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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-953

Filed 3 September 2024

Forsyth County, Nos. 22 CRS 361, 22 CRS 51576-77, 22 CRS 52480

STATE OF NORTH CAROLINA

v.

TAYSHON DAVIS, Defendant.

Appeal by Defendant from order entered 17 February 2023 by Judge Michael A. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 20 March 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General T. Davis Hill, III, for the State.*

*Assistant Public Defender Max E. Ashworth, III, for the Defendant-Appellant.*

PER CURIAM

Defendant Tay'shon D. Davis appeals from a final judgment entered upon his guilty plea. Defendant argues certain evidence was inadmissible, and the trial court erred in denying his motions to suppress evidence. We conclude that Defendant has waived his first argument on appeal and affirm the trial court's denial of Defendant's motions to suppress evidence.

## **I. Background**

On 28 February 2022, Winston-Salem Police Sergeant Keltner was patrolling Silas Creek Parkway. He has over twenty years of law enforcement experience, including highway interdiction and narcotics training. Sergeant Keltner was traveling at the posted speed limit of forty-five miles per hour when Defendant's vehicle passed him in the left lane. In response, Sergeant Keltner paced Defendant's vehicle at fifty-five miles per hour and initiated a traffic stop.

Defendant pulled onto an off-ramp and parked his vehicle on the white fog line, leaving his left two tires to the left of the line. As Defendant was pulling over, Sergeant Keltner saw him moving around inside the vehicle and leaning over to the passenger side—tending to indicate Defendant might be grabbing a weapon or hiding contraband. Sergeant Keltner approached the vehicle on the right side and began speaking with Defendant. He observed Defendant's hands "shaking uncontrollably," that Defendant was "very tense," and noted inconsistencies with Defendant's statements regarding his point of origin and destination. After Sergeant Keltner's line of questioning, Defendant handed him his North Carolina identification card.

Sergeant Keltner returned to his patrol vehicle to run the standard traffic stop checks. The checks revealed that Defendant's driver's license was suspended, Defendant had prior arrests for possession of a firearm by a convicted felon, at least two prior drug offenses, and was a "validated gang member." In response, Sergeant Keltner requested the dispatch of a canine unit and began writing a citation for

Defendant's revoked license. Sergeant Keltner took about eight minutes to commence the traffic stop checks and write the citation.

Officer Conrad, the canine unit, arrived around the time Sergeant Keltner finished writing the citation, and upon arrival, the canine began performing a sniff of the exterior of Defendant's vehicle. During the canine sniff, Sergeant Keltner asked Defendant to step out of the vehicle. Defendant initially refused but ultimately agreed to exit his vehicle—not before rolling up the windows and locking the doors upon his exit. After Defendant's exit from the vehicle, Officer Conrad's trained drug detection canine alerted them to the presence of narcotics. In response to the canine's alert, Sergeant Keltner attempted to retrieve the vehicle's keys from Defendant's person, but he resisted. Defendant was subsequently handcuffed, and Sergeant Keltner retrieved the keys and gave them to Officer Conrad.

Officer Conrad's interior search of the vehicle revealed an odor of burnt marijuana, a Glock pistol, and a cellophane bag containing "a green, leafy substance" hidden within the vehicle's center console. Officer Conrad recognized the cellophane bag as one commonly used to transport illegal drugs and recognized the bag's contents as marijuana. Defendant was arrested and charged with possession of a firearm by a felon, possession of up to one-half ounce of marijuana, possession of a stolen firearm, carrying a concealed gun, and resisting a public officer.

On 2 May 2022, Defendant was indicted for the aforementioned charges and for attaining habitual felon status. Defendant filed two pretrial motions to suppress,

asserting both Sergeant Keltner and Officer Conrad lacked probable cause to search his vehicle. The trial court orally denied both motions on 14 February 2023 and entered the written denial order three days later. On 15 February 2023, Defendant pleaded guilty to all offenses, admitted to attaining habitual felon status, and entered notice of appeal. In his transcript of plea, Defendant reserved his ability to appeal to the denial of his suppression motions.

## **II. Jurisdiction**

This Court has jurisdiction to review this matter pursuant to N.C. Gen. Stat. § 15A-979(b) (2023).

## **III. Analysis**

Defendant presents two questions for consideration on appeal: (1) whether the use of a drug-detection canine constitutes a search, and whether there was probable cause to support such search of Defendant’s vehicle; and, alternatively, (2) whether the drug-detection canine’s positive alert provided the requisite probable cause to search Defendant’s vehicle.

### **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.” *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *State v. Chukwu*, 230 N.C.

App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation and quotation marks omitted). When a trial court's findings of fact are unchallenged on appeal, they are deemed supported by competent evidence and binding. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. Conclusions of law are reviewed *de novo*. *Id.* at 171, 712 S.E.2d at 880.

### **B. Drug-Detection Canine**

Upon review of the evidentiary record, Defendant has waived his first argument on appeal that the use of the drug-detection canine constituted a search and that the officers here did not possess probable cause to conduct this type of search. “[A] criminal 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).

Within his motions to suppress, Defendant argues the legalization of hemp now prevents the establishment of probable cause through positive alerts from drug-detection canines. The argument he presents on appeal, however, is that using the drug-detection canine was a search requiring probable cause or a warrant *before* the canine could be used. These are separate and distinct arguments, and the law does not allow Defendant to “swap horses between courts” to “get a better mount [on appeal].” *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citations omitted). We, therefore, are without reason to disturb the lower court's denial of Defendant's motion to suppress on this ground.

**C. Search of Defendant's vehicle.**

In his alternative argument, Defendant contends the trial court erred in denying his motions to suppress by arguing probable cause had not been established to search the inside of his vehicle.

“The Fourth Amendment of the United States Constitution and Article 1, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures.” *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005). Evidence “obtained by unreasonable searches and seizures” is inadmissible. *State v. McLamb*, 186 N.C. App. 124, 125–26, 649 S.E.2d 902, 903 (2007). “Typically, a warrant is required to conduct a search unless a specific exception applies.” *State v. Parker*, 277 N.C. App. 531, 539, 860 S.E.2d 21, 28 (2021) (citing *State v. Cline*, 205 N.C. App. 676, 679, 696 S.E.2d 883, 886 (2010)). One such exception generally applies to motor vehicles and provides:

[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. 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.

*State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018) (internal marks and citations omitted). Probable cause is established by applying a “totality of the circumstances’ test.” *See State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593,

597 (2014) (citing *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328 (1983)). “Probable cause requires not certainty, but only a probability or substantial chance of criminal activity.” *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015) (internal quotation marks and citations omitted).

Here, considering the totality of the circumstances, the trial court properly found multiple factors sufficient to establish probable cause to search Defendant’s vehicle. As this Court held in *State v. Walters*, a positive alert from a drug-detection dog serves as a factor in establishing probable cause to conduct a warrantless vehicle search. 286 N.C. App. 746, 763, 881 S.E.2d 730, 741 (2022). Along with the positive alert from the drug-detection canine, Defendant appeared nervous upon being stopped and provided inconsistent statements as to his destination—all factors supporting the establishment of probable cause. *See, e.g., State v. Watkins*, 220 N.C. App. 384, 391, 725 S.E.2d 400, 405 (2012) (holding a defendant’s nervous behavior while driving and exiting a vehicle was a factor in supporting the establishment of probable cause). Moreover, Sergeant Keltner obtained information about Defendant’s prior criminal conduct and history of gang affiliation while running his routine checks. *See, e.g., State v. Teague*, 259 N.C. App. 904, 911, 817 S.E.2d 239, 244 (2018) (“[a] defendant’s past criminal conduct and reputation for criminal conduct is relevant to whether probable cause exists.”).

Under the totality of the circumstances, we agree with the trial court’s determination that probable cause existed to search Defendant’s vehicle. The positive

alert from the drug-detection canine, along with Defendant's nervous demeanor, prior criminal conduct and gang affiliation, and inconsistent statements as to his traveling destination, all taken together support a finding of probable cause.

#### **IV. Conclusion**

We conclude Defendant waived the first issue presented to our Court as his argument does not align with those advanced to the trial court in his motions to suppress. As for Defendant's second argument, upon review of the record, we conclude that the trial court's finding of probable cause to search his vehicle was proper. The trial court's order denying Defendant's motions to suppress is affirmed.

AFFIRMED.

Panel consisting of Judges TYSON and CARPENTER and STADING.

Report per Rule 30(e).