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NO. COA07-1114

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

Catawba County
Nos. 06 CRS 011483-011484

RICHARD GLENN HALLYBURTON

Appeal by defendant from judgment entered 15 May 2007 by Judge Jerry Cash Martin in Catawba County Superior Court. Heard in the Court of Appeals 5 March 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, for the State.

Cheshire, Parker, Penneiler, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

TYSON, Judge.

Richard Glenn Hallyburton ("defendant") appeals from order entered, which denied his motion to suppress. We affirm.

I. Background

On 16 February 2006, Hickory Police Officer Jason Hampton ("Officer Hampton") observed a black Ford Ranger enter Public Housing Authority property. Defendant was the only person seated inside the vehicle. Once in the Public Housing Authority parking lot, defendant did not exit his vehicle.

After approximately two minutes, Officer Hampton observed someone approach defendant's vehicle. As the person approached

defendant's vehicle, the person looked around as if to make sure no one else was around. Officer Hampton observed "some type of exchange[]" between the person who approached defendant's vehicle and defendant. Based on his prior training and experience, Officer Hampton believed an illegal drug transaction had occurred.

Defendant exited the Public Housing Authority parking lot. Officer Hampton observed defendant drive across the highway and roll through a stop sign. Officer Hampton pulled out behind defendant and initiated a traffic stop. Officer Hampton exited his patrol vehicle, approached the driver's side window, and asked defendant for his driver's license and registration. Defendant presented both items.

Officer Hampton asked defendant what he was doing in the area. Defendant told Officer Hampton he was "just driving around." Officer Hampton then stated, "[w]ell, you were stationary in the parking lot, you were not driving anywhere, wasn't [sic] visiting anybody. What are you doing in the parking lot?" Defendant then handed Officer Hampton four pieces of crack cocaine from his pocket and said, "you know what I'm doing, I'm buying crack." Officer Hampton seized the narcotics and let defendant go after he told defendant the matter would go to the grand jury. Officer Hampton did not issue defendant a citation for failure to stop at a stop sign.

On 2 October 2006, defendant was indicted for felony possession of cocaine and attaining habitual felon status. On 1 March 2007, defendant filed a motion to suppress and alleged that

he was detained without probable cause while operating a vehicle and that items were seized from his vehicle in violation of his constitutional rights. Defendant's motion sought to suppress all evidence arising from the alleged unconstitutional search and seizure.

On 14 May 2007, a pretrial hearing was held on defendant's motion to suppress. Officer Hampton was the only *voir dire* witness for the State. Defendant took the stand during *voir dire* as a witness on his own behalf. Defendant's motion to suppress was denied by the trial court in open court and later reduced to writing and filed on 17 May 2007.

On 15 May 2007, defendant pleaded guilty to the charges of felony possession of cocaine pursuant to N.C. Gen. Stat. § 90-95(d)(2) and having attained the status of being an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1. The trial court sentenced defendant to a minimum term of 80 and a maximum term of 105 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it: (1) overruled defendant's objection and motion to suppress testimony of the arresting officer; (2) overruled defendant's objections made during the prosecutor's questioning of defendant; and (3) took judicial notice of the pending charges against defendant for the purpose of impeachment during *voir dire*.

III. Standard of Review

The trial court's findings of fact regarding a motion to suppress are conclusive and binding

on appeal if supported by competent evidence. This Court determines if the trial court's findings of fact support its conclusions of law. Our review of a trial court's conclusions of law on a motion to suppress is *de novo*.

State v. Edwards, ___ N.C. App. ___, ___, 649 S.E.2d 646, 648 (internal quotation and citations omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

IV. Officer Hampton's Voir Dire Testimony

Defendant contends Officer Hampton's question to defendant about his reasons for being in the area constituted interrogation and that defendant's self-incriminating response should have been suppressed. Defendant argues he was not apprised of his right to remain silent. We disagree.

"Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (internal citation and quotation omitted).

Here, the trial court concluded:

that Officer Hampton had a reasonable articulable suspicion the defendant was trespassing on Public Housing Authority property and had reasonable articulable suspicion that defendant was engaging in an illegal hand-to-hand drug transaction and had reasonable articulable suspicion to believe the defendant had failed to come to a complete stop at a duly erected stop sign.

Defendant does not argue the invalidity of this conclusion of law in his brief. Officer Hampton lawfully stopped defendant based on his reasonable articulable suspicion that defendant had trespassed,

engaged in an illegal drug transaction, or failed to come to a complete stop at a duly erected stop sign. *Id.*

"Officers who lawfully stop someone for investigation may ask the person a moderate number of questions to determine his identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop." *State v. Steen*, 352 N.C. 227, 239, 536 S.E.2d 1, 9 (2000) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 334 (1984)), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

Upon Officer Hampton's lawful stop of defendant, he was permitted to ask defendant "a moderate number of questions . . . to gain information confirming or dispelling [Officer Hampton's] suspicions that" defendant had trespassed, engaged in an illegal drug transaction, or failed to come to a complete stop at a duly erected stop sign. *Id.* Officer Hampton's questions to defendant about his reasons for being in the area were proper. *Id.*

In its order which denied defendant's motion to suppress, the trial court concluded "defendant's statements to the officer were not as a result of custodial interrogation of . . . defendant pursuant to [*Berkemer*]" We have reviewed the trial court's conclusion *de novo* and hold the trial court properly overruled defendant's objection to and motion to suppress Officer Hampton's testimony about defendant's statements. This assignment of error is overruled.

V. Defendant's Testimony

Defendant argues the trial court erred when it overruled defense counsel's objections made during the prosecutors cross-examination of defendant. We disagree.

The transcript of the portion of the cross-examination in question states:

[Prosecutor]: [Defendant], were you in the parking lot of Hickory Housing Authority at sometime around 6:00 o'clock on the 16th of February last year?

[Defendant]: Yes, sir.

[Prosecutor]: For what purpose did you go there?

[Defense Counsel]: OBJECTION. It's irrelevant for these purposes, Your Honor.

. . . .

THE COURT: The Court OVERRULES the objection. It is relevant. Answer the question then.

[Defendant]: Now, would you repeat it please?

[Prosecutor]: I asked for what purpose you went there?

[Defendant]: I guess -- I mean, I have to incriminate myself if I answer that question so I mean --

[Defense Counsel]: Your Honor, I guess [at] this point my client is asserting the Fifth Amendment. I still contend it's irrelevant but I understand the Court's ruling.

THE COURT: You want to be heard on the objection raised by the witness that his answer will be violative of his rights under the Fifth Amendment?

[Prosecutor]: The defendant, I think, has waived that particular right.

. . . .

THE COURT: The Court is of the belief though [sic] the witness does have rights under the Fifth Amendment not to incriminate himself. For example, if he were asked about something not connected to this, did you kill "X" two years ago, having nothing to do with this, I think certainly he'd have the right to not testify; but when he takes the stand, he is subject to cross-examination on matters that are relevant to the issues before the Court. . . . Defendant's objection under the Fifth Amendment is OVERRULED and the defendant -- and defendant witness is ordered to answer this question.

[Defendant]: To purchase drugs.

A. Relevancy

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2005). "Cross-examination may be employed to test a witness's credibility in an infinite variety of ways. The largest possible scope should be given, and almost any question may be put to test the value of his testimony." *State v. Freeman*, 319 N.C. 609, 617, 356 S.E.2d 765, 769 (1987) (internal quotations omitted).

The State's question was relevant and not beyond the scope of cross-examination in light of Officer Hampton's previous testimony that he believed defendant had engaged in an illegal drug transaction in the parking lot. *Id.* The trial court did not err when it overruled defendant's objection based on relevancy. *Id.* This assignment of error is overruled.

B. Fifth Amendment

Under our accusatory system of criminal justice a defendant may never be required to take the stand and testify in his own behalf. If he does not choose to so testify, he may not be called upon to explain incriminating

evidence offered against him by the State. But when a defendant chooses to testify in his own defense he subjects himself to cross-examination on any matter relevant to any issue in the case, including credibility.

Id. at 616, 356 S.E.2d at 769 (internal quotation omitted).

Having determined the State's question was relevant to an issue in the case, the trial court did not err when it overruled defendant's Fifth Amendment objection and ordered defendant to answer the question. *Id.* This assignment of error is overruled.

VI. Pending Charges

Defendant argues the trial court erred when it took judicial notice of the pending charges against defendant for the purpose of impeachment during *voir dire*. We disagree.

It is permissible for the finder of fact to consider that a testifying defendant is an interested witness, and the finder of fact "should scrutinize the testimony of a defendant . . . in light of [his] interest in the verdict." *State v. Eakins*, 292 N.C. 445, 447, 233 S.E.2d 387, 388 (1977). The trial court did not err when it considered defendant's pending charges for the purpose of impeachment during *voir dire*. This assignment of error is overruled.

VII. Conclusion

Officer Hampton lawfully stopped defendant based on his reasonable articulable suspicion that defendant had trespassed, engaged in an illegal drug transaction, or failed to come to a complete stop at a duly erected stop sign. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70. Officer Hampton's "moderate number of

questions" to defendant about his reasons for being in the area were proper. *Steen*, 352 N.C. at 239, 536 S.E.2d at 9. The trial court properly determined Officer Hampton's traffic stop was lawful and his questions were proper.

The trial court did not err when it overruled defendant's objections made during the State's cross-examination of defendant. The trial court did not err when it considered defendant's pending charges for the purpose of impeachment during *voir dire*. The trial court's order, which denied defendant's motion to suppress, is affirmed.

Affirmed.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).