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NO. COA10-1293
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

STATE OF NORTH CAROLINA

v. Pitt County
No. 09 CRS 60157

KERRY ALLEN JOHNSON

Appeal by defendant from judgment entered 17 May 2010 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 23 March 2011.

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

James W. Carter for defendant-appellant.

BRYANT, Judge.

Because the police officer's initial encounter with defendant was consensual, no seizure was made; however, when the officer had specific, articulable facts that defendant was carrying a concealed weapon, he was permitted to frisk defendant to discover the weapon. Accordingly, we affirm the order of the

trial court denying defendant's motion to suppress the weapon obtained.

On 23 October 2009, at 9:40 p.m., a patrol officer with the Greenville Police Department received a dispatch that a female caller in MacGregor Village Apartments requested police assistance. Two black men were standing near the front of building 910. As the caller entered her building, they approached and attempted to talk with her. She was frightened and requested that the police check things out. One of the men was described as having shoulder-length dread locks, a red shirt, and possibly armed.

The officer arrived at the apartment complex within five minutes. When he pulled his vehicle into the complex, he observed two African-American males walking in a direction away from his car. One had shoulder-length dreads and was wearing a red shirt. The officer asked the two men to come over to his patrol car.

The officer explained that he had come to the scene in response to a call reporting a "suspicious person"; they were in the described area; and one of them matched the physical description of the person reported. Upon request, the man wearing the red shirt provided an ID which identified him as Kerry A. Johnson, Jr., defendant.

The officer asked defendant if he had any weapons; defendant responded that he had a gun in his waistband. Officer Bowen secured defendant with handcuffs and frisked him, whereupon he "felt the distinct feature of a handle of a handgun." The officer removed an unloaded .22 caliber handgun and arrested defendant for carrying a concealed weapon. Defendant, who was a convicted felon on house arrest, was charged with possession of a firearm by a felon.

On 18 February 2010, defendant filed a pre-trial motion to suppress the weapon seized. On 17 May 2010, at the conclusion of a hearing on the matter, the trial court orally denied defendant's motion (a written order was subsequently entered). Defendant entered into a plea agreement, pleading guilty to one count of possession of a firearm by a felon while specifically reserving his right to appeal the denial of his motion to suppress. On 17 May 2010, the trial court entered judgment in accordance with the plea agreement and sentenced defendant to an active term of 15 to 18 months in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence obtained as a result of a warrantless search because the law enforcement officer lacked a reasonable, articulable suspicion of unlawful activity

justifying the initial stop and seizure. Defendant further contends he was seized at the time Officer Bowmen asked to speak to him, and any evidence obtained as a result of the seizure was fruit of the poisonous tree. We disagree.

In reviewing a trial court's order on a motion to suppress, this Court's review is limited to "a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *State v. Veazey*, ___ N.C. App. ____, ____, 689 S.E.2d 530, 532 (2009) (citation omitted). "Where, however, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. White*, 184 N.C. App. 519, 523, 646 S.E.2d 609, 611 (2007) (citation omitted). "The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (citation omitted).

"No one is protected by the Constitution against the mere approach of police officers in a public place." *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994) (citation omitted).

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another

> public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Bostick, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (citation omitted). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business the encounter is consensual and no reasonable suspicion is required." *Id.* at 434, 115 L. Ed. 2d at 398 (internal citation and quotations omitted).

In *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005), law enforcement was called to check on a suspicious individual who was sitting in a vehicle near a store about to close. *Id.* at 659, 617 S.E.2d at 11. When law enforcement arrived, the individual drove away. The reporting officer did not activate her blue lights or siren but followed the vehicle to a nearby gas station. *Id.* at 659-60, 617 S.E.2d at 11. When the defendant stopped and walked from his car, the officer, then approximately ten feet away, asked if he could speak with her. They spoke at the rear of the defendant's vehicle. *Id.* at 660, 617 S.E.2d at 11. The officer asked for the defendant's driver's license and motor vehicle registration. The defendant

conceded that he did not have identification but gave his name and date of birth, and stated that the vehicle belonged to a friend, though he could not recall the friend's name. "At this point [the officer] had not told [the] defendant he could not leave, and [the] defendant had consented to speak with her. [The officer] had not restrained [the] defendant's freedom to walk away. '[T]he encounter [was] consensual and no reasonable suspicion [was] required.'" *Id.* at 663, 617 S.E.2d at 14 (quoting *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398). The officer asked the defendant to "hold up and she would be back up with him" after she called dispatch to check the status of his driver's license. *Id.* at 660, 617 S.E.2d at 11. The defendant was soon arrested for driving without an operator's license. *Id.* at 661, 617 S.E.2d at 12. On appeal, the defendant contended that he was seized in violation of his constitutional rights when the law enforcement officer detained him without a reasonable suspicion of criminal activity. *Id.* at 659, 617 S.E.2d at 11.

> Assuming *arguendo* that [the officer's] telling [the] defendant to "hold up and she would be back up with him" would have led a reasonable person to believe that under the circumstances he was not free to leave, we conclude that at that point [the officer] had a reasonable, articulable suspicion that defendant was engaged in criminal activity warranting further investigation.

Id. at 663-64, 617 S.E.2d at 14.

"[T]his Court has described those stops that can be made upon the basis of a reasonable, articulable suspicion as investigatory stops." *State v. Styles*, 362 N.C. 412, 427, 665 S.E.2d 438, 447 (2008) (citations omitted and emphasis suppressed).

> 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.

State v. Steen, 352 N.C. 227, 238, 536 S.E.2d 1, 8 (2000) (internal citations omitted); *compare, State v. Fleming*, 106 N.C. App. 165, 170, 415 S.E.2d 782, 785 (1992) ("The officers never claimed to suspect [the] defendant of any specific misconduct, nor did they have any reason to believe defendant was armed." (citing *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979))).

> When an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries. If he reasonably believes that the person is armed and dangerous, the officer may frisk the person to discover a weapon or weapons.

State v. Pearson, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

Where a citizen comes forward to inform law enforcement of criminal activity, there exists strong indicia of reliability. *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) ("The fact that [the citizen-informant] was named and identified as [the law enforcement officer's] informant in the search warrant affidavit provided the magistrate with enough information to permit him to determine that [the informant] was reliable.").

Here, a private citizen called the Greenville Police Department to report an encounter between herself and two African-American men standing outside of an apartment complex in the evening hours of 23 October 2009. She stated that she heard what she believed to be the clicking sound of a pistol, she requested that law enforcement investigate, and she provided her contact information to the dispatcher. Shortly thereafter, a Greenville police officer arrived at the apartment complex. The trial court made the following unchallenged findings of fact:

> 6. [The officer] called out to the two males . . . in a manner that he assumed made it clear to the two males that he wished for them to stop and respond to his call and at that time the two males stopped and turned to approach [the officer]. [The officer] requested that the Defendant identify himself and asked the Defendant for an ID. [The officer] then explained to the Defendant why he was there and asked the Defendant if he, the Defendant, had any weapon on his person.

Because the encounter lacked any indication that defendant's compliance would be compelled, as defendant had not been restrained or told he could not leave, we hold the encounter was consensual, and reasonable suspicion was not necessary. *See* *Campbell*, 359 N.C. at 663, 617 S.E.2d at 14. The trial court found that when questioned, defendant "stated that he had a handgun on his person." Based on the totality of the circumstances – the caller's report that despite not seeing a weapon, she heard the clicking of a pistol, and defendant's statement that he was carrying a handgun, the officer had specific, articulable facts on which to base a reasonable suspicion that defendant was carrying a concealed weapon. The officer conducted a frisk and "felt the distinct feature of a handle of a handgun." The handgun was removed and defendant was arrested for carrying a concealed weapon. Defendant's argument that the law enforcement officer lacked reasonable suspicion to justify defendant's seizure is overruled, and the trial court order denying defendant's motion to suppress evidence obtained as a result of the warrantless search is affirmed. *See* *Pearson*, 348 N.C. at 275, 498 S.E.2d at 600.

Affirmed.

Judges ELMORE and GEER concur.

Report per Rule 30(e).