NO. COA11-751-2
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

KENNETH WAYNE VAUGHN,
Defendant.

Wake County
Nos. 09 CRS 55890
09 CRS 203672
09 CRS 203694
09 CRS 204802

Appeal by defendant from judgments entered 20 August 2010 by Judge Shannon R. Joseph in Wake County Superior Court. This case was originally heard in the Court of Appeals 30 November 2011. Upon remand by order from the North Carolina Supreme Court filed 8 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Kimberly P. Hoppin for defendant-appellant.

GEER, Judge.

Defendant Kenneth Wayne Vaughn appealed from his conviction of three counts of breaking and entering a motor vehicle, one count of felony larceny, two counts of misdemeanor larceny, one count of felony possession of stolen goods, and two counts of

misdemeanor possession of stolen goods. On appeal, this Court originally found no error in part, but reversed and remanded the trial court's denial of defendant's motion to suppress because the trial court had failed to enter a written order. *See State v. Vaughn*, ___ N.C. App. ___, 725 S.E.2d 675, 2012 WL 1690903, 2012 N.C. App. LEXIS 650 (2012) (unpublished). Our Supreme Court has remanded for reconsideration in light of its holding in *State v. Oates*, 366 N.C. 264, 732 S.E.2d 571 (2012).

Based on *Oates*, we hold that the trial court was not required to enter a written order. The only remaining issue is whether the trial court properly denied the motion to dismiss in its oral order. Based on our review of the record, we hold that the trial court's oral order resolved all material conflicts in the evidence, the findings of fact were supported by the evidence, and those findings in turn supported the trial court's denial of the motion to suppress. Because we rejected defendant's remaining arguments in our previous opinion, we hold defendant received a trial free of prejudicial error.

Facts

A complete recitation of the facts is set forth in this Court's original opinion. *See Vaughn*, 2012 WL 1690903, at *1-*4, 2012 N.C. App. LEXIS 650, at *2-*9. In the trial court,

defendant filed a motion to suppress all evidence obtained as a result of a search of defendant's person and his book bag.

Both Officer Robin Kovach, who conducted the search, and defendant testified at the hearing on the motion to suppress. According to Officer Kovach, defendant initially refused to allow her to search his book bag, but he later consented after she asked if he had any weapons or tools: "I asked again, I said do you mind if I look in it really quick, and he said no, and he handed it to me."

Defendant, however, testified that he refused to allow Officer Kovach to search his bag and that he was "almost positive that [he] didn't consent." Defendant asserted that he did not hand his bag to Officer Kovach, but rather she took it from his shoulder. Defendant also testified that Officer Kovach told him that he could be restrained for up to 72 hours for not having identification and that he believed that he "was being placed under arrest, because [Officer Kovach] had reached for her cuffs."

According to defendant, after another officer arrived at the scene, defendant asked him about Officer Kovach's having searched his bag. Defendant claimed the officer told him "something about that I was lucky they didn't get me for . . . some charge" and continued questioning him about the materials

found in his bag. According to defendant, he believed he was going to jail if he did not let the officers search his bag.

The trial court denied the motion to suppress, concluding that the State had shown, under the totality of the circumstances, that defendant's consent to search his bag was not the product of coercion and was voluntary. In support of that conclusion, the trial court found that defendant was twice asked for consent to search his bag. The first time defendant refused, but the second time, he voluntarily consented. The court further found that defendant had not been arrested, placed under arrest, restrained or detained, and he had not been threatened with detention or restraint. Although the trial court expressed the intent to file a written order denying the motion to suppress, none was ever filed.

Following trial on the charges, the jury convicted defendant of three counts of breaking and entering a motor vehicle, one count of felony larceny, two counts of misdemeanor larceny, one count of felony possession of stolen goods, and two counts of misdemeanor possession of stolen goods. Additionally, the jury found that defendant was a habitual felon.

The trial court arrested judgment on the possession of stolen goods convictions and sentenced defendant to a single

presumptive-range term of 144 to 182 months imprisonment on all the remaining charges. Defendant timely appealed to this Court.

On appeal, defendant argued that the trial court erred in denying his motion to suppress, that the trial court committed plain error by instructing the jury on a theory of felony larceny not alleged in the indictments, and that the trial court erred in denying defendant's motion to dismiss. This Court, in its opinion of 15 May 2012, found no error with respect to the felony larceny instruction and the denial of the motion to dismiss. With respect to the motion to suppress, however, this Court held that the trial court erred in failing to enter a written order denying the motion.

The State petitioned the Supreme Court for discretionary review. The Court granted review and remanded to this Court for reconsideration in light of *Oates*.

Discussion

N.C. Gen. Stat. § 15A-977(f) (2011) requires that when a trial court conducts a hearing on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." This Court had interpreted that provision as requiring 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). Therefore, "[i]f a reviewing court conclude[d] that either of [those] criteria [were] not met, then a trial court's failure to make findings of fact . . ., contrary to the mandate of section 15A-977(f), [was] fatal to the validity of its ruling and constitute[d] reversible error." *State v. Baker*, 208 N.C. App. 376, 381-82, 702 S.E.2d 825, 829 (2010).

However, in *Oates*, our Supreme Court clarified the requirements of N.C. Gen. Stat. § 15A-977(f), which, it noted, requires "a judge ruling on a suppression motion . . . to 'set forth in the record his findings of facts and conclusions of law.'" *Oates*, 366 N.C. at 268, 732 S.E.2d at 574 (quoting N.C. Gen. Stat. § 15A-977(f)). The Court continued: "While a written determination is the best practice, nevertheless the statute does not require that these findings and conclusions be in writing." *Id.* Under *Oates*, therefore, the trial court, in this case, did not err in rendering only an oral order denying the motion to suppress and not filing a written order.

Because, in our initial opinion, we remanded for entry of a written order, we did not address defendant's arguments regarding the adequacy of the oral order's findings of fact and conclusions of law. The trial court stated, in denying the motion to suppress:

> In the motion to suppress, the Court finds that the motion was timely and in proper form. The Court also finds that the State has met its burden and shown by a preponderance of the evidence under the totality of circumstances that the consent was not the product of coercion and it was voluntary.
>
> The Court has had the opportunity to observe the demeanor of the witnesses and the directness in answering, as well as the specificity of the answers to the questions given by both the officer and the defendant.
>
> And the Court finds that the defendant was not threatened or otherwise intimidated, and that the officer asked twice for consent to search the bag. First time the defendant refused; the second time the defendant agreed, and that consent was given voluntarily.
>
> At no time was the defendant arrested, placed under arrest, restrained or detained, remained free to move around and was not in handcuffs, nor did the officer threaten to handcuff or restrain him or detain him.

Defendant argues that this oral order did not include sufficient findings of fact to resolve all material conflicts in the evidence. Specifically, defendant argues that "the trial court did not make findings of fact about particular questions that were necessary to determine whether [defendant's] consent was voluntary: whether [defendant] handed the officer his book bag or whether she took it off his shoulder; what the officers said to [defendant] about their ability to detain or arrest him for not having an I.D. or obstructing the duties of an officer;

and whether the officers indicated that they would forego detention or arrest if he consented to a search of his book bag. Whether the officers made a statement to [defendant] about their power to detain him, and what specifically they said to him about this power, were questions of fact necessary to a determination of the voluntariness of [defendant's] consent."

Thus, although defendant claimed in his testimony that he did not consent, he focuses his argument on appeal on the question whether his consent was voluntary. It is well established that a trial court, in determining whether that consent was voluntary, must decide whether a defendant "was threatened or offered any promises or inducements in exchange for his consent to search." *State v. Austin*, 320 N.C. 276, 291, 357 S.E.2d 641, 650 (1987).

With respect to defendant's claim that he thought he was being placed under arrest, the trial court found that he was never arrested, restrained or detained, but instead remained free to move around and was not in handcuffs. Although defendant testified that Officer Kovach threatened to restrain him for 72 hours and another officer suggested he could have been charged with obstructing the duties of an officer, the trial court found that there was no threat to restrain him or

detain him, thus resolving the conflict between defendant's testimony and Officer Kovach's testimony.

As for promises or inducements, defendant has argued that "the officers indicated that they would forego detention or arrest if he consented to a search of his book bag." Defendant does not, however, cite to any testimony regarding such a promise. Regardless, we fail to see a meaningful distinction between (1) a threat to detain a person if he does not consent to a search and (2) a promise not to detain a person if he does consent to a search. In either case, the person would believe that he would be detained if he did not consent to a search. The trial court's finding that defendant was not threatened with detention also, therefore, resolves any claim regarding a promise to forego detention.

Finally, defendant has argued that the trial court needed to supply more details in its findings, including what specifically the various parties to the encounter said and whether defendant handed over the book bag or the officer removed it after obtaining consent to search. However, the trial court was required to make findings of fact to resolve "all *material* factual conflicts" in the evidence. *State v. Phillips*, 365 N.C. 103, 116, 711 S.E.2d 122, 134 (2011)

(emphasis added), *cert. denied*, __ U.S. __, 182 L. Ed. 2d 176, 132 S. Ct. 1541 (2012).

In this case, the material conflict was whether the officers made threats or promises that induced defendant's consent -- a conflict in the evidence that the trial court resolved in favor of the State's witness. While a more detailed order would be the better practice, the trial court was not required to specify precisely what each officer said or how defendant's book bag came to be removed from his shoulder. The trial court's findings of fact are adequate. *See also State v. Taylor*, 61 N.C. App. 589, 590, 300 S.E.2d 890, 892 (1983) ("The trial judge made the essential finding that defendant waived his *Miranda* rights both orally and in writing. The order sufficiently resolves the basic question of whether defendant was fully and properly advised of his rights and made a waiver of those rights freely, voluntarily and with understanding." (internal citation omitted)).

No error.

Judges ROBERT C. HUNTER and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).