An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-533

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Guilford County
No. 09 CRS 77885

DERRICK STEPHEN TYSON

Appeal by defendant from judgment entered 16 December 2009 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 28 October 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the State.

Faith S. Bushnaq, for defendant-appellant.

JACKSON, Judge.

Derrick Stephen Tyson ("defendant") appeals a 16 December 2009 order denying his motion to suppress evidence obtained pursuant to a warrantless search. For the reasons stated herein, we remand.

Prior to April 2009, Greensboro police received information from two confidential informants that illegal substances were being sold from a house on Oliver Street in Greensboro ("the house"). These informants had provided reliable information in the past. On 17 April 2009, a "trash pull" was conducted at the house, yielding marijuana and cocaine residue.

On 29 April 2009, Detective Justin Blanks ("Detective Blanks") observed a green Ford Explorer ("the Explorer"), occupied by one man in the driver's seat, idling at the curb near the house in question. Detective Blanks then observed a person, later identified as defendant, run from the house and get into the Explorer, which pulled away from the curb. Detective Blanks believed that this behavior was consistent with illegal drug activity and followed the Explorer to a Food Lion parking lot at the intersection of Randleman Road and Glendale Drive. The Explorer drove around the perimeter of the parking lot, a maneuver that Detective Blanks said was indicative of "counter-surveillance." The Explorer parked next to a gray or silver pickup truck; defendant then exited the Explorer and approached the driver's side window of the pickup truck. Detective Blanks observed "[a] brief hand-to-hand [exchange] . . . and less than 30 seconds later, he [defendant] walked back and reentered the passenger side of the Explorer." Believing that he had witnessed a drug transaction, Detective Blanks contacted Detective E. A. Goodykoontz ("Detective Goodykoontz") and Detective Marsh ("Detective Marsh") for assistance.

Based upon Detective Blanks's information, Detectives Marsh and Goodykoontz were able to find the Explorer as it exited a gas station parking lot. Detective Goodykoontz observed that the driver of the Explorer was not wearing a seatbelt and initiated a traffic stop. Detective Marsh approached the driver of the Explorer and asked him to step out of the vehicle. Detective

Goodykoontz approached defendant and asked him to step out of the vehicle. Detective Goodykoontz asked defendant if he had any weapons, and defendant replied, "No." Detective Goodykoontz believed that it was possible for defendant to have a weapon, so he asked permission to "check." Defendant raised his hands and said, "Go ahead."

Prior to beginning the search, Detective Goodykoontz saw "a bulge in each [front pocket of defendant's pants.]" Detective Goodykoontz testified that, when he placed his hand on defendant's left front pocket, he was "unsure" as to what was in it. When he "opened [the pocket] up . . . to make sure that there wasn't a hard item in there[,]" he "observed an extreme[ly] large amount of cash . . . wadded up in that pocket." The total was later determined to be approximately $2,328.00. Detective Goodykoontz then felt the outside of the right front pocket and testified that the item inside "kind of gave way and kind of gave a cushiony hit to it[.]" Based upon that consistency, Detective Goodykoontz believed that the pocket contained "illegal narcotics." Detective Goodykoontz testified that he "pressed" defendant's pocket, rather than "manipulated" it.

Upon opening the pocket, Detective Goodykoontz discovered "a plastic bag that had white powder substance in it" that later was determined to be approximately two ounces of cocaine. Detective Goodykoontz handcuffed defendant. Detective Goodykoontz then asked defendant, "What is it, about two ounces?" and defendant replied, "Yeah, about."

On or about 15 June 2009, defendant was indicted on three counts: trafficking cocaine by possession, pursuant to North Carolina General Statutes, section 90-95(h)(3); trafficking cocaine by transportation, pursuant to North Carolina General Statutes, section 90-95(h)(3); and possession with intent to sell or distribute cocaine, pursuant to North Carolina General Statutes, section 90-95(a).

On 26 October 2009, defendant moved to suppress as evidence the illegal drugs. On 16 December 2009, the trial court denied the motion to suppress, concluding that the search "was not unreasonable or in violation of the Fourth Amendment." On the same day, while expressly reserving his right to appeal the denial of the motion to suppress, defendant entered an *Alford* plea. *See N.C. v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). Defendant was sentenced to between thirty-five and forty-two months in prison. He now appeals.

Defendant first argues that the trial court erred by applying an incorrect legal standard in its review of his motion to suppress. We agree.

When we review a ruling on a motion to suppress, "[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. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001)) (internal quotation marks omitted).

In some instances in which a trial court has applied an incorrect legal standard, our courts have remanded the issue for reconsideration pursuant to the correct standard. *See, e.g.*, *Buchanan*, 353 N.C. at 339–40, 543 S.E.2d at 828 ("The trial court in the instant case mistakenly applied the broader 'free to leave' test in determining whether defendant was 'in custody' for the purposes of *Miranda*. We therefore remand the case to the trial court for a redetermination of whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest."); *State v. Williams*, 195 N.C. App. 554, 561, 673 S.E.2d 394, 398–99 (2009) ("Where, as here, the trial court mistakenly applies an incorrect legal standard in determining whether a defendant's constitutional rights have been violated for purposes of a motion to suppress, the appellate court must remand the matter to the trial court for a 'redetermination' under the proper standard.") (citation omitted). However, in other instances, we simply have applied the correct legal standard in order to uphold the trial court's decision. *See, e.g.*, *State v. Barnhill*, 166 N.C. App. 228, 231, 601 S.E.2d 215, 217 ("The standard the trial court applied, the reasonable suspicion standard, does not apply here[.] . . . Thus, we apply the probable cause standard to the facts of this case to determine if Officer Malone had sufficient justification to stop defendant's vehicle."), *disc. rev. denied*, 359 N.C. 191, 607 S.E.2d 646 (2004).

The Fourth Amendment to the United States Constitution enjoins ". . . unreasonable searches and seizures," unless supported by "probable cause[.]" U.S. Const. amend. IV. The "plain feel" doctrine is an exception to the rule prohibiting warrantless searches. *See State v. Briggs*, 140 N.C. App. 484, 489, 536 S.E.2d 858, 861 (2000). It applies when a police officer has a lawful right to frisk a suspect, detects an item that is immediately apparent as contraband in the course of his search, and therefore, has a legal right to access the contraband. *Id.* In reviewing motions to suppress evidence, this Court has held that "in order for the seizure of the contraband . . . to be constitutional under the plain feel doctrine, the trial court [is] required to determine that the officer had probable cause – *not reasonable suspicion* – to believe that the item . . . was contraband." *Williams*, 195 N.C. App. at 561, 673 S.E.2d at 398 (emphasis added).

In the instant case, the only case law cited in the trial court's order related to the reasonable suspicion required for an officer to initiate a weapons frisk. The trial court then set forth the facts of defendant's case and concluded that "[t]he search of the defendant was not unreasonable or in violation of the Fourth Amendment." At no point in its three-page order does the trial court recite the phrase "probable cause," even though, with respect to the "plain feel" doctrine, the Fourth Amendment requires probable cause. *See Williams*, 195 N.C. App. at 561, 673 S.E.2d at 398. Accordingly, we hold that the trial court improperly applied the reasonable suspicion standard in denying defendant's motion to

suppress, and we remand this case to the trial court for determination of whether Officer Goodykoontz had probable cause to seize the cocaine.

Because we remand this case to the trial court for application of the proper standard, we do not address defendant's second argument — that the seizure of the cocaine was illegal pursuant to the "plain feel" doctrine.

Remanded.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).