NO. COA13-293
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v. Duplin County
Nos. 11 CRS 50335
11 CRS 50343

RODNEY PAUL SMITH,
Defendant.

Appeal by the State from order entered 26 December 2012 by Judge John E. Nobles, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 29 August 2013.

*Roy Cooper, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.*

*Andrew L. Farris for defendant-appellee.*

DAVIS, Judge.

The State of North Carolina ("the State") appeals from the trial court's 26 December 2012 order granting a motion to suppress filed by Rodney Paul Smith ("Defendant"). After careful review, we remand to the trial court for further proceedings.

**Factual Background**

At approximately 9:30 p.m. on 5 February 2011, Deputy Jerry

Wood ("Deputy Wood"), a child support deputy with the Duplin County Sheriff's Office at the time of the incident, responded to a call regarding a breaking and entering at the residence of Aubrey Smith ("Aubrey") on Providence Church Road, outside of the city limits of Wallace, North Carolina. Deputy Wood arrived at the home and was met by Aubrey's brother, Thomas Lee Smith ("Thomas"). Thomas told Deputy Wood that the back door of Aubrey's residence had been broken into and that there were firearms and coins missing from the house. Thomas further related that he had heard Defendant — Aubrey's next door neighbor — speaking on the phone in an "excited, anxious manner" and indicating to the other party to his conversation that he was "in a hurry to leave" and "waiting for somebody to come get him." Thomas also informed Deputy Wood that there were boot prints on his brother's driveway that were similar to the boot prints on Defendant's driveway.

As Deputy Wood was speaking to Thomas, a van pulled into Defendant's driveway. After walking over to Defendant's driveway and then returning to Deputy Wood's patrol car, Thomas told Deputy Wood that he had seen Defendant "throwing bags of stuff in a hurried fashion into the van." Deputy Wood estimated that the van was in Defendant's driveway for approximately four

minutes or less. As the van exited Defendant's driveway, Deputy Wood "pulled out to go catch up to it and initiated a vehicle stop." Deputy Wood then stopped the van based on his belief that he had "reasonable suspicion to believe that the defendant had participated or committed a crime, and that there were stolen items, including firearms, that were potentially leaving in that vehicle." As a result of the investigation following the stop, law enforcement officers found approximately $127 in quarters in Defendant's possession and two Remington rifles in a nearby ditch on Providence Church Road.

Defendant was charged with felony breaking and entering, larceny pursuant to a breaking and entering, larceny of a firearm, two counts of possession of stolen goods, and having attained habitual felon status. On 21 March 2012, Defendant filed a motion to suppress in which he alleged that the vehicle stop was unlawful and that all evidence seized as a result of the stop should be suppressed as fruit of the poisonous tree.

Defendant's motion to suppress was heard on 12 September 2012 and 5 November 2012. On 8 November 2012, the trial court granted Defendant's motion to suppress, and on 26 December 2012 the trial court entered a written order ruling that "there [was] no reasonable, articulable suspicion to justify the vehicle stop

and search [of] the defendant's vehicle by Officer Jerry Wood." The State appealed to this Court.

**Analysis**

**I. Appellate Jurisdiction**

We have jurisdiction to hear the State's appeal because the State filed a timely certificate stating that the appeal was "not taken for the purpose of delay and that the evidence suppressed as a result of the Court's Order is essential to the prosecution of the case." *See* N.C. Gen. Stat. § 15A-979(c) (2011) ("An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case."); *State v. Turner*, 305 N.C. 356, 359, 289 S.E.2d 368, 370 (1982)("[T]he certificate envisioned by G.S. 15A-979(c) is timely filed if it is filed prior to the certification of the record on appeal to the appellate division.").

**II. Motion to Suppress**

This Court's review of a trial court's suppression order is "strictly limited to determining whether the trial judge's

underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Any findings of fact that are not challenged on appeal are "deemed to be supported by competent evidence and are binding on appeal." *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). "However, a trial court's conclusions of law regarding whether the officer had reasonable suspicion to detain a defendant is reviewable *de novo*." *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

When a trial court holds a hearing on a defendant's motion to suppress, the trial judge must find facts to support his determination and "set forth in the record his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(d)-(f) (2011). "[A]n appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision . . . as to whether or not a constitutional violation of some kind has occurred." *Cooke*, 306

N.C. at 134, 291 S.E.2d at 619-20.

In the present case, the trial court made the following findings of fact:

> 1. The defendant's motion to suppress was heard on September 12, 2012 and further argued on November 5, 2012 in Duplin County Superior Court.
> 2. Officer Jerry Wood of the Magnolia Police Department was called to testify at the hearing concerning stopping a van on February 5, 2011. He testified that he was called to investigate a breaking and entering at . . . Providence Church Road a little after 9:30 p.m.
>
> 3. Officer Wood testified that he was employed with the Duplin County Sherriff's Department in February 2011 as a child support deputy and not a detective. Officer Wood was previously employed by the Warsaw Police Department as a detective for approximately twelve and a half years from 1998 to 2010. Officer Wood investigated a lot of breaking and entering and larceny-type cases during that time.
>
> 4. Officer Wood testified he went to . . . Providence Church Road and was met by Thomas Lee Smith, the victim's brother. Mr. Smith told Officer Wood that the residence had been broken into through the back door and there were some guns and change missing from the residence.
>
> 5. Officer Wood testified that Mr. Smith told him that Smith heard the defendant talking loudly on his phone before law enforcement arrived. Smith described the manner of the defendant's tone as excited and in an anxious manner. Smith described the

nature of the conversation to Officer Wood that the defendant seemed to be in a hurry to leave and was waiting for somebody to come get him.

6. Officer Wood testified that Mr. Smith told him that Smith observed boot prints in the victim's driveway and boot prints in the defendant's driveway next door. The boot prints in both driveways were similar in nature. There was more than one boot print.

7. Officer Wood testified that he observed the victim's driveway and it was mainly dirt and it was wet. The side of the road was grassy and Providence Church Road was made of asphalt and there should not have been a print there.

8. Officer Wood testified that Mr. Smith never said how many boot prints there were and never said the prints belonged to the defendant.

8. [sic] Officer Wood testified that he never looked at the boot prints himself and he had no knowledge as to the reliability of Mr. Smith.

9. Officer Wood testified that the victim's house and defendant's house were next to each other but were approximately 210 feet apart.

10. Officer Wood testified that it was a matter of minutes and a van pulled up to the defendant's home. Officer Wood testified that Mr. Smith walked to the defendant's driveway and saw him throwing bags of stuff in a hurried fashion into the van. The defendant made several trips.

11. Officer Wood testified that he did not see anyone else walking around Providence Church Road at that time.

12. Officer Wood testified that after the van pulled out of the defendant's driveway he pulled out to catch up to it in order to initiate a vehicle stop. Officer Wood trailed the vehicle for a little ways, giving the other responding units a chance to get closer to his proximity.

The trial court then made the following conclusions of law:

1. That the court has jurisdiction over [the] parties and the subject matter of this action.

2. That Officer Jerry Wood did not have reasonable suspicion or probable cause to believe that the defendant had committed, was committing or was about to commit a crime.

3. That the parties have agreed that the Court may make findings of fact, and conclusions of law and enter an Order in the above-captioned case out of session and in chambers.

Virtually every "finding of fact" the trial court made in its suppression order merely recited that Deputy Wood had *testified* to that particular fact. Notably absent from the order are actual *findings* by the trial court on the key facts at issue. It is well established that "[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge." *In re Bullock*, ___ N.C. App. ___, ___, 748

S.E.2d 27, 30 (2013) (citation and quotation marks omitted) (emphasis in original); *see Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) ("[F]indings of fact must be more than a mere summarization or recitation of the evidence . . . ."), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). "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). If the trial court includes the recitation of testimony in its suppression order, "our review is limited to . . . facts found by the trial court and the conclusions reached in reliance on those facts, *not* the testimony recited by the trial court in its order." *State v. Derbyshire*, ___ N.C. App. ___, ___, 745 S.E.2d 886, 893 (2013) (emphasis in original).

As discussed above, the "findings" in the trial court's order essentially consist of recitations of Deputy Wood's testimony at the suppression hearing. Consequently, they are not proper findings of fact. "[W]hen the trial court fails to make findings sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court." *State v. Salinas*, 366 N.C. 119, 124, 729

S.E.2d 63, 67 (2012) (remanding where trial court's findings supporting suppression "simply restated the officers' testimony"). Accordingly, we remand this case to the trial court so that it may make proper findings of fact and conclusions of law as to whether the vehicle stop at issue was supported by reasonable suspicion.[1] *See State v. Veazey*, 191 N.C. App. 181, 190-91, 662 S.E.2d 683, 689 (2008) (remanding order denying motion to suppress where finding of fact "simply recite[d]" officer's testimony and trial court did not make independent finding regarding lawfulness of DWI checkpoint).

**Conclusion**

For the reasons stated above, we remand for further proceedings consistent with this opinion.

REMANDED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).

---

[1] In the conclusions of law, the suppression order stated that "[Deputy] Wood did not have reasonable suspicion *or probable cause* to believe that the defendant had committed, was committing or was about to commit a crime." (Emphasis added.) We note that reasonable suspicion is the appropriate legal standard when reviewing a vehicle stop. *See State v. Styles*, 362 N.C. 412, 427, 665 S.E.2d 438, 447 (2008) ("[A]n officer may stop a vehicle on the basis of a reasonable, articulable suspicion that criminal activity is afoot."). It is not necessary for the higher standard of probable cause to be established.