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NO. COA10-372
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. — Buncombe County No. 09 CRS 053938, 053939

FREDDIE TOWIA WOOD

Appeal by defendant from judgment entered 2 December 2009 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 29 November 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Daniel M. Blau for defendant.

ELMORE, Judge.

Freddie Towia Wood (defendant) appeals from the trial court's denial of his motion to suppress evidence. After careful consideration, we affirm the trial court's denial.

On or about 29 September 2009, defendant filed a pretrial motion to suppress evidence obtained as the result of an allegedly unconstitutional search that occurred on 26 March 2009. The trial court held a pretrial hearing on 2 December

2009 and denied the motion. Defendant preserved his right to appeal the denial of the motion, and he then entered a plea of guilty to one count of possession of marijuana up to half an ounce, once count of possession of drug paraphernalia, one count of possession with intent to sell or deliver a Schedule II controlled substance, and one count of maintaining a dwelling for the purpose of selling a controlled substance. The trial court thereafter consolidated the charges into one judgment, in accordance with the parties' plea agreement. The trial court imposed a suspended sentence of ten to twelve months' imprisonment and placed defendant on thirty months of supervised probation.

After hearing the State's evidence and both parties' arguments, the trial court found the following facts: On 26 March 2009, Asheville Police Officers Joshua Biddix and Brett Maltby received information from a confidential informant that someone was selling drugs at the Roadway Inn and Suites in Asheville. The informant, whom Officers Biddix and Maltby had found to be reliable on multiple occasions, stated that there was a twenty-five or twenty-six-year-old man selling "wholesale amounts" of cocaine "at the back door of the Roadway Inn, at the bottom of the hill of the parking area." The informant had

observed the man “in a red vehicle that appeared to be a PT Cruiser,” which is “a little short boxy looking vehicle with four tires on it[.]” According to the informant, the red vehicle had a Florida license plate with “551HAZ” written on it.

Officers Biddix and Maltby drove their marked police vehicle, which had the words “Drug Suppression Unit” clearly stenciled on the exterior, to the Roadway Inn. Officer Biddix left Officer Maltby at the hotel’s office and then left to park the marked vehicle in a less conspicuous location. At the office, Officer Maltby learned that defendant was driving a red Chevrolet HHR with Florida license plate 551HAZ and that defendant was staying at the Roadway Inn. A Chevrolet HHR, like a PT Cruiser, is a “little short, boxy vehicle with four tires on it[.]” The officers also learned that defendant had checked in to room 507 on 24 March 2009. The officers ran defendant’s record and saw that he had been charged with dealing in controlled substances, though he had not been convicted.

Shortly after their arrival at the hotel, Officer Biddix saw the red Chevrolet HHR with Florida license plate 551HAZ drive by him and into the hotel parking lot. Officer Maltby then approached the car to make contact with the driver. A woman, Ms. Mills, exited the vehicle. She told the officers

that she was defendant's girlfriend, and "[a]s she began to talk to them, she began to come unraveled and physically shaken, nervous and said that she had gone to get some food for him[,] but she didn't have a thing in her hands."

The two officers, Ms. Mills, and a hotel manager then went up the stairs to the fifth floor, where room 507 was located. While they were going up the stairs, they heard a "sudden opening and closing of a door somewhere at the top of the stairwell[,]" which sounded close to the fifth floor. At that time, the officers considered that, "if there was contraband in the room, they had no time to spend to go try to get a warrant to enter the room with a search warrant . . . because whatever contraband was there could be flushed." When they arrived, room 507 was locked. "[A]t the time, the probable cause was developing; if it hadn't already. The circumstances were urgent to get to the interior of that room and secure the contraband before anybody in there, if anybody was there, [could] destroy it."

At the officers' request, the hotel manager then opened the door to the hotel room.[1] Defendant was not inside the hotel

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[1] The trial court found as fact that the hotel manager opened the hotel room with the "assistance" of his master key, but both Officer Biddix and Officer Maltby testified that Ms. Mills gave

room, but once inside, they observed marijuana and "what appeared to be cocaine" on a table and approximately $200.00 in cash. Within thirty seconds of the officers entering the hotel room, defendant entered the hotel room. He immediately took responsibility for "all that was going on inside the room[.]"

The trial court also took notice of the fact that it would have taken the officers between two and three-and-a-half hours to obtain a search warrant. The trial court then concluded, "All those circumstances taken in to consideration, the totality of them, the Court finds exigent circumstances existed for those officers to take the actions that they did." The trial court then denied defendant's motion to suppress.

Defendant did not give oral notice of appeal in open court at the time of his sentencing. However, on 2 December 2009, through counsel, defendant filed a notice of appeal of the denial of his motion to suppress. Appellate counsel was appointed, but no notice of appeal from the judgment itself was ever filed.

This Court first heard defendant's appeal on 29 November 2010, and, on 4 January 2011, we filed an unpublished opinion dismissing defendant's appeal for failure to file a notice of

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the hotel manager *her* hotel key, and he used that key to open the hotel room.

appeal. On 5 January 2011, appellate counsel filed a petition for writ of certiorari. The State did not oppose the petition, which we granted on 19 January 2011. The original unpublished opinion was withdrawn on 24 January 2011, before the mandate, and we now issue this opinion in its place. We note that the original panel that heard this appeal consisted of Chief Judge Martin and Judges Elmore and Jackson. Because of the departure of Judge Jackson from the Court of Appeals, this case was reassigned to a panel consisting of Chief Judge Martin and Judges Elmore and Thigpen, by order on 2 June 2011.

On defendant's motion, we also allowed both parties to submit short supplemental briefs addressing the U.S. Supreme Court's recent decision in *Kentucky v. King*, ___ U.S. ___, 179 L. Ed. 2d 865 (2011).

We turn now to the merits of defendant's appeal. Defendant argues that the trial court erred by denying his motion to suppress. He argues that exigent circumstances did not exist to justify the officers' warrantless entry into defendant's hotel room. However, in the event we conclude that exigent circumstances *did* exist, defendant argues that the officers themselves created the exigency. Finally, defendant argues that the officers did not have probable cause at the time of their

warrantless entry. As to all of defendant's arguments, we disagree.

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.

State v. Biber, 365 N.C. 162, ___, ___ S.E.2d ___, ___ (2011). We review conclusions of law de novo. *Id.*

> The Fourth Amendment to the United States Constitution protects individuals "against unreasonable searches and seizures" and provides that search warrants may only be issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV; *see also* N.C. Const. art. I, § 20 ("General warrants . . . are dangerous to liberty and shall not be granted."). "'[S]earches and seizures inside a home without a warrant are presumptively unreasonable.'" *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)). "The governing premise of the Fourth Amendment is that a governmental search and seizure of private 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 involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982).

State v. McKinney, 361 N.C. 53, 57-58, 637 S.E.2d 868, 871-72 (2006). An exigent circumstance can include the imminent destruction of evidence. *State v. Guevara*, 349 N.C. 243, 250 506 S.E.2d 711, 716-17 (1998); *see also Minnesota v. Olson*, 495 U.S. 91, 100, 109 L. Ed. 2d 85, 95 (1990). For example, in *State v. Johnson*,

> we found "exigent circumstances" justifying a warrantless search. In *Johnson*, a police officer received a tip from a confidential reliable informant that the defendant was standing on the street in front of some apartments and offering cocaine for sale. The officer immediately proceeded to the apartments located about twenty minutes away from the police station. The officer did not obtain a search warrant. Upon arriving at the apartments and locating the defendant, the officer conducted an "emergency search" and discovered three bags of heroin. We concluded that the distance of the defendant from the police station and the "known mobility of the drug 'pusher,' justified the officer in proceeding directly to the defendant without first proceeding to a magistrate's office to obtain a search warrant which would have caused substantial delay in arriving at the scene and the probable absence of the purported drug violator."

State v. Mills, 104 N.C. App. 724, 730, 411 S.E.2d 193, 196 (1991) (quoting and explaining *State v. Johnson*, 29 N.C. App. 698, 701, 225 S.E.2d 650, 652 (1976)).

The United State Supreme Court recently explained the exigent circumstances exception and the "imminent destruction of

evidence" justification in *Kentucky v. King*, resolving differences among various state and federal courts as to the application of an exception to the exigent circumstances exception, known as the "police-created exigency doctrine." *King*, ___ U.S. at ___, 179 L. Ed. 2d at 876. "Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." *Id.* at ___, 179 L. Ed. 2d at 875. The Court explained both the doctrine and its frequent application in drug cases as follows:

> In applying this exception for the "creation" or "manufacturing" of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, as the Eighth Circuit has recognized, "in some sense the police always create the exigent circumstances." *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990). That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain. Persons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police. Consequently, a rule that precludes the

> police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

Id. at ___, 179 L. Ed. 2d at 875-76. The Court identified a "welter of tests devised by the lower courts" to determine when the police have manufactured the exigency, but the Court found most those tests to be either "fundamentally inconsistent with [its] Fourth Amendment jurisprudence," impractical, or otherwise "unsound."[2] *Id.* at ___, 179 L. Ed. 2d at 876-79. It adopted the following rule, which we follow here:

> [T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.

Id. at ___, 179 L. Ed. 2d at 876.

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[2] We note that defendant urges us to adopt the "reasonable foreseeability" test, which states that "police may not rely on an exigency if it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances." *King*, ___ U.S. at ___, 179 L. Ed. 2d at 878 (quotations and citation omitted). The U.S. Supreme Court rejected this rule both because it is unpredictable and because the Court had previously "rejected the notion that police may seize evidence without a warrant only when they come across the evidence by happenstance." *Id.* Accordingly, we decline to adopt the "reasonable foreseeability" test here.

Here, the trial court's findings of fact support its conclusion that exigent circumstances existed for Officers Biddix and Maltby to enter defendant's hotel room. "[T]he circumstances, viewed objectively, justify the action." *King*, ___ U.S. at ___, 179 L. Ed. 2d at 877 (quotations and citation omitted). The officers had reliable information that defendant was staying in room 507 and was dealing drugs at the hotel; they knew that, if defendant had been in his hotel room, it was possible that he had seen their marked police vehicle in the hotel parking lot; they had defendant's girlfriend, who was visibly nervous and claiming to be bringing defendant food, even though she had none; they heard a stairwell door slam near the fifth floor; and they knew that it was possible that, if defendant was aware of their presence, he could destroy the contraband before they were able to obtain a search warrant. In addition, there is no evidence that the officers created the exigency by engaging in or threatening to engage in conduct that violates the Fourth Amendment. They entered the room with the permission of one of its occupants, Ms. Mills, using her room key. They did not threaten to enter without permission unless they were admitted. *See King*, ___ U.S. at ___ n.4, 179 L. Ed. 2d at 876 n.4 ("There is a strong argument to be made that, at

least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted.”).

Accordingly, we conclude that the trial court properly found that exigent circumstances existed, that the police did not manufacture those exigent circumstances, and, thus, that the trial court did not err by denying defendant’s motion to suppress.

Defendant also argues that the trial court failed to find that the officers had probable cause to enter defendant’s hotel room. He bases this argument on the following statement by the trial court, which was part of its findings and conclusions, which he contends is too equivocal to constitute a finding that the officers had probable cause: “And, furthermore, at the time, *the probable cause was developing; if it hadn’t already*. The circumstances were urgent to these officers to get to the interior of that room and secure the contraband before anybody in there, if anybody was there, [could] destroy it.” (Emphasis added.) Defendant argues that the trial court’s statement that probable cause was “developing[,] if it hadn’t already” shows that the trial court did not believe that probable cause was

fully developed when the officers entered the hotel room. Because law enforcement must have probable cause in addition to exigent circumstances to justify a warrantless search, a lack of probable cause would be fatal to the State's case.

However, we are permitted to infer that the trial court concluded that probable cause existed from its ultimate conclusion. *See Biber*, 365 N.C. at ___, ___ S.E.2d at ___ ("In concluding that none of [the] defendant's constitutional rights were violated, the trial court implicitly concluded that the officers had probable cause to arrest [the] defendant.") (citing *State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc.*, 272 N.C. 591, 600, 158 S.E.2d 855, 863 (1968)). Accordingly, we hold that the trial court implicitly concluded that Officers Biddix and Maltby had probable cause to enter defendant's hotel room, and defendant's argument fails.

Accordingly, we affirm the trial court's decision to deny defendant's motion to suppress.

Affirmed.

Chief Judge MARTIN and Judge THIGPEN concur.

Report per Rule 30(e).