IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-266

Filed: 6 November 2018

Forsyth County, Nos. 16 CRS 002452, 050882

STATE OF NORTH CAROLINA

v.

TIMOTHY LAMONT HAZEL

Appeal by defendant from judgment entered 1 June 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip T. Reynolds, for the State.

James R. Parish for defendant-appellant.

TYSON, Judge.

Timothy Lamont Hazel ("Defendant") appeals the trial court's denial of his motion to suppress evidence seized during an encounter with police in a school parking lot. We find no error.

I. Background

At 11:19 p.m. on 29 January 2016, an anonymous caller contacted the Winston-Salem Police Department and complained a vehicle was driving upon a baseball field in a public park near Wright and Main Streets, in the vicinity of Main Street Academy. The caller called a second time at 11:22 p.m. and described the vehicle as being either a truck or sport-utility vehicle with a "red light on top." Within minutes of these calls, Winston-Salem Police Officers T. Shu and M.L. Sisson were independently dispatched to the area.

At 11:29 p.m., while Officer Shu was driving around the area of the disturbance, a woman driving a sedan stopped Officer Shu and reported a "souped-up" pickup truck with a loud exhaust was being driven in a circle to carve "doughnuts" in the baseball field at the park. Officer Shu continued to patrol the area, and apart from the woman who had stopped him to complain about the pickup truck, he observed no other traffic in the area.

Officer Shu parked his patrol car in the parking lot of Main Street Academy, a school adjacent to the baseball field and park, turned off his lights, and waited to see whether the pickup truck would return. During this time, Officer Sisson was driving around the area in his own patrol car. Approximately ten minutes after Officer Shu had parked his patrol car at the school, Officer Shu observed a white 1999 Chevrolet 2500 pickup truck with a red brake light located above its rear cab window. Officer Shu observed the pickup truck turn onto Wright Street from Main Street, cross the

oncoming traffic lane, and park on the street with the driver side of the vehicle closest to the curb, in violation of a city ordinance.

The pickup truck turned out its headlights and sat idly. Officer Shu did not observe anyone enter nor exit the truck. After three to five minutes, the pickup truck turned on its lights and traveled a short distance to a gravel lot, which is located adjacent to both the baseball field and the paved parking lot where Officer Shu was parked. Once the pickup truck parked in the gravel parking lot, it turned off its lights. Officer Shu was unable to see the truck, as there were no artificial lights illuminating the lot.

Officer Shu called Officer Sisson for backup because the "location was an isolated location and it was completely dark." Officer Shu drove his patrol vehicle into the gravel parking lot. After entering the gravel lot, Officer Shu observed the pickup truck parked at the back of the lot, but facing towards the entrance to the lot with its lights turned off. Officer Shu parked his patrol vehicle near the entrance of the lot, approximately 30 feet from the pickup truck, without blocking ingress or egress to the lot. Officer Shu turned on his headlights and overhead lights to illuminate the unlit area, but did not activate his blue lights.

Officer Shu then stepped out of his patrol car and asked the driver of the pickup truck, later identified as Defendant, to "please exit the vehicle" and walk towards

him. Officer Shu did not place his hand on or draw his service weapon during this time. Officer Sisson arrived at the lot as Defendant was walking towards Office Shu.

Officer Shu asked Defendant to stand with Officer Sisson while he walked to the back of the pickup truck to record the license plate number, in accordance with department policy. As Officer Shu was walking by the driver's side of the pickup truck, he detected the odor of marijuana emanating from the partially rolled down driver's side window. Based upon his training and experience, Officer Shu was able to recognize the odor as that of unburnt marijuana. Officer Shu obtained the pickup truck's license plate number and verified Defendant owned the vehicle.

Officer Shu then walked over to where Defendant and Officer Sisson were standing and asked Defendant about the marijuana odor emanating from the pickup truck. Defendant told Officer Shu there was a "little bit" of marijuana on the front seat of his truck. Officer Shu asked Defendant whether he could search the vehicle. Defendant gave his consent.

Officer Shu conducted a search of the pickup truck from 11:52 p.m. to 11:59 p.m. During the time Officer Shu conducted his search, Defendant was having a conversation on his cell phone. During his search of the interior of the vehicle, Officer Shu discovered a marijuana "blunt" in the middle of the front bench seat and a holstered pistol underneath the driver seat. Officer Shu placed Defendant in handcuffs immediately following the search of the pickup truck. Officer Shu then

conducted a search of Defendant's person, and discovered a plastic bag containing 1.38 grams of marijuana in Defendant's shirt pocket.

Officer Shu verified Defendant's criminal record and learned he was a convicted felon. Officer Shu charged Defendant with possession of a firearm by a convicted felon.

Defendant was later indicted for possession of a firearm by a felon, carrying a concealed firearm, possession of marijuana, and attaining habitual felon status. Defendant filed a motion to suppress evidence seized from the search of his pickup truck. The trial court held a hearing on Defendant's motion to suppress on 29 March 2017. A written order denying Defendant's motion to suppress was filed on 22 May 2017.

Defendant was tried before a jury. At the close of the State's evidence, the trial court dismissed the charge of possession of marijuana. The jury convicted Defendant of possession of a firearm by a convicted felon and of carrying a concealed weapon. The jury also returned a verdict finding Defendant to be guilty of attaining habitual felon status. The trial court, in a consolidated judgment, sentenced Defendant to an active term of 125 months to 162 months based upon Defendant having a record level V with 16 prior record points. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Standard of Review

> 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. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

IV. Analysis

Defendant argues the trial court erred in denying his motion to suppress "because the vehicle search was a result of [Defendant's] unlawful seizure." Defendant characterizes Officer Shu's driving into the gravel lot, asking Defendant to exit his pickup truck and answer questions as "a warrantless, investigatory stop" and "traffic stop" for which Officer Shu did not have reasonable suspicion to conduct.

Defendant challenges a portion of finding of fact 10, as well as findings of fact 29 and 30 from the trial court's order denying his motion to suppress. The remaining findings of fact are unchallenged and are binding upon appeal. *Biber*, 365 N.C. at 168,

712 S.E.2d at 878. The portion of finding of fact 10 challenged by Defendant is emphasized below, as follows:

> 10. After three to five minutes, the white pickup truck turned on its lights and drove the short distance to the gravel lot, immediately adjacent to the paved lot where Officer Shu was parked. Officer Shu noticed that the truck had a red light centered along the top edge of the rear of the cab between the rear window and the roof. *He was unable to make any observation about the sound of the pickup truck[']s muffler or exhaust, but only saw the vehicle drive a short distance at a slow speed.* (emphasis supplied).

The trial court's findings of fact 29 and 30 state:

> 29. There is a city ordinance that prohibits being in a public park after hours. The park was closed as of 10:30 pm.
>
> 30. There is a city ordinance that prohibits loitering about school property without permission from the school. The Defendant did not have permission from the school administration to use the gravel lot.

Even if we were to agree that findings of fact 29 and 30, and the challenged portion of finding of fact 10, are not supported by competent evidence, the remaining unchallenged findings of fact are sufficient to support the trial court's conclusions of law and ruling to deny Defendant's motion to suppress.

The trial court made, in part, the following two alternate conclusions of law to support its denial of Defendant's motion to suppress, both of which are challenged by Defendant:

> 1. The Court concludes, based on the totality of the circumstances, that the Defendant was not seized until the

> officers placed him in handcuffs and arrested him. Up until that point a reasonable person would feel that they were free to terminate the encounter and leave the area.
>
> 2. Even if the Defendant was seized sometime prior to being placed in handcuffs, Officer Shu had reasonable articulable suspicion to seize the defendant based on the totality of the circumstances including: the call to the non-emergency line, the face-to-face report from the female witness, the short period of time between the reports and the Defendant's arrival at the scene, the Defendant being the only truck observed in the area, the Defendant having a right light on the rear of the pickup truck at the top of the cab which was consistent with the non-emergency call description, Officer Shu's observation of a parking violation, the violation of the school loitering ordinance, and trespassing in a public park afterhours.

The trial court also concluded, as follows:

> 3. Officer Shu was justified in extending the traffic stop following his observation of an odor of unburnt marijuana emitting from the cab of the pickup truck. This also provided Officer Shu with probable cause to search the pickup truck.
>
> 4. Even absent probable cause, the Defendant consented to the search of his pickup truck.
>
> 5. In addition to having reasonable articulable suspicion to seize the Defendant, Officer Shu was permitted to talk to the driver as part of his community caretaker responsibilities. The pickup truck was already stopped and the officer was attempting to see if the Defendant knew anything about the call that a truck spinning its tires at the nearby park.

With regard to the trial court's conclusion of law 1, Defendant does not argue this conclusion of law is not supported by any specific findings of fact, rather he

asserts "No reasonable person would believe under these circumstances that they were free to leave." We disagree.

The precedents on initial interactions of citizens with law enforcement officers are well settled. "An encounter between a law enforcement officer and a citizen does not implicate the Fourth Amendment's prohibition against unreasonable searches and seizures in the absence of a 'seizure' of the person." *State v. Williams*, 201 N.C. App. 566, 568-69, 686 S.E.2d 905, 907 (2009) (citing *Florida v. Royer*, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 236 (1983)).

"[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991)). As the trial court also concluded: "Seizure of a person within the meaning of the Fourth Amendment occurs 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980)). "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *Campbell,*

359 N.C. at 662, 617 S.E.2d at 13 (alteration omitted) (quoting *United States v. Drayton,* 536 U.S. 194, 200, 153 L. Ed. 2d 242, 251 (2002)).

"Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search . . . provided they do not induce cooperation by coercive means." *Drayton*, 536 U.S. at 201, 153 L. Ed. 2d at 251; *see also State v. Brooks*, 337 N.C. 132, 143-44, 446 S.E.2d 579, 586-87 (1994) (holding no seizure occurred when an officer approached a parked car and seeing an empty holster on the seat, asked the occupant where his gun was located), and *State v. Farmer*, 333 N.C. 172, 186-88, 424 S.E.2d 120, 128-29 (1993) (holding that the defendant was not seized when two officers approached the defendant on a public street and asked him questions). "A traffic stop is a seizure[.]" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)).

The unchallenged findings of fact here are analogous to *Brooks*. In *Brooks*, the Supreme Court of North Carolina held that the actions of a police officer who parked his patrol car, approached a suspect sitting in a parked car and questioned him through an opened car door "did not amount to an investigatory 'stop' and certainly was not a 'seizure.'" *Id.* at 142, 446 S.E.2d at 586. Our Supreme Court based its conclusion upon the lack of any evidence that might have indicated "a reasonable person in the position of the defendant would have believed that he or she was not

free to leave or otherwise terminate the encounter[,]" nor was there evidence that "defendant submitted to any show of force." *Id.*

We also find instructive this Court's opinion in *State v. Isenhour*, 194 N.C. App. 539, 670 S.E.2d 264 (2008). In *Isenhour*, two law enforcement officers were patrolling the area near a fast food restaurant parking lot and the area had a reputation for drug and prostitution activity. *Id.* at 540, 670 S.E.2d at 266. The officers observed the defendant and a passenger sitting in a car in the back corner of the restaurant parking lot, and observed that neither the defendant nor his passenger had exited from the car during a ten-minute period. *Id.* The officers pulled up in a marked patrol car and parked approximately eight feet away from the defendant's car. *Id.* The officers approached the defendant's car and asked to speak with the defendant. *Id.* After becoming suspicious of the defendant's explanation for his presence in the parking lot, one officer asked the defendant to exit the vehicle, patted down the defendant, and received consent to conduct a search of the defendant's vehicle, which revealed illegal narcotics. *Id.* at 541, 670 S.E.2d at 266.

This Court held that the encounter between the officers and the defendant did not constitute a seizure for Fourth Amendment purposes. *Id.* at 544, 670 S.E.2d at 268. The officers' actions "would not lead a reasonable person to believe that he was not free to leave at any time." *Id.* This Court based its determination upon the following: (1) the defendant was free to drive away from the officers, as the patrol car

did not physically block the defendant's car; (2) that "nothing else in [the officers'] behavior or demeanor amounted to the 'show of force' necessary for a seizure to occur"; (3) that the officers did not create "any real 'psychological barriers' to [the] defendant's leaving" such as activating their siren or blue lights, removing guns from their holsters, or using threatening language; and (4) "that the encounter proceeded in a non-threatening manner and that [the] defendant was cooperative at all times." *Id.* at 544, 670 S.E.2d at 268.

In *Williams*, this Court held that an officer did not seize or conduct a traffic stop of the defendant, because:

> [The officer] did not initiate a traffic stop. Defendant did not pull into the driveway as a result of any show of authority from [the officer]. Although [the officer] suspected that Defendant's 30-day tag was expired, he did not receive confirmation of this until he was speaking with Defendant. There is no evidence that [the officer] exerted any physical force or engaged in any show of authority during his brief encounter with Defendant.

201 N.C. App. at 570, 686 S.E.2d at 908.

Here, the trial court found that Officer Shu parked his patrol car approximately thirty feet away from Defendant's parked pickup truck. Defendant was already present and had parked in the gravel parking lot when Officer Shu entered the lot with his patrol car. Defendant did not enter or stop in the gravel parking lot "as a result of any show of authority" from Officer Shu. *Id.* Officer Shu

did not block Defendant's ingress to or egress from the gravel parking lot and did not activate his blue lights.

Officer Shu did not "place a hand upon his weapon or make any authoritative gestures or commands." Once Officer Sisson arrived upon the scene, "[n]either officer told the Defendant he could not leave the area." *See Isenhour*, 194 N.C. App. at 540, 670 S.E.2d at 266. Although Officer Shu requested Defendant to stand with Officer Sisson, while he checked the license tag and verified registration of the vehicle, there is no finding or evidence to suggest this request was made in a threatening manner or that Officer Shu coerced Defendant's compliance with the request. *See id.* Defendant was speaking on his cell phone while Office Shu verified his registration. As in *Isenhour*, it appears that, initially, the encounter between Officer Shu and Defendant "proceeded in a non-threatening manner and that [D]efendant was cooperative at all times." *Id.* at 544, 670 S.E.2d at 268.

Under the totality of the circumstances, a reasonable person in this situation "would feel free 'to disregard the police and go about his business[.]'" *Bostick,* 501 U.S. at 434, 115 L .Ed. 2d at 398. Officer Shu's request for Defendant to exit his truck and answer questions did not constitute a "seizure" for purposes of the Fourth Amendment. *See id*; *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586; *Isenhour*, 194 N.C. App. at 540, 670 S.E.2d at 266. The trial court's conclusion of law 1: "that the Defendant was not seized until the officers placed him in handcuffs and arrested him.

Up until that point a reasonable person would feel that they were free to terminate the encounter and leave the area[,]" is supported by the trial court's unchallenged findings of fact and our precedents. *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13.

Defendant does not challenge the trial court's findings of fact 24 and 25, which recount: (1) Defendant's admission to marijuana being present upon the front seat of the pickup truck; (2) Defendant's consent for Officer Shu to search the pickup truck; and (3) Officer Shu's discovery of marijuana and a concealed handgun within the pickup truck. Defendant also does not challenge the trial court's conclusion of law 4, in which the trial court determined that even if Officer Shu did not have independent probable cause to search Defendant's truck, Defendant consented to the search.

No seizure of Defendant occurred until Officer Shu placed him in handcuffs following the consensual search of Defendant's truck, which resulted in Officer Shu discovering the illegal presence and possession of marijuana and a concealed firearm. No traffic stop of Defendant occurred as Defendant and his vehicle were stationary when Officer Shu initiated the encounter. *See Williams*, 201 N.C. App. at 570, 686 S.E.2d at 908.

The trial court correctly denied Defendant's motion to suppress the evidence recovered from the voluntary search of his vehicle. The trial court's conclusion of law 1 provides an adequate and independent basis to support the trial court's denial of Defendant's motion to suppress. In light of our holding, it is unnecessary to address

Defendant's arguments concerning the trial court's conclusions of law 2 and 5, which recite alternative bases upon which the trial court denied Defendant's motion to suppress.

V. Conclusion

The trial court's unchallenged findings of fact and our binding precedents support the trial court's conclusion of law that "Defendant was not seized until the officers placed him in handcuffs." We affirm the trial court's order, which denied Defendant's motion to suppress.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).