NO. COA05-759

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v. Forsyth County
No. 03 CRS 56794

DANIEL MARCUS CORDRAY

Appeal by defendant from judgment entered 9 March 2005 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert T. Hargett, for the State.

Appellant Defender Staple Hughes, by Assistant Public Defender Paul M. James, for the defendant-appellant.

JACKSON, Judge.

On 19 June 2003, Daniel Cordray ("defendant") and two friends entered a Bojangles restaurant in Winston-Salem, North Carolina at about 6:00 a.m. Officer Ednee Gaylor arrived at the restaurant just as the three men were entering the restaurant through a door on the side of the restaurant. Officer Gaylor, who was in uniform, parked his patrol car, and attempted to enter the restaurant through the same door defendant and the other men entered, but found the door to be locked. He tried the other door on that same side of the restaurant, and found that door also to be locked. Officer Gaylor was meeting his father and other individuals at the

restaurant for breakfast. When he was unable to enter the locked door, he motioned for one of his father's friends to come and open the door for him. He asked the individual who had let him in why the doors were locked, and the individual responded that he did not know, but that the doors had been unlocked and open a minute ago.

Officer Gaylor saw that defendant and his two friends were at the front counter, and he assumed they were ordering food. At this point he was concerned as to why the doors had been locked. Once Officer Gaylor entered the restaurant, he went to the back of the dining room to meet his father. One of the individuals with the officer's father was a retired magistrate. Officer Gaylor testified that he felt uneasy about the situation, because defendant and the other two men kept a constant watch on the officer the entire time he was in the restaurant, and had watched him walk to the back of the restaurant. The officer knew that it was 6:00 a.m., and that the restaurant had opened at 5:30 a.m. He stated that he "felt real uneasy with the fact that the doors were locked and knowing that they had just walked in." Defendant and his friends were the last people to enter the restaurant through that door prior to the officer's entering, and defendant and his friends had not had any problem entering the restaurant.

Officer Gaylor stood in the back of the restaurant for a couple of seconds with his father and his father's friends, watching the three men at the counter. He stated that at all times, one or all three of the men were turning around and watching the officer. At this point, Officer Gaylor felt as though he may

have entered the restaurant during the middle of a robbery attempt, and he called for a backup unit. He based this suspicion on his training and experience, the fact that the doors had been locked when he tried to enter them, and that the three men kept a constant watch on him while he was in the restaurant.

Defendant and his friends were at the counter of the restaurant when Officer Gaylor and the retired magistrate approached them. The officer testified that based on the behavior of the three men, and the restaurant doors' being locked, he had a reasonable suspicion that the men were engaging in criminal activity. When Officer Gaylor approached the men, he ordered them to put their hands on the counter. The three men seemed to be caught off guard and surprised, and did not immediately comply with the officer's order. The officer then unholstered his weapon and put it down by his leg. He again ordered the men to put their hands on the counter, at which time they complied.

Officer Gaylor informed the men that he was going to pat them down for his own safety. During the pat down of either defendant or defendant's friend Mr. Jones, the officer felt a large, soft bulge in one man's pocket. He removed a large soft bag and placed it on the counter without looking at or examining the bag. As he continued to pat down the men, defendant pushed the bag to the other side of the counter where it fell to the floor. When Officer Gaylor retrieved the bag, he saw for the first time that the bag contained a green vegetable material that he believed to be marijuana.

Officer Gaylor then placed defendant under arrest for the possession of marijuana. The officer searched defendant incident to the arrest, and discovered a plastic bag containing a white rock substance in defendant's jacket pocket. Officer Gaylor immediately believed the substance to be cocaine. On 28 October 2003 defendant filed a motion to suppress seeking to suppress the bag of marijuana and the bag of cocaine. Following a hearing on the motion to suppress, the trial court denied defendant's motion on 6 May 2004.

On 9 March 2005, defendant entered a conditional plea of guilty to the reduced charge of simple possession of cocaine and possession of marijuana with the intent to sell and deliver it. Pursuant to the plea agreement, defendant preserved his right to appeal the denial of his motion to suppress. *See* N.C. Gen. Stat. § 15A-979(b) (2004). Defendant was sentenced to a suspended sentence of six to eight months imprisonment, and was placed on twenty-four months of supervised probation.

Defendant contends the trial court erred in denying his motion to suppress the bags of marijuana and cocaine found as a result of the officer's *Terry* stop and frisk, and subsequent arrest. Defendant specifically argues that his Fourth Amendment right to be free from unreasonable searches and seizures was violated when the officer did not have a reasonable articulable suspicion of criminal activity such that a *Terry* stop was warranted, the officer did not have additional reasonable suspicion to warrant a pat down of defendant, the officer lacked probable cause to arrest defendant,

and thus the subsequent search of defendant incident to his arrest was unlawful.

At the suppression hearing, the trial court found that based upon the doors to the restaurant being locked and defendant and the two other men constantly watching the officer, the officer had a reasonable articulable suspicion that criminal activity was about to occur, such that his approaching of the men and detaining them was proper. The court also found that based on the type of activity the officer suspected the men to be involved in, it was reasonable for him to pat them down in order to see if any of them were carrying a weapon. When the officer conducted the pat down of either defendant or Mr. Jones, the officer felt a large, soft bulge in the pocket, and removed the object so that he could conduct a more effective pat down of the suspect's pocket. Once defendant pushed the bag and caused it to fall to the back side of the counter, the officer retrieved the bag, at which time he was able to see through the mesh side of the bag and was able to see that the bag contained a green vegetable material, which the officer believed to be marijuana. The court found that by causing the bag to fall to the other side of the counter, defendant exercised dominion and control over it, thus justifying the officer's arrest of defendant for possession of marijuana.

"The fundamental inquiry under the Fourth Amendment is whether the governmental intrusion into a private individual's liberty and property was reasonable." *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 375, *appeal dismissed and disc. review denied*,

__ N.C. __, 624 S.E.2d 369 (2005); *see also Terry v. Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 904 (1968). A law enforcement officer may, without violating the Fourth Amendment, "temporarily detain a person for investigative purposes." *Id.* (citing *Terry*, 392 U.S. at 22, 20 L. Ed. 2d at 906-07). In order for this temporary detention to be lawful, the officer must have a reasonable suspicion that criminal activity is in process or about to be committed, and this reasonable suspicion must be based on articulable facts. *Id.* (citing *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 906). Once an officer has detained a person for investigative purposes, he may frisk the person, or conduct a pat-down, only "where the officer reasonably suspects that 'criminal activity may be afoot and that the [person] with whom he is dealing may be armed and presently dangerous.'" *Id.* (quoting *Terry*, 392 U.S. at 30, 20 L. Ed. 2d at 911). The purpose of the officer's frisk or pat down is for the officer's safety, and "is limited to the person's outer clothing and to the search for weapons that may be used against the officer." *Id.* at 226, 612 S.E.2d at 376. A search conducted in this manner will be considered reasonable "under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken." *Terry*, 392 U.S. at 31, 20 L. Ed. 2d at 911. "Evidence of contraband, plainly felt during a pat-down or frisk, may also be admissible, provided the officer had probable cause to believe that the item was in fact contraband." *Shearin*, 170 N.C. App. at 226, 612 S.E.2d at 376 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375-77, 124 L. Ed. 2d

334, 346-47 (1993)). Our courts have established that in "determining whether an officer had a 'reasonable suspicion to make an investigatory stop' or had reason to believe that a defendant was armed and dangerous, trial courts must consider the totality of the circumstances." *Id.* (quoting *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997)); *see also*, *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994).

Defendant argues that he was subjected to an unlawful detention and frisk, in that the officer did not have a reasonable suspicion based on articulable facts justifying the detention. It is undisputed that the officer detained defendant and two other men, the question thus becomes whether the detention was lawful. The officer testified at the suppression hearing that when he arrived at the Bojangles, he saw defendant and two other men enter the restaurant, and that no one entered the restaurant between the time the men entered and when the officer attempted to enter. When the officer attempted to enter the restaurant, he found that both doors on that side of the restaurant were locked. Once he was inside the restaurant, defendant and the other two men kept a constant watch on the officer. The officer stated that he immediately felt uneasy, and called for a backup unit because he believed that he may have walked in during the middle of a robbery. Based on defendant's and the other two men's behavior, and the fact that the restaurant doors had been locked, the officer stated that he believed the men were about to take part in a criminal activity. The officer testified that his concern that the men were about to

commit a robbery was based not only on the events leading up to the detention of the men, but also on his training and experience. Based on these facts, we hold the officer's observations, when coupled with the events leading up to the detention, were sufficient to support the trial court's finding that the officer had reasonable suspicion to justify a temporary detention of the men for investigative purposes.

At the suppression hearing, the officer testified that he asked the men if any of them had a weapon, to which they replied in the negative. He then informed the men that he was going to pat them down for his safety. During the pat down of defendant or one of the other men, the officer felt a large, soft bulge, which took up the entire pocket. The officer stated that he immediately recognized that the soft bulge was not a weapon. He stated that he was unable to tell if there was a weapon in the pocket under the bag, and that he removed the bag from the pocket for the purpose of being able to conduct a complete pat down of the suspect. The officer placed the bag on the restaurant's counter, and did not open it or inspect it in any way.

While the officer's reaching into one of the suspect's pockets may have constituted a search beyond the scope of a limited frisk, the issue before this Court is "whether the degree of intrusion [was] reasonably related to the events that took place." *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995).

> In determining whether or not conduct is unreasonable, "there is no slide-rule formula," and "each case must turn on its own

> relevant facts and circumstances." In determining reasonableness, courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Willis, 125 N.C. App. at 543, 481 S.E.2d at 411 (quoting *Watson*, 119 N.C. App. at 399, 458 S.E.2d at 522). Based on the facts of the instant case, we conclude that the officer was justified in removing the bag from one of the suspect's jacket, thus enabling him to conduct a full and lawful pat-down for possible weapons.

After removing the bag from one of the suspect's jackets, the officer continued to pat down the other suspects. The officer was then informed by the retired magistrate that defendant pushed or threw the bag onto the floor on the other side of the counter. When the officer recovered the bag, he was able to see, for the first time, that the bag was leather on one side and mesh on the other. The bag landed on the floor with the mesh side facing up, and when the officer retrieved the bag, he was able to see that it contained a plastic bag containing a green vegetable matter which he immediately believed to be marijuana. The officer then arrested defendant for possession of marijuana.

In order to justify an arrest, an officer must have probable cause, which is "'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) (quoting 5 Am. Jur. 2d *Arrests* § 44 (1962)). Here, the officer immediately believed the substance in the bag to be marijuana, and he was

informed by a witness that defendant was the one who pushed the bag off the counter. The officer's subsequent arrest of defendant for possession of marijuana was lawful, in that once defendant pushed the bag off the counter, he had exercised dominion and control over the bag. Defendant's pushing of the bag constituted possession of the marijuana and was sufficient to give the officer probable cause thereby justifying the officer's arrest of defendant.

After the officer arrested defendant, he conducted a full search of defendant's person, at which time he found a plastic bag containing a white rock substance which he believed to be cocaine. In conducting a search incident to an arrest, "the officer may lawfully take from the person arrested any property which such person has about him and which is connected with the crime charged or which may be required as evidence thereof." *State v. Roberts*, 276 N.C. 98, 102, 171 S.E.2d 440, 443 (1970); *see also State v. Bone*, 354 N.C. 1, 9, 550 S.E.2d 482, 487 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002). As the officer had probable cause thereby justifying his arrest of defendant, he was thus entitled to conduct a full search of defendant's person. Therefore, the search of defendant which resulted in the discovery of the bag of white rock substance was lawful.

It has been well established in this State "that 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. The trial court's conclusions of law, however, are

fully reviewable." *State v. Nixon*, 160 N.C. App. 31, 33, 584 S.E.2d 820, 822 (2003); *see also State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001); *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003). Defendant contends that the court erred by finding the officer did not exceed the scope of the *Terry* stop and frisk when he removed the bag from the jacket of one of the suspects, and that the officer did not have probable cause to arrest defendant for possession of marijuana.

After a full review of the record and briefs, and the transcript of the hearing on defendant's motion to suppress, we hold there was sufficient evidence to support the trial court's findings of fact. We also hold the trial court's findings of fact support the trial court's decision to deny defendant's motion to suppress.

No error.

Judges HUDSON and LEVINSON concur.

Report per Rule 30 (e).