NO. COA09-1538

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 220501-02, 04

VINCENT CARZEL MILLNER

Appeal by Defendant from judgments and commitments entered 28 May 2009 by Judge J. Gentry Caudill, Jr. in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the State.

John T. Hall for Defendant.

STEPHENS, Judge.

I. Factual Background and Procedural History

On 5 May 2008, Defendant was indicted by the grand jury of Mecklenburg County for (1) possession with intent to sell or deliver marijuana, (2) felony possession of marijuana, (3) trafficking in cocaine, and (4) possession of drug paraphernalia. On 31 December 2008, Defendant moved to suppress all evidence found in the search of his apartment and statements he made to police. A suppression hearing was held on 26 May 2009. The evidence presented at the suppression hearing tended to show the following:

On 28 April 2008, Officer Jason Colquitt ("Officer Colquitt")

and Officer Z.T. Hagler ("Officer Hagler") of the Charlotte-Mecklenburg Police Department went to Carolinas Medical Center and University Hospital regarding a patient who had presented with a gunshot wound. The officers met Defendant, who had sustained a gunshot wound to the leg, in the emergency department of the hospital. The officers questioned Defendant and Defendant told them that earlier that day when he entered his residence, there were two men inside and they robbed him at gunpoint. Defendant told the officers that while he was held at gunpoint, money was stolen from his person and one of the men searched through the rest of his home. Defendant said he decided to fight back against the assailants, was shot during the struggle, and that in the struggle the perpetrators' gun had been kicked into his bedroom. When asked about the incident later that day, Defendant told the officers that he was already in the residence when the attackers arrived.

Defendant gave the officers his address as 6616 Accrington Court and said that he lived there with his aunt. Officer Hagler contacted Rose Millner ("Ms. Millner"), Defendant's aunt, who was away from the residence at the time and asked her to return to the residence to assist the police. Officer Colquitt testified that he requested Defendant's consent to search the residence as part of the investigation. Office Colquitt further testified that Defendant responded, "Sure, go ahead. It's no problem." Officer Colquitt then called an officer at the residence to tell him that Defendant had consented to the search.

Detective Lucas Veith ("Detective Veith") testified that outside the residence he smelled a strong odor of marijuana coming from the residence. Detective Veith spoke with Ms. Millner outside the residence and she signed a consent to search form. Officer Paul Brian Connor ("Officer Connor") also participated in the search of the residence. Officer Connor observed blood throughout the living room and hallway, a blood stained glove and sock in the dining room, pieces of broken ceramic statues in the living room and kitchen, and cleaning products and signs that attempts had been made to remove the blood. Officer Connor also observed a large hole in the drywall of the wall next to a bedroom and in that bedroom found a shoe with blood on it, a wet rag, marijuana and paraphernalia in open view, and a box labeled "Vincent's Clothes."

Based on his narcotics law enforcement training and his involvement in more than 100 cocaine arrests, Officer Connor was of the opinion that a violent home invasion such as this one is frequently related to drugs being sold at the residence. Officer Connor looked inside the box labeled "Vincent's Clothes" and found men's clothes and a bag containing marijuana. In the closet of that bedroom, officers found two sets of digital scales, an assault rifle, and an open safe that contained marijuana and $1,800 in cash. In the closet, officers also found a stuffed animal with a zippered back, which contained powder cocaine.

Defendant, having been released from the hospital, arrived at the crime scene. Officer Connor testified that he told Defendant, "You know what we found[,]" to which Defendant responded, "[Y]eah."

Thereafter, Officers Colquitt and Hagler drove Defendant to the police division office. In the interview room, Defendant spoke with Detective Hank Suhr ("Detective Suhr"). Defendant was advised of his *Miranda* rights and then signed a written waiver of those rights. Defendant gave a statement to Detective Suhr that he sold drugs at his residence and that the people who shot him were there to buy drugs from him.

At the suppression hearing, Defendant argued that he never consented to the search of his bedroom, that Ms. Millner's signature on the written consent form was "not rendered knowingly and intelligently," and that he waived his *Miranda* rights and made a statement to the police under the threat of the police arresting his aunt. At the conclusion of the suppression hearing, Judge J. Gentry Caudill, Jr., in open court, denied Defendant's motion to suppress.

Following the suppression hearing, Defendant's case came on for trial at the 27 May 2009 Criminal Session of Mecklenburg County Superior Court, Judge Caudill presiding. On 28 May 2009, the jury found Defendant guilty of possession with intent to sell or deliver marijuana, felony possession of marijuana, trafficking in cocaine, and possession of drug paraphernalia. Judge Caudill entered judgment on the jury's verdict, sentencing Defendant to 35 to 42 months imprisonment for trafficking in cocaine, followed by a consecutive sentence of 5 to 6 months imprisonment for the possession of marijuana and possession of drug paraphernalia charges. At the conclusion of Defendant's trial, on 29 May 2009,

Judge Caudill presented in open court a written order denying Defendant's motion to suppress supported by findings of fact and conclusions of law. Defendant appeals.

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress evidence seized from his apartment and statements made to the police. Specifically, Defendant asserts that the trial court erred in finding and concluding that the scope of the search was not limited by Defendant and his aunt. We disagree.

"[T]he scope of appellate review of [a denial of a motion to suppress] 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). The trial court's conclusions of law are reviewed *de novo* by this Court. *State v. Branch*, 194 N.C. App. 173, 176, 669 S.E.2d 18, 20 (2008).

The scope of a valid consent search is measured against a standard of objective reasonableness where the court asks, "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991). "The scope of a search is generally defined by its expressed object." *Id.* at 251, 114 L. Ed. 2d at 303. "The scope of the search can be no broader than the

scope of consent . . . . When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness[.]" *State v. Johnson*, 177 N.C. App. 122, 124-25, 627 S.E.2d 488, 490 (internal citation and quotation marks omitted), *vacated in part on other grounds*, 360 N.C. 541, 634 S.E.2d 889 (2006).

"The scope of a warrantless search . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *State v. Toledo*, __ N.C. App. __, __, 693 S.E.2d 201, 203 (2010) (quoting *U.S. v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572 (1982)); *see, e.g., State v. Jones*, 161 N.C. App. 615, 619, 589 S.E.2d 374, 376 (2003) (Police need not separately request permission to open closed containers within a car after receiving general consent to search the automobile when the closed container might "'reasonably hold the object of the search.'") (quoting *Jimeno*, 500 U.S. at 249, 114 L. Ed. 2d at 301), *disc. rev. denied*, 358 N.C. 379, 597 S.E.2d 770 (2004). A party "'may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particularized container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.'" *Jones*, 161 N.C. App. at 619, 589 S.E.2d at 376 (quoting *Jimeno*, 500 U.S. at 252, 114 L. Ed. 2d at 303).

Defendant argues that certain items of evidence should have been suppressed, because those items were found in a search of his

residence which exceeded the scope of his consent. Specifically, Defendant argues that the consent he gave did not extend to a search of the box marked "Vincent's Clothes" or the stuffed animal. Defendant's argument is meritless.

According to Officer Colquitt, when he asked Defendant "if [the police] could search his house, his room, his residence for any evidence of a crime . . . that [the police] could locate," Defendant responded, "Sure, go ahead. It's no problem." Later at trial, Officer Colquitt reiterated, "I asked him could we search his residence for any evidence of a crime." Officer Hagler also testified that Officer Colquitt asked Defendant for consent to search the residence and that in response, Defendant said "sure" and "shrugg[ed] his shoulders."

It does not appear from the officers' testimony that Defendant limited the scope of his consent in any way. Furthermore, it is clear that the officers did not limit their request to any one particular area of Defendant's residence or evidence of a specific crime. Based on this evidence the trial court found that "Officer Colquitt told Defendant that the police needed to search his residence as part of their investigation and requested his consent to search the residence. He responded -- the defendant responded, quote, sure, go ahead, no problem, close quote." We conclude that the officers' testimony presented at the suppression hearing supported this finding.

The trial court also made several findings of fact that are not challenged by Defendant on appeal. Findings of fact not

challenged on appeal are deemed supported by competent evidence and are therefore binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The following unchallenged findings support the trial court's conclusions:

> 2. In the emergency department, the officers met with the defendant, Vincent Millner.
>
> 3. Mr. Millner was, at that time, 20 years old and was being treated for a gunshot wound to his leg, and the officers found him to be alert, calm and responsive to their statements to him and questions of him.
>
> 4. When they asked how he was injured, Mr. Millner told them the following:
>
> A) That earlier that day when he entered his residence two men were inside and they robbed him at gunpoint.
>
> B) That he knew one of them by first name.
>
> C) That the one he knew took money from his person.
>
> D) That while he was held at gunpoint in the living room by the other person, the other perpetrator searched through the rest of the house.
>
> E) That he decided to fight back and was shot during the struggle.
>
> F) That during the struggle the perpetrator's handgun was kicked into Mr. Millner's bedroom.

The evidence and the unchallenged findings support the trial court's conclusions that

> 1. The defendant's consent to search his residence was given when he's being interviewed as a robbery and shooting victim at the hospital. There was no coercion, duress or fraud on the part of officers in requesting or obtaining the consent. The

> consent was freely and voluntarily given.
>
> 2. The defendant did not limit his consent and the consent that he gave was consent to search the entire house.
>
> . . . .
>
> 4. The defendant told the officers the following:
>
> A) That he was pointed [sic], one of the perpetrators knew [his] first name.
>
> B) That after his attack they took money from his person. The one he knew held him at gunpoint in the living room while the others searched the rest of the house.
>
> C) That the perpetrator's gun's kicked into Defendant's bedroom during the struggle. Under the objective reasonableness standard, a typical, calm, reasonable person would have understood, by the exchange between the defendant and the officer, that the police would be searching the house to determine;
>
> A) Whether the perpetrator who rummaged through the house left something of evidentiary value anywhere in the house;
>
> B) Whether there was something in the house the perpetrators were specifically looking for which could help the police learn more about the crime and assist in the investigation;
>
> C) Where in the defendant's bedroom the gun might have been kicked, including the closet.

Thus, the trial court properly concluded that the scope of Defendant's consent extended to a search of his entire residence. Furthermore, the trial court concluded that the search was conducted within the "bounds of reasonableness[.]" *Johnson*, 177 N.C. App. at 124-25, 627 S.E.2d at 490 ("[T]he scope of a permissible search is not limitless. Rather it is constrained by

the bounds of reasonableness[.]").

With Defendant's consent, the officers searched the residence for evidence regarding the shooting, which in turn revealed evidence of illegal drug activity. The search for evidence regarding the shooting and home invasion was inherently intertwined with the search for motive of the crime, and thus, the police did not exceed the scope of the consent given when they searched the box labeled "Vincent's Clothes" or the stuffed penguin for motive of the crime.

According to Officer Connor's testimony, evidence of the shooting was found throughout the house. "There was blood splatter on the door . . . on the wall, on the ceiling" and there were "broken pieces of a ceramic figurine in the living room." "In the dining room there was a trash bag with a bloody sock . . . and a bloody glove" and there was more broken ceramic in the kitchen as well as bleach and other cleaning products someone had earlier used to partially clean the blood splatter. Further, "[t]here was a big hole in the Drywall of the wall to the right of [one] bedroom" and Defendant had previously told police that the assailants' gun may have been kicked into his bedroom during the struggle. Thus, the police officers reasonably entered the bedroom in the belief that they would find evidence of a crime. Inside the bedroom, in plain view, police officers found a bloody basketball shoe, a rag, a marijuana crusher, and a plastic box marked "Vincent's Clothes." Inside the plastic box, officers found a clear plastic bag with marijuana in it and a partially open safe "with a strong odor of

marijuana coming from it," which contained more than 50 grams of marijuana. Officer Connor searched the safe after finding the bloody shoe and the marijuana crusher, because based on his "training and experience [in] arresting people that use drugs or sell drugs on the streets of Charlotte[,] safes are used to contain drugs and/or money and . . . I could smell marijuana coming from inside the safe."

Officer Connor then searched the closet because it "can store drugs or money or any type of weapons." Inside Defendant's closet, Officer Connor found two sets of digital scales, an assault rifle and the stuffed penguin toy with a zipper, which contained 70 grams of powder cocaine. Officer Austin unzipped the stuffed penguin because "drugs can be hidden in any kind of thing such as stuffed animals or sometimes in toys, containers. So [the stuffed penguin] was one of those things where I would have checked because drugs had already been found."

Officer Connor testified that the purpose of the search was to find evidence of "[t]he crime of the shooting, robbery, if it was a home invasion, if there was any drugs in the residence as well[,]" because "[b]ased on [Officer Connor's] little over 11 years of law enforcement, [he] knew that home invasions are directly related to drugs."

Accordingly, the stuffed penguin and the bag marked "Vincent's Clothes" were well within the scope of consent given to search the residence. Furthermore, neither the box nor the penguin was locked, and there was no other indication that a search of these

items was restricted. Thus, the officers' search of these items was proper.

Defendant also argues that the officers obtained his consent without disclosing their suspicions that a search of Defendant's residence would reveal evidence of drug activity. In support of this argument, Defendant relies on *State v. White*, 322 N.C. 770, 370 S.E.2d 390, *cert. denied*, 488 U.S. 958, 102 L. Ed. 2d 387 (1988), in which our Supreme Court held that the "inadvertent discovery" of evidence of a crime that is in plain view while officers are conducting a legal search for evidence of another crime is admissible so long as the police are "without probable cause to believe evidence would be discovered until they actually observe it in the course of an otherwise justified search." *Id.* at 774, 370 S.E.2d at 393 (internal citation and quotation marks omitted). Defendant's reliance on *White* is misguided, however. The holding in *White* was abrogated by the United States Supreme Court in *Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112 (1990). This Court has subsequently followed *Horton* in holding that "no additional Fourth Amendment interest is furthered by requiring that the discovery of the evidence be inadvertent." *State v. Church*, 110 N.C. App. 569, 574-75, 430 S.E.2d 462, 465 (1993). In this case, Defendant gave police permission to search the residence for evidence of a crime related to the shooting. Police then properly searched for evidence of motive related to the crimes of the shooting and home invasion, and during that search uncovered evidence of drug activity.

In addition, the officers obtained the consent of Defendant's aunt, Ms. Millner, who also resided in the home. Ms. Millner informed Detective Veith that she was renting the residence and that Defendant lived there with her. Under N.C. Gen. Stat. § 15A-222, "[t]he consent needed to justify a search and seizure . . . must be given [b]y the person to be searched [or] [b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises." The United States Supreme Court has held

> that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

U.S. v. Matlock, 415 U.S. 164, 171-72, 39 L. Ed. 2d 242, 249-50 (1974). "[V]alid consent may be given by any one of the co-habitants of a premises, even though no other co-habitant has consented." *State v. McLeod*, __ N.C. App. __, __, 682 S.E.2d 396, 399 (2009) (internal citation and quotation marks omitted).

Defendant has not challenged any of the trial court's findings of fact regarding the consent provided by Ms. Millner. The trial court found that "Detective Veith asked Ms. Millner for consent to search the residence and went over a consent search form with her. She signed the consent to search form[.]" The consent to search form applied to the residence at 6616 Accrington Court and a black Volkswagen Jetta and was not limited in any way. This finding

supports the trial court's conclusion of law that Ms. Millner "gave her consent to search the Millner residence." Accordingly, we conclude that the findings of fact support the trial court's conclusion that the search of Defendant's residence was conducted pursuant to the scope of consent granted by both Defendant and Ms. Millner.

Defendant also contends that statements he made to the police, including a confession that he sold drugs at his residence "and that the people who shot him were there to buy drugs from him[,]" "were based upon illegally seized evidence of marijuana, cocaine and a rifle." Defendant makes no other argument as to the admissibility of his statements. Based on our holding that the search of Defendant's residence and the seizure of evidence within was proper, Defendant's argument that his statements should have been suppressed is overruled.

Lastly, Defendant contends that the scope of consent given did not extend to closed containers, *i.e.*, the stuffed penguin or the grey container marked, "Vincent's Clothes." We disagree. As stated in our holding above, Defendant and Ms. Millner gave consent to law enforcement officers to search the residence, and they did not limit this consent in any way. Accordingly, this argument is likewise overruled.

NO ERROR.

Judges HUNTER and GEER concur.

Report per Rule 30(e).