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NO. COA14-411
NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v. Wake County
No. 12 CRS 212660

WILLIAM EARL ASKEW,
Defendant.

Appeal by defendant from judgment entered 10 September 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 25 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General John R. Green, Jr., for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

GEER, Judge.

Defendant William Earl Askew appeals his judgment sentencing him for trafficking in heroin by possession, trafficking in heroin by delivery, and conspiracy to traffic heroin by delivery. Defendant primarily argues that the trial court erred in denying his motion to suppress. Defendant consented to an officer's

checking defendant's wallet for his identification, but the officer also examined a $100 bill in the wallet to see whether its serial number matched a bill used in a drug purchase by a confidential informant. We need not address whether, as defendant argues, under *Arizona v. Hicks*, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987), the examination of the bill was a search that exceeded the scope of defendant's consent because the trial court's findings establish that seizure of the bill was justified under the plain view doctrine. Consequently, we affirm.

Facts

On 6 June 2012, defendant was riding as a passenger in a Kia Soul being driven by Tammy Pettiford. Sergeant Jeff Malzahn of the Raleigh Police Department ("RPD") stopped the vehicle, asked defendant to step out of the vehicle, and asked for defendant's identification. Defendant consented to Sergeant Malzahn's retrieving defendant's identification from his wallet, which was still in the car. In addition to opening the wallet to get defendant's identification, Sergeant Malzahn also checked a $100 bill in the wallet and determined that it was incriminating evidence of a controlled purchase of heroin, and he arrested defendant. Following defendant's arrest, defendant led officers to a stash of heroin.

Defendant was indicted on 29 October 2012 for trafficking in heroin by possession, trafficking in heroin by delivery, and conspiring to deliver heroin. On 21 August 2013, defendant filed a motion to suppress arguing that Sergeant Malzahn's examination of the $100 bill exceeded the scope of defendant's consent to a search of his wallet, and the bill was "not in plain sight." Defendant further sought to suppress any evidence seized following defendant's arrest as fruit of the poisonous tree. On 7 February 2014 -- after a hearing at which defendant presented no evidence -- the trial court entered an order denying defendant's motion to suppress.

The trial court made the following findings of fact. In January or February 2012, RPD Detective Daniel Jones had come to suspect defendant and Jennifer Robertson of trafficking in heroin. RPD officers began maintaining surveillance on defendant and Ms. Robertson, including on their residences and vehicles. Ultimately, a confidential informant ("CI") agreed to participate in a controlled purchase of seven grams of heroin from defendant and Ms. Robertson at Ms. Robertson's residence on 6 June 2012.

On 6 June 2012, Detective Jones met with the CI and searched the CI and the CI's vehicle and found no contraband or money. Detective Jones equipped the CI with audio and video surveillance as well as $1,000.00 of RPD funds to make the purchase, including

nine $100 bills and five $20 bills. Detective Jones had made photocopies of the bills and recorded the serial numbers for each bill. The CI telephoned Ms. Robertson and asked to buy seven grams of heroin. Ms. Robertson then called defendant whom the trial court found to be "her source" for heroin.

Defendant and Ms. Pettiford subsequently arrived at Ms. Robertson's house in the Kia Soul, and Ms. Robertson got into the back of the vehicle and made a phone call to the CI that was monitored. Ms. Robertson went back inside her residence, and the CI drove to meet Ms. Robertson. The CI went inside Ms. Robertson's house, completed the transaction, left the house, and met Detective Jones at a prearranged location to deliver to him the seven grams of heroin.

Ms. Robertson again left her residence, got into the back of the Kia Soul that was still parked in her driveway, and gave defendant the money from the drug transaction. Ms. Pettiford, Ms. Robertson, and defendant then drove in the Kia to a nearby Zaxby's Restaurant. Detective Jones began following the Kia hoping defendant would lead him to defendant's supplier. The Kia, however, returned to Ms. Robertson's residence, and after Ms. Robertson went back inside her residence, Ms. Pettiford and defendant went to a store where they stayed for a short time. Ms. Pettiford and defendant then went to defendant's residence and

went inside. Shortly thereafter, Ms. Pettiford and defendant again drove away in the Kia.

About an hour or an hour and a half after the controlled purchase, it became clear that defendant was not going to contact his heroin supplier. Detective Jones requested over the radio that a patrol officer stop the Kia. While Detective Jones and others involved in the investigation were in plain clothes and driving unmarked RPD vehicles, Sergeant Malzahn was in uniform and driving a marked patrol car nearby.

Detective Jones, who was parked a short distance from where Sergeant Malzahn was located, asked Sergeant Malzahn to stop the Kia Soul. After pulling the Kia over, Sergeant Malzahn spoke with Ms. Pettiford and then returned to his patrol car. Detective Jones was able to maintain surveillance of the encounter. Sergeant Malzahn discovered that Ms. Pettiford had a revoked North Carolina driver's license and observed that defendant was acting "extremely nervous while speaking with him." After Sergeant Malzahn relayed this information to Detective Jones, Detective Jones advised Sergeant Malzahn to try to obtain consent to search the vehicle and "to specifically look for $100 bills and to obtain the serial numbers if possible." Sergeant Malzahn returned to the Kia and asked Ms. Pettiford and defendant for identification. Defendant told Sergeant Malzahn that his identification was in his wallet,

which was located in defendant's suitcase in the back of the vehicle.

Sergeant Malzahn asked Ms. Pettiford and defendant to step out of the vehicle, and he "obtained limited consent to retrieve [defendant's] wallet for the ID." After defendant and Ms. Pettiford complied, Sergeant Malzahn opened defendant's suitcase and retrieved defendant's wallet, "a billfold, which opened horizontally, with a pocket that runs the length of the billfold." The trial court found that "as [Sergeant Malzahn] opened the wallet, he could see a $100 bill partially sticking out of the pocket that runs the length of the billfold[.]" Then, Sergeant Malzahn "open[ed] the wallet slightly, and partially removed the $100 bill to write down the serial number. He was also able to retrieve Askew's identification from the billfold[.]" After returning to his patrol car, Sergeant Malzahn read the serial number to Detective Jones, who confirmed that the bill was used in the controlled purchase.

Detectives then arrested both Ms. Robertson and defendant for trafficking heroin. Subsequent to his arrest, defendant admitted that he had more heroin at Ms. Pettiford's home. Officers in fact found a large amount of heroin when they searched Ms. Pettiford's home.

Based on those findings of fact, the trial court made the following conclusions of law:

> 1. Sgt. [Malzahn] had reasonable suspicion to stop the vehicle. In reviewing the totality of the circumstances, Detective Jones "possessed a reasonable suspicion that criminal conduct had occurred, was occurring or was about to occur." State v. Battle, 109 N.C. App. 367 (1993). Detective Jones possessed that reasonable suspicion prior to his request that Sgt. [Malzahn] stop Askew's vehicle. Id.
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> 2. Sgt. [Malzahn]'s search of Askew's wallet did not exceed the consent given. Askew gave Sgt. [Malzahn] consent to search the wallet for his identification. Sgt. [Malzahn] understood this to mean that he had limited consent to search the wallet and retrieve Askew's ID. Sgt. [Malzahn] followed that limited consent by opening the wallet and when he saw the $100 bill that was partially sticking out of the billfold, he recorded the serial number.[1]
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> 3. The stop of the vehicle and subsequent search of the wallet do not violate the Defendants [sic] rights protected by the Fourth Amendment of the United States Constitution.

Following the denial of defendant's motion to suppress, defendant pled guilty to trafficking in heroin by possession, trafficking in heroin by delivery, and conspiracy to deliver

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[1]While the second conclusion of law could be read as including a finding that the serial number was visible on the portion of the bill partially sticking out, the State has conceded that the serial number was concealed in the wallet.

heroin. Defendant conditioned his plea on preserving his right to appellate review of the trial court's denial of his motion to suppress. The trial court sentenced defendant to a term of 225 to 279 months imprisonment. Defendant timely appealed to this Court.

Discussion

"'[T]he scope of appellate review of an order [regarding a motion to suppress] is strictly limited to determining whether the trial [court]'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 [court]'s ultimate conclusions of law.'" *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

"Because the 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, '[t]he appellate court cannot substitute itself for the trial court in this task.'" *State v. Villeda*, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004) (quoting *NationsBank of N.C. v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994)). "This deference is afforded the trial judge because he is in the best position to weigh the evidence . . . ." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000). Findings of fact that are

not challenged "are presumed to be supported by competent evidence and are binding on appeal." *Tinkham v. Hall*, 47 N.C. App. 651, 652-53, 267 S.E.2d 588, 590 (1980).

I

Defendant first argues that competent evidence did not support a number of the trial court's findings of fact. We hold that the challenged findings either are adequately supported by evidence and reasonable inferences drawn from the evidence or are immaterial to the conclusions of law.

We note, however, as a preliminary matter, that the State, in arguing that the findings are all supported, relies extensively on two exhibits: written incident reports of the events of 6 June 2012 prepared by Detective Jones and Sergeant Malzahn. Although the trial court acknowledged at the hearing that these exhibits were attached to defendant's motion to suppress, the trial court's order states that "[t]he Court has considered only the testimony of Detective Jones, Sergeant Malzhan [sic], and Jennifer Robertson, as well as the statements of counsel . . . ."[2] In addition, in a subsequent order, the trial court stated that in the order denying the motion to suppress, "the Court has only considered the testimony of Detective Jones, Sergeant Malzhan

[2]From the transcript, the reference to "statements of counsel" appears to be a reference to the attorneys' arguments during the suppression hearing.

[sic] and the co-defendant Jennifer Robertson, and makes no findings of fact or conclusions of law based upon any other evidence." The motion to suppress order also stated that the trial court "had the opportunity to observe the demeanor and testimony of the witnesses and finds the testimony of Detectives [sic] Jones, Sargeant [sic] Malzhan [sic] and Jennifer Robertson to be credible and true." The trial court admitted Ms. Robertson's testimony only for corroborating other testimony and also explained that "[t]he Court has not considered the testimony of Detective Marbrey [sic] in this matter."

Because the trial court did not indicate that it considered the exhibits relied upon by the State when making its decision, we likewise have not considered them, but rather have limited our review to the substantive testimony given at the suppression hearing by Detective Jones and Sergeant Malzahn. We have considered the testimony of Ms. Robertson to the extent that it corroborated other testimony.

Defendant first challenges the portions of finding of fact 5 stating that Ms. Robertson called defendant in connection with the controlled purchase and that defendant was Ms. Robertson's "source." However, at the suppression hearing, Detective Jones explained that "about four months prior we had been told by a [CI] that two subjects, Jennifer Robertson and William Askew, were

trafficking in heroin in the Raleigh area." Detective Jones testified without objection regarding the events of 6 June 2012:

> In the morning [of 6 June 2012] I had our [CI] meet me at the old Raleigh police station on Hargett Street. I had the informant make a phone call to Ms. Robertson on her cell phone. Place the order for the 7 grams of heroin. I was monitoring the phone call. Ms. Robertson told the CI that she would have to call her source and get the heroin brought over to her house and that she would call him back when she wanted him to come over.
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> . . . We had other detectives . . . [who had] Ms. Robertson's residence under surveillance. I told them what she had said. . . . A few minutes after we had the phone call [from the CI], . . . [a] gray Kia Soul had pulled into the driveway of Ms. Robertson's house and was driven by [Ms. Pettiford] and Mr. Askew was the right passenger in the vehicle.
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> . . . [Detective Marbry] kept the vehicle under surveillance. Said he saw Ms. Robertson come out of her residence. Get into the back passenger seat of the gray Kia. And could see that they were all talking inside the car. Shortly thereafter Ms. Robertson called my CI who I was still with and said she was ready for him to come down to the residence.

Also, defendant does not challenge the finding that the CI drove to Ms. Robertson's residence for the controlled purchase and, shortly thereafter, returned from there with heroin. The trial court could reasonably infer, based on this finding and Detective

Jones' testimony, that Ms. Robertson called defendant prior to the controlled purchase and that defendant was Ms. Robertson's source for heroin.

Defendant next challenges finding of fact 11, which found: "Detective Jones then followed the CI's car in an unmarked patrol vehicle to Robertson's residence." We agree that this finding is not supported by the evidence. Detective Jones in fact testified that he "didn't actually drive to where [the CI] was going" and that he "was not in a position to see the house from where [he] was sitting." Nonetheless, defendant does not explain why this finding is material to the conclusions of law at issue on appeal. The CI provided audio and video recordings of the controlled purchase and other officers conducted surveillance of Ms. Robertson's residence during the transaction.

Defendant next challenges the portion of finding of fact 14 finding that Ms. Robertson handed defendant the money from the controlled purchase with the CI. However, this finding is supported with other supported findings and reasonable inferences from the evidence. The trial court found that defendant was Ms. Robertson's source and that she got into the Kia Soul after the transaction with the CI. Additionally, Detective Jones testified, without any objection or limitation, that "Detective Marbry . . . reported . . . that he saw some money change hands."

Defendant lastly challenges finding of fact 24 to the extent it stated that Detective Jones told Sergeant Malzahn there was probable cause to stop the Kia Soul in which defendant was riding. While we agree that Detective Jones testified that he told Sergeant Malzahn there was reasonable suspicion -- as opposed to probable cause -- to stop the vehicle, this discrepancy is immaterial since whether there was probable cause or reasonable suspicion is a question of law and not a finding of fact.

II

Defendant next argues that the trial court's findings of fact failed to support its conclusion that Sergeant Malzahn's partial removal of the $100 bill and recording of the serial number was not an unconstitutional search. We disagree.

Under the Fourth Amendment to the United States Constitution, "'[a] governmental search and seizure of property unaccompanied by prior judicial approval in the form of a warrant is per se unreasonable unless the search falls within a well-delineated exception to the warrant requirement.'" *State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Hardy*, 339 N.C. 207, 226, 451 S.E.2d 600, 610 (1994)). However, "'[c]onsent . . . has long been recognized as a special situation excepted from the warrant requirement . . . .'" *Id.* (quoting *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997)).

An officer who obtains limited consent to search is constrained to looking in places "which reasonably might contain" the object of the search. *State v. Morocco*, 99 N.C. App. 421, 430, 393 S.E.2d 545, 550 (1990). Here, defendant consented to Sergeant Malzahn looking into his wallet in order to find defendant's identification.

In arguing that the trial court should have concluded that Sergeant Malzahn exceeded the scope of defendant's consent by partially removing the $100 bill to see its serial number, defendant contends that Sergeant Malzahn's actions were similar to the search that the United States Supreme Court concluded was unconstitutional in *Hicks*. In *Hicks*, after officers had made a lawful warrantless entry into an apartment, based on exigent circumstances, in order to search for a shooter, victims, and weapons, one of the officers "noticed two sets of expensive stereo components which seemed out of place[.]" 480 U.S. at 323, 94 L. Ed. 2d at 353, 107 S. Ct. at 1152. Although the officer suspected the stereo components were stolen, he had no more than reasonable suspicion to believe that was the case. *Id.* at 326, 94 L. Ed. 2d at 355, 107 S. Ct. at 1153. Nonetheless, the officer lifted the speakers and "read and recorded their serial numbers," which revealed the speakers were stolen. *Id.* at 323, 94 L. Ed. 2d at 353, 107 S. Ct. at 1152.

The Supreme Court concluded that because the scope of the officers' search was limited to looking for people and weapons and the officer's action in looking at the serial numbers was "unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents," the officer "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry." *Id.* at 325, 94 L. Ed. 2d at 354, 107 S. Ct. at 1152. Defendant argues that, similarly, Sergeant Malzahn's partial removal of the $100 bill to view a concealed serial number, unnecessary to locate defendant's identification, produced "a new invasion of [defendant's] privacy unjustified" by the scope of the consent given to him. *Id.*

However, even assuming without deciding that the partial removal of the $100 bill was unconstitutional under *Hicks*, we hold that the trial court's findings of fact establish that Sergeant Malzahn's partial removal of the $100 bill and recording of its serial number was justified under the plain view doctrine. As this Court has recently explained:

> "[T]he 'plain-view' doctrine provides an exception to the warrant requirement for the *seizure* of property, but it does not provide an exception for a search. Viewing an article that is already in plain view does not involve an invasion of privacy and, consequently, does not constitute a search implicating the Fourth

> Amendment." *United States v. Jackson*, 131 F.3d 1105, 1108 (4th Cir. 1997). . . .
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> Under the plain view doctrine, a warrantless seizure is lawful if (1) the officer views the evidence from a place where he has legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself.

State v. Alexander, ___ N.C. App. ___, ___, 755 S.E.2d 82, 87 (2014).

The "immediately apparent" requirement is "satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. White*, 322 N.C. 770, 777, 370 S.E.2d 390, 395 (1988), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990). "When the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that the item may be contraband," or, as here, evidence of a crime, "probable cause exists." *State v. Briggs*, 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000) (emphasis omitted).

Further, even though an officer does not himself have personal knowledge of facts amounting to probable cause, the warrantless search may nonetheless be justified if that officer is responding

to a request to perform the search by another officer who possesses information that constitutes probable cause, and the warrantless search would otherwise be appropriate. *See State v. Zuniga*, 312 N.C. 251, 260, 322 S.E.2d 140, 145 (1984) (upholding arrest of defendant by Tennessee officers upon request by North Carolina officers when North Carolina officers had probable cause to arrest, explaining that "one law enforcement officer may rely upon bulletins from other officers as the basis for an arrest, but only so long as the originating officer himself had probable cause").

Initially, defendant contends that the State is barred from arguing the applicability of the plain view doctrine because it did not argue plain view below, citing *Cooke*, 306 N.C. at 136-37, 291 S.E.2d at 621 ("It would clearly be unfair to the defendant for us either to consider this contention on the record as it stands, for we cannot determine the necessary underlying matters of fact, or to allow the State a gratuitous second chance to develop a theory of abandonment, in opposition to the formerly contested motion to suppress, by remanding to the trial court for further hearing, findings of fact and conclusions of law upon the issue."). Defendant, however, overlooks the fact that the State was the appellant in *Cooke* and not the appellee as in this appeal.

Our Supreme Court has specifically observed that "[a]ssuming arguendo that the trial court's reasoning for denying defendant's

motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous. A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (internal citations omitted).[3]

With regard to the first and third elements of the plain view doctrine, defendant does not contend that Sergeant Malzahn's stop of the Kia Soul and subsequent encounter with defendant were unjustified. When Sergeant Malzahn spotted the $100 bill, he was looking in defendant's wallet which he had a right to do because of defendant's consent. Therefore, the findings support the first element of the plain view doctrine. Additionally, because the findings indicate that the $100 bill itself -- as opposed to the serial number on the bill -- was in a place where defendant's ID might reasonably have been found, Sergeant Malzahn had lawful access to the bill.

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[3]We also note that in his closing statement before the trial court, defense counsel argued that seizure of the $100 bill was *not* justified under the plain view doctrine.

Further, although Sergeant Malzahn's search of defendant's wallet was, as the trial court found, in response to Detective Jones' request to "specifically look for $100 bills and to obtain the serial numbers if possible[,]" the trial court's binding findings of fact support the conclusion that the facts known to Detective Jones when he requested the search amounted to probable cause to believe that any $100 bills found in defendant's wallet were evidence of the controlled purchase. Those findings include the following facts relating to knowledge possessed by the officers at the time Sergeant Malzahn observed the $100 bill in defendant's wallet.

After the CI called Ms. Robertson requesting to buy heroin, Ms. Robertson contacted her "source" for heroin in order to set up the transaction. Defendant then arrived at Ms. Robertson's residence, Ms. Robertson got into the back of his vehicle, and she made a phone call to the CI. Detective Jones provided the CI with $1,000.00 -- comprised of nine $100 bills and five $20 bills -- to make the controlled purchase. After the CI arrived at Ms. Robertson's residence, the CI went inside and gave the bills to Ms. Robertson in exchange for heroin.

After the CI left, Ms. Robertson again got into the backseat of the Kia Soul in her driveway, at which point Detective Marbry "saw some money change hands." Further, defendant visited a

Zaxby's, a "store,"[4] and defendant's residence, over the course of one and a half hours, before being pulled over by Sergeant Malzahn. When Sergeant Malzahn pulled the Kia over, defendant was "extremely nervous."[5]

These findings support the conclusion that the incriminating nature of the $100 bill was "immediately apparent." *See United States v. Paneto*, 661 F.3d 709, 714 (1st Cir. 2011) (finding probable cause to search $20 bill for marking where "[the officer] knew that [the middle man] had gone into the apartment and returned with drugs; that [the middle man] had identified his source by an initial -- 'D' -- which corresponded to the defendant's first name; that the defendant, when opening the door, had referred to himself as 'D'; and that the clearly visible denomination of the bill matched the denomination of the 'bait' bill that [the officer] had given to [the middle man]."); *State v. Robinson*, 379 S.W.3d 875, 882 (Mo. Ct. App. 2012) ("[T]he police officers . . . had the

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[4]Defendant does not challenge the finding that he and Ms. Pettiford "went to a store where they stayed for a short time," and this finding is binding on appeal.

[5]Although defendant cites *United States v. Richardson*, 385 F.3d 625, 630 (6th Cir. 2004), for the proposition that a defendant's nervousness is an "unreliable indicator" of guilt, our Supreme Court, in *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999), has held that nervousness is a relevant factor for determining the existence of reasonable suspicion. *See also, e.g., State v. Watkins*, 220 N.C. App. 384, 391, 725 S.E.2d 400, 405 (2012) (concluding that existence of probable cause was supported in part by defendant's nervousness).

benefit of the plain-view exception. . . . [T]he incriminating nature of the money was, based on [the detective's] testimony, 'immediately' apparent in that it was bundled in a manner similar to that which was stolen from the Country Mart. . . . Even if [the detective] did not have the aforementioned information about the robbery, [the defendant] had explicitly told him that he had been 'hustl[ing]' by selling marijuana and prescription pain medication such that the currency could have been profits from drug money. . . . [I]n the given situation, [the detective] had probable cause to believe the money was the result of some sort of criminal activity.").

Defendant counters that whether there was a "'fair probability that Defendant had engaged in the criminal activity of selling heroin.' . . . is simply irrelevant to whether there was probable cause that [a $100 bill] would be found in Mr. Askew's wallet." To the contrary, the fact that a person participated in a drug transaction in which drugs were exchanged for nine $100 bills are ample facts and circumstances within the knowledge of the officers "sufficient to warrant a person of reasonable caution in the belief that [a $100 bill found in the person's wallet] may be," just an hour or an hour and a half later, evidence of a crime, and, therefore, "probable cause exists." *Briggs*, 140 N.C. App. at 493, 536 S.E.2d at 863.

Defendant -- citing *United States v. Szymkowiak*, 727 F.2d 95 (6th Cir. 1984), *State v. Graves*, 135 N.C. App. 216, 519 S.E.2d 770 (1999), and *State v. Connard*, 81 N.C. App. 327, 344 S.E.2d 568 (1986), *affirmed per curiam*, 319 N.C. 392, 354 S.E.2d 238 (1987) -- additionally contends that the incriminating character of the bill was not immediately apparent because "in order to determine the bill's incriminating character, not only did Malzahn need to slightly open the wallet and partially remove the bill, but he needed to record the serial number and call it in to be compared with those numbers used in the controlled buy." However, in each of the cases cited by defendant, the courts concluded that, at the time of the seizure, there were no circumstances at all that would suggest that the seized property might be contraband or evidence of illegal activity. *See Szymkowiak*, 727 F.2d at 99 (noting, with respect to seized firearm, that firearms expert who examined gun determined that possession of gun did *not* violate federal law and could not tell whether possession violated state law); *Graves*, 135 N.C. App. at 220, 519 S.E.2d at 773 (holding record contained no evidence that officer had any reason to suspect that wad of brown paper contained contraband); *Connard*, 81 N.C. App. at 335, 344 S.E.2d at 573 (holding that record contained "no evidence of other circumstances which might properly have excited further inquiry" regarding whether goods were in fact stolen). Here, the facts and

circumstances known to the officers were sufficient to allow an officer to reasonably believe that the $100 bill was part of the proceeds of the heroin sale.

Defendant further argues that under *State v. Ledbetter*, 120 N.C. App. 117, 461 S.E.2d 341 (1995), even if immediately following the controlled buy there was probable cause to believe that bills from the sale of the heroin would be found in defendant's wallet, "due to the nature of the [bills] and the passage of time, probable cause would have evaporated by the time of the actual search."

Ledbetter addressed whether information used to support an application for a search warrant was too stale to be reliable. It first recognized that in determining the "timeliness of information," our Supreme Court has explained, "'The ultimate criterion in determining the degree of evaporation of probable cause . . . is . . . reason. The likelihood that the evidence sought is still in place is [in part] a function . . . of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.'" *Id.* at 124, 461 S.E.2d at 346 (quoting *State v. Louchheim*, 296 N.C. 314, 323, 250 S.E.2d 630, 636 (1979)).

While the relevant question is generally "'whether the information constituting the probable cause in the search warrant

is so remote from the date of the affidavit as to render it improbable that the alleged violation of law authorizing the search was extant at the time the application for the search warrant was made[,] [t]he time element . . . is not the only factor.'" *Id.* at 125, 461 S.E.2d at 346 (quoting *Davidson v. State*, 54 Md. App. 323, 331, 458 A.2d 875, 879-80 (1983)). This is because "'[t]he hare and the tortoise do not disappear at the same rate of speed.'" *Id.* (quoting *Davidson*, 54 Md. App. at 331, 458 A.2d at 880).

Despite the relatively short passage of time from the controlled purchase to the discovery of the $100 bill in defendant's wallet, defendant likens the $100 bill in this case to the "hare" rather than the "tortoise" and suggests that because "[a] piece of legal currency is the embodiment of an easily transferrable item[,]" the bill's incriminating character had evaporated. However, *Ledbetter* recognized that evidence of drug dealing is less likely to become stale with the passage of time -- even, for instance, after six days -- because drug dealing is a "'regenerating activity.'" *Id.* (quoting *Davidson*, 54 Md. App. at 331, 458 A.2d at 880).

Further, even assuming the $100 bill is more like the "hare" than the "tortoise," this weakens rather than supports defendant's position. Defendant acquired as many as nine $100 bills in his wallet as a result of the controlled purchase. For this evidence

to have become "stale" at the time of Sergeant Malzahn's search, it must have been reasonable for the original nine $100 bills to have been removed from defendant's wallet. Because Sergeant Malzahn actually saw multiple $100 bills in defendant's wallet when he opened it, it must have been reasonable for those bills to have replaced the original $100 bills used by the CI. Yet, the places that defendant visited after receiving the controlled purchase money -- Zaxby's, another store, and defendant's residence -- were merely opportunities for defendant to shed the bills rather than acquire new $100 bills. Thus, the presence of the $100 bills in defendant's wallet at the traffic stop added to, rather than subtracted from, the reasonableness that they were extant evidence of the controlled purchase.

The trial court's findings, therefore, support the denial of the motion to suppress based on the theory that the seizure of the bill in order to record its serial number was justified under the plain view doctrine. The trial court, therefore, did not err in denying defendant's motion to suppress. Because of our resolution of this issue, we need not address defendant's remaining arguments.

Affirmed.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).