NO. COA05-1131

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v. Harnett County
Nos. 03 CRS 50165-67
TONY LEE SWANN 03 CRS 50172
03 CRS 50183-84

Appeal by Defendant from judgment entered 20 November 2003 by Judge John R. Jolly, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 19 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Clinton C. Hicks, for the State.

Love & Love, P.A., by Jimmy L. Love, Sr., for Defendant-Appellant.

STEPHENS, Judge.

Tony Lee Swann ("Defendant") appeals from his *Alford* plea of guilty of possession with intent to sell or deliver cocaine entered upon denial of his motion to suppress evidence seized by police officers during a search of Defendant's residence. For the reasons stated herein, we reverse and remand to the trial court for appropriate findings of fact.

At the suppression hearing, the State presented evidence that on 9 January 2003, officers from the Harnett County Sheriff's Department executed several search warrants near Defendant's

residence. At some point during these searches, an officer reported that a confidential informant had advised him the night before of Defendant's alleged illegal drug trade activities occurring at Defendant's house. Based on this information, officers "seized" Defendant's house and performed a "protective sweep," freezing everything in the house until they obtained a search warrant. Detective Kelly Fields testified this "seize and freeze" was authorized by Sergeant Council, who was applying for a search warrant. Detective Fields stated they did not search the house prior to obtaining the search warrant, but they did walk through the house looking for people. Approximately one hour later, Sergeant Council arrived with the search warrant, and officers conducted the full search.

Beverly Ann Judd, the owner of the residence, first testified that Defendant did not reside at her house, and then stated that the officers entered her home without her permission. Once inside, officers instructed her to, "Sit down and have a seat, and don't move." She stated she did not give them permission to search her house, but maintained they did so prior to obtaining the search warrant.

Defendant testified that prior to the execution of the search warrant, officers in the house were "looking in the rooms in the house." Defendant stated, "[The officer] was telling me things that were locked, I needed to get a key to unlock them[,]" before the search warrant had been obtained. After the search warrant was procured, officers seized multiple firearms, two motorcycles,

marijuana, and cocaine.

Following the hearing, the trial court denied Defendant's motion to suppress the evidence seized by the officers. The trial court made no findings regarding its decision. Defendant subsequently entered an *Alford* plea of guilty of possession with intent to sell or deliver cocaine, and the trial court sentenced him to eight to ten months of imprisonment, followed by thirty-six months of supervised probation. Defendant appeals.

Under section 15A-977 of the North Carolina General Statutes, the trial judge may summarily deny a defendant's motion to suppress if either "(1) [t]he motion does not allege a legal basis for the motion; or (2) [t]he affidavit does not as a matter of law support the ground alleged." N.C. Gen. Stat. § 15A-977(c) (2005). If the motion is not determined summarily, the trial court "must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d) (2005). Following the hearing, the trial judge "must set forth in the record his findings of facts and conclusions of law[]" denying a defendant's motion to suppress unless there is no material conflict in the evidence. N.C. Gen. Stat. § 15A-977(f) (2005); *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990), *appeal dismissed and disc. review denied*, 328 N.C. 273, 400 S.E.2d 459 (1991)("When there is no material conflict in the evidence presented at a motion to suppress evidence, the trial judge may admit the challenged evidence without specific findings of fact, although findings of fact are preferred. 'In that event, the necessary findings are implied from the admission of the

challenged evidence.'")(Citations omitted).

Where there is a material conflict in the evidence, however, the trial judge "must set forth in the record his findings of fact and conclusions of law." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984)(citation omitted); *see also State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980)("If there is a material conflict in the evidence on voir dire, [the trial court] *must* [make findings] in order to resolve the conflict.")(Citing *State v. Smith*, 278 N.C. 36, 178 S.E.2d 597, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971)). "Findings and conclusions are required in order that there may be a meaningful appellate review of the decision." *Horner*, 310 N.C. at 279, 311 S.E.2d at 285; *see also State v. Rose*, 170 N.C. App. 284, 299, 612 S.E.2d 336, 345, *disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005)(reversing and remanding the order of the trial court denying the defendant's motion to suppress where the trial court failed to make findings regarding the reasonableness of the stop).

> The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law.

State v. Corpening, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993)(citing *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982) and *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992)).

In this case, the trial court failed to enter a written order containing findings of fact and conclusions of law into the record. Nor did the trial court enter an oral order with any findings of fact. Rather, the trial court made several conclusions of law regarding the evidence and denied Defendant's motion. The record contains conflicting evidence on key points of dispute between Defendant and the State. For instance, with regard to the constitutionality of the officers' initial search of the home without a search warrant, the State presented evidence that the search was a mere "protective sweep" designed to ensure the officers' safety while awaiting the search warrant. Defendant, however, presented evidence that the officers' search exceeded the scope of a "protective sweep." The trial court failed to resolve this dispute, concluding only that the officers' entry "was for the purpose of, not to search the home, but to secure it and determine that there were no other persons in the house that could present a threat to the officers[.]" Although this might be properly labeled as both a finding of fact and a conclusion of law, it only resolves the *purpose* of the officers' entry into the home; it does not resolve the question of the *scope* of the search once the officers entered.

Because the trial court failed to make proper findings of fact in its order denying Defendant's motion to suppress, we are precluded from meaningful appellate review. We therefore reverse the order of the trial court denying Defendant's motion to suppress and remand this case for appropriate findings of fact.

Reversed and remanded.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).