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NO. COA11-170
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v.	Forsyth County
	Nos. 08 CRS 59714
JUSTIN SEAMSTER,	08 CRS 59736
Defendant.	10 CRS 447

Appeal by defendant from judgments entered 27 October 2010 by Judge Ed Wilson in Forsyth County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the State.

Jon W. Myers for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Justin Seamster appeals from the judgments entered on 27 October 2010 after he pled guilty to trafficking in opium, possession with intent to sell and deliver an opium derivative, possession with intent to sell and deliver marijuana, maintaining a dwelling place for the purpose of storing or selling a controlled substance, possession of a firearm by a felon, and having attained the status of a habitual

felon. Defendant argues on appeal that: (1) the trial court erred in failing to enter a written order denying his motion to suppress, and (2) the trial court erred in denying his motion to suppress the evidence uncovered from an unlawful search and seizure of defendant's person and his apartment. After careful review, we reverse and remand this case to the trial court for entry of written findings of fact.

Background

The State's evidence at the motion to suppress hearing tended to establish the following facts: On 3 September 2008, Deputy Chris Leonard and Deputy J.D. Sloan of the Forsyth County Sheriff's Office were sitting outside of a Sheetz gas station while on a break from their patrol duties. According to Deputy Leonard's testimony, Holly Farrington, defendant's girlfriend, sat down at the table with the deputies and told them that defendant had recently assaulted her at his home. She also informed the deputies that defendant was on probation and in possession of a pound of marijuana, an ounce of cocaine, and a gun.

The deputies drove to defendant's home, but he was not there so they waited for him in the parking lot. Soon thereafter, defendant drove into the parking lot on a

motorcycle. He approached the deputies and began discussing the alleged assault on Ms. Farrington. Defendant claimed that there was a "'disturbance'" but that Holly was the "'aggressor.'" Deputy Leonard asked defendant if he had any drugs or weapons on his person and defendant stated that he did not. Defendant then refused to consent to a search of his motorcycle. Deputy Leonard again asked defendant if he had any weapons on his person and defendant stated: "'Fuck it. You're going to find it anyway.'" Defendant pulled out a bag of pills from his pocket. Deputy Leonard asked defendant if he had anything else and defendant pulled out a "wad" of dollar bills.

Defendant denied having contraband in his apartment when questioned by Deputy Leonard in the parking lot. Deputy Leonard asked defendant if he would allow the deputies to search his apartment and defendant responded: "'I don't know why I should let you.'" Deputy Leonard asked defendant: "Aren't you supposed to submit to all searches while on probation?" Defendant indicated his belief that he only had to allow his probation officer to search his home, but he was not sure. Deputy Leonard then stated: "It's either yes, I can search; or no, I can't. What will it be?" Defendant replied: "'Yeah, you can search. You're going to find it anyway.'" Defendant unlocked the door

and directed the deputies to a pistol and marijuana. The deputies also found \$1,000.00 in cash hidden in a stereo speaker. At no time did defendant rescind his consent to search the apartment. Deputy Sloan's testimony at the suppression hearing was consistent with that of Deputy Leonard.

Defendant testified at the hearing and claimed that when he arrived at his apartment, the deputies were waiting for him and began questioning him about his altercation with Ms. Farrington and asking to search his apartment. According to defendant, he stated emphatically: "No, you're not searching my bike; you're not searching me; you're not searching my house; you're not searching anything[.]" Defendant testified that Deputy Leonard "grabbed" him and began "feeling all [his] pockets." When Deputy Leonard felt a bulge in one of defendant's pockets, defendant told him that he was feeling "change[.]" but Deputy Leonard reached into the pocket and pulled out a bag of pills. Deputy Leonard then reached into defendant's other pocket and retrieved defendant's cash. Deputy Leonard began telling defendant that he had to consent to a search of his apartment because he was on probation and defendant responded: "You're probably going to do it anyway; but I'm not giving you permission to search shit." Defendant claimed that Deputy

Leonard then opened the door to defendant's apartment, which was unlocked, and proceeded to search the apartment without defendant's consent. A witness for defendant, Michael Cameron, testified that he was at the apartment complex on 3 September 2008 and that he heard defendant refuse to allow the officers to search his apartment without his parole officer being present. Mr. Cameron also stated that he saw one of the deputies pat defendant down and retrieve a bag from one of his pockets.

After the hearing, the trial court made oral findings of fact, concluded that "the search was consensual[,] " and, consequently, denied defendant's motion to suppress. Defendant pled guilty to the crimes charged and preserved his right to appeal from the trial court's denial of his motion to suppress.

Discussion

Defendant argues that the trial court erred in failing to enter a written order denying his motion to suppress pursuant to N.C. Gen. Stat. § 15A-977(f) (2009). Specifically, defendant claims that a material conflict existed as to whether defendant consented to the search of his person and apartment building, and, therefore, the trial court was required to enter written findings of fact resolving the conflicts in the evidence.

N.C. Gen. Stat. § 15A-977(f) states that when ruling on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." "This statute has been interpreted as mandating a *written order* unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009) (emphasis added); accord *State v. Neal*, ___ N.C. App. ___, ___, 709 S.E.2d 463, 468 (2011).

[W]hen a trial court's failure to make findings of fact . . . is assigned as error, the appropriate standard of review on appeal is as follows: The trial court's ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria set forth in *Williams* have been met[.]

State v. Baker, ___ N.C. App ___, ___, 702 S.E.2d 825, 829 (2010). "If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress[.]" *Id.* "If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact . . ., contrary to the mandate of section 15A-977(f), is fatal to the validity of its ruling and constitutes reversible error." *Id.*

In the present case, the trial court provided its rationale from the bench; however, defendant contends that there was a material conflict in the evidence presented at the suppression hearing which necessitated entry of a written order. We must first determine whether there was a conflict in the evidence, then we must determine whether the conflict, if one exists, was material.

At the hearing, the deputies testified that defendant pulled the pills and cash out of his own pockets and that he consented to the search of his apartment. Defendant testified that Deputy Leonard forcibly took the pills and cash from his pockets without his consent and that the search of his apartment was likewise nonconsensual. Although defendant provided corroborating testimony from another witness, "[d]efendant was not required to present any evidence apart from his own testimony. It was then up to the trial court to decide whom to believe: defendant or the officers." *Neal*, __ N.C. App. at __, 709 S.E.2d at 468. Consequently, we hold that there was a conflict in the evidence at the hearing.

"The key question remains, however, whether this conflict was material." *Id.* "[F]or purposes of section 15A-977(f), a material conflict in the evidence exists when evidence presented

by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *Baker*, __ N.C. App. at __, 702 S.E.2d at 831. "[W]e must now determine whether, at the hearing on defendant's motion to suppress, defendant presented evidence that controverts evidence presented by the State such that . . . the suppression of evidence w[as] likely to be affected." *Id.*

Whether defendant was subjected to an unlawful search and seizure of his person and his apartment, as he claimed, required the trial court to engage in a Fourth Amendment analysis. The Fourth Amendment protects against unreasonable searches seizures, U.S. Const. amend. IV; however, it is well established that "a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given[,]" *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997).

This Court has consistently held that a conflict in the evidence is material where the conflict pertains to the "ultimate questions of the constitutionality of the encounter between [the police officers] and defendant." *Baker*, __ N.C. App. at __, 702 S.E.2d at 831 (holding that a conflict in the evidence was material where defendant claimed that he was unlawfully seized by a police officer who activated his blue

lights during an encounter with defendant); see *State v. Williams*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Sept. 6, 2011) (No. 10-1133) (holding that a conflict in the evidence was material where defendant claimed that he was in custody when he was interrogated prior to receiving the *Miranda* warnings); *Neal*, ___ N.C. App. at ___, 702 S.E.2d at 469 (holding that a conflict in the evidence was material where defendant claimed that his consent to search was not voluntary).

Here, defendant's consent, or lack thereof, was vital to the trial court's constitutional analysis and the trial court's ultimate determination regarding suppression of the evidence. If defendant's claims are taken as true, then the officers searched his person and his apartment without a warrant and without his consent. Consequently, we hold that the conflict in the evidence regarding defendant's consent was material. We must, therefore, abide by *Williams* and this Court's recent decision in *Neal* and conclude that "the trial court violated N.C. Gen. Stat. § 15A-977(f) by failing to enter a *written order* setting out findings of fact resolving the material conflict in the evidence." *Neal*, ___ N.C. App. at ___, 709 S.E.2d at 469 (emphasis added).

The State argues that *Neal* is distinguishable because in that case the trial court failed to resolve the material conflicts in its oral findings of fact. The State claims that in the case *sub judice*, the trial court resolved all of the material conflicts in its oral findings of fact. We disagree with the State's attempt to distinguish *Neal*. The trial court in this case, as in *Neal*, failed to properly resolve the material factual dispute. After hearing the evidence, the trial court merely recited the testimony of Deputy Leonard and stated that his testimony was corroborated by Deputy Sloan. "Although such recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983).

Based on the foregoing, we must reverse this case and remand to the trial court for entry of written findings of fact that resolve the material conflicts in the evidence. *Neal*, ___ N.C. App. at ___, 709 S.E.2d at 470. We need not address defendant's argument that the trial court erred in denying his motion to suppress.¹

¹ We note that defendant argues on appeal that his consent was not voluntary because he was subject to coercion by the deputies; however, defendant did not argue before the trial

Reversed and Remanded.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).

court that his consent was not voluntary. Defendant strictly argued that he did not give consent for the officers to search his person or apartment.