NO. COA02-235

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 01 CRS 25589, 51908

THADDEUS LAMONT WILKINS

Appeal by defendant from judgment entered 5 November 2001 by Judge Henry E. Frye, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Richard E. Jester for defendant-appellant.

CAMPBELL, Judge.

Having preserved his right to appeal the denial of his motion to suppress, *see* N.C. Gen. Stat. § 15A-979(b) (2001), defendant entered a guilty plea to possession of cocaine with intent to sell or deliver, possession of drug paraphernalia, and habitual felon status. The trial court consolidated the offenses for judgment and imposed a mitigated sentence of seventy-two to ninety-six months' imprisonment.

At the suppression hearing, Winston-Salem Police Officer Jeff Azar testified that he was on patrol in the area of Cleveland

Avenue between Twentieth and Twenty-First Streets at approximately 3:00 p.m. on 16 February 2001. Azar twice drove past the corner of Cleveland and Twenty-First and saw "several individuals hanging around that corner" in front of Carter's Grocery. Azar contacted Officer Ben Jones, and the two officers decided to contact the group in order to "make sure no criminal activity [wa]s going on." Azar had made numerous drug-related arrests in the area and was "very familiar" with it as the site of "[a] lot of drug activity[.]"

The officers parked on Twentieth Street. As they got out of their cars, the group dispersed and "left the area pretty quick" at a pace that was "[n]ot a run, but not a walk." Defendant went across Twenty-First Street and behind an abandoned house at the corner of Twenty-First and Cleveland. The officers went into the abandoned house but found no one there. When they stepped onto the back porch, Azar observed defendant standing behind a tree in a wooded area behind the house. It appeared to Azar that defendant was "trying to hide[.]" Azar estimated that the woods were approximately fifty to sixty yards from the back of the house, and defendant was standing one hundred yards from the porch. After watching defendant remain behind the tree for two or three minutes, Azar and Jones walked to the edge of the woods. In a normal tone of voice, Azar called to defendant, "[S]ir, you can come out of the woods, there's nothing wrong, we'd like to speak to you a minute."

Defendant came out of the woods toward the officers. As he approached, Azar noticed defendant had both hands in the front

pouch of his hooded sweatshirt. Azar asked defendant to take his hands from his pockets while they talked. When defendant removed his hands from the sweatshirt, Azar noticed a large bulge remaining in the pouch and asked defendant if he was carrying any weapons. When defendant answered in the negative, Azar asked if he could frisk him. Defendant responded, "[T]hat's fine." In patting down defendant's sweatshirt pocket, Azar felt what he believed was a bottle with a stem sticking out of it. Based on Azar's training and experience, it was "readily apparent" that the object was a crack pipe. After defendant denied possessing a crack pipe, Azar asked him if he would mind letting Azar look at the object. Defendant replied, "No, I don't have a problem with that." Azar then removed the crack pipe from defendant's sweatshirt and placed defendant under arrest for possession of drug paraphernalia. A search incident to the arrest yielded a bag of crack cocaine from defendant's right front pants pocket.

Officer Jones, who had been on the police force for two years and had made "many" drug-related arrests in the area, offered an account of defendant's arrest that was substantially similar to Azar's version. He described defendant as hiding behind a tree in the woods and "peeking out kind of around the tree, looking at" the officers, at which point Azar called out to defendant in a "[c]alm tone, . . . just loud enough to where you could hear it." Jones explained the reason for getting defendant's hands out of his sweatshirt as follows:

> Officer Azar asked [defendant] to remove his hands, from my training and experience I know

> that guns and drugs go together, so we immediately wanted him to get his hands out of his pocket[.] [H]e was on the corner where a lot of drug activity is known to happen.

In his lone significant variance from Azar's testimony, Jones stated that when Azar asked defendant if he could frisk him for weapons, defendant gave no response.

Defendant testified that he left the corner when the police arrived and was walking on a path through the wooded area to visit a friend who lived nearby. Realizing that he needed a pack of cigarettes, he stopped and turned around, intending to return to Carter's Grocery. When he came within sixty yards of the abandoned house, the officers addressed him from the back porch, asking him where he was going. Defendant said he was going to the store to buy cigarettes, and the officers told him to "come on through." As defendant walked, the officers came off the porch and stood in front of him on the path, blocking his way. They asked defendant what he was doing and where he lived. The officers then asked for his identification. When defendant said he was not carrying identification, they asked to frisk him. Defendant did not respond but was patted down anyway. Defendant did not recall being asked to take his hands from his pockets. Moreover, his hands were in his pants' pockets, rather than his sweatshirt pocket.

In denying defendant's motion to suppress the pipe and cocaine found on his person, the trial court concluded that Azar performed a *Terry* search of defendant during an otherwise consensual encounter. *See Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 20 L. Ed. 2d 889, 905 n.16 (1968). The court found that Azar observed defendant

as part of a group gathered on Cleveland Avenue in an area known for drug activity. When Azar and Jones exited their cars, defendant crossed the street and went toward an abandoned house. The officers went to look for defendant in the house, stepping out onto the back porch when they found it unoccupied. The court further found as follows:

> Officer Azar observed the Defendant two or three minutes behind a tree and that the Defendant was not moving, and made a request of the Defendant to come out of the woods. The officer's tone of voice was in a normal tone and the officer had not drawn his weapon . . . .
>
> The Defendant responded on his own and came out. Officer Azar noticed the Defendant had . . . on . . . a black hooded sweat[shirt] in which the Defendant's hands were in [] part concealed from the officer. [Azar] at that time made a request, because the officer's experience that drugs and guns were a part of this drug activity area, and requested the Defendant to take his hands out of his pockets.

The court found that defendant voluntarily removed his hands from his pocket but was silent when Azar asked for his consent to a frisk for weapons. In performing the frisk, "which he had the authority to do," Azar felt an object which he believed was a crack pipe. After a search confirmed the presence of the crack pipe, defendant was arrested. A full search of defendant's clothing disclosed the crack cocaine.

The court concluded "[t]hat based on the totality of the circumstances, the officers were justified in a *Terry* frisk of the Defendant for weapons; and upon the officers' observation of the noticeable bulge in the Defendant's pockets, . . . they had a

reasonable, articulable suspicion to search the Defendant and to retrieve both the crack pipe and the cocaine which was later found."

Defendant contends that the trial court erred in concluding that the facts gave rise to a reasonable suspicion of wrongdoing supporting an investigatory stop and frisk under *Terry*. He avers that the only facts suggestive of criminal activity were (1) his presence in an area with a high level of drug activity and (2) the bulge in his pocket. Defendant contends, citing *State v. Artis*, 123 N.C. App. 114, 472 S.E.2d 169, *disc. review denied*, 344 N.C. 633, 477 S.E.2d 45 (1996), that such facts are insufficient to support the warrantless search of his person. Defendant also disputes the court's conclusion that he was not "seized" for constitutional purposes when the two officers initially blocked his path.

On appeal from the denial of a motion to suppress, the trial court's findings of fact are binding if supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Its conclusions of law will be upheld if supported by its findings of fact. *Id.*

The Fourth Amendment protects citizens from "unreasonable searches and seizures" at the hands of law enforcement or other governmental authority. U.S. Const. amend. IV. For constitutional purposes, a seizure occurs when a police officer, "by means of physical force or show of authority, has in some way restrained the liberty" of the person. *State v. Foreman*, 133 N.C. App. 292, 296,

515 S.E.2d 488, 492 (1999), *affirmed as modified*, 351 N.C. 627, 633, 527 S.E.2d 921, 925 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 20 L. Ed. 2d 889, 905 n.16 (1968)). No seizure occurs merely because a police officer approaches a person in a public area. *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994). Police are free to pose questions of individuals, ask for identification, or seek consent to conduct a search, provided a reasonable person would feel free under the circumstances to break off the encounter. *Id.* at 142, 446 S.E.2d 585-86. "[A] seizure does not occur until there is a physical application of force or submission to a show of authority." *Foreman*, 133 N.C. App. at 296, 515 S.E.2d at 492.

Consistent with the testimony of Azar and Jones, the trial court found that defendant was standing behind a tree and came out of the woods after Azar asked to speak with him in a calm tone of voice from a distance of more than fifty yards. Azar and Jones did not draw their weapons, rush toward defendant, or otherwise make any show of authority that would have moved the incident outside the realm of a purely voluntary encounter between police officers and a member of the public. These findings are binding on appeal and support the trial court's conclusion that defendant was not stopped or "seized" when he came into the yard to speak with Azar. *Cf. United States v. Drayton*, __ U.S. __, __, 70 U.S.L.W. 4539, __ (2002); *Foreman*, 133 N.C. App. at 296, 515 S.E.2d at 492.

The trial court further found that Azar performed a pat-down search for weapons after defendant removed his hands from the

pocket of his sweatshirt, revealing a bulge. The court found that defendant remained silent when Azar asked for his consent to the search. (This Court has held that an individual's silent acquiescence to a search of his person is insufficient to constitute a waiver of his Fourth Amendment rights.) *See State v. Pearson*, 348 N.C. 272, 277, 498 S.E.2d 599, 601 (1998). Consent to a search "must be [] clear and unequivocal" before it will be treated as a waiver of constitutional protections. *Id.* (citing *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967)).

An officer may conduct a limited pat-down search for weapons if the totality of the circumstances gives rise to a reasonable suspicion that the person to be searched is engaged in criminal activity and is armed and potentially dangerous. *See State v. Beveridge*, 112 N.C. App. 688, 694, 436 S.E.2d 912, 915 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)), *aff'd*, 336 N.C. 601, 444 S.E.2d 223 (1994). Here, defendant was observed with a group of men on a street corner associated with a high degree of illegal drug activity. *See State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722 (1992). When Azar and Jones stepped out of their patrol cars, defendant and the rest of the group dispersed in various directions. Although perhaps not "[h]eadlong flight[,]" defendant's departure from the area at a pace somewhere between a run and walk was suggestive of possible criminal activity. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576-77 (2000) ("Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite.");

Butler, 331 N.C. at 234, 415 S.E.2d at 722-23. Azar and Jones then saw defendant engage in further evasive action, attempting to hide behind a tree in a wooded area for a period of two or three minutes. When defendant came out of the woods at Azar's behest, his hands were in the front pouch pocket of his sweatshirt. When he removed his hands, a noticeable bulge remained in the pocket. *See State v. Sanders*, 112 N.C. App. 477, 482, 435 S.E.2d 842, 845 (1993). Finally, the officers knew from experience that guns were commonly used in the illegal drug trade. Based on the entirety of the officer's observations, we conclude that Azar's decision to pat down defendant for weapons as a safety precaution was reasonable.

Relying on our decision in *State v. Artis*, defendant contends that the bulge in his pocket and his presence in a high crime were insufficient to justify a pat-down search. In *Artis*, the defendant was playing a video game in an airport game room when he was approached by an officer and patted down, a process which ultimately led to the discovery of crack cocaine in the defendant's pocket. To support the search, the prosecution relied upon three facts: (1) the level of drug activity in the airport game room; (2) a bulge in defendant's pant's pocket similar in shape to brass knuckles or a weapon's handgrip; and (3) the fact that defendant had not yet passed through the airport's metal detector. *Artis* at 123 N.C. App. at 117-18, 472 S.E.2d at 170-71. We found these facts gave rise to only a "generalized suspicion" and that defendant's conduct in playing a video game did not present "any apparent need for quick action by [the officer] to insure that

defendant was not armed with a weapon that would be used against him or others nearby." *Id.* at 119, 472 S.E.2d at 171. Because no reasonably prudent officer would have believed the safety of himself or others was in danger, this Court concluded that the search was unreasonable under *Terry* and held the resulting evidence inadmissible. *Id.* at 119, 472 S.E.2d at 171.

The instant case is distinguishable from *Artis*. Here, defendant took evasive action when the officers arrived, fleeing the street corner and hiding behind a tree in the woods for a period of minutes. Moreover, unlike the defendant in *Artis*, defendant approached the officers with his hands in the sweatshirt pocket where the bulge was located. Defendant's ready access to the potential weapon and the suspicious conduct observed by the officers rendered the pat-down search a reasonable safety precaution supported by objective facts.

The trial court next found that Azar reached into defendant's sweatshirt pocket and seized the crack pipe, "after feeling and noticing what he, in his past experience, [had] known to be a crack pipe." Azar testified that in frisking defendant, he had discovered "a large object that felt from [his] experience to be a crack pipe, a bottle and a stem sticking out of it[.]" Based on his experience, the nature of the object was "readily apparent" during the frisk.

An officer who conducts a limited *Terry* search need not ignore the discovery of what is obviously contraband merely because it is not a weapon. *See State v. Streeter*, 17 N.C. App. 48, 50, 193

S.E.2d 347, 348 (1972), *aff'd*, 283 N.C. 203, 195 S.E.2d 502 (1973). "When the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband, probable cause exists" to support a search or arrest. *State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000) (citing *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983)). Under the facts found by the trial court, Azar's warrantless seizure of the crack pipe from defendant's pocket was properly supported by probable cause adduced during the pat-down search. Moreover, "[b]ecause . . . defendant's arrest was lawfully based on the fruits of a valid pat down search, the warrantless search of his person incident to the arrest, which yielded the . . . crack cocaine, was likewise constitutional." *See State v. Pulliam*, 139 N.C. App. 437, 442, 533 S.E.2d 280, 283 (2000) (citing *State v. Hardy*, 299 N.C. 445, 455, 263 S.E.2d 711, 718 (1980)). The motion to dismiss was properly denied.

Defendant also asserts that the trial court erroneously entered the sentence against him in case file number 01 CRS 25589, which contained his indictment under the habitual felon statute. Because habitual felon status is not a substantive crime, he contends this file number will not support a criminal sentence. Defendant further argues that he cannot now be re-sentenced for his substantive crimes in 01 CRS 51908, in light of the statutory bar against imposing a greater sentence for a crime on remand than was initially imposed at trial. *See* N.C. Gen. Stat. § 15A-1335 (2001). Thus, defendant asserts his sentence must be stricken.

Defendant's claim is without merit. The judgment entered by the trial court plainly lists both defendant's habitual felon status in 01 CRS 25589 and his substantive convictions for possession of drug paraphernalia and possession of cocaine with intent to sell or deliver in 01 CRS 51908. The mere fact that the superior court's file number in 01 CRS 025589 appears at the upper right-hand corner of the judgment does not constitute a sentencing error.

Defendant expressly abandons his remaining assignments of error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).