NO. COA10-5

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 06 CRS 251612-15

DANIEL WAYNE FORSE

Appeal by defendant from judgment entered 25 August 2009 by Judge Joe Crosswhite in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 July 2010.

Attorney General Roy Cooper, by Assistant Attorney General John R. Green, Jr., for the State.

North Carolina Prisoner Legal Services, Inc., by Sarah Jessica Farber, for defendant-appellant.

BRYANT, Judge.

Defendant Daniel Wayne Forse appeals from the judgment entered after he pled guilty to possession with intent to sell or deliver cocaine, possession of drug paraphernalia, possession of marijuana, and possession of a schedule IV controlled substance. We affirm.

Facts

On 23 December 2008, defendant filed a written motion to suppress any physical evidence seized as a result of an arrest and search of his person conducted on 4 November 2006. The motion claimed that defendant's seizure was the result of an illegal arrest that was not supported by probable cause, and that any

evidence seized as a result of the search was tainted. The motion came on for hearing on 25 August 2009.

At the hearing, the State's evidence showed that on 4 November 2006, special agents Christopher Kluttz and Matthew Davis of the North Carolina Alcohol Enforcement Division ("ALE") were in an unmarked patrol car observing a Mecklenburg County gas station and convenience store because of complaints of alcohol sales to minors and narcotics activity in the store's parking lot. Agent Kluttz testified that he had personally made several prior felony arrests in the same parking lot. The agents were in plain clothes, but were wearing their bullet-proof "attack vests" marked "police."

At about 12:20 a.m., a Mustang with a female driver and passenger pulled into the parking lot. The Mustang's passenger went into the store for about ten minutes. When the passenger returned, the Mustang's driver pulled around to the side of the building and re-parked. In Agent Kluttz's experience, the activity of lingering in the parking lot after going into the store for only a short time was consistent with drinking in the car or a drug transaction in progress.

The agents moved their own car to get a better view of the Mustang, and about two minutes later a Toyota parked a few spots away from the Mustang. Defendant was driving the Toyota, which also contained a male passenger. After defendant parked the Toyota, defendant's passenger went inside the store. The Mustang's passenger then immediately followed him inside the store. Agent

Kluttz took off his vest and followed the two passengers into the store.

Inside the store, agent Kluttz saw the two passengers talking to each other in front of the beer cooler. Defendant's passenger asked the Mustang's passenger what she wanted to drink, and she replied that she did not know. The two passengers also talked about smoking marijuana. The conversation lasted about two or three minutes, but neither passenger ever removed anything from the cooler. The conversation ended when defendant's passenger received a phone call and walked out of the store. The Mustang's passenger followed him out the door. Defendant never left his car or went inside the store.

On the way out of the store, defendant's passenger made eye contact with Agent Kluttz, and Agent Kluttz believed that he had been identified as a law enforcement officer. Outside the store, defendant's passenger began speaking to the driver of another car, and the Mustang's passenger got back into the Mustang. When Agent Kluttz approached defendant's passenger and said, "Police, I need to talk to you" defendant's passenger jumped into the other car and fled the parking lot. Agent Kluttz told Agent Davis to approach defendant.

When the agents approached defendant's car, they saw an open beer can in the center console and could smell marijuana. Officers asked defendant to get out of the car, and he complied. Agent Kluttz detected the odor of alcohol coming from defendant. As Agent Davis conducted a pat-down search of defendant, he discovered

a metal bulge that he thought might be a gun, but which the agents discovered was digital scales. Agent Kluttz then found a case containing two plastic baggies filled with white powder in defendant's pocket. Agent Kluttz believed the white powder was cocaine.

Defendant presented no evidence at the suppression hearing. After hearing the arguments of counsel, the trial court rendered an oral order denying the motion to suppress. The trial court made numerous findings of fact, and concluded:

> Based upon the foregoing findings by a preponderance of the evidence, the Court concludes as a matter of law that from the totality of the circumstances, including the conversation overheard in the store and the fact that the other individuals fled, creates a reasonable and articular [sic] suspicion that illegal activity may be occurring. Also, given the fact that the other vehicle fled, Special Agent Davis was correct in approaching the Defendant's vehicle and asking the Defendant to step out of his vehicle. Upon exiting the vehicle, both officers testified that they observed a 24 ounce can of malt beverage and smelled the odor of alcohol, and the Court finds that the officers had probable cause to arrest the Defendant after approaching the vehicle and otherwise seeing both the malt beverage and a smell of alcohol [sic].

After the trial court announced its ruling, defendant requested that the trial court add or amend several findings of fact. Defendant requested that the findings indicate that the store was not in a high crime area, but rather in an area known for illicit alcohol sales; that the agents asked defendant to get out of his car, rather than that defendant voluntarily got out of the car; that the agents could not tell whether the beer can in

defendant's car was full; and, that one of the agents was wearing a bullet-proof vest and both were carrying guns, badges, night sticks, and other equipment. The trial court agreed to amend its findings, and at the State's request, also added a finding that the agents detected the odor of marijuana when they approached defendant's car.

After the denial of the motion to suppress, defendant agreed to plead guilty to possession of cocaine with intent to sell or deliver, possession of marijuana, possession of a schedule IV controlled substance, and possession of drug paraphernalia. All the charges were consolidated into one judgment, and the trial court imposed a term of 5 to 6 months imprisonment. As a condition of his plea, defendant specifically reserved his right to appeal the denial of his motion to suppress.

On appeal, defendant contends that (I) the trial court erred by orally denying his motion to suppress evidence, and (II) the evidence did not support the trial court's conclusions that agents had a reasonable suspicion or probable cause to seize, search, and arrest him.

I

Defendant argues the trial court committed prejudicial error by failing to reduce the oral order denying his motion to suppress to written form. We disagree.

In ruling upon a defendant's motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions

of law." N.C. Gen. Stat. § 15A-977(f)(2009). "The judge is the finder of fact at the hearing on a motion to suppress evidence and must make written findings of fact and conclusions of law." *State v. Grogan*, 40 N.C. App. 371, 375, 253 S.E.2d 20, 23-24 (1979). "Findings and conclusions are required in order that there may be a meaningful appellate review of the decision." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984). "[O]ur Supreme Court has held that '[i]f there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows.'" *State v. Toney*, 187 N.C. App. 465, 469, 653 S.E.2d 187, 189-90 (2007)(quoting *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995)).

After reviewing the evidence presented at the suppression hearing, we conclude that there was no material conflict in the evidence. The ALE agents were the only witnesses to testify at the suppression hearing, and their testimony was consistent in every significant detail. The trial court's oral findings of fact reflect the uniformity of the State's evidence. The purported evidentiary conflicts cited by defendant on appeal, including the suggestion that the store was a scene of illegal alcohol sales rather than a high crime area, that the agents could not tell whether the open beer can was full, and that the agents wore identifying attire during the incident, were not material to the outcome of the motion, and were addressed by the trial court when it revised its oral findings at defendant's request. Further, the

trial court's oral recitation of its findings of fact and conclusions of law were recorded in a transcript of the proceedings and are part of the appellate record and available for review. Accordingly, this argument is without merit.

II

Defendant's remaining arguments are that the evidence did not support the trial court's conclusions that officers had a reasonable suspicion to seize and search him or probable cause to arrest him. We disagree.

In reviewing a trial court's order on a motion to suppress, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). After reviewing the findings of fact, we must determine whether they support the trial court's conclusions of law. *See State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000). "[T]he trial court's conclusions of law are reviewed de novo and must be legally correct." *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (citing *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *disc. review denied*, 361 N.C. 177, 640 S.E.2d 59 (2006).

The first component of defendant's argument is that the trial court's conclusion that "the totality of the circumstances, including the conversation overheard in the store and the fact that the other individuals fled, creates a reasonable and articular

[sic] suspicion that illegal activity may be occurring" is not supported by the evidence, and is an incorrect application of the relevant legal principles. We disagree.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)(quoting *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)). An investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

In evaluating reasonable suspicion,"the essence of all that has been written is that the totality of the circumstances - the whole picture - must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 629 (1981). Otherwise legal conduct, including flight from an officer, can support a reasonable suspicion when considered among the totality of the circumstances. *See State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992). The conduct

of third parties present at the scene is also relevant when analyzing the totality of the circumstances. *See State v. Mello*, ___ N.C. App. ___, ___, 684 S.E.2d 483, 492 (2009)(citing *Butler*, 331 N.C. at 234, 415 S.E.2d at 723)).

In this case, in evaluating the totality of the circumstances, the agents' initial stop of defendant was justified by a reasonable suspicion based on objective facts. The evidence demonstrates that while on enforcement duty, ALE agents Kluttz and Davis saw a Mustang park in the lot of a store known for drug activity and underage alcohol sales. Agent Kluttz had made numerous previous arrests in the same lot, and observed the Mustang's passenger enter the store. When the Mustang's passenger quickly returned from the store, the Mustang moved to a different part of the lot and then remained parked. A short time later, defendant parked a few spots away from the Mustang and defendant's passenger entered the store, followed shortly thereafter by the Mustang's passenger. As the two passengers stood in front of the store's beer cooler, Agent Kluttz observed them speak to each other about buying alcohol and using marijuana. When the passengers left the store, Agent Kluttz approached defendant's passenger and identified himself as a law enforcement officer. Defendant's passenger jumped into another car and fled the parking lot. Only at that point, after agents had observed at least three distinct instances of suspicious activity in an area known for drug and alcohol crime, did the agents approach defendant's car. Considering the totality of the circumstances, we conclude that the trial court properly found that

the agents had a reasonable suspicion that defendant was involved in criminal activity.

Defendant's remaining contention is that the trial court's conclusion that "officers had probable cause to arrest the Defendant after approaching the vehicle and otherwise seeing both the malt beverage and a smell of alcohol" is incorrect because it bases the finding of probable cause on factors only observed by the officers after they seized defendant. This argument is without merit.

A law enforcement officer may arrest a suspect without a warrant if he has probable cause to believe the suspect has committed a felony. N.C. Gen. Stat. § 15A-401(b)(2)(a) (2009). Our Supreme Court has held:

> A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.

State v. Shore, 285 N.C. 328, 335, 204 S.E.2d 682, 686-687 (internal citations omitted), *affirmed*, 285 N.C. 328, 204 S.E.2d 682 (1974).

As we previously discussed, the totality of the circumstances provided the agents with a reasonable suspicion to conduct a *Terry*-style stop and search of defendant. Once a vehicle has been lawfully stopped, police officers may order the driver to exit the vehicle without violating the Fourth Amendment because the

officer's interest in safety outweighs the additional intrusion of requiring a driver to exit his vehicle. *See Arizona v. Johnson*, ___ U.S. ___, ___, 172 L. Ed. 2d 694, 702 (2009). As the trial court found, the agents observed the open alcohol container and detected the odor of drugs and alcohol while conducting their initial investigation. Thus, the trial court's conclusion that the agents had probable cause to arrest defendant once they observed the open container and detected the odor of drugs and alcohol was proper. Defendant's argument is without merit, and we affirm the trial court's oral order denying defendant's motion to suppress.

Affirmed.

Judges HUNTER, Robert C., and STEELMAN concur.

Reported per Rule 30(e).