NO. COA11-325
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 09 CRS 542-44, 52759, and 55628-31

LEMAR DARIUS JOHNSON

Appeal by defendant from judgments entered 15 July 2010 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

William B. Gibson, for defendant-appellant.

ERVIN, Judge.

Defendant Lemar Darius Johnson appeals from judgments sentencing him to an active term of imprisonment based upon his convictions for possession of a firearm by a convicted felon and to a consecutive suspended sentence based on his consolidated convictions for possession of marijuana with the intent to sell or deliver, possession of drug paraphernalia, and maintaining a dwelling for the purpose of keeping or selling controlled substances. On appeal, Defendant contends that the trial

court's judgments rested upon the erroneous denial of his motions to suppress statements that he made after being taken into custody and various items of physical evidence seized from a room in an apartment occupied by his mother. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On the morning of 29 April 2009, officers of the Asheville Police Department's Gang Task Force were investigating an anonymous threat that had allegedly been made against a judicial official by an individual known as "Twitty." Since Defendant was known to be one of "Twitty's" associates, the officers went to 21 River Glen Drive, an address which Defendant had given as his residence at the time of a traffic stop several months earlier. At the time that the investigating officers arrived at 21 River Glen Drive, they knew that drug activity had been reported to have been occurring at that location.

After the investigating officers arrived at 21 River Glen Drive, Defendant's mother, Phyllis Harris, answered the door. Although Ms. Harris denied that Defendant was present, she

consented to a search of the residence for Defendant or "Twitty."

Upon entering the apartment, investigating officers detected an odor of marijuana. The odor became stronger as the officers entered the first bedroom on the left. At that time, the officers observed a backpack on the floor from which an odor of marijuana emanated and from which small bags, described as "apple seed bags," protruded. The investigating officers recognized these "apple seed bags" as items frequently used for the purpose of packaging controlled substances. In addition, articles of adult male clothing, adult male shoes, and correspondence addressed to Defendant at 21 River Glen Drive were observed in plain view in the bedroom.

After making these observations, Officer Brett Maltby opened the backpack, looked inside, and observed two mason jars containing a leafy, green substance which the investigating officers believed to be marijuana. The officers did not remove, open, or analyze the mason jars, their contents, or anything else in the backpack at that time. Instead, while Officers Maltby and Leo McCabe left to obtain a search warrant, Detective Michael Lamb and Officers Louis Tomasetti and Brandon Morgan remained at 21 River Glen Drive for the purpose of securing the residence.

When Officer Tomasetti left the residence to get lunch for the officers, he observed Defendant jogging through the apartment complex. Officer Tomasetti asked Defendant to accompany him to 21 River Glen Drive, handcuffed Defendant, and escorted him to the residence. After waiving his *Miranda* rights, Defendant made several statements to the investigating officers, including admissions that he "smokes marijuana but does not sell it" and that he owned a small amount of marijuana and the backpack containing the mason jars. After the issuance of a search warrant authorizing a search of the residence at 21 River Glen Drive, investigating officers seized a number of items of evidence, including the contents of the backpack and a firearm.

B. Procedural History

On 26 February 2009, a Magistrate's Order was issued charging Defendant with possessing marijuana on that date with the intent to sell, deliver, or manufacture. On 29 April 2009, Magistrate's Orders were issued charging Defendant with committing the following offenses on that date:

> 1) possession of marijuana with the intent to manufacture, sell, or deliver;
>
> 2) knowingly and intentionally keeping or maintaining a dwelling house resorted to by persons using controlled substances;

3) possessing a firearm after having been convicted of a felony; and

4) knowingly using or possessing drug paraphernalia.

On 14 September 2009, the Buncombe County grand jury returned bills of indictment charging Defendant with possession of marijuana with the intent to sell or deliver and possession of drug paraphernalia on 26 February 2009, possession of marijuana with the intent to sell or deliver, maintaining a dwelling house for the purpose of keeping or selling marijuana, possession of a firearm by a convicted felon, felony possession of marijuana, and possession of drug paraphernalia on 29 April 2009.

On 30 October 2009, Defendant moved to suppress certain statements made by him and evidence seized from his person at the time that he was taken into custody on 29 April 2009 on the grounds that they had been obtained as the result of an unlawful arrest. Defendant's suppression motion came on for hearing at the 25 January 2010 criminal session of the Superior Court of Buncombe County before Judge Alan Z. Thornburg. At the conclusion of the hearing held with respect to Defendant's initial suppression motion, Judge Thornburg entered an order finding that the officers had probable cause to arrest Defendant and that his suppression motion should be denied.

On 9 July 2010, Defendant filed a second suppression motion, in which he sought the suppression of various items of

physical evidence seized from the residence at 21 River Glen Drive on 29 April 2010. Defendant's second suppression motion came on for hearing before the trial court on 12 July 2010. At the conclusion of the hearing held with respect to Defendant's second suppression motion, the trial court, after suppressing certain evidence seized from Defendant's computer, denied the remainder of Defendant's motion.

Following the denial of his second suppression motion, Defendant entered a negotiated plea of guilty to possessing marijuana with the intent to sell or deliver and possessing drug paraphernalia on 26 February 2009 and to possessing marijuana with the intent to sell or deliver, possessing a firearm despite having a prior felony conviction, possessing drug paraphernalia, and maintaining a dwelling where drugs are kept or used on 29 April 2009.[1] At the time that Defendant entered his pleas of guilty, he reserved the right to seek appellate review of the trial court's rulings concerning his suppression motions. On 15 July 2010, the trial court entered judgments sentencing Defendant to 16 to 20 months imprisonment based upon his conviction for possession of a firearm by a felon, consolidating the remaining convictions for judgment, and sentencing Defendant

[1] In return for Defendant's guilty pleas, the State agreed to dismiss two counts of felony possession of marijuana and to make certain sentencing concessions.

to a consecutive term of 6 to 8 months imprisonment based upon those convictions. The trial court suspended the second of these two sentences on the condition that Defendant successfully complete 30 months of supervised probation. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Standard of Review

On appeal, Defendant challenges the decisions by Judge Thornburg and the trial court to deny his suppression motions. According to N.C. Gen. Stat. § 15A-977(f), trial judges are required to make findings of fact and conclusions of law in the course of ruling on a suppression motion. Appellate "review of a denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct." *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

In challenging the lawfulness of the orders denying his second suppression motion, Defendant contends that Findings of Fact Nos. 51, 86, 88, and 90 are, in actuality, conclusions of

law and that, to the extent that they are properly classified as factual findings, they lack the necessary evidentiary support.

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through "logical reasoning from the evidentiary facts" is more properly classified a finding of fact. *Quick*, 305 N.C. at 451, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)).

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). As a result of the fact that the "findings" in question result from a process involving "logical reasoning" rather than constituting simple statements of fact, we agree with Defendant that Findings of Fact Nos. 51, 86, 88, and 90 are conclusions of law and will treat them as such throughout the remainder of this opinion.

B. Probable Cause for Search Warrant

In challenging the trial court's decision to deny his second suppression motion, Defendant contends that the investigating officers' initial intrusion into the backpack was unlawful because it was not authorized by a properly issued search warrant and because the investigating officers lacked the

probable cause needed to support the issuance of a warrant authorizing a search of the 21 River Glen Drive apartment until they discovered the mason jars apparently containing marijuana at the time that they opened the backpack. As a result, Defendant contends that the trial court erred by denying his second suppression motion. We disagree.

The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution guarantee the right to be free from unreasonable searches and seizures. According to the United States Supreme Court, the constitutional protections against unreasonable searches and seizures "include the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas v. Sanders*, 442 U.S. 753, 758, 99 S. Ct. 2586, 2590, 61 L. Ed.2d 235, 241 (1979). A valid search warrant must be based on probable cause, defined as "a reasonable ground for belief of guilt." *Carroll v. United States*, 267 U.S. 132, 161, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881)). Although there are exceptions to the warrant requirement, "the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated." *Arkansas v. Sanders*, 442 U.S. at 760, 99 S. Ct. at

2591, 61 L. Ed.2d at 242. Among these exceptions is the "inevitable discovery" rule, which applies when "the police would have obtained that evidence if no misconduct had taken place." *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed.2d 377, 387 (1984). As a result, evidence which would inevitably have been discovered despite the occurrence of otherwise unlawful police conduct is not subject to suppression. *Id.* at 448, 104 S. Ct. at 2511, 81 L. Ed.2d at 390.

In the present case, the investigating officers came to the residence at 21 River Glen Drive during the course of their search for "Twitty." After receiving permission to search the residence for Defendant or "Twitty," the officers detected an odor of marijuana and observed drug paraphernalia, male clothing, and correspondence addressed to Defendant in plain view in a bedroom. As the trial court determined, the available evidence, exclusive of the mason jars containing a substance believed to be marijuana, provided ample justification for the issuance of the requested search warrant. *See State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) (holding that an officer's detection of the odor of marijuana in a vehicle is sufficient to establish probable cause to search that vehicle for marijuana). After the issuance of the requested search warrant, investigating officers would have

inevitably discovered the two mason jars of marijuana located within the closed portion of the backpack and the other evidence that Defendant sought to have suppressed, including the firearm. We reach this conclusion for a number of reasons, including the fact that the search warrant that the investigating officers ultimately obtained specifically authorized them to search for and seize "weapons to include but not [be] limited to: hand guns, shot guns, long rifle, auto weapons (both hand held and shoulder fired);" "controlled substance[s;]" and "drug paraphernalia" located anywhere within the residence. As a result, the trial court correctly denied Defendant's second suppression motion on the basis of the inevitable discovery rule.

C. Statements by Defendant Incident to Arrest

Secondly, Defendant contends that Judge Thornburg erred by denying his motion to suppress the statements that he made to investigating officers after he was detained. In essence, Defendant contends that, in the absence of the information obtained as a result of the discovery of mason jars apparently containing marijuana in the backpack, the investigating officers lacked probable cause to place him under arrest. We disagree.

"An arrest is constitutionally valid whenever there exists probable cause to make it." *State v. Wooten*, 34 N.C. App. 85,

88, 237 S.E.2d 301, 304 (1977). A showing of probable cause requires "only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983)). Probable cause exists when there is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973).

At the time that Defendant was apprehended, investigating officers had detected or observed an odor of marijuana, drug paraphernalia, male clothing and shoes, and correspondence addressed to Defendant in plain view in a room located in a residence at which Defendant's mother answered the door and which Defendant had listed as his residence only two months earlier. In addition, investigating officers had received an anonymous tip regarding drug activity involving a black male with dreadlocks who resided in the apartments in question. Finally, Defendant had previous drug-related convictions. In light of these facts and circumstances, we conclude that there was ample justification for Defendant's arrest for possession of drug paraphernalia and maintaining a dwelling at which

controlled substances were used or sold without any consideration of the mason jars that apparently contained marijuana. As a result, Judge Thornburg did not err by denying Defendant's first suppression motion.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Judge Thornburg and the trial court did not err in denying Defendant's motions to suppress. As a result, the trial court's judgments should remain undisturbed.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).