IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-529

Filed: 21 April 2020

Wake County, No. 17CRS222594

STATE OF NORTH CAROLINA

v.

JEREMY JOHNSON, Defendant.

Appeal by Defendant from judgment entered 17 January 2019 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 4 March 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.*

BROOK, Judge.

Jeremy Johnson ("Defendant") appeals from judgment entered upon a plea of guilty to felony possession of cocaine and resisting a public officer. Defendant argues that the trial court erred in denying his motion to suppress evidence on Fourteenth Amendment grounds. Defendant further argues that he was denied effective

assistance of counsel. For the following reasons, we disagree and find no prejudicial error.

## I. Factual and Procedural Background

On 22 November 2018 around 12:30 a.m., Officer Kuchen of the Raleigh Police Department was patrolling Raleigh North Apartments in southeast Raleigh, when he drove past Defendant, who was parked in a parking space approximately five feet away from a non-functioning light pole and a no trespassing sign.

Officer Kuchen stopped his marked patrol car in the lane of travel just past Defendant's car. As Officer Kuchen approached Defendant's car, he turned on a flashlight and began to shine it at the vehicle. Defendant then began to get out of the car, at which point Officer Kuchen smelled "the odor of raw marijuana" from about five to six feet away. Officer Kuchen ordered Defendant to stay in the car, but Defendant continued to get out of the car, reaching into the driver side door as he exited. Defendant then walked at a pace "faster than a jog but slower than a run" to the back of his vehicle.

Defendant stopped at the back of his car, and Officer Kuchen attempted to detain Defendant by putting him in handcuffs. Defendant began to pull away and ran 10 to 15 feet before officers brought him to the ground. Officers found a small amount of cocaine and less than one half an ounce of marijuana in Defendant's pocket upon the search incident to arrest.

Defendant was arrested and indicted for felony possession of cocaine, possession of marijuana up to one-half ounce, and resisting a public officer.

Defendant moved to suppress the drug evidence alleging Fourth and Fourteenth Amendment violations. Defendant first argued Officer Kuchen lacked the reasonable articulable suspicion required to seize him under the Fourth Amendment. Defendant, a black man, also alleged that Officer Kuchen was influenced by racial bias in determining whom to investigate and seize, and he was thus denied equal protection under the law as guaranteed by the Fourteenth Amendment. Defendant also moved to dismiss for the alleged equal protection violation.

On 5 September 2018, the trial court conducted separate suppression hearings for each alleged violation. Before doing so, the trial court indicated that the burden was on the State for the Fourth Amendment motion to suppress, while the burden was on the defense for the equal protection claim.

Officer Kuchen, the only witness during the Fourth Amendment hearing, testified that he detained Defendant due the odor of marijuana, Defendant's "digging into the door pocket" of his car, and walking quickly to the back of the vehicle after being commanded to stay in the car.

During the equal protection hearing, Defendant called three witnesses. Ian Mance, an attorney at the Southern Coalition for Social Justice, testified first. He

testified that the law requires officers to report traffic stop data, and he used this data to locate, with a high degree of confidence, the ID number associated with Officer Kuchen's stops in the database. According to his information, Mr. Mance determined that Officer Kuchen had stopped 299 drivers, 245 of whom were black. At the time, the most recent population estimate listed the black population of Raleigh at 28%. Of all Raleigh Police Department stops since 2002, 46% were stops of black drivers. Of Officer Kuchen's stops, 82% were stops of black drivers. Mr. Mance did not know the racial demographics of southeast Raleigh.

An intern with the Wake County Public Defender's Office testified that he had researched all charges for which Officer Kuchen was listed as a complainant in ACIS, a public database. Of those charges, 81.4% were black.

Defendant next called Officer Kuchen, who testified that he did not know the racial demographics of the southeast district or of Raleigh as a whole.

The trial court denied both motions. In its written order denying Defendant's motion to suppress for a Fourth Amendment violation,[1] the trial court concluded that

[1] The trial court styled its order as "Order Denying Defendant's Motion to Dismiss for Lack of Reasonable Suspicion." However, Defendant moved to *suppress* for lack of reasonable suspicion, not dismiss, which the trial court indicated it understood during the hearing on Defendant's motions. Further, despite the trial court's typographical error, the order itself is responsive to Defendant's Fourth Amendment motion to suppress. Accordingly, we refer to this as a motion to suppress in spite of its label.

Officer Kuchen had reasonable articulable suspicion to stop Defendant. In its order rejecting Defendant's equal protection arguments,[2] the trial court concluded that

> Defendant has failed to identify a similarly situated individual who was treated differently by Officer Kuchen, but instead relies on statistical evidence.
>
> . . . While the statistical evidence shows that Officer Kuchen initiated traffic stops of more African Americans than whites, it does not provide a basis for determining whether the data represents similarly situated individuals.

On 17 January 2019, Defendant pleaded guilty to felony possession of cocaine and resisting a public officer. The trial court sentenced Defendant to six to seventeen months' imprisonment suspended upon 24 months of supervised probation. Defendant timely noticed appeal.

## II. Analysis

On appeal, Defendant argues that the trial court erred in denying his motion to suppress evidence seized in violation of his Fourteenth Amendment rights. Specifically, Defendant argues that the trial court inappropriately placed the burden on the defense to establish the evidence in question was obtained in violation of the Fourteenth Amendment. Defendant further argues that he was denied effective

[2] As discussed above, Defendant moved both to suppress and dismiss on equal protection grounds. The trial court rejected these equal protection arguments after hearing from the parties. As with the Fourth Amendment arguments, the trial court's order is styled as a response to a motion to dismiss. Ultimately, and as discussed below, this lack of precision in the trial court's order does not hinder or otherwise factor into our analysis.

assistance of counsel when his trial counsel acquiesced to the trial court placing the burden on the defense to establish he was denied equal protection under the law.

We consider each issue through the lens of whether the interaction in question violated Defendant's Fourth Amendment rights, which, in this instance, resolves the equal protection and ineffective assistance of counsel claims.

A. Motion to Suppress

i. 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." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "Where, 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." *State v. Faulk*, 256 N.C. App. 255, 262, 807 S.E.2d 623, 629 (2017) (citation and internal marks omitted). Conclusions of law are reviewed de novo. *Id.* "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal marks omitted).

ii. Merits

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d

824, 827 (2012). "[A] seizure occurs within the meaning of the Fourth Amendment only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen[.]" *State v. Holley*, ___ N.C. App. ___, ___, 833 S.E.2d 63, 74 (2019) (citation and internal marks omitted). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389, 398 (1991) (citation and internal marks omitted).

However, "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[.]" *INS v. Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 1762, 80 L. Ed. 2d 247, 255 (1984). "The crucial test to determine if a person is seized is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Wilson*, 250 N.C. App. 781, 784, 793 S.E.2d 737, 739 (2016) (citation and internal marks omitted).

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

*United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509-10 (1980) (citations omitted).

"A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007). "An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (citation and internal marks omitted). "Factors to determine whether reasonable suspicion exist[s] include activity at an unusual hour, a suspect's nervousness, presence in a high-crime area, and unprovoked flight." *State v. Garcia*, 197 N.C. App. 522, 529, 677 S.E.2d 555, 559 (2009) ("[N]one of th[e]se factors are sufficient independently."); *see also State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) ("A court must consider the totality of the circumstances . . . in determining whether a reasonable suspicion to make an investigatory stop exists.") (citation and internal marks omitted).

The Fourteenth Amendment of our federal and Article I, Section 19 of our state constitutions recognize the right to equal protection under the law. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19. Both "prohibit[] selective enforcement of the law based on considerations such as race[.]" *State v. Ivey*, 360 N.C. 562, 564, 633

S.E.2d 459, 461 (2006), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412, 415 n.1, 665 S.E.2d 438, 440 n.1 (2008).

If evidence was unconstitutionally obtained, a defendant can file a motion to suppress that evidence under N.C. Gen. Stat. § 15A-974. Once the defendant meets certain procedural requirements, *State v. Cheek*, 307 N.C. 552, 556, 299 S.E.2d 633, 636 (1983), the burden shifts to the State to show beyond a preponderance of the evidence that the evidence is admissible, *State v. Wilson*, 225 N.C. App. 246, 251, 736 S.E.2d 614, 618 (2013).

Defendant here moved to suppress under N.C. Gen. Stat. § 15A-974, alleging both Fourth and Fourteenth Amendment violations. Assuming without deciding that the trial court erred in placing the burden on Defendant during the hearing on his motion to suppress on equal protection grounds, as Defendant contends, we hold that any error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2019) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.").

Here, when Officer Kuchen walked around his vehicle and began his interaction with Defendant, the encounter started as voluntary in nature. When Officer Kuchen stopped his car, Defendant was not prohibited from departing. *See Wilson*, 250 N.C. App. at 785, 793 S.E.2d at 741 ("[The defendant]'s movement was

not restricted the way a passenger on a bus would be restricted with a police officer standing above him."). And as Officer Kuchen approached Defendant's vehicle, he did not draw his weapon, his lights and sirens were off, and he did not touch Defendant or use language which would indicate that compliance was compelled prior to ordering him to stay in the car. *See id.* at 786, 793 S.E.2d at 741.

When Defendant opened his car door, Officer Kuchen smelled "the odor of raw marijuana." Defendant then reached his hand into the door's side pocket and moved to the back of his car despite Officer Kuchen ordering Defendant to stay in the car. Looking at these facts in their totality rather than in isolation, these developments gave Officer Kuchen the reasonable suspicion necessary for the subsequent stop of Defendant. *See State v. Rivens*, 198 N.C. App. 130, 134, 679 S.E.2d 145, 149 (2009) ("In this case, the smell of marijuana, bolstered by [the] defendant's nervousness, was sufficient to create a reasonable and articulable suspicion of criminal activity.").

This evidence is fatal to Defendant's motion to suppress on equal protection grounds. By the time the encounter lost its consensual nature and implicated Defendant's constitutional rights, Officer Kuchen had a valid basis for the stop in question, wholly divorced from the suspect's race.

B. Ineffective Assistance of Counsel

Having concluded the trial court did not err in denying Defendant's motion to suppress, we necessarily conclude that Defendant's ineffective assistance of counsel claim fails as well.

In order to establish ineffective assistance of counsel, the defendant must first "show that counsel's performance was deficient" and then that counsel's deficient performance prejudiced his defense. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). Where we conclude that counsel's performance did not prejudice the defendant, we need not analyze whether counsel's performance was actually deficient. *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011); *see also State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987) (reviewing for prejudice questions "whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different.").

Regardless of whether Defendant's trial counsel erred in advising the trial court that the defense bore the burden on his motion to suppress on equal protection grounds, Defendant cannot succeed in making the required showing of prejudice for his ineffective assistance of counsel claim. For the previously stated reasons, there is not a reasonable probability that the result of the proceeding would have been different absent trial counsel's alleged errors.

## III. Conclusion

We hold that any error of the trial court in ruling on Defendant's motion to suppress, if present, is harmless beyond a reasonable doubt. In so holding, we necessarily conclude that Defendant cannot establish the necessary prejudice for his ineffective assistance of counsel claim.

NO PREJUDICIAL ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).