

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-723

Filed: 7 April 2015

Guilford County, No. 12 CRS 71601

STATE OF NORTH CAROLINA,

v.

DARIO FIZOVIC, Defendant.

Appeal by defendant from order entered 22 January 2014 by Judge Susan E. Bray and judgment entered 20 March 2014 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 6 November 2014.

Attorney General Roy Cooper, by Associate Attorney General Laura Askins, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant.

GEER, Judge.

Defendant Dario Fizovic appeals from a judgment entered on his *Alford* plea of guilty to possession of a firearm by a felon. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence seized from defendant's vehicle after he was stopped for having an open container of alcohol in his vehicle. Defendant first argues that the search amounted to a "search incident to citation" and was invalid pursuant to *Knowles v. Iowa*, 525 U.S. 113, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998), and *State v. Fisher*, 141 N.C. App. 448, 539 S.E.2d 677

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(2000). However, because defendant was never issued a citation and was in fact arrested for the open container offense, *Knowles* and *Fisher* are inapplicable.

Alternatively, defendant argues that the search cannot be justified as a search incident to arrest because at the time of the search, the officer had already obtained sufficient evidence to prosecute the open container offense. Defendant misstates the standard. An officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle. The trial court's unchallenged findings of fact (1) that it is common to find alcohol in vehicles of individuals who are stopped for alcohol violations and (2) that the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in defendant's vehicle. Accordingly, we hold that the trial court properly concluded that the search was a valid search incident to defendant's arrest, and we affirm.

Facts

The trial court made the following undisputed findings of fact in its order denying defendant's motion to suppress. On 14 March 2012, Officer Billy Wyatt of Lankford Company Police was patrolling the Davie Street Parking Deck in Greensboro, North Carolina. Around 11:50 p.m., Officer Wyatt observed defendant driving a Jeep Grand Cherokee up the ramp in his direction. Officer Wyatt saw a

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passenger in the front seat and observed defendant raise a can of Modelo beer to his mouth and consume alcohol. He stopped defendant's vehicle and asked defendant for his driver's license. Defendant gave Officer Wyatt a resident alien card. Officer Wyatt asked again for a driver's license. Defendant told Officer Wyatt that his license was in the center console and started to reach for it. For officer safety reasons, Officer Wyatt stopped defendant and asked him to step out of the vehicle.

By this time, Officer Neff of Lankford Company Police and Officer Shaffer of the Greensboro Police Department had arrived to provide assistance. While Officer Neff got the passenger out of the car, Officer Wyatt patted defendant down for weapons and asked him if he had any drugs or weapons in the car. Defendant replied that he did not.

Officers Wyatt and Shafer then searched the center console for defendant's driver's license and for additional alcohol or alcohol containers. When Officer Shaffer lifted up the inner console, he found a loaded .357 Taurus revolver. The officers did not find a driver's license in the outer compartment of the console or in the inner console. When Officer Wyatt asked defendant why he did not tell him there was a weapon in the vehicle, defendant replied that it was because he was a convicted felon. Officer Wyatt then arrested defendant for possession of a firearm by a felon and for the open container violation.

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The following day, a magistrate determined that there was probable cause to arrest defendant for both charges, and defendant was released on bond. On 23 April 2012, the trial court dismissed the open container violation, and on 21 May 2012, defendant was indicted for possession of a firearm by a felon. On 17 January 2014, defendant filed a motion to suppress the evidence obtained as a result of the search of his vehicle and his motion was heard before Judge Susan E. Bray on 21 January 2014.

In an order entered 22 January 2014, Judge Bray concluded based on her findings of fact that “Officer Wyatt had probable cause to arrest Defendant Fizovic for driving while consuming alcohol and/or open container” at the beginning of the stop and that Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant’s vehicle. Judge Bray therefore concluded that the search was a lawful search incident to defendant’s arrest and denied defendant’s motion to suppress.

On 10 March 2014, defendant entered an *Alford* plea of guilty to possession of a firearm by a felon. Judge Edgar B. Gregory sentenced defendant to a presumptive-range term of 12 to 24 months imprisonment, suspended the sentence, and placed

defendant on supervised probation for 18 months. Defendant timely appealed to this Court.¹

Discussion

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). Unchallenged findings of fact are binding on appeal. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). The trial court’s conclusions of law are, however, fully reviewable and “must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

On appeal, defendant does not challenge the trial court’s factual findings, but contends that the trial court erred in concluding that the warrantless search of defendant’s vehicle was justified as a search incident to arrest. We disagree.

¹Defendant additionally filed a petition for writ of certiorari seeking review of the suppression order in the event this Court were to determine that his notice of appeal was inadequate. Because we have determined that defendant preserved his right to appeal the order denying his motion to suppress and provided proper oral notice of appeal from the judgment entered on his *Alford* guilty plea, we dismiss defendant’s petition for writ of certiorari as moot.

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Generally, “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.” *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967) (internal footnote omitted). One such exception is a search incident to a lawful arrest. Pursuant to this exception, the police may “search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Arizona v. Gant*, 556 U.S. 332, 351, 173 L. Ed. 2d 485, 501, 129 S. Ct. 1710, 1723 (2009).

Defendant, citing *Knowles* and *Fisher*, argues first that the search in this case was not a search incident to arrest, but rather a “search incident to citation.” Pursuant to *Knowles* and *Fisher*, when a citation is issued for a traffic offense, and a search of the vehicle will not yield any additional evidence of that offense, a warrantless search of the vehicle is unconstitutional. In *Knowles*, the United States Supreme Court held that a search of the defendant’s vehicle after he had been issued a citation for speeding violated the Fourth Amendment because neither of the historic rationales for a search incident to arrest -- the concern for officer safety and the destruction or loss of evidence -- was present. Specifically with respect to the loss of evidence rationale, the Court reasoned that “[n]o further evidence of excessive speed

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was going to be found either on the person of the offender or in the passenger compartment of the car.” 525 U.S. at 118, 142 L. Ed. 2d. at 499, 119 S. Ct. at 488.

In *Fisher*, the police stopped the defendant’s vehicle and issued a citation for defendant’s driving while his license was revoked. 141 N.C. App. at 450, 539 S.E.2d at 679. While one officer took defendant to his patrol car to issue the citation, a canine unit arrived to sniff the vehicle and “alerted” to the presence of drugs. *Id.*, 539 S.E.2d at 679-80. The officers found marijuana in the hood of the vehicle and arrested defendant on several drug charges. *Id.* at 450, 451, 539 S.E.2d at 680. On appeal, this Court determined that there was not competent evidence to support the trial court’s finding that defendant had been *arrested* for the offense of driving with a revoked license. *Id.* at 454, 539 S.E.2d at 682. It then concluded that “[b]ecause defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest. Furthermore, in accordance with *Knowles*, the officers were not justified in searching defendant’s car based upon the issuance of the citation. This is true even though the officers may have had probable cause to arrest defendant.” *Id.* at 456, 539 S.E.2d at 683.

Here, unlike in *Knowles* and *Fisher*, defendant was not issued a citation, but was in fact arrested for the open container violation. Defendant cites no authority, and we have found none, suggesting that *Knowles* and *Fisher* apply where no citation is issued. We, therefore, hold that *Knowles* and *Fisher* are inapplicable to this case.

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See Virginia v. Moore, 553 U.S. 164, 177, 170 L. Ed. 2d 559, 571, 128 S. Ct. 1598, 1608 (2008) (holding *Knowles* did not control where officers arrested the defendant instead of issuing him a citation).

Defendant argues, nonetheless, that we should treat the search as one incident to citation because Officer Wyatt testified that he originally intended only to issue defendant a citation, and at the time of the search, defendant had not yet been arrested. However, in certain circumstances, the search incident to arrest exception may apply to a search conducted prior to arrest. As explained in *State v. Wooten*, 34 N.C. App. 85, 89-90, 237 S.E.2d 301, 305 (1977):

[W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as "incident to the arrest" provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime. These considerations are rendered no less important by the postponement of the arrest.

Here, although defendant was not formally arrested until after the search, defendant does not challenge the trial court's determination that Officer Wyatt had probable cause to arrest defendant for driving while consuming alcohol and open

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container violations at the beginning of the stop. Defendant cites no authority, and we have found none, holding that the officer's initial intent to issue a citation rather than arrest the defendant is relevant to the validity of the search. Accordingly, we hold that pursuant to *Wooten*, the search may still be justified as incident to arrest, even though the arrest occurred after the search. *See United States v. Nash*, 100 A.3d 157, 168 (D.C. 2014) (holding where officer had probable cause to believe that the defendant had committed offense of possession of open container of alcohol, search incident to arrest exception applied even though at time of search officers had not yet arrested the defendant and did not intend to do so).

Defendant next contends that even if the search could be considered under the search incident to arrest doctrine, it was not justified because Officer Wyatt had already obtained all the evidence necessary to prosecute the offense for which defendant was ultimately arrested. Defendant argues that this case is similar to *State v. Johnson*, 204 N.C. App. 259, 265-66, 693 S.E.2d 711, 716 (2010), where this Court held unconstitutional the search of the defendant's vehicle after he had been arrested for driving with a revoked license.

Defendant, however, misstates the standard for determining whether a search may be justified under the discovery-of-evidence prong of the search incident to arrest exception. The question is not whether the officer has obtained the evidence minimally necessary to convict the defendant of the offense, but rather, whether it is

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reasonable to believe that any evidence relevant to the crime will be found in the vehicle. *Gant*, 556 U.S. at 343, 173 L. Ed. 2d at 496, 129 S. Ct. at 1719.

For example, in *State v. Foy*, 208 N.C. App. 562, 563, 703 S.E.2d 741, 741 (2010), an officer discovered a revolver in the defendant's truck, arrested the defendant for carrying a concealed weapon, and then searched the truck. The State argued that the search was a valid search incident to arrest because "the discovery of one concealed weapon gave the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt, or a gun permit, could exist in the truck. Not only would the discovery of this evidence compound the crime, such evidence would be necessary and relevant to show ownership or possession, could serve to rebut any defenses offered by defendant at trial, and would aid the State in prosecuting the crime to its full potential." *Id.* at 565-66, 703 S.E.2d at 743. This Court found the State's reasoning to be consistent with *Gant*, and upheld the search because the officers had reason to believe that evidence relating to the charge of carrying a concealed weapon could be found in the truck. *Id.* at 566, 703 S.E.2d at 743.

The offense of arrest in this case -- an open container violation -- is more similar to the offense in *Foy* than the offense in *Johnson*. In *Johnson*, the defendant was arrested for driving with a revoked license -- an offense for which it is unreasonable to expect to find any related evidence. Here, in contrast, there may exist tangible

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evidence of a violation of open container laws -- specifically, open containers of alcohol -- that an officer may reasonably expect to find in a suspect's vehicle. Furthermore, defendant does not dispute the trial court's findings that the center console of his vehicle was large enough to hold beer cans and that it is common to find alcohol in the vehicles of drivers that are stopped for alcohol violations. These findings support the trial court's determination that Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant's vehicle. Consequently, the search of the console was a valid search incident to arrest.

In conclusion, we hold that there is competent evidence to support the trial court's findings of fact, and those findings support the trial court's conclusion that the search of defendant's vehicle was justified as a search incident to defendant's arrest for an open container violation. The trial court, therefore, did not err in denying defendant's motion to suppress.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.