NO. COA05-1218

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA,

v. Forsyth County
Nos. 04 CRS 57426, 35977

PARIS LAMONT STEPHENS,
Defendant

Appeal by Defendant from judgment entered 10 May 2005 by Judge Lindsay R. Davis, Jr., in Superior Court, Forsyth County. Heard in the Court of Appeals 9 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Karen Ousley Boyer, Assistant Attorney General, for the State.

Anne Bleyman, for defendant-appellant.

WYNN, Judge.

Section 15A-401(b)(1) of the North Carolina General Statutes permits an officer to arrest without a warrant any person the officer has probable cause to believe has committed a criminal offense in the officer's presence.[1] Defendant argues that the trial court erred by not finding probable cause based on the offense for which he was arrested, consuming alcohol where the business did not have an on-premise consumption permit. Because there was objective probable cause to arrest Defendant for

[1] N.C. Gen. Stat. § 15A-401(b)(1) (2005); *State v. Brooks*, 337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994); *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993).

attempting to flee from an officer, we uphold the trial court's conclusions of law.

The evidence presented at trial tended to show that on 15 June 2004, Officer R.J. Paul, a detective assigned to the Winston-Salem Police Department's vice and narcotics unit, observed Michael Rayvon Williams, who had an outstanding warrant for his arrest, and Defendant Paris Lamont Stephens sitting in the parking lot of a gas station in a known drug area. Officers J.D. McCready and C.N. Kiser assisted Officer Paul in taking Williams into custody. Because Officer Paul knew Defendant "possibly had outstanding warrants, due to his arrests in this known high drug sales area and being around Mr. Williams who has a past drug arrest," he advised Officers McCready and Kiser to speak with Defendant regarding what he was doing in the area, and ask Defendant to consent to search of his person.

Officers McCready and Kiser approached Defendant, who was sitting in a chair with an open beer in a plastic bag on the ground between his feet. Officer Kiser asked Defendant whether the bottle was open. Defendant responded that the beer did not belong to him and that he had "just sat down in the chair." Officer McCready asked Defendant whether he had any identification, and Defendant refused to provide identification.

Defendant asked the officers why they were "messing with him" since "he hadn't done anything wrong." Defendant stood up and "began to look around as if he was looking for a route to escape."

Defendant continued scanning the area, looking over the officers' shoulders, to the sides and avoiding eye contact. Based on the officers' training and experience, they knew Defendant was looking for an "avenue of escape" and that he "was going to eventually run."

Defendant suddenly took off running around the left side of the officers toward the road. The uniformed officers chased Defendant and ordered him to stop. After running about fifteen or twenty feet, the officers caught Defendant. Defendant was placed under arrest for consuming an alcoholic beverage where the business did not have an on-premises consumption permit, in violation of section 18B-300(b) of the North Carolina General Statutes.

Officer Paul conducted a search of Defendant incident to the arrest. He found approximately twenty packaged "dime bags" of marijuana and a larger sandwich bag of loose marijuana in Defendant's pockets. The total weight of the marijuana seized from Defendant was 30.3 grams.

Defendant was charged with felony possession of marijuana with the intent to sell and deliver and consumption of a malt beverage on premises with an off-premises permit. On 8 November 2004, a grand jury issued two separate indictments charging Defendant with possession with intent to sell and deliver marijuana and with being an habitual felon.

On 10 May 2005, a jury returned a verdict finding Defendant guilty of possession with intent to sell and deliver marijuana. The State then presented evidence to show that Defendant was an

habitual felon, and the jury returned a guilty verdict. Defendant was sentenced as an habitual felon for the possession with intent to sell and deliver marijuana to a term of eighty-four to 110 months imprisonment.

On appeal to this Court, Defendant contends the trial court erred by: (I) denying his motion to suppress evidence obtained as a result of his arrest, (II) finding that there was probable cause to arrest Defendant, (III) denying his motion to dismiss the charge of possession with intent to sell and deliver, and (IV) denying his motion to dismiss based on insufficiency of the evidence.

I.

Defendant first argues that the trial court erred in denying his motion to suppress evidence obtained as a result of his arrest. Specifically, Defendant contends the trial court's determination that probable cause existed with respect to N.C. Gen. Stat. § 14-223 (2005) was not sufficient to support its order because the trial court did not conclude that there was probable cause to arrest him based on N.C. Gen. Stat. § 18B-300(b) (2005), the violation for which he was, in fact, arrested and charged. Defendant argues that because the arrest was unlawful, the trial court should have granted his motion to suppress the evidence obtained incident to the unlawful arrest. We disagree.

This Court's review of a denial of a motion to suppress is 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 whether the findings of fact in turn support the

conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). If the trial court's conclusions of law are supported by its factual findings, this Court will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

Here, Defendant did not challenge on appeal the trial court's findings of fact. Thus, our review is limited to "whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (citation omitted). Therefore, the sole question for our consideration is whether these conclusions of law are supported by the undisputed findings of fact and are legally correct. *State v. Coplen*, 138 N.C. App. 48, 52, 530 S.E.2d 313, 317, *cert. denied,* 352 N.C. 677, 545 S.E.2d 438 (2000).

A warrantless arrest is lawful if based upon probable cause, *Brinegar v. United States*, 338 U.S. 160, 174, 93 L. Ed. 1879, 1889-90 (1949); *State v. Phillips*, 300 N.C. 678, 683-84, 268 S.E.2d 452, 456 (1980), and permitted by state law. *State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977). Section 15A-401(b)(1) of the North Carolina General Statutes permits an officer to arrest without a warrant any person the officer has probable cause to believe has committed a criminal offense in the officer's presence. N.C. Gen. Stat. § 15A-401(b)(1); *Brooks,* 337 N.C. at 145, 446 S.E.2d at 588; *Trapp*, 110 N.C. App. at 587, 430 S.E.2d at 486. The facts to establish probable cause must be sufficient to justify the

issuance of an arrest warrant even though one has not been requested prior to the arrest. *See Phillips,* 300 N.C. at 684, 268 S.E.2d at 456.

In *Brinegar,* the United States Supreme Court discussed the concept of probable cause, stating:

> [p]robabilities . . . are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved. . . . Probable cause exists where the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

338 U.S. at 175-76, 93 L. Ed. at 1890 (internal quotations and citation omitted). In *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984), the North Carolina Supreme Court explained that

> while a reviewing court must, of necessity view the action of the law enforcement officer in retrospect, our role is not to import to the officer what in our judgment, as legal technicians, might have been a prudent course of action; but rather our role is to determine whether the officer has acted as a man of reasonable caution who, in good faith and based upon practical consideration of everyday life, ***believed the suspect committed the crime for which he was later charged.***

Id. at 262, 322 S.E.2d at 147 (citations omitted) (emphasis added).

To determine whether probable cause existed to arrest, a court may consider the following non-exclusive factors:

> (1) the time of day; (2) the defendant's suspicious behavior; (3) flight from the officer or the area; and (4) the officer's

> knowledge of defendant's past criminal conduct.

State v. Mills, 104 N.C. App. 724, 729, 411 S.E.2d 193, 196 (1991) (internal citations omitted). Moreover, "information given by one officer to another is reasonably reliable information to provide probable cause." *State v. Thomas*, 127 N.C. App. 431, 433, 492 S.E.2d 41, 42 (1997) (citations omitted).

In this case, the trial court judge found that the officers had probable cause to arrest Defendant based on the following findings of fact, which are presumed correct and supported by competent evidence:

> On June 15, 2004 officers of the Winston-Salem Police Department were serving criminal process in the vicinity of Glenn and Greenway within the City; in the process of doing so they observed the Defendant sitting outside of the Bi-Lo gas station at that intersection. Officer Paul of the Winston-Salem Police Department informed Officers McCready and Kiser that the Defendant may have warrants outstanding, and that he had previously been arrested on drug related charges.
>
> The vicinity of Glenn and Greenway is an area of incidents of high drug related illegal activity.
>
> Officers McCready and Kiser approached the Defendant and observed a can of beer in a plastic bag at his feet; they asked the Defendant for identification; the defendant did not produce identification, but stood and appeared to be looking for a way to leave. Suddenly the Defendant ran but was apprehended by Officers McCready and Kiser within ten to fifteen feet. The Defendant was arrested at that time for violation of General Statutes Section 18B-300(b).
>
> The Defendant was searched at the scene following that arrest. The search produced

> from his person approximately twenty dime bags and one larger bag of marijuana.
>
> Subsequently, the Defendant was charged with felony possession with intent to sell or deliver marijuana.

Based on the totality of the circumstances, the trial judge concluded as a matter of law that:

> One, Officers McCready and Kiser were carrying out the duties of their office when they approached the Defendant and inquired about identification.
>
> Two, it is not necessary that the Defendant be arrested for the commission of the offense for which probable cause exists.
>
> Three, probable cause exists that by attempting to flee the Defendant violated GS Section 14-223.
>
> Four, his arrest was supported by probable cause, and the search incident to that arrest was valid.
>
> Five, evidence discovered pursuant to the search was not unlawfully seized.

Defendant contends the trial court's determination that probable cause existed with respect to N.C. Gen. Stat. § 14-223 was not sufficient to support its order because the trial court did not conclude that there was probable cause to arrest him under N.C. Gen. Stat. § 18B-300(b), the violation for which he was, in fact, arrested and charged.

In *Devenpeck v. Alford*, 543 U.S. 146, 152, 160 L. Ed.2d 537, 544 (2004), the United States Supreme Court held that a warrantless arrest by a law officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable cause

to believe that a crime has been or is being committed. *Id.* The *Devenpeck* Court reasoned:

> [o]ur cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. *See Whren v. United States*, 517 U.S. 806, 812-813, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996) (reviewing cases); *Arkansas v. Sullivan*, 532 U.S. 769, 149 L. Ed. 2d 994, 121 S. Ct. 1876 (2001) (*per curiam*). That is to say, *his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.* As we have repeatedly explained, 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' *Whren*, *supra*, at 813, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (quoting *Scott v. United States*, 436 U.S. 128, 138, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978)). '[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.' *Whren*, *supra*, at 814, 135 L. Ed. 2d 89, 116 S. Ct. 1769. '[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' *Horton v. California*, 496 U.S. 128, 138, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990).

Id. at 153, 160 L. Ed. 2d at 545 (emphasis in original).

Thus, based on the Supreme Court's reasoning in *Devenpeck*, the trial judge in this case was not required to conclude that there was probable cause to arrest Defendant based on his violation of N.C. Gen. Stat. 18B-300(b) simply because that was the resulting arrest and offense charged. The trial judge found that the officers were lawfully discharging a duty of their office when they

asked Defendant to identify himself, he refused to identify himself, ran and was then arrested by the officers. Based on these findings of fact, the trial judge properly focused on the factors that objectively established probable cause and concluded there was probable cause to arrest Defendant for resisting, delaying or obstructing a police officer in violation of section 14-223 of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 14-223. It is irrelevant that Defendant was ultimately charged and arrested for violation of N.C. Gen. Stat. § 18B-300(b) since there was objective probable cause to arrest Defendant for violating N.C. Gen. Stat. § 14-223.

II.

Defendant next argues that flight from a police officer, standing alone, does not constitute probable cause. Analogous to this case, in *State v. Swift*, 105 N.C. App. 550, 414 S.E.2d 65 (1992), two police officers investigated a complaint about persons drinking beer in a store parking lot. *Id.* at 551, 414 S.E.2d at 66. When the officers entered the parking lot, the defendant exited a car from the driver's side and placed a beer down beside the car. *Id.* One of the officers approached the defendant and asked for a driver's license. The defendant said that he did not have one and fled. The officers pursued the defendant, caught him, and arrested him for resisting an officer under section 14-223 of the North Carolina General Statutes. *Id.* at 551-52, 414 S.E.2d at 66.

The *Swift* court concluded that because "[t]he officers observed defendant emerge from the car and place a beer down on the ground[]" and the parking lot only had an off-premises license for alcohol, the officers had "reasonable suspicion to believe" that the defendant had committed a misdemeanor in violation of section 18B-300(b). *Id.* at 555, 414 S.E.2d at 68. The *Swift* Court explained,

> [b]ecause the investigatory stop was legal, defendant did not have a right to resist. His subsequent flight from a lawful investigatory stop contributed to probable cause that defendant was in violation of both N.C.G.S. § 18B-300(b) as well as § 14-223. With probable cause, the officers were entitled to arrest defendant for resisting an officer.

Id.

Similarly, in this case, the trial judge's findings of fact reveal that the trial judge considered not only Defendant's flight, but also the officers' knowledge that Defendant may have had outstanding warrants for his arrest, had been arrested for drug related crimes, was sitting in a high crime area known for drug sales with a can of beer between his feet, refused to identify himself, immediately exhibited signs of agitation and evasiveness, and ran from the officers before an arrest was attempted.

"Flight is a strong indicia of *mens rea*, and when coupled with other relevant facts or the specific knowledge on the part of the arresting officer relating the subject to the evidence of the crime, it may properly be considered in assessing probable cause". *Williams*, 32 N.C. App. at 208, 231 S.E.2d at 284. (citation

omitted). Because the trial court did not base its conclusion solely on the fact that Defendant fled the officers, we conclude that the trial judge properly concluded that the officers had probable cause to arrest Defendant for resisting, delaying or obstructing a police officer in violation of section 14-223 of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 14-223.

As it relates to Officer Paul's search of Defendant, it is well-established under North Carolina law that an officer may conduct a search without a warrant incident to a lawful arrest. *Zuniga*, 312 N.C. at 258, 322 S.E.2d at 144 ("A search without a search warrant may be made incident to a lawful arrest[.]"); *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) ("Both the North Carolina Constitution and the United States Constitution allow a search incident to a lawful arrest[.]" (citation omitted)), *appeal dismissed and disc. review denied*, 328 N.C. 273, 400 S.E.2d 459 (1991); *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991) ("An officer may conduct a warrantless search incident to a lawful arrest[.]" (citation omitted)). Because the trial judge in this case determined the officers had probable cause to arrest Defendant for violation of N.C. Gen. Stat. § 14-223, and, therefore, Defendant's arrest was lawful, the trial judge properly concluded that the search incident to Defendant's arrest was lawful. Accordingly, we find no error in the trial judge's denial of Defendant's motion to suppress and the admission of the marijuana seized from Defendant as evidence in his trial for possession with intent to sell and deliver.

III.

In his next argument on appeal, Defendant contends the trial court erred in denying his motion to dismiss the charge of possession with intent to sell and deliver marijuana on the ground that there was insufficient evidence of intent to sell and deliver. Defendant's argument is without merit.

To withstand a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) the defendant being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002); *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

To convict a defendant of marijuana possession with intent to sell or deliver, the State must prove the following elements: 1) knowing; 2) possession; 3) of marijuana; 4) with the intent to sell or deliver. N.C. Gen. Stat. § 90-95(a)(1) (2005); *see also State v. Carr,* 145 N.C. App. 335, 341, 549 S.E.2d 897, 902 (2001); *State v. Fletcher*, 92 N.C. App. 50, 55, 373 S.E.2d 681, 685 (1988). Defendant asserts on appeal that the amount of the marijuana, approximately 30.3 grams, recovered from his pants pockets does not

raise a presumption that the marijuana was possessed for sale and delivery. In viewing all evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference supported by that evidence, we conclude that there is sufficient evidence to establish that Defendant possessed the controlled substance of marijuana with the intent to sell or deliver.

We find this Court's decision in *State v. Williams*, 71 N.C. App. 136, 321 S.E.2d 561 (1984), instructive. In *Williams,* the defendant possessed 27.6 grams of marijuana, which is a misdemeanor pursuant to section 90-95(d) of the North Carolina General Statutes. *Id.* at 139, 321 S.E.2d at 564. The defendant argued that this small amount of marijuana was insufficient to raise a presumption that the marijuana was possessed for sale and delivery, a felony. This Court rejected the defendant's argument, explaining:

> Defendant's argument would be persuasive except for the evidence of how the 27.6 grams of marijuana was packaged. The evidence at trial showed that the marijuana in question was packaged in seventeen separate, small brown envelopes known in street terminology as "nickel or dime bags." "Nickel or dime bags" are the units in which small amounts of marijuana are generally sold for five or ten dollars. The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *see also State v. Casey*, 59 N.C. App. 99, 296 S.E. 2d 473 (1982). While it is true that there was no direct evidence that defendant possessed the 27.6 grams of marijuana for sale and delivery, the circumstances of the packaging could be

> considered by the jury in finding defendant guilty of the felony offense. *See State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *cert. denied*, 298 N.C. 302, 259 S.E. 2d 916 (1979).

Id. at 139-40, 321 S.E.2d at 564.

Likewise, in this case, the record reveals that Defendant possessed 30.3 grams of marijuana that was packaged in twenty separate "dime bags" and one larger sandwich bag, less than one and a half ounces, a Class 1 misdemeanor under section 90-95(d) of the North Carolina General Statutes. At trial, the officers testified that "dime bags" are slang for approximately $10.00 worth of marijuana and that drug dealers in the ordinary course of business package marijuana in "dime bags."

"Once the court decides that a reasonable inference of [Defendant's] guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that [Defendant] is actually guilty." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Based on this Court's decision in *Williams,* this method of packaging the marijuana was sufficient evidence for a jury to infer Defendant's intent to distribute marijuana and, therefore, find him guilty of a felony offense. Accordingly, the trial judge properly denied Defendant's motion to dismiss for insufficiency of the evidence and Defendant's assignment of error is, therefore, rejected.

IV.

In his final argument on appeal, Defendant contends the trial court erred in denying his motion to dismiss the habitual felon indictment. Defendant's argument is without merit.

"Our habitual felon statute is the result of a deliberate policy choice by the legislature that those who repeatedly commit felonious criminal offenses should be segregated from the rest of society for an extended period of time." *State v. Quick*, 170 N.C. App. 166, 170, 611 S.E.2d 864, 866-67 (2005) (quoting *State v. Aldridge*, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108 (1985)). In this case, the jury found Defendant guilty of being an habitual felon based on the following underlying felony guilty pleas: (1) possession of cocaine on 17 February 1991; (2) habitual misdemeanor assault on 10 April 1998; and (3) possession with intent to manufacture, sell and deliver marijuana on 21 April 2000. The trial judge then adjudged Defendant an habitual felon to be sentenced as a Class C felon, and sentenced Defendant in the presumptive range to a minimum of eighty-four and a maximum of 110 months imprisonment.

In 2004, the General Assembly amended section 14-33.2 of the North Carolina General Statutes, entitled "Habitual Misdemeanor Assault," to state in pertinent part: "A conviction under this section shall not be used as a prior conviction for any other habitual offense statute." N.C. Gen. Stat. § 14-33.2 (2005). The legislature specifically stated in Session Law 2004-186, section 10.2, which relates to the amended section 14-33.2, that

> [t]his part is effective December 1, 2004, and applies to offenses committed on or after that

> date. Prosecutions for offenses committed before the effective date of this part are not abated or affected by this part, and the statutory provisions that would be applicable but for this part remain applicable to those prosecutions.

2004 N.C. Sess. Laws 186, section 10.2.

Without citing any authority to support his argument, Defendant contends that because the General Assembly amended the habitual felon statute to exclude habitual misdemeanor assault convictions to support habitual indictments after 1 December 2004, use of his habitual misdemeanor assault conviction as an underlying felony violated "the rule of leniency and fundamental fairness." However, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). The record reveals that Defendant pled guilty on 1 December 1998 to habitual misdemeanor assault, a felony that was committed on 10 April 1998. Defendant was indicted on 8 November 2004 as an habitual felon with an offense date of 15 June 2004. The trial court, therefore, properly dismissed Defendant's motion to dismiss the habitual felon indictment.

Defendant further argues that North Carolina's Habitual Felon Act is "cruel and unusual punishment." We need not further consider Defendant's argument because this Court specifically rejected it in *Quick*, 170 N.C. App. at 170, 611 S.E.2d at 866. *See also State v. Garcia*, __ N.C. App. __, __, 621 S.E.2d 292, 298

(2005) (holding that sentence of a term of 133 to 167 months imposed on defendant based on his status as a habitual felon was not cruel and unusual punishment). Accordingly, we reject this assignment of error as barred by binding precedents. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

No error.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).