IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA13-1445

Filed: 7 April 2015

Mecklenburg County, Nos. 12 CRS 214351-53, 12 CRS 35787

STATE OF NORTH CAROLINA,

v.

KENNETH E. CLYBURN, Defendant.

Appeal by the State from order entered 11 July 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

GEER, Judge.

The State appeals from an order granting in part defendant Kenneth E. Clyburn's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on defendant's person which, as a result of the search, was determined to have been stolen. On appeal, the State argues that the trial court erred in granting the motion because defendant did not have a reasonable expectation of privacy in the GPS and, therefore, cannot show that his Fourth Amendment rights were violated. Alternatively, the State argues that even assuming that the defendant

did have a privacy interest in the GPS, the search was valid because (1) defendant consented to the search and (2) the search was justified as a search incident to arrest.

Because the State did not raise the consent argument below, we decline to address it. We hold that the United States Supreme Court's recent decision in *Riley v. California*, ___ U.S. ___, 189 L. Ed. 2d 430, 134 S. Ct. 2473 (2014), applies to the search of the digital data stored on a GPS device, and affirm the trial court's conclusion that the search incident to arrest exception does not apply in this case. With respect to defendant's privacy interest in the stolen GPS, we hold that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. At the suppression hearing, defendant presented evidence that, if believed, would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. Because the trial court failed to make a factual determination regarding whether defendant innocently purchased the GPS, we reverse and remand for further findings of fact.

Facts

On 2 April 2012, police officers Aaron Skipper and Todd Watson of the Charlotte-Mecklenburg Police Department ("CMPD") were on motorcycle patrol in the residential neighborhood of Villa Heights in Charlotte, North Carolina. The officers were on the lookout for evidence of residential and auto break-ins and sales of controlled substances.

Just before 8:00 a.m., the officers saw defendant walking down the sidewalk of Umstead Street. Defendant was dirty, had numerous tears in his clothing, "unusually bulging pants pockets . . . [and] could have passed for one of the homeless common to the area." Officer Watson initially suspected that defendant "may have recently been under an abandoned house removing copper pipes for resale" due to his dirty condition.

The officers pulled up about five feet behind defendant as he was walking down the street. Defendant stopped and turned towards the officers, at which point Officer Skipper dismounted, told defendant the officers' names and why they were in the area, and asked for defendant's name and date of birth. Defendant did not have identification on him, but told the officers his name and date of birth and explained that he was walking to his mother's house around the corner. The conversation was polite, and defendant was cooperative.

The officers did not make any show of force or attempt to block defendant's path. Defendant turned and began walking away from the direction of his mother's address, at which point Officer Skipper reengaged defendant and asked him what he had in his rear pocket. Defendant stopped and removed a cell phone. Officer Skipper asked what else he had in that pocket, and defendant removed a pair of binoculars.

Officer Skipper then approached defendant and asked for consent to search his person. Defendant said "go ahead," turned his back to the officer, and raised his arms.

Officer Skipper found a crack pipe in defendant's waistband and arrested defendant for possession of drug paraphernalia. Officer Skipper then searched defendant incident to the arrest, finding a box cutter, several small shards of auto glass, and a Garmin GPS with an attached car charger in defendant's pants pockets. Defendant, unprompted, claimed that the GPS was his own and that the binoculars belonged to his brother.

The officers had no knowledge of whether defendant had a car, but they thought it unusual that he was walking with a GPS and attached charger cord in his pocket. Officer Watson took the GPS and pressed the "Home" button. He did not ask for, or receive, permission from defendant to search the GPS. The GPS displayed an address in Blowing Rock, North Carolina -- approximately 90 miles from Charlotte, North Carolina. Officer Watson then scrolled through the address history of the GPS and found the closest address to their current location was several blocks away on Pecan Avenue, in the opposite direction from where defendant's mother lived.

CMPD sent a patrol car to the Pecan Avenue address and located a car in the driveway of a home with the window broken out. On the seat of the car was an owner's manual for a GPS of the same make and model as that taken from defendant. CMPD then contacted the homeowner, who was not aware of the car break-in. The homeowner identified the GPS taken from defendant as his.

Defendant was charged with felony breaking and entering a motor vehicle, misdemeanor larceny, and possession of drug paraphernalia. On 23 April 2012, defendant was indicted on those same charges in addition to being a habitual felon. Defendant moved to suppress the evidence obtained as a result of the search of his person and a hearing was held on his motion on 1 July 2013.

At the hearing, defendant testified that on the morning of 2 April 2012, he left his girlfriend's house to walk to his mother's home and on the way he purchased the GPS from a man who sold it for $10 to $15. He testified that he did not know that the GPS belonged to someone else.

In an order entered 11 July 2013, the trial court concluded that the initial encounter between the officers and defendant was consensual and that the second encounter was an investigatory stop that was based upon the officer's reasonable suspicion that defendant had been or was engaged in criminal activity. The trial court concluded that defendant consented to a search of his person and that when the officers found the crack pipe in defendant's waistband, they had probable cause to arrest him for possession of drug paraphernalia.

The trial court concluded that the search of the GPS device was not necessary to prevent defendant from using a weapon or destroying evidence and, therefore, was not justified as a search incident to arrest. The trial court concluded that the crack pipe was admissible, but that any evidence obtained as a result of the search of the

digital contents of the GPS was inadmissible. The State timely appealed the order to this Court.

Discussion

The sole issue on appeal is whether the trial court erred in granting defendant's motion to suppress the evidence obtained from the officers' search of the contents of the GPS device. Our review of a trial court's denial of a motion to suppress 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). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

On appeal, the State argues that the trial court erred in granting in part the motion to suppress because defendant did not have a reasonable expectation of privacy in the GPS and, therefore, cannot show that his Fourth Amendment rights were violated. Alternatively, the State argues that even assuming that the defendant did have a privacy interest in the GPS, the search was valid because (1) defendant consented to the search and (2) the search was justified as a search incident to arrest.

With respect to consent, the trial court found that defendant gave Officer Skipper consent to search his person. It additionally found, however, that the officer

who searched the GPS, Officer Watson, neither asked for nor received permission to do so. The State argues that because defendant consented to the initial search of his person and did not limit the scope of the search or tell the officers not to search the GPS, his consent could reasonably be interpreted to cover a search of the GPS. The State did not, however, make this argument to the trial court. In fact, at the suppression hearing, the State asserted that the interactions between the officers and the defendant "were completely consensual *up until the point the Defendant was placed under arrest for the possession of paraphernalia*[.]" (Emphasis added.)

"This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]" *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Otherwise stated, "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Because the State did not argue below that defendant's general consent to search his person extended to the search of the digital contents of the GPS, we decline to address this argument on appeal.

We turn now to the State's argument that the search of the digital contents of the GPS was a valid search incident to arrest. It is well established that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few

specifically established and well-delineated exceptions.' " *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485, 493, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967)). Searches of the person and the area immediately surrounding the person incident to arrest are reasonable (1) "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," or (2) to secure "any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, 2040 (1969).

In *United States v. Robinson*, 414 U.S. 218, 235, 38 L. Ed. 2d 427, 440, 94 S. Ct. 467, 477 (1973), the Court held that a case-by-case adjudication is not required to determine whether either rationale set forth in *Chimel* supports the search of an arrestee's person incident to their lawful arrest. Rather, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.*

The rule set forth in *Robinson* was recently narrowed by the United States Supreme Court in *Riley*, a case involving the warrantless search, incident to arrest, of data stored on the arrestee's cell phone that had been seized from the arrestee's pants pocket. Acknowledging that *Chimel* and *Robinson* were decided before modern cell phone technology had been invented, the Court began its analysis with the principle that courts "generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *Riley*, ___ U.S. at ___, 189 L. Ed. 2d at 441, 134 S. Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 143 L. Ed. 2d 408, 414, 119 S. Ct. 1297, 1300 (1999)).

Applying these considerations to the search of digital data on a cell phone, the Court held:

> [W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel* -- harm to officers and destruction of evidence -- are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

Id. at ___, 189 L. Ed. 2d at 441-42, 134 S. Ct. at 2484-85. Thus, the search of digital data on a cell phone did not further government interests in officer safety or preventing the destruction of evidence because "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape" and "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* at ___, ___, 189 L. Ed. 2d at 442, 443, 134 S. Ct. at 2485, 2486.

In contrast, the Court considered an arrestee's privacy interests in the digital data on a cell phone to be great, due in large part to "their immense storage capacity":

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information -- an address, a note, a prescription, a bank statement, a video -- that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at ___, 189 L. Ed. 2d at 447, 134 S. Ct. at 2489.

We believe that the same analysis applies to the search of the digital data on the GPS device in this case. As in *Riley*, the search of the GPS did not further any government interest in protecting officer safety or in preventing the destruction of evidence. In contrast, the individual privacy interests in the data on the GPS are great. The type of data that may be found on a GPS device was specifically mentioned by the *Riley* Court in distinguishing the digital data that can be stored on a cell phone from the type of data that is typically stored in physical records found on one's person:

> Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. See *United States v. Jones,* 565 U.S. ___, ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911, 925 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Id. at ___, 189 L. Ed. 2d at 448, 134 S. Ct. at 2490. Although a GPS typically does not store as vast an amount of information as a modern cell phone, an individual's expectation of privacy in the digital contents of a GPS outweighs the government's interests in officer safety and the destruction of evidence.

The State, nevertheless, argues that the GPS should be viewed as a type of "digital container" and treated the same as an address book, a wallet, or a purse. The *Riley* Court, however, expressly rejected this approach because "[m]odern cell phones,

as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom." *Id.* at ___, 189 L. Ed. 2d at 446, 134 S. Ct. at 2488-89. The Court also declined to create a rule "under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart" because such a rule would allow officers to search a much larger amount of information than previously allowed or contemplated and it would "launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records." *Id.* at ___, 189 L. Ed. 2d at 450, 451, 134 S. Ct. at 2493. Accordingly, we find the State's arguments unpersuasive, and we hold that the trial court properly concluded that the search was not justified as a search incident to arrest.

The State nonetheless contends that defendant's Fourth Amendment rights were not violated by the search of the digital contents of the GPS because defendant did not have a legitimate expectation of privacy in the GPS given that it was stolen. "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.,* one that has 'a source outside of the Fourth

Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " *Minnesota v. Carter*, 525 U.S. 83, 88, 142 L. Ed. 2d 373, 379, 119 S. Ct. 469, 472 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12, 58 L. Ed. 2d 387, 401 n.12, 99 S. Ct. 421, 430 n.12 (1978)). The defendant bears the burden of proving that he had a legitimate expectation of privacy in the item searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 65 L. Ed. 2d 633, 641, 100 S. Ct. 2556, 2561 (1980). *See also State v. Mackey*, 209 N.C. App. 116, 122, 708 S.E.2d 719, 723 (2011) ("With regard to defendant's standing to challenge the legality of a search, the burden rests with defendant to prove that he had a legitimate expectation of privacy in the item that was searched.").

The State argues that a defendant never has a reasonable expectation of privacy in a stolen item. Indeed, "[i]t is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981). Therefore, at a suppression hearing, the defendant must show that he has an "ownership or possessory interest" in the item searched before he may challenge the search of the item. *State v. Mandina*, 91 N.C. App. 686, 695, 373 S.E.2d 155, 161 (1988).

Defendant, however, points to 6 Wayne R. LaFave, *Search and Seizure* § 11.3(f) p. 290 (5th ed. 2012), which explains that a defendant can challenge the search of a stolen item by "establish[ing] that the police actually interfered with his person or

with a place as to which he had a reasonable expectation of privacy." Thus, defendants have been able to challenge the search of stolen property when the search interfered with other well-established privacy concerns.

In particular, defendant cites *Arizona v. Hicks*, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987), in which the Supreme Court held that moving stolen stereo equipment located inside the defendant's home in order to record the serial numbers constituted an unlawful search under the Fourth Amendment. As explained by the Second Circuit, "because the Supreme Court in *Hicks* held that the search of the stereo equipment was unlawful, it necessarily also found . . . that the defendant had a legitimate expectation of privacy in that equipment, despite its having been stolen." *United States v. Haqq*, 278 F.3d 44, 50 (2d Cir. 2002). The expectation of privacy in the stolen equipment "reflects a conclusion that exclusive custody and control of an item within one's home is sufficient to establish a reasonable expectation of privacy in that item." *Id.* at 51. Thus, "[t]he controlling factor in *Hicks* was that the stolen property was inside Hicks' apartment where he clearly had an expectation of privacy[.]" *Shaver v. Commonwealth*, 30 Va. App. 789, 799-800, 520 S.E.2d 393, 398 (1999).

Similarly, in *McFerguson v. United States*, 770 A.2d 66, 71 (D.C. 2001), the defendant challenged the search of a plastic bag defendant was carrying at the time police officers stopped him in connection with a burglary, even though the bag was

found to contain items allegedly stolen during the burglary. Citing the principle that " 'a street pedestrian has a reasonable expectation of privacy in covered objects associated with his person[,]' " the court concluded that "[t]he contents of the bag were 'sufficiently physically connected with [the defendant's] person to fall properly under the umbrella of protection of personal privacy.' " *Id.* (quoting *Godfrey v. United States*, 408 A.2d 1244, 1246-47 (D.C. 1979)).

Defendant argues that, like the search in *McFerguson*, the search in this case interfered with his reasonable expectation of privacy in his person. We disagree. Although the initial search and seizure of the GPS from defendant's pocket interfered with defendant's legitimate expectation of privacy in his person, the trial court found, and defendant does not dispute, that he gave the officers consent for that search. The search that defendant seeks to challenge is not the initial search of his person, but rather the subsequent search of the digital contents of the GPS after it had been seized. That part of the search did not, in any way, interfere with his legitimate expectation of privacy in his person.

Consequently, the question remains whether defendant had a reasonable expectation of privacy with respect to the GPS. With respect to searches of stolen property that do not fall under the umbrella of a defendant's reasonable expectation of privacy in his home or person, the case law suggests that a defendant may nevertheless challenge the search if he can show at the suppression hearing that he

acquired the stolen property innocently and did not know that the item was stolen. As recognized by the Maryland Court of Special Appeals, "[t]he legitimacy of one's expectation of privacy [in a stolen item] is in large measure a function of its reasonableness, and that, in turn, is determined to some extent by the elements of time, place, and circumstance. There may well be situations, for example, in which the unlawfulness of an initial acquisition can become attenuated by other factors, such as . . . an honest, though mistaken, belief that the object in question actually belongs to [the defendant] -- that his acquisition of it was not unlawful." *Graham v. State*, 47 Md. App. 287, 294, 421 A.2d 1385, 1389 (1980).

Thus, how the defendant acquired the stolen property and whether he knew that the property was stolen are relevant considerations in determining whether his expectation of privacy in the item is reasonable. *See United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995) (holding that "a defendant who *knowingly* possesses a stolen car has no legitimate expectation of privacy in the car" (emphasis added)); *United States v. Hargrove*, 647 F.2d 411, 413 (4th Cir. 1981) ("[I]n view of his burden to establish standing to contest the search [of a stolen car] at the suppression hearing, it sufficed at the very least to require him to show, if he could, that he acquired the car innocently.").

In this case, defendant does not dispute that the GPS had been stolen from its original owner, but argues that he presented evidence at the hearing from which the

trial court could determine that he acquired the GPS innocently and did not know that the GPS was stolen. Defendant testified at the suppression hearing that he bought the GPS from an unidentified man at the gas station for $10 or $15 shortly before he encountered the officers. Although the trial court found that "[d]efendant claimed the GPS as his own[,]" the trial court failed to make a factual determination as to whether defendant had, in fact, purchased the GPS, and, if so, whether defendant knew or should have known that the GPS was stolen. Because these determinations were necessary to determine whether defendant had a reasonable expectation of privacy in the GPS, we reverse and remand for further findings of fact.

On remand, the trial court must determine, for purposes of the motion to suppress, whether defendant purchased the GPS as he claimed at the suppression hearing. In the event that the trial court believes that defendant purchased the GPS, it must then determine whether defendant knew or should have known that the GPS was stolen. In making this determination, we find *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986), instructive. In *Parker*, our Supreme Court recognized that, in the context of convictions for possession or receipt of stolen property, the "knowing" element of those offenses may be satisfied by evidence that there were reasonable grounds to believe that the item was stolen. *Id.* at 304, 341 S.E.2d at 560. Such evidence includes "unusual" "mechanics of the transaction," a lack of documentation of the sale, such as failure to receive a title of a vehicle, a seller's "willingness to sell

the property at a mere fraction of its actual value," a buyer's purchase of "property at a fraction of its actual cost," or flight from police, which "is evidence of consciousness of guilt." *Id.* These considerations are equally relevant to determining, for purposes of a motion to suppress, whether the defendant's expectation of privacy in stolen property is reasonable.

Here, the evidence that defendant could not identify who the seller was, did not have a receipt from the sale, and only paid $10 or $15 for the GPS tend to show that defendant knew or should have known that the GPS was stolen. On the other hand, that defendant did not flee from police and was cooperative is evidence that defendant did not have consciousness of guilt. *See id.* We also note that there was no evidence presented as to the value of the GPS or whether sales of that type were a typical transaction occurring at the location where defendant alleged he bought the GPS. These are all considerations that the trial court, and not this Court, must weigh in the first instance.

Defendant, citing *State v. Larocco*, 794 P.2d 460 (Utah 1990) and *McFerguson*, argues that he has standing to contest the legality of the search because (1) defendant claimed that he owned the GPS and (2) the question whether defendant stole the GPS, as opposed to purchasing it, was an issue for trial. In *Larocco*, the Supreme Court of Utah held that the defendant had standing to challenge the search of a vehicle that he was subsequently charged with stealing. *Id.* at 464. The court

distinguished other cases in which the courts held the defendant lacked standing to challenge the search of stolen property on the grounds that in those cases, "it was clearly established and not disputed prior to the search that the defendant did not own or did not have an interest in the property searched" and held that "[w]here a defendant has not declared beforehand that he has no interest in the vehicle and where proof that the car was stolen is an issue at trial, . . . the defendant has standing to challenge the legality of the search." *Id.*

Defendant argues, relying on *McFerguson*, that the State's assertion, in seeking reversal of the denial of the motion to suppress, that the GPS was stolen "assumes the very facts that were to be proved at trial . . . . If assuming those facts as given dictates whether he could move to suppress the evidence by which the government meant to prove his guilt, that would do away with the justification for suppression hearings in a great many cases[.]" *McFerguson*, 770 A.2d at 71.

The rule stated in *Larocco* is inconsistent with prior, controlling decisions of our courts. Our appellate courts have previously held that the question whether it is established *prior* to the search that the defendant did not own or have an interest in the property searched is relevant only to the state of mind of the officers conducting the search. *State v. Cooke*, 54 N.C. App. 33, 43, 282 S.E.2d 800, 807 (1981), *aff'd*, 306 N.C. 132, 291 S.E.2d 618 (1982). However, " '[t]he state of mind of the searcher regarding the possession or ownership of the item searched is irrelevant to the issue

of standing [to assert Fourth Amendment rights]. Rather, standing to object is predicated on the objector alleging *and, if challenged, proving* he was the victim of an invasion of privacy.' " *Id.* (emphasis added) (quoting *United States v. Canada*, 527 F.2d 1374, 1378 (9th Cir. 1975)).

Furthermore, our holding does not ask the trial court to assume the GPS was stolen, but rather, to weigh the evidence before it to determine whether the defendant has met his burden of showing that he has a legitimate expectation of privacy in the digital contents of the GPS. In this case, in deciding solely for purposes of the motion to suppress whether defendant had a legitimate expectation of privacy in the GPS, it was the trial court's duty to determine the credibility of defendant's testimony that he bought the GPS and reasonably believed it was not stolen. *See State v. Villeda*, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004) ("[T]he trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom[.]").

Indeed, in *Greenwood*, our Supreme Court addressed a case materially indistinguishable from this one. In *Greenwood*, 301 N.C. at 706, 273 S.E.2d at 439, an officer searched a car as a search incident to arrest and found a pocketbook under some jackets on the back seat of the car. The officer searched the pocketbook and discovered from its contents that it did not belong to the defendant, but rather belonged to a woman whose motor vehicle had been broken into. *Id.*, 273 S.E.2d at

439-40. The defendant was then charged with breaking and entering the victim's motor vehicle and larceny of her pocketbook. *Id.*, 273 S.E.2d at 440. The Supreme Court reversed this Court's opinion holding that the defendant's motion to suppress should have been allowed as to the contents of the pocketbook. *Id.* at 707, 273 S.E.2d at 440.

After noting that it was "apparent from the face of the record that the pocketbook in question was not the property of the defendant[,]" the Court then pointed out that "[d]efendant offered no evidence to show any legitimate property or possessory interest in the pocketbook, and we conclude that he had none." *Id.* The Court, therefore, held "that *defendant failed to show* that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment. Therefore, defendant's motion to suppress the pocketbook and its contents was properly denied by the trial court. [The d]ecision of the Court of Appeals to the contrary is erroneous and must be reversed." *Id.* at 708, 273 S.E.2d at 441 (emphasis added).

Under *Greenwood*, defendant, in this case, has the burden of showing, for purposes of the motion to suppress, that the search of the GPS infringed on his Fourth Amendment rights because he had a reasonable expectation of privacy in the digital contents of the GPS. The trial court, before granting the motion to suppress, was required to make sufficient findings of fact, based on the evidence, to establish that

defendant had the necessary reasonable expectation of privacy. Because the trial court failed to do so, we reverse and remand for a factual determination whether defendant knew the GPS was stolen and whether he acquired it innocently, as he asserted at the suppression hearing.

REVERSED AND REMANDED.

Judges STEELMAN and McCULLOUGH concur.