IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-873

Filed: 18 August 2020

Rutherford County, No. 16 CRS 53926

STATE OF NORTH CAROLINA

v.

RAHKIM TASHIEM FRANKLIN

Appeal by defendant from judgment entered 20 March 2019 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact support its conclusions of law denying defendant's motion to suppress, we find no error.

On 1 May 2018, defendant Rahkim Tashiem Franklin was found guilty of driving while impaired in Rutherford County District Court. Defendant appealed to Superior Court. On 19 March 2019, the matter was tried before a jury in Rutherford County Superior Court before the Honorable J. Thomas Davis, Judge presiding.

Defendant filed a motion to suppress any evidence seized as a result of a search on 13 December 2016, and a hearing was held prior to trial.

The State's evidence presented at the suppression hearing tended to show that on 13 December 2016, police responded to a 911 call of a vehicle at a Domino's Pizza drive-thru that had a smell like marijuana coming from the vehicle. Sergeant Brad Moore ("Sgt. Moore") and Officer Troy Scroggs ("Officer Scroggs") responded to the call. Sgt. Moore went into Domino's to speak with the employees while Officer Scroggs remained outside. One of the employees identified the car at the drive-thru window, a white Toyota Corolla, as the car that smelled like marijuana. Sgt. Moore never identified the employee at Domino's as the 911 caller. While inside Domino's Sgt. Moore identified defendant as the driver. Sgt. Moore knew defendant, having dealt with him on other occasions regarding defendant's possession of marijuana. Sgt. Moore then directed Officer Scroggs to stop defendant's vehicle. As defendant pulled away from the drive-thru window Officer Scroggs, using his blue lights, initiated a stop of defendant's vehicle. Upon approaching the vehicle, both Sgt. Moore and Officer Scroggs smelled a strong odor of marijuana. Defendant admitted to smoking marijuana earlier but stated there was none in the vehicle. The officers searched the vehicle and found crumbs of marijuana, but nothing that evidenced defendant was currently or had just finished smoking marijuana. However, a female passenger had a small bag of marijuana on her person, which she handed over to the officers.

Because defendant's eyes were red and glassy, his speech was slurred, and he appeared to be unsteady on his feet. He was subsequently asked to perform sobriety tests. Defendant submitted to the Horizontal Gaze Nystagmus Test, the Walk-and-Turn Test, the One-Legged Stand Test, and an Alco-Sensor Test. After assessing defendant's performance on the tests, Officer Scroggs determined that defendant's mental and physical faculties were appreciably impaired by a substance, and defendant was arrested.

Following the testimony at the suppression hearing, the trial court entered the following order:

FACTS

> 1. [ ] Defendant was driving a vehicle and was in line at Domino's Pizza.
>
> 2. Forest City Police Department Officers, Sgt. Brad Moore and Off. Troy Scroggs responded to a call to investigate a car at Domino's Pizza that was emitting marijuana smell from the vehicle.
>
> 3. Sgt. Brad Moore arrived first, went into Domino's, and talked with employees who told him that the car at the drive[-]thru was emitting marijuana smell from the vehicle.
>
> 4. Sgt. Brad Moore then told Off. Scroggs that [ ] defendant, Rahkim Franklin, was the driver of the vehicle.
>
> 5. Sgt. Brad Moore had prior dealings with [ ] defendant, and knew [] defendant sometimes possessed marijuana.

6. Sgt. Brad Moore told Off. Scroggs to stop [ ] defendant's vehicle when it pulled away from the drive[-]thru window.

7. Off. Troy Scroggs then initiated a stop on [ ] defendant's vehicle, without observing any bad driving.

8. Off. Troy Scroggs searched [ ] defendant's vehicle, and made several observations about [ ] defendant while doing so, including observing [ ] defendant having red, glassy eyes, slurred speech, and being unsteady on his feet.

9. Off. Troy Scroggs then performed Field Tests, including the HGN (Horizontal Gaze Nystagmus), Walk/Turn Test, and One Leg Stand test, Using Off. Scrogg's training and experience, [ ] defendant showed signs of being under the influence of some type of drug in that [ ] defendant demonstrated nystagmus. [ ] [D]efendant then performed the Walk/Turn Test, missing touching heel to toe and stepping off to the side once, in violation of his instructions. On the One Leg Stand, [ ] defendant put his foot down 5 times, in violation of his instructions.

10. [ ] [D]efendant was then placed under arrest by Off. Troy Scroggs.

CONCLUSION OF LAW

The Officers had Reasonable Suspicion of criminal activity when Off. Scroggs stopped [ ] defendant, based on the facts stated above, which included face to face reports of marijuana smell coming from [ ] defendant's car. Officer Troy Scroggs also had Probable Cause to Arrest [ ] Defendant at the time he placed [ ] defendant under arrest, using the facts he gathered and the observations he made of [ ] defendant prior to arrest.

WHEREFORE, the Court issues the following ORDER:

> [ ] Defendant's Motion to Suppress the Stop of [ ] Defendant is hereby Denied, and [ ] Defendant's Motion to Suppress the Arrest of [ ] Defendant is also hereby Denied.

At trial, following the motion to suppress, defendant was found guilty of driving while impaired and sentenced as a Level Five offender to a sixty-day sentence. The sentence was suspended for twelve months, and defendant was placed on unsupervised probation. Defendant filed notice of appeal.

On appeal, defendant argues that the trial court erred by I) finding that a marijuana smell was coming from the car at the drive-thru window, II) finding that multiple Domino's Pizza employees told Sgt. Moore that a marijuana smell was emitting from the car at the drive-thru window, III) concluding that the police had reasonable suspicion of criminal activity when stopping defendant's car, and IV) committed plain error by failing to grant defendant's motion to suppress the evidence gathered as a result of the stop.[1]

Because defendant's appeal only challenged the trial court's findings and conclusions relating to the motion to suppress, our review is likewise limited.

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[1] Defendant asks, without argument or citation to authority, that this court should consider the 911 caller and the Domino's Pizza employee to be two distinct informants because Sgt. Moore did not identify any of the Domino's Pizza employees as the 911 caller, and therefore, there is not sufficient evidence to confirm that the two were the same person. Since this issue was not raised at trial, and thus not preserved, we do not address the request. *See* N.C.R. App. P. 28(b)(6) (stating issues on appeal in a party's brief, or in support of which no reason or argument is stated, will be considered abandoned).

I

Defendant argues the trial court erred in finding that the marijuana smell was coming from the car at the drive-thru. Defendant states the trial court's finding that officers "responded to a call to investigate a car at Domino's Pizza that was emitting marijuana smell from the vehicle" could be interpreted in multiple ways. Defendant contends it is reasonable to read the finding as a factual conclusion that the car at the drive-thru was emitting the marijuana smell, and that the evidence at trial did not support this finding. We disagree.

In reviewing the trial court's findings of fact on a motion to suppress, we determine "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). "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).

"An informant's tip may provide the reasonable suspicion necessary for a Terry stop." *State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001). Where information is relayed to an officer by an informant in face-to-face communications, "an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion." *State v. Hudgins*, 195

N.C. App. 430, 672 S.E.2d 717 (2009). "In evaluating the reliability of an informant's tip, due weight must be given to the informant's veracity, reliability, and basis of knowledge as highly relevant factors in determining whether an informant's tip is sufficient from the totality of circumstances." *Sanchez*, 147 N.C. App. at 624, 556 S.E.2d at 606–07 (citing *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L.Ed.2d 527, 543 (1983)). If "an anonymous tip [does not exhibit] sufficient indicia of reliability. . . , then there must be sufficient police corroboration of the tip before the stop can be made." *State v. McArn*, 159 N.C. App. 209, 213, 582 S.E.2d 371, 374 (2003). "If reasonable suspicion exists before the stop is made, there is no violation of the Fourth Amendment." *Sanchez*, 147 N.C. App. at 624, 556 S.E.2d at 607.

In the instant case, the officers arrived at Domino's Pizza, after receiving an anonymous tip, and Sgt. Moore spoke with an employee who identified a car in the drive-thru emitting the smell of marijuana. While assessing the tip, Sgt. Moore gathered information as to the description of the car and the driver—later determined to be defendant. At that point, the officers were no longer operating on an anonymous tip. Moreover, Sgt. Moore's knowledge of prior dealings with defendant corroborated the tip and thus, gave reason to believe that the marijuana smell was coming from defendant's car. Based on the tip and corroboration, Sgt. Moore directed Officer Scroggs to initiate the stop.

Although the identity of the 911 caller was never revealed, the credibility of the tip was not diminished because Sgt. Moore independently verified the information which matched the description from the tip, and he personally observed defendant's vehicle at the drive-thru.

Thus, there was competent evidence to support that the tip was sufficiently reliable and that the officers were justified in making the investigatory stop. The trial court did not err in finding that the marijuana smell was coming from the vehicle at the Domino's Pizza drive-thru window.

II

Defendant argues that defendant was prejudiced by the court's finding that multiple Domino's Pizza employees told Sgt. Moore that a marijuana smell was coming from the car. We disagree.

As with the last issue, when reviewing a trial court's findings of fact, we determine "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." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

"A defendant's conviction will not be reversed on appeal where the State shows that the error was harmless beyond a reasonable doubt." *State v. Thomas*, 134 N.C. App. 560, 518 S.E.2d 222 (1999). "The test of harmless error is whether there is a

reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Davis*, 284 N.C. 701, 722, 202 S.E.2d 770, 784 (1974) (citation and quotation marks omitted).

Here, the trial court's finding at issue states that Sgt. Moore "went into Domino's and talked with employees who told him that the car at the drive-thru was emitting marijuana smell from the vehicle." However, at the suppression hearing, Sgt. Moore testified that "[o]ne of the employees [at Domino's Pizza] said that they smelled marijuana."

Because Sgt. Moore testified that only one of the employees said they smelled marijuana, a portion of the trial court's finding was made in error. This misstatement in the finding is not sufficient enough to affect the trial court's conclusion. Regardless of whether Sgt. Moore spoke with one or multiple employees, the tip from the face-to-face employee was reliable enough to create reasonable suspicion. This reasonable suspicion led to the investigation of defendant which led to defendant's arrest. Because the alteration from "employees" to "employee" in the trial court's finding would not result in a different outcome for defendant, the error was harmless, and defendant was not prejudiced.

III

Defendant argues that the trial court erred by concluding that the Officers had reasonable suspicion of criminal activity at the time of the stop. We disagree.

"Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

An officer's brief investigatory stop of a vehicle is warranted "when justified by specific, articulable facts which would lead a police officer 'reasonably to conclude in light of his experience that criminal activity may be afoot.' " *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L.Ed.2d 889, 911 (1968)). "In determining whether an officer has the necessary reasonable suspicion of criminal activity, the court must examine both the articulable facts known to the officer at the time he determines to stop the vehicle and the rational inferences the officer was entitled to draw from those facts." *Id.* As such, "the court [views] the totality of the circumstances through the eyes of a *reasonable and cautious police officer* at the scene." *Id.* (emphasis added).

Here, the trial court's relevant findings on this issue include: (1) defendant was driving the vehicle that was at the drive-thru window at Domino's Pizza; (2) Sgt. Moore and Officer Scroggs responded to a call to investigate a car at Domino's Pizza that was emitting marijuana smell; (3) Sgt. Moore spoke to an employee that stated that car at the drive-thru was emitting the smell of marijuana; (4) Sgt. Moore had

prior dealings with defendant and knew defendant sometimes possessed marijuana; (5) Sgt. Moore told Officer Scroggs to stop defendant's vehicle when it pulled away from the drive-thru window.

Defendant cites *United States v. Bryant*, an unpublished federal case, claiming that because an anonymous tip cannot be considered a concrete fact, the officers in the instant case did not have reasonable suspicion at the time of the stop. *See United States v. Bryant*, 654 F. App'x 622 (4th Cir. 2016) (holding that the stop of the defendant was not justified because an unreliable anonymous tip, mild signs of nervousness, and a prior conviction for an offense unrelated to the one being investigated were not enough to support a finding of reasonable suspicion of criminal activity necessary for a Terry stop).

Although we note that *Bryant* is not controlling legal authority, we, nevertheless, find in the instant case, unlike in *Bryant,* that the officer's reasonable suspicion, which led to the stop, was not based on an unreliable tip. Although Sgt. Moore originally arrived on scene at Domino's Pizza pursuing an anonymous tip, Sgt. Moore did have a face-to-face conversation with a Domino's Pizza employee who stated that the car at the window was emitting the smell of marijuana. Sgt. Moore recognized defendant as the driver of the car at the window. The face-to-face tip from the Domino's employee, coupled with Sgt. Moore's knowledge of defendant's prior criminal involvement, was sufficient reasonable suspicion to believe defendant was

engaged in criminal activity. Thus, the trial court did not err in concluding that the officers had reasonable suspicion at the time of the stop.

IV

Defendant argues that the trial court committed plain error by denying defendant's motion to suppress the evidence gathered as a result of the stop. We disagree.

Rule 10 of the North Carolina Rules of Appellate Procedure allows plain error review in criminal cases where judicial action is questioned on issues not preserved at trial. N.C.R. App. P. 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id*. (citation and quotation marks omitted).

"Our state constitution, like the Federal Constitution, requires the exclusion of evidence obtained by unreasonable search and seizure." *State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988). "If the investigatory seizure is invalid, evidence resulting from the warrantless stop is inadmissible under the exclusionary rule both according to the federal constitution and our state constitution." *State v. Jones*, 96 N.C. App. 389, 394, 386 S.E.2d 217, 220 (quotation marks omitted).

Here, defendant argues that because Sgt. Moore and Officer Scroggs did not have reasonable suspicion of criminal activity at the time of the stop, defendant's Fourth Amendment rights were violated by allowing the evidence from the stop to be heard at trial.

As we have already established herein, the face-to-face tip from the Domino's Pizza employee coupled with Sgt. Moore's knowledge of defendant's prior criminal involvement resulted in reasonable suspicion. Because there was reasonable suspicion, the stop did not violate defendant's Fourth Amendment rights. Therefore, because defendant's rights were not violated, the stop was legal. The trial court did not err by denying defendant's motion to suppress.

Having determined that the trial court did not err in denying defendant's Motion to Suppress, we affirm the trial court's ruling on suppression. Further, as defendant raised no issues regarding the trial of this case, the judgment of the trial court following the jury verdict remains undisturbed.

NO ERROR.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).