NO. COA01-219

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v. Hyde County
No. 00 CRS 0188

JESSE SCOTT WARREN,
Defendant

Appeal by State from order entered 23 October 2000 by Judge James R. Vosburgh in Hyde County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Alexy, Merrell, Wills & Wills, L.L.P., by James R. Wills, III, for defendant-appellee.

EAGLES, Chief Judge.

The State appeals from an order entered by the trial court granting Jesse Scott Warren's ("defendant") motion to suppress evidence. After careful consideration of the briefs and record, we reverse and remand.

On 25 March 2000, the Hyde County Sheriff's Department received an anonymous telephone call. The caller reported a red, four-door Jeep Cherokee being driven recklessly while bottles were being thrown from inside the vehicle. Deputy Sheriff Daniel Cahoon ("Cahoon") was parked "at Joyce's of Ocracoke parking lot" when he

saw a red Jeep Cherokee turn from British Cemetery Road onto N.C. 12. Cahoon saw the vehicle accelerate rapidly and heard "the engine whining very, very high . . . ." Cahoon could then no longer see the vehicle. He pulled out of the parking lot and proceeded in the direction taken by the Jeep Cherokee.

The State's evidence tends to show that Cahoon then saw the Jeep Cherokee parked in Sweet Tooth's parking lot. Cahoon pulled in behind the vehicle and activated his blue lights.

Defendant's evidence tends to show that at approximately 11:30 p.m. defendant was driving north on Highway 12 when Cahoon "pulled behind [him] and then put his lights on and pulled me over." Defendant then pulled his vehicle into a parking lot and stopped.

Cahoon approached the vehicle and asked for defendant's license and registration. Cahoon issued defendant a citation for driving while impaired in violation of G.S. § 20-138.1 and transporting an open container of alcoholic beverage after consuming alcohol in violation of G.S. § 20-138.7. The citation indicated it was issued at 11:28 p.m. on 25 March 2000. Defendant was arrested and charged on these offenses.

A hearing on defendant's motion to suppress was held on 23 October 2000 before Judge James R. Vosburgh in Hyde County Superior Court. The trial court granted defendant's motion to suppress "any testimony and/or evidence obtained from [sic] the Officer during the stop forward . . . ." The State appeals.

The State raises one issue on appeal: whether the trial court erred in allowing defendant's motion to suppress the evidence

resulting from the interaction between defendant and Cahoon. The State argues that the findings of fact are insufficient to afford effective appellate review. In the alternative, the State argues that no reasonable articulable suspicion was required by Cahoon to approach defendant, and if needed, Cahoon had a reasonable articulable suspicion to support a stop. After careful consideration, we reverse and remand.

> When the competency of evidence is challenged and the trial judge conducts a *voir dire* to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. *If there is a material conflict in the evidence on voir dire, he must do so in order to resolve the conflict.*

State v. Vick, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995) (emphasis added) (citations omitted).

"In reviewing the trial court's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Tarlton*, __ N.C. App. __, __, 553 S.E.2d 50, 53 (2001).

Here, the evidence that Cahoon obtained as a result of the stop was challenged by defendant. The trial court conducted a hearing and entered the following findings of fact:

> 2. The Officer testified that he had received an anonymous tip regarding the Defendant's automobile. The tip described a red Jeep Cherokee.
>
> 3. The Officer testified that he had received this tip sometime earlier on the night of March 25, 2000.

4. The Officer testified that at approximately 11:30 p.m. on the night of March 25, 2000 he spotted the Defendant's vehicle because he heard the Defendant revving his engine. He then pursued the Defendant.

5. The Officer testified the Defendant pulled off the road and stopped his vehicle. The Officer pulled behind the Defendant and activated his blue lights.

6. The Defendant testified that he was traveling north on Highway 12 to return to the ferry.

7. The Defendant testified that he stopped his motor vehicle because he was being pulled over by the Officer.

8. The Officer testified that the only reason that he stopped the Defendant's motor vehicle was because of the anonymous tip.

The trial court then concluded:

> BASED UPON the foregoing Findings of Fact this Court concludes as a matter of law that pursuant to State v. Foreman, 133 N.C. App. 292, 515 S.E.2d 488 (1999) and Florida v. J.L., 529 U.S. ___ (2000), No. 98-1993, an anonymous tip, without more, does not provide reasonable articulable suspicion to initiate a traffic stop.

When "it becomes incumbent on the trial court to make findings of fact, the court should make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *Davis v. Davis*, 11 N.C. App. 115, 117, 180 S.E.2d 374, 375 (1971). Here, the trial court's "Findings of Fact" are not ultimate findings, they are a recitation of the testimony. "[V]erbatim recitations of the testimony of each witness *do not* constitute

findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *Kraemer v. Moore*, 67 N.C. App. 505, 505 n.1, 313 S.E.2d 610, *disc. review denied*, 311 N.C. 758, 321 S.E.2d 137 (1984).

"If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982).

> If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected. Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show.

In re Gleisner, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000) (citations omitted).

Here, there is conflicting evidence as to whether Cahoon stopped defendant which is shown in Findings 5 and 7. The trial court must make its own determination of the facts established by the evidence. *Id.* at 480, 539 S.E.2d at 366.

Accordingly, the decision of the trial court is reversed and the matter is remanded for the trial court to enter ultimate findings of fact.

Reversed and remanded.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).