NO. COA08-406

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Pasquotank County
No. 06 CRS 050411

DOUGLAS O'BRYAN SMITH, JR.

Appeal by defendant from judgment entered on or after 27 June 2007 by Judge Alma L. Hinton in Pasquotank County Superior Court. Heard in the Court of Appeals 25 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Charles K. McCotter, Jr., for defendant-appellant.

TYSON, Judge.

Douglas O'Bryan Smith, Jr. ("defendant") appeals from order entered, which denied his motion to suppress. We affirm.

I. Background

On 2 March 2006, Narcotics Enforcement Unit Officer James Judge ("Officer Judge") and two other Elizabeth City Police officers patrolled the Herrington Road area of Elizabeth City, where Brown Street and Walston Street intersect. Officer Judge patrolled this area in response to a prior complaint from the community watch group, who reported illegal narcotic sales had taken place at 522 Brown Street.

Officer Judge saw defendant leave the porch at 522 Brown Street and walk onto the street. Officer Judge knew defendant from an earlier occasion when defendant was arrested by another officer for a drug offense. Officer Judge and the other officers drove toward defendant. Defendant turned his back to the officers and placed his hands down the front of his pants. Officer Judge and the other officers approached defendant and asked defendant to remove his hands from his pants. After two requests for defendant to remove his hands from inside his pants, defendant refused.

The officers had defendant place his hands on top of their unmarked police vehicle. Defendant's pants were sagging "well below his butt" and Agent Paul Perry ("Agent Perry") lifted defendant's pants up. When Agent Perry lifted defendant's pants, "a white, plastic baggy containing an off-white, rock-like substance fell out of [defendant's left] pant[] leg directly between his feet . . . ." The substance inside the "baggy" was later determined to be cocaine. The officers placed defendant into custody.

On 26 June 2006, defendant was indicted on one count of possession of cocaine, a schedule II controlled substance. On 21 June 2007, defendant filed, and the trial court later denied, a motion to suppress evidence obtained from the 2 March 2006 search and seizure. Defendant pleaded guilty to possession of cocaine and preserved his right to appeal the trial court's ruling on the motion to suppress. The trial court determined defendant to be a prior record level II offender and sentenced him to a minimum of

six and a maximum of eight months incarceration. The trial court suspended defendant's sentence and placed him on supervised probation for thirty-six months. Defendant appeals.

II. Issue

Defendant argues the trial court erred when it denied his motion to suppress.

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, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (internal citations and quotation omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

IV. Motion to Suppress

Defendant argues the trial court erred when it denied his motion to suppress and entered findings of fact numbered 6 and 8 and conclusion of law numbered 1. We disagree.

Defendant only assigns error to findings of fact numbered 6 and 8. With regard to the remaining findings of fact, "'[w]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.'" *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). The trial court's remaining unobjected to findings of fact are binding on appeal. *Id.*

A. Finding of Fact Numbered 6

Findings of fact numbered 6 states:

> When Officer . . . Judge and Officer . . . Perry entered the area where Brown and Walston Street intersect, Officer Judge noticed an individual leaving the porch of the residence at 522 Brown Street who he immediately recognized as . . . defendant, because he had arrested . . . defendant on more than one prior occasion for drug offenses.

The State concedes that Officer Judge did not "arrest[] . . . defendant on more than one prior occasion for drug offenses." This portion of finding of fact numbered 6 is not supported by competent evidence. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648. Officer Judge testified at the motion to suppress hearing that he recognized defendant because "he was with Agent Parker in the past or Deputy Parker when [defendant] was arrested for a drug – earlier drug offense." Finding of fact numbered 6 is not supported by competent evidence to the extent that it misstated the number of times defendant has been arrested for drug related offenses and that Officer Judge was the arresting officer. The beginning portion of finding of fact numbered 6 up to the word "because" is clearly supported by competent evidence and is conclusive and binding upon this Court. *Id.*; *see also Riggan v. Highway Patrol*, 61 N.C. App. 69, 77, 300 S.E.2d 252, 256 ("The evidence in the present case, and that portion of Finding of Fact No. 7 which is supported by the evidence, reveals a classic sudden emergency situation."), *disc. rev. denied*, 308 N.C. 387, 302 S.E.2d 253 (1983).

B. Finding of Fact Numbered 8

Finding of fact numbered 8 states:

> When Officer . . . Judge saw . . . defendant leaving the porch of the residence at 522 Brown Street, he noticed the defendant look at the car occupied by Officer Judge and then turn away and place his hands inside the front of his pants.

Officer Judge testified at the motion to suppress hearing that "[w]hen we pulled forward towards [defendant], our headlights were directly on him. [Defendant] directly — turned his back towards us while he was placing his hands down the front of his pants." The portion of finding of fact numbered 8 which states "he noticed the defendant look at the car occupied by Officer Judge" is not supported by competent evidence. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648. The remaining portions of finding of fact numbered 8 are supported by competent evidence and are binding upon this court. *Id.*

C. Conclusion of Law Numbered 1

Conclusion of law numbered 1, the trial court's only conclusion of law, states:

> That Officer Judge had a reasonable suspicion based on the circumstances that there was criminal activity afoot with regard to the defendant and thus was entitled to conduct a protective Terry stop to ensure his personal safety.

Recently, our Supreme Court stated:

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as

> viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion exists.

State v. Styles, 362 N.C. 412, ___, 665 S.E.2d 438, 439-40 (2008) (internal quotations omitted).

Here, the trial court's unchallenged findings of fact and those portions of findings of fact numbered 6 and 8, which are supported by competent evidence, establish: (1) defendant was in an area known to be frequented by drug users and sellers; (2) defendant was seen exiting a residence that was under surveillance for drug activity based upon a prior complaint; (3) Officer Judge recognized defendant; (4) Officer Judge noticed defendant turn away and place his hands inside the front of his pants; and (5) defendant twice refused to remove his hands from his pants when asked to do so by the officers.

Considering the totality of the circumstances, the trial court properly concluded "Officer Judge had a reasonable suspicion based on the circumstances that there was criminal activity afoot . . . ." *Id.* at ___, 665 S.E.2d at 440. This assignment of error is overruled.

V. Conclusion

The trial court's unchallenged findings of fact and those portions of findings of fact numbed 6 and 8, which are supported by competent evidence, support the trial court's conclusion of law numbered 1. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648. The trial court's order is affirmed.

Affirmed.

Judges MCCULLOUGH and CALABRIA concur.

Report per Rule 30(e).