NO. COA08-433

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2009

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 233328-29

DONAVON D. FLEMING

Appeal by defendant from order entered 26 March 2007 and judgment entered 8 March 2007 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 November 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Johnson, for the State.

Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant.

ELMORE, Judge.

Donavon D. Fleming (defendant) was found guilty by a jury of trafficking in cocaine and possession with intent to sell or deliver cocaine. The trial court sentenced defendant to (1) a minimum term of thirty-five months and a maximum term of forty-two months in prison for trafficking and (2) a minimum term of fifteen months and a maximum term of eighteen months in prison, to run consecutively, for possession with intent to sell or deliver. The trial court also fined defendant $50,000.00 as a condition of post-

release supervision. Defendant appeals his conviction and the denial of his motion to suppress.

In the early morning of 14 July 2006, Officer Christopher Clifton of the Charlotte-Mecklenburg Police Department received a call reporting a breaking and entering into a commercial business. The dispatcher relayed an anonymous tip that it had received via 911 from a person driving by the business. The tipster had seen a "light-skinned" black male with dreadlocks and a black shirt exiting the business through a window. As Officer Clifton was responding to the call, he saw a taxi with a black male with dreadlocks and a black shirt sitting in the back seat. The taxi was driving in the opposite direction, but was within several hundred yards of the business. Officer Clifton reported to Officer Aaron Skipper, who was also in the area, that a black male with dreadlocks and a black shirt was riding in the back of a taxi in the vicinity. Officer Clifton did not recall seeing any other cars or people in the area that night, but did notice dogs barking nearby.

Officer Skipper initiated the stop. He observed that defendant had a backpack next to him on the seat and a cell phone in his lap. Officer Skipper testified at the suppression hearing that he believed that the bag could have contained common burglary tools such as screwdrivers and crowbars, which defendant could have employed as weapons. Officer Skipper asked defendant what was in the backpack, and defendant responded, "Why do you need to know what is in my backpack?" Officer Skipper then had defendant exit

the vehicle and frisked defendant for weapons. He "felt a large suspicious bulge" in one of defendant's pockets and asked what it was. Defendant replied that the bulge was drugs. Officer Skipper asked again if there was anything on him or in the backpack, and this time defendant replied that there were drugs in the backpack and on his person.

Following a search, Officer Skipper found three small corner baggies of powder cocaine and a larger baggy of marijuana in defendant's pockets. The backpack contained just over 200 grams of crack cocaine, digital scales, razors, a melted spoon with white residue on it, a small amount of marijuana, plastic baggies, a large bottle of white powder dietary supplement, and $8,500.00 in cash.

On 9 February 2007, defendant filed a motion to suppress the evidence seized on 14 July 2006 on the ground that the "seizure was made pursuant to an unlawful search of the defendant's person and hired vehicle[.]" Following a 5 March 2007 suppression hearing, the trial court issued an amended order denying defendant's motion to suppress on 26 March 2007.

Defendant first argues that it was plain error for the trial court to deny his motion to suppress. "In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2007). "Plain error is error 'so fundamental as to amount to a miscarriage of

justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (2007) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)).

> Our review of a denial of a motion to suppress by the trial court is limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Barden, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quotations and citation omitted).

The thrust of defendant's argument is that Officer Skipper's stop constituted an unreasonable search and seizure in violation of the Fourth Amendment because defendant did not match the description given by the anonymous tipster.

> On a motion to suppress evidence, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. Defendant has not assigned error to any specific finding of fact. Therefore, the findings of fact are not reviewable, and the only issue before us is whether the conclusions of law are supported by the findings, a question of law fully reviewable on appeal.

State v. Campbell, 359 N.C. 644, 661–62, 617 S.E.2d 1, 12–13 (2005) (quotations and citations omitted).

> Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.
>
> A court must consider the totality of the circumstances—the whole picture in determining

> whether a reasonable suspicion to make an investigatory stop exists. The stop must 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. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

State v. Watkins, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (quotations and citations omitted).

Defendant objects to the following two conclusions of law:

> 7. While investigating the barking dogs, a CMPD officer was passed by a taxi with a passenger in the rear. This was in close proximity to both the barking dogs and the location of the breaking and entering. The passenger fit the reported description of the suspect.
>
> 8. Once the taxi was stopped, Defendant was seen with an open cell phone on his lap, as if he had just called the taxi, and a duffle bag beside him which the officer, based on his training and experience, reasonably believed could be carrying burglary tools or spoils of the break-in.

Defendant argues that he did not "fit the reported description of the suspect" because he is not "light-skinned." Both Officers Clifton and Skipper admitted during voir dire that defendant is not "light-skinned." Officer Skipper testified that the reason that he stopped defendant was because "he matched the description of a black male with braids wearing a black shirt." Officer Clifton testified that he would have stopped "any black male with a black shirt on and dreadlocks" who was leaving the area of the burglary. Defendant argues that there were "noticeable, appreciable, and material individual differences in complexion" between defendant

and the individual spotted by the anonymous tipster. In this situation, we find that defendant's argument lacks merit because neither Officer Clifton nor Officer Skipper saw the individual spotted by the anonymous tipster. The term "light-skinned," although descriptive, is subjective. That the anonymous tip described a "light-skinned black male" and defendant has been described as "not light-skinned," does not vitiate Officer Skipper's stop. Given the late hour, the absence of other people or cars in the area, the barking dogs, defendant's proximity to the burglarized business, and defendant's race, hair, and shirt, Officer Skipper had reasonable suspicion to initiate the stop.

Defendant also objects to the trial court's conclusion that it was proper for Officer Skipper to ask defendant to step out of the taxi and pat him down for weapons. We disagree. Because Officer Skipper reasonably suspected that defendant had just committed a burglary, he reasonably believed that defendant might have burglary tools in his backpack or on his person. Officer Skipper opined at the suppression hearing that burglary tools can be used as weapons. Given the facts as known to Officer Skipper at the time, he met the test of "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" and was justified in searching defendant. *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968) (citations omitted). Accordingly, we hold that the trial court did not commit error, plain or otherwise, by denying defendant's motion to suppress.

Defendant next argues that he received ineffective assistance of counsel because trial counsel failed to renew his objection to the introduction of evidence stemming from Officer Skipper's stop. To succeed on a claim of ineffective assistance of counsel, a "defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations omitted). There is no evidence that any probability exists that the trial court would have suppressed the same evidence that it had refused to suppress earlier and that flowed from a reasonable stop and seizure. Accordingly, defendant cannot show that trial counsel's failure to renew his objections to the evidence prejudiced defendant's defense and we hold that this assignment lacks merit.

No error.

Judges HUNTER, Robert C., and JACKSON concur.

Report per Rule 30(e).