NO. COA03-1339

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

STATE OF NORTH CAROLINA

v. Forsyth County
No. 01 CRS 57370
No. 01 CRS 57470

TERRY LEE BETHEA,
Defendant.

Appeal by State of North Carolina from pretrial order entered 25 June 2003 by Judge Charles C. Lamm, Jr., in the Superior Court in Forsyth County. Heard in the Court of Appeals 10 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for the defendant.

HUDSON, Judge.

The State appeals a 23 June 2003 pretrial order granting defendant's motion to suppress evidence from searches of cars alleged to have been used in robberies. The court held a hearing on the motion to suppress and then entered a written order which includes extensive findings of fact, from which this factual summary is derived. The court then concluded, *inter alia*, that in the absence of consent or exigent circumstances, the officers must have a warrant based on probable cause before conducting a search.

Based on these findings and conclusions, the court allowed the defendant's motion. For the reasons stated below, we reverse.

The indictments here charge defendant with having participated in three robberies in a six-week time period, ending on 29 June 2001. The information available to the police before the search tended to show that an accomplice, corroborating another suspect's story, reported that the defendant was a perpetrator in the three robberies. The accomplice also told the police that the Mercury Sable parked outside his house on the public street belonged to the defendant and was used in the first two robberies. Police searched the car at the scene and at the sheriff's office without a warrant.

On 30 July 2001, police spotted defendant's other car, a light blue or gray Jaguar, in a holding lot of an automotive shop near defendant's home. The accomplice told police that the Jaguar had been used in the third robbery, a story the restaurant manager corroborated. Police were looking for defendant in his neighborhood when they staked out the car for awhile, then seized and searched the vehicle without a warrant. At no time did the officers seek a warrant for either car, despite having enough time to do so.

On appeal, the State argues that the court erred in granting the motion because no warrant was necessary, according to the so-called "automobile exception" to the Fourth Amendment's general warrant requirements. *See U.S. v. Patterson*, 150 F.3d 382, 383-86 (4th Cir. 1998), *cert. denied*, 525 U.S. 1086, 142 L.Ed.2d 691 (1999). Defendant first contends that the State may not argue

the automobile exception on appeal since it did not raise the issue specifically at the hearing on the motion to suppress. "[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount.'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934)). Thus, the first issue before us is whether the State adequately preserved this issue for review.

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved . . . may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1) (2003). The record tends to show that before the close of the suppression hearing, the State argued that, "it's a search, it's a warrantless search of a vehicle which they have the right to do. . . . Once they had probable cause to seize the vehicle, they had probable cause to search it, a warrant wasn't required because of the exigent circumstances regarding each vehicle." We conclude that this assertion sufficiently describes the automobile exception to preserve the issue for appeal. Therefore, we proceed to address the substantive issue.

The State contends that the trial court erred because the warrantless search of these automobiles was permissible under both state and federal law.

> [T]he United States Supreme Court has held that a search warrant is not a prerequisite to the carrying out of a search based upon probable cause of a motor vehicle on public property. The so-called 'automobile exception' to the warrant requirement carved out by *Carroll* and its progeny is founded upon two separate but related reasons: the inherent mobility of motor vehicles which makes it impracticable, if not impossible, for a law enforcement officer to obtain a warrant for the search of an automobile while the automobile remains within the officer's jurisdiction, and the decreased expectation of privacy which citizens have in motor vehicles, which results from the physical characteristics of automobiles and their use. . . . Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. . . . The exigency may arise at any time. . . . **We hold that no exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle if there is probable cause to believe that it contains the instrumentality of a crime or evidence pertaining to a crime, and the vehicle is in a public place.**

State v. Isleib, 319 N.C. 634, 636-38, 356 S.E.2d 573, 575-76 (1987) (internal citations omitted) (emphasis added).

Although the State argued that it had probable cause for the warrantless search and seizure of the vehicles, the trial court did not address the issue of probable cause. We hold, however, that the facts found necessarily lead to a conclusion that the police did have probable cause.

According to N.C. Gen. Stats. §§ 15A-243 through 245, "probable cause may be defined as a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Eutsler*, 41 N.C. App. 182, 183, 254 S.E.2d 250, 251 (1979). Here, the police were seeking the gun or any other evidence that could reasonably be found in a car involved in a crime. Both cars were in plain view and the police had received independent corroboration that the defendant's cars were used in the commission of the three robberies. Defendant was still at large and, as the Supreme Court pointed out in *Isleib*, exigent circumstances can arise at any time. Although the police had time to get a warrant, officers testified that they did not because they did not need one. Applying the automobile exception, we conclude that they were correct. The information they had constituted probable cause to believe that the car may have contained evidence pertinent to the robberies with which defendant was charged, and the warrantless search was permissible.

Our Supreme Court in *Isleib* recognized that the automobile need not be in motion for the automobile exception to apply. Here, the Mercury Sable was parked on a public street in plain view. The Jaguar was parked in a holding lot of an automotive shop and defendant had surrendered a key to the garage owner. Under these circumstances, we conclude that the defendant could have easily moved both cars. *See State v. Mitchell,* 300 N.C. 305, 311, 266

S.E.2d 605, 609 (1980) (holding that a car in bad repair was still capable of movement since defendant was at large, thereby supporting a warrantless search). Furthermore, where "circumstances justify a warrantless search, it matters not that the vehicle is parked rather than moving at the time it is located by the police. . . . Once the right to make a warrantless search obtained, the officers could search the [car] immediately. . . ." *Id.* at 312, 266 S.E.2d at 609-10 (internal citations omitted).

Defendant also argues that the time between the robbery and the searches was too remote to support probable cause. However, under North Carolina law, a search must have as its basis "probable cause for believing that there is a condition, object, activity, or circumstance which legally justifies such a search or inspection of that property[.]" N.C. Gen. Stat. § 15-27.2(c)(1) (2003). Here, once police identified suspects and cars based on the accomplice's confession, they searched the cars allegedly used in the robberies charged, seeking the gun or other relevant evidence. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Maryland v. Dyson*, 527 U.S. 465, 466-467, 144 L. Ed. 2d 442, 445 (1999). Since there was probable cause, the timing of the search was legitimate.

Thus, we conclude that, applying the automobile exception to the warrant requirement, we must reverse the trial court's ruling granting the motion to suppress.

Reversed and remanded for further proceedings.

Judges GEER and THORNBURG concur.

Report per Rule (30)e.