NO. COA10-296

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Wake County
Nos. 07 CRS 60136, 75096

ANTOINE JARROD WATKINS

Appeal by defendant from judgment entered 2 November 2009 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 25 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Stanley G. Abrams, for the State.

James H. Monroe for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from the judgment entered upon his plea of guilty to possession of cocaine and to having attained habitual felon status. Defendant argues that one of the findings of fact contained in the trial court's order denying his motion to suppress is not supported by the evidence, and that the remaining findings of fact do not support the trial court's conclusion that officers had a reasonable suspicion to seize him. We affirm.

At about 1:00 a.m. on 24 August 2007, defendant was sitting in the driver's seat of his parked pickup truck in the parking lot of a Raleigh convenience store. Officers Brent Howard and S.R. Best,

as well as several other officers, were patrolling the area in an unmarked white van. Officer Howard had substantial experience patrolling the area, had made many drug arrests there, and testified that it was known as a "high drug" area. The store was closed, but the chain that normally blocked the entrance to the parking lot had been removed. A "no trespassing" sign was posted on the store's door.

When the officers noticed defendant in the driver's seat of the truck parked at the closed convenience store, they pulled into the parking lot and parked behind the truck. Three officers got out of the van, and defendant got out of the truck and began quickly walking away from the officers. Officer Best said, "Hey, hold up. Let me talk to you for a second." At that point, defendant put an object in his mouth with his right hand and began to drink water. Both Officer Howard and Officer Best, based on their experience in drug interdiction, believed that defendant's actions were consistent with someone trying to conceal drugs by swallowing them. Officer Howard estimated that he had seen suspects attempt to conceal drugs in this manner "probably a hundred times."

After defendant placed the object in his mouth and began to drink the water, Officer Best said, "Police, stop," but defendant continued to walk away. The officers caught up to defendant and detained him by grabbing him by his arms. Defendant began to spit the water out of his mouth, and the officers observed a small, plastic bag that appeared to contain cocaine in the puddle of water

that defendant spit out of his mouth. After they confirmed that the substance in the bag was cocaine, the officers arrested defendant. Later, defendant admitted that he was swallowing narcotics, but claimed that the drug was marijuana rather than cocaine.

On 16 October 2009, defendant filed a written motion to suppress any evidence obtained as a result of the 24 August 2007 seizure. Defendant claimed that officers lacked a reasonable suspicion that he was involved in any illegal activity at the time they seized him. The matter came on for a hearing on 2 November 2009.

At the suppression hearing, the State offered testimony from Officer Best and Officer Howard. Officer Best was cross-examined on the issue of whether there were "no trespassing signs" posted at the convenience store:

> Q: I believe you testified in response to Mr. Wilson's questions you weren't sure if the no trespassing sign was up there as of August of '07?
>
> A: No, that was the Raleigh Police Department's prepared sign. To my knowledge there have always been signs there. I was assigned as a beat officer there as beat 2402 a number of years before I was corporal. There have always been no trespassing signs on the property. Sometimes the ones on the gates are removed, but the building has always had a no trespassing sign.

At the conclusion of the hearing, the trial court announced in open court that it had denied the motion to suppress, and on 29 December 2009, the trial court entered a written order denying defendant's motion to suppress. In its written order, the trial court found

that "[p]rior to August 24, 2007, Officer Best had seen a 'No Trespassing' sign posted outside the store on several occasions and believed the sign to have been there and visible on August 24, 2007." The trial court concluded that, based on the totality of the circumstances, officers had a reasonable suspicion that defendant was engaged in criminal activity when they seized him.

Following the trial court's oral denial of his motion to suppress, defendant pled guilty to possession of cocaine and to having attained habitual felon status. In return for defendant's plea, the State agreed to a mitigated-range sentence of 80 to 105 months imprisonment. Defendant preserved his right to appeal the denial of his motion to suppress as a condition of his plea. The trial court imposed a mitigated-range term of 80 to 105 months imprisonment. Defendant gave oral notice of appeal at the conclusion of the plea hearing.

We address defendant's two arguments on appeal together, because they are both related to the denial of his motion to suppress. Defendant contends that the trial court's finding of fact number six, specifically that Officer Best observed a "no trespassing" sign at the store, is not supported by the evidence, and that the remaining findings of fact do not support the trial court's conclusion that the officers had a reasonable suspicion to seize him. We disagree.

"'The scope of appellate review of an order [concerning suppression of 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. Bell*, 156 N.C. App. 350, 353, 576 S.E.2d 695, 697 (2003)(quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)(citations omitted)).

"Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619-20. "If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions on appeal." *State v. Pickard*, 178 N.C. App. 330, 333-34, 631 S.E.2d 203, 206 (citations omitted), *appeal dismissed and disc. review denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

Here, we hold that Officer Best's testimony supports the trial court's finding that Officer Best saw a "no trespassing" sign posted at the store both on, and prior to, 24 August 2007. In response to defendant's suggestion that there was not a "no trespassing" sign posted at the convenience store on 24 August 2007, Officer Best plainly stated, "[t]o my knowledge there have always been signs there. I was assigned as a beat officer there as beat 2402 a number of years before I was corporal. There have always been no trespassing signs on the property. Sometimes the

ones on the gates are removed, but the building has always had a no trespassing sign." Officer Best's testimony thus supports the trial court's finding that Officer Best observed a "no trespassing" sign at the store.

Even assuming, *arguendo*, that the finding regarding the "no trespassing" sign is not supported by the evidence, we conclude that the trial court's remaining findings of fact support its conclusion that officers had a reasonable suspicion to seize defendant, because the seizure did not rely solely on suspicion that defendant had committed the offense of trespassing.

The trial court's remaining unchallenged findings of fact are "'presumed to be correct'" by this Court on appeal. *Pickard*, 178 N.C. App. at 334, 631 S.E.2d at 206 (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)(citing *State v. Payne*, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991)).

An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct "would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L.

Ed. 2d 565, 569 (1988)). In reviewing whether a particular police encounter constitutes a seizure, a reviewing court must consider the totality of the circumstances. *Id.*

"'No one is protected by the Constitution against the mere approach of police officers in a public place.'" *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973) (quoting *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. 1972)). "[P]olice officers may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate." *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994) (citations omitted). "Such encounters are considered consensual and no reasonable suspicion is necessary." *Id.*

Here, applying the totality of the circumstances approach, we conclude that the officers did not seize defendant, within the meaning of the Fourth Amendment, until they ordered him to stop and physically detained him. Initially, when the officers approached defendant's truck, he began to walk away. At that point, Officer Best asked defendant, "Hey, hold up. Let me talk to you for a second." Officers had in no way physically restrained defendant or commanded him to stop, and defendant was free to continue to walk away from the officers, which he did. Accordingly, the officers had not yet seized defendant.

As defendant continued to walk away from the officers, they saw him put his right hand up to his mouth and quickly drink water.

At this point, officers ordered defendant to stop and then physically apprehended him. Thus, only at this point, when defendant had been ordered to stop and physically restrained by officers, was he seized for Fourth Amendment purposes, and officers initiated an investigatory stop.

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "*Terry v. Ohio* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity." *State v. Hughes*, 353 N.C. 200, 206-07, 539 S.E.2d 625, 630 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

Our Supreme Court has held:

> A court must consider "the totality of the circumstances - the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). 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. *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979).

Watkins, 337 N.C. at 441-42, 446 S.E.2d at 70.

Here, we hold that the evidence and the trial court's findings of fact support the trial court's conclusion that officers had a

reasonable suspicion to support their investigatory stop of defendant. Officers observed defendant sitting alone in his truck at 1:00 a.m., parked in the parking lot of a closed convenience store in an area known for drug activity. When officers approached defendant, he walked away from them. After officers tried to engage defendant in conversation, they observed him attempt to swallow items in a manner that officers recognized, based on their experience in drug interdiction, as a means drug suspects employed to conceal evidence. At this point, a reasonable officer would have had reason to believe that criminal activity was afoot, and to detain defendant. Only after that point did officers discover the incriminating evidence that led to defendant's arrest and conviction.

Accordingly, we hold that the trial court properly denied defendant's motion to suppress the evidence discovered as a result of his seizure, and we affirm the judgment.

Affirmed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).