NO. COA05-1226

NORTH CAROLINA COURT OF APPEALS

Filed: 19 September 2006

STATE OF NORTH CAROLINA

v. Durham County
No. 03-CRS-57557

KEVIN ISAAC BURCH

Appeal by defendant from judgment entered 22 March 2005 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 14 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Gregory P. Roney, for the State.

Russell J. Hollers III, for defendant appellant.

McCULLOUGH, Judge.

Kevin Isaac Burch ("defendant") appeals from an order denying his motion to suppress evidence. We affirm the order of the trial court.

FACTS

On 22 October 2003, at 4:00 a.m., defendant occupied the rear seat in a van driven by Charles Majett ("Majett"). Another man, Victor Bullock ("Bullock"), sat in the front passenger seat. Two uniformed Durham Police Officers, Scott Bell and John McDonough, observed the van entering the parking lot of a service station. The officers recognized Majett, and were aware from previous encounters

with him that Majett did not have a driver's license. The officers confirmed this with their computer system, and decided to follow the van.

As the officers approached in marked Durham police cars, Majett turned the van abruptly onto a side street and stopped in a private driveway. Officer Bell approached the van on the driver's side, while Officer McDonough approached the van on the passenger side. Officer Bell engaged Majett with questioning, and ultimately placed him under arrest. Officer McDonough meanwhile questioned defendant and Bullock. In the course of the questioning, Officer McDonough smelled the strong odor of marijuana emanating from defendant. Officer McDonough asked defendant to step out of the van, and proceeded to conduct a search of defendant's person.

Officer McDonough frisked defendant, pulling up his shirt. Defendant was wearing his pants very low around his waist, around the level of his genitals, leaving defendant's underwear exposed above his pants. Officer McDonough observed bulges in the defendant's underwear, which made the sounds of plastic when disturbed. The officer then pulled back the waistband of defendant's underwear and observed three plastic baggies of marijuana. A fourth baggie of marijuana had fallen down defendant's leg, and was visible on the ground. Defendant was then arrested, and charged with possession of a schedule VI controlled substance with an intent to manufacture, sell, or deliver.

At trial, defendant made a motion to suppress tangible evidence. The trial court denied the motion to suppress, and

thereafter defendant pled guilty to the charges, but reserved his right to appeal the denial of his motion to suppress. Defendant offered no evidence on his behalf. Defendant now appeals the denial of his motion to suppress.

Analysis

I

Defendant contends on appeal that the trial court erred in denying his motion to suppress evidence found at the scene of defendant's arrest. Specifically, defendant argues that the trial court erred in making certain findings of fact and conclusions of law not supported by the evidence. We disagree.

In reviewing a trial court's denial of a motion to suppress evidence, this court is "'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Bone,* 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (citation omitted), *cert. denied,* 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

The gravamen of defendant's argument on appeal is that certain erroneous findings of fact support the conclusion of law that the officer performed a lawful search of defendant pursuant to a *Terry* stop.

While the trial court did make findings and conclusions of law relating to a search pursuant to a *Terry* stop, such findings and conclusions were superfluous and do not warrant disturbance of a

correct ruling on the motion to suppress. *Id.* at 8, 550 S.E.2d at 486. In addition to the findings of fact and conclusions of law relating to a search pursuant to a *Terry* stop, the trial court made further findings of fact and conclusions of law relating to a warrantless search pursuant to probable cause and exigent circumstances.

The trial court concluded that the totality of the circumstances permitted a warrantless search of defendant's person. Specifically, the trial court determined that the "odor of marijuana was sufficient to establish probable cause to search for the contraband drug marijuana." The court also recognized that "[b]ecause marijuana is easily and quickly hidden or destroyed, an immediate search was justified and necessary to preserve the evidence." Though the trial court may have determined this to be a *Terry* pat-down, superfluous conclusions of law do not affect the validity of the denial of a motion to suppress where the trial court's ruling is correct. *Bone,* 354 N.C. at 8, 550 S.E.2d at 486.

We now turn to a determination of whether the trial court's findings of fact were supported by competent evidence and whether those findings of fact in turn support the conclusion of law that the search and seizure were proper as based on probable cause and exigent circumstances.

"Unreasonable searches and seizures are prohibited by the fourth amendment to the United States Constitution, and all evidence seized in violation of the Constitution is inadmissible in a State court as a matter of constitutional law." *State v. Cherry*,

298 N.C. 86, 92, 257 S.E.2d 551, 555 (1979) (citation omitted), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). "[S]eizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). "[W]arrantless searches are not allowed absent probable cause and exigent circumstances, the existence of which are factual determinations that must be made on a case by case basis." *State v. Harper,* 158 N.C. App. 595, 602, 582 S.E.2d 62, 67, *disc. review denied,* 357 N.C. 509, 588 S.E.2d 372 (2003). Probable cause has been defined as "'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . .'" *State v. Harris,* 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (citations omitted).

In *State v. Greenwood*, our Supreme Court extended the "plain view" doctrine and held that the smell of marijuana can give an officer probable cause to search an automobile. *See State v. Greenwood,* 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) (extending the plain view doctrine to include contraband discovered through any of the senses, especially odor). Following this expansion, this Court extended the "plain smell" doctrine and determined it to be sufficient to establish probable cause to search the suspect's person. *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004). In such an instance where the police have established

probable cause on the basis of observing the odor of marijuana, exigent circumstances are present where there is imminent danger the evidence will be lost or destroyed. *Id.*

In determining whether the findings of fact are supported by competent evidence in the instant case, we look to two material findings made by the trial court. First, the trial court concluded in Finding of Fact No. 7 that "Officer McDonough asked of Victor Bullock and the person in the back of the Caravan, the defendant herein Kevin Burch, what they were doing pulling into the driveway. Upon the response of Kevin Burch, Officer McDonough smelled the odor of marijuana." This finding of fact is supported by the testimony of Officer McDonough, and was not objected to by defendant, or contested with any evidence. Further, where no error was assigned and no exception noted to Finding of Fact No. 7, the finding of fact is binding on this Court and is presumed to be correct. *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000).

Second, the court concluded in Finding of Fact No. 10 that "Officer McDonough has been with the Durham Police Department on uniformed patrol for a little more than five years and has made multiple drug arrests, that he knows the smell of marijuana by virtue of his knowledge, training, and experience with the Durham Police Department." Defendant alleges that such experience may be insufficient to allow Officer McDonough to identify the smell of marijuana, but offers no evidence to support this contention. Officer McDonough offered testimony with regard to his ability to

identify the smell of marijuana, based on personal experience and his police training. Officer McDonough testified that he was able to recognize the odor of marijuana from his more than five years of active duty police work, prior arrests, and police training. We hold this to be competent evidence sufficient to support the finding of fact by the trial court. As such, the trial court's findings of fact are conclusively binding.

Defendant also argues on appeal that there are additional findings of fact that were not supported by the evidence. However, none of the findings of fact to which defendant now objects are material to the case at hand. It is well settled that, while it is the better practice to make findings of fact, a trial court is not required to make any findings when there is no material conflict in the evidence before them. *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (stating that denial of a motion to suppress can be sustained based on the State's undisputed evidence without any finding of fact).

In the instant case, defendant presented no evidence whatsoever at the hearing on the motion to suppress. The only evidence before the court was the testimony of the two police officers. While defendant may object to the findings of fact which state the exact location of the evidence seized, or what exactly on defendant's person gave off the odor of marijuana, these are immaterial conflicts. *See, e.g., State v. Ladd*, 308 N.C. 272, 279, 302 S.E.2d 164, 169 (1983) (finding the exact location of the evidence seized to be an immaterial conflict).

Therefore, we hold that the findings of fact made by the trial court were indeed supported by substantial evidence. These findings of fact were sufficient to support a decision by the court that Officer McDonough had probable cause to search defendant. A search, under such circumstances, was a reasonable search justified by exigent circumstances, and thus was not violative of the Fourth Amendment. *Yates*, 162 N.C. App. at 123, 589 S.E.2d at 905. The seizure of the evidence was lawful, and therefore the motion to suppress was properly denied. Further, defendant contends that the motion to suppress was improperly denied where the search and seizure went beyond the permissible bounds of a *Terry* stop. However, where we have determined that sufficient probable cause and exigent circumstances existed, certainly the standard of a "reasonable, articulable suspicion" was met. This assignment of error is overruled.

Accordingly, the trial court properly denied defendant's motion to suppress where the findings of fact, which are supported by competent evidence, support the conclusion of law that the search and seizure were proper pursuant to probable cause and exigent circumstances. Further, the record on appeal contains additional assignments of error which are not properly addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

Affirmed.

Chief Judge MARTIN and Judge HUNTER concur.

Report per Rule 30(e).