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NO. COA09-1290

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 08 CRS 53293-94

EUGENE ELDONRAY RIVERS

Appeal by State of North Carolina from order entered 5 June 2009 by Judge Kevin M. Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 10 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Sallenger & Brown, LLP, by Thomas R. Sallenger, for defendant-appellant.

STEELMAN, Judge.

Where a law enforcement officer ordered defendant out of his vehicle at gunpoint after an observed hand-to-hand drug transaction and then questioned defendant about whether he had anything illegal on his person without first administering *Miranda* warnings, the trial court properly concluded that these circumstances were the functional equivalent of an arrest and custodial interrogation, and granted defendant's motion to suppress.

I. Factual and Procedural Background

On 9 September 2008, Cabarrus County Deputy J.D. Barnhardt (Deputy Barnhardt) commenced surveillance of a residence located in

Kannapolis. The surveillance was initiated based upon multiple complaints concerning drug activity at the residence. Deputy Barnhardt observed vehicles stop in front of the residence. A man would walk from the residence to the vehicle, then return to the residence. At approximately 12:20 a.m. on 10 September 2008, Deputy Barnhardt observed Eugene Eldonray Rivers (defendant) park his silver Nissan Altima in the driveway of the residence. Defendant and two other persons exited the vehicle and entered the residence. Deputy Barnhardt recognized defendant from prior dealings. Subsequently, another vehicle pulled into the driveway and parked behind defendant's vehicle. The operator of the second vehicle entered the residence, and then exited the residence, followed by defendant. Deputy Barnhardt observed movements between the two persons consistent with a hand-to-hand drug transaction. The driver of the second vehicle and defendant returned to their respective vehicles. Deputy Barnhardt approached defendant, with weapon drawn, and told defendant to place his hands on the roof of the vehicle.

Deputy Barnhardt holstered his weapon and proceeded to pat down defendant for weapons. Defendant was asked, "Are you holding?" to which defendant replied, "You know I am." Deputy Barnhardt asked defendant where it was and he replied "in my pocket." A small baggie of marijuana and a baggie of crack cocaine was found in defendant's front "watch pocket."

Defendant was indicted for possession with intent to sell and deliver cocaine, possession of drug paraphernalia, possession of

cocaine, possession of less than a half ounce of marijuana, and being an habitual felon. On 6 April 2009, defendant filed a motion to suppress the evidence seized and statements made by defendant based upon a lack of probable cause to arrest defendant, and a custodial interrogation without having given defendant *Miranda* warnings. On 5 June 2009, the trial court denied the motion as to the initial seizure of defendant, but granted the motion to suppress all evidence seized as a result of an unlawful interrogation.

The State appeals.

II. Partial Granting of Defendant's Motion to Suppress

In its first argument, the State contends that the trial court erred in suppressing defendant's statements to Deputy Barnhardt and the drugs found on defendant's person. We disagree.

A. Standard of Review

In reviewing a trial court's findings of fact, if the findings are supported by competent evidence in the record, the appellate courts are bound by those findings. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). Unchallenged findings of fact are not reviewable on appeal. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006). We review the trial court's conclusions of law *de novo*. *State v. Haislip*, 362 N.C. 499, 500, 666 S.E.2d. 757, 758 (2008).

B. Analysis

In the instant case, the trial court found and neither party challenges the following: "That based upon [the totality of the circumstances] standard, the Deputy, under these facts, had reasonable, articulable suspicion of criminal activity so as to warrant an investigatory stop of the Defendant[.]" This finding is binding on appeal. *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13.

The State challenges the following "findings of fact:"

27. That the failure to administer *Miranda* warnings in a custodial situation creates a presumption of compulsion;

30. That the State has argued to the Court that *Miranda* is not triggered during a brief investigatory detention, and that the questioning of the Defendant following his seizure by the Deputy was akin to questioning following a routine traffic stop, which does not invoke *Miranda*; That the seizure at issue in this case is different from a routine traffic stop;
31. That the cases holding that a routine traffic stop does not invoke *Miranda* so holds [sic] based upon a belief that there is a non-coercive aspect of ordinary traffic stops, even though the person may be detained and questioned regarding the officer's suspicions;
32. That the present situation is substantially different than a routine traffic stop; that in this instance the Deputy drew his weapon, pointed it in the general direction of the Defendant, the Defendant was clearly not free to leave, the Deputy exercised control over the person of the Defendant by having the Defendant place his hands on the roof of the vehicle, and the actions of the Defendant were in compliance with and in submission to the Deputy's show of authority;

33. That based upon the totality of the circumstances in this matter, a reasonable person in the position of the Defendant would believe that they were under arrest, or its functional equivalent; That as such *Miranda* was invoked;
34. That the State has argued that the question posed by the Deputy, namely "Are you holding?" is an investigative question which could mean a variety of things;
35. That the Court finds that some of the possible responses to this question would be an incriminating response, and because the Deputy did exercise restraints upon the Defendant's freedom of movement, indicative of formal arrest, that a reasonable person in the Defendant's position would believe that he was under arrest or the functional equivalent thereof, and that this question is more than an investigative one;
36. That asking the question "Are you holding?" to this Defendant under these circumstances is interrogation for the purposes of *Miranda*;
37. That in addition, the follow up question of "Where is it?" is likewise interrogation for the purposes of *Miranda*;
38. That as a direct result of the Deputy's interrogation of the Defendant, without first being given his *Miranda* warnings, the Deputy located and seized physical evidence and arrested the Defendant;
39. That all the evidence seized after the initial questioning of the Defendant are the fruits of the "poisonous tree" of the unlawful interrogation[.]

The trial court then concluded that the interrogation of defendant violated his Fifth and Fourteenth Amendment rights and granted

defendant's motion to suppress "any and all evidence seized as a result of Deputy's unlawful interrogation."

At the outset, we note that many of the designated findings of fact are actually conclusions of law and will be reviewed as such. *See State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("[F]indings of fact which are essentially conclusions of law . . . will be treated as such on appeal. In distinguishing between findings of fact and conclusions of law, as a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified [as] a conclusion of law." (internal quotations, citations, and alterations omitted)). As stated above, the trial court's conclusions of law are reviewed *de novo*.

Law enforcement officers are required to administer *Miranda* warnings to individuals that are subjected to custodial interrogation. *Buchanan*, 353 N.C. at 336-337, 543 S.E.2d at 826. To determine whether an individual is in custody, "an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). The test is "whether a reasonable person in defendant's position would believe that he was under arrest or the functional equivalent of arrest." *State v. Benjamin*, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996) (citation omitted). We must

determine whether the trial court correctly concluded that defendant was "in custody" when Deputy Barnhardt asked defendant, "Are you holding?" during the investigatory stop to invoke *Miranda*.

The State contends that we should follow case law that holds that a motorist subject to a traffic stop, who is asked to exit his vehicle, is patted-down, and asked investigative questions related to the suspicion that gave rise to the stop, is not "in custody" for purposes of *Miranda*. See *Benjamin*, 124 N.C. App. at 738, 478 S.E.2d at 653; *State v. Sutton*, 167 N.C. App. 242, 249, 605 S.E.2d 483, 487 (2004), *disc. review denied and appeal dismissed*, 359 N.C. 326, 611 S.E.2d 847 (2005); *State v. Martinez*, 158 N.C. App. 105, 110-11, 580 S.E.2d 54, 58, *disc. review denied and appeal dismissed*, 357 N.C. 466, 586 S.E.2d 773 (2003). In *Benjamin*, a police officer stopped the defendant's van, and requested that the defendant exit the vehicle based upon substantial movement occurring in the van before it stopped. 124 N.C. App. at 736, 478 S.E.2d at 652. The officer directed the defendant to place his hands on top of the patrol car so that he could pat him down in order to check for weapons. *Id.* While the officer patted the defendant down, he felt two hard plastic containers in the defendant's top, left pocket of his winter jacket. *Id.* The officer asked the defendant, "What is that?" *Id.* The defendant responded that it was "crack." *Id.* The officer removed the containers from his jacket, continued his weapons search, and subsequently placed the defendant under arrest. *Id.*

On appeal, the defendant argued that he was in police custody during the pat-down search and that the officer should have administered *Miranda* warnings before asking any questions. *Id.* at 737, 478 S.E.2d at 653. This Court disagreed and held that these circumstances did not rise to the level of a custodial interrogation and that *Miranda* was inapplicable. *Id.* at 738, 478 S.E.2d at 653. The rationale underlying this holding was that due to "the noncoercive aspect of ordinary traffic stops[,] " no reasonable person would have thought they were in custody for purposes of *Miranda*. *Id.* (citing *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 82 L. Ed. 2d 317, 334-35 (1984)).

The facts of the instant case are markedly different. On the previous day, Deputy Barnhardt interacted with defendant on the street, and warned him that he should stop selling drugs because Deputy Barnhardt was "going to be working this area[.]" The next day, Deputy Barnhardt observed a hand-to-hand drug transaction take place on the porch of a residence between defendant and another individual. Defendant left the front porch and entered his vehicle, which was parked in the driveway. Defendant's driver side door was opened and he was sitting in the driver's seat, half inside the vehicle and half outside. Defendant was leaning down, reaching towards the back seat of the vehicle. Deputy Barnhardt was dressed in "camo" and approached defendant with his weapon drawn. Deputy Barnhardt stated to defendant, "Put your hands up" and "get out of the car." Defendant turned and saw Deputy Barnhardt. Deputy Barnhardt then identified himself as the deputy

defendant had spoken with the night before and again stated, "put your hands up." Defendant complied with this request and put his hands on top of his vehicle. Deputy Barnhardt then holstered his weapon.

Deputy Barnhardt conducted a pat-down search for weapons. Deputy Barnhardt started working down his arms and when he reached the armpit area he asked defendant, "Are you holding?" Deputy Barnhardt testified that he meant was defendant holding anything illegal, including controlled substances. Deputy Barnhardt also testified that defendant was not free to leave. Defendant responded, "You know I am." Deputy Barnhardt asked defendant where it was and he said it was in his front right watch pocket. Deputy Barnhardt reached into defendant's pocket and retrieved a small bag of marijuana and a bag of crack cocaine. Defendant was then placed in handcuffs.

The State argues *Benjamin* and its progeny control our analysis. However, those cases do not involve an individual being directed to exit his vehicle at gunpoint and being asked whether he was holding anything illegal at the beginning of the pat-down search before any objects were detected on his person.

In *State v. Wrenn*, our Supreme Court had to determine when the defendant was actually placed under arrest to resolve the question of whether the evidence seized from his vehicle should have been excluded on constitutional grounds. 316 N.C. 141, 146, 340 S.E.2d 443, 447 (1986). The Court stated that "when a law enforcement officer, by words or actions, indicates that an individual must

remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty." *Id.* (quotation and alteration omitted). In *Wrenn*, the arresting officer testified that he stopped the defendant's vehicle, opened the door, ordered defendant out of the vehicle at gunpoint, and advised the defendant to keep his hands where the officer could see them. *Id.* The Court held that "[a]pplying the rules stated above, we find that defendant was under arrest at the point the officers held him at gunpoint as a suspect in the reported crime." *Id.*

While we recognize that our Court has previously stated that "in conducting *Terry* stops, the investigating officers may take steps reasonably necessary to maintain the status quo and to protect their safety including the drawing of weapons[,]" *State v. Sanchez*, 147 N.C. App. 619, 625, 556 S.E.2d 602, 607 (2001) (citing *U.S. v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985)), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002), the Court did not address how such a factor interplays with whether *Miranda* was applicable during the investigative stop.

Based upon our Supreme Court's reasoning in *Wrenn*, we hold that defendant was under "the functional equivalent of arrest" at the time Deputy Barnhardt questioned defendant by asking, "Are you holding?" Because defendant was "in custody" at the time of this questioning, *Miranda* was applicable.

The State also argues on appeal that *Miranda* does not work to suppress physical evidence when actual coercion is absent, and, alternatively, that the physical evidence is admissible under the doctrine of inevitable discovery. While these arguments would appear to have merit based upon the facts of this case, neither were argued to the trial court during the suppression hearing. These arguments are not properly before us and we decline to consider them. See *State v. Cooke*, 306 N.C. 132, 136-37, 291 S.E.2d 618, 621 (1982) (refusing to allow the State to argue theories of admissibility on appeal which were not advanced during the defendant's suppression hearing).

The trial court properly concluded that the circumstances of the instant case rose to the level of a custodial interrogation and granted defendant's motion to suppress. The trial court's order is affirmed.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).