NO. COA06-811

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Macon County
No. 05-CRS-2098

JOHN ROBERT POTTS

Appeal by defendant from judgment entered 10 January 2006 by Judge J. Marlene Hyatt in Macon County Superior Court. Heard in the Court of Appeals 19 February 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Rudolf, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in true bills of indictment with multiple counts of trafficking in cocaine, possession of marijuana with intent to sell and deliver, possession of drug paraphernalia, and maintaining a vehicle for keeping and selling controlled substances. He moved to suppress evidence seized as a result of an allegedly unconstitutional search of his vehicle. After a hearing, the motion to suppress was denied and defendant pled guilty to one count of trafficking in cocaine, reserving his right to appeal the denial of the motion to suppress. The State dismissed the

remaining charges. Defendant appeals from the judgment entered on his plea.

At the hearing on defendant's motion to suppress, the State's evidence tended to show that on 24 January 2004, Deputy Brent Holbrooks ("Holbrooks") observed a blue and white Corvette automobile driven by defendant traveling at a high rate of speed and crossing over the road's centerline. Holbrooks pulled the vehicle over. Holbrooks described defendant as shaking, sweating and visibly nervous. There were several brown bags with bottles in the car. From one of those bags, defendant handed Holbrooks an open bottle of vodka. In addition, Holbrooks noticed an odor of marijuana about defendant's person. Because defendant's driver's license had a restriction limiting defendant's blood alcohol level to .04, Holbrooks administered an alco-sensor test, which yielded a reading of .00. Holbrooks testified that he asked defendant for permission to search the car and that defendant responded "Go right ahead." Holbrooks testified further that he did not recall defendant's exact words, but that defendant gave him consent to search the entire vehicle. Defendant did not withdraw his consent during the search. In the car, Holbrooks found a white powder substance in a black zippered case as well as other plastic bags and a locked briefcase. At this point, defendant was standing directly behind Holbrooks in a threatening manner. Holbrooks drew his sidearm, read defendant his *Miranda* rights and placed defendant in his patrol car. When asked about the white powder substance, defendant identified it as cocaine.

Officer Brian Leopard ("Leopard") arrived on the scene and he spoke with defendant. Leopard asked to search the locked briefcase. Defendant gave his consent and provided the combination. Leopard found marijuana in the briefcase. After he was transported to the sheriff's department, defendant signed a written consent form to search his residence.

Defendant testified that when he was asked for consent to search his car, he responded by saying "I guess I don't have any choice, do I?," after which Holbrooks began searching the car. Defendant also claimed that he was put under arrest as soon as his black zippered case was found with a white powder substance on the outside.

Defendant contends the trial court erred in denying his motion to suppress. Defendant did not assign error to any of the trial court's findings of fact. As a result, the findings of fact are binding on appeal and our Court's review of the motion to suppress is "limited to whether the trial court's findings of fact support its conclusions of law." *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999). The trial court made the following findings:

> That in this matter there were grounds for the traffic stop, speeding and erratic driving. That on the stop the officer observed the defendant, that he had large beads of sweat, was shaking, had a restriction code on his driver's license that would indicate blood alcohol content must be less than .04. He observed alcohol in the vehicle and an odor of marijuana.

> The defendant was asked if he would consent to a search of the vehicle. The defendant, aware that he could refuse to let the officers search the vehicle, attempted to be equivocal and said, "Do I have a choice?" He never refused the officer's request to search the vehicle; moreover, he provided the combination to the safe - or the briefcase that was in the vehicle and provided that at the scene.
>
> The officers have testified that the defendant gave consent and that the officers searched the vehicle and the defendant's person.
>
> As to the search of the house the defendant signed the permission to search.

The trial court's conclusions of law are reviewed *de novo*. *See State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005) (citations omitted).

First, defendant argues that he did not voluntarily give consent for his vehicle to be searched. "Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress or fraud, consented to the search." *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985). In determining whether the consent was voluntary, 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). In a case where there are no material conflicts in the evidence, the trial court need not make a specific finding that a consent was voluntarily given. *State v. Cobb*, 295 N.C. 1, 18-19, 243 S.E.2d 759, 769 (1978).

In the present case, there were no material conflicts in the evidence as it related to the search of defendant's vehicle.

Though the trial court found that defendant "attempted to be equivocal" in his response to Holbrooks' request, the court's further findings that the officer testified that defendant gave consent for the search, did not refuse, and provided the combination for the locked briefcase in response to the officer's request, support a finding, which is implicit in the denial of the motion, that defendant gave voluntary consent to the search. Thus, considering the totality of the circumstances described within the trial court's findings as well as the superior position of the trial judge to evaluate the credibility of the evidence, we uphold the trial court's determination that defendant consented to the search. *See State v. Little*, 270 N.C. 234, 239-40, 154 S.E.2d 61, 65-66 (1967) (upholding the denial of a motion to suppress and noting that the "trial judge is in a better position to weigh the significance of the pertinent factors than is an appellate tribunal.")

Defendant also argues the search was constitutionally invalid because he was detained longer than was necessary to effectuate the purposes of the initial stop. We disagree. "A law enforcement officer who observes a traffic law violation has probable cause to detain the motorist, and the scope of that detention may be expanded where the officer has a reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *State v. Hernandez*, 170 N.C. App. 299, 301, 612 S.E.2d 420, 422 (2005). The court must look to the totality of the circumstances to determine if a reasonable suspicion exists to allow further

delay. *State v. Wilson*, 155 N.C. App. 89, 96, 574 S.E.2d 93, 98 (2002).

Here, the trial court found that both speeding and erratic driving served as grounds for the traffic stop. After stopping defendant, Holbrooks encountered several articulable facts supporting a reasonable suspicion of criminal activity. Defendant was sweating and shaking. Defendant had a restriction code on his driver's license mandating that his blood alcohol content be less than .04. Further, Holbrooks observed alcohol in the vehicle and an odor of marijuana. Holbrooks had reasonable and articulable suspicion sufficient to justify further detention and delay.

The order denying defendant's motion to suppress is affirmed.

Affirmed.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).