NO. COA04-112

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

STATE OF NORTH CAROLINA

v.

MARCUS ANTHONY BROOKS

Durham County
No. 02 CRS 44419
No. 02 CRS 44420
No. 02 CRS 7331

Appeal by defendant from judgment entered 30 July 2003 by Judge Ripley Rand in Durham County Superior Court. Heard in the Court of Appeals 19 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

William B. Gibson for defendant-appellant.

THORNBURG, Judge.

Marcus Brooks ("defendant") appeals judgments sentencing him to 120 months to 153 months imprisonment for possession of cocaine, heroin, marijuana, and drug paraphernalia and for being an habitual felon. On appeal, defendant argues that the trial court erred by denying his motion to suppress all contraband evidence seized by the law enforcement officer and in determining the length of his sentence. For the reasons stated herein, we find no error in the judgments.

At the pre-trial hearing on defendant's motion to suppress, the State's evidence tended to show the following: Officer C. D. Burroughs of the Durham Police Department ("Officer Burroughs") was on patrol in the early morning of 17 March 2002. Officer Burroughs saw a car with its headlights off turning from Buchanan Street onto Jackson Street. After the car made the turn, Officer Burroughs testified that it traveled another twenty feet before its headlights were turned on. Officer Burroughs testified that he made the decision to pull the vehicle over when he noticed the lights were off, but waited until the vehicle had traveled approximately seven blocks before doing so. Officer Burroughs explained this delay as necessary in order to pull the vehicle over in a safer location than where he initially observed it.

After stopping the vehicle, Officer Burroughs asked defendant, who was the driver and only occupant of the vehicle, to produce his driver's license. Defendant did not produce a driver's license but did produce an identification card. Officer Burroughs then determined that defendant's driver's license had been suspended and asked defendant to step out of the vehicle. As defendant stepped out, he grabbed a pack of cigarettes from the passenger seat of the vehicle. Officer Burroughs then asked defendant if defendant "had anything on him, anything [Officer Burroughs] needed to be concerned about." Defendant indicated that he did not. Officer Burroughs then asked defendant if Officer Burroughs could "check [defendant] out to make sure." Defendant assented. Officer Burroughs requested to see the cigarette pack, noticed a bulge in

the pack and identified the bulge as a dime bag of marijuana. Upon a more careful examination of the cigarette box, Officer Burroughs also found three rocks of cocaine wrapped inside a dollar bill. At that point, Officer Burroughs placed defendant under arrest and put him in the patrol car. Officer Burroughs then searched defendant's vehicle, finding heroin, and defendant's wallet, finding a package of rolling paper. Based on this evidence, the court concluded that Officer Burroughs acted lawfully during the searches of defendant and defendant's vehicle. Thus, defendant's motion to suppress was denied.

At trial, defendant made a renewed motion to suppress, which was denied by the trial judge. The State again presented the testimony of Officer Burroughs. The jury returned a verdict of guilty for the charges of possession of cocaine, possession of heroin, possession of drug paraphernalia, and possession of marijuana. Defendant pled guilty to being an habitual felon pursuant to a plea agreement where all the offenses of which defendant was convicted in the case at bar were consolidated for judgment with the possession of heroin offense. Defendant appeals.

Defendant first argues that the trial court erred in denying his motion to suppress all contraband seized by Officer Burroughs in that there was no probable cause to stop and search defendant and that searching defendant's car without a warrant was not justified. We disagree.

"[A] trial court's findings of fact in a suppression hearing are binding on the appellate courts when supported by competent

evidence. This Court must determine whether these findings of fact support the trial court's conclusions of law, and if so, the trial court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57 (1995) (citations omitted), *appeal dismissed and disc. review denied*, 341 N.C. 656, 462 S.E.2d 524-25 (1995). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994)(citations omitted).

The evidence presented in the instant case tended to show that Officer Burroughs observed defendant operating a motor vehicle at night without the headlights illuminated. Driving at night without headlights on constitutes an infraction under our general statutes. N.C. Gen. Stat. §§ 20-129, 20-176 (2003). Thus, Officer Burroughs had probable cause to stop defendant's vehicle. *See State v. Hamilton*, 125 N.C. App. 396, 400, 481 S.E.2d 98, 100 (1997)(holding that observing a driver and front seat passenger of a motor vehicle not wearing seat belts was probable cause for the law enforcement officer to stop the vehicle even if a reasonable law enforcement officer would not have done so), *appeal dismissed and disc. review denied*, 345 N.C. 757, 485 S.E.2d 302 (1997). Thus, the fact that defendant was observed committing a specific traffic infraction before the stop was made distinguishes this case from *State v.*

Roberson, upon which defendant relies. *State v. Roberson,* 163 N.C. App. 129, 132, 592 S.E.2d 733, 735 (2004)(analyzing whether the defendant's "eight-to-ten second delayed reaction at a traffic light gave rise to a reasonable, articulable suspicion that criminal activity may be afoot), *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). Therefore, the stop of the vehicle in the instant case was not unconstitutional, even though a reasonable officer might not have made the stop. Accordingly, the trial court did not err in denying the motion to suppress on the basis of Officer Burrough's stop of defendant's vehicle.

After stopping defendant's vehicle, Officer Burroughs was constitutionally able to order defendant to step out of the vehicle. *Hamilton*, 125 N.C. App. at 400, 481 S.E.2d at 100 ("[T]he Fourth Amendment is not violated when an officer requires a driver of a vehicle, stopped for a traffic violation, to exit the vehicle.")(citation omitted). Defendant then consented to the search of his person and the pack of cigarettes he was holding. "Consent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997). We note that defendant does not argue that evidence was presented showing that his consent was coerced or involuntary. *State v. Barden*, 356 N.C. 316, 341, 572 S.E.2d 108, 125-26 (2002) (Consent must be voluntarily and knowingly given for the evidence seized during a search to be

admissible at trial.), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Accordingly, we conclude that the searches of defendant's person and pack of cigarettes were lawful.

Finally, the evidence showed that immediately following defendant's arrest, Officer Burroughs searched defendant's vehicle and found further contraband. "Incident to a lawful arrest, an officer may search the passenger compartment of a vehicle and the containers therein without a search warrant." *State v. Cornelius*, 104 N.C. App. 583, 588, 410 S.E.2d 504, 508 (1991), *disc. review denied*, 331 N.C. 119, 414 S.E.2d 762-63 (1992)(citing *New York v. Belton*, 453 U.S. 454, 460, 69 L. Ed. 2d 768, 775 (1981); *State v. Cooper*, 304 N.C. 701, 705-06, 286 S.E.2d 102, 104-05 (1982)). Officer Burroughs's arrest of defendant was justified due to defendant's possession of the contraband and defendant's failure to produce a driver's license. *See State v. Hudson*, 103 N.C. App. 708, 716, 407 S.E.2d 583, 587 (1991), *disc. review denied*, 330 N.C. 615, 412 S.E.2d 91-92 (1992). Therefore, we conclude that the searches of defendant, his pack of cigarettes, and his car were legal searches. Accordingly, the motion to suppress the evidence seized during those searches was properly denied. This assignment of error is overruled.

Defendant's final assignment of error asserts that the trial court erred in sentencing defendant as an habitual felon. In support of this assertion, defendant relies on two opinions by this Court, *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003) and *State v. Sneed*, 161 N.C. App. 331, 588 S.E.2d 74 (2003)(holding

that possession of cocaine is a misdemeanor and thus an improper basis for an habitual felon indictment). However, our Supreme Court recently reviewed and reversed *Jones* and *Sneed*, holding "the offense of possession of cocaine is classified as a felony for all purposes." *State v. Jones*, 358 N.C. 473, 486, 598 S.E.2d 125, 133 (2004); *State v. Sneed*, 358 N.C. 538, 599 S.E.2d 365 (2004).

Moreover, defendant concedes that his prior possession of cocaine conviction was not used as one of the three felony convictions necessary for sentencing him as an habitual felon. Rather, defendant argues that if the trial court had foreseen this Court's decisions in *Jones* and *Sneed*, he would have received a more lenient sentence. This argument is without merit.

No error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).