NO. COA01-1552

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 01 CRS 50029

WILLIAM EDWARD JONES, JR.,
Defendant.

Appeal by defendant from judgment entered 5 July 2001 by Judge Ronald K. Payne in Superior Court, New Hanover County. Heard in the Court of Appeals 8 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Angela Humes Brown, for the defendant-appellant.

WYNN, Judge.

Following his convictions of carrying a concealed weapon, possession of marijuana, and possession of a firearm by a felon, defendant William Edward Jones, Jr. presents one issue on appeal: Did the trial court erroneously deny his motion to suppress the evidence of a gun and marijuana as fruits of an illegal search? We answer no, and therefore, uphold the defendant's convictions and suspended sentence of 13 months and not more than 16 months with 36 months of supervised probation.

The underlying facts of this appeal tend to show that on 1

January 2001, defendant was a passenger in an automobile lawfully stopped by the police for an equipment violation. As one of the two police officers approached the passenger side of the car, defendant opened the passenger door because the passenger window was inoperable. Not knowing of defendant's reasons for opening the door, the officer asked defendant to step out of the car in order to prevent a possible threat to his safety or possible flight by defendant. The officer asked defendant if he had any weapons on his person to which the defendant replied, no. He next asked defendant if he could search him for weapons; the defendant responded by raising his hands. Next defendant made a motion to his left jacket pocket as if he was reaching for something. The officer, suspecting he was reaching for a weapon, grabbed defendant's wrist and felt his jacket pocket. After feeling something similar to a gun, the officer reached inside the left jacket pocket and retrieved a gun. Defendant was arrested and subsequently tried for carrying a concealed weapon, possession of marijuana, and possession of a firearm by a felon. At trial, the trial court denied defendant's motion to suppress the gun and the marijuana. He appeals from the denial of that motion.

"The scope of appellate review of a ruling upon a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Johnston*, 115 N.C. App.

711, 713, 446 S.E.2d 135, 137 (1994). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *Id.*

In ruling upon defendant's motion to suppress the gun and the marijuana, the trial judge found defendant exited the vehicle without any request from the officer; replied to the officer's request to search him by raising his hands; and turned his back to the officer. The trial court further found that the officer observed a movement of defendant's hand and it was at that point the officer conducted a pat-down and found the weapon. The trial court then concluded:

> [T]he search of the defendant at the stop of the vehicle was reasonable; that it was a legal stop. Thereafter, that at the request of the officer, if he did, in fact, so request, the defendant exited the vehicle. Considering all the facts, the subsequent search conducted by Officer Johnson was reasonable, based upon a reasonable suspicion and the actions of the defendant, either by his consent to the search or by his actions following the inquiry of Officer Johnson concerning whether he had any contraband or weapons on his person.

As an initial matter, we find the officer ordering the defendant out of the car after the defendant voluntarily opened the car door unproblematic. An officer "may order passengers to get out of the car pending completion of the stop." *Maryland v. Wilson*, 519 U.S. 408, 414, 117 S.Ct. 882, 886 (1997). Therefore, we turn our attention to the reasonableness of the officer's search for weapons

upon defendant's person.

"Consent to search, freely and intelligently given, renders competent the evidence thus obtained." *State v. Graham,* 149 N.C. App. 215, 218, 562 S.E.2d 286, 288 (2002)(quoting *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973)). As recently held by this Court, consent may be given verbally or by nonverbal conduct. *See id*. (finding consent was voluntary when the defendant stood up and raised his hands away from his body accompanied by a gesture which the officer took to mean consent after being asked by the officer if she could check his pocket).

In this case, when the officer asked if he could conduct a pat-down search, the defendant replied by raising his hands. This nonverbal conduct was sufficient to give consent for a search.

In the alternative, the trial court found that defendant's actions following the inquiry of Officer Johnson concerning whether he had any contraband or weapons on his person was a sufficient basis for the pat-down search. "The police are, ..., permitted to conduct a 'pat-down' for weapons once the defendant is outside the automobile, and if the circumstances give the police reasonable grounds to believe that the defendant may be 'armed and presently dangerous.'" *State v. McGirt*, 122 N.C. App. 237, 239, 468 S.E.2d 833, 835 (1996).

In this case, at 9:00 p.m. near a known drug area, after the officer asked defendant whether he had any weapons on his person, the defendant said no, turned his back to the officer and made a movement with his hands towards his left coat pocket. Under these

circumstances, the officer had reasonable grounds to believe the defendant was posing a threat to the officer's safety.

No error.

Judges GREENE and McGEE concur.

Report per Rule 30(e).