NO. COA06-625

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 03 CRS 254286

WILBERT L. ALEXANDER

Appeal by defendant from judgment entered 25 August 2004 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Irving Joyner, for defendant-appellant.

ELMORE, Judge.

While reserving the right to appeal the denial of his motion to suppress, defendant entered an *Alford* plea to the charge of possession of cocaine with intent to sell or deliver. See *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d. 162, 171 (1970). The trial court suspended a sentence of fifteen to eighteen months' imprisonment and placed defendant on supervised probation for thirty-six months. Defendant gave notice of appeal in open court at the conclusion of the plea hearing.

We note initially that defendant's brief to this Court addresses only one of the two assignments of error found in the record on appeal. Pursuant to N.C.R. App. P. 28(b)(6), we deem the unaddressed assignment of error to be abandoned. Because defendant confines his appeal to the denial of his motion to suppress evidence seized from his person by Mecklenburg County Police Officer Graham P. Brown during an investigatory detention on 12 November 2003, we limit our discussion accordingly.

Officer Brown testified that at the suppression hearing that he met defendant while participating in a drug interdiction operation at 1836 Union Street in the Villa Heights neighborhood in Charlotte. As a member of the operation's "take-down" team, Brown waited near the target area in an unmarked van while "undercover officers [rode] through the neighborhood looking for people to flag down, or to attempt to solicit them for sales of cocaine." Based on his training and eight years of experience with street crime in Charlotte, Brown knew that the local cocaine trade involved "typically . . . nickel and diming where people are selling cocaine in [$]10 and $20 amounts[,] . . . small one or two dosage units that an individual can use immediately[.]" The officers selected the site of the operation on 12 November 2003 based on the neighborhood's known status as an open-air drug market.

At approximately 1:30 p.m., Officer Bobby Tarte notified the take-down team that "he had made a purchase[.]" Tarte reported the amount and location of the transaction and described both the person who sold him the drug and a second "subject standing there

with him at that time" of the purchase. In less than a minute, Brown and his fellow officers arrived at the site of the sale and found two individuals matching Tarte's descriptions.

While an officer arrested the reputed seller, Brown engaged defendant, who was standing eight to ten feet from the seller. Primarily concerned for the safety of the arresting officer, Brown believed it was "unsafe really to deal with a person who sold [drugs], without dealing with the gentleman in such close proximity" to the transaction. He explained that street-level drug dealing "more often than not" involved the participation of more than one individual, as follows:

> It's very rare that you . . . find a stash of drugs, money or firearm on one person. Generally it's passed through a crowd. It's not . . . uncommon at all to find drugs on one person, marked money on the second or third individual, and then someone standing guard with a firearm in a group.

Brown further observed that it was "very uncommon" for someone to stand close to a hand-to-hand drug sale without some degree of involvement, and that "more often than not . . . someone in that close proximity [who] watches a hand-to-hand transaction [and] does not attempt to walk away or object to it is generally, at a minimum, a lookout[.]"

In speaking to Brown, defendant was "evasive and agitated[,]" but did not appear to be nervous. Rather than responding to questions, defendant asked why he was being questioned. Brown saw that defendant's "pockets were fairly bulging" but could not determine the nature of their contents by sight. Although

defendant kept his hands in view at all times, Brown was concerned about the items in his pockets. He frisked defendant but was unable to determine by this pat-down search whether defendant's pockets held a weapon. Brown then walked around defendant in order to look for "visual indicators" of a weapon. While standing closely behind him to the left, Brown saw protruding from defendant's left pants' pocket "a clear colored plastic pill bottle." Brown could see "[a]lmost half" of the bottle and noticed that it contained small pieces of plastic and a white residue. Based upon his training and experience, his knowledge of how cocaine was packed for sale, and defendant's proximity to the undercover drug purchase, Brown found it "more probable than not" that the bottle contained a controlled substance. He noted that police "typically f[ou]nd street level drugs in pill bottles [or] small containers[,] items that can be dropped easily without discarding the contents so they can be retrieved." Brown removed the bottle from defendant's pocket and confirmed his suspicion that it held a small quantity of cocaine. He placed defendant under arrest and found approximately $800.00 in cash in his pockets.

Defendant cross-examined Brown but offered no rebuttal evidence.

In its order denying defendant's motion to suppress the evidence seized by Brown, the trial court made findings consistent with the officer's hearing testimony and concluded as follows: (1) Brown's detention and pat-down search of defendant were supported by a reasonable suspicion that he was involved in drug sales and

"might be armed[;]" (2) the pill bottle in defendant's pocket "was in plain view of Officer Brown who was in a place where he had a lawful right to be[;]" (3) Brown's observation of the pill bottle, in light of his training and experience, provided probable cause to believe defendant was in possession of a controlled substance; and (4) Brown's warrantless seizure of the pill bottle from defendant's pocket was lawful under both the United States and North Carolina Constitutions.

On appeal, defendant claims that the trial court erred in refusing to suppress evidence that was the product of an illegal stop, search, and seizure. Defendant contends that the facts found by the court provided no grounds for a reasonable articulable suspicion of his involvement in criminal activity. He asserts that the findings did not establish any connection between him and the reputed drug dealer. Likewise, he argues that Brown's subjective belief about the possible contents of the pill bottle did not provide probable cause for a warrantless arrest or search.

Although defendant's briefed argument challenges the sufficiency of the court's findings to support its conclusions of law, his corresponding assignment of error instead challenges the evidentiary support for the court's findings of fact, as follows:

> 1. The Trial Judge erred when he made findings of facts which were not supported by the evidence and denied the Defendant's Suppression Motion.

To the extent defendant challenges the sufficiency of the evidence to support the court's findings, his failure to assign error to any individual finding or to argue the issue in his brief, renders the

trial court's findings of fact binding on appeal. *See, e.g.*, *Chambliss v. Health Sciences Foundation, Inc.*, __ N.C. App. __, __, 626 S.E.2d 791, 795 (2006) (quoting *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000)), *petition for disc. review withdrawn*, 360 N.C. 532, __ S.E.2d __ (2006); *see also* N.C.R. App. P. 10(c)(1) (2005). Our review is thus limited to the issue of whether the court's findings support its ultimate conclusions of law regarding the admissibility of the evidence. *See id*; *see also State v. Carpenter*, __ N.C. App. __, __, 632 S.E.2d 538, 540 (2006); *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001).

Investigatory Stop and Frisk

"It is well established that an officer may undertake an investigatory stop of a person, so long as that officer has a reasonable and articulable suspicion, based on objective facts, that the person is engaged in criminal activity." *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997) (citations omitted). In *In re Keith Whitley*, this Court found the following facts adequate to support an investigatory stop of the defendant:

> [O]fficers had received a telephone call indicating two black males were selling drugs on Merrick Street. Upon arriving at the scene to investigate, the officers found two black males standing in the location where the drugs were purportedly being sold. . . . [W]hen [an officer] approached respondent, he noticed respondent's legs were very tight.

Whitley, 122 N.C. App. 290, 292, 468 S.E.2d 610, 612, *disc. review denied*, 344 N.C. 437, 476 S.E.2d 132 (1996). However, a reasonable suspicion of criminal activity does not arise from a defendant's

mere presence in an area identified by an unknown tipster as the site of drug activity, or in a location known for such activity, absent additional incriminating circumstances such as flight or evasive action by the defendant. *Compare State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 722-23 (1992) *and State v. Rhyne*, 124 N.C. App. 84, 89-90, 478 S.E.2d 789, 792 (1996), *with State v. Willis*, 125 N.C. App. 537, 541-42, 481 S.E.2d 407, 410-11 (1997) (upholding investigatory stop based on the defendant's presence at a "drug house" plus his nervous behavior and attempt to evade police).

The facts before us were sufficient to provide Brown with a reasonable suspicion of defendant's involvement in illegal drug activity. In contrast to cases such as *Whitley*, defendant was observed by police standing in close proximity to a second subject while the subject actually sold drugs to an undercover officer. When Brown arrived at the scene of the felonious transaction, defendant remained within several feet of the dealer. Although defendant did not attempt to flee or appear nervous, he was evasive and "agitated" in response to questioning. Brown also noticed bulges in defendant's pockets. Based on Brown's years of experience with Charlotte street crime, he was aware both that uninvolved persons rarely stood next to open-air drug transactions and that drug dealers typically worked in tandem with other individuals who held money, drugs, or weapons. The circumstances, coupled with Brown's experience and training, fully justified an investigatory stop. *See Willis*, 125 N.C. App. at 541, 481 S.E.2d

at 410 ("[T]he reviewing court must take into account an officer's training and experience.").

Likewise, Brown's observations of the bulges in defendant's pockets, his knowledge of the association of violence to street-level drug sales, and his concern for the safety of the arresting officer justified a pat-down search of defendant for weapons. *Willis*, 125 N.C. App. at 542, 481 S.E.2d at 411 (quoting *Butler*, 331 N.C. at 234, 415 S.E.2d at 723); *see also State v. Pulliam*, 139 N.C. App. 437, 441, 533 S.E.2d 280, 283 (2000) (citing *State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988)). Although the frisk did not produce any evidence, its was lawful. Moreover, no evidence suggested that Brown manipulated the bottle during the frisk so as to bring it into view.

Warrantless Seizure

Because the investigatory stop was proper, we further conclude that the pill bottle protruding from defendant's pocket was subject to seizure under the "plain view" exception to the Fourth Amendment's proscription of warrantless searches and seizures. *See generally Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564 (1971). "[T]he 'plain view' doctrine . . . allows an officer to seize evidence when the initial intrusion which brings the evidence into plain view is lawful, and it is immediately apparent to the police that the items observed constitute evidence of a crime, are contraband[.]" *State v. Beveridge*, 112 N.C. App. 688, 694, 436 S.E.2d 912, 915 (1993) (citation omitted), *aff'd per curiam*, 336 N.C. 601, 444 S.E.2d 223 (1994). The requirement that an item's

status as contraband be immediately apparent is "'satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.'" *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389-90 (1993) (quoting *State v. White*, 322 N.C. 770, 777, 370 S.E.2d 390, 395, *cert. denied*, 488 U.S. 958, 102 L. Ed. 2d 387 (1988)). Moreover, "[p]lain view does not require unobstructed sight, but only as much sight as is necessary to give a reasonable man the belief that there is evidence of criminal activity present." *State v. Wynn*, 45 N.C. App. 267, 270, 262 S.E.2d 689, 692 (1980) (citing *United States v. Drew*, 451 F. 2d 230 (5th Cir. 1971)).

In determining whether probable cause exists to support a warrantless seizure under the Fourth Amendment, this Court must consider the "'totality of the circumstances'" as filtered through the knowledge and experience of the officer making the judgment. *Wilson*, 112 N.C. App. at 390, 437 S.E.2d at 782 (quoting *State v. Wallace*, 111 N.C. App. 581, 584, 433 S.E.2d 238, 240 (1993)). "'*Probable cause is a flexible, common-sense standard*. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required.'" *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (quoting *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984)).

We believe that the circumstances under which Officer Brown observed the pill bottle provided sufficient probable cause to support his seizure of the bottle from defendant's pocket. Brown

encountered defendant while interdicting street-level cocaine sales in an area known for such activity. An undercover officer reported that he had made a drug purchase at a particular location and described a second subject standing in close proximity to the dealer during the transaction. When Brown arrived at the scene less than a minute later, defendant was standing next to the dealer. In the course of a lawful investigatory detention, Brown stood behind defendant and saw the top half of a plastic pill bottle in his pants pocket. Visible inside the bottle were pieces of plastic and a white residue. Based on his extensive knowledge of the methods and packaging used by cocaine dealers in Charlotte, Brown was justified in concluding that the pill bottle contained evidence incriminating defendant in a felony drug crime. *See State v. Peck*, 54 N.C. App. 302, 306-07, 283 S.E.2d 383, 386 (1981), *aff'd*, 305 N.C. 734, 742, 291 S.E.2d 637, 642 (1982); N.C. Gen. Stat. § 90-95(a), (d)(2) (2006); *see also Whitley*, 122 N.C. App. at 293, 468 S.E.2d at 612.

Because the trial court properly denied defendant's motion to suppress, we affirm the judgment entered upon his guilty plea.

Affirmed.

Judges WYNN and GEER concur.

Report per Rule 30(e).