NO. COA03-1419

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

STATE OF NORTH CAROLINA

v. Caldwell County
No. 02 CRS 52123

DONALD WILLIAM PERRY

Appeal by Defendant from judgment entered 26 June 2003 by Judge F. Donald Bridges in Superior Court, Caldwell County. Heard in the Court of Appeals 30 August 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Bryan Gates for defendant-appellant.

WYNN, Judge.

Defendant Donald William Perry appeals from judgment of the trial court entered upon his plea of guilty to the charge of possession of cocaine reserving for this Court the issue of whether the trial court properly denied his motion to suppress the evidence of cocaine seized from his person. Defendant argues that the search violated his right to be free from unreasonable searches and seizures under the United States and North Carolina Constitutions. For the reasons stated herein, we reverse the judgment of the trial court.

At the hearing on the motion to suppress the facts tended to show that on 10 August 2002, several officers of the Lenoir Police Department executed a search warrant for the search of Friendly Billiards, a pool hall located in Caldwell County, North Carolina. The search warrant allowed for the search of "[v]ehicles and persons present at the time of the execution of this search warrant." The object of the search warrant was controlled substances, including cocaine and weapons. The officers obtained the search warrant after electronic and personal surveillance of the pool hall. Between June 2002 and the execution of the search warrant, officers viewed numerous drug sales and employees smoking marijuana and crack cocaine at Friendly Billiards. On 7 and 8 August 2002, a cooperating witness purchased drugs from employees at the pool hall. The officers also had information that weapons were kept in the pool hall and might be carried by patrons.

The police officers executed the search warrant at 2:07 a.m. The hours of operation of the pool hall were 10:00 a.m. to 2:00 a.m. The doors were unlocked when the officers entered, and approximately twenty-five people were in the pool hall. The officers instructed patrons to place their hands on the pool tables. Thereafter the officers searched the office area along with the pool hall operator and another individual in the office. The officers did not find any drugs in the office; however, they did find several weapons. The officers then told patrons to empty the contents of their pockets onto the pool tables. The officers continued simultaneously to search the remainder of the pool hall

and the patrons, including Defendant. After conducting a full search of Defendant, the officers found a small plastic bag containing crack cocaine in Defendant's pocket and a small plastic bag of marijuana in his sock.

In denying Defendant's motion to suppress, the trial court orally made the following findings of fact:

> [Friendly Billiards] had closed for business operations at 2:00 o'clock a.m. Consequently execution of the search warrant occurred on the premises at a time that Friendly Billiards was not open to the general public for business.
>
> ***
>
> The search of the defendant's person was conducted after a search of the business offices of the pool room. So apparently, it was done before a complete search of the entire premises was completed.

Based on these findings of fact the trial court concluded that:

> [T]he search warrant, as executed, was not overly broad so as to be in violation of the fourth amendment of the Constitution of the United States.
>
> ***
>
> That the manner and method of search conducted by these officers did not amount to a substantial violation of G.S. 15A-256.

The trial court denied Defendant's motion to suppress. Defendant conditionally pled guilty to possession of cocaine. The trial court sentenced Defendant to six to eight months in prison, but suspended the sentence and placed Defendant on supervised probation for eighteen months. Defendant appeals.

The sole issue on appeal is whether the trial court erred in denying Defendant's motion to suppress the cocaine found on his person. Defendant argues that the search of his person violates section 15A-256 of the North Carolina General Statutes. We agree and now reverse.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (citation omitted). If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

The Fourth Amendment of the United States Constitution and Article I of the North Carolina Constitution protect individuals from unreasonable searches and seizures. U.S. Const. Amend. IV; N.C. Const. Art. I, § 20. A search and seizure of an individual must be supported by probable cause particularized with respect to that individual. *Ybarra v. Illinois*, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 245 (1979). Here, the State argues that section 15A-256 of the North Carolina General Statutes permits the search of Defendant's person. The statute reads:

> An officer executing a warrant directing a search of premises not generally open to the public or of a vehicle other than a common carrier may detain any person present for such time as is reasonably necessary to execute the warrant. If the search of such premises or vehicle and of any persons designated as objects of the search in the warrant fails to

> produce the items named in the warrant, the officer may then search any person present at the time of the officer's entry to the extent reasonably necessary to find property particularly described in the warrant which may be concealed upon the person, but no property of a different type from that particularly described in the warrant may be seized or may be the basis for prosecution of any person so searched. For the purpose of this section, all controlled substances are the same type of property.

N.C. Gen. Stat. § 15A-256 (2003). This Court has held that a search conducted pursuant to section 15A-256 of the North Carolina General Statutes complies with the requirements of probable cause. *State v. Cutshall*, 136 N.C. App. 756, 758, 526 S.E.2d 187, 189 (2000). However, a search of an individual who is not in control of the designated premises but is found there when a search warrant is executed is permitted only in limited circumstances: (1) if the premises is not generally open to the public, and (2) after a search of the premises fails to reveal the items sought in the search warrant. *Id.* at 759, 526 S.E.2d at 189.

The trial court made a finding of fact that the pool hall was closed at the time of the warrant's execution and not open to the public. The police officers executed the warrant seven minutes after the pool hall regularly closed. We hold that even though the doors remained unlocked, there is ample evidence to support the trial court's finding that the pool hall was closed at the time of the warrant's execution.

The trial court also made a finding of fact that the search of the pool hall was not complete before the officers performed a full

search, as opposed to a limited frisk, of Defendant. In *Cutshall* this Court stated:

> Probable cause does not arise from defendant's mere presence on the premises. The State's reading of the statute would eliminate the requirement that 'the search pursuant to the warrant fails to uncover evidence of such activity.' [G.S. § 15A-256]. Without this statutory requirement, G.S. § 15A-256 would entitle officers to search individuals merely because they were found on the premises. The U.S. Supreme Court has already held that proposition unconstitutional.

Cutshall, 136 N.C. App. at 760, 526 S.E.2d at 190; *see Ybarra*, 444 U.S. at 92, 62 L. Ed. 2d at 246. The trial court held that significant concerns of officer safety justified a frisk of Defendant, therefore the manner of search did not amount to a "substantial violation" of the statute. However, this Court has previously strictly construed this statute. *Cutshall*, 136 N.C. App. at 759, 526 S.E.2d at 189. Section 15A-256 of the North Carolina General Statutes provides that officers cannot simultaneously search individuals on the premises and the premises itself. N.C. Gen. Stat. § 15A-256. Individuals found on the premises can be searched only after the search of the entire premises has been completed and the objects of the search warrant not discovered. *Cutshall*, 136 N.C. App. at 759, 526 S.E.2d at 189; N.C. Gen. Stat. § 15A-256. Here, the officers performed a full search, rather than a frisk, of Defendant before completing a search of the premises. The full search of Defendant prior to the completion of the search of the premises violated section 15A-256

of the North Carolina General Statutes. Therefore, the trial court's conclusion of law was in error and we now reverse.

Reversed.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).