NO. COA00-1288

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v. Davidson County
No. 98 CVS 3741-44

JACKY MARCUS WESTMORELAND

Appeal by defendant from judgment entered 25 May 2000 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 7 January 2002.

Attorney General Roy A. Cooper, by Assistant Attorney General David L. Elliott, for the State.

Jon W. Myers for defendant-appellant.

EAGLES, Chief Judge.

On 25 May 2000, a jury found defendant Jacky Marcus Westmoreland guilty of trafficking cocaine by possessing greater than 28 grams but less than 200 grams, maintaining a vehicle to keep or sell controlled substances, possession of cocaine with intent to sell or deliver, and trafficking cocaine by transporting greater than 28 grams but less than 200 grams. Judge Klass sentenced defendant to 35 to 42 months incarceration for trafficking cocaine by possessing greater than 28 grams but less than 200 grams, 35 to 42 months for possession of cocaine with intent to sell or deliver and trafficking cocaine by transporting

greater than 28 grams but less than 200 grams. For maintaining a vehicle to keep or sell controlled substances, Judge Klass imposed and suspended a six to eight month sentence and ordered that defendant be put on supervised probation for three years after serving the active sentences. Defendant appeals.

On 18 February 1998, Captain Glisson, Supervisor of the Narcotics/Vice Division of the Davidson County Sheriff's Department, received a telephone call from a person known to him as "Ace Golden Coral" (Ace). Ace informed Captain Glisson that defendant and Sam Musgrave had left North Carolina to go to Florida to purchase a kilo of cocaine. The two men were riding in a burnt-orange Dodge van with a raised camper roof bearing North Carolina license plate number HNM-3045. Ace said that the van was pulling an aluminum boat, and that the men had scanners, CB radios, a ham radio, and a vat of acid in which to drop the drugs if the two men were caught. Ace further stated that the men would return to North Carolina on either Saturday, 21 February, or Sunday, 22 February 1998. Ace also gave Captain Glisson directions to Musgrave's North Carolina residence.

Prior to receiving Ace's tip, officers of the Davidson County Vice/Narcotics Division were familiar with defendant's reputation as someone who dealt in illegal drugs. Officers were aware that defendant had a prior conviction for cocaine trafficking. Defendant had also been the subject of prior investigation and surveillance by the Vice/Narcotics Division. Vice officers knew by sight defendant's residence, the burnt-orange van, and the aluminum

boat. Officers knew that defendant lived with his wife, Janice Browning Westmoreland. Officers also determined that both the van and the boat were registered in Janice Westmoreland's name.

After receiving the tip, vice officers began surveillance of both defendant's and Musgrave's residences. In the early morning hours of 23 February 1998, Lieutenant Douglas Westmoreland and Detective W.M. Rankin observed a burnt-orange van pulling an aluminum boat pass by and turn toward the second entrance to defendant's house. The right rear taillight on the boat trailer was not lit. Lieutenant Westmoreland initiated a traffic stop of the van. Lieutenant Scott Woodall arrived at the scene of the stop almost immediately after the stop occurred.

After the officers identified the occupants of the van, they separately questioned defendant and Musgrave about where the two had been. Musgrave told Lieutenant Woodall that he had been at High Rock Lake. When asked if he was sure, Musgrave responded that he had been in Myrtle Beach. Lieutenant Woodall then questioned defendant. Defendant responded that he and Musgrave had been fishing in Florida.

Lieutenant Woodall told defendant that the police had received a tip indicating that Musgrave and defendant were involved in drug activity. Lieutenant Woodall then asked for defendant's consent to search the van. Defendant responded, "I guess I don't mind." Lieutenant Woodall told defendant that he needed a "straight answer." Defendant responded, "well, help yourself." Musgrave was placed in one police vehicle and defendant was placed in another.

Lieutenant Woodall presented defendant with a search consent form which defendant then signed.

Officer Mike Thompson and a drug search police dog, Pepper, arrived at the scene. During a walk-around of the van, Pepper alerted on one side of the van. From a search of the inside of the van, officers discovered a small plastic bag of cocaine, a bag of marijuana, a CB radio, $6,800.00 in cash, electronic digital scales, brass weights, a bent silver spoon, and Florida newspapers dated 20 February 1998. Lieutenant Woodall then placed defendant and Musgrave under arrest. After arresting defendant and Musgrave, officers searched the boat and found three bags of cocaine and one bag of marijuana. The cocaine found totaled 95.3 grams and the marijuana totaled 10.6 grams.

On appeal, defendant contends that: (1) the trial court erred in denying defendant's motion to suppress evidence and (2) the trial court erred in refusing to include in its charge to the jury defendant's requested instruction regarding exculpatory statements offered by the State.

Defendant first argues that Ace's tip failed to provide sufficient indicia of reliability to create reasonable suspicion that criminal activity was afoot that would permit officers to stop the van, thereby rendering all evidence seized from the officer's consensual search inadmissible. *See Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990).

Generally, when reviewing a trial court's decision on a defendant's motion to suppress evidence, this Court first

determines whether the trial judge's findings of fact are supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact that are supported by competent evidence are binding on appeal. *Id.* The reviewing court next performs a de novo review to determine whether the findings of fact support the trial court's conclusions of law. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994). Here, defendant concedes, in his brief, that the trial court's findings of fact are supported by competent evidence. Consequently, this Court need only determine whether the trial court's findings of fact support the trial court's conclusions of law.

An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability. *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000). In determining whether a tip is sufficiently reliable to pass constitutional muster, the court must consider the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983). Under the *Gates* test, the basis of knowledge and reliability or veracity are relevant, but instead of being independent of each other, they are closely intertwined issues, where "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233, 76 L. Ed. 2d at 545.

Here, Captain Glisson received an anonymous tip indicating that defendant had traveled to Florida in order to purchase illegal drugs. The tip accurately identified the individuals, the vehicle,

the boat involved, and Musgrave's home address. Ace informed Captain Glisson that defendant and Musgrave would return on either 21 or 22 February 1998. Ace also gave specific information about equipment he believed defendant and Musgrave would have with them.

Before receiving the tip from Ace, officers knew of defendant's reputation as someone who dealt in illegal drugs. Before the stop, officers of the Davidson County Vice/Narcotics Division had verified that defendant and Musgrave both had prior drug convictions and the location and description of Musgrave's residence. Though defendant and Musgrave did not return on 21 or 22 February 1998 as predicted by Ace, they did return in the early morning hours of 23 February 1998.

Ace's tip, the officers' prior knowledge of defendant's reputation, and the officers' corroboration and investigation of the information supplied in the tip provided the vice/narcotics officers of the Davidson County Sheriff's Department with reasonable suspicion to believe that defendant was engaged in criminal activity. Accordingly, after considering the totality of the circumstances, we hold that the officers' investigatory stop of the burnt-orange van was based on reasonable suspicion and did not violate defendant's constitutional rights. This assignment of error fails.

Defendant's remaining contention is that the trial court erred in refusing to give defendant's requested instruction regarding exculpatory statements offered by the State. If a request is made for a jury instruction and that request is supported by evidence,

the trial court must give the instruction at least in substance. *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). Here, defendant requested that the trial court instruct the jury using language from *State v. Bruton*, 264 N.C. 488, 499, 142 S.E.2d 169, 176 (1965), as follows:

> When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements.

In *State v. Hankerson*, 288 N.C. 632, 637-38, 220 S.E.2d 575, 580-81 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977), our Supreme Court concluded that the State was not bound by defendant's exculpatory statement, which the State introduced, when the State introduced other evidence that impeached the defendant's statement.

Our review of the portions of the record identified by defendant as containing exculpatory statements does not reveal any uncontradicted statement made by defendant and introduced by the State that could be construed as exculpatory in nature. Accordingly, we hold that defendant's requested instruction was not supported by the evidence and that this assignment of error fails.

No error.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).