NO. COA08-409

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

STATE OF NORTH CAROLINA

v. Lee County
Nos. 06 CRS 53669, 53685

JOSHUA VAN HARRIS,
Defendant.

Appeal by defendant from order entered 28 February 2008 by Judge Paul G. Gessner in Lee County Superior Court. Heard in the Court of Appeals 1 December 2008.

Roy Cooper, Attorney General, by Martin T. McCracken, Assistant Attorney General, for the State.

Staton, Doster, Post, Silverman & Foushee, P.A., by Norman C. Post, Jr., for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from an order denying his motion to suppress evidence of an AR-15 type rifle found by police officers during a search of his living quarters and evidence of defendant's statements to police officers during that search.

The evidence presented at the hearing on defendant's motion to suppress tended to show that on 22 October 2006, defendant called Sanford police officers following a break-in to his business to request that they check his office and second-floor living quarters for any intruders who might still be in the building. Responding

Officer Eric Pate and Sergeant Russell Singer arrived at the scene and, at defendant's request, went about searching "every room, closets, every place that a person could be hiding" in the second-floor living quarters and the first-floor real estate office to "make sure it's safe and secure" for defendant to enter.

Sergeant Singer, while searching defendant's bedroom for intruders, approached the closet, which was open. In the closet, Sergeant Singer saw no intruders but noticed a couple of "semi-automatic rifles or assault-type rifles" "leaning against the wall in the closet, on the bottom of the closet," as well as a disassembled AR-15 type rifle and a drop-in auto sear on "a small shelf above where the clothes were hanging." Sergeant Singer recognized the "auto sear," a device which converts a semi-automatic weapon into a fully automatic weapon, and also noticed that the disassembled weapon's barrel appeared to be only 12 inches long. Sergeant Singer was aware that in order to legally possess a weapon with a barrel length of less than 16 inches, an individual is required to possess a federal Class III firearms license. After he finished searching the rest of the house, Sergeant Singer returned to the closet and, without handling it, observed that the sear did not have a serial number.

Sergeant Singer then asked defendant whether he possessed a Class III firearms license. Defendant said that he did not, and made further statements to Sergeant Singer and Officer Pate regarding the sear, the weapons, and some locked briefcases in the apartment. At the request of the police officers, defendant

executed a consent form permitting a further search of the premises. The police recovered bottles labeled "methadone" from defendant's briefcases, as well as syringes, Xanax pills, marijuana, and other contraband from defendant's living quarters.

Defendant was arrested and subsequently indicted for possession of a weapon of mass destruction, which was the short barreled AR-15 type rifle, and for possession with intent to sell a Schedule II controlled substance, which was the methadone. Defendant moved to suppress evidence seized by the officers, and the statements defendant made to the officers regarding the items they seized. The trial court granted defendant's motion to suppress the sear seized by the officers, but denied defendant's motion to suppress the other evidence seized. Defendant entered an *Alford* plea regarding the weapon of mass destruction charge, reserving his right to appeal the denial of his motion to suppress the evidence. As a result of defendant's plea, the charge of possession with intent to sell a Schedule II controlled substance was dismissed. The court imposed a sentence of 18 months supervised probation. Defendant appeals.

Defendant first argues that the trial court erred by denying his motion to suppress the AR-15 type rifle parts seized from the top of defendant's bedroom closet. Defendant asserts that the nature of the AR-15 type rifle parts could not have been "immediately apparent" to Sergeant Singer. Thus, defendant argues that the AR-15 type rifle cannot fall within the plain view

exception to the Fourth Amendment's warrant requirement and must be excluded. We disagree.

Under the plain view exception, police may, without a search warrant, seize items when "the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause." *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998). This evidence must also "be discovered *inadvertently*." *See id.*

In the present case, defendant concedes that Sergeant Singer had a right to enter and search defendant's home for intruders, and that Sergeant Singer inadvertently discovered the AR-15 type rifle components among the objects in defendant's closet. However, defendant contends that Sergeant Singer could not have immediately recognized that the items he observed constituted evidence of a crime or contraband. We disagree.

In the context of the plain view exception, the term "immediately apparent" means that the police had "probable cause to believe that what they have come upon is evidence of criminal conduct." *See State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999) (internal quotation marks omitted). Such probable cause exists if the police officer's knowledge of the facts and circumstances are sufficient in themselves to "warrant a man of reasonable caution in the belief that an offense has been or is

being committed." *See id.* (internal quotation marks omitted). The State's burden, therefore, was to show that Sergeant Singer's knowledge of the facts and circumstances was sufficient to lead him to reasonably suspect the items he inadvertently discovered were contraband.

The trial court made the following relevant findings of fact:

> 7. Sgt. Singer noted that the closet door was open. Sgt. Singer looked in the closet and observed no one. Sgt. Singer further observed two assault rifles and four other rifles in the bottom of the closet. On a shelf in the top of the closet Sgt. Singer also observed a semi-automatic handgun and other rifle parts. Beside the parts was a small metal object identified as a drop-in auto sear. Sgt. Singer retrieved the sear, examined same and determined that it did not have a serial number. Sgt. Singer then noticed that one of the rifle parts ie., the upper part, had a barrel length shorter than sixteen inches.
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> 8. Sgt. Singer then proceeded to ask Defendant, who had followed him into the room, if he had a Federal Firearms License for Class III weapons. After Defendant indicated that he did not possess such a license, Sgt. Singer seized the rifle parts. Defendant was charged with possession of a weapon of mass destruction.

Based on these findings, the trial court concluded that:

> 3. After looking into the closet and seeing no one it was apparent to Officer Singer that the rifle barrel on the top shelf was less than sixteen inches long and, therefore, was contraband.
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> 4. The rifle barrel of less than sixteen inches in length discovered on the top shelf of the closet was in plain view at the time Sgt. Singer conducted his inspection of the inside of the closet.

Sergeant Singer testified that he was in the bedroom no more than thirty seconds and made note of the rifle parts on the shelf. He said that it was apparent to him that the barrel was too short. Sergeant Singer gave the following testimony:

> When I looked up, the barrel was lying on the shelf itself. And you look -- I looked up there, just from handling firearms over the past 20 years, basically, at my father's -- had a dealership, my father had a federal firearms license for 20 years, I handled guns on a daily basis over there, and just seeing the barrel I knew immediately it wasn't regulation.

After Sergeant Singer observed that the barrel length was too short, he asked defendant if he had the license necessary to possess such a rifle. This question, asked immediately afer Sergeant Singer observed the rifle parts, acts as evidence that it was apparent to Sergeant Singer that the rifle barrel was too short. Sergeant Singer's subsequent testimony further supports this premise. Accordingly, we conclude that the trial court's findings of fact are supported by competent evidence and those findings, in turn, support the trial court's conclusion that the search was valid under the plain view exception.

Defendant next argues that, because the trial court made no findings of fact or conclusions of law regarding the statements made by defendant, the denial of the motion to suppress the statements was in error.

N.C.G.S. § 15A-977(f) provides that, when a motion to suppress evidence is heard, "[t]he judge must set forth in the record his

findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2007). Our Supreme Court has stated that,

> [w]hen the competency of evidence is challenged and the trial judge conducts a *voir dire* to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. If there is a material conflict in the evidence on *voir dire*, he must do so in order to resolve the conflict. If there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence.

State v. Vick, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995) (citations omitted); *see also State v. Futrell*, 112 N.C. App. 651, 665, 436 S.E.2d 884, 891 (1993) ("[w]here evidence is uncontroverted and the facts not in dispute, a trial court is not *required* to make findings of fact, even when provided for by statute or case law.").

In this case, defendant presented no evidence to contradict Sergeant Singer's testimony. Therefore, we conclude that the trial court's failure to make findings and conclusions regarding the defendant's statements does not constitute error.

Lastly, defendant argues that it was error to deny the motion to suppress because the statements made by defendant and the remaining items seized were the fruit of the initial "unlawful" search of the closet. Having found that the search and seizure of the rifle parts from defendant's closest were lawful under the plain view exception, we do not address this argument.

The order from which defendant appeals is affirmed.

Affirmed.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).