NO. COA10-181

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 201162

MARK ANTHONY WARMACK,
Defendant.

Appeal by defendant from judgment entered 5 October 2009 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

J. Clark Fischer for defendant-appellant.

HUNTER, Robert C., Judge.

Mark Anthony Warmack ("defendant") appeals from the judgment entered upon his plea of guilty to a charge of felony possession of marijuana, raising the sole issue that the trial court erred in denying his motion to suppress. After careful review, we affirm the order of the trial court denying the motion to suppress.

Background

On 14 July 2008, defendant was indicted for felony possession of marijuana. On 22 December 2008, defendant filed a motion to suppress evidence obtained as a result of an allegedly illegal search and seizure. The motion was heard in the trial court on 1

April 2009. Officer Steve Selogy with the Charlotte Police Department testified that on 7 January 2008, he received two complaints about drug activity at a particular apartment in Seneca Woods apartment complex. Officer Selogy and other officers went to the apartment and knocked on the door. Denise Taylor, defendant's girlfriend, answered the door. One of the officers asked if they could step in to ask some questions, and Ms. Taylor opened the door and invited them into the apartment. Officer Selogy stepped into the foyer which opened into the living room. He told her they were investigating complaints of drug activity and asked if defendant was home. She told him defendant was not home and that he was at a neighbor's residence. The apartment was small, and the officer could see into the kitchen. He asked Ms. Taylor if she could provide identification, and she replied that it was in the bedroom and began walking away as Officer Selogy followed.

When they walked through the kitchen and into a small hallway, Ms. Taylor told Officer Selogy that she did not want him to come any further, that he would need a warrant if he wanted to go further, and he stopped. Officer Selogy stated at this point he immediately smelled a strong odor of raw marijuana, which he stated is distinct in smell from smoked marijuana. He informed Ms. Taylor of his observation and stated that with the odor, he would have probable cause to get a warrant.

Officer Selogy heard some movement nearby, and called out, "Mark come on out . . . we know you're back there, come on out." He called out a few times, and then defendant stepped out of the

bathroom. Officer Selogy testified that he smelled a strong odor of "smoked marijuana" coming from defendant's person. The officer asked defendant if he lived in the apartment, and defendant stated he lived there with Ms. Taylor. Officer Selogy asked defendant if he had any marijuana, and defendant answered "yes" and pointed to a stacked washer and driver about five to six feet from where they were standing. Another officer retrieved 70 grams of marijuana from the dryer. The officers arrested defendant.

Ms. Taylor also testified at the suppression hearing. She stated that she answered a knock on the door to find Officer Selogy standing in the hallway. He asked her for identification, and she closed the door and walked to the bedroom. While she was looking through her purse, she looked up and saw Officer Selogy standing in the kitchen. She told him she never gave him permission to come in, and told him to leave unless he had a warrant. At that point the officer "became frantic saying that he smelled marijuana, and that that was his probable cause." Other officers came in, and Ms. Taylor told them she did not give them permission to be there, or to search the apartment.

Based on the evidence presented at the suppression hearing, the trial court made the following findings of fact:

> 3. That, Officers conducted a "knock and talk" at the address in responding to two complaints that a Mark Warmack had been selling marijuana at that address.
>
> 4. That, a Denise Taylor answered the door.
>
> 5. That, Officer Selogy told Ms. Taylor why they were there and asked if they could come

in and Ms. Taylor responded by saying "yeah come on in."

6. That, Officer Selogy heard noises coming from the back of the apartment and asked Ms. Taylor if Mr. Warmack was there.

7. That, Ms. Taylor said that Mr. Warmack was not there, but that he was at the neighbor's house.

8. That, Officer Selogy asked Ms. Taylor if she had any identification.

9. That, Ms. Taylor said it was in the bedroom and she needed to get it and she started walking through the kitchen to the bedroom.

10. That, Officer Selogy followed her through the kitchen to a hallway.

11. That, at that point, Ms. Taylor told Officer Selogy to come no further and asked Officer Selogy to leave unless he had a warrant.

12. That, Officer Selogy smelled a strong odor of raw marijuana coming from the hallway and told Ms. Taylor that he smelled marijuana and that officers would not be leaving.

13. That, after Officer Selogy smelled the raw marijuana, he was preparing to secure the residence to obtain a Search Warrant to seize the marijuana.

14. That, Officer Selogy then heard noises from the back of the apartment and Officer Selogy called for the Defendant to come out from the back.

15. That, Mark Warmack then came from the bathroom in the back and Officer Selogy smelled a strong odor of burnt marijuana.

16. That, Officer Selogy asked the Defendant if he had marijuana and the Defendant said "I smoke some and it is up there."

> 17. That, the Defendant pointed to a dryer that was five to six feet away from Officer Selogy.
>
> 18. That, Officer Hairston then opened up the dryer and pulled out a book bag that contained approximately 70 grams of marijuana.

From the facts entered, the trial court concluded that Ms. Taylor gave the officers consent to enter the home, and that "when Officer Selogy smelled the strong odor of marijuana in the home, the marijuana had been placed in plain view of Officer Selogy." The trial court denied defendant's motion to suppress.

Thereafter, defendant pled guilty to felony possession of marijuana, while preserving his right to appeal from the denial of his motion to suppress. The trial court imposed a five to six months suspended sentence and placed defendant on supervised probation for 24 months. Defendant appeals.

Analysis

Defendant contends that the trial court erred in denying his motion to suppress based on a conclusion that the officers had consent to be in the apartment when Officer Selogy smelled the marijuana. Defendant contends that the evidence shows that any consent by Ms. Taylor to enter the apartment was limited in scope and did not extend to the entire apartment, and any consent was expressly revoked when she told Officer Selogy to leave. He also contends that the trial court mistakenly relied on the "plain view" doctrine since the doctrine may only be invoked where a police officer is engaged in a lawful investigation, which he contends was not the case here where consent was limited and had been revoked. Finally, defendant asserts that the trial court made no findings

regarding exigent circumstances such as a concern for the officers' safety or destruction of evidence which would obviate the need for a warrant, and no such circumstances existed. We are not persuaded by defendant's arguments.

On appeal, our

> review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly 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. If so, the trial court's conclusions of law are binding on appeal.

State v. Veazey, __ N.C. App. __, __, 689 S.E.2d 530, 532 (2009) (internal citations and quotation marks omitted), *disc. review denied*, 363 N.C. 811, __ S.E.2d __ (2010). "Where a defendant fails to challenge the findings of fact in an order denying a motion to suppress, this Court's review is 'limited to whether the trial court's findings of fact support its conclusions of law.'" *State v. Little*, __ N.C. App. __, __, 692 S.E.2d 451, 454 (2010) (quoting *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000)). Here, defendant does not specifically challenge any of the trial court's eighteen findings of fact; therefore, the findings of fact are binding and we review the order to determine whether the findings support the conclusions of law.

"The Fourth Amendment to the Constitution of the United States and Section 20 of Article I of the North Carolina Constitution prohibits unreasonable searches and seizures." *State v. Sanchez*,

147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). Although a warrant based on probable cause is generally required for a search, it is well established that an exception to this rule exists when the search is based upon lawful consent. *State v. Stone*, 179 N.C. App. 297, 304, 634 S.E.2d 244, 249 (2006), *aff'd*, 362 N.C. 50, 653 S.E.2d 414 (2007). Moreover, N.C. Gen. Stat. § 15A-221(a) (2009) expressly authorizes warrantless searches and seizures "if consent to the search is given." This statute defines "consent" as "a statement to the officer, made voluntarily . . ., giving the officer permission to make a search." N.C. Gen. Stat. § 15A-221(b). This Court has further held that "the use of nonverbal conduct intended to connote an assertion is sufficient to constitute a statement" within the meaning of consent pursuant to N.C. Gen. Stat. § 15A-221(b). *State v. Graham*, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 685, 578 S.E.2d 315 (2003).

The trial court specifically determined from the evidence that consent was granted for the officers to enter the apartment, and we hold that the evidence is sufficient to support this conclusion of law. Although defendant contends that the officer exceeded the scope of consent by proceeding into the apartment, there is no evidence that Ms. Taylor limited the scope of her permission prior to asking the officer not to follow her into her bedroom. When they passed through the kitchen and reached the hallway, Ms. Taylor did state that the officer needed to stop and leave unless he had

a warrant. Up to this point, Officer Selogy had consent to be in the apartment, and the trial court did not err in concluding that Ms. Taylor gave the officers consent to be in the apartment.

At the time that Ms. Taylor sought to prevent Officer Selogy from proceeding further, the officer immediately smelled a strong odor of marijuana, at which time the "plain view" doctrine became relevant. This doctrine may be explained as follows:

> One exception to the warrant requirement is the plain view doctrine, under which police may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband.

State v. Graves, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999). Defendant contends that Officer Selogy was only able to smell the marijuana because he had unlawfully exceeded the scope of consent to be in the apartment, and that the plain view doctrine does not apply. In support of his contention, defendant relies on *State v. McBennett*, 191 N.C. App. 734, 664 S.E.2d 51 (2008), in which this Court held that a police officer's unauthorized entry into a hotel room precluded application of the plain view doctrine.

McBennett is inapposite to this case since we have already determined that the officers were authorized to be in the apartment. Ms. Taylor's request for the officer to leave was made right when Officer Selogy smelled the marijuana. "Plain smell of drugs by an officer is evidence to conclude there is probable cause for a search." *State v. Downing*, 169 N.C. App. 790, 796, 613

S.E.2d 35, 39 (2005). Here, Officer Selogy was in a place where he had a right to be, he discovered the evidence of marijuana inadvertently by detecting the odor in the air, and the smell was sufficient to alert him to the presence of illegal drugs. *See State v. Stover*, __ N.C. App. __, __, 685 S.E.2d 127, 132 (2009) (stating that "an officer's olfactory identification of the drug is equally reliable" as visual identification). Therefore, based on the trial court's uncontested findings, we hold that the trial court did not err in concluding that "the marijuana had been placed in plain view of Officer Selogy."

Based on the trial court's findings and established case law, we conclude that the findings of fact support the trial court's conclusions of law, and the trial court did not err in determining that consent was given, and that the plain view doctrine applied in this case. Therefore, defendant's remaining argument about the lack of exigent circumstances has no effect on our ultimate conclusion that the motion to suppress was properly denied. Accordingly, the trial court's order denying the motion to suppress is affirmed.

Affirmed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).