

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1548

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v.

MICHAEL ANTHONY PEELER

Rockingham County  
Nos. 00 CRS 12046  
01 CRS 298

Appeal by defendant from judgment entered 10 May 2001 by Judge Lindsay Davis in Rockingham County Superior Court. Heard in the Court of Appeals 9 December 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Emery E. Milliken, for the State.*

*Craig M. Blitzer for defendant appellant.*

CAMPBELL, Judge.

Defendant was found guilty by a jury of breaking and entering, larceny, and possession of stolen goods. Following defendant's guilty plea to habitual felon status, the trial court arrested judgment on defendant's conviction for possession of stolen goods, consolidated his remaining offenses, and sentenced him as an habitual felon to 107 to 138 months' imprisonment. Defendant gave notice of appeal in open court.

Defendant was charged with a break-in at 1226 Ridge Avenue in Eden during the early morning hours of 13 October 2000. Approximately one-half hour after the incident, eyewitness Ruby

Turner identified defendant as the perpetrator after he was apprehended by Eden Police Officer John Price. On appeal, defendant contends that the trial court erred in denying his motion to suppress Turner's pretrial identification and in overruling his subsequent objection to Turner's testimony at trial.

In reviewing the denial of a motion to suppress, we must usually determine (1) whether the trial court's findings of fact are supported by competent evidence, and (2) whether the trial court's findings of fact support its conclusions of law. In this case, defendant offered only a general exception to the denial of his motion and did not object to any of the court's findings. Therefore, we are bound by the findings of fact entered below and must determine only whether the trial court's findings support its conclusions of law. See *State v. Jones*, 96 N.C. App. 389, 392, 386 S.E.2d 217, 219 (1989) (quoting *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982)), *appeal dismissed, disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990).

The findings of fact relevant to our discussion are as follows:

1. That on or about the evening of October 13th, 2000 at around 12 midnight to 12:30 a.m., Ruby Turner was awakened by the barking of her dog.
2. That she arose and went into her kitchen and from the window observed a black male coming from behind the house of her next door neighbor, Cathy Johnson.
3. That the area between the Turner residence and the Johnson residence was illuminated by

backyard lights in the Turner yard and in the yard of the neighbor on the other side of the Johnson residence.

. . .

5. That [Turner] observed the black male break out a window at the Johnson residence and enter the residence.

6. That she observed the black male emerge from the residence with a bag.

7. That she then observed the black male's face.

. . .

11. That she observed the black male dragging a bag across the street in front of the Johnson and Turner residences past empty buildings into a grassy area behind the buildings.

12. That she telephoned 911 and reported what she had observed.

13. That Officer John W. Price of the Eden Police Department was dispatched to the area.

. . .

16. That Ms. Turner described the person she saw [to Price] as a black male, short of stature with braided hair and wearing a black or brown coat.

17. That Officer Price went into a wooded area across the street from the Johnson and Turner residences and found the defendant lying on the ground with a bag beside him.

. . .

19. That Officer Price went back . . . and informed Ms. Turner that a person fitting her description had been located.

20. That . . . Officer Price also mentioned that a bag had also been found.

21. That Officer Price requested that Ms. Turner accompany him to Stadium Drive to see if she could identify the person found . . . .

. . . .

23. Ms. Turner believed before she saw defendant on Stadium Drive that the person[] that the police had apprehended [was] the person she had seen earlier at the Johnson residence.

24. That when Officer Price drove Ms. Turner to the location on Stadium Drive where the defendant had been taken and used his alley light to illuminate the defendant seated in the back of the police patrol car.

25. That Ms. Turner immediately identified the defendant as the person whom she had seen earlier at the Johnson residence.

Based on these findings, the trial court also reached the following "conclusions:"

1. The witness, Ms. Turner, had sufficient opportunity to see the defendant at the time of the alleged crime.
2. That the witness devoted a sufficient degree of attention to her observation of the defendant at that time.
3. That the witness' prior description of the person she had observed at the Johnson residence was reasonably accurate.
4. That the witness demonstrated a sufficient level of certainty of identification at the time of the confrontation on Stadium Drive.
5. That the length of time between the alleged crime and the confrontation was not material.
6. The witness had . . . formed a belief that the person apprehended was the perpetrator before the confrontation occurred. And while the evidence does not indicate a deliberate attempt by law enforcement to influence her belief, . . . the officer's communications with her did in fact influence.

7. However, the Court is unable to determine applying the applicable tests that as the result of the procedure followed a very substantial likelihood of irreparable misidentification existed.

The motion to suppress is denied.

Defendant argues that the trial court's conclusions of law failed to resolve whether or not Turner's pre-trial identification was tainted by a very substantial likelihood of irreparable misidentification caused by the show-up procedure. Because the trial court did not resolve this ultimate question, defendant contends that its findings of fact are not binding on this Court. Moreover, defendant insists that "the Due Process Clause of the United States Constitution[] would prohibit a trial court from denying a motion to suppress simply because the trial [c]ourt is unable to determine any result using what the [c]ourt considers to be the applicable standards."

In taking the position that the trial court failed to assess the likelihood of misidentification, defendant has grounded his appeal in a mis-reading of the trial transcript. The transcript reflects the trial court's conclusion, after a painstaking examination of the circumstances, that it was "unable to determine applying the applicable tests that as the result of the procedure followed a very substantial likelihood of irreparable misidentification existed." What defendant casts as a failure to resolve the dispositive question before the court was, in fact, the court's affirmative ruling that no substantial likelihood of irreparable misidentification was created by the show-up procedure.

Having misconstrued the trial court's statement as an inability to decide the matter, defendant has not addressed the merits of the court's analysis. In an abundance of caution, we review the court's ruling under the appropriate legal standard.

Defendant's motion to suppress challenged the show-up identification by Turner on the morning of 13 October 2000. This Court has summarized the applicable legal standard as follows:

Identification evidence must be suppressed if the facts show the pretrial identification procedures were so suggestive as to create a very substantial likelihood of irreparable misidentification. The determination of this question involves a two-step process: "First, the Court must determine whether the pretrial identification procedures were unnecessarily suggestive. If the answer to this question is affirmative, the court then must determine whether the unnecessarily suggestive procedures were so impermissibly suggestive that they resulted in a substantial likelihood of irreparable misidentification."

*State v. Capps*, 114 N.C. App. 156, 161-62, 441 S.E.2d 621, 624 (1994) (citing *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985)). Show-up identifications are generally disfavored and are deemed sufficiently suggestive to trigger the second stage of the *Capps* analysis. See *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). The inquiry thus turns to whether the procedures used by Officer Price were so suggestive as to create a substantial likelihood of misidentification by Turner. In assessing the likelihood of misidentification, the trial court was obliged to consider the circumstances in which the show-up was conducted, including "(1) the opportunity of the witness to view the criminal

at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation." *State v. Harris*, 308 N.C. 159, 164, 301 S.E.2d 91, 95 (1983).

The trial court's denial of the motion to suppress was proper in all respects. The court applied the appropriate legal standard as articulated in *Capps*. It made specific, detailed findings of fact on each of the *Capps* factors, including Turner's ability to see the intruder as he committed the break-in, her level of attentiveness during the incident, the extent and accuracy of her initial description of the intruder to Officer Price, see *State v. Richardson*, 328 N.C. 505, 512, 402 S.E.2d 401, 405 (1991), her immediate and positive identification of defendant at the show-up, and the short amount of time between the break-in and the identification. Moreover, the trial court took into account the possible "corrupting effect" of the show-up procedure, specifically noting that Turner arrived at Stadium Drive already believing that Price had caught the perpetrator. See *Turner*, 305 N.C. at 364-365, 289 S.E.2d at 373-374 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)). Finally, we conclude that the facts found by the trial court support its legal conclusion that, under the totality of the circumstances, there was no substantial likelihood of misidentification. See *Capps*, 114 N.C. App. at 163, 441 S.E.2d at 625.

Defendant also faults the trial court for overruling his objection to Turner's testimony about the pre-trial identification. Having found that defendant's motion to suppress was properly denied, we further find Turner's testimony admissible. We note that defendant failed to raise a due process challenge to Turner's testimony in the trial court and is precluded from doing so now. See *State v. Cooke*, 306 N.C. 132, 137, 291 S.E.2d 618, 621 (1982) (citations omitted) (constitutional questions not raised in the trial court will not be considered on appeal). Accordingly, his argument is not properly before this Court.

To the extent that defendant's second assignment of error in the record on appeal is not addressed in his brief to this Court, it is deemed abandoned. See N.C.R. App. P. 28(b)(6) (2002).

For the reasons discussed above, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).