NO. COA01-1004

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 00 CRS 13069-72

VERNON JAY RALEY

Appeal by defendant from judgment entered 9 April 2001 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals

Attorney General Roy A. Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

BIGGS, Judge.

Defendant Vernon Raley appeals from the denial of his motion to suppress evidence seized during his arrest for disorderly conduct. We affirm the decision of the trial court.

Defendant was arrested and charged with several offenses, including disorderly conduct, all arising out of an altercation occurring at a Charlotte, North Carolina convenience store during the pre-dawn hours on 29 March 2000. Prior to trial, defendant moved to suppress certain physical evidence seized from his vehicle during a search incident to his arrest. This matter was heard by

the trial court on 9 April 2001.

The evidence tended to show that at approximately 1:15 a.m. on 29 March 2000, a female clerk at the Ashley Road Amoco in Charlotte, North Carolina, observed a red Cadillac sedan pull into the store's parking lot and park. Defendant, who was the driver and sole occupant of the vehicle, exited the car and approached the store. The clerk had earlier locked the doors to the store after observing some customers stealing beer, and had to to open the door by a remote door locking mechanism to let defendant into the store. Defendant became angry because the door had been locked, and when he entered the store he said to the clerk, "You don't have to lock me out[,] Beautiful, you know you are making me horney [sic]." When the clerk requested that he not address her in that manner, defendant responded, "F--k you, B--ch." Further, when the clerk informed defendant that the police were on the way, he stated, "F--ck you, I have something for you, and the police."

Police officers arrived on the scene moments later and the clerk told them about defendant's statements. In response, the officers asked defendant, who was standing outside of the store at this time, to come back inside to explain what happened from his perspective. Defendant refused and continued to utter profanity. When advised to calm down, defendant stated, "F--ck that s--t I can say what I want." The police officers detected a strong odor of alcohol about defendant's person, and subsequently arrested him for disorderly conduct. The officer then conducted a pat-down of defendant's clothing before placing him in the patrol car.

Thereafter, one of the officers located defendant's prison identification card in his wallet, identifying defendant as a convicted felon.

After his arrest, defendant informed the officers that he owned the red Cadillac sedan parked in front of the store. When one of the officers approached the vehicle, he observed an open bottle of liquor on top of the front passenger seat. The officer also saw the handle of a pistol sticking out from underneath the driver's seat. The officer subsequently informed defendant that he was also going to be charged with transporting an open container of alcoholic beverage, possession of a firearm by a felon, and altering serial numbers on a gun. Enraged by the additional charges, defendant began to shout racial epitaphs to the police officers, and threatened, "Ya'll will pay for this."

After reviewing the evidence filed during discovery of this matter and hearing the arguments of counsel, the trial court denied defendant's motion to suppress. Thereafter, defendant, reserving the right to appeal the denial of his motion to suppress, pled guilty to all of the charges against him. In accordance with the plea agreement, the charges were consolidated for sentencing and defendant was placed on intensive probation. Defendant appeals.

I.

By his first assignment of error, defendant argues that the trial court erred in denying his motion to suppress evidence obtained during a search incident to his arrest. Specifically, defendant contends that his warrantless arrest was unlawful, since

police officers lacked probable cause to arrest him for disorderly conduct. Accordingly, defendant submits that the evidence seized pursuant to that arrest should have been suppressed. We disagree.

In reviewing the trial court's ruling on a motion to suppress, this Court need "determine only whether the trial court's findings of fact are supported by competent evidence in the record, and whether th[ose] findings of fact support the court's conclusions of law." *State v. Colbert*, 146 N.C. App. 506, 511, 553 S.E.2d 221, 224 (2001). The trial court's findings are binding on appeal if supported by competent evidence, even if there is evidence to support contrary findings. *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 502 (2000). "The conclusions drawn from the facts found are, however, reviewable." *State v. Wallace,* 111 N.C. App. 581, 584, 433 S.E.2d 238, 240 (1993).

At the outset, we note that defendant has failed to assign error or present argument as to any of the trial court's findings of fact; thus, the findings are presumed correct and are binding on this Court on appeal. *See State v. Rhyne*, 124 N.C. App. 84, 90, 478 S.E.2d 789, 791 (1996)(citing N.C.R. App. P. 28(a)). Our sole inquiry on appeal, therefore, is whether the trial court erred in concluding that the officers had probable cause to arrest him.

The Fourth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, protects the citizens from unreasonable searches and seizure. U.S. Const. Amend. IV. The North Carolina Constitution contains similar protections. *See* N.C. Const. Art. I, § § 19, 20. It is well settled that an arrest

passes constitutional muster when founded upon probable cause. *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209, *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002). Probable cause has been defined as "'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.'" *State v. Harris,* 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (quoting 5 Am.Jur.2d *Arrests* § 44 (1962)). Significantly, probable cause does not require an actual showing of criminal activity, "'only *a probability or substantial chance*'" of such activity. *State v. Riggs,* 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (emphasis in original) (quoting *Illinois v. Gates,* 462 U.S. 213, 243 n. 13, 76 L. Ed. 2d 527, 552 n. 13 (1983)). Whether probable cause exists is determined by the facts and attenuating circumstances, and is based upon an objective of reasonableness. *Harris*, 279 N.C. at 311, 182 S.E.2d at 367. Once a police officer has executed a lawful arrest, based upon probable cause, he may conduct a warrantless search incident to that lawful arrest. *See State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 195 (2001)(noting that a search incident to a lawful arrest is a "well-recognized" exception to the warrant requirement").

Defendant was charged with disorderly conduct. N.C.G.S. 14-288.4 defines disorderly conduct thusly:

> (a) Disorderly conduct is a public disturbance intentionally caused by a person who:
> (1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or violence; or

> (2) makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby causes a breach of the peace.

N.C.G.S. § 14-288.4 (2001). "Public disturbance" is defined in G.S. § 14-288.1(8) as follows:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C. Gen. Stat. § 14-299.1(8) (2001).

The facts here tend to show that during the early morning hours of 29 March 2000, a convenience store clerk locked the doors of the store where she worked, after observing customers shoplifting. Defendant became upset when he approached the store and found it locked. When he gained entrance, he became abusive toward the clerk-- first, making sexually suggestive comments, and then cursing her. When the clerk informed defendant that the police had been called, defendant continued to curse her and threatened, "F--k you, I have something for you and the police." After police officers responded to the scene, the clerk informed them of defendant's comments. When the officers requested that he move out of the store's doorway and enter the store so that they could further investigate the matter, defendant refused, yelling, "No I ain't going inside that fucking store." Despite the officers

attempts to calm defendant, he continued with his outbursts. Customers in the parking lot seemed bothered by defendant's behavior. When defendant continued to refuse to cooperate and continued to curse the officers, they arrested him for disorderly conduct. During the arrest, the officers detected a strong odor of alcohol about defendant's person.

Based upon this evidence, the trial court made the following findings in open court:

> I am going to find that the Defendant appeared in the store; . . . that his admission was delayed because the Clerk had locked the door . . . because of an earlier incident, in which the Defendant was not involved. When the Defendant was allowed access into the store he was angry and cursed and made comments to the clerk, saying, "You don't have to lock me out" and "you make me horny" and "I have . . . "--- after being told that the police had been called, he said, "I have something for you and the police." The evidence would suggest that the Defendant had been drinking and there was an odor of alcohol about him. The Defendant also made the statement in the presence of police, "F--k that sh-t. I can say what I want." In addition, there were others presence [sic] within the hearing of these comments.

Based upon those findings, the Court concluded as follows:

> The Court concludes as a matter of law that the Defendant engaged in abusive behavior which was intended to provoke a breach of the peace; that his comments were troublesome to others; . . . and that the police were authorized to arrest the Defendant for disorderly conduct; and that the motion to suppress should be denied.

On this record, the trial court properly concluded that the officers had probable cause to arrest defendant for disorderly conduct. We reject defendant's attempts to distinguish seminal

cases, which support our decision in this regard. *See State v. Summerell*, 282 N.C. 157, 192 S.E.2d 569 (1972), *reversed on other grounds*, 324 N.C. 539, 380 S.E.2d 118 (1989); *State v. McLoud*, 26 N.C. App. 297, 215 S.E.2d 872 (1972); *State v. Cunningham*, 34 N.C. App. 72, 237 S.E.2d 334 (1977). We conclude that the instant facts and attenuating circumstances would permit a reasonable, prudent police officer similarly situated to believe that defendant's profane and abusive language was intended to, and did in fact, disrupt the peace. Unquestionably, defendant's conduct disrupted operations at the convenience store. The clerk was forced to stop the orderly operation of the store to deal with defendant's belligerent behavior and to speak with the officers about that behavior. Moreover, after their arrival, defendant continued to direct abuses and profanity at the store clerk and police officers. When asked to calm down, he loudly and profanely refused. Responding officers observed that store customers seemed disturbed by defendant's language and behavior.

Because the officers had probable cause to arrest defendant for disorderly conduct, the search conducted incident thereto, was not constitutionally infirm and the trial court did not err in denying defendant's motion to suppress. Defendant's first assignment of error is overruled.

II.

By his second assignment of error, defendant argues that the trial court erred in denying his motion to suppress evidence, based

upon statutory violations. Defendant contends that his warrantless arrest for disorderly conduct was in violation of G.S. 15A-401, and that the evidence seized was obtained in substantial violation of Chapter 15 of the North Carolina General Statutes. Again, we disagree.

The record reveals that it is unclear whether trial counsel objected to the admission of the evidence seized during defendant's arrest, based upon violation of G.S. 15A-401. Moreover, it does not appear that the trial court ruled upon the motion to suppress in this regard, so as to preserve the issue for review under N.C.R. App. P. 10(b)(1). Defendant, therefore, seeks review under the "plain error" doctrine. Our Supreme Court has previously stated, "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where ... it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done'. . . ." *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill,* 676 F.2d 995, 1002 (4th Cir.1982)). "To satisfy the requirements of the plain error rule, the Court must find error, and that if not for the error, the jury would likely have reached a different result." *State v. Holmes*, 120 N.C. App. 54, 64, 460 S.E.2d 915, 921, *disc. review denied*, 342 N.C. 416, 465 S.E.2d 545 (1995).

G.S. 15A-401 provides in pertinent part:

> (b) Arrest by Officer Without a Warrant. --
> (1) Offense in Presence of Officer. --An officer may arrest without a warrant any person who the officer has probable cause to

> believe has committed a criminal offense in the officer's presence.
>
> (2) Offense Out of Presence of Officer. -- An officer may arrest without a warrant any person who the officer has probable cause to believe:
>
> a. Has committed a felony; or
>
> b. Has committed a misdemeanor, and:
>
> 1. Will not be apprehended unless immediately arrested, or
>
> 2. May cause physical injury to himself or others, or damage to property unless immediately arrested.

N.C.G.S. § 15A-401(b)(2001). Evidence obtained as a result of a "substantial violation" of any provision in Chapter 15A must be suppressed. N.C.G.S. [§] 15A-974(2) (2001). In making a determination as to whether a violation is substantial within the meaning of G.S. § 15A-974(2), the trial court must consider all of the circumstances, including the importance of the interest violated, the extent of the deviation, the willfulness of the deviation, and the deterrent value that the exclusion of the evidence will provide. *State v. Simpson*, 320 N.C. 313, 322, 357 S.E.2d 332, 337 (1987). Suppression is required where "a causal relationship [] exist[s] between the violation and the acquisition of the evidence sought to be suppressed." *State v. Richardson*, 295 N.C. 309, 322, 245 S.E.2d 754, 763 (1978).

As we concluded earlier, the arresting officers in this case had probable cause to arrest defendant for disorderly conduct. We further conclude that the arresting officers had probable cause to believe that defendant committed the offense in their presence.

While defendant argues to the contrary, we believe that defendant's continued, threatening behavior and use of profanity after police officers arrived on the scene, despite warnings to calm down; his refusal to cooperate with the police in investigating the matter; and his continued disruption of the business of the convenience store, along with his drunken demeanor, support such a conclusion. Discerning no error -- plain or otherwise-- in denying defendant's motion based upon violations of G.S. § 15A-401 or -974(2), we overrule defendant's second assignment of error.

In light of the forgoing, we hold that the trial court properly denied defendant's motion to suppress. Accordingly, the decision of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

Report Rule 30(e).