NO. COA06-595

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 04 CRS 243337;
05 CRS 47024

DEMONT MAURICE FORTE

Appeal by defendant from judgment entered 19 October 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

ELMORE, Judge.

Demont Maurice Forte (defendant) appeals the judgment of the trial court, entered 19 October 2005, convicting him of possession of cocaine and sentencing him as an habitual offender to a minimum of seventy-two months and a maximum of ninety-six months in prison. After a thorough review of the record, we find no error.

On 22 September 2005, defendant was driving a car when he was recognized by a police officer as having had his license revoked. The officer followed defendant. After briefly losing sight of him, the officer spotted defendant on foot, walking between two nearby

apartment buildings. At this time, the officer confirmed that defendant's license had been revoked, and the officer discovered that there was an outstanding warrant for defendant's arrest. The officer arrested defendant.

The officer then handcuffed defendant and searched him incident to the arrest. The officer discovered in defendant's right pants pocket a plastic bag containing what was later determined to be .21 grams of cocaine. Upon its discovery, defendant stated, "I snort powder; I don't sell no dope." Slightly before the search, the officer carried on a conversation with defendant, asking, for example, "Where [defendant] had been" and commenting that he "hadn't seen [defendant] in a while." At no point before defendant's statement had the officer read him his *Miranda* warnings.

A jury subsequently found defendant guilty of possession of cocaine, and the State presented evidence that defendant was an habitual felon. Specifically, the State published records of prior convictions of manslaughter and two separate instances of possession of cocaine. The jury found defendant guilty as an habitual felon.

Defendant now assigns error to both the trial court's jury instructions on the habitual felon charge, and the trial court's denial of defendant's motion to suppress his statement to the police officer. We find neither argument persuasive, and hold that the trial court committed no error.

Defendant first argues that the trial court failed to charge and instruct the jury on an essential element of the crime alleged. Specifically, defendant argues that the trial court, in charging the jury on the State's burden of proof with regards to the habitual felon charge, stated only that the jury must find that defendant was convicted of his prior crimes in Mecklenburg County, rather than Mecklenburg County Superior Court. Defendant bases this assertion on the language of our General Statutes, which defines "habitual felon," in pertinent part, as "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof . . . ." N.C. Gen. Stat. § 14-7.1 (2005). He also seeks to rely on that part of our General Statutes mandating that, among other things, an indictment charging a defendant with being an habitual felon must specify "the identity of the court wherein said pleas or convictions took place." N.C. Gen. Stat. § 14-7.3 (2005). Defendant claims that the fact that he "may have been convicted of the named offense in 'Mecklenburg County' is not sufficient to show 'the identity of the court wherein said pleas or convictions took place' or that defendant was convicted 'in any federal court or state court in the United States.'"

While defendant's argument is creative, it is also entirely without merit. As the State notes in its brief, this Court recently declared that "our courts have not required rigid adherence to [the] rule [set out in N.C. Gen. Stat. § 14-7.3]." *State v. Montford*, 137 N.C. App. 495, 500, 529 S.E.2d 247, 251

(2000). We are not prepared to require rigid adherence in this case, particularly in light of the State's publication of the records of the underlying prior convictions to the jury. Accordingly, defendant's first assignment of error must fail.

Defendant also assigns error to the trial court's denial of defendant's motion to suppress his statement, "I snort powder; I don't sell no dope." Defendant maintains that the police officer's comments and questions constituted an "interrogation" necessitating the recitation of defendant's *Miranda* rights. We disagree, and find no error with the trial court's conclusion that the statement was a spontaneous utterance.

Preliminarily, we note:

> [I]n superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under [G.S. § 15A-975](b) or (c). Here, defendant did not move to suppress his statement prior to trial; rather, defendant only objected during trial . . . . Notwithstanding defendant's apparent failure to comply with G.S. § 15A-975, the trial court conducted an evidentiary hearing . . . . Because the record is silent as to the trial court's basis for permitting defendant to make his motion for the first time at trial, we presume the trial court acted correctly.

State v. Smith, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (quotations and citations omitted). We therefore address the merits of defendant's contention.

This Court has established that its standard of review of a trial court's ruling on a motion to suppress in these circumstances is as follows:

> [T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. However, because the determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, this question is fully reviewable on appeal.

The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.

Id. (quotations and citations omitted).

Likewise, the issue of what actions by police will be considered an "interrogation" has recently been addressed by this Court: "Our Supreme Court has held that 'any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect' constitute an interrogation." *State v. Crudup*, 157 N.C. App. 657, 660, 580 S.E.2d 21, 24 (2003) (quoting *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000)).

> Factors that are relevant to the determination of whether police "should have known" their conduct was likely to elicit an incriminating response include: (1) "the intent of the police"; (2) whether the "practice is designed to elicit an incriminating response from the accused"; and (3) "any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . ."

Smith, 160 N.C. App. at 115, 584 S.E.2d at 835 (quoting *State v. Fisher*, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003)).

In this case, the trial court expressly found that the officer's intent was "to calm the situation [and that he] had no intent to elicit incriminating responses . . . ." Further, the trial court found that the officer "was not engaged in any practice designed to [elicit incriminating responses], and had

no knowledge of any unusual susceptibility of the defendant to such statements or questioning." We agree with the trial court. Moreover, we note that "responses to generalized questions by law enforcement officers, which are not reasonably likely to elicit incriminating responses, are admissible." *Golphin*, 352 N.C. at 407, 533 S.E.2d at 200 (citing *State v. Gray*, 347 N.C. 143, 171, 491 S.E.2d 538, 549 (1997)). In this case, the officer asked defendant, "what have you been up to; what's been going on; I haven't seen you in a while." These are "generalized questions." Defendant's claim that his statement was in response to these questions is disingenuous; it is clear the statement was not responsive. He did not tell the officer what he had been up to; he did not tell the officer what was going on in his life; he did not tell the officer where he had been. When, immediately after the officer's discovery of the cocaine, defendant blurted out "I snort powder; I don't sell no dope," he was, as the State asserted at trial, "concerned that the officer would charge him with possession with intent to sell or deliver [the] cocaine . . . ." Thus, no custodial interrogation took place, and the trial court properly denied defendant's motion to suppress his spontaneous utterance.

Accordingly, having conducted a thorough review of defendant's assignments of error, we find

No error.

Judges MCGEE and BRYANT concur.

Report per Rule 30(e).