NO. COA07-1300

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 06CRS91219, 91220, 91221, 91227

DERRICK LASHAWN WRIGHT

Appeal by defendant from judgment entered 31 May 2007 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 3 April 2008.

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

Bryan Gates for defendant appellant.

McCULLOUGH, Judge.

FACTS

On 6 September 2006, R.C. Monge, a detective with the Greensboro Police Department, received an anonymous tip providing the address for an individual named Derrick Wright, who was wanted in Virginia for charges of cocaine possession and violation of parole. According to the informant, this individual dealt cocaine, sometimes carried a gun, and drove a white Honda Accord. In response to this tip, Detective Monge, accompanied by Detective Duane James and Detective Caviness, drove to the address provided by the informant to investigate the tip.

When the officers arrived at the apartment complex located at the address provided by the informant, they observed a white Honda Accord parked outside. The officers knocked on the door to the apartment and explained to the woman who answered the door that they had received a tip regarding Derrick Wright. The woman identified herself as Ms. Perkins, informed the officers that Derrick Wright was inside, and consented to a search of her apartment. Detective Caviness and Detective Monge then entered the apartment and performed a sweep for occupants. Detective Monge found defendant asleep in the master bedroom. Detective Monge woke defendant and asked him to come to the living room so the detective could talk to him.

Once in the living room, Detective James asked defendant to sit on the couch while the officers searched the apartment. When asked his name, defendant was deceptive and became nervous and aggressive. Defendant also began to look toward the exit of the apartment and stood up as if to take flight. To ensure his own safety, as well as the safety of the other occupants of the apartment, Detective James handcuffed defendant. Detective James informed defendant that he was being handcuffed for safety reasons, but he was not under arrest.

After defendant calmed down, Detective James asked defendant to move into the foyer of the apartment. Detective James explained that a tipster had told the police that defendant was wanted in Virginia. Detective James further explained that he needed defendant's name and date of birth to determine if the tip was

accurate. Defendant then provided his name and date of birth to the detective. Defendant also informed the detective that he had acted in a deceptive manner earlier because he was aware he was wanted in Virginia. Once he received defendant's information, Detective James ran an NCIC check and determined that a warrant had been issued for defendant's arrest in Roanoke, Virginia.

Detective James then alerted the police records division that he had located defendant. Detective James told defendant that he was not under arrest, and would be free to go if the Roanoke agency did not inform the records division of its intention to extradite defendant. Detective James also obtained a second set of handcuffs which he used to give defendant more room to move, lessening the pressure on defendant's shoulders.

Detective James asked defendant if the white Honda Accord ("the car") in the parking lot belonged to him. Defendant responded that an individual named Sonny had given the car to him. The detective further inquired if there were any weapons or drugs in the vehicle, but defendant responded that he did not know. Detective James asked defendant if he could search the car and received permission from defendant. Inside the car, Detective James and Detective Caviness found a gun and cocaine.

After the officers searched the car, defendant asked Detective Caviness what the officers had found. Detective Caviness informed defendant of the gun and cocaine they found in the car. In response, defendant stated that he had been impaired the previous night and had driven the car home. When the officers received

notice that a warrant had been issued for defendant's arrest in Virginia, Detective James informed defendant that he was formally under arrest.

On 2 January 2007, defendant was indicted on charges of trafficking in cocaine by possession of more than 28 grams, but less than 200 grams of cocaine; possession with intent to sell cocaine; felony possession of a firearm by a felon; and keeping and maintaining a vehicle for the keeping and selling of cocaine. On 5 March 2007, a superceding indictment was issued on the charge of felony possession of a firearm. On 29 May 2007, defendant was tried before a jury in Guilford County Superior Court. On 31 May 2007, the jury found defendant to be guilty of all of the charges against him. The trial court held a sentencing hearing, determined defendant's prior conviction level, and entered judgments against defendant. The trial court entered the felony possession of a firearm and keeping and maintaining a vehicle charges separately, and consolidated the judgments for the charges of trafficking and possession of cocaine. Defendant now appeals.

I.

Defendant first argues that the trial court erred in concluding defendant was lawfully detained by law enforcement officers. We disagree.

Law enforcement officers may initiate a brief investigative stop of an individual if the stop is "based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a

reasonable and cautious police officer on the scene, guided by his experience and training." *State v. Allen*, 90 N.C. App. 15, 25, 367 S.E.2d 684, 689 (1988); *see State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979); *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E.2d 230, 234 (1984). "'An anonymous tip may provide reasonable suspicion [for an investigative stop] if it exhibits sufficient indicia of reliability and if it does not, then there must be sufficient police corroboration of the tip before the stop can be made.'" *State v. Maready*, ___ N.C. App. ___, ___, 654 S.E.2d 769, 776 (2008) (citation omitted).

"The United States Supreme Court has held that in conducting [such] stops, the investigating officers may take steps reasonably necessary to maintain the status quo and to protect their safety including the drawing of weapons." *State v. Sanchez*, 147 N.C. App. 619, 625, 556 S.E.2d 602, 607 (2001), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002); *see United States v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985). These steps may include the detention of individuals using handcuffs, provided the detention is limited and lasts "no longer than is necessary to 'effectuate the purpose of the stop.'" *Sanchez*, 147 N.C. App. at 625, 556 S.E.2d at 607 (citation omitted). The scope of the detention permitted varies with the facts and circumstances of each case. *Id.*

Here, officers from the Greensboro Police Department received an anonymous tip that an individual by the name of Derrick Wright

was staying at a local apartment. The tipster further stated that Mr. Wright drove a white Honda Accord, dealt drugs, and often carried a gun. Upon arriving at the apartment, the officers observed a white Honda Accord in the parking lot. The officers then knocked on the door to the apartment, determined Mr. Wright was inside, and received permission to search the apartment. When Officer Monge found defendant in the apartment asleep, he woke defendant and asked him to come into the living room. Officer James then inquired as to defendant's name.

We note that it was only after defendant became nervous and aggressive that Officer James attempted to restrain him. According to Officer James, he handcuffed defendant "for safety reasons, as far as the one and a half year old infant child being inside the apartment, the other female, as well as the safety of the defendant[.]" Officer James further explained that he "placed him in handcuffs just to detain him until we could get to the bottom of the matter[.]"

On review, we hold the police officers were presented with sufficient evidence to perform an investigative stop. During the course of their investigation, the officers were able to confirm several of the allegations made by the anonymous tipster. Further, the officers did not attempt to detain defendant based solely on information contained in the anonymous tip. Rather, the officers only attempted to restrain defendant when he began to act in a deceptive manner and presented a danger to himself as well as others in the apartment. Once the officers determined defendant

might pose a threat, they placed him in handcuffs until they could complete their search of the premises and determine if authorities in Virginia had issued a warrant for his arrest. Therefore, we hold the police officers' lawfully detained defendant prior to his arrest no longer than was necessary to effectuate the purpose of their stop. Defendant's assignment of error is overruled.

II.

Defendant next argues the trial court erred in admitting defendant's statements with regard to the white Honda Accord. According to defendant, these statements were the product of a custodial interrogation, and as defendant was not given the *Miranda* warnings prior to questioning, these statements should have been suppressed. We disagree.

On review, a trial court's findings of fact "'"are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting."'" *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citations omitted), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001); *see State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). "Additionally, the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *Id.* "'[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.'" *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (citation

omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001), *cert. denied*, 358 N.C. 157, 593 S.E.2d 84 (2004).

"It is well established that *Miranda* warnings are required only when a [criminal] defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (citation omitted), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 548 (2001). For the purposes of *Miranda*, custodial interrogation refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966).

"[T]he appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. For the purposes of the formal arrest test, a defendant is in custody if the circumstances "go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly 'in custody.'" *Id.* "Circumstances supporting an objective showing that one is 'in custody' might include a police officer standing guard at the door, locked doors or application of handcuffs." *Id.*

The term "interrogation" includes not only express questioning by law enforcement officers, but also "any words or actions on the part of the police (other than those normally attendant to arrest

and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980). "The focus of the definition is on the suspect's perceptions, rather than on the intent of the law enforcement officer, because *Miranda* protects suspects from police coercion regardless of the intent of police officers." *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199. "However, because 'the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.'" *Id.* (citation omitted).

As the United States Supreme Court noted in *Oregon v. Elstad*:

> The Fifth Amendment, of course, is not concerned with nontestimonial evidence. . . . Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion. Voluntary statements "remain a proper element in law enforcement." "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. . . . Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."

470 U.S. 298, 304-05, 84 L. Ed. 2d 222, 229 (1985) (citations omitted).

In the case *sub judice*, defendant asserts that he was subject to custodial interrogation at the time he made statements concerning the car. Accordingly, defendant argues the trial court

erred in finding defendant was not in custody and certain statements he made regarding the car were spontaneous.

The circumstances of this case present a close question as to whether defendant was subject to police custody. It is clear from the record that defendant was restrained by the police officers during the course of their investigation. What we will now consider is if this restraint was sufficient to constitute custody for the purposes of *Miranda*. In performing this inquiry, the question before this Court is whether the level of restraint imposed upon defendant amounted to more than a mere temporary seizure. *See Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. Although we will consider the methods of physical restraint imposed by the police, the crux of this analysis will be whether the police officers' actions were sufficient to support an objectively reasonable belief that defendant was under arrest. *Id.*

Prior to being handcuffed, the record indicates that defendant was not detained in any significant manner. However, once defendant acted in an aggressive manner, Detective James chose to handcuff defendant in an attempt to preserve the safety of the apartment's occupants, including defendant. Detective James informed defendant of the reason for the restraint, and emphasized to him that he was not under arrest. Despite being handcuffed, the police officers did not undertake any additional actions to curtail defendant's movements. Once defendant had calmed, Detective James asked defendant to come with him to the foyer area of the apartment complex so the two might speak more privately. In the foyer area,

Detective James reiterated that defendant was not under arrest and told defendant that he would be free to go if the police were unable to confirm that there existed an outstanding warrant for defendant's arrest in the State of Virginia.

While Detective James was waiting for confirmation on the status of any warrants that might have been issued for defendant, he began to inquire about the car in front of the apartment complex. Defendant responded that he had been driving the car, though he did not own it, and was unaware if the vehicle contained any weapons or drugs. Detective James asked defendant if he could search the vehicle and defendant granted him permission. After conducting the search, defendant asked the detective what he had found in the vehicle. Upon learning the officers had found guns and cocaine, and without any prompting on the part of the police, defendant stated that he had been impaired the previous night and that he had driven the car home.

Given the circumstances of this case, we hold defendant could not have formed an objectively reasonable belief that he was in custody at the time he made statements concerning his car. While we recognize that defendant was handcuffed at the time he made these statements, when viewed in their totality, the circumstances do not support the conclusion that defendant's detention was anything more than a temporary seizure. *See U.S. v. Bennett*, 329 F.3d 769, 774 (10th Cir. 2003) (holding that where police officers acted reasonably to minimize the risk to themselves and others, "[t]heir use of firearms and handcuffs did not transform Mr.

Bennett's detention into an arrest"). The arresting officer clearly communicated to defendant that he was being restrained as a safety precaution, and that he was not under arrest. Further, the officers informed defendant that he would be let go pending the outcome of the police investigation. Therefore, we hold defendant was not in custody because the officers' actions were insufficient for him to believe that he was actually or ostensibly under arrest. *See Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828.

As defendant was not in custody at the time Detective James questioned him regarding the car, defendant was not the subject of custodial interrogation. *See Patterson*, 146 N.C. App. at 121, 552 S.E.2d at 253. Thus, we need not determine if defendant's statements concerning his impairment and use of the car the previous night were spontaneous for the purposes of a *Miranda* analysis. However, even assuming *arguendo* that defendant was in custody, we find the trial court was correct in classifying defendant's statements as spontaneous. Here, Detective Caviness answered a question posed by defendant as to what the police had found in the car. Under the circumstances, Detective Caviness could not have reasonably expected his reply, a simple factual statement, to elicit an incriminating response from defendant. Therefore, we hold defendant's statements were spontaneous and not the product of police interrogation. Defendant's assignment of error is without merit.

III.

Defendant also argues that the trial court erred in concluding he consented to the search of the car. We disagree.

"It is beyond dispute that a search pursuant to the rightful owner's consent is constitutionally permissible without a search warrant as long as the consent is given freely and voluntarily, without coercion, duress or fraud." *State v. Powell*, 297 N.C. 419, 425-26, 255 S.E.2d 154, 158-59 (1979). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973). This Court will consider factors such as: whether defendant was in custody at the time the consent was made, whether he had been given his *Miranda* warnings prior to giving consent, and if defendant was informed he had the right not to consent to a search. *Powell*, 297 N.C. at 425-26, 255 S.E.2d at 158-59. However, these factors "are not, taken either alone or together, conclusive." *Id.* at 426, 255 S.E.2d at 158.

Here, defendant consented to allow the officers to search his car. According to defendant, this consent was not valid, however, as it was the product of his unlawful detention. On review, we are unpersuaded by defendant's claim. As we have previously discussed, defendant was lawfully detained by the officers while they performed their investigation. Although defendant was handcuffed and did not receive the *Miranda* warnings, he was informed that he was not under arrest and that he would be released if the agency in

Virginia did not want to extradite him. There is no evidence that the officers in this instance used any form of duress, coercion, or fraud to induce defendant's consent. Rather, Officer James testified that he asked defendant, "Do you mind if we search the car?" to which defendant responded, "you can, but whatever you find in there is not mine." After considering the totality of the circumstances, we hold defendant voluntarily consented to the search of the car. Defendant's assignment of error is therefore overruled.

IV.

Defendant lastly argues the trial court erred in using his previous conviction for possession of a controlled substance while calculating the sentencing level for his current conviction for possession of a firearm. We disagree.

N.C. Gen. Stat. § 14-415.1 (2007) provides: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)." Under this statute, a felon's possession of a firearm constitutes a fresh offense and is not used as the basis for imposing a second punishment for the previous felony. *State v. Crump*, 178 N.C. App. 717, 722, 632 S.E.2d 233, 236 (2006), *disc. review denied, appeal dismissed*, 361 N.C. 431, 648 S.E.2d 851 (2007). Thus, "the mere reliance on [a past felony conviction] to establish that defendant was a recidivist for sentencing purposes does not implicate double jeopardy concerns." *Id.*

Similarly, double jeopardy concerns are not implicated where a previous offense is used both as a ground for a more severe punishment and in calculating defendant's prior record level. *State v. Hyden*, 175 N.C. App. 576, 580, 625 S.E.2d 125, 127 (2006). So long as the most recent conviction involves a separate offense, and does not elevate defendant's sentencing status, "there is no basis for declining to include these convictions in calculating defendant's prior record level." *Id.*; *Crump*, 178 N.C. App. at 722, 632 S.E.2d at 236.

Here, defendant argues the trial court incorrectly used his previous felony conviction for possession of controlled substances to satisfy an element of the charge of felony possession of a firearm and to increase his prior record level. On review, we find no merit to defendant's claim. Although defendant's assertion that the trial court used his previous conviction for these purposes is correct, we find no error in the trial court's actions. It is undisputed that defendant was previously convicted for the offense of possessing controlled substances, a felony. Thus, defendant's conviction as a felony could properly be used as an element of his most recent charge for possessing a firearm. Further, defendant's charge for possession of a firearm was based on a separate offense from the one that led to his previous drug charge. Defendant's previous drug charge was not used to elevate his sentencing status. Rather, defendant's drug charge was simply used to calculate defendant's prior record level. Therefore, we hold defendant was not subject to double jeopardy for his prior charge of possession

of controlled substances. Defendant's assignment of error is overruled.

No error.

Judges STEELMAN and ARROWOOD concur.

Report per Rule 30(e).