NO. COA11-49
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Durham County
No. 09 CRS 41186

JAMES KENNETH BELL

Appeal by Defendant from judgment entered 17 December 2009 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 10 May 2011.

Attorney General Roy Cooper, by Associate Attorney General David Shick, for the State.

Parish & Cooke, by James R. Parish, for Defendant.

BEASLEY, Judge.

James Kenneth Bell (Defendant) appeals pursuant to N.C. Gen. Stat. § 15A-979(b) from the trial court's order denying his motion to suppress. We affirm the trial court's order.

On 3 February 2009, Defendant was charged with two counts of possession of a firearm by a felon and maintaining a residence for the purpose of keeping and selling cocaine and marijuana. On 15 June 2009, Defendant was indicted on one count

of possession of a firearm by a felon. Defendant filed a motion to suppress any evidence obtained as a result of a warrantless search of his residence and a subsequent search pursuant to a warrant. Following a hearing on 12 November 2009, Defendant's motion was denied by written order entered 16 December 2009. The trial court's findings of fact, none of which Defendant challenges on appeal, set forth the circumstances of the searches of Defendant's residence as follows.

On 3 February 2009, Durham Police Department Investigators J.R. Craig and T.B. McMaster were parked at an apartment complex when, around 1:50 p.m., they observed three black males walking toward an apartment building. One of the men scaled the side of the building and climbed up to the balcony of a second-story apartment. The other two men walked toward the stairwell of the same building. The investigators observed the male who had climbed to the second story attempt to enter the apartment at 521 Discovery Way via the balcony door; after thirty to forty-five seconds, he successfully gained entry. Based upon their training and experience, the investigators believed they were witnessing a breaking and entering and contacted Investigators T.D. Douglass and R.C. Swartz, who arrived within minutes.

Investigators McMaster and Douglass approached the front door of Apartment 521 and knocked. They received no response but heard movement from within the apartment and knocked again. Defendant answered the door thirty to forty-five seconds later, and Investigator McMaster smelled smoke coming from inside. The investigators identified Defendant, who was shaking and nervous, as one of the two men seen walking to the stairwell. They asked Defendant if he lived in the apartment and why another male had climbed up to the balcony and entered through the balcony door. Defendant indicated that he lived in and had a key to the apartment, but provided neither a key nor any form of identification upon the officers' request.

Moments later, Investigators Craig and Swartz, who had been waiting at the ground level to cover possible escape routes, joined the other officers at the front door of the apartment. At that time, no officer had been provided any proof that any of the three males lawfully resided in Apartment 521, nor were the others aware of the number of people inside. Therefore, Investigators McMaster and Craig took less than one minute to conduct a brief sweep of the apartment to ensure that "people" inside the residence were not in need of assistance. The three males were present outside the apartment when the officers

entered and no other people were found therein. During the sweep of the apartment, however, Investigator McMaster saw a small amount of marijuana on the kitchen floor. At some point thereafter, Defendant produced identification showing Apartment 521 as his address and refused to consent to a search. Over the next hour, Investigator Craig applied for and received a warrant to search Apartment 521, pursuant to which two handguns were recovered.

The trial court concluded that: "based on their observations" and "the totality of the circumstances," the investigators "had probable cause to believe a crime was being committed at 521 Discovery Way," and "exigent circumstances" thus justified their warrantless entry; "[t]he entry into the residence was exceptionally brief and minimally intrusive"; and "[t]he marijuana seized was in plain view" while "[t]he firearms discovered in the residence were seized pursuant to a search warrant." The trial court denied Defendant's motion to suppress, and on 17 December 2009, Defendant pled guilty to one count of possession of a firearm by a felon while preserving the right to appeal the denial of his motion to suppress. Defendant filed written notice of appeal on 29 December 2009, but did not appeal from the conviction, vesting no jurisdiction with this

Court. Defendant filed a petition for writ of certiorari 20 August 2010, which this Court granted on 7 September 2010.

When evaluating the denial of a motion to suppress, this Court must determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, __ S.E.2d __, __ (2011). Defendant does not challenge any findings of fact. Accordingly, this Court's review is limited to whether the findings of fact support the conclusions of law, which we review *de novo*. *See id.*

The Fourth Amendment, "applicable to the states through the Due Process Clause of the Fourteenth Amendment," *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997), guarantees protection "against unreasonable searches and seizures" and commands that warrants be supported by probable cause, U.S. Const. amend. IV. "Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, [the United States Supreme] Court has inferred that a warrant must generally be secured." *Kentucky v. King*, 563 U.S. __, __, 179 L. Ed. 2d 865, 874 (2011). Furthermore, "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City*

v. Stuart, 547 U.S. 398, 403, 164 L. Ed. 2d 650, 657 (2006) (internal quotation marks and citations omitted). Where "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *id.*, however, "the warrant requirement is subject to certain reasonable exceptions" that may overcome this presumption, *King*, 563 U.S. at __, 179 L. Ed. 2d at 874. One well-established exception arises when "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394, 57 L. Ed. 2d 290, 301 (1978) (citations omitted).

While "the Fourth Amendment has drawn a firm line at the entrance to the house," officers may reasonably cross the threshold without a warrant in exigent circumstances. *Payton v. New York*, 445 U.S. 573, 590, 63 L. Ed. 2d 639, 653 (1980) (internal quotation marks and citation omitted). Of the "several exigencies that may justify a warrantless search of a home," the "emergency aid" exception permits officers to "enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *King*, 563 U.S. at __, 179 L. Ed. 2d at 875 (internal quotation marks and citation omitted); *see also Brigham City*,

547 U.S. at 403, 164 L. Ed. 2d at 657-58 (noting that "[o]ne exigency obviating the requirement of a warrant is the need to . . . protect or preserve life or avoid serious injury." (internal quotation marks and citation omitted)). This Court has described the standard under which a warrantless entry pursuant to the emergency aid doctrine is evaluated:

> A law enforcement officer's action is reasonable and therefore constitutional as long as the circumstances objectively justify the officer's behavior. An objectively reasonable basis for believing either that a party has been injured and may need assistance or that further violence is about to ensue is sufficient to permit warrantless entry into a home based on that exigency. The existence of exigent circumstances and the reasonableness of a search are factual determinations that must be made on a case-by-case basis.

State v. Cline, __ N.C. App. __, 696 S.E.2d 554, 557 (2010) (internal citations omitted). Prior to *State v. Woods*, 136 N.C. App. 386, 524 S.E.2d 363 (2000), however, our appellate courts had not considered whether "the purpose of investigating a probable burglary" or breaking and entering qualified as an exigent circumstance justifying an officer's entry of a home without a warrant. *Woods*, 136 N.C. at 391, 524 S.E.2d at 366.

In *Woods*, we recognized a general consensus among other state and federal courts "that where an officer reasonably

believes that a burglary is in progress or has been recently committed, a warrantless entry of a private residence to ascertain whether the intruder is within or there are people in need of assistance does not offend the Fourth Amendment." *Id.*; *see also United States v. McCullough*, 457 F.3d 1150, 1164 (10th Cir. 2006) ("[O]ur sister circuits appear to unanimously agree . . . 'that an officer may lawfully enter a residence without a warrant under the exigent circumstances exception when the officer reasonably believes a burglary is in progress.'" (citations omitted)); *State v. Carroll*, 629 A.2d 1247, 1249 (Md. Ct. Spec. App. 1993) (observing the "complete agreement" of other jurisdictions having addressed the issue "that where police have probable cause to believe that a housebreaking had been or is being committed, a warrantless search of the house to determine whether the intruder is still present, or to ascertain whether there are victims in need of assistance, does not offend the Fourth Amendment"), *aff'd*, 646 A.2d 376, 380-81 (Md. 1994). One court reasoned it is "not surprising" that exigent circumstances are routinely found "where officers have responded to a call of a burglary in progress, as it 'would defy reason to suppose that [the officers] had to leave the area and secure a warrant before investigating, leaving the putative burglars free

to complete their crime unmolested.'" *Kain v. City of Eden Prairie*, No. 10-1740, 2011 WL 797455, at *5 (D. Minn. Feb. 28, 2011).

In *State v. China*, 150 N.C. App. 469, 564 S.E.2d 64 (2002), this Court held that an officer's warrantless entry and seizure of suspicious items in plain view were lawful, where the officer arrived at the defendant's apartment after receiving a report that a break-in was underway there; heard a violent argument from inside; "knocked on the door which opened"; and walked inside based on his reasonable belief that someone in the house was in need of immediate aid. *China*, 150 N.C. App. at 479, 564 S.E.2d at 71; *see also, e.g.*, *United States v. Johnson*, 9 F.3d 506, 509-10 (6th Cir. 1993) (ruling exigent circumstances existed where officers believed a burglary was in progress, their initial knocks were given no response by persons inside the house, and the woman who said she lived there provided no identification or key to alleviate the officers' suspicions of criminal activity); *In re Forfeiture of $176,598*, 505 N.W.2d 201, 206 (Mich. 1993) (holding warrantless search of dwelling "at the scene of an apparent breaking and entering" proper where "[t]here is a very real chance that the intruders are still present"; "[t]he intruders may have restrained or, worse yet,

injured or killed the inhabitants"; and immediate entry may "prevent further damage or personal injury").

Here, the investigators had an objectively reasonable belief that there was a breaking and entering in progress at 521 Discovery Way as they witnessed an individual scale the wall to climb to a second-floor apartment's balcony and then fumble with the door for thirty to forty-five seconds. *See Cline*, __ N.C. App. at __, 696 S.E.2d at 557 ("[I]n assessing the constitutionality of a warrantless entry and evidence seized pursuant to plain view therein, the reviewing court must determine whether the action was reasonable under the circumstances, as viewed through 'the eyes of a reasonable and cautious police officer on the scene, guided by . . . experience and training.'" (quoting *State v. Scott*, 343 N.C. 313, 329, 471 S.E.2d 605, 615 (1996))). Moreover, Defendant gave the officers no reason to believe that he was not engaged in any criminal activity, and thus did not dispel their reasonable suspicion that the three men were jointly involved in a housebreaking. In fact, Defendant's nervousness and failure to produce the apartment key he claimed he had or any document identifying 521 Discovery Way as his residence likely peaked the officers' suspicions. *See McCullough*, 457 F.3d at 1164 (holding belief

that burglary was in progress was objectively reasonable and entry without a warrant therefore "justified by exigent circumstances" where, in addition to the activation of the alarm at the defendant's residence which initially drew police there, the individual answering the residence's telephone did not know the alarm code; and the responding officer "was confronted with two people who were unusually dirty in appearance, did not have any form of personal identification, were admittedly not the homeowners, did not know the name of the homeowner, and were acting in a nervous manner"). The investigators thus reasonably believed that they needed to conduct a warrantless search of the premises to ensure that no one in the apartment needed assistance.

While Defendant cites *State v. Johnson*, 64 N.C. App. 256, 262, 307 S.E.2d 188, 191 (1983), *remanded on other grounds,* 310 N.C. 581, 313 S.E.2d 580 (1984), for the proposition that "the existence of exigent circumstances are factual determinations that must be made on a case by case basis," he compares the facts of several other cases to those here and argues that the present case does not include "similar facts to support an objective belief that an emergency situation existed." He suggests it was unreasonable for the officers to believe that a

breaking and entering was occurring because: (i) Defendant "came to the door when the officers knocked"; (ii) "[h]e told [them] he had a key but needed to call his wife"; (iii) "[t]he officers heard no sounds of a breaking and entering when they saw the individual enter through the balcony door[,] . . . heard no screams for help," nor heard any "sounds of a scuffle" while interviewing Defendant with the door open; and (iv) "[t]he officers saw no weapons," could not tell whether the two men who entered the stairwell had in fact entered the apartment, and were not asked for any help or assistance by Defendant. However, we reject Defendant's attempt to hold the investigators to a certain series of facts as our review is not so restricted. *See, e.g.*, *Cline*, ___ N.C. App. at ___, 696 S.E.2d at 557 (upholding warrantless entry of residence even though this Court had not been presented with a similar fact pattern, as "the reasonableness of a warrantless search is determined on a case-by-case basis, under the totality of the circumstances").

In *Cline*, the search without a warrant, during which drug paraphernalia was observed, was justified by the specific circumstances coupled with the officer's experience. Contrary to Defendant's argument, this Court held in *Cline* that, although the officer "did not hear any sounds from within the residence,

nor did he observe any blood or other signs suggesting criminal activity, a reasonable officer in [his] position could have believed that a party was in need of immediate assistance." *Id.* at __, 696 S.E.2d at 558. In the case *sub judice*, the observation of an unconventional entry into an apartment, where no proof that any of the three males resided therein was offered, rendered the belief that a breaking and entering was in progress was reasonable. Moreover, Defendant did not come to the door immediately after the officers knocked, and the investigators "hear[ed] some noises from inside the apartment." The officers reasonably believed that a breaking and entering was in progress. *See McCullough*, 457 F.3d at 1165 ("In other words, in addition to having probable cause to believe a burglary was in progress, the circumstances provided [the officer] with a reasonable basis for concluding that the warrant requirement was impractical. Had she left the scene to obtain a warrant, [she] clearly risked allowing a potential burglary to continue, thereby placing the contents of the residence . . . at issue, and likely allowing the . . . obvious burglary suspects to flee."). In addition to protecting the homeowner's property, the investigators here were justifiably concerned that people inside may be in need of assistance, even though no screams for

help or sounds of a scuffle or of a breaking were heard. *See State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000) (holding officers to a standard of "common-sense determination" of probable cause, which "does not require hard and fast certainty"). We conclude that the warrantless entry into and search of Defendant's apartment was supported by exigent circumstances.

Furthermore, where the warrantless search of Defendant's apartment "took less than one minute," the trial court's conclusion that "[t]he entry into the residence was exceptionally brief and minimally intrusive" is supported by the findings of fact. *See Mincey*, 437 U.S. at 393, 57 L. Ed. 2d at 300 (recognizing that the scope of a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation" (internal quotation marks and citation omitted)). The findings of fact refer to this search as a "protective sweep of the apartment to ensure that no one inside was in need of assistance as well as to secure the scene." There is no indication that the officers acted otherwise. The scope of the cursory search was thus permissible, and the officers therefore possessed legal authority to be in the apartment when they saw marijuana in plain view on the kitchen floor. *See State v.*

Allison, 298 N.C. 135, 140, 257 S.E.2d 417, 420 (1979) ("The seizure of suspicious items in plain view inside a dwelling is lawful if the officer possesses legal authority to be on the premises."); *see also Horton v. California*, 496 U.S. 128, 136, 110 L. Ed. 2d 112, 123 (1990) (holding it is essential "to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"). Therefore, the search warrant—issued in part upon the averment that marijuana had been found inside 521 Discovery Way—was not, as Defendant argues, based on "unconstitutionally obtained evidence." The firearms in the instant case were accordingly obtained pursuant to a valid search warrant, and we affirm the trial court's denial of Defendant's motion to suppress.

Affirmed.

Judges McGEE and STROUD concur.

Report per Rule 30(e).