NO. COA12-437
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

IN THE MATTER OF:

R.D.

Alamance County
No. 11 JB 85

Appeal by Juvenile from order entered 25 October 2011 by Judge Bradley R. Allen, Sr., in Alamance County District Court. Heard in the Court of Appeals 11 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Charlotte Gail Blake for Juvenile-appellant.

THIGPEN, Judge.

R.D. ("Juvenile") appeals from an order adjudicating him delinquent for possessing drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22. After careful review, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Shortly before midnight on the evening of 17 April 2011, Burlington Police Officers Shawn Gardner ("Sergeant Gardner") and Cameron Leight ("Officer Leight") were patrolling South Church Street in Burlington when they observed Juvenile and another individual in the parking lot area of the city park, which is closed to the public after 9 p.m. Sergeant Gardner testified that there had been "continuing . . . issues and problems . . . with juveniles being in the park . . . after the park is closed and . . . with gang graffiti, spray painting and vandalism," and that he accordingly turned the vehicle around at the next intersection and headed back towards the park in order to see "what these guys were actually doing."

Sergeant Gardner testified that Juvenile and his companion "began to walk faster" upon seeing the police vehicle turn around at the intersection and approach them. Without activating the blue lights on the patrol car, Sergeant Gardner pulled the vehicle over to the side of the road where the juveniles were walking and stated, "Guys can you come here for a minute. Can we talk to you for a minute?" The juveniles complied with this request, and Officer Leight spoke with Juvenile while Sergeant Gardner spoke with the other individual. Officer Leight asked Juvenile his age, and Juvenile replied he

was "sixteen." Juvenile appeared "very nervous" and "[h]is hands were shaking." Juvenile's "eyes were glazed over . . . and bloodshot." Officer Leight twice asked Juvenile to keep his hands out of his pockets, but Juvenile "just kept shaking" and responded "you guys are just, you guys are making me nervous[.]" When Juvenile failed to heed Officer Leight's direction to keep his hands out of his pockets a second time, Officer Leight conducted a pat down search to ensure that Juvenile was not carrying any weapons. In conducting the search, Officer Leight felt what he believed to be a glass marijuana pipe in Juvenile's back left pocket. Officer Leight removed the item from Juvenile's pocket and determined that "it was a multi-colored bowl" containing marijuana residue. Based on this finding, Officer Leight proceeded with the search and also found a bag of "rolling papers" in Juvenile's back right pocket. Officer Leight escorted Juvenile to the patrol car and asked Juvenile for his date of birth so that he could issue him a citation. At this point, Officer Leight learned that Juvenile was fifteen years old, not sixteen, as Juvenile had previously represented. Juvenile was thereafter transported to the Burlington Police Department, where his parents were contacted.

On 4 May 2011, a petition was filed alleging that Juvenile was delinquent, in that he "did unlawfully, willfully and knowingly possess with intent to use drug paraphernalia" in violation of N.C. Gen. Stat. § 90-113.22. On 25 August 2011, an adjudication hearing was held on the matter in Alamance County District Court. At the hearing, Juvenile moved to suppress evidence obtained from the initial stop and subsequent search on the ground that the officers lacked reasonable suspicion to carry out these procedures. The trial court denied these motions at the close of the State's evidence and again at the close of all the evidence.

The trial court adjudicated Juvenile delinquent and sentenced him to six months probation with numerous conditions and thirty hours of community service. Additionally, the court ordered that Juvenile be placed in a juvenile detention center for a period of five days. The court stayed three of these days, but denied Juvenile's request to stay all five days of the detention pending appeal. Thus, in accordance with the court's order, Juvenile reported to detention the following day, Friday, 26 August 2011, to serve out the two days of his sentence that had not been stayed. Juvenile appeals.

II. Analysis

A. Motion to Suppress

Juvenile first contends the trial court erred in denying his motion to suppress evidence of drug paraphernalia found on his person. We disagree.

> Our review of an order suppressing evidence is strictly limited. In evaluating such an order, this Court must determine whether competent evidence supports the trial court's findings of fact. Findings of fact supported by competent evidence are binding on appeal. Although a trial court's findings of fact may be binding, we review its conclusions of law *de novo*. We must not disturb the court's conclusions when they are supported by the factual findings.

In re D.D., 146 N.C. App. 309, 314, 554 S.E.2d 346, 350 (2001) (internal citations omitted).

At the outset, we note that Juvenile has challenged one of the trial court's factual findings. Juvenile contends that "[a]lthough the trial court found as a fact that there had been numerous incidents of graffiti and vandalism in the park, the officers' testimony did not support that." Our review of the trial transcript, however, reveals two portions of Sergeant Gardner's testimony that directly support this finding. Specifically, Sergeant Gardner stated that "it's a continuing problem . . . with juveniles being in the park . . . after the park is closed and . . . with gang graffiti, spray painting and

vandalism" and also that "the gang graffiti that we have had problems with . . . [is] a continuing problem . . . [and] at that point in time we had a lot of . . . calls for service as far as gang graffiti and vandalism within the park." We conclude this testimony is competent evidence in support of the challenged finding, and Juvenile's contention is overruled. The trial court's remaining findings of fact are unchallenged and therefore binding on appeal. *See In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) ("[T]he trial court's findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court."). We accordingly turn to Juvenile's contention that the trial court erred in denying his motion to suppress because the officers lacked the reasonable suspicion required to conduct an investigatory stop of him on the night in question.[1]

The Fourth Amendment to the United States Constitution protects individuals "against unreasonable searches and seizures[,]" U.S. Const. amend. IV, and "is applicable to the states through the Due Process Clause of the Fourteenth Amendment[,]" *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d

[1]Juvenile does not challenge the propriety of the search of his person conducted during the investigative stop.

67, 69 (1994) (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).[2] "The right to be free from unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops." *In re J.L.B.M.*, 176 N.C. App. 613, 619, 627 S.E.2d 239, 243 (2006). "An investigatory stop is a 'brief stop of a suspicious individual [] in order to determine his identity or to maintain the status quo momentarily while obtaining more information.'" *State v. White*, __ N.C. App. __, __, 712 S.E.2d 921, 925 (2011) (alteration in original) (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)). "[I]n 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). "An officer has reasonable suspicion if a 'reasonable, cautious officer, guided by his experience and training,' would believe that criminal activity is afoot 'based on specific and articulable facts, as well as the rational inferences from those facts.'" *State v. Williams*, __ N.C. __, __, 726 S.E.2d 161, 167 (2012) (citation omitted). "While something more than a mere hunch is required, the reasonable suspicion standard demands

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[2]Article I, Section 20 of the North Carolina Constitution provides our citizens with similar protections. *See* N.C. Const. art. I, § 20 (prohibiting the use of general warrants).

less than probable cause and considerably less than preponderance of the evidence." *Id.* "Factors relevant in determining whether a police officer had reasonable suspicion include: (1) nervousness of an individual; (2) presence in a high crime area; and (3) unprovoked flight. None of these factors, standing alone, are sufficient to justify a finding of reasonable suspicion, but must be considered in context." *In re I.R.T.*, 184 N.C. App. 579, 585, 647 S.E.2d 129, 134-35 (2007) (citations and quotation marks omitted).

We conclude in the instant case that Sergeant Gardner and Officer Leight possessed more than a mere hunch that criminal activity was afoot, as both officers observed Juvenile and his companion trespassing on city park property.[3] N.C. Gen. Stat. § 14-159.13 defines a second degree trespass to include instances where an individual, without authorization, "enters or remains on premises of another . . . [t]hat are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises." N.C. Gen. Stat. § 14-

[3]We note the State's contention that the officers' initial approach of Juvenile did not amount to an investigatory stop (or "seizure") within the meaning of the Fourth Amendment. Juvenile raises no argument on this point. In reaching our holding, we assume *arguendo* that the officers' actions did constitute a "seizure," but that said actions were justified and did not violate Juvenile's constitutional rights in light of the factual context presented.

159.13(a)(2) (2011). The offense of second degree trespass is classified as a Class 3 misdemeanor. *Id.* Sergeant Gardner testified that the city park's hours were posted on signs located near the park entrance at "the edge of the park[;]" that the park closed to the public at 9 p.m.; and that Juvenile was observed leaving the city park property at approximately midnight. The trial court found as fact that the city park closed at 9 p.m.; that the officers observed Juvenile "inside the parking lot of [the] city park" at "approximately [] midnight"; that "[t]here had been numerous juveniles who had trespassed in [the] city park, spray painting and vandalizing [the] city park[;]" and that the officers questioned the juveniles "as to why they were trespassing in the city park." These factual findings, which are not contested on appeal, establish that Juvenile was trespassing and, in addition, support the trial court's conclusion that there was reasonable suspicion to justify the investigative stop at issue. This holds true notwithstanding the fact that Juvenile was not issued a citation for trespassing, as this Court has held that an officer's subjective motivation for making an investigatory stop "is irrelevant as to whether there are other objective criteria

justifying the stop[,]" *State v. Barnhill*, 166 N.C. App. 228, 233–34, 601 S.E.2d 215, 219 (2004).

Moreover, while we need not reach the issue in arriving at our holding, we note that even if the officers' observation of Juvenile trespassing, alone, was insufficient to establish reasonable suspicion, the totality of the circumstances would likely have justified the investigative stop in question: The police officers observed two juveniles on the park property at approximately midnight, an "unusual hour" of the night for a fifteen-year-old to be at the park, *see Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (stating that "[t]he 'unusual hour' is an appropriate factor for a law enforcement officer to consider in formulating a reasonable suspicion"[4]), and an hour at which the park was clearly closed; Sergeant Gardner testified that at the time he observed Juvenile on the park property he was aware of numerous calls pertaining to acts of vandalism within the park committed by juveniles; and Juvenile "began to walk faster" upon observing the police vehicle. These facts would appear

[4]We recognize the court's indication in *Watkins* that "shortly after midnight" might not constitute "an unusual hour" for purposes of formulating reasonable suspicion; however, the court's analysis in that case was drawn upon incidents involving adults, not juveniles. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. We believe that midnight *is* an unusual hour for a *juvenile* to be on city park property.

sufficient to warrant the officers' approach of Juvenile and his companion in order to ask what they were doing in the park at that hour.[5] Accordingly, we hold the trial court did not err in denying Juvenile's motion to suppress, and Juvenile's contention on this issue is overruled.

B. The Trial Court's Dispositional Order

Juvenile next contends the trial court erred "in ordering dispositional alternatives and in particular that [he] serve five days in detention" without making the requisite findings of fact in its disposition order. The State concedes this was error and suggests the matter be remanded to the trial court for entry of the statutorily mandated findings in its order.

Our Juvenile Code "specifically provides the [trial] court with the power and discretion to order appropriate dispositional alternatives." *In re Hartsock*, 158 N.C. App. 287, 291, 580 S.E.2d 395, 398 (2003) (emphasis removed) (citing N.C. Gen. Stat. § 7B-2506)). On appeal, this Court "will not disturb a trial court's ruling regarding a juvenile's disposition absent an abuse of discretion, which occurs 'when the trial court's ruling is so arbitrary that it could not have been the result of

[5]Sergeant Gardner testified that Juvenile and his companion were the only individuals he observed leaving the park at that hour.

a reasoned decision.'" *In re J.B.*, 172 N.C. App. 747, 751, 616 S.E.2d 385, 387 (2005) (citation omitted). In selecting among the dispositional alternatives described in N.C. Gen. Stat. § 7B-2508, the trial court must consider the following factors:

> (1) The seriousness of the offense; (2) The need to hold the juvenile accountable; (3) The importance of protecting the public safety; (4) The degree of culpability indicated by the circumstances of the particular case; and (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2011). Moreover, N.C. Gen. Stat. § 7B-2512 requires that the dispositional order "be in writing and . . . contain appropriate findings of fact and conclusions of law." *In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004) (quoting N.C. Gen. Stat. § 7B-2512) (emphasis removed). This Court has "previously held that the trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile matter." *In re V.M.*, __ N.C. App. __, __, 712 S.E.2d 213, 215 (2012) (citing *Ferrell*, 162 N.C. App. at 177, 589 S.E.2d at 895).

The trial court's dispositional order in the instant case reflects the court's written findings that (1) Juvenile had a delinquency history level of "low," and that (2) the court had

considered and incorporated by reference the contents of Juvenile's predisposition report, risk assessment, and needs assessment in rendering its disposition. The trial court did not enter any written findings of fact indicating that it had considered the factors set forth in N.C. Gen. Stat. § 7B-2501(c), and paragraph 3 of the disposition order, labeled "Other Findings," was left blank. We also note that the trial court did not indicate in open court that it had considered any of these statutorily prescribed factors in reaching its decision. Accordingly, "we hold the trial court's written order contains insufficient findings to allow this Court to determine whether it properly considered all of the factors required by N.C.G.S. § 7B-2501(c)[,]" and "we must reverse the trial court's dispositional order and remand this matter for a new dispositional hearing." *In re V.M.*, __ N.C. App. at __, 712 S.E.2d at 216.

C. Juvenile's Release Pending Appeal

Lastly, Juvenile contends the trial court erred in denying his request to stay two days of his detention pending the outcome of his appeal without providing compelling reasons in support of his confinement. The State concedes this was error,

and this issue is easily resolved by the plain language of N.C. Gen. Stat. § 7b-2605, which provides:

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. ***For compelling reasons which must be stated in writing***, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (2011). The court below made no written findings of fact in support of its denial of Juvenile's release pending appeal. This, clearly, was error. The appropriate remedy here — notwithstanding the fact that Juvenile has already served two days in detention — is to vacate the order denying Juvenile's release pending appeal and to remand the matter to the district court. *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249. On remand, the trial court must dispose of this matter as follows: (1) the court must determine whether Juvenile's confinement pending appeal was proper; and, if so, then (2) the court must enter "compelling reasons for denying release." *Id.*

III. Conclusion

For the foregoing reasons, the trial court's 25 October 2011 order adjudicating Juvenile delinquent is hereby

AFFIRMED in part; REVERSED and REMANDED in part.

Judges McGee and BEASLEY concur.

Report per Rule 30(e).