IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-102

Filed: 3 October 2017

Pitt County, Nos. 12 CRS 53795, 13 CRS 3949

STATE OF NORTH CAROLINA

v.

DAVID PAIGE

Appeal by defendant from order entered 14 September 2016 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

DAVIS, Judge.

David Paige ("Defendant") appeals from the trial court's order denying his motion to suppress, which was entered pursuant to our directive in *State v. Paige*, __ N.C. App. __, 791 S.E.2d 284, 2016 N.C. App. LEXIS 778, 2016 WL 4086748 (2016) (unpublished) (hereinafter "*Paige I*"). On appeal, he argues that the trial court erred by denying the motion because (1) he was questioned while in custody without first

receiving his *Miranda* rights; and (2) his consent to search his motel room was not voluntarily given. After careful review, we affirm.

Factual and Procedural Background

The facts giving rise to this appeal are set out in full in *Paige I*. However, the pertinent facts are repeated below.

On 1 May 2012, Detectives Chris Atkinson, Justin Wooten, and Rose Edmonds of the City of Greenville Police Department were investigating a tip received by Detective Atkinson from a confidential informant. The informant had stated that an unknown black male was selling drugs out of Room 112 of the Motel 6 located on Greenville Boulevard in Greenville, North Carolina. After thirty minutes of conducting surveillance at the motel, the detectives observed Defendant walk out of Room 112. Defendant matched the description given by the informant.

The detectives exited the patrol car and walked up to Defendant, who was standing in the motel parking lot. Detective Atkinson asked Defendant for his name, which Defendant provided. Detective Atkinson explained the information that he had received from the informant and asked Defendant if he was "in possession of anything illegal and, if not, would he consent to a search or a pat down." Defendant agreed to allow Detective Atkinson to search his person.

As Detective Atkinson conducted a pat-down of the outside of Defendant's clothing, he "felt a large bulge that felt like money." Detective Atkinson asked

Defendant "what it was" and Defendant responded by pulling out $1,400 from his pocket. Detective Atkinson asked Defendant to walk with him to a nearby breezeway "[t]o get out of the middle of the parking lot." The three detectives and Defendant walked to the breezeway.

Detective Atkinson informed Defendant of the tip that had been received and told him that "he was suspected of selling drugs." He asked Defendant if he would consent to a search of Room 112. Defendant agreed to a search of the room and gave Detective Atkinson a motel room key.

During this conversation with the detectives, Defendant stated that "there were three B's and a P" in his motel room. Based on the detectives' experience, they understood a "B" to mean "a brick [of] heroin, which is fifty bags of heroin packaged together for sale[,]" and a "P" to mean "a partial brick of heroin, which could be . . . three bundles, which are ten bags packaged for sale, but anything less than fifty bags." Upon searching the room, the detectives found 196 bags of heroin.

Defendant was subsequently arrested and charged with trafficking heroin by possession and possession with intent to sell and deliver heroin. On 8 October 2014, Defendant filed a motion to suppress the statements he made to the detectives and the evidence seized from Room 112 based on his argument that the search and seizure of his person had been illegal. A suppression hearing was held before the Honorable

W. Russell Duke, Jr. in Pitt County Superior Court, and the trial court denied the motion.

A jury trial was held on 10 and 11 December 2014, and Defendant was found guilty of possession of heroin with intent to sell or deliver. He was sentenced to 48 to 70 months imprisonment. Defendant appealed his conviction based on the denial of his motion to suppress. In *Paige I*, this Court remanded "for the limited purpose of allowing the trial court to make findings of fact and conclusions of law related to Defendant's motion to suppress." *Paige I*, 2016 N.C. App. LEXIS 778, at *3.

On 14 September 2016, the trial court entered an order containing findings of fact and conclusions of law and, once again, denied the motion to suppress. Defendant filed a timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress. "When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted).

On remand following our decision in *Paige I*, the trial court made the following pertinent findings of fact in its 14 September 2016 order denying Defendant's motion to suppress:

> 6. Detective Atkinson and Detective Wooten got out of the patrol car and walked to the defendant and asked the defendant his name and explained the information that Detective Atkinson had received.
>
> 7. The defendant consented to answering the questions asked by Detective Atkinson.
>
> 8. Detective Atkinson never told the defendant that he could not leave and did not prevent the Defendant from walking away.
>
> 9. Detective Atkinson asked the defendant if he had anything illegal on him and for consent to search.
>
> 10. The defendant consented to a search of his person and Detective Atkinson patted the defendant's outside clothing and felt a large bulge that felt like money.
>
> 11. Detective Atkinson asked the defendant what it was, and the defendant pulled out a large sum of money.
>
> 12. Detective Atkinson asked the defendant to walk to the breezeway to get out of the parking lot.
>
> 13. The defendant was not in custody and walked behind the detectives to the breezeway.
>
> 14. The detectives began to talk with the defendant about the information they had received and asked for consent to search room 112.
>
> 15. The defendant gave consent to search the room and

gave the detectives the hotel room key for room 112.

16. The defendant made a statement that there were three B's and a P in the room.

17. Based on the detective's experience, a "B" is a brick of heroin which is 50 bags of heroin and a "P" is a partial brick of heroin.

18. Detective Atkinson and Detective Wooten searched room 112 and found 196 bags of heroin in a shoe in room 112.

19. During the search, the defendant was not in custody and still had the money, found by the detective during the pat down search, in his possession.

20. After the detectives found the heroin, the defendant was arrested.

Defendant does not challenge the above-quoted findings of fact. Accordingly, those factual findings are binding on appeal. *See State v. Moses*, 205 N.C. App. 629, 633, 698 S.E.2d 688, 692 (2010) (where defendant did not challenge trial court's findings of fact, review of denial of motion to suppress was limited to whether unchallenged findings ultimately supported court's conclusions of law).

Defendant argues, however, that these findings do not support the trial court's conclusions of law. Specifically, he argues that his statements and the evidence discovered in Room 112 should have been suppressed because (1) he was never advised of his *Miranda* rights despite being in custody before making the incriminating statements to the detectives; and (2) he did not voluntarily provide

consent to the detectives' search of Room 112, which resulted in the unlawful seizure of the heroin. We address each of these arguments in turn.

I. Failure to Advise Defendant of *Miranda* Rights

Defendant first argues that the trial court erred by denying his motion to suppress because his Fifth Amendment rights were violated when the detectives stopped him outside of the motel room. He contends that after the detectives conducted a pat-down of his person the stop became a custodial interrogation. Thus, he contends, the statements he made should have been excluded as they were made in violation of his *Miranda* rights. We disagree.

The warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), "appl[y] only in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). "[T]he appropriate inquiry in determining whether a defendant is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (quotation marks omitted). "Circumstances supporting an objective showing that one is 'in custody' might include a police officer standing guard at the door, locked doors or application of handcuffs." *Id.* "However, no single factor controls the determination

of whether an individual is 'in custody' for purposes of *Miranda*." *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737 (2004) (citation omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

In the present case, Defendant argues that he was in custody after the detectives conducted a pat-down of his person and discovered that he had $1,400 in his pocket. He contends that this discovery of a large sum of money combined with the detectives' questions whether he was engaged in illegal activities resulted in him being constrained to such a degree that a reasonable person would have believed he was under arrest. We are unpersuaded by this argument.

Defendant was not handcuffed or placed under arrest, told he was not free to leave, or questioned for a lengthy amount of time. Nor was he placed into a patrol car or taken to an interview room. Rather, the detectives simply conducted a pat-down of Defendant's person in an open breezeway near a motel and asked him whether he possessed any illegal substances. Although they told him that he was "suspected of selling drugs," Defendant has failed to show that this factor alone resulted in him being in custody for purposes of *Miranda*.

The facts of this case are unlike those in which this Court has held that a defendant's *Miranda* rights were violated because he was questioned while in custody without being informed of those rights. *See, e.g.*, *State v. Crook*, __ N.C. App. __, __, 785 S.E.2d 771, 777 (2016) (defendant was handcuffed, placed under arrest, and

patted down in motel room); *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) (defendant was ordered out of vehicle at gunpoint, handcuffed, placed in back of patrol car, and questioned by detectives).

Thus, based on the totality of circumstances we conclude that Defendant was not in custody for purposes of *Miranda*. *See State v. Portillo*, __ N.C. App. __, __, 787 S.E.2d 822, 830 (holding defendant was not in custody at time he made incriminating statements based on totality of circumstances), *appeal dismissed*, 369 N.C. 44, 792 S.E.2d 785 (2016).

II. Voluntariness of Defendant's Consent

Defendant's final argument is that his consent to the search of Room 112 was not voluntary. However, Defendant did not actually make this argument in his motion to suppress.

In his motion, Defendant alleged, in pertinent part, as follows:

> 14. That there was no legal justification for detaining Defendant.
>
> 15. That Atkinson then proceeded to search Defendant without Defendant's consent.
>
> 16. That there was no legal justification for searching Defendant without his consent.

Thus, it is clear that Defendant did not raise the issue of the *voluntariness* of his consent in his motion to suppress. Instead, he made the separate argument that

he never actually gave consent to search Room 112 at all. Thus, the theory he is raising on appeal is different than the one he raised in the trial court.

"[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" in the appellate courts. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and quotation marks omitted). Because Defendant never raised this argument before the trial court, he has failed to preserve it for appellate review. *See Portillo*, __ N.C. App. at __, 787 S.E.2d at 832 (dismissing defendant's argument that N.C. Gen. Stat. § 15A-974 "require[d] suppression" of his statement to officers because he failed to present that theory before trial court); *State v. Holliman*, 155 N.C. App. 120, 124, 573 S.E.2d 682, 686 (2002) (dismissing defendant's challenge to denial of motion to suppress because he presented "a different theory on appeal than argued at trial"). Accordingly, we do not reach the merits of Defendant's argument on this issue.

Conclusion

For the reasons stated above, we affirm the trial court's 14 September 2016 order.

AFFIRMED.

Judges HUNTER, JR. and MURPHY concur.

Report per Rule 30(e).