NO. COA08-334

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 06 CRS 56614
LITHOMAS DEWAYNE GRAHAM 06 CRS 20438

Appeal by defendant from judgment entered 29 November 2007 by Judge Jerry Cash Martin in Forsyth County Superior Court. Heard in the Court of Appeals 13 October 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

M. Alexander Charns for defendant-appellant.

ELMORE, Judge.

Defendant Lithomas Dewayne Graham (defendant) was charged in bills of indictment with one count of possession with intent to sell and deliver cocaine and attaining habitual felon status. Prior to trial, defendant moved to suppress evidence seized as a result of a search of his person. After a hearing, the motion to suppress was denied. Defendant was convicted by a jury of possession of cocaine and subsequently entered a plea of guilty to attaining habitual felon status. Defendant appeals from a judgment sentencing

him to a minimum term of 120 months and a maximum term of 153 months imprisonment. We find no error.

The evidence presented at the suppression hearing tended to show that on 31 May 2006, Detectives T.D. James and R.J. Paul of the Winston-Salem Police Department were on patrol in an unmarked vehicle. As they drove down the 2700 block of Piedmont Circle, the detectives noticed a vehicle stopped ahead in the driving lane. From two-car lengths away, the detectives observed an individual leaning into the passenger side window of the vehicle and making what appeared to be a hand to hand drug transaction. The individual then stepped away from the vehicle and the vehicle left. The detectives recognized the individual as defendant, with whom they had a "cordial relationship." Defendant had interacted with the detectives while participating in the New Hope Initiative, a program designed to combat street level drug activity in the community by offering individuals "an opportunity to get out of the drug game" through education and jobs.

The detectives drove up to the curb, a little past defendant, and called his name. Defendant walked towards the unmarked vehicle, recognized the detectives and then turned away. In the rearview mirror, Detective James observed defendant "put his hands towards his waist as if he was stuffing something in his waistband." The detectives exited the unmarked vehicle, approached defendant and asked defendant "what was he up to[.]" Defendant replied, "[N]othing." The detectives then asked defendant if he was "holding [drugs]." Defendant responded, "No." When the

detectives asked if they "could check to make sure that he was not in possession of any drugs[,]" defendant "extended his arms to the air" and said, "[G]o ahead." Detective James immediately reached for defendant's waist band, lifted up defendant's t-shirt and observed "what appeared to be plastic lodged between [defendant's] pants and his underwear." Detective James removed the plastic, which contained off-white colored rock-like substance later determined to be crack cocaine. The detectives did not obtain a "Consent to Search" form from defendant regarding the search as police typically use consent forms regarding the search of a vehicle or residence.

Upon the finding of the drugs, defendant became emotional and pleaded not to be arrested. Defendant asserted that he only sold drugs "to support his children" because he could not find work due to his criminal record. The detectives then asked for consent to search defendant's residence. Defendant verbally consented. Detective James failed to obtain defendant's signature on a "Consent to Search" form to search defendant's residence so when Detective James later completed the consent form, Detective James signed defendant's name "for the sake of turning in the paperwork[.]" Detective James testified that he did not believe that he ever told defendant that if he was located in a high crime area he could be searched without consent. The detectives testified that they had not heard any other officer say to defendant that he could be searched at any time because he was a

known drug dealer. Further, defendant was not required to consent to search as a requirement of the New Hope Initiative.

Defendant testified on *voir dire* that Detective Paul said, "[Dlo you mind if I search you?" and defendant responded, "No." Defendant further testified that when the detectives exited their vehicle and approached him, defendant "put [his] hands up and said, go ahead." Defendant testified that he thought he had to let the detectives search him because Detective Singletary had previously told him that "if I'm a known drug dealer in a known drug area they've got the right to search me at any time." According to defendant, Detectives Paul and James were "polite" and "didn't threaten [him.]"

At the conclusion of the *voir dire* testimony on defendant's motion to suppress, the trial court made oral findings of fact and conclusions of law, including that defendant voluntarily consented to the search. Accordingly, the trial court denied the motion to suppress.

On appeal, defendant first contends the trial court erred in denying his motion to suppress the evidence seized by the officers as a result of the search of defendant's person. In reviewing a denial of a motion to suppress, we must first determine if the trial court's findings were "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), *cert. denied,* 531 U.S. 1165, 148 L. Ed.2d 992 (2001)(citation omitted). We then determine if the trial court's conclusions of law based on this evidence were

"legally correct." *State v. Parker*, 183 N.C. App. 1, 7, 644 S.E.2d 235, 240 (2007) (quoting *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002)).

Defendant does not argue that police had neither probable cause nor a reasonable, articulable suspicion to stop and detain him. Rather, defendant argues the consent to search his person was not voluntarily given. Defendant maintains his consent was involuntary because he was not advised he could refuse to consent and because he did not sign the "Consent to Search" form. We disagree.

When the State relies upon consent to justify a warrantless search of one's person, it has the burden of proving "that the consent was given without coercion, duress, or fraud." *State v. Hardy*, 339 N.C. 207, 226, 451 S.E.2d 600, 610 (1994). In determining whether this burden has been carried, 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), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). It is not necessary for the government to prove that the defendant knew he had the right to refuse consent in order for the consent to be valid. *Ohio v. Robinette*, 519 U.S. 33, 40, 136 L. Ed. 2d 347, 355 (1996).

Here, defendant's own testimony demonstrates voluntary consent. Defendant testified that when Detective Paul asked, "Do you mind if I search you?" defendant said, "No" and then "put [his] hands up and said, [G]o ahead." The detectives' testimony confirms that after they asked permission to search defendant's person,

defendant said "[G]o ahead" and lifted his arms. Contrary to defendant's assertion, the detectives need not have informed defendant that he had a right to refuse the search of his person. *See State v. Christie,* 96 N.C. App. 178, 185, 385 S.E.2d 181, 185 (1989) ("Although defendant was not informed of his right to refuse to consent to a search, it does not make his consent inherently involuntary"). Finally, the "Consent to Search" form not signed by defendant was in regards to searching defendant's residence and had no bearing on his voluntary verbal consent to search defendant's person. We hold the court properly denied the motion to suppress.

Defendant also argues that he received ineffective assistance of counsel because his trial counsel did not request recordation of opening/closing arguments, jury selection, and bench conferences. Defendant admits that he "cannot at this time show prejudice from the failure to record the entire trial" and that he has made the argument for preservation purposes only. Further, we have resolved this issue against defendant in *State v. Verrier*, 173 N.C. App. 123, 130, 617 S.E.2d 675, 680 (2005) (although "appellate counsel may be at a disadvantage when preparing an appeal for a case in which he did not participate at the trial level, as appellate counsel [he] is somewhat bound by the decisions and strategies of trial counsel)." *See also State v. Hardison*, 326 N.C. 646, 661-62, 392 S.E.2d 364, 373 (1990) (defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection and bench conferences where no specific allegations

of error were made and no attempts were made to reconstruct the transcript). Defendant's assignment of error is overruled.

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).