IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-477-2

Filed: 20 August 2019

Mecklenburg County, Nos. 15 CRS 212911-13

STATE OF NORTH CAROLINA

v.

JERRY GIOVANI THOMPSON

Appeal by defendant from judgment entered 3 January 2017 by Judge William R. Bell in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 5 October 2017, with opinion issued 2 January 2018. On 1 February 2019, the Supreme Court vacated and remanded to this Court for reconsideration in light of *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018).

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, for defendant-appellant.

ZACHARY, Judge.

Defendant Jerry Giovani Thompson appealed from the trial court's judgment sentencing him for convictions of felony possession of marijuana, possession with intent to sell or deliver marijuana, possession of marijuana paraphernalia, and possession of a firearm by a felon. Defendant argued on appeal that the trial court

erred in denying his motion to suppress.[1] By published opinion issued on 2 January 2018, a majority of this Court concluded over a dissent "that the factual findings in the order denying defendant's suppression motion did not resolve a pivotal disputed issue of fact, requiring us to vacate the judgment and remand for further findings." *State v. Thompson*, ___ N.C. App. ___, ___, 809 S.E.2d 340, 343 (2018) ("*Thompson I*"). The Supreme Court subsequently vacated *Thompson I* and remanded the matter to this Court for reconsideration in light of the Supreme Court's decision in *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018). Upon reconsideration, we conclude that the trial court's order denying Defendant's motion to suppress cannot be upheld on the grounds enumerated in *State v. Wilson*. Accordingly, we vacate the judgment and remand for entry of additional findings consistent with our decision in *Thompson I*.

I. Background

On 10 April 2015, a team of roughly eight to twelve law enforcement officers with the Charlotte-Mecklenburg Police Department traveled to an apartment on Basin Street in Charlotte in order to execute a search warrant. The target of the search warrant was a female.

Defendant was cleaning his vehicle in the street adjacent to the apartment when the officers arrived to execute the search warrant. Sergeant Michael Sullivan approached Defendant in order to confirm that he was not the female named in the

[1] Defendant also argued that the judgment sentencing him for felony possession of marijuana should be vacated on the grounds that he did not plead guilty to that offense.

search warrant and to ensure that he would not interfere with the search. Defendant told Sergeant Sullivan that he did not live in the apartment, but his girlfriend did.

Sergeant Sullivan asked Defendant for his identification, "handed him" and his driver's license off to Officer Justin Price, and then proceeded inside the apartment in order to supervise the search. Officer Price testified that Defendant was already in custody at that point. Officer Price and Officer Michael Blackwell remained outside with Defendant while the other officers executed the search warrant. Roughly ten minutes later, Officer Mark Hefner exited the apartment and asked Defendant for permission to search his vehicle. Defendant consented to the search, and officers found marijuana, paraphernalia, and a firearm in the trunk.

Defendant was indicted for possession of marijuana paraphernalia, possession with intent to sell or deliver marijuana, felony possession of marijuana, maintaining a vehicle for the purpose of keeping a controlled substance, and possession of a firearm by a felon.

On 4 October 2016, Defendant filed a motion to suppress the evidence seized from the search of his vehicle. Defendant argued that "[t]he initial police encounter . . . was not a voluntary contact, but rather an illegal seizure and detention of [Defendant] which was unsupported by reasonable suspicion," and that the trial court was therefore required to "suppress all evidence gathered as a result of the illegal seizure of his person and the illegal search of his vehicle." Following a hearing,

however, the trial court found that Defendant "was neither seized nor in custody" at the time he consented to the search of his vehicle.

Because Defendant was never "seized" within the meaning of the Fourth Amendment, the trial court concluded that no Fourth Amendment violation had occurred and, accordingly, denied Defendant's motion to suppress. Defendant subsequently pleaded guilty to possession of drug paraphernalia, possession with intent to sell or deliver marijuana, and possession of a firearm by a felon, preserving his right to appeal the trial court's denial of his motion to suppress. The trial court imposed a suspended sentence and placed Defendant on 24 months' supervised probation. A written order denying Defendant's motion to suppress was entered on 5 January 2017. Defendant timely appealed.

This Court heard Defendant's appeal on 5 October 2017. Defendant argued on appeal that the officers "seized" him for purposes of the Fourth Amendment "when they took and retained his driver's license," and that such seizure, in the absence of "any reasonable suspicion that he was involved in criminal activity," violated Defendant's Fourth Amendment rights. Citing *State v. Cottrell*, 234 N.C. App. 736, 760 S.E.2d 274 (2014), Defendant maintained that the trial court was required to suppress the evidence recovered from the search of his vehicle because it was the product of "this unconstitutional seizure."

Over a dissent, this Court concluded that the trial court's findings of fact were insufficient to determine whether Defendant had been "seized" for purposes of the Fourth Amendment:

> It is long-established that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). As a result, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984).
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> In determining whether a defendant was seized, "relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification, or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).
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> In arguing that he was seized, defendant places great emphasis upon his contention that the law enforcement officers retained his driver's license during the encounter. Defendant cites several cases, including *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009), in which this Court stated, in analyzing

whether the defendant had been seized, that "a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration." We find this argument persuasive. Indeed, we have not found any cases holding that a defendant whose identification or driver's license was held by the police without reasonable suspicion of criminal activity was nonetheless "free to leave."

. . . .

In its appellate brief, the State does not dispute the crucial significance of whether the officers kept defendant's license. . . . The State instead argues that the trial court's findings of fact fail to establish whether the officers retained defendant's license or returned it to him after examination. We agree with this contention.

Witnesses at the hearing on defendant's suppression motion gave conflicting testimony with regard to the circumstances under which law enforcement officers took possession of defendant's driver's license and the time frame in which the relevant events occurred. . . .

[D]efendant testified that the officers retained his license, but the officers did not testify about this issue. Assuming that the law enforcement officers kept defendant's identification, the testimony is conflicting as to whether defendant's car was searched before, immediately after, ten minutes after, or a half-hour after defendant gave his license to [Sergeant] Sullivan.

. . . .

In this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred. Given that the officers conceded that their interaction with defendant was not

> based upon suspicion of criminal activity, a finding that officers kept defendant's identification would likely support the legal conclusion that he had been seized.

Thompson I, ___ N.C. App. at ___, 809 S.E.2d at 345-49 (internal citations, quotation marks, and brackets omitted). Accordingly, "[b]ecause the court's findings of fact fail[ed] to resolve material issues, we vacate[d] the judgment entered against defendant, and remand[ed] for the trial court to enter findings of fact that resolve all material factual disputes."[2] *Id.* at ___, 809 S.E.2d at 349. Judge Berger dissented on the grounds that "Defendant was never seized by Charlotte-Mecklenburg Police Department . . . officers within the meaning of the Fourth Amendment." *Id.* at ___, 809 S.E.2d at 350 (Berger, J., dissenting).

The State appealed of right to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-30(2). On 1 February 2019, the Supreme Court vacated *Thompson I* and remanded the case to this Court for review in light of its decision in *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018).

Wilson requires this Court to determine, assuming, *arguendo*, that Defendant was in fact "seized" for purposes of the Fourth Amendment, whether such seizure was nevertheless justified under the rule set forth by the United States Supreme Court

[2] We likewise agreed with Defendant "that the judgment entered against [him] and the written transcript of plea, both of which were signed by the trial judge, are inconsistent," and therefore remanded "for resolution of this discrepancy." *Id.* at ___, 809 S.E.2d at 343. The dissent, and thus the resulting appeal, was not predicated upon this ground, nor does the Supreme Court's decision in *Wilson* affect that conclusion. Accordingly, we reiterate that portion of our holding from *Thompson I*, but decline to address it further in this opinion.

in *Michigan v. Summers*, 452 U.S. 692, 69 L. Ed. 2d 340 (1981). We conclude that it was not.

II. *Michigan v. Summers* and *State v. Wilson*

In *Michigan v. Summers*, the United States Supreme Court held that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705, 69 L. Ed. 2d at 351 (footnote omitted). Our Supreme Court in *Wilson* identified three prongs to the rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." *Wilson*, 371 N.C. at 924, 821 S.E.2d at 815 (citations and quotation marks omitted). "These three parts roughly correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant." *Id.*

Our Supreme Court in *Wilson* applied the *Summers* rule and rejected the defendant's challenge to the trial court's denial of his motion to suppress. In that case, the defendant had arrived on the scene while the Winston-Salem Police Department was in the process of actively securing a home in order to execute a search warrant. *Id.* at 922, 821 S.E.2d at 813. The defendant penetrated the perimeter securing the

scene, walked past an officer, and announced that he was going to retrieve his moped. *Id*. After disobeying the officer's command to stop, the defendant proceeded down the driveway toward the home, at which point officers detained and frisked him. *Id.* Officers recovered a firearm, and the defendant was charged with possession of a firearm by a felon. *Id.* at 922, 821 S.E.2d at 814.

In determining whether the defendant had been lawfully seized under the *Summers* rule, our Supreme Court noted that the application of the second and third prongs was "straightforward," and thus focused its inquiry on the first prong, i.e., whether the defendant's brief detention was justified on the ground that he was an "occupant" of the premises during the execution of a search warrant. *Id.* at 924-25, 821 S.E.2d at 815.

The United States Supreme Court adopted the *Summers* rule based in part upon the rationale that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search [her] home." *Summers*, 452 U.S. at 704-05, 69 L. Ed. 2d at 351. Our Supreme Court noted, however, that beyond enumerating the governmental interests that combine to justify a *Summers* detention, the United States Supreme Court had yet to "directly resolve[ ] the issue

of who qualifies as an 'occupant' for the purposes of the . . . rule." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815.

In attempting to answer this question, the *Wilson* Court examined the various rationales underlying the *Summers* rule. The Court ultimately concluded that a person is an "occupant" for purposes of the rule "if he poses a real threat to the safe and efficient execution of a search warrant." *Id.* (quotation marks omitted); *see also Bailey v. United States*, 568 U.S. 186, 195, 185 L. Ed. 2d 19, 29-30 (2013) ("When law enforcement officers execute a search warrant, safety considerations require that they secure the premises, which may include detaining current occupants. By taking unquestioned command of the situation, the officers can search without fear that occupants, who are on the premises and able to observe the course of the search, will become disruptive, dangerous, or otherwise frustrate the search." (citation and quotation marks omitted)). Thus, under this formulation of the rule, our Supreme Court noted that although a defendant may not be "an *occupant* of the premises being searched in the ordinary sense of the word," *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815, the defendant's "own actions" may nevertheless "cause[ ] him to satisfy the first part, the 'who,' " of a lawful *Summers* detention. *Id.* at 926, 821 S.E.2d at 816.

Applying this definition, although the defendant was not inside the premises when the officers arrived to execute the search warrant, our Supreme Court concluded that the defendant's own actions had nevertheless rendered him an

"occupant," thereby subjecting him to a suspicionless seizure incident to the lawful execution of the search warrant. The Supreme Court reasoned:

> We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search. . . . [I]t was apparent to [the officer] that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained.

Id. at 925, 821 S.E.2d at 815. Because the defendant's initial detention, lawful under the *Summers* rule, did not taint the subsequent search, no Fourth Amendment violation occurred, and the Supreme Court therefore affirmed the trial court's denial of his motion to suppress.

III. Application

In the instant case, there is no question but that the third prong of the *Summers* rule—the "when"—is satisfied, in that the officers detained Defendant during their lawful execution of a warrant to search his girlfriend's apartment. Moreover, given the apartment's proximity to the street on which Defendant's vehicle was parked, it is also arguable that the circumstances here satisfied the second prong—the "where"—of the *Summers* rule. *See id.* at 924, 821 S.E.2d at 815 ("It is also evident that defendant was seized within the immediate vicinity of the premises being searched."). We conclude, however, that Defendant was not an "occupant" of

the searched premises, as that term is defined in *Wilson*, so as to satisfy the first prong—the "who"—of a lawful *Summers* detention.

Defendant was cleaning his vehicle in the street when officers arrived to execute the search warrant. The officers approached Defendant to question him. Defendant remained inside his vehicle and told the officers that he did not live in the apartment, but that his girlfriend did. At no point did Defendant attempt to approach the apartment. Nor did he exhibit nervousness or agitation, disobey or protest the officers' directives, appear to be armed, or undertake to interfere with the search.[3] *Cf. id.* at 925-26, 821 S.E.2d at 816 ("Indeed, if such precautionary measures [such as erecting barricades or posting someone at the door] did not carry with them some categorical authority for police to detain individuals *who attempt to circumvent them*, it is not clear how officers could practically search without fear that occupants, who are on the premises and able to observe the course of the search, would become disruptive, dangerous, or otherwise frustrate the search." (emphasis added) (quotation marks omitted)). Quite simply, there were no circumstances to indicate

[3] The dissent appears to argue that Defendant's detention was justified, in part, upon his girlfriend "identif[ying] him as the supplier of the drugs that were the target of the search." *Dissent* at 7. This is obviously irrelevant, as Defendant had already purportedly been "seized" by the time the officers learned this information.

that Defendant would pose "a real threat to the safe and efficient execution" of the officers' search.[4] *Id.* at 925, 821 S.E.2d at 815.

To hold that Defendant's presence in his vehicle under these circumstances was sufficient to render him an "occupant" of the apartment for purposes of the *Summers* rule would afford the State the wide discretion to detain any unlucky bystander, simply because he or she happens to be familiar with a resident of the premises being searched.[5] Nevertheless, the dissent maintains that "[t]he Court in *Wilson* addressed [this] main concern when it limited law enforcement's ability to detain only those who are within 'the immediate vicinity of the premises to be searched.' " *Dissent* at 5. This contention is misplaced. Nor is the same eliminated by virtue of Defendant's "connection to the apartment." *Id.* at 6.

The dissent's suggestion that a defendant's presence in the immediate vicinity of a searched premises should operate categorically to satisfy the first prong of the *Summers* rule would render entirely superfluous our Supreme Court's scrupulous effort in *Wilson* to define "occupant" as someone who "poses a real threat to the safe and efficient execution of a search warrant." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. To be sure, in arriving at its definition of "occupant" for purposes of the first

[4] The dissent would also conclude that Defendant posed a threat "to the efficacy of the search, as CMPD resources were diverted away from the execution of the search to prevent any potential interference by Defendant[.]" *Dissent* at 6. This circular argument is a logical fallacy.

[5] Such a precedent would be particularly concerning given the prevalence of neighborhoods in which family members live within close proximity to one another.

prong of *Summers*, the *Wilson* Court used as a "guidepost" that same reasoning which underlies the lawful spatial dimension of a *Summers* detention under the second prong. *Id.* ("The reasoning in *Bailey* comports with the justification in *Summers* because someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises."). Such *guidance*, however, does not amount to a holding that an individual's presence within the immediate vicinity of a search, by its very nature, poses a threat to the search's safe and efficient execution.

Had the Supreme Court intended such a rule, it would have had no reason to examine the particular circumstances in order to analyze whether the defendant in that case had, in fact, posed "a *real* threat to the safe and efficient execution of [the] search warrant." *Id.* (emphasis added) ("We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. . . . Defendant argues that he was not an *occupant* of the premises being searched in the ordinary sense of the word. Given defendant's actions here, however, it was apparent to [the officer] that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained."). Moreover, although both factors

were present, our Supreme Court's holding in *Wilson* was not based, even in part, upon either the defendant's "connection" to the premises or his proximity thereto. *Id.*

Thus, under the dissent's logic—where the second prong of *Summers* is the only meaningful requirement—*Summers* would still boundlessly subject to detention any grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail, merely based upon his "connection" to the premises and hapless presence in the immediate vicinity. We do not interpret *Summers* or *Wilson* as creating such a sweeping exception to the Fourth Amendment's proscription against unreasonable seizures. Nor are we able to perceive any line which might practically be drawn to curtail this tremendous discretion, beyond that which our Supreme Court has already set forth. *See id.* ("[A] person is an occupant for the purposes of the *Summers* rule if he poses a *real threat to the safe and efficient execution* of [the] search warrant." (emphasis added) (quotation marks omitted)).

Accordingly, assuming that there was one, we conclude that Defendant's suspicionless seizure in the instant case cannot be justified on the ground that he was an "occupant" of the premises during the lawful execution of a search warrant. Therefore, we vacate the judgment entered upon the denial of Defendant's motion to suppress, and remand the matter to the trial court for entry of an order containing findings of fact necessary to resolve all material factual disputes, pursuant to our holding in *Thompson I*. *See Thompson I*, ___ N.C. App. at ___, 809 S.E.2d at 349 ("In

this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred."). In addition, we reiterate our decision in *Thompson I* to remand for correction of the discrepancy between the transcript of Defendant's plea and the judgment entered against him. *Id.* at ___, 809 S.E.2d at 350.

VACATED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting.

This case is before us again on remand from the Supreme Court of North Carolina with instructions to reconsider this matter in light of *State v. Wilson,* 371 N.C. 920, 821 S.E.2d 811 (2018). *State v. Thompson*, ___ N.C. ___, 822 S.E.2d 616 (2019). I continue to believe that no seizure occurred. *See State v. Thompson*, ___ N.C. App. ___, 809 S.E.2d 340 (2018) (*Thompson I*) (Berger, J., dissenting). Following the Supreme Court's instructions and assuming, *arguendo*, that a seizure did occur, I respectfully dissent.

"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. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). 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) (citations omitted). "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).

"The question for review is whether the ruling of the trial court was correct and not whether the reason given therefore is sound or tenable." *State v. Austin*, 320

N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citation omitted). "[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) (citation omitted).

> The burden on appeal rests upon Defendant to show the trial court's ruling is incorrect. . . . the State's failure to raise the . . . issue at the hearing does not compel nor permit this Court to summarily exclude the possibility that the trial court's ruling was correct under this or some other doctrine or rationale. . . . Our precedents clearly allow the party seeking to uphold the trial court's presumed-to-be-correct and "ultimate ruling" to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from.

State v. Hester, ___ N.C. App. ___, ___, 803 S.E.2d 8, 16 (2017) (*purgandum*).

On remand, we have been instructed to review this case in light of *Wilson* which states:

> a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant . . . . These three parts roughly correspond to the "who," "where," and "when" of a lawful suspicionless seizure incident to the execution of a search warrant.

State v. Wilson, 371 N.C. 920, 923, 821 S.E.2d 811, 815 (2018) (*purgandum*). I disagree with the majority's conclusion that, assuming Defendant was in fact seized, such seizure cannot be justified upon the ground that he was an "occupant of the premises" during the execution of a search warrant.

Our Supreme Court has defined the term occupant to be one who "poses a real threat to the safe and efficient execution of a search warrant." *Id.* at 925, 821 S.E.2d at 815 (citation omitted). The threat does not have to be immediately present during the execution of the search warrant. As the Court in *Wilson* noted, "someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises." *Id.* Sufficient proximity to the premises being searched allows for the mere possibility of interference with the search, which *could* result in potential harm to officers and a less efficient execution of the search warrant.

This potential for interference and harm has led to "the Supreme Court's recognition that officers may constitutionally mitigate the risk of someone entering the premises during a search 'by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door.' " *Id.* (quoting *Bailey v. United States*, 568 U.S. 186, 195 (2013)).

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence . . . [and] the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Michigan v. Summers, 452 U.S. 692, 702-03 (1980).

Officers must have the authority to mitigate risks during the execution of a search warrant. Without such authority, "it is not clear how officers could practically

'search without fear that occupants, who are on the premises and able to observe the course of the search, [would] become disruptive, dangerous, or otherwise frustrate the search.' " *Wilson*, 371 N.C. at 926, 821 S.E.2d at 816 (alteration in original) (quoting *Bailey*, 568 U.S. at 195).

The majority seems to be concerned that if mere presence in the "immediate vicinity" of a search is sufficient for someone to be an "occupant," and subject to lowered Fourth Amendment protections, this would justify detaining "any unlucky bystander." Perhaps confident that Defendant did not pose a threat to law enforcement, the majority declines to acknowledge that an individual within "immediate vicinity" of the area to be searched is a real threat to safe and efficient execution of a search warrant. In addition, the majority ignores the fact that the target of the search identified Defendant as her drug supplier.

The majority opinion jeopardizes the safety of law enforcement officers across this State. While the majority is content to focus on the coolness and calmness of Defendant, law enforcement officers should not be required to gamble with their lives because an individual within the immediate vicinity simply *looked* calm. The majority elevates hyper-technical Monday-morning quarterbacking over common sense. We should be reminded that "courts should credit the practical experience of officers who observe on a daily basis what transpires on the street, so as to avoid

indulging in unrealistic second-guessing of law enforcement judgment calls." *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 118 (2016) (*purgandum*).

The Court in *Wilson* addressed the majority's main concern when it limited law enforcement's ability to detain only those who are within "the immediate vicinity of the premises to be searched." *Wilson*, 371 N.C. at 924, 821 S.E.2d at 815. The *Wilson* Court adopted the limitations from *Bailey* to circumscribe law enforcement's authority to detain occupants, and the Court listed factors to be considered "to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limit of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Id.* (quoting *Bailey*, 568 U.S. at 201).

Officer safety has justified the broad discretion for law enforcement to use detention as a measure of mitigation and protection during the execution of a search warrant. The United States Supreme Court found that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Summers*, 452 U.S. at 705, n. 19). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's

identification; and request consent to search his or her [possessions]." *Id*. at 101 (first alteration in original) (citation omitted).

Here, in their lawful search for drugs, a situation which can often give rise to "sudden violence," CMPD officers "exercise[d] unquestioned command of the situation." *Summers*, 452 U.S. at 703. Defendant was engaged by officers to determine who he was, to prevent any potential interference by Defendant, and to keep officers safe. After discovering Defendant's connection to the apartment—that he was visiting his girlfriend who lived there and who was the subject of the search warrant—CMPD officers were not willing to risk any potential interference or harm by Defendant.

His proximity and connection to the apartment being searched "pose[d] just as real a threat to officer safety and to the efficacy of the search as someone who [was] within the premises." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. The nature of the search and Defendant's proximity to the apartment gave rise for officers to believe Defendant *could* pose a threat to the safety of the search. Upon learning that Defendant was the subject's boyfriend and supplier, Defendant required officer attention because he was a threat, not only to the efficacy of the search, as CMPD resources were diverted away from the execution of the search to prevent any potential interference by Defendant, but to officer safety. Therefore, Defendant was

an occupant of the premises to be searched pursuant to *Wilson*, and CMPD officers detention of Defendant was appropriate in their effort to mitigate risk.

Applying the *Bailey* factors to determine whether Defendant was within the immediate vicinity or not, there is no question that he was both "within the line of sight" of the dwelling to be searched and could have easily gained entry from his location. *Bailey*, 568 U.S. at 201.

As noted before, Defendant stated his purpose for being there was to visit his girlfriend, the target of the search. Officers could infer that he had been there before and was familiar with the surrounding areas and layout of the apartment. Defendant told police during his interrogation after arrest that he had slept at the residence the previous night. He was well within the line of sight of the apartment being searched, located "directly in front of the walkway that would lead to the residence." Additionally, while law enforcement was searching the apartment, his girlfriend *saw* him outside and identified him as the supplier of the drugs that were the target of the search. Defendant's location at the end of the walkway leading to the apartment, and the girlfriend's ability to identify him from inside the residence show Defendant's being "within the line of site" and therefore within the immediate vicinity.

Defendant "*could* [have] pose[d] just as real a threat to officer safety and to the efficacy of the search as someone who [was] within the premises." *Wilson,* 371 N.C. at 925, 821 S.E.2d at 815. Pursuant to *Wilson*, Defendant was an occupant of the

premises. Defendant was within the line of sight of the apartment being searched, and was a threat to enter or attempt to enter the premises. Thus, Defendant was located within the "immediate vicinity of the premises to be searched," *Bailey*, 568 U.S. at 199, and subject to detention.

The trial court did not err in denying Defendant's motion to suppress. Even assuming a seizure occurred, it was justified under *Wilson* because CMPD officers had authority to detain Defendant as an occupant of the premises who was in the immediate vicinity. I would affirm the trial court.