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NO. COA11-384
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Brunswick County
No. 10 CRS 50018
10 CRS 50019

JASON THOMAS DAIL

Appeal by the State from order entered 21 December 2010 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 27 September 2011.

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

Paul M. Green, attorney for defendant.

ELMORE, Judge.

The State appeals an order entered 21 December 2010 granting a pretrial motion of Jason Thomas Dail (defendant) suppressing all evidence obtained as a result of a search of his vehicle. After careful consideration, we affirm the decision of the trial court.

On 1 January 2010, defendant was at the residence of Jeffrey Lewis when the Brunswick County Sheriff's Department responded to a 911 call regarding the possible sale of drugs at the residence. Lewis consented to a search of his residence, and narcotics officers uncovered a small amount of marijuana. Lewis told the officers that the marijuana belonged to him. Deputy Bryan Carlisle then asked defendant for consent to search his person. Defendant consented to the search, and no contraband or weapons were found on his person.

Next, Deputy Carlisle asked defendant to step outside. Defendant was not placed under arrest at that time, but Deputy Carlisle later admitted that defendant was not free to leave. Deputy Carlisle then asked defendant if he was under the influence of alcohol, and defendant admitted that he was. Deputy Carlisle next asked defendant for permission to search his vehicle. Defendant refused to give consent for his vehicle to be searched. Deputy Carlisle then used his canine to conduct an exterior sniff of defendant's vehicle. During the sniff, the canine alerted Deputy Carlisle to the passenger door. Based on this information, Deputy Carlisle believed he had probable cause to search the vehicle. Deputy Carlisle placed defendant in handcuffs, and then he moved towards the vehicle to begin his

search. Immediately before Deputy Carlisle opened the door to the truck, defendant confessed that he had marijuana in the vehicle. Deputy Carlisle then searched the vehicle, where he discovered marijuana and powder cocaine.

Defendant was arrested and charged with felony possession of marijuana and cocaine. On 13 August 2010, defendant filed a pre-trial motion to suppress evidence of the search. Defendant argued that the evidence seized by the Brunswick County Narcotics Officers was illegally obtained in violation of the U.S. Constitution and the N.C. Constitution. On 15 November 2010, a hearing was held regarding defendant's motion to suppress. On 20 December 2010, the trial court entered an order granting defendant's motion. In that order the trial court made several conclusions stating in sum that: 1) the evidence was seized pursuant to an illegal seizure of defendant; 2) defendant was illegally seized and placed in custody without reasonable suspicion; 3) statements made by defendant prior to his arrest were invalid because they were made while he was in custody without being given his Miranda rights. The State now appeals.

The State first argues that the trial court erred in granting defendant's motion to suppress. Specifically, the State argues that 1) defendant was not seized, 2) the officers

had reasonable suspicion to detain defendant, and 3) any evidence discovered was not discovered as a result of any seizure of defendant or any illegal search of his vehicle. We disagree.

When reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced.

State v. Wilkerson, 363 N.C. 382, 433-34, 683 S.E.2d 174, 205 (2009) (quotations and citations omitted).

Here, the State challenges several findings of fact as not being based on competent evidence. First, the State challenges the finding that the Brunswick County Sheriff's Department responded to an anonymous 911 call. The record shows that during the motion to suppress hearing, Deputy Carlisle testified that he did not speak to the person who made the 911 call. However, he explained that when he arrived at Lewis's residence, Lewis stated "Did she call you guys?" Deputy Carlisle further explained that he understood the term "she" to be Lewis's ex-wife. We conclude that these facts are sufficient to support the finding that the 911 call was made by an anonymous caller. Deputy Carlisle admittedly never spoke to the person who made

the 911 call. Also, there is no evidence in the record to indicate the identity of the caller, or to suggest that the caller made his or her identity known to the officers. Furthermore, this Court notes that the identity of the caller had no bearing on the trial court's decision to grant the motion to suppress. Therefore, the State's challenge of the language of this finding of fact appears to be irrelevant.

Next, the State challenges the findings that Deputy Carlisle seized defendant and that the State consented during the hearing that defendant was not free to leave. The U.S. Supreme Court has held that "[a]n individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (quotations and citations omitted). This determination must be made under a totality of the circumstances test. *Id.* Here, the record indicates that defendant was at Lewis's residence when two officers, Deputy Carlisle and Corporal Medlin, entered and searched the premises. Deputy Carlisle then searched defendant for narcotics, and questioned defendant about whether he used

narcotics. Deputy Carlisle also asked defendant to step outside. Once outside, defendant and Deputy Carlisle were alone, and Deputy Carlisle continued to question defendant. We conclude that these facts are sufficient to support the finding that Deputy Carlisle seized defendant. It is unlikely that a reasonable person under the circumstances would feel free to ignore the officers and go about his business when 1) he is searched, 2) he is questioned, and 3) he is asked to move outside to be alone with one of the officers. In addition, the record also indicates that during the motion to suppress hearing Deputy Carlisle was asked whether defendant was free to leave. Deputy Carlisle responded "No, he wasn't." This exchange is sufficient to support the finding that the State consented that defendant was not free to leave. Therefore, we conclude that this finding of fact is entirely supported by sufficient evidence.

Lastly, the State challenges that the finding that defendant was kept on the porch for seven to ten minutes. Here, the record indicates that during the motion to suppress hearing Deputy Carlisle testified that he talked to defendant on the front porch for approximately five minutes. Corporal Medlin also testified that Deputy Carlisle questioned defendant for

"[f]ive, six, seven minutes." Corporal Medlin also testified that it took Deputy Carlisle an additional "couple of minutes" to conduct the exterior sniff of defendant's vehicle. Defendant was on the porch and not free to leave at any time during the canine sniff. We conclude that these facts are sufficient to support the finding that defendant was kept on the porch for seven to ten minutes.

Therefore, we conclude that each of the findings of fact challenged by the State are supported by sufficient evidence. Next, this Court must determine whether the findings of fact support the conclusions of law. Here, the trial court made three conclusions of law. These conclusions state in sum that: 1) The evidence was seized pursuant to an illegal seizure of defendant; 2) defendant was illegally seized and placed in custody without reasonable suspicion; 3) statements made by defendant prior to his arrest were invalid because they were made while he was in custody without being given his Miranda rights. We will address each conclusion of law individually.

We will first address whether the findings of fact support the conclusion that defendant was illegally seized without reasonable suspicion. Our Supreme Court has held that:

The Fourth Amendment to the United States
Constitution protects the right of the

people to be secure . . . against unreasonable searches and seizures. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Article I, Section 20 of the North Carolina Constitution provides similar protection against unreasonable seizures.

State v. Campbell, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005) (quotations and citations omitted). "Seizure of a person within the meaning of the Fourth Amendment occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 662-63, 617 S.E.2d at 13 (quotations and citation omitted). When an officer seizes an individual to conduct an investigatory stop, the officer must have "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.* at 664, 617 S.E.2d at 14 (citation omitted).

Here, the findings of fact establish that 1) Deputy Carlisle searched defendant, 2) Deputy Carlisle had defendant step onto the front porch of the residence, and 3) defendant was not free to leave at any point. Therefore, the findings of fact support the conclusion that defendant was seized. This Court must next determine if the findings of fact support the conclusion that Deputy Carlisle lacked reasonable suspicion to seize defendant. Finding of fact 5 states that 1) Deputy

Carlisle believed that defendant was impaired and had an odor of alcohol about his person and 2) based on these factors, Deputy Carlisle seized defendant. As our Supreme Court has noted, reasonable suspicion is derived only from objective facts indicating that an individual is involved in criminal activity. It was not illegal for defendant to be intoxicated while sitting inside of a private residence. In fact, Deputy Carlisle acknowledged that defendant committed no crime by being intoxicated:

State: He [was] sitting in the house impaired, correct?

Deputy Carlisle: Correct.

State: That is not a violation of any law, is it, sir?

Deputy Carlisle: No, sir, it is not.

Therefore, we conclude that finding of fact 5 supports the conclusion that Deputy Carlisle lacked reasonable suspicion to seize defendant.

Next, we will address whether the findings of fact support the conclusion that the evidence was seized pursuant to an illegal seizure of defendant. "The fruit of the poisonous tree doctrine, a specific application of the exclusionary rule, provides that [w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be

suppressed, but all evidence that is the fruit of that unlawful conduct should be suppressed." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (quotations and citation omitted).

Here, the findings of fact indicate that 1) defendant was seized by Deputy Carlisle, 2) after being seized, defendant admitted to Deputy Carlisle that he owned the truck parked at Lewis's residence, 3) defendant refused to consent to a search of his truck, 4) Deputy Carlisle searched defendant's truck and discovered marijuana and powder cocaine. We conclude that these findings support the conclusion that the evidence was obtained as the result of an illegal seizure of defendant.

Finally, we will address whether the findings of fact support the conclusion that statements made by defendant prior to his arrest were invalid because they were made while he was in custody without being given his Miranda rights. "[P]olice officers are not required to administer Miranda warnings to everyone whom they question." *State v. Waring*, ___ N.C. App. ___, ___, 701 S.E.2d 615, 633 (2010) (citation omitted). "The proper inquiry for determining whether a person is in custody for purposes of Miranda is based on the totality of the circumstances[.]" *Id.* The test is whether a "reasonable person

in defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree." *Id.* at ____, 701 S.E.2d at 633 (quotations and citation omitted).

Here, the findings of fact indicate that 1) defendant was searched, 2) defendant was questioned, 3) defendant was seized, and 4) defendant was not free to leave. Therefore, we conclude that these findings support the conclusion that defendant was in custody. Furthermore, the State does not contend that defendant was given his Miranda rights. Therefore, we conclude that this conclusion of law is entirely supported by the findings of fact.

In sum, we conclude that the trial court did not err in granting defendant's motion to suppress the evidence.

The State next argues that the trial court erred in suppressing statements or confessions made by defendant prior to his arrest. Specifically, the State argues that the statement by defendant, that he had marijuana in his vehicle, should not have been suppressed, because defendant was not in custody at that time.

As we have already noted, the test for determining if an individual is in custody is whether a "reasonable person in defendant's position would have believed that he was under

arrest or was restrained in his movement to that significant degree." *Id.* at ____, 701 S.E.2d at 633 (quotations and citation omitted).

Here, defendant was searched, questioned, and handcuffed. Based on these facts, we conclude that a reasonable person in defendant's position would have believed that he was under arrest. Furthermore, Deputy Carlisle admitted that he did not read defendant any Miranda warnings prior to the statement being made. Accordingly, we conclude that the trial court did not err in suppressing statements made by defendant prior to his arrest.

Affirmed.

Judges McGEE and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).