NO. COA11-105
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Buncombe County
No. 10 CRS 52384

AARON JEROME WRIGHT

Appeal by Defendant from judgment dated 31 August 2010 by Judge James L. Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

On 7 June 2010, Defendant Aaron Jerome Wright ("Wright") was indicted on one count of possession of a firearm by a felon. On 16 August 2010, Wright filed a motion to suppress evidence recovered from his home during a warrantless search conducted prior to his arrest. Wright's motion was heard on 27 August

2010 in Buncombe County Superior Court, the Honorable Alan Z. Thornburg presiding.

The evidence presented at the suppression hearing tended to show the following: On 6 February 2010, the Asheville Police Department ("APD") received an anonymous tip regarding possible drug activity at Wright's residence. On 2 March 2010, Officer Brandon Morgan ("Officer Morgan"), the APD officer assigned to investigate the tip, observed Wright's residence for two hours. After observing no unusual activity, Officer Morgan, accompanied by Officer Jonathan Brown ("Officer Brown") and Officer Steven Hendricks ("Officer Hendricks"), knocked on Wright's door to speak with him about the drug tip.

Officer Morgan testified at the hearing that after the officers knocked on the door, Wright initially opened the door "halfway," but after Officer Morgan "engaged in conversation with [Wright] . . . [Wright] stepped back . . . and once he stepped back he opened the door completely open[] and stepped back behind the door as if to say 'come on in.'" Wright, however, testified that upon opening the door, Officer Morgan said, "'Please step back; please step back,'" and then Officer Morgan "pushed his way in," "backing [Wright] up in the foyer." Inside Wright's residence, Officer Morgan informed Wright and

Wright's fiancée Natasha Roberts ("Roberts"), who also lived at the residence and had two warrants out for her arrest, about the anonymous tip regarding drug activity at the residence.

All three officers testified at the hearing that they smelled the odor of marijuana upon entering the home. Officer Morgan testified that when he confronted Wright about the smell of marijuana in the residence, Wright admitted to smoking marijuana just before the officers arrived. After observing multiple people going upstairs and downstairs, Officers Brown and Hendricks conducted a "protective sweep," "looking in places where a human being could be hidden or be at."

While the officers were inside Wright's residence, Wright and Roberts repeatedly asked the officers why the officers were searching their home. Roberts told the officers that she did not want them searching the residence and called an attorney. Officer Morgan described Roberts as "hysterical," as if "[s]he just could not believe the police were in her home." Roberts asked to leave the residence with her children, but Officer Morgan told her that he could not let her leave.

When Officers Brown and Hendricks completed their "protective sweep," Officer Hendricks informed Officer Morgan that the marijuana odor was strongest in an upstairs bedroom.

Officer Morgan then asked Wright and Roberts for consent to search the home; Wright and Roberts denied consent numerous times. Officer Morgan told Wright that Wright could either consent to the search or Officer Morgan would "get a search warrant." All three officers testified at the hearing that after Officer Morgan asked Officer Hendricks for the keys to the squad car so that he could go apply for a search warrant, Wright stated, "Go ahead and search and get it over with." Wright, however, testified that he does not remember this incident or giving consent to search his home at any time.

Upon searching the home, Officer Brown found a loaded handgun in the closet of the bedroom that smelled of marijuana. No marijuana or drug paraphernalia was found.

Following the hearing, on 27 August 2010, Judge Thornburg entered an order denying Wright's motion to suppress the evidence of the firearm found at his residence. In the order, Judge Thornburg made the following findings:

> 5. After [Officer] Morgan knocked on the door the officers could hear movement in the house and the resident took a couple of minutes to respond to the knock. [ ] Wright eventually answered the door.
>
> 6. Officers asked if they could come in[]side the apartment and Wright opened the door and made a gesture inviting the officers in the apartment. Officer Morgan

> observed the odor of burnt marijuana as soon as the door was opened, and the other two officers observed the odor once inside the apartment.
>
> . . . .
>
> 8. Wright continued to ask the officers why they were there, and who had made the complaint. [Officer] Morgan asked for consent to search the apartment, and Wright responded with his prior questions. [Officer] Morgan confronted Wright about the odor of marijuana and Wright stated that [] he had smoked some marijuana in the apartment shortly before the officers [sic] arrival.
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> . . . .
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> 10. [Officer] Morgan then asked for consent to search the room where the odor was coming from. Wright asked what would happen if he denied consent. [Officer] Morgan stated that he would go to the magistrate's office and apply for a search warrant. Wright denied consent. [Officer] Morgan asked for the keys to the patrol car from Officer Hendri[cks] and started out the door when Wright told [Officer] Morgan not to leave and to "go ahead and search."
>
> 11. Officer Brown searched the room where the odor was coming from and did not find any drugs, but did find a loaded handgun in a box containing Wright's social security card.

Based on the foregoing findings, Judge Thornburg concluded as follows:

> 2. The officers were invited into the apartment by [Wright].

> . . . .
>
> 4. When [Officer] Morgan stated that he was going to go request a search warrant there was sufficient probable cause for the officers to obtain a search warrant based on the tip, odor of marijuana, and [Wright's] admission that he had recently smoked marijuana in the apartment.
>
> 5. [] Wright did freely and voluntarily give the officers consent to search the room where the handgun was found.
>
> 6. The court concludes that there are no grounds to suppress any evidence obtained as a result of the search.

On 31 August 2010, pursuant to a plea agreement, Wright pled guilty to possession of a firearm by a felon and reserved his right to appeal the denial of his motion to suppress. Judge James L. Baker, Jr. accepted Wright's guilty plea and sentenced Wright to 14 to 17 months in prison. Wright filed written notice of appeal on 2 September 2010.

Discussion

The standard of review on appeal from a motion to suppress evidence is "strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence." *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005). If the trial court's findings are supported by competent evidence, they are conclusive on appeal, "even if the

evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). If the trial court's findings are supported by competent evidence, then this Court reviews "whether the findings support the trial court's ultimate conclusion." *Hernandez*, 170 N.C. App. at 304, 612 S.E.2d at 423. "[T]he trial court's conclusions of law are reviewed *de novo* and must be legally correct." *Id.*

In this case, Wright argues that the trial court erred in finding that Wright consented to the police officers entering the residence. We disagree.

Our Supreme Court has held that

> [i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given.

State v. Smith, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (internal quotation marks and citations omitted). Consent means a voluntarily-given statement to a police officer, giving the officer permission to make a search. N.C. Gen. Stat. § 15A-221(b) (2009). As previously held by this Court:

> In determining whether under the totality of

> the circumstances defendant's nonverbal response in this case constituted a statement within the meaning of consent under N.C. Gen. Stat. § 15A-221(b), we are guided by *Black's Law Dictionary* definition of the word "statement" as "a verbal assertion or nonverbal conduct intended as an assertion." *Black's Law Dictionary*, 1416 (7th ed. 1999). Thus, a statement need not be in writing *nor orally made. Rather, the use of nonverbal conduct intended to connote an assertion is sufficient to constitute a statement.*

State v. Harper, 158 N.C. App. 595, 603, 582 S.E.2d 62, 67–68 (2003) (quoting *State v. Graham*, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002), *disc. review denied*, 356 N.C. 685, 578 S.E.2d 315 (2003)) (emphasis in original).

In *Harper*, this Court held that opening a door for a police officer to enter the premises is sufficient assertive conduct for consent. 158 N.C. App. at 603, 582 S.E.2d at 68. In that case, a police officer knocked on the defendant's hotel room door, identified himself as a police officer, engaged the defendant in conversation, and then asked to enter the hotel room. *Id.* Initially, the defendant "opened the door slightly, a crack." *Id.* As the defendant and police officer continued talking, the defendant "opened [the door] slightly more," though remaining "in a posture suggesting [that he] did not want [the police officer] to enter." *Id.* However, after the police

officer asked if he could enter the room, the defendant "stepped back from the threshold [and] the door opened to its full extension." *Id.* "The [d]efendant said nothing[, his] hand was still on the doorknob, but his body had moved and the door had opened to its full extent." *Id.* This Court held that the defendant's actions were sufficient to show consent. *Id.*

In this case, according to the testimony of Officers Morgan, Brown, and Hendricks, Wright initially opened the door only half-way. Similar to *Harper*, after conversing with the uniformed police officers and upon Officer Morgan's request to enter Wright's residence, Wright ultimately stepped back from the doorway and opened the door wide enough for the police officers to enter the residence. Under *Harper*, Wright's action of opening the door and admitting the police officers into his residence constituted consent, even though Wright never verbally consented to the police officers entering his home. Although Wright's testimony conflicts with the officers' testimony, the testimony of the three police officers is competent evidence to support the trial court's finding that Wright invited the police officers into his residence. This finding of fact in turn supports the court's conclusion that the officers "were invited

into the apartment by [Wright]." Wright's argument is, therefore, overruled.

Wright next argues that even if he did consent to the police officers entering his residence, he did not voluntarily consent to the police officers searching his home. Again, we disagree.

"For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary." *Smith*, 346 N.C. at 798, 488 S.E.2d at 213 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222–27, 36 L. Ed. 2d 854, 860–63 (1973)). "Whether the consent is voluntary is to be determined from the totality of the circumstances." *Id.* In order to be voluntary, the consent must be free from duress and coercion. *State v. Powell*, 297 N.C. 419, 425–26, 255 S.E.2d 154, 158 (1979).

In this case, Wright argues his consent was rendered involuntary by the following coercive conditions: Wright had previously denied consent; the three uniformed officers had "rounded up" the residents in the living room; the officers would not let Roberts leave the home; Officer Morgan threatened to "get" a warrant; and the officers brought up the matter of

Roberts' misdemeanor arrest warrants. In our view, these facts are not sufficient to show duress or coercion.

This Court has previously held that "it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case." *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978). A police officer's statement that he will "get a search warrant" after a defendant denies consent to search is not sufficient to cause duress or coercion. *State v. Davis*, 26 N.C. App. 696, 699, 217 S.E.2d 131, 133 (holding that police officer's statement that he "could get a search warrant" after defendant denied consent was not coercive because the officer had "ample grounds to obtain a search warrant, and there was nothing improper in [informing defendant]"), *cert. denied*, 288 N.C. 394, 218 S.E.2d 467 (1975).

In this case, the testimony of the officers tends to show that Officer Morgan threatened to do what he was authorized to do under the law, *i.e.*, obtain a search warrant based on the drug tip and the odor of marijuana. *See State v. Downing*, 169 N.C. App. 790, 796, 613 S.E.2d 35, 39 (2005) ("Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search."). Furthermore, any implicit threat to

arrest Roberts based on her arrest warrants was not duress. *Paschal*, 35 N.C. App. at 241, 241 S.E.2d at 94 (holding that it is not duress to threaten to take any measure authorized by law and the circumstances of the case). Finally, it would not have been unlawful for Officer Morgan to require the occupants of Wright's residence to wait at the residence until a search warrant could be obtained. *See Segura v. United States*, 468 U.S. 796, 810, 82 L. Ed. 2d 599, 612 (1984) (holding that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought" is not unlawful); *Downing*, 169 N.C. App. at 796, 613 S.E.2d at 39 (holding that plain smell of drugs is evidence to conclude there is probable cause for a search); *see also* N.C. Gen. Stat. § 15A-256 (2009) ("An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant."). Accordingly, we conclude that the totality of the circumstances does not render Wright's consent involuntary. Thus, the trial court's conclusion that the search of Wright's home was undertaken pursuant to Wright's lawfully given consent was not error.

Based on the foregoing, we conclude that the trial court did not err in denying Wright's motion to suppress the evidence recovered as a result of the search of his residence. The order of the trial court is

AFFIRMED.

Judges ERVIN and BEASLEY concur.

Report per Rule 30(e).