NO. COA01-883

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Catawba County
No. 00 CRS 6302

JESUS MARTINEZ MARTINEZ

Appeal by defendant from judgments entered 4 December 2000 by Judge Claude S. Sitton in Catawba County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi, II, for the State.

Mark L. Killian for defendant appellant.

McCULLOUGH, Judge.

On 27 March 2000, Investigator John Michael Saunders of the Catawba County Sheriff's Office was contacted by a confidential informant who stated that he had been approached by a third party to break into a house in Hickory, North Carolina. Saunders provided the informant, Juan Ruben Torres, with a monitoring device and Torres met with a Hispanic male to find out the exact location of the house. Saunders followed Torres as Torres met with the other individual. During the meeting, the individual talked to Torres about breaking into the house and mentioned the possibility

of drugs being on the premises. Torres and the other individual then drove to a location on Ninth Street Drive, Northeast, to show him where the house was, and then to a restaurant. Eventually, Torres left the restaurant and met with Saunders. Torres told Saunders about his meeting, told him about the possibility of drugs being at the house, and took him to the house where the break-in was to occur. The residence was located at 919 Ninth Street Drive.

Based on the information provided by Torres, Saunders, other officers and an interpreter approached the house to conduct a "knock-and-talk" or "consent search." Pursuant to this method, the officers were going to knock on the door, announce who they were, ask permission to enter, give the occupants the information the police had received and ask permission to search. Saunders and the interpreter, Armando Lagunas, went to the front door while another officer went to the back door to intercept anyone trying to flee the residence. Saunders knocked on the door and Lagunas announced in Spanish that it was the Sheriff's Department and to open the door. After knocking twice, defendant, Jesus Martinez, exited the rear of the house, where he was asked to stop by the officer positioned at the rear of the house. After being asked twice, defendant stopped and the officer asked defendant to walk with him to the front of the house for questioning. Juan Martinez, who is defendant's brother, opened the front door at the same time the officer came around the house with defendant. Lagunas explained to Juan Martinez the information police had about narcotics being in the house, and asked for permission to search the premises. Both

Juan Martinez and another occupant of the house, Maria Martinez, responded, "No problem."

After gaining entry into the home, Saunders detected the odor of marijuana. Lagunas then read to defendant and the other occupants of the house a "Consent to Search" form. All four occupants, including defendant, indicated that they understood the form and consented to a search of the premises. Evidence found during a search of the home included marijuana, electronic scales, and cocaine.

Walter Craig was the owner of the property located at 919 Ninth Street Drive Northeast in Hickory, North Carolina. On 11 or 12 January 2000, Craig had shown the property to prospective tenants, a young Hispanic couple and their child. The couple identified themselves as Jesus and Claudette Chavez. Craig met with the couple for about forty-five minutes to an hour. Craig met with the couple again on 13 January 2000, again for about forty-five minutes, and Craig agreed to lease the property to them. On 10 May 2000, Craig visited the property to collect unpaid rent. Upon inspection, Craig noticed that the house had been vacated and the property damaged, so he called the police. Shortly thereafter, Craig was informed by Officer Randy Isenhour of the Hickory City Police Department that there had been a drug bust at the property and arrests had been made.

On 12 May 2000, Craig met with Investigator Saunders to look at a photographic lineup. Craig was shown three photographs and a picture identification. The lineup included two Hispanic men and

two Hispanic women. Craig picked out the photographs of the two people who had leased the property from him, the couple who had identified themselves as Jesus and Claudette Chavez. The photographs were of Norma Morones and defendant.

On 7 August 2000, defendant was indicted on charges of trafficking in marijuana by possession, trafficking in cocaine by possession and maintaining a place for controlled substances. Juan Martinez was also indicted on drug charges stemming from the search of the residence. Defendant's and Juan Martinez' cases were joined for trial. Their cases were tried at the 27 November 2000 Criminal Session of Catawba County Superior Court.

At trial, defendant moved to suppress the evidence found during the search of the residence. Defendant also moved to suppress Craig's identification of defendant. The motions were denied. Craig identified defendant in court and identified Morones as the person who had been with defendant.

Defendant was found guilty by a jury of trafficking in marijuana by possession, possession of cocaine, and guilty of knowingly maintaining a place or residence for keeping a controlled substance. He was sentenced to a minimum term of 35 months and maximum of 42 months for the trafficking conviction and was placed on supervised probation following the completion of his sentence for 24 months.

Defendant brings forth the following assignments of error: The trial court erred in (1) allowing the State's motion for joinder of defendant's charges for trial with the codefendants on

the grounds that joinder deprived defendant of a fair trial; (2)denying defendant's motion to suppress evidence of controlled substances found in the residence on the grounds that defendant's consent to search was obtained as a result of an illegal seizure and arrest; and (3) denying defendant's motion at trial to suppress identification testimony of Walter Craig on the grounds that his testimony was so unnecessarily or impermissibly suggestive as to violate defendant's right to due process.

I.

We first consider whether the trial court erred by denying defendant's motion to suppress evidence. Defendant contends that his consent to search was the result of an illegal search and seizure. Specifically, defendant argues that the seizure was based on an investigatory stop made without reasonable suspicion that he was engaged in criminal conduct. Defendant further notes that almost all of the trial court's findings focus exclusively on the other codefendant's consent, and there were no findings as to whether he consented to the search. Thus, defendant asserts that the trial court's conclusion denying his motion to suppress was not supported by adequate findings of fact.

After careful review of the record, briefs and contentions of the parties, we find no abuse of discretion. Our Supreme Court has stated:

> The scope of review of the denial of 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. Bone, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Defendant argues that the trial court erred in denying the motion to suppress, noting that the court made no findings regarding defendant's consent to search. Defendant contends that he did not give voluntary consent to the search, and that the evidence should be suppressed. We disagree.

This Court has stated that:

> "'[a] governmental search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement.'" . . . [One] exception exists when the law enforcement searches by the consent of third party with "'... common authority over or other sufficient relationship to the premises or effects sought to be inspected.'"

State v. Williams, 145 N.C. App. 472, 474-75, 552 S.E.2d 174, 175-76 (2001) (citations omitted). Here, the trial court found as fact that defendant's codefendants, Juan Martinez and Maria Martinez, both being lawful occupants of the home, allowed police entry to the home and voluntarily consented to the search. Since the trial court found and there was evidence in support of their finding that Juan Martinez and Maria Martinez both had "common authority" over the premises and voluntarily consented to the search, their consent was a sufficient basis for denial of defendant's motion to suppress. *State v. Russell*, 92 N.C. App. 639, 646-47, 376 S.E.2d

458, 462-63 (1989); *see also U.S. v. Matlock*, 415 U.S. 164, 39 L. Ed. 2d 242 (1974). Accordingly, we conclude that the motion to suppress was properly denied. Thus, this assignment of error is overruled.

II.

We next consider whether the trial court erred by allowing the State's motion for joinder. Defendant contends that joinder was improper because it resulted in the admission of evidence against defendant which should have been excluded. We are not persuaded.

This Court has stated:

> Under N.C. Gen. Stat. § 15A-927(c)(2)b (1999), the trial court must grant a severance upon a defendant's motion if "it is found necessary to achieve a fair determination of the guilt or innocence of that defendant." "Whether defendants should be tried jointly or separately ... is a matter addressed to the sound discretion of the trial judge." "Absent a showing that defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed on appeal."

State v. Galloway, 145 N.C. App. 555, 569, 551 S.E.2d 525, 535 (2001)(citations omitted). Here, defendant argues that joinder was improper because it resulted in admission of evidence against him that should have been excluded. However, as stated above, the evidence challenged by defendant was admissible because consent to search the residence was granted by persons with common authority over the premises. Thus, because the evidence was admissible against him, defendant has failed to show how he was deprived of a fair trial. Accordingly, we find no abuse of discretion, and this

assignment of error is overruled.

III.

Defendant's third assignment of error is that the trial court erred by denying his motion to suppress the identification testimony of Walter Craig. Defendant asserts that Craig was only given four photographs to view, two of two Hispanic males, and two of two Hispanic females. Defendant further notes that the two Hispanic couples differed in age, although the only description given by Craig was as "Hispanic and a *young* couple." Thus, defendant contends that the photographic identification was impermissibly suggestive.

We find no abuse of discretion. This Court has stated that:

> "Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." Therefore, even when the procedures used at a pretrial identification are suggestive, the pretrial identification is nevertheless admissible unless under the totality of the circumstances "there is a substantial likelihood of irreparable misidentification." In determining whether this substantial likelihood exists, the trial court must consider the following factors:
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> 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;
> 4) the level of certainty demonstrated at the confrontation; and
> 5) the time between the crime and the

confrontation.

> A trial court's findings of fact regarding these factors are binding on appeal when supported by competent evidence.

State v. Pinchback, 140 N.C. App. 512, 518, 537 S.E.2d 222, 225-26 (2000)(citations omitted); *see also State v. Pigott*, 320 N.C. 96, 99-100, 357 S.E.2d 631, 633-34 (1987).

In the case *sub judice*, the trial court concluded that the pretrial identification was "somewhat suggestive," but that the procedure was not so impermissibly suggestive as to result in irreparable misidentification. The trial court based its conclusions on findings that Craig viewed and talked with defendant for an extended period of time, approximately forty-five minutes to one hour on the first occasion they met, and another forty-five minutes on the day he signed the lease agreement; that Craig had an interest in observing defendant and paid particular attention to him, because defendant planned to lease property from him; that the observation was made when Craig was in a "cool, collected manner"; and Craig based his identification of defendant not on the photographs, but on the two occasions he met with him in January 2000. We find there was sufficient evidence in the record to support each of the trial court's findings. Accordingly, under the totality of the circumstances, we conclude the identification of defendant was sufficiently reliable to be admissible.

We note that the above cases refer to the witness's opportunity to view defendant at the scene of the crime, and that here, the witness based his identification of defendant on his

meeting with him to discuss the lease. However, this is a distinction without a difference. The key to the analysis is the opportunity to view defendant, and as found by the trial court, Craig had the opportunity to view defendant for an extended period of time, and thus determined that the identification was reliable. Therefore, this assignment of error is overruled.

Defendant additionally argues that the photograph used in the identification was taken following his arrest. Defendant contends that the photograph was the result of an illegal arrest of defendant, and the photograph should have been suppressed. *See State v. Accor*, 277 N.C. 65, 84, 175 S.E.2d 583, 595 (1970). However, we have already concluded there was no unlawful search and seizure. Furthermore, even assuming *arguendo* that the photographs were unlawfully seized, the trial court found that there was an independent basis for the identification. Accordingly, we affirm.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).