IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-219

Filed: 15 January 2019

New Hanover County, No. 16CRS057327

STATE OF NORTH CAROLINA

v.

DARRYL J. WADDELL, Defendant.

Appeal by defendant from judgment entered 28 September 2017 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 20 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore III, for the State.

Leslie Rawls for defendant-appellant.

BERGER, Judge.

On September 28, 2017, Darryl J. Waddell ("Defendant") pleaded guilty to possession of a firearm by a felon and having attained habitual felon status after the trial court had denied Defendant's motion to suppress evidence obtained from a search and seizure. Defendant appeals from the trial court's denial of his motion to suppress, and argues that the trial court erred by making two findings of fact not

supported by competent evidence and in concluding that the officers had conducted a proper *Terry* stop and frisk. We disagree and affirm the trial court's ruling.

Factual and Procedural Background

On September 12, 2017, Detective Allen Mitchell ("Detective Mitchell") and Officer Brian Wilson ("Officer Wilson") of the North Carolina Wilmington Police Department were patrolling the Creekwood housing community in Wilmington. At the time, Detective Mitchell was assigned to the New Hanover Joint Housing Task Force (the "Task Force"). The Task Force had been designed to promote community policing and to combat gang and drug crimes in certain residential areas. As a member of the Task Force, Detective Mitchell had access to a list of individuals' names who were banned from the Creekwood community. The officers knew Creekwood's reputation as an area known for violent crimes and drug sales

The officers had been assigned to patrol Creekwood because of a gang-related shooting that had occurred approximately two weeks prior. The officers were advised that individuals involved in the recent shooting were not residents of Creekwood, that the perpetrator was still at large, and that retaliation was likely.

At approximately 11:15 p.m., the officers had observed Defendant's vehicle circle the Creekwood community several times during a five-to-ten minute period. Defendant eventually backed his vehicle into a parking space that had been posted with a "No Trespassing" sign and reserved for Creekwood residents and their guests.

However, Defendant had not appeared to be a resident or visitor as he did not exit his vehicle after parking. Rather, Defendant had remained seated in his car with the engine running, windows down, and music playing.

Without initiating their patrol car's lights or sirens, the officers exited their marked patrol car, approached Defendant, and informed Defendant that they had noticed him circle the area several times. After observing that Defendant appeared nervous and his hands were shaking, Detective Mitchell asked Defendant for his driver's license. The address on Defendant's license was not a Creekwood address. Defendant told the officers that the car he was driving belonged to his mother, but was registered to another person. Detective Mitchell then asked for Defendant to stay in his car while he ran Defendant's record. Officer Wilson remained with Defendant.

Officer Wilson observed that Defendant had constricted breathing and shaky hands. Defendant also provided conflicting answers about from where he had come that evening. Officer Wilson then asked Defendant if he could search Defendant's car, to which Defendant replied, "that's fine." Officer Wilson asked Defendant to step out of the car and informed him that he was going to "pat him down." While frisking Defendant, Officer Wilson felt a metallic object in the shape of a gun in Defendant's right pocket. As Officer Wilson squeezed the object to confirm its identity, Defendant appeared to have reached for the gun, so Officer Wilson moved Defendant onto the

hood of the car and placed him in handcuffs.

While this was taking place, Detective Mitchell was informed that Defendant had been charged with possession of a firearm by a felon six months prior, and Detective Mitchell independently suspected that Defendant was armed. However, before Detective Mitchell could relay this information to Officer Wilson, he had already searched and handcuffed Defendant.

On November 28, 2016, Defendant was indicted for possession of a firearm by a felon and having attained habitual felon status. On September 28, 2017, Defendant moved to suppress evidence obtained as a result of the search and seizure. After Defendant's motion to suppress was denied, Defendant pleaded guilty to possession of a firearm by a felon and having attained habitual felon status, while reserving his right to appeal the suppression ruling. Defendant was sentenced to a term of fifty to seventy-two months in prison.

On October 10, 2017, the trial court entered its written order ("the Order") on the motion to suppress. The trial court concluded that Defendant had been seized when Detective Mitchell asked Defendant to provide his identification and to remain in the car. The trial court also concluded that the stop had been reasonable because they "had reasonable and articulable suspicion to conclude in light of their experience and training and based on the totality of the circumstances that the defendant was engaged in criminal activity." Also, the "investigatory detention of the defendant . . .

was conducted in a reasonable manner, was not physically intrusive and was limited to a reasonable amount of time." Moreover, the trial court found that Officer Wilson's *Terry* frisk was justified because "based upon his observations of the defendant and the totality of the circumstances," Officer Wilson reasonably believed that Defendant "was armed and dangerous."

Defendant timely appeals arguing that the trial court erred (1) because two findings were purportedly not supported by competent evidence;[1] and (2) by concluding, based on these findings of fact, that the officers had conducted a proper *Terry* stop and frisk. We disagree.

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, as here, 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.

[1] Defendant also asserts that several of the trial court's other "findings" were not supported by competent evidence, including the trial court's conclusions that the officers had reasonable suspicion that criminal activity was afoot and that Officer Wilson had an objectively reasonable belief that Defendant was presently armed and dangerous. Although the trial court notes these determinations in the Order's "Findings of Fact" section, these determinations are conclusions of law rather than findings of fact and will be reviewed by this Court as such. *See State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016) ("[W]e do not base our review on findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.").

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

Analysis

I. Findings of Fact

Defendant first argues that a portion of Finding #13, in which the trial court found that "the defendant did not pull into a residence parking space in an apparent visit at that time of night," was not supported by competent evidence because the officers never asked Defendant if he was visiting someone or why he parked in that parking space. We disagree.

During the motion to suppress hearing, Detective Mitchell testified on direct examination as follows:

> [The State:] [D]id [Defendant] appear to be there to visit anyone, was he getting out and going up to attempt to go into someone's home?
>
> [Detective Wilson:] It did not appear at that time because of the fact that he backed in and was still sitting in his car after circling the area.

On cross-examination, Detective Mitchell also testified as follows:

> [Defense Counsel:] The fact that there was an African American male, which is consistent with residents that reside in the area, by himself in a parking spot in that area, that in and of itself was not unusual?
>
> [Detective Mitchell:] The residents know they're not supposed to loiter in their vehicles. Due to the fact of him circling the area and then backing into a parking spot and

> staying in his vehicle with it running and playing music is unusual because the residents know they're not supposed to be in the vehicles sitting in the parking lot. . .
>
> [Defense Counsel:] Is there a rule that says they can't sit in their car and listen to music?
>
> [Detective Wilson:] Yes, ma'am.
>
> [Defense Counsel:] There is a rule that says that?
>
> [Detective Wilson:] Yes, ma'am, it's in their lease.

Further, Officer Wilson also testified on direct examination as follows:

> [The State:] When you approached the vehicle, did it appear that the defendant was about to exit the vehicle or was in the process of exiting the vehicle?
>
> [Officer Wilson:] No, ma'am.
>
> [The State:] Was there anyone in the community, maybe a homeowner, or not a homeowner but a resident I guess I'll say, coming out towards the defendant as if they knew him or as if they expected him?
>
> [Officer Wilson:] No, ma'am.

Taken together, Detective Mitchell and Officer Wilson's testimonies provide competent evidence to support the trial court's finding that Defendant was neither a resident nor visiting a resident of the Creekwood housing community. Accordingly, we affirm the trial court's Finding #13.

Defendant also asserts that a portion of Finding #25, in which the trial court found that "Officer Wilson was fearful for his safety and believed the [D]efendant to

be armed and dangerous," was not supported by competent evidence because Officer Wilson was unaware of Defendant's prior possession of a firearm by a felon conviction before he frisked Defendant. We disagree.

During the motion to suppress hearing, Officer Wilson testified on direct examination as follows:

> [The State:] And describe for us how [Defendant] was breathing, [while] answering your questions.
>
> [Officer Wilson:] So when we were standing there and I first initially started asking the questions, once I would ask him a question, it was as if he would take a breath and hold it, and then go to answer the question but couldn't answer the question because he was constricting his breathing and it was weird because it was almost as if he was choking up on almost what his answer was. So then I waited and then would ask him another question and he would do the same thing. It seemed weird because he was constricting his breathing to where he almost couldn't breath and then he would try to answer the question or he wouldn't answer the question at all.
>
> [The State:] Did that concern you for your safety?
>
> [Officer Wilson:] Yes, ma'am, I mean, that goes on more and more with the nervous behavior from the initial time that we got there, he was shaking.
>
> [The State:] And so what was your concern at that point?
>
> [Officer Wilson:] At this time, based on his behavior from being nervous, shaking, and constricting his breathing, there is something wrong and it just doesn't make any sense.

On cross-examination, Officer Wilson further testified:

> [Defense Counsel:] So your understanding was just because he gave you consent to search his car that you believed that you had consent to search his person as well?
>
> [Officer Wilson:] No, ma'am, based off of his behavior with him being nervous, shaking, and constricting his breathing, that informed me that something was wrong. So for my safety, I patted him down to ensure he didn't have any weapons on him.

Although it is true that Officer Wilson was unaware of Defendant's prior possession of a firearm conviction before he frisked Defendant, Officer Wilson testified that his fear for his safety and belief that Defendant was armed stemmed from Defendant's behavior. He also testified that he and Detective Mitchell were patrolling the neighborhood that had a reputation for violence following a fatal gang-related shooting. Therefore, competent evidence in the record supports the trial court's finding that Officer Wilson feared for his safety and, based upon the totality of the circumstances, had a reasonable belief that Defendant was armed and dangerous. Accordingly, we also affirm the trial court's Finding #25.

II. Conclusions of Law

Defendant next contends that the trial court erred in concluding that the officers had reasonable suspicion to justify stopping and frisking him. We disagree.

The Fourth Amendment to the United States Constitution protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. Similarly, "Article I, Section 20 of the Constitution of North Carolina likewise prohibits

unreasonable searches and seizures." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016).

> An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. A reviewing court determines whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter by examining the totality of circumstances. . . . Although the standard is not satisfied when a police officer merely engages an individual in conversation in a public place, additional circumstances attending such an encounter may reveal that the individual is not participating consensually but instead has submitted to the officer's authority. 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, 308-09, 677 S.E.2d 822, 826-27 (2009) (citations and quotation marks omitted).

"The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 187-88 (2004) (citation and quotation marks omitted).

> In *Terry v. Ohio*, [392 U.S. 1 (1968),] the United States Supreme Court held the Fourth Amendment requires that a brief investigatory stop of a individual be supported by reasonable suspicion. . . . [I]n order to conduct an investigatory detention—a "*Terry* stop"—in the first place, the police must have reasonable suspicion that criminal activity is afoot. [Additionally], the police must also have reasonable suspicion that the persons with whom they are dealing may be armed and presently dangerous in order to justify a careful limited search—a "*Terry* frisk"—of the outer clothing of such persons in an attempt to discover weapons which might be used to assault them.

State v. Johnson, 246 N.C. App. 677, 686, 783 S.E.2d 753, 760 (2016) (*purgandum*[2]).

Moreover, *Terry* stops must be limited "[t]o ensure that the resulting seizure is constitutionally reasonable." *Hiibel*, 542 U.S. at 185. In other words, "[t]he officer's action must be justified at its inception, and reasonably related in scope to the circumstances which justified the interference in the first place. For example, the seizure cannot continue for an excessive period of time, or resemble a traditional arrest." *Id.*, at 185-86 (*purgandum*).

Additionally, because *Terry* frisks are "justified by the legitimate and weighty interest in officer safety,"

> the frisk is limited to the person's outer clothing and to the search for weapons that may be used against the officer. But an officer need not be absolutely certain that the

[2] Our shortening of the latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

> individual is armed. Rather, the police are entitled to formulate common-sense conclusions about the modes or patterns of operation of certain kinds of lawbreakers in reasoning that an individual may be armed. The crucial inquiry is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Johnson, 246 N.C. App. at 692-93, 783 S.E.2d at 764-65 (*purgandum*).

This Court "has recognized that facts giving rise to a reasonable suspicion include nervousness, sweating, failing to make eye contact, and conflicting statements." *Id.* at 690, 783 S.E.2d at 762-63 (*purgandum*). Moreover, "[t]he proximity to a crime scene, the time of day, or the absence of other persons in and of themselves may be insufficient to establish reasonable suspicion, but taken together, such factors certainly may suffice." *State v. Campbell*, 188 N.C. App. 701, 706, 656 S.E.2d 721, 726 (2008).

The trial court's conclusion that the *Terry* stop was justified by the officers' reasonable suspicion that criminal activity was afoot is supported by the trial court's findings of fact, which are binding on this Court. Defendant was in a high-crime area, which was subjected to increased police presence "due to a recent gang related shooting" and the Wilmington Police Department's concerns "about retaliation for the killing of a high ranking gang member." At 11:15 p.m. on a Monday night, "when many residents [were] home and in bed," Defendant was "circling the area for an extended period of time," and subsequently backed into a space reserved for

Creekwood residents and guests, and posted with a "No Trespassing" sign. Defendant remained seated in the vehicle with the engine running and the driver and passenger windows down. The officers approached Defendant in his vehicle at this point and attempted to engage in a consensual encounter. As this Court has stated, the Fourth Amendment's prohibition against unreasonable seizures is not violated

> merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Even when police officers have no reason to suspect that a person is engaged in criminal behavior, they may pose questions, ask for identification, and request consent to search . . . provided they do not induce cooperation by coercive means.

State v. Isenhour, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (citation and quotation marks omitted).

During the encounter, officers determined that Defendant was not a Creekwood resident or guest, was nervous, and was located in a high-crime area late at night. "Based on the totality of circumstances, reasonable suspicion existed to support a reasonable and cautious police officer's determination that criminal activity may have been afoot." *Johnson*, 246 N.C. App. at 692, 783 S.E.2d at 764. Accordingly, we affirm the trial court's conclusion that the seizure of Defendant was lawful.

In addition, the trial court's conclusion that the *Terry* frisk was justified by Officer Wilson's reasonable belief that Defendant was presently armed and dangerous is also supported by the trial court's findings of fact. Officer Wilson was assigned to patrol Creekwood because the Wilmington Police Department was

concerned that someone would retaliate for the recent gang-related shooting. Moreover, because the gang members "involved in the [prior shooting] were not residents of the Creekwood housing community," it is also particularly relevant that Defendant circled the community "for an extended period of time" as this act demonstrated that Defendant was either looking for someone or was unfamiliar with the area. Therefore, a reasonable officer under the circumstances would have been appropriately concerned that Defendant may have been armed and dangerous. Additionally, after backing into a parking space, Defendant "remained seated in a stationary vehicle with the engine running" and windows down, suggesting that Defendant was seemingly prepared to retaliate and quickly flee the area. Finally, the trial court's finding that Defendant informed the officers that "the car belong[ed] to his mother but the tag [was] registered to another person" reasonably raised suspicions that Defendant consciously attempted to avoid being linked to the scene of possible criminal activity. Taken together, these articulable facts support Officer Wilson's reasonable belief that Defendant was presently armed and dangerous. Accordingly, we affirm the trial court's conclusion that Officer Wilson's *Terry* frisk was justified.

Conclusion

We affirm the trial court's denial of Defendant's motion to suppress.

AFFIRM.

Judges TYSON and INMAN concur.

Report per Rule 30(e).