NO. COA07-1143

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v. Alamance County
No. 06 CRS 52268

JAMES P. BRILL

Appeal by Defendant from judgments dated 10 April 2007 and from order entered 31 May 2007 by Judge J.B. Allen, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 19 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General John P. Scheller III, for the State.

Robert W. Ewing for Defendant-Appellant.

McGEE, Judge.

James P. Brill (Defendant) appeals from his convictions of possession of a firearm by a felon and of criminal contempt and from the denial of his motion to suppress. For the reasons set forth below, we affirm Defendant's conviction for criminal contempt and the denial of Defendant's motion to suppress.

Defendant filed a motion on 9 April 2007 to suppress the inventory search of his vehicle. The trial court heard the motion that day and denied it in open court. The trial court subsequently entered a written order on Defendant's motion to suppress on 31 May

2007, in which the trial court made the following findings of fact:

> 1. On March 14, 2006 Officer G.E. Wilson was on routine patrol and parked at the Education Center off of Apple St. doing some paperwork.
>
> 2. Officer Wilson noticed an old model GMC light blue truck pass by him on three different occasions with five to six minute intervals between sightings. These three different sightings of the old model GMC light blue truck drew the suspicion of Officer Wilson. Officer Wilson saw . . . [D]efendant driving the . . . truck.
>
> 3. Officer Wilson pulled out of the Education Center and checked the license plate of the truck and ran them through the computer. Officer Wilson received information that the license plate was expired, that there was a pick-up order, and there was no Insurance on the vehicle.
>
> 4. Prior to stopping the vehicle, Officer Wilson observed that the tag on the vehicle had expired.
>
> 5. . . . [D]efendant was driving his vehicle off of Rauhut St. and onto Key St. and pulled in a public parking lot at Jackson Park.
>
> 6. Officer Wilson went up to . . . [D]efendant's vehicle and asked for [Defendant's] license and registration. . . . [D]efendant did produce a driver's license. . . . [D]efendant stated that he went to DMV earlier to obtain proper tags but was told to return at a later time. . . . [D]efendant did produce an old insurance card which had expired.
>
> 7. Officer Wilson determined that . . . [D]efendant's vehicle was on public streets, highways, and in a public park with no insurance whatsoever.
>
> 8. The Burlington Police Department has a towing policy as set forth in State's Exhibit 2. The Burlington Police has a policy prohibiting uninsured vehicles to . . . continue[] to be operated on public streets, highways, or public parking lots.

> 9. Officer Wilson asked . . . [D]efendant if he had someone that he wanted to tow [his] vehicle and . . . [D]efendant said he had no one. Pursuant to Burlington Police Department policy, Officer Wilson had a tow truck come to pick [Defendant's vehicle] up.
>
> 10. Pursuant to Burlington Department policy, an inventory search must be conducted before a car is towed.
>
> 11. Officer Wilson conducted an inventory search of [Defendant's] vehicle. There were two t-shirts in the middle of the bench seat. There was a pistol underneath these t-shirts and [it] was not in plain view. Officer Wilson moved the t-shirts and found the firearm.

Based upon these findings of fact, the trial court concluded that "Officer Wilson['s] decision to have the vehicle towed was reasonable and proper because of the public safety risk of the vehicle being driven on the public streets or highways without valid insurance. Officer Wilson's inventory search of . . . [D]efendant's vehicle was reasonable and pursuant to Burlington Police Department Policy." The trial court denied Defendant's motion to suppress.

Defendant failed to appear when the trial court called the case for trial early in the day on 9 April 2007. Defendant later appeared and was taken into custody. At that time, the trial court heard Defendant "making comments and mumbling something towards [the trial court]." When the case was called for trial later that day, the trial court struck "the call and fail[,]" reminded Defendant that he could be kept in custody, and cautioned Defendant about future disrespect for the trial court. After the trial court heard motions and took a recess, Officer G.E. Wilson (Officer

Wilson) testified that Defendant walked by him and called him a "Rambo cop and a piece of s---." Defendant did not testify or present evidence regarding his alleged statement to Officer Wilson. The trial court found that Defendant, after being cautioned about disrespect for the trial court, called Officer Wilson a "Rambo cop and a piece of s---" and found Defendant in direct criminal contempt of court. The jury found Defendant guilty of carrying a concealed weapon and possession of a firearm by a felon. The trial court entered prayer for judgment continued on the charge of carrying a concealed weapon, and Defendant pleaded guilty to having attained habitual felon status. The trial court sentenced Defendant to a term of forty-four months to sixty-two months in prison for possession of a firearm by a felon, and to a thirty-day consecutive sentence for criminal contempt. Defendant appeals.

Defendant first argues that findings of fact eight and nine in the trial court's order denying his motion to suppress were unsupported by the evidence. The scope of review of a ruling on a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We review a trial court's conclusions of law *de novo*. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005).

Defendant argues that findings eight and nine were unsupported by evidence because the Burlington Police Department's towing policy (the towing policy) did not require that uninsured vehicles be towed. Defendant relies upon Officer Wilson's testimony that the towing policy did not explicitly state that uninsured vehicles should be towed. Defendant also relies upon the State's stipulation that there was "no exact language in the inventory procedure" regarding the towing of uninsured vehicles.

However, the towing policy stated:

> A. Vehicles parked or abandoned on or near the roadway.
>
> > 1. Vehicles which are a hazard, impede the flow of traffic *or otherwise jeopardize the public welfare may be towed immediately*.

(Emphasis added). Officer Wilson testified that "[i]n [the] three years [he had been an officer, he had] never let a vehicle leave a traffic stop when it had . . . no valid insurance." Officer Wilson testified that he was required to have an uninsured vehicle towed because: (1) if he did not, "and it was involved in an accident, [he] could be held liable for the damages since [he] knew the vehicle had no insurance[;]" (2) if operators did not have insurance and "if they were involved in an accident, they would have no insurance policy to cover the damages to their vehicle or other innocent individuals who [were] part of that accident[;]" and (3) the Department of Motor Vehicles requires drivers to have valid insurance in order to operate vehicles on the public streets.

Officer Wilson's testimony regarding the reasons for towing

uninsured vehicles illustrates why uninsured vehicles that are allowed to remain on the public streets jeopardize the public welfare. Therefore, pursuant to the towing policy, Officer Wilson was authorized to tow Defendant's vehicle immediately. Thus, we hold that the challenged findings of fact were supported by competent evidence.

Defendant also argues the trial court erred by concluding that Officer Wilson's decision to have Defendant's vehicle towed was both reasonable and pursuant to the policy. Because inventory searches may be conducted without a warrant, "the validity of an inventory search under the Fourth Amendment is premised upon its being a benign, neutral, administrative procedure designed primarily to safeguard the contents of lawfully impounded automobiles until owners are able to reclaim them." *State v. Phifer*, 297 N.C. 216, 220, 254 S.E.2d 586, 588 (1979). Therefore, "inventory searches should be 'carried out in accordance with *standard procedures* in the local police department, a factor tending to insure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function.'" *Id.* (quoting *South Dakota v. Opperman*, 428 U.S. 364, 375, 49 L. Ed. 2d 1000, 1008 (1976)). Such "standardized inventory procedures [cannot] be [used] as a 'pretext concealing an investigatory motive.'" *Id.* (quoting *Opperman*, 428 U.S. at 376, 49 L. Ed. 2d at 1009). While inventory searches conducted under these circumstances are generally reasonable, "the reasonableness of any given inventory search depend[s] upon the circumstances presented

by each case." *Id.* at 220-21, 254 S.E.2d at 588 (citing *Opperman*, 428 U.S. at 372-73, 49 L. Ed. 2d at 1007-08).

In the case before us, Defendant specifically argues that Officer Wilson violated the following provisions of the policy:

> 3. Vehicles that are parked or abandoned on or near a roadway that are not a hazard may be towed after the following criteria are followed:
>
> > a. Notice must be given to the registered owner twenty-four (24) hours prior to towing if the vehicle has a North Carolina registration, and within seventy-two (72) hours prior to towing for out-of-state registration.

Defendant argues that because Officer Wilson failed to give Defendant twenty-four hour's notice before towing Defendant's vehicle, Officer Wilson failed to follow the standardized criteria required for a valid inventory search. We disagree.

As recited earlier, a preceding paragraph of the towing policy provided: "Vehicles which are a hazard, impede the flow of traffic or otherwise jeopardize the public welfare may be towed immediately." We hold that this provision, rather than the provision cited by Defendant, applies to the present case. Based upon the provision regarding vehicles that jeopardize the public welfare, Officer Wilson was authorized to have Defendant's vehicle towed immediately, and was not required to provide Defendant with twenty-four hour's notice. Moreover, before having Defendant's vehicle towed, Officer Wilson attempted to allow Defendant to make alternative provisions for the removal of his vehicle from the public streets. Officer Wilson asked Defendant if he had a towing

company that could retrieve his vehicle and Defendant replied that he "didn't know of anyone who could tow [his vehicle]". Only then did Officer Wilson have Defendant's vehicle towed. Pursuant to the towing policy, "[w]hen an officer confiscates or impounds a vehicle or has a vehicle towed, [the officer is] placed in the position of sharing the responsibility for its contents" and "[t]he officer will make an inventory of the vehicle and list all portable items in the vehicle, including items in the glove box, passenger compartment and trunk area." Therefore, pursuant to the policy, once an officer has a vehicle towed, the officer must conduct an inventory search of the vehicle. For all of these reasons, we hold that Officer Wilson's decision to have Defendant's vehicle towed was reasonable and pursuant to the towing policy.

Defendant further argues the trial court erred by concluding that "Officer Wilson['s] decision to have [Defendant's] vehicle towed was reasonable and proper because of the public safety risk of [Defendant's] vehicle being driven on the public streets or highways without valid insurance." Defendant argues that because his vehicle was legally parked in a public parking lot and was not hindering traffic, Defendant's vehicle did not pose a risk to public safety. Defendant again argues that "the findings of fact and the evidence do not support this conclusion of law that . . . [D]efendant's parked vehicle was jeopardizing the public welfare." However, as recited above, Officer Wilson's testimony demonstrated multiple reasons why uninsured vehicles pose a risk to the public welfare: (1) if an officer were to allow someone to

drive an uninsured vehicle, and the driver was in an accident, the driver would have no insurance coverage for the damages to innocent individuals who were involved in the accident; (2) the officer would potentially be liable; and (3) the Department of Motor Vehicles requires drivers to have valid insurance in order to operate vehicles on the public streets. *See* N.C. Gen. Stat. § 20-309 (2007).

Defendant also contends there were no findings that Defendant

> was going to drive his vehicle after he received his citations for the alleged traffic violations, that . . . [D]efendant was going to drive the vehicle after he received his citations without first obtaining proper insurance or that . . . [D]efendant could not find a ride or a way home without the use of his automobile.

"'[T]he touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."'" *Maryland v. Wilson*, 519 U.S. 408, 411, 137 L. Ed. 2d 41, 46 (1997) (citations omitted). "[R]easonableness 'depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers[.]"'" *Id.* (citations omitted).

In the present case, before Officer Wilson had Defendant's vehicle towed, he did give Defendant the option of having his vehicle towed himself. Officer Wilson had Defendant's vehicle towed only after Defendant said he did not know of anyone who could tow his vehicle. Moreover, Officer Wilson lacked other reasonable options. Had Officer Wilson allowed Defendant to drive the

vehicle, Officer Wilson would have exposed the public to the risks to which he testified. We hold the trial court did not err by concluding that Officer Wilson's decision to have Defendant's vehicle towed was reasonable in light of the public safety risks posed by the operation of an uninsured vehicle on the public streets.

In support of Defendant's argument that his vehicle did not pose a threat to public safety, Defendant relies upon *State v. Phifer*, 297 N.C. 216, 254 S.E.2d 586 (1979) and *State v. Peaten*, 110 N.C. App. 749, 431 S.E.2d 237 (1993). However, these cases are distinguishable.

In *Phifer*, a police officer stopped the defendant's vehicle for speeding and discovered that the defendant did not have a driver's license. *Phifer*, 297 N.C. at 218, 254 S.E.2d at 586-87. Another officer arrived and informed the first officer that he recognized the defendant as a known drug dealer. *Id.* at 218, 254 S.E.2d at 587. The officers determined that there was an outstanding warrant for the defendant's arrest and they then placed the defendant under arrest. *Id.* The officers began an inventory search and because there had been break-ins at the location of the stop, the officers decided to call a wrecker to tow the defendant's vehicle. *Id.* As part of the inventory search, the officers searched the vehicle's glove compartment and discovered marijuana and cocaine. *Id.*

Our Supreme Court recognized as follows:

> "'In the interests of public safety and as part of what the Court has called "community

> caretaking functions," automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities.'"

Id. at 219, 254 S.E.2d at 587 (quoting *Opperman*, 428 U.S. at 368, 49 L. Ed. 2d at 1005 (internal citation omitted)). Our Court held that the officers failed in two respects to comply with the applicable standard procedures for towing and inventory of vehicles. *Id.* at 221-22, 254 S.E.2d at 588-89. First, the standard procedures required officers to have authorization from a supervisor before having a vehicle towed or alternatively required that an assisting officer drive the vehicle. *Id.* However, the officers did not seek authorization nor did they consider whether one of them should drive the vehicle to the magistrate's office. *Id.* at 222, 254 S.E.2d at 589. Second, despite the fact that the defendant was capable of determining what should be done with the vehicle, the officers did not consult him regarding the disposition of the vehicle. *Id.* This also violated the applicable procedures governing the towing and inventory of vehicles. *Id.*

Our Supreme Court also recognized that while the officers cited the danger of theft and vandalism as their reasons for having the vehicle towed, "it is highly unlikely that a traffic problem would have been created had [the] defendant desired to risk exposure to theft by leaving his car temporarily parked on the right-of-way, the vacant lot, or a nearby parking space." *Id.* Our

Supreme Court further emphasized that because the officers knew that the defendant was a drug dealer and had an outstanding arrest warrant, the officers "utilized the inventory procedure as a 'pretext concealing an investigatory motive.'" *Id.* at 223, 254 S.E.2d at 589.

In the present case, unlike in *Phifer*, Officer Wilson complied with the applicable standard procedures. While the towing policy did not explicitly require the towing of uninsured vehicles, it did provide that vehicles that jeopardized public welfare could be towed immediately. We have already determined that an uninsured vehicle poses significant risks to public safety, and therefore, jeopardizes the public welfare. Moreover, unlike in *Phifer*, there is no indication in the case before us that Officer Wilson's decision to have the vehicle towed and to conduct an inventory of the vehicle was pretextual.

In *Peaten*, police officers executed a search warrant for tax paid alcoholic beverages at a club. *Peaten*, 110 N.C. App. at 750, 431 S.E.2d at 237. After the officers had searched the people inside the club and had processed those who had been charged, they noticed several vehicles remaining on the premises, including a BMW registered in North Carolina. *Id.* at 750, 431 S.E.2d at 237-38. The officers' testimony indicated that "if the BMW was left on the lot, it would have been gone by morning or it would have been vandalized. Therefore, they impounded the vehicle and inventoried the vehicle contents at the scene because an independent contractor would be called to tow the vehicle." *Id.* at 750, 431 S.E.2d at

238. Upon an inventory search of the trunk, which was unlocked, officers found a rifle, which was determined to have been stolen. *Id.* Our Court recognized that the BMW was not obstructing traffic or threatening public safety in any way. *Id.* at 753, 431 S.E.2d at 239. Moreover, the officers did not follow the standard procedures in place because those procedures did not allow for towing and an inventory simply because there was a risk of vandalism. *Id.*

In the case before us, unlike in *Peaten*, Defendant's vehicle did pose a risk to public safety. Moreover, Officer Wilson complied with the applicable standard procedures in place at the time. We hold the trial court did not err by denying Defendant's motion to suppress, and we overrule these assignments of error.

Defendant also argues the trial court erred by holding Defendant in direct criminal contempt because the trial court did not indicate that it found the facts beyond a reasonable doubt. Pursuant to N.C. Gen. Stat. § 5A-14(b) (2007), a trial court must find facts beyond a reasonable doubt before holding someone in contempt of court. Moreover, we have held that N.C.G.S. § 5A-14(b) "clearly requires that the standard should be 'beyond a reasonable doubt' and we find implicit in the statute the requirement that the [trial court's] findings should indicate that that standard was applied to [the trial court's] findings of fact." *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979). In *State v. Ford*, 164 N.C. App. 566, 596 S.E.2d 846 (2004), our Court clarified that "[f]ailure to make such an indication is fatally deficient, unless the proceeding is of a limited instance where there were no

factual determinations for the court to make." *Id.* at 571, 596 S.E.2d at 850 (citing *In re Owens*, 128 N.C. App. 577, 582, 496 S.E.2d 592, 595 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999)).

The State contends that the *Owens* exception applies to the present case, and we agree. In *Owens*, the trial court imposed "direct criminal contempt sanctions against a subpoenaed reporter who refused to testify regarding non-confidential information from a non-confidential source." *Owens*, 128 N.C. App. at 580, 496 S.E.2d at 594. On appeal, the reporter argued that the trial court failed to indicate that it found the facts beyond a reasonable doubt. *Id.* at 581, 496 S.E.2d at 595. Our Court recognized that the purpose for this requirement was "to ensure that the [trial court] considered any excuse and found it inadequate." *Id.* at 581, 496 S.E.2d at 595. Our Court held:

> In this case, there was simply no factual determination for the trial court to make. It is clear that [the reporter] asserted her privilege argument, that the trial court rejected such an argument and instructed her that she would be held in contempt for refusing to answer the prosecutor's question, and that she subsequently refused to answer any questions. Although she may have acted in good faith, there is no factual dispute that Owens willfully disobeyed the trial court's order.

Id. at 581, 496 S.E.2d at 595. Accordingly, we held that "under these facts the requirements of the statute were met." *Id.* at 582, 496 S.E.2d at 595.

Likewise, in the present case, there was no factual dispute regarding the conduct which gave rise to the contempt sanctions.

Despite the fact that the trial court had earlier cautioned Defendant about future disrespect for the trial court, Officer Wilson testified that when the trial court took a recess after hearing motions, Defendant called Officer Wilson a "Rambo cop and a piece of s---." Defendant did not testify or present any evidence regarding the statement he allegedly made to Officer Wilson. Accordingly, there was no dispute for the trial court to resolve. We hold that under these circumstances, it was unnecessary for the trial court to state that it found the facts beyond a reasonable doubt. *See Owens*, 128 N.C. App. at 582, 496 S.E.2d at 595.

Affirmed.

Judges TYSON and STEPHENS concur.

Report per Rule 30(e).