NO. COA09-1502

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. Wake County
No. 08 CRS 85484
08 CRS 85486-87
09 CRS 6924

DERRICK LAMONT WATKINS

Appeal by defendant from judgments entered 13 July 2009 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 April 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Lars F. Nance, for the State.

Benjamin D. Porter, for defendant-appellant.

JACKSON, Judge.

On 8 December 2008, at approximately 12:35 a.m., Deputy Jennifer Brame ("Deputy Brame") was patrolling her usual fifty-two mile area in Wake County, North Carolina when she noticed an old Volvo parked in an otherwise empty church parking lot. She previously had driven past the church parking lot at least six times during her patrol that night, and the parking lot had been empty each time. Deputy Brame does not usually see vehicles in this lot after 9:00 or 10:00 p.m. Deputy Brame had been told to

check on churches and construction sites as often as possible because there had been recent reports of church break-ins, vandalism, and construction site thefts in the area. There also was the possibility that the car had broken down, or that it was a stolen vehicle that had been left in the parking lot. Deputy Brame drove closer to the vehicle and saw defendant sitting in the driver's seat and a woman in the passenger seat. As Deputy Brame was calling the "suspicious vehicle" into dispatch, defendant exited the Volvo and started to approach Deputy Brame's car. Deputy Brame told defendant to return to his car and that she would speak with him shortly. Deputy Brame knew that she had backup police nearby, and she planned to wait until they arrived to make her approach to defendant's vehicle. As defendant returned to the driver's seat, a mesh bag fell onto the ground. Defendant quickly picked up the bag with a "surprised look on his face." Deputy Brame then approached defendant, who was back in the driver's seat of the Volvo. Deputy Brame asked defendant about the mesh bag, but he had no response. She then asked defendant and the female passenger for identification. Shortly thereafter, backup police arrived and found the mesh bag containing crack cocaine on the ground outside of the passenger side. Officers also found more crack cocaine, ecstasy pills, and a handgun in the vehicle.

Defendant was charged with possession of a firearm by a convicted felon, possession of 3, 4-Methylenedioxymethamphetamine (ecstasy), possession with intent to sell and/or deliver cocaine, and having attained the status of an habitual felon. On 8 April

2009, defendant moved to suppress all evidence. At the 28 May 2009 hearing, the trial court denied defendant's motion to suppress. On 8 July 2009, defendant gave notice of intent to appeal the denial of his motion to suppress. On 13 July 2009, defendant pleaded guilty to all charges. All offenses were consolidated for judgment, and defendant was sentenced to eighty to 105 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred by denying his motion to suppress. We disagree.

Our review of a denial of a motion to suppress evidence "is strictly 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. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Here, defendant assigned error to the trial court's denial of his motion to suppress, but he does not challenge any of the court's findings of fact. Unchallenged findings of fact are "'presumed to be supported by competent evidence and [are] 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 only issue remaining is whether these findings support the trial court's conclusions of law. *See State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (2006) (citing *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005)). We review conclusions of law *de novo*. *Id.*

In the case *sub judice*, the trial court made the following relevant findings of fact:

> 6. On or about the subject date of Monday, December 8, 2008, in the early morning hours at 12:35 a.m., Wake County Deputy Sheriff Brame was on night shift patrol in her regular patrol area.
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> 10. Deputy Brame was aware of an attempted church break-in within a five minute drive of this area that occurred just weeks before this date. Additionally, Deputy Brame was aware of multiple church break-ins with property damage, construction site thefts, and thefts from other buildings in the area.
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> 11. Deputy Brame does not usually see vehicles in this parking lot after 9:00–10:00 p.m.
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> 12. As Deputy Brame pulled into the parking lot to check on the suspicious vehicle, she determined that the Volvo vehicle was backed into a parking space with its lights off at a location approximately 15 feet from bushes that were 6–7 feet high. Her stated purpose in driving in to check on this vehicle was to ascertain if there was perhaps a vehicle break down, a break-in, a stolen car, or a need for further law enforcement action.
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> 13. Due to the position of the Volvo, Deputy Brame could not view the license tag thereof.
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> 14. Deputy Brame was driving a marked Ford Crown Victoria Sheriff's Department vehicle with light bars thereon. She was in uniform. She was a female officer patrolling alone.
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> 16. Even though Deputy Brame pulled her patrol vehicle within 10 feet of the subject Volvo vehicle with the lights of the patrol car facing the Volvo, it was, nevertheless, dark to the extent that Deputy Brame could not further see into the interior compartment of the Volvo vehicle.

> 17. The driver of the Volvo vehicle, later determined to be the defendant, got out of the Volvo vehicle and started to approach Deputy Brame's patrol car. At that same time, Deputy Brame, by radio was calling for assistance from a backup officer that Deputy Brame determined to be necessary for her safety.
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> 18. At that time, Deputy Brame had her driver's door open, and as the defendant approached her patrol car, Deputy Brame asked the defendant to step back into his vehicle with words to the effect of: Get back in your car. I'll be there in a minute.
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> 19. This request by Deputy Brame was based upon her determination that it was necessary for her safety while she awaited a backup officer to assist as she investigated further.
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> 21. As the defendant was approaching Deputy Brame's vehicle, she was unable to see the defendant's hands, though his hands were in front of his body.

Based upon these facts, the trial court concluded that Deputy Brame had reasonable suspicion to conduct an investigatory detention and her actions were necessary for her safety and to allow further investigation. We agree.

In determining when an individual has been seized within the meaning of the Fourth Amendment to the United States Constitution, a reviewing court "must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 439, 115 L. Ed. 2d 389, 402 (1991). Although mere consensual encounters with police officers, when a reasonable person may "feel free to decline the

officers' request," do not trigger Fourth Amendment protections, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment[.]" *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 826 (2009) (citations and internal quotation marks omitted). "A seizure does not occur until there is a physical application of force or submission to a show of authority." *State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 58 (1995) (citing *California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 697 (1991)). Circumstances that exhibit a show of force include the "use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

In the case *sub judice*, Deputy Brame pulled her Wake County Sheriff's cruiser to within ten feet of defendant's parked car and shined her lights at his car. Deputy Brame was in uniform, and defendant testified that he recognized that she was a law enforcement officer. When defendant approached Deputy Brame on foot, the encounter was consensual. However, a seizure occurred when defendant submitted to Deputy Brame's directive to return to his vehicle and notification that she would "be there in a minute." Defendant's submission and Deputy Brame's indication of her intent to investigate further are sufficient factors, in context, to indicate that a reasonable person would not have felt free to terminate the encounter. Therefore, the initially consensual

encounter evolved into an investigative detention, triggering Fourth Amendment protections.

The reasonable suspicion standard for brief investigative detentions "clearly falls short of the traditional notion of probable cause, which is required for arrest." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979), *cert. denied*, 444 U.S. 907, L. Ed. 2d 143 (1979). In order to conduct an investigatory detention, there must be "specific and articulable facts, which[,] with inferences from those facts[,] create a reasonable suspicion that a person has committed a crime." *State v. Lovin*, 339 N.C. 695, 703-04, 454 S.E.2d 229, 234 (1995) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). These facts should not "be analyzed in isolation, but . . . should be viewed as a whole through the eyes of a reasonable and cautious police officer on the scene, guided by [her] experience and training." *Thompson*, 296 N.C. at 706, 252 S.E.2d at 779 (quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976)). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

Generally, in determining whether an officer had reasonable suspicion to stop a suspect, a court may consider: "(1) activity at an unusual hour; (2) nervousness of an individual; (3) an area's disposition toward criminal activity; and (4) unprovoked flight."

State v. Blackstock, 165 N.C. App. 50, 58, 598 S.E.2d 412, 417 (2004) (citations omitted). However, "'[n]one of these factors, standing alone, [is] sufficient to justify a finding of reasonable suspicion, but [they] must be considered in context.'" *Id.* at 58, 598 S.E.2d at 417-18 (quoting *State v. Roberts*, 142 N.C. App. 424, 429, 542 S.E.2d 703, 707-08 (2001)). In *Thompson*, our Supreme Court held that officers had reasonable suspicion to detain the defendant when the officers were aware of the following facts before effecting the seizure: (1) the hour was late — approximately 12:30 a.m.; (2) the subject vehicle, a van, was parked in a remote and isolated public parking area near the end of state Highway 421; (3) the officers were aware of recent reports of break-ins involving a van in the area; and (4) the officers observed "considerable activity" around the van prior to approaching the defendant. *Thompson*, 296 N.C. at 707, 252 S.E.2d at 779.

In the case *sub judice*, the trial court's findings of fact detail facts known to Deputy Brame that are sufficiently similar to those held by the Court in *Thompson* to support a conclusion that Deputy Brame had reasonable suspicion to effectuate a limited investigatory detention of defendant. Deputy Brame observed a car parked in a church parking lot at approximately 12:35 a.m. The trial court also found that Deputy Brame was aware of multiple church break-ins in the area recently, including an attempted church break-in within a five minute drive. We acknowledge that Deputy Brame did not testify as to defendant's having a nervous demeanor prior to effectuating a stop by directing him to return to

his car or as to defendant's unprovoked flight. *See Blackstock*, 165 N.C. App. at 58, 598 S.E.2d at 417 (listing an officer's pre-stop observation of a defendant's nervousness or unprovoked flight as factors that may be considered in forming an officer's reasonable suspicion). Also, Detective Brame did not testify as to any "considerable activity" around defendant's vehicle, which distinguishes the instant case from *Thompson*. Nonetheless, the facts that (1) defendant's car was parked in a manner so as to obstruct vision and inspection; (2) Deputy Brame already had passed the church's parking lot at least six times that evening; and (3) the lot had been empty during each of Deputy Brame's prior passes provide additional factors from which the court properly concluded that a reasonable and cautious police officer in Deputy Brame's situation could form reasonable suspicion to warrant an investigatory detention.

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress.

Affirmed.

Chief Judge MARTIN and Judge BEASLEY concur.

Report per Rule 30(e).