NO. COA07-21

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2007

STATE OF NORTH CAROLINA

v. Forsyth County
No. 05 CRS 58338-40

GRACIANO M. SANCHEZ and
DIONICIO A. AGUIRRE



Appeal by Defendants from judgments entered 28 August 2006 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 10 September 2007.



*Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, Special Deputy Attorney General Ted R. Williams, and Assistant Attorney General LaShawn L. Strange, for the State.*

*J. Darren Byers and Teresa Stewart, for Defendant-Appellant Graciano M. Sanchez.*

*J. Clark Fischer, for Defendant-Appellant Dionicio A. Aguirre.*

ARROWOOD, Judge.

On 22 August 2005, indictments were handed down charging Defendants Graciano M. Sanchez (Sanchez) and Dionicio Aguire Aguirre (Aguirre) (together, Defendants), each with counts of trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation and possession with intent to sell and deliver methamphetamine. Sanchez was also charged with

maintaining a motor vehicle for keeping and selling controlled substances. On 28 August 2006, both Defendants pled guilty to all charges, but pursuant to N.C. Gen. Stat. § 15A-979(b), expressly reserved the right to appeal the denial of their motions to suppress. The trial court entered judgments against Defendants on 28 August 2006, sentencing each Defendant to 225 to 279 months incarceration. From this judgment, Defendants appeal. For the reasons that follow, we conclude the trial court did not err by denying Defendants' motions to suppress.

The relevant evidence is summarized as follows: On 7 July 2005 Officer Kim Jones (Jones), during a routine investigation, noticed an automobile parked at a Motel 6 with a license plate registered to Elgordo Cortez, Jr., of San Bernardino, California. The vehicle was registered to Room 238, which was occupied by Aguirre and Sanchez. Reports revealed that the vehicle had been stopped the day before in Winston-Salem, driven by Sanchez. At that time, a drug dog "alerted" the vehicle, but no contraband was found. As Jones continued surveillance, she observed Defendants leave the motel room holding clothes. Sanchez held tan clothes tightly bundled under his arm, and Aguirre carried black and white clothes in his left hand. Defendants got into the car and put the clothes in the back seat.

Jones and Sergeant Tim Southern (Southern) proceeded to follow Defendants. As time passed Defendants' route became confusing, and Jones suspected that they were attempting to lose the officers and escape. At one point, Defendants suddenly shifted lanes "[a]cross

three lanes of travel" and ran three red lights without stopping. Jones testified that, as Defendants changed lanes, "[p]eople had to stop, hit their brakes . . . to keep from . . . colliding into their vehicle."

After following Defendants for about an hour and one half, and attempting to pull the car over numerous times, Sanchez and Aguirre finally reached a stop sign behind several other vehicles. Jones and Southern exited their police vehicle and approached Defendants. They asked Defendants to step out of the vehicle. Jones patted down Aguirre for weapons, and Southern took the keys from the ignition of the vehicle.

A few minutes later, Officer Theresa Fish (Fish) arrived to the scene, and Southern and Jones requested Fish to ask Sanchez in Spanish whether he would consent to a search of his vehicle. Sanchez consented to the search, and the officers moved the vehicle out of traffic and into a nearby parking lot. They searched the car with a K-9 dog, which alerted to narcotics in the pile of clothes lying in the backseat of the car. Over 400 grams of methamphetamine was hidden in the tan clothes. In the black and white clothes, the officers found packaging materials.

Standard of Review

In reviewing the trial court's order on a motion to suppress, the court's findings of fact "'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. McArn*, 159 N.C. App. 209, 211, 582 S.E.2d 371, 373 (2003) (quoting *State v. Brewington*, 352 N.C. 489, 498,

532 S.E.2d 496, 501 (2000)). However, the court's conclusions of law are fully reviewable on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

First, we note that the Record submitted contains no written order determining Defendants' motions to suppress. However, the trial judge announced his ruling in open court. N.C. Gen. Stat. § 15A-977(f) (2005) states that "[t]he [trial] judge must set forth in the record his findings of facts and conclusions of law." Our Courts have generally interpreted this statute to require a written order, unless (1) "the trial court did provide its rationale from the bench" and (2) "there [was] no material conflict in the evidence on *voir dire*[.]" *State v. Shelly*, __ N.C. App. __, __, 638 S.E.2d 516, 523, *disc. review denied,* 361 N.C. 367, 646 S.E.2d 768 (2007). In that event, "the necessary findings are implied from the admission of the challenged evidence." *Id.* Here, because the trial court provided its rationale from the bench and there was no material conflict in the evidence, the court's failure to enter a written order stating findings of fact and conclusions of law was not error. We must therefore determine whether the trial court's implied findings are supported by competent evidence, and whether those findings support the legal conclusions.

I: Voluntariness of Consent

In his first argument, Sanchez contends that the trial judge erred by denying his motion to suppress evidence because Sanchez' consent to search the vehicle during the traffic stop was involuntary. We disagree.

N.C. Gen. Stat. § 15A-221(b) (2005) defines consent as "a statement to the officer, made voluntarily and in accordance with the requirements of G.S. [§] 15A-222, giving the officer permission to make a search." N.C. Gen. Stat. § 15A-222 (2005) provides:

> The consent needed to justify a search and seizure under G.S. [§] 15A-221 must be given:
>
> (1) By the person to be searched;
>
> (2) By the registered owner of a vehicle to be searched or by the person in apparent control of its operation and contents at the time the consent is given;
>
> (3) By a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises.

When the State seeks to rely upon a defendant's consent to support the validity of a search, "it has the burden of proving that the consent was voluntary." *State v. Morocco*, 99 N.C. App. 421, 429, 393 S.E.2d 545, 549 (1990) (citing *State v. Hunt*, 37 N.C. App. 315, 321, 246 S.E.2d 159, 163 (1978)). Voluntariness is a question of fact to be determined from all of the surrounding circumstances. *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985).

The trial court must "determine whether, under the totality of the circumstances, the consent to enter . . . was freely and voluntarily given[,]" or was the product of duress or coercion, either express or implied. *State v. Bogin*, 66 N.C. App. 184, 186, 310 S.E.2d 640, 642, *disc. review denied*, 310 N.C. 478, 312 S.E.2d 886 (1984). "[K]nowledge of the right to refuse consent is one factor to be taken into account[.]" *Schneckloth v. Bustamonte*, 412

U.S. 218, 227, 36 L. Ed. 2d 854, 863 (1973). The trial court's findings are conclusive when supported by competent evidence. *Id.*

In the instant case, Officers Jones and Southern had been following Defendants and attempting to pull the car over for an hour and one half. The police stopped Sanchez after he recklessly crossed several lanes of traffic and ran several stop lights. When the police stopped the vehicle, Southern drew his pistol from its holster and approached the vehicle. Southern stated that he held his gun "as we [are] trained, in what is commonly called in police training the low-ready position. In other words, . . . the weapon is clear of the holster [and] pointed toward the ground[.]" Southern returned the gun to waistband once he ascertained that Sanchez and Aguirre were not armed. When asked "what was your tone of voice when you . . . were giving commands to [Sanchez][,]" Southern stated, "[i]t was firm, but not yelling, trying to speak slowly so that I was understood and speak clearly. . . . Not overly excited but firm so that he understood."

Southern then took the car keys out of the ignition, and Officer Fish, who was fluent in Spanish, asked Sanchez if he would consent to a search of his vehicle. Sanchez replied in Spanish that he did not own the vehicle. Fish then told Sanchez that he could nonetheless consent to a search since he was driving the vehicle. Defendant gave consent. At that time, there were no weapons being displayed and Sanchez was not handcuffed. During the hearing on Defendants' motions to suppress, Officer Jones testified:

> Q: . . . What did you ask Corporal Fish to do?
>
> A: I asked her if she would ask the driver for consent to search his vehicle.
>
> Q: And what happened?
>
> A: [Sanchez] first stated it wasn't his vehicle. . . .
>
> Q: What . . . did you explain to Corporal Fish to tell [Sanchez]?
>
> A: I had her to explain to him, since he was in control of the vehicle, that he could grant consent to search the vehicle.
>
> Q: And what happened then?
>
> A: He consented to searching[.]

In determining whether under these circumstances, Defendants' consent was voluntarily, we find this Court's opinion of *State v. Sanchez*, 147 N.C. App. 619, 556 S.E.2d 602 (2001), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 353 (2002), to be controlling authority. In that case, "officers conducted a felony traffic stop for their safety where they placed the occupants of the vehicle in handcuffs, placed them on the ground, searched them for weapons, and then searched the vehicle for weapons." *Id.* at 621, 556 S.E.2d at 605. Meanwhile, another officer stood back and "covered the occupants with his handgun." *Id.* at 625, 556 S.E.2d at 608. "Once the officers ensured their safety, they uncuffed the defendant and the occupants of the vehicle and put away their own handguns." *Id.* at 626, 556 S.E.2d at 608. Thereafter, officers asked the defendant for consent to search his briefcase. This Court determined that the defendant's "consent to search his briefcase

was not the product of coercion." *Id.* Morever, federal courts have found "a defendant's consent to be voluntary where the officers approached the defendant with guns drawn, but then holstered them once the area was secured and before asking for consent to search." *United States v. Kimoana*, 383 F.3d 1215, 1226 (10th Cir. 2004); *See e.g.*, *United States v. Mitchell*, 209 F.3d 319, 324 (4th Cir. 2000).

Based upon the testimony presented, we conclude that the court's implied findings of fact are supported by competent evidence, and the findings in turn support the trial court's conclusion that Sanchez knowingly and voluntarily consented to the search of the vehicle.

There is no evidence that Sanchez was so intimidated that he felt he could not reasonably refuse to consent. Nor is there any evidence Sanchez was restrained or threatened by the officers at the time he gave consent. The officers did not behave in a coercive or intimidating manner, and the entire search lasted only fifteen or twenty minutes. Considering the totality of the circumstances of this case, we conclude that Sanchez' consent was not a product of duress or coercion, either express or implied. This assignment of error is overruled.

II: Scope of Consent

In his second argument, Sanchez contends that the trial court erred by denying his motion to suppress because the police exceeded the scope of Sanchez' consent when they searched the clothes in the backseat of the car. We disagree.

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991). "The test of reasonableness . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979). "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

This Court has held that a defendant's consent to search an automobile for contraband entitles police to conduct a reasonable search anywhere inside the automobile which reasonably might contain contraband. *Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (holding that defendant's consent to a search of his automobile included the trunk and the tote bag in the back seat, even though defendant told police the bag contained nude photos of his wife); *see also State v. Aubin*, 100 N.C. App. 628, 634, 397 S.E.2d 653, 656 (1990) (holding that defendant's consent to a search of his car reasonably allowed an officer to "lift up the corner of the back seat in the progress of his search"), *disc. review denied*, 328 N.C. 334, 402 S.E.2d 433 (1991).

In the instant case, Sanchez consented to the officers' search of the vehicle, but stated that not all of the clothes in the back seat belonged to him. Officer Fish testified:

Q: Did the [D]efendants make any statements to you about ownership of the clothing inside the vehicle?

A: When I asked him for consent, after he consented, he advised me that there – there was some clothing that did not belong to [Sanchez]. . . .

. . . .

Q: Did [Aquirre] . . . make any statements about the clothing contained within the vehicle?

A: He did. . . . [A]fter they did their search, they asked me to ask him if he can identify the clothing and he advised that that was his . . . pants.

. . . .

Q: What exactly – how did you ask him?

A: For consent to search the vehicle.

Q: And he said?

A: He said okay.

Q: And what else did he say?

A: After he gave me consent, he stated that . . . there was some clothing that was not his.

Based on *State v. Aubin* and *State v. Morocco*, we conclude that Sanchez' statement, pertaining to whether the clothes in the back seat belonged to him, was not a limitation on Sanchez' consent to search the vehicle. A reasonable person may have understood that his consent to search an automobile for contraband entitles police to conduct a reasonable search of the clothes lying in the backseat of a car. The police here did not exceed the scope of Sanchez' consent. This assignment of error is overruled.

III: Reasonable Expectation of Privacy

In his only argument on appeal, Aguirre contends that because none of the investigating officers attempted to seek consent from Aguirre to search the car, the trial court erred by denying Aguirre's motion to suppress. We disagree.

"The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *State v. Wiley*, 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002) (citing U.S. Const. amend. IV and N.C. Const. art. I, §§ 18, 19, 23). However, in order to challenge the reasonableness of a search or seizure, a defendant must have standing, which "requires both an ownership or possessory interest and a reasonable expectation of privacy." *State v. Swift*, 105 N.C. App. 550, 556, 414 S.E.2d 65, 68-69 (1992); *see also Rakas v. Illinois*, 439 U.S. 128, 143, 58 L. Ed. 2d 387, 401 (1978) (holding that the protection of the Fourth Amendment extends only to those persons who have a reasonable expectation of privacy in the premises searched); *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980).

A defendant's "'legitimate expectation of privacy . . . has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable.'" *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35-36 (2004) (quoting *Wiley*, 355 N.C. at 602, 565 S.E.2d at 32), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005).

N.C. Gen. Stat. § 15A-222(2) (2005), requires that the consent needed to justify a search and seizure under N.C. Gen. Stat. § 15A-221 must be given "[b]y the registered owner of a vehicle to be searched or by the person in apparent control of its operation and contents at the time the consent is given[.]" G.S. § 15A-22(2). "A driver is in apparent control of a car and its contents, whether the vehicle or its contents belong to him or to others." *State v. McDaniels*, 103 N.C. App. 175, 187, 405 S.E.2d 358, 366 (1991), *aff'd*, 331 N.C. 112, 413 S.E.2d 799 (1992) (internal quotations omitted).

Consent given by the owner or person lawfully in control of a "vehicle is sufficient to justify a search that yields evidence used against a non-consenting passenger." *State v. Mandina*, 91 N.C. App. 686, 695, 373 S.E.2d 155, 161 (1988). This is because "a defendant who has no ownership or possessory interest in the vehicle searched has no 'legitimate expectation of privacy' in that vehicle, and, accordingly, no standing to object to the search." *Id.* (quoting *State v. Melvin*, 53 N.C. App. 421, 425, 281 S.E.2d 97, 100 (1981)).

In the instant case, Aguirre argues, generally and without any citation to legal authority, that "the back seat where the contraband was located contained personal items, specifically clothing, which was the property of Aguirre alone[,]" and therefore, Aguirre "had a legitimate expectation of privacy in the rear area of the vehicle in which his clothing was stored." We find this argument unconvincing.

Initially, we note that there is no evidence that Aguirre objected to Sanchez' consent at the scene. Our North Carolina Supreme Court has held that "failure to speak and assert the personal right of immunity from unreasonable search and seizure 'amount[s] to a voluntary consent to search,' where the person who remains silent knows that the driver has given his verbal consent to a search." *McDaniels,* 103 N.C. App. at 186, 405 S.E.2d at 365 (quoting *State v. Coffey*, 255 N.C. 293, 297-98, 121 S.E.2d 736, 740 (1961)); *see also State v. Foster*, 33 N.C. App. 145, 148, 234 S.E.2d 443, 446 (1977) ("silence in face of consent by person in apparent control of car permits court to infer consent by person remaining silent").

Moreover, the facts of *State v. Jones*, 161 N.C. App. 615, 619, 589 S.E.2d 374, 376 (2003), *disc. review denied*, 358 N.C. 379, 597 S.E.2d 770 (2004), are virtually identical to the instant case. In *Jones*, police officers saw the Defendant walk to a nearby Mustang, get in the back seat of the car and place his jacket there. Then, the Defendant got out of the car, wearing only a tee shirt despite the freezing winter weather. The police asked the owner of the Mustang for consent to search, and the owner gave consent. This Court explained:

> [Defendant] contends . . . that [the vehicle owner] giving general consent to search the vehicle did not entitle the officers to search [Defendant's] coat on the back seat. Defendant asserts that he retained a reasonable expectation of privacy with respect to his coat, even after leaving it in [the vehicle owner's] car, and that [the owner] did not have authority to consent to a search of his jacket. On this basis, [D]efendant argues

> that without [D]efendant's consent, the search of his jacket violated his rights under the Fourth Amendment. We do not agree.

*Id.* In *Jones*, this Court concluded that vehicle owner's general consent to the search of his car reasonably included the search of the Defendant's jacket lying in the back seat of the car.

*Jones* is controlling authority in the instant case. Here, after we imply the necessary findings from the admission of the challenged evidence, we conclude that the trial court's findings of fact were supported by the evidence, and that these findings support its conclusion of law, that the police did not violate the Aguirre's constitutional rights by searching his clothes in the backseat of the vehicle after obtaining Sanchez' consent to search. This assignment of error is overruled.

We conclude that the trial court did not err by denying defendants' motions to suppress.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).