NO. COA06-212

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Guilford County
No. 04 CRS 69643-46

RODERICK SHELTON MCLAUGHLIN

Appeal by defendant from judgment entered 13 June 2005 by Judge Edwin G. Wilson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jay Osborne, for the State.

Gilda C. Rodriguez for defendant-appellant.

LEVINSON, Judge.

Roderick Shelton McLaughlin (defendant) appeals pursuant to N.C. Gen. Stat. § 15A-979(b) from an order denying his motion to suppress. Defendant pled no contest on 13 June 2005 to possession with intent to sell or deliver counterfeit drugs, carrying a concealed weapon, possession of drug paraphernalia, possession with intent to sell or deliver cocaine, possession of cocaine, possession of drugs in jail, and habitual felon status. The trial court consolidated all of the offenses into a single judgment and imposed an active term of imprisonment for a minimum of 93 months and a maximum of 121 months.

The evidence of the State at the suppression hearing tends to show that at approximately 11:20 p.m. on 16 February 2004, Officer Benjamin Altizer, a member of the Tactical Special Enforcement Team (TSET) of the Greensboro Police Department, observed two men meet in the parking lot in front of an Exxon station located at 1409 South Eugene Street. This was an area having a reputation as an "open air drug market." Officer Altizer saw the men trade something and one of the men enter the passenger seat of a burgundy Lincoln Town Car automobile. Believing he had just witnessed a drug transaction, Officer Altizer reported by radio to other members of the team what he had observed.

Officer T.D. Moore, another TSET member, heard Officer Altizer's radio report about witnessing an apparent drug transaction and observing one of the participants get into a burgundy Lincoln Town Car automobile. Officer Moore spotted a vehicle matching that description headed on Eugene Street in the direction reported by Officer Altizer. Officer Moore proceeded to follow the Lincoln in his unmarked vehicle. Officer Moore observed that the Lincoln automobile, occupied by two people, did not have a visible light over its license tag and that its driver did not have a seat belt engaged. Officer Moore stopped the vehicle and advised the driver of these violations. Officer Moore requested the driver, identified as Willie Rufus Galloway, Jr., to step out of the vehicle. The right front passenger, identified as defendant, remained in the vehicle as Officer Moore spoke to Galloway at the rear of the vehicle. Officer Moore issued a

citation to Galloway, charging him with the violations.

Officer Anthony Hill of the TSET stopped to assist Officer Moore. He observed several pieces of a white rock substance on the floorboard of the stopped vehicle. He retrieved the substance after the driver exited the vehicle.

Officer Kenneth Jones of the Greensboro Police Department also assisted Officer Moore with the vehicle stop. As the driver exited the vehicle, Officer Jones observed an off-white substance on the floorboard. Officer Jones asked the passenger, defendant, to exit the vehicle. Defendant complied and Officer Jones asked defendant whether he had any weapons or drugs on his person. Defendant responded that he did not have any weapons. Officer Jones then asked defendant for permission to conduct a patdown search. As he patted defendant down for weapons, Officer Jones asked defendant for permission to search his person. Defendant responded, "No, I don't mind." Officer Jones searched defendant and found in his front left waistband a small, hard plastic tube which he believed to be a pipe for smoking crack cocaine. He also found some white and brown paper containing small objects identified by defendant as wax. Officer Jones also found in defendant's waistband a bag containing an off-white rock substance. Officer Jones arrested defendant. He continued to search defendant's person and found in defendant's jacket pocket a tube with white residue on it.

Defendant testified that he gave consent to a patdown search for weapons but he did not give consent to reach into his pockets and clothing.

In denying the motion to suppress, the court found that Officer Moore had a reasonable basis to stop the car because of equipment and seat belt violations and that Officer Jones had a reasonable and articulable suspicion of criminal activity "based on suspicious activity in a high drug area and what appeared to be cocaine on the floorboard." The court further found that defendant voluntarily consented to a search of his person and that Officer Jones had probable cause to arrest defendant.

Defendant contends the court erred in denying the motion to suppress. He argues the initial stop of the vehicle was a pretextual stop. He also argues that the consent to search his person was not voluntarily given.

A. Pretextual Stop

Defendant argues that the officers did not have a reasonable suspicion to stop the vehicle in which defendant was a passenger, and consequently, the stop of the vehicle using minor traffic violations as its justification was pretextual and any evidence obtained as a result of the stop should have been excluded. We disagree.

In *Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 98 (1996), the United States Supreme Court ruled that as long as a police officer has probable cause to believe that a motorist has violated a traffic law, the officer may constitutionally stop the motorist consistent with the Fourth Amendment of the United States Constitution regardless of the subjective intention or motivation of the officer. This ruling effectively ended claims

that stops for minor traffic violations were unconstitutionally being used as a pretext for stopping the motorist for other reasons. *State v. McClendon*, 350 N.C. 630, 635, 517 S.E.2d 128, 131-32 (1999). This objective standard, rather than a subjective one, also applies to claims arising under Article I, Section 20 of the Constitution of North Carolina. *Id.* at 636, 517 S.E.2d at 132.

A stop based upon a readily-observed traffic violation is valid if it is based upon probable cause. *State v. Barnhill*, 166 N.C. App. 228, 231, 601 S.E.2d 215, 217, *appeal dismissed and disc. review denied,* 359 N.C. 191, 607 S.E.2d 646 (2004). Probable cause is "a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167 (1999). Here, Officer Moore observed that the driver of the Lincoln vehicle was not wearing a seat belt, an act made a criminal infraction by N.C. Gen. Stat. § 20-135.2A(e) (2005), and that a light over the license plate was not illuminated as required by N.C. Gen. Stat. § 20-129(d) (2005), an act made a criminal infraction by N.C. Gen. Stat. § 20-176(a) (2005). Based upon his own objective observations, Officer Moore had probable cause to stop the vehicle for these infractions.

B. Consent to Search

Defendant also argues that his consent, if in fact given, was not voluntary. When the State relies upon consent to justify a warrantless search of one's person, it has the burden of proving "that the consent was given without coercion, duress, or fraud."

State v. Hardy, 339 N.C. 207, 226, 451 S.E.2d 600, 610 (1994). In determining whether this burden has been carried, the court must look at the totality of the circumstances. *State v. Steen*, 352 N.C. 227, 240, 536 S.E.2d 1, 9 (2000).

Defendant maintains his consent was not voluntary because he was removed from the vehicle, patted down with outstretched arms in the presence of multiple officers, and not advised he could refuse to consent. We disagree.

It is not necessary for the government to prove that the defendant knew he had the right to refuse consent in order for the consent to be valid. *Ohio v. Robinette*, 519 U.S. 33, 40, 136 L. Ed. 2d 347, 355 (1996). In conducting a stop, an officer may lawfully and reasonably request that the driver or any passenger exit the vehicle and the officer may pat down the person for weapons. *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 283 (2000). The mere presence of multiple officers also does not invalidate the consent in the absence of evidence to indicate that the officers made a concerted effort to coerce the defendant to consent or displayed their authority in such a manner as to cause the defendant to believe that he had no alternative but to consent. *State v. Wilson*, 155 N.C. App. 89, 97-98, 574 S.E.2d 93, 99 (2002). Such evidence is lacking in the case at bar.

We hold the court properly denied the motion to suppress.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).