that the “reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means.” *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

The facts of this present case are strikingly similar to those in a case where our Supreme Court concluded a nighttime, roadside search was reasonable. *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995), adopting the dissenting opinion of Judge Walker from our Court, 118 N.C. App. 106, 116–118, 454 S.E.2d 680, 687 (1995). In that case, Judge Walker concluded that a search was reasonable under the

circumstances where officers pulled down the pants of the defendant and found cocaine in his underwear against his genital area. *Id.* Following Judge Walker's logic, which was adopted by our Supreme Court, we conclude the search of Defendant was reasonable under the circumstances, notwithstanding that there may have been less intrusive means by which the officers could have retrieved the cocaine from underneath his clothes. We rely on the findings cited above. We note that there was no evidence that a member of the public driving by saw Defendant's exposed buttocks.

Accordingly, we conclude that the search of Defendant's person was reasonable under the circumstances; and, therefore, the trial court did not err by denying Defendant's motion to suppress.

NO ERROR.

Judges COLLINS and GORE concur.

Report per Rule 30(e).