

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-135

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v.

Buncombe County
Nos. 07 CRS 59698-99

EDIN AMAURY BENAVIDES

Appeal by defendant from judgments entered 27 April 2009 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Crumpler Freedman Parker & Witt, by David B. Freedman, for defendant-appellant.

CALABRIA, Judge.

Edin Amaury Benavides ("defendant") appeals judgments entered upon jury verdicts finding him guilty of two counts of trafficking in cocaine. We find no error.

I. Background

On 7 August 2007, Troopers Davidson and Herndon (collectively "the troopers") of the North Carolina State Highway Patrol ("SHP") were traveling west on Interstate 40 in Buncombe County. Trooper Herndon was a K-9 officer who was training Trooper Davidson for the Western Criminal Interdiction Team ("the Interdiction Team").

Trooper Davidson had been in training with the Interdiction Team for six months.

While they were traveling, Trooper Davidson noticed a blue 2002 Ford Taurus ("the Taurus") traveling in the same direction as the troopers, at approximately sixty miles per hour. The Taurus was following within two car lengths of a FedEx tractor trailer ("the FedEx truck"), which Trooper Davidson considered to be an unsafe distance. As a result, Trooper Davidson activated his blue lights and siren and initiated a traffic stop.

Trooper Davidson exited his vehicle and approached the driver of the Taurus. While Trooper Davidson did this, Trooper Herndon used his computer to check the Taurus's Illinois license plate number. The computer indicated that the license plate was either not on file or did not exist. When Trooper Davidson reached the Taurus, he found a driver and two passengers, one male and one female (collectively "the group"). Trooper Davidson asked the driver, David Todd Davis ("Davis") for his driver's license and registration. When Davis handed his license to Trooper Davidson, his hand was noticeably shaking and his voice cracked when he spoke. Davis's license indicated a South Carolina address. Davis was unable to provide the Taurus's registration, but he told Trooper Davidson that the Taurus belonged to "a buddy" and that he was borrowing it because his car had broken down in Chicago.

Trooper Davidson then asked Davis to step out of the Taurus. Davis did so and allowed Trooper Davidson to frisk him. The frisk did not uncover any weapons or contraband. Trooper Davidson then

informed Davis that he was only issuing a warning ticket. Davis continued to show increasing signs of nervousness. Trooper Davidson noted that Davis's carotid artery was pulsing, that Davis was breathing very heavily, and that Davis kept scanning the area.

Trooper Davidson explained the warning ticket to Davis and repeated the question regarding the owner of the vehicle. Davis suggested that Trooper Davidson speak to defendant about the identity of the owner. Before Trooper Davidson returned Davis's license or the warning ticket, he approached the front passenger door of the Taurus, where defendant was seated. He asked defendant who owned the Taurus. Defendant told him that the owner was a woman, but that he did not know the woman's name. Trooper Davidson then asked defendant to look in the glove box to see if he could locate the vehicle's registration. Defendant was unable to locate the registration in the glove box.

While Trooper Davidson was speaking to defendant, Trooper Herndon spoke to Davis. Davis told Trooper Herndon that the group had driven to Chicago in defendant's Lincoln Navigator, and that defendant borrowed the Taurus to return to South Carolina because the Navigator had broken down in Chicago.

Trooper Davidson then went back to where Davis stood, returned his license and issued the warning ticket. However, neither Trooper Davidson nor Trooper Herndon indicated that Davis was free to leave. While Trooper Davidson issued the warning ticket, Trooper Herndon approached the Taurus and spoke with defendant. Defendant told Trooper Herndon that the group had traveled to

Chicago in a rental car and that the group had borrowed the Taurus to return to South Carolina.

Trooper Herndon then returned to the place where Trooper Davidson and Davis were standing. The troopers explained to Davis that they were concerned about the conflicting stories they had been told about the Taurus and the group's trip to Chicago. Trooper Davidson asked Davis for consent to search the Taurus, and Davis gave consent. No consent was obtained from defendant.

Trooper Herndon walked his dog around the exterior of the Taurus. The dog alerted positively to the presence of drugs. Trooper Herndon then placed the dog inside the Taurus, where it again alerted positively for drugs. Specifically, the dog indicated that it had detected drugs inside the center console of the Taurus, located between the driver and front passenger seats. Trooper Herndon opened the console, discovered it contained a false bottom, and removed the false bottom. Trooper Herndon found packages of cocaine and heroin. After the drugs were discovered, the troopers arrested Davis, his wife, and defendant.

The Taurus was then transported to the SHP Troop G garage in Asheville, North Carolina, for further investigation. The group was also separately transported to the Troop G garage. When they arrived, defendant was given *Miranda* warnings. Nevertheless, defendant provided a statement to Special Agent Walt Thrower of the Drug Enforcement Administration. According to defendant's statement, the group planned to leave the Taurus at a shopping mall

in Greenville, South Carolina, where it would be picked up by an unknown third party.

Defendant was subsequently indicted for two counts of trafficking in cocaine and two counts of trafficking in heroin. Defendant filed a motion to suppress the evidence seized during the stop of the Taurus and the subsequent statements made by defendant after he was arrested. Beginning 20 April 2009, a hearing on the motion to suppress was conducted in Buncombe County Superior Court. After the hearing, the trial court denied defendant's motion to suppress, orally rendering its findings of fact and conclusions of law.

After the suppression hearing, defendant was tried by a jury for two counts of trafficking in cocaine and two counts of trafficking in heroin. On 27 April 2009, the jury returned verdicts of guilty to the two counts of trafficking in cocaine and not guilty to the two counts of trafficking in heroin. The trial court sentenced defendant to a minimum of 175 months to a maximum of 219 months in the North Carolina Department of Correction. Defendant appeals.

II. Motion to Suppress

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress. Specifically, defendant contends that the trial court erred by denying the portion of his motion to suppress challenging the evidence seized as a result of the extended stop of the Taurus.

The scope of appellate review of a ruling upon 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. An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence.

State v. Battle, ___ N.C. App. ___, ___, 688 S.E.2d 805, 811 (internal quotations and citation omitted), *disc. rev. denied*, 364 N.C. 327, ___ S.E.2d ___ (2010). Initially, we note that while defendant has assigned error to the trial court's denial of his motion to suppress, he has failed to assign error to any specific finding of fact. As a result, "the findings of fact are not reviewable, and the only issue before us is whether the conclusions of law are supported by the findings. . . ." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005).

Defendant contends that the trial court erred when it concluded as a matter of law that the troopers possessed reasonable, articulable suspicion to continue to detain defendant after the purpose of the original stop had been addressed. Therefore, the question before this Court is whether the trial court's conclusion that the troopers possessed reasonable and articulable suspicion to continue to detain defendant after Trooper Davidson issued the warning ticket to Davis is supported by the trial court's findings of fact.

A law enforcement officer may stop and briefly detain a vehicle and its occupants if the officer has reasonable, articulable

suspicion that criminal activity may be afoot. Generally, the scope of the detention must be carefully tailored to its underlying justification. Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual. Where no grounds for a reasonable and articulable suspicion exist and where the encounter has not become consensual, a detainee's extended seizure is unconstitutional.

State v. Jackson, ___ N.C. App. ___, ___, 681 S.E.2d 492, 496 (2009) (internal quotations and citations omitted). "An investigatory stop must be justified by a *reasonable suspicion*, based on objective facts, that the individual is involved in criminal activity. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Huey*, ___ N.C. App. ___, ___, 694 S.E.2d 410, 412 (2010) (quoting *In re J.L.B.M.*, 176 N.C. App. 613, 619, 627 S.E.2d 239, 243 (2006)).

The trial court's findings indicate that Trooper Davidson initiated the stop of the Taurus because he felt the Taurus was following the FedEx truck too closely. Thus, the initial scope of the detention was limited to addressing that infraction. Defendant concedes that the initial stop of the Taurus was justified, but contends that the troopers possessed no reasonable, articulable suspicion at the time the purpose of that stop had been addressed to prolong defendant's detention and that the stop had not become consensual. Because we determine that the troopers possessed the reasonable, articulable suspicion necessary to extend the detention

of defendant after the purpose of the initial stop was complete, we do not address defendant's argument that the extension of the stop was not consensual.

In the instant case, the trial court's findings indicate that after the stop had been initiated, but before the warning was issued, the troopers discovered that the Taurus's Illinois license plate was either not on file or did not exist, that the driver, Davis, who was acting extremely nervous, had a South Carolina driver's license rather than an Illinois license, and that the group was unable to provide a valid registration for the Taurus. In addition, neither Davis nor defendant was able to provide more than a vague description of the owner of the Taurus. The trial court concluded that although defendant was seized after the warning ticket was issued, the seizure was justified because under the totality of the circumstances, the troopers possessed a reasonable, articulable suspicion that defendant was involved in criminal activity.

In support of his argument that his detention was unconstitutionally prolonged, defendant relies primarily on *State v. Myles*, 188 N.C. App. 42, 654 S.E.2d 752, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008) and *Jackson*. In both of these cases, this Court determined that law enforcement lacked the requisite reasonable suspicion to further detain the defendants after the purposes of the respective traffic stops had been fulfilled and that the detentions were not consensual; thus, in each case the prolonged stop was determined to be unconstitutional.

Myles, 188 N.C. App. at 51, 654 S.E.2d at 758; *Jackson*, ___ N.C. App. at ___, 681 S.E.2d at 497. The facts of *Myles* and *Jackson* are readily distinguishable from the instant case.

In *Myles*, the defendant-passenger and his driver were stopped for weaving, which caused the law enforcement officer to suspect the driver might be intoxicated. 188 N.C. App. at 45, 654 S.E.2d at 755. During the stop, the officer did not detect any evidence that the driver or the defendant were impaired, the license check revealed the driver possessed a valid license, and the officer did not observe any indication that contraband or weapons were present. *Id.* The only factor that arguably provided support for the officer's reasonable suspicion to extend the stop was the driver's nervousness, which this Court concluded was not sufficient, standing alone, to constitute reasonable suspicion. *Id.* at 49-50, 654 S.E.2d at 757-58. Furthermore, this Court noted that while the officer testified that defendant exhibited nervousness, defendant's nervousness did not manifest itself until after the original purpose of the traffic stop had already been completed; consequently, the *Myles* Court concluded that the trial court could not consider this fact to support the officer's reasonable suspicion. *Id.* at 51, 654 S.E.2d at 758.

In *Jackson*, the defendant-passenger, his driver, and another passenger were stopped because the registered owner of the vehicle, who matched the description of the driver, possessed an inactive license. ___ N.C. App. at ___, 681 S.E.2d at 494. The officer was able to confirm that the driver had a valid Kentucky driver's

license. *Id.* In addition, the officers searched the names of the three occupants of the vehicle and found no outstanding warrants for them. *Id.* However, after this investigation was complete, the officer questioned the driver about any potential contraband in the vehicle and eventually obtained consent to search the vehicle. *Id.* This Court held that because the original purpose of the stop had been addressed, and because there was nothing that occurred during the investigation of the driver's license that would give rise to a reasonable, articulable suspicion that either the driver or his passengers were involved in criminal activity, the extended seizure of the defendant was unconstitutional. *Id.* at ____, 681 S.E.2d at 497.

It is important to note that the officers in *Myles* and *Jackson* possessed absolutely no evidence that could give rise to a reasonable, articulable suspicion before the purpose of the initial stop had been completed. The troopers in the instant case were faced with a very different situation. After they initiated a valid stop of the Taurus, but before they had addressed the purpose of the stop, the troopers discovered that the Taurus's Illinois license plate was either not on file or did not exist. In addition, Davis acted extremely nervous, and no one was able to provide a valid registration for the Taurus. Finally, neither Davis nor defendant was able to provide more than a vague description of the owner of the Taurus. The totality of these circumstances, articulated in the trial court's findings of fact, support the trial court's conclusion that the troopers possessed

reasonable, articulable suspicion that the Taurus may have been involved in criminal activity before the initial purpose of the stop was complete.

Even after the warning ticket had been issued, the information possessed by the troopers provided the minimal level of objective justification necessary to seize the group until the troopers could determine ownership of the Taurus and/or how the group came to possess the Taurus. *See State v. Fisher*, 141 N.C. App. 448, 458, 539 S.E.2d 677, 684 (2000) (An officer may ask a limited number of questions to try to obtain information confirming or dispelling the officer's suspicions). During their investigation of these questions, Davis gave the troopers consent to search the Taurus, and that search led to the discovery of drugs in the Taurus.

Defendant challenges Davis's consent to search the Taurus, but does so only on the basis that it occurred during an illegal extended detention. Since it has been determined that the extended detention was permissible, Davis's consent cannot be vitiated on this basis. This assignment of error is overruled.

III. Conclusion

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6) (2008), we deem these assignments of error abandoned and need not address them. The trial court's findings of fact support its conclusion of law that the troopers possessed a reasonable, articulable suspicion that the Taurus may have been involved in criminal activity, prior to the completion of the

initial stop. Thus, the extended detention of defendant, during which drugs were discovered in the Taurus, was justified.

No error.

Judges MCGEE and GEER concur.

Report per Rule 30(e).