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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-2

Filed: 19 September 2017

Harnett County, Nos. 15 CRS 56050-51, 56050-52

STATE OF NORTH CAROLINA

v.

MAJOR ALEXANDER NEWKIRK III

Appeal by defendant from order entered 22 October 2016 by Judge C. Winston Gilchrist and judgments entered 15 August 2016 by Judge Gale M. Adams in Harnett County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher Spiller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

ELMORE, Judge.

Major Alexander Newkirk, III (defendant) appeals from an order denying his motion to suppress drugs from his pants pockets he voluntarily surrendered in response to an officer's question about whether he "had anything on him," a question posed during a knock-and-talk investigation at an illegal liquor house. After a

STATE V. NEWKIRK

Opinion of the Court

residential property owner confessed to police he was unlawfully selling alcohol out of a small shed located on his property and consented to a search of the shed, the entering officers observed a bar at which alcohol was being sold and consumed, encountered defendant and eight others drinking alcohol, and instructed each person to exit the shed one by one for questioning.

Defendant, standing nearest the door and holding a beer, exited first and an officer waiting outside immediately asked if he “had anything on him.” Defendant responded by producing from his pants pocket thirty-seven OxyContin pills and then twenty-five grams of heroin. Defendant moved to suppress the drugs, arguing they were obtained in violation of his constitutional rights to be free from unreasonable searches and seizures. After a suppression hearing, the trial court rendered an oral ruling denying his motion, and defendant pled guilty to attempted trafficking in both opium and heroin, reserving his right to appeal the suppression ruling.

On appeal from the subsequently entered written suppression order, defendant contends the trial court erred by denying his motion because the officers lacked an individualized reasonable suspicion that he was involved in criminal activity, since he was holding a beer, not the liquor being unlawfully sold at the shed. Alternatively, defendant argues, to the extent reasonable suspicion existed to justify a brief investigatory stop, the officer’s question about what items he possessed exceeded the permissible scope of a lawful seizure. Defendant also contends the court erred by making an alternative conclusion in its order to support its ruling: that since the

STATE V. NEWKIRK
Opinion of the Court

officers had probable cause to arrest defendant for possessing or consuming illegal liquor, he could have been lawfully subjected to a search incident to arrest, which would have yielded the drugs.

Because we conclude the trial court properly determined that the officers had reasonable suspicion to conduct the brief investigatory stop and that it remained within constitutional bounds, we hold the court properly denied defendant's suppression motion and thus affirm its order.

I. Background

The suppression hearing evidence and the trial court's order reveals the following facts. Around 9:00 p.m. on 10 December 2015, nine officers of the Harnett County Sheriff's Office (HCSO), some equipped with bulletproof vests and all wearing visibly holstered handguns, and one Alcohol Law Enforcement (ALE) officer, arrived at 1207 North Railroad Street in Dunn to conduct a knock-and-talk investigation in response to multiple reports from neighbors that illegal alcohol and small amounts of drugs were being sold on the premises. When two officers encountered the property owner, Marvin Franks, he admitted to running an illegal liquor house out of a small twenty-by-twenty foot outbuilding, described as a shed, located on his property. After Franks gave the officers verbal and written consent to search the shed, the entering officers observed a bar at which it was immediately apparent alcohol was being unlawfully sold, and encountered defendant and eight others drinking alcohol. Supervisor Lieutenant Josh Christensen stood outside the shed's only door, observed

STATE V. NEWKIRK
Opinion of the Court

the illegal liquor operation, and overheard the interaction between the officers who entered the shed and its nine occupants.

The entering officers announced they were investigating the illegal sale of non-tax paid alcohol, that Franks admitted to running an illegal liquor house and had consented to a search of the shed, and that ALE needed to seize the alcohol. Deputy Sheriff Christopher Carroll, sergeant of the narcotics division, asked if anyone possessed a gun, to which Franks admitted, and requested everyone's identification to initiate a police report. Having detected its odor, Deputy Carroll also asked if anyone possessed marijuana, to which two occupants admitted. About five to ten minutes after the officers entered the shed, Lieutenant Christensen overheard Deputy Carroll instruct everyone to exit the shed one by one so the officers could collect information to complete their investigation.

Defendant, holding a beer and standing nearest the shed's door, was the first person asked to exit. Defendant encountered Lieutenant Christensen waiting outside, who immediately asked him if he "had anything on him." In response, defendant produced a bag of thirty-seven OxyContin pills from his pants pocket that he voluntarily surrendered. Lieutenant Christensen stated that defendant would probably only receive a citation if the pills were all he had. When Lieutenant Christensen asked if he "had anything else on him," defendant produced a pill bottle containing twenty-five grams of heroin from his pants pocket. Defendant was arrested, charged, and indicted for trafficking in both heroin and an opium derivative.

STATE V. NEWKIRK

Opinion of the Court

On 13 June 2016, defendant filed a motion to suppress the pills and heroin, arguing that the drugs were obtained in violation of his constitutional rights to be free from unreasonable searches and seizures, since they were obtained through an “illegal, non-consent search.” Defendant alleged in relevant part that he did not consent to a search of his person and that the officers lacked reasonable suspicion to believe he had committed a crime. In his trial counsel’s supporting affidavit, he alleged that the officers “reached into [d]efendant’s pockets and seized [the drugs]” and that, “even if a protective pat-down of [d]efendant was justified, . . . the officer’s search exceeded the permissible scope of a protective search.” After a suppression hearing, the trial court rendered an oral ruling denying the motion.

On 15 August 2016, defendant entered a plea arrangement in which he pled guilty to attempted trafficking in opium and attempted trafficking in heroin, reserving his right to appeal the suppression ruling; in return, the State agreed to dismiss charges of conspiracy to sell or deliver a schedule I controlled substance, driving while license revoked, possession of up to one-half ounce of marijuana, and possession of marijuana paraphernalia. The trial court sentenced defendant to twenty-eight to forty-three months and thirty-five to fifty-four months of imprisonment to run consecutively. The next day, defendant filed a written notice of appeal from the suppression ruling.

On 22 October 2016, the trial court entered its suppression order. It found that “those present” in the shed were consuming non-tax paid alcohol, and concluded that

because defendant was “engaged in illegal conduct, specifically, consuming and/or possessing illegal alcohol,” the officers had reasonable suspicion to temporarily seize him for investigative purposes; and that the duration and scope of that seizure was reasonable. The trial court also concluded, in the alternative, that although defendant was not under arrest when he voluntarily surrendered the drugs, because the officers had probable cause to arrest him for possessing or consuming illegal alcohol, defendant thus could have been lawfully subjected to a search incident to arrest. Accordingly, the trial court ultimately determined that none of defendant’s constitutional rights were violated and thus denied defendant’s motion. Defendant appeals from this suppression order.

II. Issues

On appeal, defendant contends the trial court erred by denying his suppression motion because the drugs were obtained in violation of his constitutional right to be free from unreasonable seizures. Specifically, defendant asserts that (1) part of the court’s factual finding allegedly implying he was unlawfully consuming alcohol was unsupported by the evidence. Defendant also contends that the trial court erred by concluding (2) the officers had reasonable suspicion to temporarily seize him because he was “engaged in illegal conduct”; (3) Lieutenant Christensen’s question about the items he possessed was not impermissibly excessive in scope; and (4) the officers had probable cause to arrest him for possessing or consuming alcohol unlawfully.

III. Standard of Review

STATE V. NEWKIRK
Opinion of the Court

Our review of an order denying a suppression motion “is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Conclusions of law “are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

IV. Analysis

A. Factual Finding Sufficiency

Defendant first contends a portion of the trial court’s seventh factual finding allegedly implying that defendant was consuming alcohol unlawfully was unsupported by the evidence.

Challenged factual findings supported by competent evidence are “conclusive on appeal, even if conflicting evidence was also introduced.” *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009) (citing *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). Unchallenged factual findings are presumed to be supported by competent evidence and are thus conclusive on appeal. *State v. Evans*, ___ N.C. App. ___, ___, 795 S.E.2d 444, 453 (2017) (citing *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619).

The trial court’s seventh factual finding provided: “Alcohol was being sold in the shed, and those present were consuming the same. This was immediately apparent to the officers upon entering the shed. The alcohol was non-tax paid

alcohol.” Defendant challenges the portion of this finding stating that “those present were consuming the same” to the degree it implies defendant was consuming non-tax paid alcohol, since beer was not being sold at the illegal liquor house, and the officers encountered defendant holding a beer, not the alcohol being sold there. Defendant’s argument is misplaced and, nonetheless, is meritless.

At the suppression hearing, Deputy Carroll testified that Franks admitted to unlawfully selling alcohol in the shed, and that he observed people inside the shed “drinking alcohol.” Lieutenant Christensen testified that Frank was selling “liquor by the drink,” that he saw alcohol on the bar, and that people inside were “drinking alcohol.” Ahtawnta Smith, one of the nine people found in the shed, testified that Franks was selling liquor “at one dollar a shot or two dollars a shot” and that the officers “could see the drinks that [he and others in the shed] were drinking,” and Smith admitted that they were drinking “illegal alcohol.” Although the evidence showed and the court found that defendant was holding a beer, not liquor, this testimony provided competent evidence to support the challenged portion of the finding that “those present” were consuming non-tax paid alcohol.

Nonetheless, to the extent the precision of this finding would have been sharpened had the trial court qualified the phrase “those present” with “some,” it is irrelevant; the unchallenged portion of finding seven, combined with the remaining unchallenged findings, adequately supported its conclusion that the officers had reasonable suspicion to briefly seize defendant for investigative purposes.

B. Issue Preservation

The State argues defendant failed to preserve for appellate review any of his challenges to the court's conclusions of law. We disagree.

Generally, “[w]here a theory argued on appeal was not raised before the trial court, the appellate court will not consider it because ‘[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal.’” *State v. Henry*, 237 N.C. App. 311, 316, 765 S.E.2d 94, 99 (2014) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004)).

In his written suppression motion, defendant alleged in part that the “[o]fficers had no reasonable suspicion to believe [d]efendant had committed a crime” After the State’s presentation of evidence at the suppression hearing, defendant’s counsel argued in relevant part:

This is not a stop-and-frisk case. *This is a case about whether [defendant] validly consented to his person being searched or whether, at the time that he encountered law enforcement, [defendant] was seized and his 4th Amendment protections were violated when he was there, continued to be seized.*

(Emphasis added.)

Having raised below the theory that the officers lacked reasonable suspicion to seize him on the basis that he was involved in criminal activity, and the argument that the continuation of that seizure violated his constitutional rights, we conclude

defendant has preserved for appellate review his challenges to whether the officers had reasonable suspicion to stop him, and whether that stop exceeded constitutional bounds. Additionally, although defendant never argued below that the officers lacked probable cause to arrest him, which the trial court concluded as an alternative means to support its ruling that the evidence was admissible, the suppression evidence revealed that defendant was never searched; he voluntarily surrendered the drugs in response to a question arising from the seizure. Moreover, that the court neither provided its rationale from the bench nor rendered any findings or conclusions indicating that it might rely upon this alternative conclusion to support its suppression ruling, further supports our determination that defendant's challenge to the trial court's probable-cause conclusion should not be deemed waived. We thus conclude defendant's challenges to these three conclusions of law have been preserved for appellate review.

C. Reasonableness of the Stop

Defendant contends the trial court erred by concluding the officers had reasonable suspicion to briefly seize him because he was "engaged in illegal conduct," since defendant possessed a beer, not the liquor being sold at the shed.

We review *de novo* whether a trial court's factual findings support its legal conclusion that an officer had reasonable suspicion to conduct a brief investigatory stop. *See State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). In determining whether adequate reasonable suspicion existed, a reviewing court must

STATE V. NEWKIRK
Opinion of the Court

consider “ ‘the totality of the circumstances—the whole picture.’ ” *Id.* (quoting *Navarette v. California*, ___ U.S. ___, ___, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014)).

“Both the United States and North Carolina Constitutions protect against unreasonable . . . seizures,” *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20), but permit brief investigatory stops when an officer has “reasonable suspicion”—that is, “ ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’ ” *Navarette*, ___ U.S. at ___, 134 S. Ct. at 1687 (quoting *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981); citing *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968)). Reasonable suspicion demands merely “a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’ ” *State v. Watkins*, 337 N.C. 437, 441–42, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989)).

“An officer has reasonable suspicion if a ‘reasonable, cautious officer, guided by his experience and training,’ would believe that criminal activity is afoot ‘based on specific and articulable facts, as well as the rational inferences from those facts.’ ” *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (quoting *Watkins*, 337 N.C. at 441–42, 446 S.E.2d at 70).

STATE V. NEWKIRK

Opinion of the Court

Here, the trial court made the following relevant factual findings, either unchallenged or supported by competent evidence, underlying its conclusion that the officers had reasonable suspicion to justify the challenged stop:

1. On December 10, 2015, after 9:00 p.m., nine members of the Harnett County Sheriffs Office and one officer with North Carolina Alcohol Law Enforcement arrived at 1207 North Railroad Avenue, Dunn, North Carolina to conduct a “knock and talk” investigation in response to complaints regarding the illegal sale of alcohol.

....

3. Mr. Franks gave verbal and written consent for the officers to enter his property and conduct a search of the premises, including an outbuilding, also referred to as a “shed”, [sic] located on the property.

4. Mr. Franks also admitted to selling alcohol without a permit within the outbuilding.

....

6. Officers entered the outbuilding on the property and encountered nine individuals in the building, including the Defendant, Major Newkirk. The outbuilding was relatively small in size.

7. Alcohol was being sold in the outbuilding, and those present were consuming the same. This was immediately apparent to the officers upon entering the outbuilding. The alcohol was non-tax paid alcohol.

8. Through the open door of the shed, officers could see a bar at which alcohol was being consumed. There was also a noticeable odor of marijuana in the building. Defendant was holding a beer and standing inside near the door when the officers entered the outbuilding.

STATE V. NEWKIRK
Opinion of the Court

....

10. The officers asked whether anyone present had a gun. Mr. Franks stated that he had a gun. Two individuals also stated that they had marijuana in their possession. The officers asked all persons present to step out of the outbuilding one at a time. . . .

We conclude the totality of the circumstances presented in these factual findings adequately established that the officers had reasonable suspicion to justify the brief investigatory stop. Specifically, the findings establish that Franks admitted to running an illegal liquor house in his shed; that the officers observed alcohol being sold and consumed there; and that defendant was one of only nine people inside. That the court found defendant was holding a beer and not illegal liquor is irrelevant to whether the officers had reasonable suspicion to conduct an investigatory stop of defendant under the facts of this case.

Our General Statutes prohibit both the possession and consumption of non-tax paid alcohol. *See* N.C. Gen. Stat. § 18B-101(a) (2015) (“It shall be unlawful for any person to . . . sell, . . . consume, or possess any alcoholic beverages except as authorized by ABC law.”). Based on the ongoing criminal activity to which Franks admitted (i.e. selling alcohol without a license in the shed), and to which the officers observed (i.e. alcohol being unlawfully sold and consumed in the shed), particularly in light of this known illegal activity occurring in a small, private area, it was reasonable for the officers to infer that the nine people in the shed were there for the purpose of

STATE V. NEWKIRK
Opinion of the Court

consuming alcohol unlawfully and to suspect that defendant had already participated or intended to participate in this activity.

Under the totality of the circumstances established by the court's factual findings, we conclude the officers had reasonable suspicion to believe that defendant was involved in the known criminal activity, justifying the brief investigatory stop. We thus hold the court's findings supported its reasonable-suspicion conclusion.

Although irrelevant to our ultimate review of the trial court's findings, we note that the suppression evidence provided further support for the court's conclusion that reasonable suspicion existed. The court found that the officers smelled burnt marijuana and that two people admitted to possessing marijuana. Deputy Carroll testified that they had also received reports of small amounts of drugs being sold at the illegal liquor house and that, based on his experience, "street-level drug dealers" often hang out at these establishments. It was thus reasonable for the officers to infer that defendant might also have been involved in selling, buying, possessing, or consuming marijuana or other drugs. Moreover, the court found that Franks admitted to possessing a weapon, and, although not issued as a finding, Lieutenant Christensen testified that in his investigative experience with drug activity "at these sorts of establishments," he has encountered weapons "on numerous occasions." By virtue of defendant's presence with only eight others, two having admitting to possessing marijuana and one admitting to possessing a gun, in the small shed being

knowingly run as an illegal liquor house and currently being investigated, the officers were justified in temporarily seizing defendant for investigative purposes.

D. Scope of the Seizure

Defendant contends, alternatively, that even if the officers had reasonable suspicion to seize him, Lieutenant Christensen's question to defendant about whether he "had anything on him" exceeded constitutional bounds. We disagree.

The permissible scope of an investigatory stop depends upon the particular facts and circumstances of each case. "[T]he tolerable duration of police inquiries . . . is determined by the seizure's 'mission'—to address [that which] warranted the stop . . . and attend to related safety concerns." *Rodriguez v. United States*, ___ U.S. ___, ___, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015) (citations omitted); see also *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983) (plurality opinion) (explaining that a lawful stop "must be temporary and last no longer than is necessary to effectuate the purpose of the stop," and "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." (citations omitted)). "After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions." *State v. McClendon*, 350 N.C. 630, 636–37, 517 S.E.2d 128, 132–33 (1999) (citing *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Jones*, 96

STATE V. NEWKIRK
Opinion of the Court

N.C. App. 389, 386 S.E.2d 217 (1989), *appeal dismissed and disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 809 (1990)).

In its written order, the trial court made the following unchallenged findings supporting its conclusion that the seizure's "duration and scope . . . was reasonable":

8. Through the open door of the shed, officers could see, a bar at which alcohol was being consumed. There was also a noticeable odor of marijuana in the building. Defendant was holding a beer and standing inside near the door when the officers entered the shed.

. . . .

10. The officers asked whether anyone present had a gun. Mr. Franks stated that he had a gun. Two individuals also stated that they had marijuana in their possession. The officers asked all persons present to step out of the outbuilding one at a time. . . .

. . . .

12. Defendant was the first person to step out of the building. Between five and ten minutes passed from the time officers first entered the shed being used as a bar to the time defendant stepped outside the building. Defendant had not been arrested when he was asked to step from the building.

13. Officer Josh Christians[e]n immediately made contact with Defendant when Defendant left the shed and asked Defendant if he "had anything on him that we need to know about" or words to that effect.

14. Defendant, at that time, removed a bag of pills from his pocket. Christians[e]n told Defendant that he could probably be released on a citation if that was all he had. Christians[e]n then asked defendant was there "anything else?"

STATE V. NEWKIRK

Opinion of the Court

15. Defendant then removed a pill bottle containing twenty-five grams of heroin from his pocket. . . .

16. Defendant was not frisked or searched before surrendering the pills and heroin.

18. No force or coercion, either express or implied, was used to compel Defendant to surrender the pills or heroin. Defendant was not threatened, nor was any violence used, to induce defendant to surrender the contraband in question.

19. No promises or offers of reward or inducements were offered to Defendant.

These findings establish that Lieutenant Christensen's question remained within the permissible bounds of the investigatory seizure. Lieutenant Christensen knew criminal activity was occurring in the shed, both the selling, possessing, and consumption of illegal alcohol, and the possession and consumption of marijuana, and thus had reasonable suspicion to temporarily seize defendant to investigate his involvement in this criminal activity. Only five to ten minutes elapsed between the officers' entry into the shed and Lieutenant Christensen encountering defendant and immediately questioning him about the items he possessed.

Under the totality of the circumstances, Lieutenant Christensen's immediate and unobtrusive question was appropriately limited in duration, reasonably related in scope to the purpose which justified the initial seizure, and served to quickly verify or dispel his reasonable suspicion that defendant may have participated in the known, ongoing criminal activity. Because we conclude Lieutenant Christensen's

question did not exceed the permissible scope of the investigatory seizure, we hold the trial court's findings support its conclusion that "[t]he duration and scope of [d]efendant's seizure was reasonable."

E. Probable Cause to Arrest for Possession of Illegal Alcohol

Finally, defendant contends the trial court erred by making an alternative conclusion of law supporting its suppression ruling. Specifically, the court concluded that since the officers had probable cause to arrest defendant for possession or consumption of non-tax paid alcohol, defendant could have been lawfully subjected to a search incident to his arrest, which would have yielded the drugs. This challenge, however, is irrelevant in light of our holding that the officers possessed reasonable suspicion to stop and question defendant, which resulted in his voluntary surrender of the drugs.

We uphold a suppression ruling if it is supported by any reasonable view of the evidence. *See, e.g., State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (upholding suppression ruling even after presuming the lower court's reasoning for its ruling was incorrect, on the basis that "[a] correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned"; rather, "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable" (citation omitted)), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987); *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (upholding suppression ruling despite

STATE V. NEWKIRK
Opinion of the Court

one of the trial court's alternative conclusions of law being erroneous, explaining "[t]he crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence" (quoting *Austin*, 320 N.C. at 290, 357 S.E.2d at 650).

In light of our holding that the trial court's suppression ruling was correct because reasonable suspicion existed to justify the brief stop, we need not address this argument. Nonetheless, we note that "'probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *State v. Benters*, 367 N.C. 660, 664–65, 766 S.E.2d 593, 598 (2014) (quoting *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991)). As this Court concluded in *In re I.R.T.*, "in this case, we find probable cause based on the same factors in which we found reasonable suspicion to conduct the investigatory seizure." 184 N.C. App. 579, 587, 647 S.E.2d 129, 136 (2007). Thus, we conclude the court's alternative conclusion, while unnecessary to its ultimate ruling and our holding, was not erroneous.

III. Conclusion

Because we conclude the trial court's factual findings supported its conclusion that the officers had reasonable suspicion to justify the investigatory stop, and because Lieutenant Christensen's question did not exceed its constitutionally permissible scope, we affirm the trial court's order.

AFFIRMED.

Judges DIETZ and ARROWOOD concur.

STATE V. NEWKIRK
Opinion of the Court

Report per Rule 30(e).