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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-819

Filed: 31 December 2020

Carteret County, No. 18 CRS 52039–40, 52045–46

STATE OF NORTH CAROLINA

v.

LESLIE ANN MCNEILL and TIMOTHY EDWARD DOOLITTLE

Appeal by defendants from judgments entered 11 February 2019 by Judge Imelda J. Pate in Carteret County Superior Court. Heard in the Court of Appeals 17 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellants.

BRYANT, Judge.

This appeal arises from a trial court's denial of defendants' motion to suppress and subsequent guilty pleas and convictions for trafficking methamphetamine by possession and by transportation. Where the denial of defendants' motion to suppress was proper, we find no error and affirm the order of the trial court.

Factual and Procedural History

In the summer of 2017, law enforcement officers received anonymous tips from several sources that Leslie Ann McNeill ("McNeill") and her husband, Thomas Edward Doolittle ("Doolittle") (collectively "defendants"), were taking road trips to Georgia and bringing back large quantities of methamphetamine to distribute in Carteret County and surrounding areas in North Carolina. Law enforcement officers began physical surveillance of defendants' house and stopped a vehicle shortly after it left defendants' residence. The vehicle contained methamphetamine and the driver confirmed that defendants were bringing large quantities of methamphetamine from Georgia. On 23 August 2017, the vehicle driver, who had become an informant, alerted investigators that McNeill was returning from Georgia with a payload of methamphetamine. The informant, who was communicating with McNeill by cell phone, informed law enforcement officers of McNeill's location. Officers stopped McNeill in Carteret County.

During the 23 August 2017 stop, McNeill consented to a search of her vehicle, a Toyota pickup truck. In aggregate, officers found eighty-four grams of methamphetamine in the backseat of the vehicle and at her residence (which she consented to be searched). McNeil gave "a full written debrief on her illegal goings to Georgia and bringing back quantities of methamphetamine." She stated that at that time she had made six trips to Georgia to get drugs. She also indicated Doolittle

was involved in the trips to Georgia and that he knew she had gone to Georgia to get methamphetamine at the time she was stopped. McNeill was not taken into custody on 23 August 2017, but she agreed to be an informant and work with the FBI in drug investigations in Georgia.

Shortly thereafter, investigators received information that McNeill and Doolittle had resumed their trips to Georgia. Officers observed that defendants were purchasing "toys"—ATVs, cars—and had moved to a nicer residence. On 7 June 2018, investigators made a videotaped undercover purchase of methamphetamine from McNeill at her home, while Doolittle was in the garage. Two days later, another controlled purchase was conducted with Doolittle. Unable to continue long-term physical surveillance, investigators applied for a warrant to install a GPS tracker to continuously monitor McNeill's 2004 GMC Yukon.

The matter of the warrant application was heard before the Honorable Benjamin Alford, Superior Court Judge. On 6 June 2018, Judge Alford granted the warrant application and authorized the installation of the GPS tracker for a period of sixty days. An informant notified Detective Scott Moots, with the Carteret County Sheriff's Office, that either McNeill or Doolittle would soon be going out of town. On or about 17 June 2018, Detective Moots observed the GPS signal on the GMC Yukon returning to North Carolina from Georgia. Once in Carteret County, Detective Moots, along with five other officers, followed the GMC Yukon and conducted a traffic stop

after Detective Moots observed several "lane violations." Doolittle was driving and McNeill was in the passenger seat. Upon exiting the vehicle and being handcuffed, Doolittle stated, "Scott, [Detective Moots,] do you want me to show you where it's at." Doolittle voluntarily informed Detective Moots where to find the methamphetamine in the vehicle. Law enforcement officers seized some 544 grams of methamphetamine. Defendants were arrested and charged with trafficking 400 grams or more of methamphetamine by possession and by transportation.

McNeill filed two motions to suppress evidence (one to suppress evidence seized on 17 June 2018 stemming from the use of the GPS tracking device and another suppressing evidence seized during her arrest); Doolittle filed one motion to suppress evidence seized on 17 June 2018. The motions were heard before the Honorable Imelda J. Pate, Senior Resident Superior Court Judge. On 18 February 2019, Judge Pate denied all three motions. Each defendant pled guilty to two counts of trafficking in methamphetamine (one count trafficking by possession, one count trafficking by transportation) and reserved the right to appeal the trial court's denial of defendants' respective motion(s) to suppress. The trial court accepted each defendant's guilty pleas and for each defendant entered a consolidated judgment sentencing each defendant to an active term of 201 to 254 months. Each defendant gave oral notice of appeal.

Standard of Review

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).

> Because its duty in ruling on a motion to suppress based upon an alleged lack of probable cause for a search warrant involves an evaluation of the judicial officer's decision to issue the warrant, the trial court should consider only the information before the issuing officer. Thus, although our appellate courts have held that "the scope of the court's review of the [judicial officer's] determination of probable cause is not confined to the affidavit alone[,]" additional information can only be considered where
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> > [t]he evidence shows that the [judicial officer] *made his notes on the exhibit contemporaneously from information supplied by the affiant under oath*, that the paper was not attached to the warrant in order to protect the identity of the informant, that the notes were kept in the magistrate's own office drawer, and that the paper was in the same condition as it was at the time of the issuance of the search warrant.
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> *State v. Hicks*, 60 N.C. App. 116, 119, 120–21, 298 S.E.2d 180, 183 (1982) (internal quotation marks omitted; emphasis added), *disc. review denied*, 307 N.C. 579, 300 S.E.2d 553 (1983). In such circumstances, an appellate court may consider whether probable cause can be supported by the affidavit in conjunction with the aforementioned notes. *Id.* at 121, 298 S.E.2d at 183; *see*

> *also* N.C. Gen. Stat. § 15A–245(a) (2015) ("Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, *but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official*.") (emphasis added). Outside of such contemporaneously recorded information in the record, however, it is error for a reviewing court to "rely [ ] upon facts elicited at the [suppression] hearing that [go] beyond 'the four corners of [the] warrant.' " *See* [*State v. Benters*, 367 N.C. 660, 673, 766 S.E.2d 593, 603 (2014)].

State v. Brown, 248 N.C. App. 72, 75–76, 787 S.E.2d 81, 85 (2016) (alterations in original). "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).

Motions to Suppress

Defendants each contend the trial court erred by failing to suppress the controlled substances they contend were unconstitutionally seized from the Yukon because the order authorizing law enforcement to install a GPS tracking device did not contain a finding of probable cause that any specific object might be found in the vehicle.[1, 2] We disagree.

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[1] Defendants each filed separate briefs challenging the trial court's denial of their respective motions to suppress. Because they raise similar arguments on appeal challenging installation of a GPS tracking device on their vehicle, we consolidate their discussion of this issue.

[2] On appeal, McNeill argues that the 6 June 2018 order fails to specify the GMC Yukon's link to drug trafficking. As this argument was not presented for consideration before the trial court, we do

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

> "A grudging or negative attitude by reviewing courts toward warrants" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

State v. Sinapi, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 434–35 (1991) (alterations in original).

Pursuant to General Statutes, section 15A-244, an application for a search warrant must contain

> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
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> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[] . . . .

N.C. Gen. Stat. § 15A-244 (2), (3) (2019).

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not address it for the first time on appeal. *See State v. Hudson*, 206 N.C. App. 482, 488, 696 S.E.2d 577, 582 (2010).

In describing an approach to determine the existence of probable cause, the Supreme Court of the United States directed courts to consider the "totality-of-the-circumstances." *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983); *see also State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260–61 (1984) (adopting the totality of the circumstances approach espoused in *Gates* for resolving questions arising under Article 1, Section 20 of the North Carolina Constitution with regard to the determination of probable cause to support the issuance of a search warrant). With regard to informants, the Court noted that

> probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. . . . "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation."

Gates, 462 U.S. at 232, 76 L. Ed. 2d at 544 (quoting *Adams v. Williams*, 407 U.S. 143, 147, 32 L.Ed.2d 612 (1972)). "Because there can be no fixed formula, we are admittedly met with 'recurring questions of the reasonableness of searches[.]' " *Mapp v. Ohio*, 367 U.S. 643, 653, 6 L. Ed. 2d 1081, 1089 (1961) (quoting *United States v. Rabinowitz*, 1950, 339 U.S. 56, 63, 94 L. Ed. 653, 658 (1950)).

In *United States v. Jones*, 565 U.S. 400, 181 L. Ed. 2d 911 (2012), the Supreme Court held that "the Government's installation of a GPS device on a target's vehicle,

and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " 565 U.S. 400, 404, 181 L. Ed. 2d 911, 918 (2012).[3] Which suggests "individuals have a reasonable expectation of privacy in the whole of their physical movements." *Carpenter v. United States*, 585 U.S. ___, ___, 201 L. Ed. 2d 507, 521 (2018) (citing *Jones*, 565 U.S. at 403, 181 L. Ed. 2d 911 (Alito, J., concurring in the judgment); *id.* at 415, 181 L. Ed. 2d 911 (Sotomayor, J., concurring). *Compare United States v. Knotts*, 460 U.S. 276, 281, 75 L.Ed.2d 55, 62 (1983) ("A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."), *with Carpenter*, 575 U.S. at ___, 201 L. Ed. 2d at 52 (reasoning that as to travel in vehicles on public thoroughfares, the impingement on expectations of privacy by law enforcement surveillance on a subject becomes more intrusive the longer the surveillance (citing *Jones*, 565 U.S. at 430, 181 L. Ed. 2d at ___.

As to the issuance of a warrant, our North Carolina Supreme Court has held that

> [a] valid search warrant may be issued upon the basis of an affidavit setting forth information [establishing probable cause] which may not be competent as evidence. *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 . . . . The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the

[3] The Court in *Jones* did not address the argument (the State raised only on appeal) that if the attachment of the GPS device constituted a search, it was reasonable—and thus lawful—under the Fourth Amendment where law enforcement officers had probable cause to believe the defendant was the leader of a large-scale illegal narcotics operation. *Jones*, 565 U.S. at 413, 181 L. Ed. 2d at __.

> designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782; *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495; *State v. Bullard*, *supra.*

State v. Vestal, 278 N.C. 561, 575–76, 180 S.E.2d 755, 765 (1971); *see also State v. Beam*, 325 N.C. 217, 220–21, 381 S.E.2d 327, 329–30 (1989) (holding the totality of the circumstances set forth in the warrant application affidavit—a statement by a "reliable" confidential informant and a second confidential informant—were sufficient to support the magistrate's determination of probable cause and support a warrant to search the defendant's residence).

In reviewing a judicial official's determination of probable cause based on the totality of the circumstances, "the duty of a reviewing court is simply to ensure that the [judicial official] had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Gates*, 462 U.S. at 238–39, 76 L. Ed. 2d at 548 (quoting *Jones v. United States*, 362 U.S. at 271, 4 L. Ed. 2d at 697); *accord State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015); *see also Maryland v. Johnson*, 208 Md. App. 573, 583–84, 56 A.3d 830, 836 (2012) ("Once a duly authorized judicial officer has issued a search (or arrest) warrant, any subsequent review of that decision—at a suppression hearing, on a suppression motion at trial, or on appeal—must be appropriately deferential."). We note the reasoning set forth by Judge Charles E. Moyhan, Jr., then retired and specially assigned to sit on the Court of Special Appeals of Maryland.

> The relationship between a suppression hearing judge and the determination of probable cause can be a tricky one. It shifts dramatically in moving from the warrantless setting to the very different setting wherein a judicially issued warrant is involved. The reviewing judge must shift gears accordingly. In the warrantless situation, the judge is the ultimate fact finder, determining the existence or absence of probable cause. Where a judicially issued warrant is being reviewed, by contrast, the suppression hearing judge enjoys no such freewheeling latitude. As we announced at the top of this opinion, the suppression judge, in that reviewing posture, "sits in an appellate-like capacity with all of the attendant appellate constraints."
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> Under those "attendant appellate constraints," the suppression hearing judge may well be called upon to uphold the warrant-issuing judge for having had a substantial basis for issuing a warrant even if the suppression hearing judge himself would not have found probable cause from the same set of circumstances. In *State v. Amerman*, [84 Md. App. at 461, 464, 581 A.2d 19, 19 (1990)], we stressed the difference between those conclusions of the suppression hearing judge that are material and those other conclusions by the same judge that are, in a given review posture, utterly immaterial:
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> Under the circumstances, it is perfectly logical and not at all unexpected that a suppression hearing judge might say, "*I myself would not find probable cause* from these circumstances; *but that is immaterial. I cannot say that the warrant-issuing judge* who did find probable cause from them *lacked a substantial basis to do so*; *and that is material*." There is a Voltairean echo, "I may disagree with what you decide but I will defend with my ruling your right to decide it."

Johnson, 208 Md. App. at 578–79, 56 A.3d at 833–34. "In practice, the reviewing court gives deference to the [judicial official]'s determination by 'ensur[ing] that the

[judicial official] had a *substantial basis for . . . conclud[ing]* that probable cause existed.' " *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) (second, fourth, and fifth alteration in original) (quoting *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258).

The record before this Court includes the affidavit submitted in support of the warrant application to surreptitiously affix a GPS tracking device to McNeill's 2004 GMC Yukon. In its 18 February 2019 order denying defendants' motion to suppress, the trial court included in its findings of fact many of the substantive points set forth in the affidavit, which we consider in our review. *Brown*, 248 N.C. App. at 75–76, 787 S.E.2d at 85.

On appeal, defendants challenge the sufficiency of the affidavit on numerous fronts: the affiant failed to state whether the methamphetamine seized in August 2017 was taken from McNeill (during a traffic stop and/or from the Yukon); whether the informant CW was reliable; whether CW had provided information regarding McNeill's "recent" trips out of town in a timely manner; whether CS and CW were different people; whether CS and/or CW had personally purchased methamphetamine from McNeill; or when during the course of the six-year investigation, CS or CW had provided their information to law enforcement officers.

We note that the 6 June 2018 warrant application sought an order to "to install and remove an electronic tracking device (GPS) on a White, 2004 GMC YUKON" registered to McNeill.

> It is believed that the installation of the electronic tracking device (GPS) on the target vehicle will greatly assist investigating officers in fully identifying the locations to which McNeill travels without compromising the secrecy of the investigation. It is believed that some of these locations may be storage locations for this narcotics, United States currency, assets, and other documents or evidence related to his illegal activities.
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> . . . [Further, use of the GPS will aid various law enforcement agencies] to fully identify other associates, co-conspirators, their storage location(s) for narcotics, United States currency, assets, and other documents or evidence that MCCOO and his co-conspirators use to conduct their illegal activities without jeopardizing the ongoing investigation.

To paraphrase the Supreme Court of the United States, law enforcement officers sought a warrant to physically occupy private property for the purpose of obtaining information—where the GMC Yukon traveled. *See Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Thus, the probable cause required as a basis for the warrant to install the GPS tracking device was whether there was probable cause to believe the target vehicle would be driven to places where McNeill stored "narcotics, United

States currency, assets, and other documents or evidence related to [her] illegal activities."[4]

As noted in the affidavit and as set out in the findings of fact of the trial court's 18 February 2019 order denying defendants' motions to suppress, at least five law enforcement agencies had been investigating the drug distribution activities in Carteret County since 2012. As a result of witness interviews, surveillance, controlled drug purchases, and other investigative means, "it has become apparent that Leslie Ann McNeill . . . [wa]s an integral part of the drug trafficking organization supplying individuals in the Carteret County . . . area with large quantities of methamphetamine."

More specifically, the affidavit provides, and the trial court's order acknowledges, that on 31 August 2017, the Carteret County Sheriff's Office recovered six (6) ounces of methamphetamine from "the subject's previous trip to Georgia."

> 7. A CW stated that McNeill had recently gone out of town to purchase more Methamphetamine.
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> 8. The Carteret County Sheriff's Office has known that McNeill has taken two to three trips out of town to purchase more Methamphetamine.
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> . . . .

[4] Defendants do not challenge the order granting the application for a warrant as to its duration, sixty (60) days, and whether the averments establish probable cause to warrant such a duration. *Carpenter*, 585 U.S. at ___, 201 L. Ed. 2d at 521 (reasoning that as to travel in vehicles, even on public thoroughfares, "society's expectation has been that law enforcement agents . . . would not . . . secretly monitor and catalogue every single movement of an individual's car for a very long period" (quoting *Jones*, 565 U.S. at 430, 181 L. Ed. 2d 911)).

> . . . A confidential source of information (CS), which has provided credible and reliable information in the past, has informed investigators that Doolittle and McNeill are a distributor of methamphetamine in the Carteret, North Carolina area. During the course of the investigation it is known to investigators from the (CS) that McNeill has used the aforementioned vehicle[, the 2004 GMC Yukon,] to conduct and facilitate multiple narcotics transactions. During physical surveillance, agents of the Carteret County Sheriff's Office and Morehead City Police Department have observed the aforementioned vehicle operated by Doolittle and McNeill.

Given the lesser expectation of privacy a person enjoys in a vehicle (as compared to a residence) and her movements on a public thoroughfare, we hold that the averments set forth in the 6 June 2018 affidavit were sufficient to allow Judge Alford to find that probable cause existed to support a warrant to install a GPS tracking device on the target vehicle, McNeill's 2004 GMC Yukon, for the purpose of locating places where McNeill stores "narcotics, United States currency, assets, and other documents or evidence related to [her] illegal activities." *See Allman*, 369 N.C. at 294, 794 S.E.2d at 303; *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260–61; *see also Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 917–18; *Carpenter*, 585 U.S. ___, ___, 201 L. Ed. 2d at 521; *Knotts*, 460 U.S. at 281, 75 L. Ed. 2d at 62.

Thus, on the point of the sufficiency of the affidavit to support Judge Alford's determination that probable cause existed as a basis for the issuance of a warrant to install a GPS tracking device to track the travel of McNeill's 2004 GMC Yukon, defendants' arguments are overruled.

Where defendants further argue that the narcotics seized during a stop of McNeill's vehicle (driven by Doolittle) during the return trip from Georgia should be suppressed as fruit of the poisonous tree stemming from the execution of an invalid search warrant, those arguments are correspondingly overruled.

Traffic Stop as Alternative Basis for Denial of Motions to Suppress

We note that per unchallenged findings of fact in Judge Pate's 18 February 2019 order, the traffic stop (during which law enforcement officers seized over 500 grams of methamphetamine) was precipitated by Detective Moots' observation that McNeill's 2004 GMC Yukon drifted over the center solid yellow line on the roadway on several different occasions.

"[A] traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citation and quotation marks omitted). In North Carolina, except as provided, it is illegal to drive a vehicle to the left of the centerline of the highway. N.C. Gen. Stat. § 20-146(c) (2019). The trial court properly concluded that officers had reasonable suspicion to stop the Yukon based on "the violations of the motor vehicle laws of the State of North Carolina observed by Detective Moots."

Generally, warrantless searches are prohibited by the Fourth Amendment. *State v. Harris*, 145 N.C. App. 570, 580, 551 S.E.2d 499, 506 (2001). "Consent, however, has long been recognized as a special situation excepted from the warrant

requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citation omitted). "Consent to search, freely and intelligently given, renders competent the evidence thus obtained." *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973) (citations omitted).

After Detective Moots stopped the GMC Yukon which Doolittle was driving, Doolittle said "Scott[, Detective Moots], do you want me to show you where it's at?" Detective Moots originally said, "not right now, hold on a second." Upon arriving at a safer location off the road, Doolittle again said, "Scott, do you want me to show you where it's at?" Detective Moots said yes, and Doolittle told him "it's in the plaid bag behind the driver's seat." In an unchallenged finding of fact, the trial court stated that Doolittle's "spontaneous statement" to Detective Moots was "consent to . . . [a] search of the vehicle" and that the "search of the vehicle was lawful and the fruits of that search . . . are admissible."

We hold that as to the traffic stop and search of McNeill's 2004 GMC Yukon, the trial court's unchallenged findings of fact support its conclusions of law that Detective Moots had reasonable suspicion to stop the Yukon and had Doolittle's consent to search. Accordingly, on this alternate basis, the trial court did not err in denying the motions to suppress.

Defendants also allege statutory violations; however, those arguments were not preserved for appeal and we do not reach their merits. *See State v. Robinson*, 221 N.C. App. 509, 519–20, 729 S.E.2d 88, 97–98 (2012); N.C. R. App. P. 10(a)(1).

The order of the trial court denying defendants' motions to suppress is

AFFIRMED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).