NO. COA11-697
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 10 CRS 000343-44, 10 CRS 56463

OCTAVIO ANDRADE LOPEZ

Appeal by defendant from judgment entered 7 December 2010 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 3 October 2011.

Attorney General Roy Cooper, by Associate Attorney General Gayle L. Kemp, for the State.

James N. Freeman Jr., for Defendant-Appellant.

ERVIN, Judge.

Defendant Octavio Andrade Lopez appeals from a judgment sentencing him to thirty-five to forty-two months imprisonment based upon his pleas of guilty to two counts of trafficking in marijuana and one count of possession of marijuana with the intent to sell or deliver. On appeal, Defendant argues that the trial court erred by denying his motion to suppress certain evidence obtained in connection with a search of Defendant's vehicle. After careful consideration of Defendant's challenges

to the trial court's order in light of the record and the applicable law, we conclude that the trial court's judgment should be affirmed.

I. Factual Background

A. Substantive Facts

At approximately 4:20 p.m. on 3 June 2010, Deputy David McMurray of the Henderson County Sheriff's Department, a member of a joint highway interdiction task force involving the Henderson and Buncombe County Sheriffs' Departments, was patrolling Interstate 40 in Buncombe County. At that time, Deputy McMurray noticed a white Dodge van following a truck at an estimated distance of less than a car length or around "fifteen to twenty feet." After determining that the distance between the vehicles was "entirely too close," Deputy McMurray decided to stop the van. As he neared the van in preparation for the stop, Deputy McMurray noticed that he could not read the van's registration plate because it had a heavily-tinted cover.

After Deputy McMurray activated his blue lights, the van stopped. As he approached the van, Deputy McMurray determined that the van bore a Colorado temporary registration plate. At the time that he spoke with Defendant, who was driving the van, Deputy McMurray explained that he had stopped the vehicle because Defendant had been following a truck too closely in

violation of N.C. Gen. Stat. § 20-152 and the van had a heavily-tinted registration plate cover in violation of N.C. Gen. Stat. § 20-129(d). After Deputy McMurray asked Defendant for his driver's license, proof of insurance, and registration information relating to the van, Defendant produced a Mexican driver's license, a bill of sale evidencing the purchase of the van, and proof that the van had insurance coverage for a period of one month. As he spoke with Defendant, Deputy McMurray noticed that Defendant's hands were shaking and that his heart was "beating in his belly."

After telling Defendant that he intended to issue a warning ticket, Deputy McMurray asked Defendant to join him in his patrol car so that Deputy McMurray could issue the warning ticket and check the validity of the information that Defendant had provided. As he returned to his patrol car, Deputy McMurray observed a "large aftermarket platform," which looked like a "wooden platform . . . covered with some type of carpet," located between the second row of seats and the rear doors of the van. After frisking Defendant for weapons, Deputy McMurray allowed Defendant to enter the patrol car and sit in the front passenger seat without wearing handcuffs or being subject to any other restraint. As the two of them entered the patrol vehicle, Deputy McMurray commented that "[i]t's hot out there."

After taking a seat in the patrol car, Deputy McMurray reviewed the items that he had received from Defendant and began the process of verifying this information using his onboard computer equipment. While waiting to receive the requested verifying information, Deputy McMurray engaged Defendant in casual conversation. In response to Deputy McMurray's inquiry about where he was going, Defendant indicated that he was heading to Charlotte to visit his sister and that he planned to return to his home in Kansas City on the following day. Defendant also told Deputy McMurray that, while he did not have a job in Kansas City, he worked in Denver on occasion. When Defendant asked whether Charlotte was a big city, Deputy McMurray responded by asking whether Defendant had ever been to Charlotte before and received a negative answer. At that point, Deputy McMurray asked Defendant if he knew where he was supposed to go in Charlotte or if he had an address for his sister's home. Defendant replied that he had been given a telephone number to call upon reaching the intersection of Highway 321 and Interstate 85 in order to get directions. Although Defendant was cooperative during this conversation, Deputy McMurray thought that Defendant exhibited "nervous and deceptive behavior," including "fail[ing] to maintain eye contact [and] . . . continually touch[ing] and rubb[ing] his face[;] "observed

that Defendant was sweating profusely despite the fact that the patrol car's air condition was running; and noticed that Defendant's pulse continued to "pound[] rapidly in his belly." After determining that Defendant's documents were in order, Deputy McMurray returned them to Defendant and issued Defendant a warning ticket.

At that point, Deputy McMurray asked Defendant if he could "talk to [him] just a minute." Defendant responded by indicating that he was willing to speak with Deputy McMurray further. When Deputy McMurray asked if the van contained cocaine, marijuana, or other drugs, Defendant gave a negative reply. After Defendant denied that there were any controlled substances in the van, Deputy McMurray asked Defendant if he could search the van and was told, "yeah, go ahead." When Deputy McMurray asked if Defendant understood what "search the van" meant, Defendant indicated that he understood what Deputy McMurry wanted to do and that there was "no problem." Before searching the van, Deputy McMurray prepared a "consent to search form," which Defendant signed.

At that point, Deputy McMurray contacted Deputy Ray Herndon of the Buncombe County Sheriff's Department and requested that he bring his drug-detecting dog to assist in the investigative process. Following Deputy Herndon's arrival, the officers

released the dog into the van, at which point she alerted to the area in which the wooden after-market platform was located. Upon inspecting the platform, Deputies McMurray and Herndon located a fabricated wooden compartment in its interior. When Deputy Herndon asked Defendant whether there was anything in the compartment, Defendant responded that it contained 100 pounds of marijuana. At that point, Deputy McMurray placed Defendant under arrest and seated Defendant in his patrol car. Upon opening the compartment, Deputies McMurray and Herndon discovered twenty-one packages containing a total of 100.2 pounds of marijuana which had been covered in carpet deodorizer and peppers as part of an attempt to foil detection. While being taken to the Buncombe County Sheriff's Department, Defendant volunteered that he had bought the marijuana in Denver for $40,000; that he planned to sell it in Charlotte for $60,000; and that he was disappointed that the officers had located the marijuana so quickly since he had spent four days building the platform and compartment.

B. Procedural History

On 3 June 2010, a magistrate's order was issued charging Defendant with trafficking in marijuana by possession and transportation. On 2 August 2010, the Buncombe County grand jury returned bills of indictment charging Defendant with

trafficking in between 50 and 2,000 pounds of marijuana by both possession and transportation and one count of possession of marijuana with the intent to sell or deliver. On 8 November 2010, Defendant filed a motion seeking to have any evidence, including statements, obtained as a result of the search of Defendant's van suppressed on the grounds that investigating officers obtained the evidence in question as the result of an unconstitutional search and seizure.

After conducting a hearing concerning the issues raised by Defendant's suppression motion at the 8 November 2010 criminal session of Buncombe County Superior Court, the trial court entered an order denying Defendant's suppression motion on 7 December 2010 in which it made findings of fact consistent with the factual statement set out above and concluded that there was reasonable suspicion to justify a continued detention of Defendant and that Defendant consented to the search of the van. Subject to a reservation of his right to "appeal . . . based on the denial of his [suppression motion,]" Defendant entered a plea of guilty to the offenses with which he had been charged. As a result, the trial court consolidated for judgment the offenses to which Defendant had pled guilty and sentenced Defendant to thirty-five to forty-two months imprisonment.

Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Standard of Review

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002) (citation omitted). Assuming that they have adequate evidentiary support, the trial court's findings of fact are conclusive for purposes of appellate review even if the record contains conflicting evidence. *State v. Crudup*, 157 N.C. App. 657, 659, 580 S.E.2d 21, 23 (2003). "Once [we] conclude [ ] that the trial court's findings of fact are supported by the evidence, [our] next task 'is to determine whether the trial court's conclusion[s] of law [are] supported by the findings.'" *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7-8 (2000) (quoting *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 287 (2000)), *cert denied*, 531 U.S. 1167, 121 S. Ct. 1131, 148 L. Ed. 2e 997 (2001). The trial court's conclusions of law are subject to *de novo* review. *State v. Edwards*, 185 N.C. App. 701, 702,

649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

B. Validity of Search

In challenging the trial court's decision to deny his suppression motion, Defendant places principal reliance upon his claim that Deputy McMurray did not have reasonable suspicion to detain him after issuing the warning ticket and returning his license and other documents and that, in the absence of such reasonable suspicion, the search of his van constituted an unlawful search and seizure. After carefully reviewing the record, however, we conclude that we need not determine the extent to which Deputy McMurray had the requisite reasonable suspicion to engage in further investigative activities given that Defendant freely and voluntarily consented to engage in further conversation with Deputy McMurray and to the search of his van.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" "[A] traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.'" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Illinois v. Wardlow*, 528 U.S.

119, 123, 120 S. Ct. 673, 675, 145 L. Ed. 2d 570, 576 (2000)). The temporary detention of an individual during a traffic stop constitutes a seizure for Fourth Amendment purposes. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979). "Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). As a result, the issuance of a traffic citation or the return of a suspect's driver's license or other documents, actions which generally indicate that the initial investigatory detention has ended, does not terminate an officer's ability to ask additional questions or to engage in additional investigative activities so long as the officer's activities were otherwise lawful.

An officer has the authority to ask questions or conduct a search so long as the individual involved freely and voluntarily consents to answer questions or to allow his or her property to be searched. *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (stating that, while it was true that "initial reasonable suspicion evaporated [upon return of defendant's documents], [the officer] was neither prohibited

from simply asking if defendant would consent to additional questioning, nor was the officer prohibited from questioning defendant after receiving his consent"); *State v. Morocco*, 99 N.C. App. 421, 427-29, 393 S.E.2d 545, 548-49 (1990). As a result, "police officers may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate." *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994) (citing *Florida v. Bostick*, 501 U.S. 429, 431, 111 S. Ct. 2382, 2384, 115 L. Ed. 2d 389, 396 (1991) and *INS v. Delgado,* 466 U.S. 210, 216-17, 104 S. Ct. 1758, 1762-63, 80 L. Ed. 2d 247, 255 (1984)). "'[T]he return of documentation would render a subsequent encounter consensual only if a reasonable person under the circumstances would believe he was free to leave or disregard the officer's request for information.'" *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 299 (quoting *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997) (internal quotation marks omitted)). Thus, the ultimate issue that we must resolve in this case is whether, in light of the totality of the circumstances, the trial court appropriately determined that the encounter between Deputy McMurray and Defendant following the issuance of the warning ticket and the return of Defendant's documents was consensual

and whether Defendant freely and voluntarily consented to the search of his van. In making this determination, we should consider such factors as "'the presence of more than one officer, the display of a weapon, physical touching by the officer, or [the officer's] use of a commanding tone of voice indicating that compliance might be compelled.'" *Kincaid*, 147 N.C. App. at 99, 555 S.E.2d at 298 (quoting *Elliott*, 107 F.3d at 814).

According to the trial court's findings of fact, which Defendant has not challenged on appeal as lacking in adequate evidentiary support and which are, for that reason, binding on us for purposes of appellate review, *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) (stating that "[u]nchallenged findings of fact, '[w]here no exceptions have been taken[,] . . . are presumed to be supported by competent evidence and binding on appeal'") (quoting *State v. Phillips*, 151 N.C. App. 185, 190, 565 S.E.2d 697, 701 (2002)), Defendant was seated in the front side passenger seat of the vehicle without being handcuffed or otherwise restrained during the initial stages of his encounter with Deputy McMurray. Deputy McMurray was the only officer present during the initial investigation into the issues arising from Defendant's driving. During the fifteen minutes required for Deputy McMurray to

receive a response to his inquiries concerning Defendant's identification and the status of the van, the two men engaged in casual conversation concerning the trip that Defendant was taking. The record contains no indication that Deputy McMurray displayed a weapon, physically touched Defendant, spoke in anything other than a normal tone of voice or engaged in any other sort of coercive activities during this interval. After returning Defendant's license and the other documents that Defendant had provided for his inspection, Deputy McMurray asked if he could "talk" to Defendant further, and Defendant agreed to Deputy McMurray's request. *See Kincaid*, 147 N.C. App. at 99-100, 555 S.E.2d at 299 (holding that, where the only officer present spoke to the defendant in a regular tone of voice and where the defendant consented to answer additional questions after the return of his license and related documents, a reasonable person in the defendant's position would have felt free to leave, rendering the officer's subsequent investigative activities consensual). As a result, in light of the totality of the circumstances, we conclude that the trial court did not err by determining that "defendant consented orally and in writing that law enforcement could search his van."

In an attempt to persuade us to reach a different conclusion, Defendant argues that Deputy McMurray's failure to

inform Defendant that he was free to leave at the time that he returned Defendant's driver's license and related documents rendered their subsequent encounter non-consensual. In support of this contention, Defendant relies upon *State v. Myles*, 188 N.C. App. 42, 45-50, 654 S.E.2d 752, 754-58, *aff'd*, 362 N.C. 344, 661 S.E.2d 732 (2008), in which we held that the lessor of a rented vehicle had been unconstitutionally detained and had not voluntarily consented to a search of the vehicle because investigating officers lacked reasonable suspicion to conduct the challenged investigative activities. In the course of our analysis, we held that the defendant's nervousness while subject to questioning by investigating officers did not establish the reasonable suspicion necessary to justify further investigative activities after the reasons that led to the initial traffic stop had been resolved. *Id.* at 47-50, 654 S.E.2d at 756-58. In addition, we held that, because the officer questioned the defendant and observed his nervous behavior after the completion of the initial traffic stop, the facts upon which the State relied to establish the necessary reasonable suspicion for the search of the rented vehicle had not been obtained during a period of lawful detention. *Id.* at 50-52, 654 S.E.2d at 758. We do not, however, believe that *Myles* controls our decision in this instance given that, unlike the situation at issue in

Myles, Defendant agreed to speak further with Deputy McMurray after the issuance of the warning ticket and the return of his license and other documents, obviating the necessity for the existence of reasonable suspicion in order to justify further investigative activities. 188 N.C. App. at 45-46, 654 S.E.2d at 755.

Defendant's other challenges to the trial court's determination that he consented to the search of the van are equally unpersuasive. Despite Defendant's insistence that he was never told that he was free to go at or after the time that Deputy McMurray returned his license and related documents, a lawfully detained defendant need not be advised that he is "free to go" as a prerequisite for a finding of voluntariness. *Ohio v. Robinette*, 519 U.S. 33, 39-40, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996). We are also unable to agree with Defendant's contention that it was "clear that [Defendant] was not free to leave as [Deputy] McMurray testified that he had concerns regarding [Defendant's] travel plans and behavior." The relevant inquiry for purposes of determining the lawfulness of Deputy McMurray's actions "'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken."

Maryland v. Macon, 472 U.S. 463, 470-71, 105 S. Ct. 2778, 2783, 86 L. Ed. 2d 370, 378 (1985) (quoting and citing *Scott v. United States*, 436 U.S. 128, 136, 98 S. Ct. 1717, 1723, 56 L. Ed. 2d 168, 177 (1978)). As a result of the fact that nothing in the record suggests that Deputy McMurray engaged in any action that rendered his encounter with Defendant after the return of Defendant's license and related documents non-consensual, we conclude that Defendant's additional arguments lack merit as well.

Finally, although Defendant suggests that Deputy McMurray's conversation with Defendant prior to issuance of the warning ticket was improper because their discussion "went well beyond the scope of confirming or dispelling [Deputy McMurray's] suspicions," we need not address this contention given that the only theory that Defendant appears to have advocated in the trial court in support of his suppression motion was that Deputy McMurray lacked the reasonable suspicion needed to support a further involuntary detention of Defendant. *See State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (recognizing that, where a defendant advances arguments in support of a suppression motion on appeal that differ from those advanced in the trial court, his new arguments are not properly before the reviewing court). Assuming that we were to reach the

merits of this aspect of Defendant's challenge to the trial court's order, we note that an officer may ask unrelated questions during the course of an investigatory detention as long as those questions do not impermissibly prolong the duration of the detention, *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694, 704 (2009), or otherwise convert the encounter into something other than a lawful seizure. *Muehler v. Mena*, 544 U.S. 93, 100-02, 125 S. Ct. 1465, 1470-72, 161 L. Ed. 2d 299, 308-09 (2005). As a result of the fact that the additional questions that Deputy McMurray asked Defendant during the course of the investigative detention were limited in nature, involved the sorts of subjects that would normally be considered casual conversation, and do not appear to have prolonged the initial investigative detention or to have had a coercive effect, we see no basis for concluding that the questions that Deputy McMurray asked Defendant while the two of them were seated in Deputy McMurray's patrol car transformed an admittedly valid investigatory detention into an impermissible infringement of Defendant's rights against unreasonable searches and seizures.

Thus, we hold that a reasonable person in Defendant's position would have understood that he was free to refuse Deputy McMurray's request to answer additional questions and that the

events that occurred after the issuance of the warning ticket and the return of Defendant's license and other documents stemmed from a consensual encounter. Furthermore, given that Defendant has not argued that he did not voluntarily consent to a search of the van and given that the trial court's findings of fact amply demonstrate that Defendant freely and voluntarily consented, both orally and in writing, to that search, we also hold that the trial court did not err by upholding the search of Defendant's van on the grounds of consent. *See Morocco*, 99 N.C. App. at 423-29, 393 S.E.2d at 546-50 (holding that the record evidence supported the trial court's determination that the Defendant voluntarily consented to a search of his vehicle in a case in which the officer stopped defendant for committing a traffic violation, requested the defendant to sit in the front passenger seat of his patrol car, engaged the defendant in polite and non-hostile conversation while he wrote a ticket, issued a warning ticket to the defendant and returned the documents that defendant had given him, and then obtained the defendant's oral and written consent to a search of his vehicle). As a result, the trial court did not err by denying Defendant's suppression motion.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court correctly denied Defendant's suppression motion. As a result, the trial court's judgment should be, and hereby is, affirmed.

AFFIRMED.

JUDGES STEELMAN AND MCCULLOUGH concur.

Report per Rule 30(e).