IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1204

Filed: 19 July 2016

Sampson County, No. 13CRS50372

STATE OF NORTH CAROLINA

v.

BOBBY RAY RICH, Defendant.

Appeal by Defendant from judgment entered 19 March 2014 by Judge W. Douglas Parsons in Sampson County Superior Court. Heard in the Court of Appeals 14 April 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Alexander G. Walton, for the State.

Jarvis John Edgerton, IV, for Defendant-appellant.

DILLON, Judge.

Defendant-appellant Bobby Ray Rich (the "Defendant") appeals from a judgment, pursuant to which he was convicted of several drug offenses and declared a habitual felon (the "Judgment").

I. Background

The evidence presented at trial tended to show the following: In February 2013, a Detective with the Sampson Country Sheriff's Office (the "Detective"), along

with other law enforcement officers, surveilled a premises where they believed Airatren Stevens ("Stevens") and James Newton ("Newton") would be, both of whom had outstanding warrants. After the officers saw two individuals who matched the descriptions of Stevens and Newton enter a vehicle together, the officers approached and ordered them to exit the vehicle.

Unbeknownst to law enforcement, the man matching Newton's description was Defendant. Defendant ignored Detective's repeated orders to exit the vehicle and persisted in concealing his hands from the officers. Defendant was forcibly pulled out of the vehicle. Detective conducted a pat-down search for weapons and felt, in Defendant's coat pocket, "items that were consistent with controlled substances." At trial, Detective testified that although he did not know what was in Defendant's pocket, his training and experience with controlled substances, along with their typical method of packaging, informed his opinion. After Defendant continued to ignore Detective's requests to identify what was in his pocket, Detective reached into Defendant's pocket and pulled out a bag of what appeared to be marijuana. A gold necklace was also removed from Defendant and was later found to contain cocaine in a secret compartment.

Defense counsel did not object to the introduction of the evidence seized from Defendant's pocket or person at trial. Defendant was charged with drug offenses and

habitual felon status. Defendant was found guilty of all charges by a jury. Defendant timely appealed.

II. Analysis

The sole issue on appeal is whether the trial court erred in allowing certain evidence to be introduced at trial. Specifically, Defendant contends that the trial court erroneously admitted cocaine and marijuana discovered during the pat-down search. For the following reasons, we find no error.

Defense counsel did not move to suppress this evidence at trial, and has therefore failed to preserve this issue on appeal. Accordingly, we review the admission of this evidence only for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error."). In order to prevail on a plain error appeal, "a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury's finding" of guilt. *Id.* at 518, 723 S.E.2d at 334 (emphasis added) (citations omitted) (internal quotation marks omitted).

The Constitution permits "a reasonable search for weapons for the protection of the police officer." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Under *Terry*, a frisk or pat-down search does not require probable cause, only reasonable suspicion of potential danger. *See id.* In the present case, Detective testified that he searched Defendant because he was concerned for his personal safety due to Defendant's refusal to exit

the vehicle and refusal to show his hands to the officers after being asked to do so repeatedly. When viewed from the common-sense perspective of a law enforcement officer performing his duties, based on controlling precedent these facts are sufficient to allow Detective to form a reasonable belief that Defendant was armed and dangerous. *See State v. McRae*, 154 N.C. App. 624, 630, 573 S.E.2d 214, 219 (2002) (concluding law enforcement had reasonable suspicion legitimating a pat-down frisk).

Defendant also argues that Detective did not have reasonable suspicion that the items he identified on Defendant's person during the pat-down search were contraband. Knowledge of the precise nature of the contraband is not required under the "plain feel" doctrine. *State v. Richmond*, 215 N.C. App. 475, 481, 715 S.E.2d 581, 585 (2011). "[T]o conduct a search an officer need only have probable cause to believe the object felt during the pat down was contraband before he seized it, not that he determine [sic] the specific controlled substance before taking action." *Id.* at 481, 715 S.E.2d at 585-86. In determining probable cause, this Court looks to the "totality of the circumstances." *State v. Robinson*, 189 N.C. App. 454, 459, 658 S.E.2d 501, 505 (2008); *see also State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000) ("[T]he better-reasoned view is to consider the totality of the circumstances in determining whether the incriminating nature of the object was immediately apparent and thus, probable cause existed to seize it.").

If, during a lawful search, an officer discovers contraband through the sense of touch, then "there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). This is true because when a police officer "lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Id.* at 375 (emphasis added).

In *Richmond*, this Court determined that there was probable cause for an officer to search a defendant's pocket after he felt a "bumpy bulge" through his clothing. *Richmond*, 215 N.C. App. at 482, 715 S.E.2d at 586. Although the officer could not "describe with any specificity" exactly what he was touching in the defendant's pocket, we agreed that the evidence "support[ed] the trial court's finding that '[based] on the officer's training and experience, he immediately formed the opinion that the bulge contained a controlled substance.'" *Id.* at 482, 715 S.E.2d at 586.

Defendant relies heavily on *State v. Beveridge*, 112 N.C. App. 688, 436 S.E.2d 912 (1994), to argue that it was not "immediately apparent," as required by *Dickerson*, *Dickerson*, 508 U.S. at 375, that the item in Defendant's pocket was contraband. In *Beveridge*, this Court held that an officer exceeded the scope of his lawful search when

he asked a defendant to turn out his pockets after feeling a "cylindrical bulge." *Beveridge*, 112 N.C. App. at 696, 436 S.E. 2d at 916. However, the officer testified that "it was not *immediately apparent* to him that the baggie held contraband." *Id.* (emphasis in original).

In the present case, Detective testified that, as he was lawfully patting down Defendant, he felt "items consistent with controlled substances." At that time, Detective had five and a half years of law enforcement experience, had worked "a hundred or more" drug cases, and was familiar with cocaine, marijuana, and how those substances are typically packaged. In addition, Detective thought Defendant was a man wanted by the Sampson County Special Investigations Division, which investigates all drug activity in the county. Based on the totality of the circumstances regarding Detective's lawful pat down, Detective had probable cause to withdraw the object based on its plain feel through the fabric of Defendant's coat. *See Richmond*, 215 N.C. App. at 481-82, 751 S.E.2d at 585-86.

III. Conclusion

The trial court did not err by admitting evidence gathered during a lawful search. The trial court must look to the totality of the circumstances when determining whether an officer had probable cause in seizing an object "plainly felt" during a lawful search; knowledge of the precise nature of the object seized is not required.

NO ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).