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NO. COA01-1419

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 00 CRS 56201

GERALD WAYNE ADAMS,
Defendant

Appeal by the State from order entered 27 June 2001 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 21 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, for the State.

Public Defender Ronald D. McSwain, by Assistant Public Defender David T. Delaney, for defendant.

BRYANT, Judge.

At approximately 1:30 a.m. on 6 April 2000, Officer Victor Starling of the Fayetteville Police Department observed defendant driving a pickup truck with a large ladder in the back. Officer Starling, believing it unusual for a construction-type vehicle to be operated at that time of night, began to follow defendant. Defendant turned onto several streets and then turned into a driveway onto Hope Mills Road. Officer Starling drove past the driveway, parked his vehicle and turned off the headlights. Within a minute or two, defendant backed out of the driveway onto Hope

Mills Road and proceeded to turn left onto Cypress Road. Officer Starling followed. After making several more turns, defendant turned into a driveway at 4904 Walnut Road.

Officer Starling pulled alongside the curb in front of the driveway, parked his car, turned on his emergency hazard lights, and approached defendant who was already outside the vehicle. Officer Starling informed defendant that he was suspicious of the numerous turns defendant had made while driving the vehicle, especially at that time of night. Defendant informed the officer that he stopped on Hope Mills Road to drop off someone. After questioning defendant about his name, address, and birth date, the officer became convinced that defendant was providing false information. Officer Starling asked for defendant's driver's license but defendant did not have any identification on his person. At this point, defendant informed the officer that he thought he was being stopped for driving with an expired inspection sticker. The officer again asked defendant for his name and address. The officer then went back to his patrol car, turned on his blue lights and tried to run the name and address defendant had given him. Unable to verify the information provided to him and believing that defendant was providing false information, the officer arrested defendant for driving without a license.

After placing defendant under arrest, Officer Starling called for a member of the canine unit to search the vehicle for narcotics and weapons. After some period of time, Canine Unit Officer Paul Fondren arrived and conducted a search of the vehicle. Two small

plastic bags were discovered and field tested positive for cocaine.

On 7 November 2000, the grand jury indicted defendant for felonious possession of cocaine, misdemeanor possession of drug paraphernalia, giving fictitious information to a police officer, driving while license revoked, and for an inspection violation. On 6 April 2001, defendant filed a motion to suppress evidence seized as a result of the arrest. The motion was heard at the 9 and 11 April 2001 sessions of Cumberland County Superior Court with the Honorable Gregory A. Weeks presiding. By order filed 27 June 2001, the motion to suppress was granted. The State gave notice of appeal in open court. The State's original record on appeal was withdrawn on 31 August 2001, because a certificate that the appeal was not being taken for purposes of delay was omitted from the record. On 18 September 2001, we granted the State's *writ of certiorari* requesting review of the order granting defendant's motion to suppress.

I. Whether a stop occurred

In considering whether an encounter with a defendant violates the defendant's Fourth Amendment rights against unreasonable searches and seizures, our Supreme Court has stated:

> The Supreme Court of the United States recently reaffirmed that 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. *Florida v. Bostic,* 501 U.S. 429, [431], 115 L. Ed. 2d 389, 396 (1991); *INS v. Delgado,* 466 U.S. 210, 80 L. Ed. 2d 247 (1984). "A seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostic,*

> 501 U.S. at [434], 115 L. Ed. 2d at 398. *See also California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 697 (1991). . . . Such encounters are considered consensual and no reasonable suspicion is necessary. *Bostic*, 501 U.S. at [434], 115 L. Ed. 2d at 398. The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter. *Id.* at [434-38], 115 L. Ed. 2d at 398-99; *Michigan v. Chesternut*, 486 U.S. 567, 573, 100 L. Ed. 2d 565, 572 (1988); *United States v. Mendenall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980); *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982).

State v. Brooks, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994).

In this case, Officer Starling, prior to approaching defendant, did not activate his blue lights. The officer got out of his car and approached defendant who was already out of his vehicle. There was no indication that the defendant was required to stop his truck. A conversation ensued as to why the defendant had made so many turns while driving, but no show of force was exhibited toward the defendant. Only after defendant provided false information and admitted that he was driving without a license, did the officer proceed to arrest defendant. Officer Starling's conduct did not amount to a stop or a seizure. Furthermore, no reasonable suspicion was necessary for the officer to approach the defendant. We hold that the encounter between the officer and defendant did not amount to a stop such that defendant's Fourth Amendment rights against unreasonable search and seizure were violated. Therefore, the trial court erred in holding that a stop occurred.

II. Standing to object to search

The State contends that defendant did not have standing to object to the search of the truck because he had no legitimate expectation of privacy as to the contents of the truck. The record reflects that the State did not object to the issue of standing at the suppression hearing. The State has not properly preserved this issue for appellate review. *See State v. Cooke*, 306 N.C. 132, 138, 291 S.E.2d 618, 621-22 (1982) (stating that the State is precluded from raising the standing issue on appeal when it did not contest this issue before the trial court); N.C. R. App. R. 10(b)(1). Therefore, this assignment of error is overruled.

III. Suppression of evidence discovered during search[1]

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[1] We note that the motion to suppress only contested the admissibility of the evidence based on lack of reasonable suspicion for the stop or lack of probable cause for the arrest. Specifically, the trial court noted:

> There is nothing in the affidavit or in the motion which contests the search specifically as a search based on lack of probable cause or an unlawful search. The language of the motion addresses the basis for the stop and the basis for the arrest, so I'm limited to what is contended in the motion and in the affidavit.

Subsequently, however, the trial court found:

> Alternatively, the Court finds that, even if there was a basis for the stop of the defendant -- and I know this is not part of the motion that's now before me but I'm trying to speed things up -- there was no basis for the search of the vehicle. I'm going to find that it was a search without a warrant and without probable cause. The officer in his testimony never indicated that he at any time was concerned about the defendant possessing

Review by this Court of an order suppressing evidence is strictly

> any weapon nor that there was any weapon that might have been contained in the vehicle.
>
> So I'm going to find that there was a stop without reasonable suspicion. Alternatively, even if there was, and I find that there was not, that the search was without probable cause . . . .
>
> . . . .
>
> Now, I recognize Mr. Starling did say that one of the reasons he called for the back-up officer, the canine officer, was to search for narcotics and weapons. But there was no articulable basis at that point to believe that there was a weapon in the car and there was no search contemporaneous with the arrest. It was sometime later.
>
> MS. WOODS: Yes, your Honor. The state would indicate that that -- that was not offered -- that evidence was not offered because the state addressed the two issues that were in --
>
> THE COURT: And I recognize that.
>
> MS. WOODS: -- the motion to suppress.
>
> THE COURT: And I recognize the situation that puts you in. But I am going on what the testimony was before me in its totality. . . . The Court finds that there was no articulable reasonable suspicion for the stop and, alternatively, even if there was, there was no probable cause for the search under the facts and circumstances.

Neither party contests whether it was error for the trial court to consider issues outside the scope of the motion. (Specifically, whether there existed probable cause to search the vehicle or whether the search occurred contemporaneously with the arrest.) Therefore, this Court refrains from addressing whether the trial court was vested with authority to consider issues not raised by the parties.

limited. *State v. Fisher*, 141 N.C. App. 448, 451, 539 S.E.2d 677, 680 (2000), *review denied*, 353 N.C. 387, 547 S.E.2d 420 (2001). Competent evidence must exist to support the trial court's findings and such findings are binding on appeal. *Id.* If the findings are supported by competent evidence, then the conclusions of law are reviewed *de novo*. *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209, *review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002). Our Supreme Court has held:

> The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances. *Robbins v. California*, 453 U.S. 420, 101 S. Ct. 2841, 69 L. Ed. 2d 744 (1981); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *accord State v. Allison*, 298 N.C. 135, 257 S.E.2d 417 (1979); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S. Ct. 2165, 64 L. Ed. 2d 796 (1980). Hence, when the State seeks to admit evidence discovered by way of a warrantless search in a criminal prosecution, it must first show how the former intrusion was exempted from the general constitutional demand for a warrant. *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951).

State v. Cooke, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982).

The right to search an automobile and the validity of the seizure depend on whether the officer has probable cause to believe that the automobile contains evidence of criminal activity. *State v. Ratliff*, 281 N.C. 397, 403, 189 S.E.2d 179, 182 (1972). In the

absence of probable cause, a search of an automobile may be lawful if the search is conducted contemporaneous with the arrest. *See New York v. Belton*, 453 U.S. 454, 460, 69 L. Ed. 2d 768 (1981). A delay between the time of the arrest and the time of the search may be found reasonable under certain circumstances. *See State v. Hopkins*, 296 N.C. 673, 681, 252 S.E.2d 755, 761 (1979) ("The fact that the search was made some six or seven hours after defendant Virginia was arrested did not make it too remote in time or place to be a search incident to a lawful arrest. "), *State v. Jackson*, 280 N.C. 122, 126, 185 S.E.2d 202, 205 (1971) ("Neither the removal of the defendant to the jail nor the delay of 30 to 45 minutes waiting for the matron to search her made the search too remote in time or place to be invalid as a search incident to a lawful arrest.").

Probable cause

In this case, Officer Starling arrested defendant for driving without a driver's license. The officer made no indication either in his report or his testimony that he suspected that the vehicle contained any evidence of a crime or evidence pertaining to a crime. The officer merely had a suspicion that the defendant smelled of crack cocaine. Although Officer Starling testified that the vehicle passenger smelled of crack cocaine, the officer did not state whether the smell was also emanating from the vehicle, or whether the passenger was still in the vehicle when the officer noticed the smell.

In addition, the trial court found:

> THE COURT: Wasn't real clear from the testimony whether the dogs alerted. The testimony was lacking in that respect. The testimony was I called out a canine officer and he responded. He searched the vehicle and he made the find. So I mean there's nothing to indicate that the dogs alerted on anything. I mean the evidence is just as susceptible of the interpretation of when the officer arrived on the scene, he immediately started a search of the vehicle.

Competent evidence exists to support the trial court's finding that there did not exist probable cause to search the vehicle. Therefore, this assignment of error is overruled.

Contemporaneous search

After placing defendant under arrest, the officer placed a call on his radio requesting that Canine Unit Officer Fondren meet him at the location of the arrest. Officer Fondren arrived after some unspecified period of time and, upon being informed of the circumstances of the arrest, was told by Officer Starling to search the vehicle. Upon searching the vehicle, Officer Fondren discovered two small plastic baggies, one on either side of the dashboard, containing white, powdery residue. The residue tested positive for cocaine.

In *U.S. v. Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987), the Ninth Circuit stated that "the circumstances of the arrest dictate whether the search was proper and conducted contemporaneously with the arrest." *Accord State v. Hopkins,* 296 N.C. 675, 252 S.E.2d 755 (1979), *State v. Jackson,* 280 N.C. 122, 185 S.E.2d 202 (1971). In the instant case, Officer Starling was alone when he dispatched for assistance. There were two occupants, the driver and the

passenger. Defendant provided false information to Officer Starling. Officer Starling testified that the driver and passenger smelled of crack cocaine. In addition, the encountered occurred at 1:30 a.m.

Based on the circumstances of the encounter, the delay between placing defendant under arrest, dispatching for assistance, an the search did not negate the contemporaneousness of the search. Therefore, we hold that the trial court erred in finding that the search was not contemporaneous with defendant's arrest.

MANDATE

We conclude that no stop or seizure of defendant occurred in violation of his Fourth Amendment rights. Moreover, we conclude competent evidence supports the trial court's finding that probable cause did not exist to justify the subsequent search of the vehicle. However, we hold that the trial court erred in finding that the search was not contemporaneous with the arrest. Accordingly, the trial court's order is reversed.

Reversed.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).