NO. COA00-1321

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Lenoir County
Nos. 98-CRS-9063
MELVIN LEON CLARK, JR. 98-CRS-2563

Appeal by defendant from judgment entered 16 February 2000 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 7 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Edwin L. West, III, P.L.L.C., by Edwin L. West, for defendant appellant.

McCULLOUGH, Judge.

Defendant Melvin Leon Clark, Jr., was tried before a jury at the 14 February 2000 Criminal Session of Lenior County Superior Court. Defendant was indicted on one count of breaking and entering, one count of possession of a controlled substance, and one count of keeping and maintaining a vehicle for the use of controlled substances. Defendant was also indicted as an habitual felon.

Prior to trial, defendant made a motion to suppress the evidence of the crack pipe and drugs that were obtained during the

pat-down search. The evidence presented at the hearing tended to show that on 11 September 1998, officers of the Kinston Police Department responded to a burglar alarm at the Bojangles on North Heritage Street. Officer Gaskins found broken glass on the outside and inside of a window near the drive-thru window of the restaurant. Officer Barnes saw a purple GEO Tracker slowly driving behind doctor's offices nearby, about "250 or 300 feet" away, then exiting onto Airport Road. Officer Kierzak called in the description of the vehicle.

Sergeant Sutton reported that he had spotted the Tracker in question at a convenience store on Queen Street. This was "less than a minute" after Officer Kierzak called in the description over the radio. Officer Gaskins and Sergeant Sutton approached defendant sitting in the car with the motor running. Defendant, at some point, exited the vehicle. The officers noted it appeared that defendant had what looked like slivers of glass on his clothing and shoes.

The officers approached defendant and asked him for identification and if he had any weapons on him. Defendant responded that he did not have any weapons. Officer Gaskins then performed a pat-down frisk of defendant. Officer Gaskins felt one hard round item and a soft pliable item in defendant's right coat pocket. Officer Gaskins asked defendant what the soft and pliable item was, to which defendant responded that it was a liquor bottle.

Officer Gaskins testified that he has about 25 years of experience on the police force. During this time, he has become

familiar with the practices of crack cocaine users. According to the officer, as soon as defendant responded that it was a liquor bottle in his pocket, due to the circumstances and his experience, he "felt that it may have been some type of paraphernalia that is used in drugs and all."

Officer Gaskins then asked defendant if he would take the items out of his pocket. Defendant presented the items requested. The hard object was a tube of chapstick. The soft object was an "airplane-sized" liquor bottle. Officer Gaskins noticed that a hole was burned into the side of the liquor bottle, indicating that it had been used to smoke crack cocaine. The officers arrested defendant for possession of drug paraphernalia. At trial, it was revealed that, during their search incident to arrest, they found a small piece of glass in defendant's front coat pocket. The "airplane-sized" bottle was later determined to contain cocaine crystals and residue. The trial court denied defendant's motion to suppress in an order signed 15 February 2000. A trial was then conducted on all charges.

The jury found defendant guilty of possession of a controlled substance and not guilty on all other charges. Defendant was also found guilty of being an habitual felon. Defendant was determined to have a prior record level III, and was sentenced to a minimum term of 116 months and a maximum of 149 months.

Defendant presents the following questions on appeal: (1) Whether the trial court erred in denying defendant's motion to suppress where the officer continued to search even after his

constitutional authority for the search, if any, was exhausted because the pat-down search failed to reveal the presence of weapons or immediately apparent contraband; and (2) whether the Habitual Felon Act violates the United States and North Carolina Constitutions because it runs afoul of double jeopardy, equal protection, and separation of powers.

I.

Defendant first argues that the trial court erred by denying his motion to suppress. His argument is two-fold: (a) that the officers did not have reasonable suspicion necessary to support the initial search of defendant; and (b) even if they did, the officers went beyond the constitutionally permissible scope of the allowed pat-down search.

Testimony by the officers at the motion to suppress hearing and at trial revealed that they found broken glass at the scene of the break-in at Bojangles; that it was 3:00 a.m. with very little traffic in the area; that they saw a purple GEO Tracker driving slowly in a nearby parking lot, which left the scene headed for Airport Road when an officer approached the vehicle. When the Tracker was stopped and defendant exited the vehicle, the officers noticed that his clothes reflected light because he had slivers of glass in his clothes.

Based on these facts and our review of the record, it seems clear that the officers "acted well within the confines of constitutional mandates" when they stopped and searched defendant. Our decision in *State v. Adams*, 55 N.C. App. 599, 600, 286 S.E.2d

371, 373 (1982) is controlling authority.

The facts in *Adams* are similar to the case *sub judice*. There, a convenience store was robbed at 1:30 a.m. A witness informed police about a vehicle he saw leaving the vicinity with its lights off, and where the vehicle went after leaving the scene. *Adams*, 55 N.C. App. at 601-02, 286 S.E.2d at 372-73. Officers pursued and stopped the vehicle matching the witness' description. There was no other traffic on the road. *Id.* The officers stopped the occupants of the vehicle and arrested them after finding evidence of the robbery in the car.

The defendant in *Adams* argued that the officer had "no probable cause to detain or arrest him and that, therefore, the admission into evidence of the guns and money obtained at the site of his arrest" violated his constitutional rights. *Id.* at 600, 286 S.E.2d at 373. The Court stated that "'[i]t is well recognized that a description of either a person or an automobile may furnish reasonable grounds for arresting and detaining a criminal suspect.'" *Id.* at 602, 286 S.E.2d at 374 (quoting *State v. Jacobs*, 277 N.C. 151, 154, 176 S.E.2d 744, 746 (1970)). The *Adams* Court also said that:

> Separate and apart from this principle that a suspect may be detained or arrested in the absence of a warrant under certain circumstances, it is also a well-settled principle in this State that a police officer may conduct a warrantless search of a vehicle capable of movement when the officer has probable cause to do so and when exigent circumstances make it impractical to secure a warrant. The test of probable cause in this instance is whether the police officer had

> reasonable grounds to believe that the suspect had committed a crime and that the vehicle in which he was riding contained evidence relating to the crime.

Adams, 55 N.C. App. at 601, 286 S.E.2d at 373 (citations omitted). The case held the officer had

> ample justification for pursuing and stopping the car . . . . No arrest warrant was required under the circumstances. Moreover, [the officer], having reasonable grounds for suspecting that defendant was involved in a crime, had the probable cause necessary to justify a warrantless search of the car. The stopping of this car at 1:30 a.m., only moments after a robbery and after it had been identified as being near the scene of the robbery, is representative of the type of exigent circumstances that make it impractical to secure a search warrant.

Id. at 602, 286 S.E.2d at 374.

We hold that the officers in this case had ample justification for pursuing and stopping the vehicle containing defendant. Officers on the scene spotted defendant's vehicle driving slowly in a nearby parking lot and leaving the scene as soon as an officer began to approach it. No more than a few minutes passed before the vehicle was stopped. In addition, the time of day was 3:00 a.m., with very little traffic on the roads. The situation appears to be analogous to *Adams*.

When defendant exited his vehicle, the officers noticed that his clothes contained slivers of glass. This is highly significant because the crime scene had significant amounts of shattered glass.

> An officer has probable cause to believe that contraband is concealed within a vehicle when given all the circumstances known to him, he believes there is a "fair probability that

> contraband or evidence of a crime will be found" therein.

State v. Ford, 70 N.C. App. 244, 247, 318 S.E.2d 914, 916 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983)). At this point, the officers had reasonable grounds for suspecting that defendant was involved in a crime, and thus had the probable cause necessary to justify a warrantless search of the car.

> Where police officers have probable cause to believe that contraband is concealed somewhere within a legitimately stopped automobile, they may conduct a search of the automobile that is as thorough as a magistrate could have authorized in a warrant. *United States v. Ross*, 456 U.S. 798 (1982).

Ford, 70 N.C. App. at 247, 318 S.E.2d at 916.

A magistrate issuing a search warrant to the investigating officers in this case would have had the authority to designate defendant as a person to be searched. *See* N.C. Gen. Stat. § 15A-243(b)(3) (1999); N.C. Gen. Stat. § 15A-256 (1999). Thus, the officers in this case would have been justified to fully search the vehicle and defendant.

However, in the alternative, it appears to this Court that the officers' actions could be justified under the plain feel doctrine, based on the totality of the circumstances test set forth by this Court in *State v. Briggs*, 140 N.C. App. 484, 536 S.E.2d 858 (2000).

In *Briggs*, a Concord police officer seized a cigar holder from the defendant in that case at a traffic checkpoint. The seizure was upheld by this Court under a totality of the circumstances

test. The *Briggs* Court stated:

> After considering the various cases addressing this issue, we conclude that the 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. We acknowledge the baseline principle that legality of the seizure in this case ultimately hinges on whether Officer Stikeleather had probable cause to believe the cigar holder contained contraband before he seized it. When the *facts and circumstances within the officer's knowledge* are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband, probable cause exists. It is well settled that the *probable* cause determination does not require hard and fast certainty by an officer, but involves more of a common-sense determination. Here, that involves considering the evidence as understood by those versed in the field of law enforcement under the circumstances then existing.

Briggs, 140 N.C. App. at 493, 536 S.E.2d at 863.

Here, Officer Gaskins had ample information to properly demand that defendant produce the liquor bottle in his pocket based on his past experience and the totality of the circumstances. Thus, under either theory, defendant's assignment of error that the denial of his motion to suppress was error is therefore overruled.

II.

Defendant also argues that the habitual felon indictment violated his state and federal constitutional rights. Specifically, defendant contends that the combination of N.C. Gen. Stat. § 14-7.1, *et seq*. (Habitual Felon Act) and N.C. Gen. Stat. § 15A-1340.10, *et seq*. (Structured Sentencing Act) runs afoul of

the double jeopardy clause, equal protection clause, and separation of powers.

Initially, we note that no objection was made at the trial level and defendant is raising these constitutional arguments for the first time on appeal. Defendant has failed to preserve the question for appellate review in accordance with N.C.R. App. P. 10(b)(1). "In addition, this Court will not review defendant's constitutional argument because the issue was not '"raised and determined in the trial court."'" *State v. Call*, 353 N.C. 400, 426, 545 S.E.2d 190, 200 (quoting *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999) (quoting *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985))), *cert. denied* ___ U.S. ___, 151 L. Ed. 2d 548 (2001). Defendant has also failed to assert plain error in accordance with N.C.R. App. P. 10(c)(4).

However, it appears that this Court has been inundated with appeals identical to defendant's, and has previously disposed of each of defendant's constitutional attacks.

We note that this Court has ruled that the Habitual Felon Act, by itself, survives constitutional attack under the due process clause, equal protection clause, and from double jeopardy challenges. *See State v. Hairston*, 137 N.C. App. 352, 528 S.E.2d 29 (2000); and *State v. Hodge*, 112 N.C. App. 462, 436 S.E.2d 251 (1993). As to defendant's arguments, in *State v. Wilson*, 139 N.C. App. 544, 533 S.E.2d 865, *appeal dismissed, disc. review denied*, ___ N.C. ___, 546 S.E.2d 394 (2000), this Court upheld the Habitual Felon Act against an attack that it violates Article I, Section 6

(separation of powers) of our state's constitution. *See also Brown*, ___ N.C. App. ___, 553 S.E.2d 428 (2001); *State v. Skipper*, ___ N.C. App. ___, 553 S.E.2d 690 (2001); *State v. Parks*, ___ N.C. App. ___, 553 S.E.2d 695 (2001), *appeal dismissed, disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2002); *State v. Brown*, 146 N.C. App. 299, 552 S.E.2d 234, *appeal dismissed, disc. review denied*, 354 N.C. 576, 559 S.E.2d 186 (2001); *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001). This is the exact same argument that defendant makes herein, and his assignment of error as it pertains to this issue is thus overruled.

Likewise, this Court has previously dealt with defendant's other two constitutional arguments. In *Brown*, this Court rejected the claim that the combined use of the Habitual Felon Act and Structured Sentencing subjects a defendant to double jeopardy. *Brown*, 146 N.C. App. 299, 552 S.E.2d 234; *see Brown*, ___ N.C. App. ___, 553 S.E.2d 428. In *Parks*, this Court held that a conviction as an habitual felon did not violate equal protection so long as the prosecutorial discretion of whether or not to prosecute defendants as habitual felons is used appropriately. Prosecutors appropriately exercise their discretion "unless there be a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." *Parks*, ___ N.C. App. at ___, 553 S.E.2d at 697 (quoting *Wilson*, 139 N.C. App. at 550, 533 S.E.2d at 870). No such abuse arises from the record or the arguments of counsel. *See also Brown*, ___ N.C. App. ___, 553 S.E.2d 428.

Therefore, defendant's final assignment of error is overruled.

No error.

Chief Judge EAGLES and CAMPBELL concur.

Report per Rule 30(e).