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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-935

Filed: 17 November 2020

Forsyth County, No. 17 CRS 55799-800

STATE OF NORTH CAROLINA

v.

DONALD LAMONT REDD

Appeal by defendant from order entered 26 March 2019 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2020.

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

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

BRYANT, Judge.

Where the trial court's unchallenged findings of fact support its ruling to deny defendant's motion to suppress, we affirm the order of the trial court.

On 26 February 2018, a Forsyth County grand jury indicted defendant Donald Lamont Redd on trafficking in heroin by possession, trafficking in heroin by transportation, possession with intent to sell and deliver heroin, felony possession of

cocaine, and possession of drug paraphernalia. In a pretrial motion, defendant moved to suppress the evidence against him contending that it was seized in violation of his rights under the Fourth Amendment. A hearing on the matter was conducted the same day in Forsyth County Superior Court before the Honorable Michael D. Duncan, Judge presiding.

With the consent of the parties, the trial court entered its order out of session and out of term denying defendant's motion to suppress, *nunc pro tunc* 26 March 2019. Per the findings of fact, on 21 June 2017, Detective B.K. Ayers, with the Winston-Salem Police Department, was conducting surveillance in a high drug crime area on Cherry Street, Winston-Salem, when he observed defendant, sitting in a white Dodge Charger parked in a business parking lot. Detective Ayers was familiar with defendant from a prior narcotics investigation. A woman briefly approached defendant, then walked away. When defendant left the parking lot followed by a Nissan Altima vehicle, Detective Ayers followed. The vehicles traveled to Piney Grove Park, another high drug crime area. Responding to Detective Ayers's request for assistance, Corporal W.A. Cumbo–who was also familiar with defendant from prior narcotics investigations–as well as other law enforcement officers, soon located defendant standing on a sidewalk near Piney Grove Park. The Dodge Charger and the Nissan Altima were both parked nearby. Corporal Cumbo believed defendant to be a member of an organization referred to as "52 North" and was involved in the

distribution of heroin in Winston-Salem. Defendant was standing with his brother Desmond, a third man, and two women. Corporal Cumbo approached and spoke with the group. An officer frisked defendant for weapons, then inspected the two vehicles parked nearby. The Dodge Charger was unoccupied but running, and defendant's driver's license was visible on the center console. However, when asked to whom the vehicles belonged, no one responded.

A K-9 unit was deployed to the scene and alerted to the presence of narcotics in the white Dodge Charger. Law enforcement officers unlocked the vehicle and conducted a search which revealed two digital scales, defendant's driver's license, a roll of cash, and the contents of a draw-string bag which tested positive for heroin. Defendant was placed under arrest.

Based on its findings of fact, the trial court concluded that law enforcement officers had a reasonable and articulable suspicion to perform a *Terry* frisk on defendant and investigate the vehicle and that defendant had suffered no constitutional violations as a result of the investigation.

Preserving his right to appeal the denial of his motion to suppress, defendant entered into a plea agreement with the State, and on 24 April 2019, defendant appeared in Forsyth County Superior Court before the Honorable James P. Hill Jr., Judge presiding, and pled guilty to trafficking in heroin by possession, trafficking in heroin by transportation, possession with intent to sell and deliver heroin, felony

possession of cocaine, and possession of drug paraphernalia. The trial court accepted defendant's plea and entered a consolidated judgment on all charges. The court sentenced defendant to an active term of 70 to 93 months. Defendant entered notice of appeal in open court.

On appeal, defendant argues the trial court erred by denying his motion to suppress evidence. We disagree.

Defendant does not challenge the trial court's findings of fact, only its conclusions.

"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. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citation omitted). "However, when, as here, the trial court's findings of fact are not challenged on appeal, they . . . are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "Conclusions of law are reviewed de novo . . . ." *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citation and quotations omitted).

The Fourth Amendment protects people against unreasonable searches and seizures of their persons, houses, papers, and effects. U.S. Const. amend. IV; *see also*

State v. Johnson, 246 N.C. App. 677, 685, 783 S.E.2d 753, 760 (2016) ("State officials' actions must comport with the Fourth Amendment . . . ." (citation omitted)).

Terry Frisk

Defendant argues that Officer Oakley frisked him without reasonable suspicion. We disagree.

Where a law enforcement officer observes conduct which gives rise to a reasonable suspicion that criminal activity is occurring and that the suspects may be armed and presently dangerous, "he is entitled . . . to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him." *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641 (1982) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

> The [reasonable suspicion] standard takes into account the totality of the circumstances—the whole picture. Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.

State v. Jackson, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *Navarette v. California*, ___ U.S. ___, ___,134 S. Ct. 1683, 1687 (2014)); *see also id.* ("This same standard—reasonable suspicion—applies under the North Carolina Constitution." (citation omitted)). In determining the existence of reasonable suspicion, "a court must objectively view the facts through the eyes of a reasonable, cautious officer,

guided by his experience and training at the time he determined to detain defendant." *State v. Crenshaw*, 144 N.C. App. 574, 577, 551 S.E.2d 147, 149 (2001) (citation omitted).

"The purpose of the officer's frisk or pat-down is for the officer's safety; as such, the pat-down is limited to the person's outer clothing and to the search for weapons that may be used against the officer." *State v. Robinson*, 189 N.C. App. 454, 458, 658 S.E.2d 501, 504 (2008) (citation and quotations omitted); *see also State v. Campbell*, 188 N.C. App. 701, 709, 656 S.E.2d 721, 727 (2008) ("[P]olice officers are authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [an investigatory] stop." (citation omitted)).

In its 26 March 2019 order, the trial court made the following unchallenged findings of fact:

> 1. That on May 11, 2017, Detective B.K. Ayers of the Winston-Salem Police Department was conducting a narcotics investigation and suspected defendant of being involved in drug activity . . . ;
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> 2. That on June 21, 2017, Det. Ayers saw . . . defendant standing outside [of a] . . . business on a portion of Cherry Street, Winston-Salem, NC he knew to be a high drug crime area based on his experience, having made prior drug arrests and seizures in the area . . . ;
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> 3. That Det. Ayers saw the defendant get into the white Dodge Charger, and another man get into a Nissan Altima parked nearby; Det. Ayers further saw a woman briefly

> approach defendant while he was seated in the Charger and then walk away;
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> 4. That Det. Ayers then observed the Charger and the Altima drive out of the parking lot together, and followed them to Piney Grove Park, which Det. Ayers also believed to be a high drug crime area;
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> 5. That Det. Ayers then requested the assistance of other officers in determining whether defendant was involved in any drug activity . . . ;
>
> . . . .
>
> 14. . . . Officer Oakley was . . . familiar with the defendant based on his previous experience working in the neighborhood as well as through interviewing people who claimed they had bought heroin from the defendant in the past;
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> 15. That Officer Oakley approached the defendant [who was standing on a sidewalk with five other people in an area known to be a high drug crime area] and frisked him for weapons based on his experience and training associating drug sales with weapons violations, as well as his previous knowledge of the defendant[.]"

The trial court's unchallenged findings of fact were based on nonconflicting evidence.[1]

On these findings of fact, the trial court concluded

> [t]hat Officer Oakley had reasonable and articulable suspicion to perform a Terry frisk of the defendant upon approaching him, given the defendant's presence in a high drug crime area, Oakley's knowledge of defendant's involvement in drug activity in the past, and Oakley's

[1] Officer Oakley testified, "In my experience, I know narcotics and firearms go hand-in-hand. From just the totality of everything, the information we had previous on [defendant] being a narcotics dealer . . . I just wanted to make sure he wasn't armed when we approached him. . . . [Also, h]e -- in the past, I believe, he's been charged with robbery."

> experience associating drug sales with the presence of weapons.

We hold the trial court's unchallenged findings of fact support its conclusion. *See Peck*, 305 N.C. at 741, 291 S.E.2d at 641 ("[W]here nothing in the initial stages of the encounter serves to dispel [a law enforcement officer's] reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing . . . ." (citation omitted)). On this point, defendant's challenge is overruled.

Detention

Defendant states that law enforcement officers violated the Fourth Amendment by detaining him beyond the time necessary to issue a traffic citation. Defendant argues that his detention was unreasonable where law enforcement officers detained him without a basis until the K-9 unit arrived. We disagree.

In his brief to this Court, defendant points out that while on the scene, Officer Oakley approached him to determine whether any criminal activity was afoot. When asked if he had drugs, defendant responded that he did not. Defendant was calm and cooperative. An outer layer frisk of defendant's clothing did not reveal any weapons or contraband. Despite not finding evidence of weapons or contraband, law enforcement officers continued to detain defendant while law enforcement officers awaited the arrival of a K-9 unit. Defendant argues that "[i]n short, nothing

suggested that [he] was doing anything other than standing on a sidewalk talking to some friends in the middle of the afternoon."

> Under *Terry*'s "dual inquiry," we must evaluate the reasonableness of a . . . stop by examining (1) whether the . . . stop was lawful at its inception, *see United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992), and (2) whether the continued stop was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The United States Supreme Court has made clear that "[t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (citation omitted). Although "[t]he scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case, . . . the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. Relatedly, "an investigatory detention must . . . last no longer than is necessary to effectuate the purpose of the stop." *Id.*

State v. Reed, 373 N.C. 498, 507–08, 838 S.E.2d 414, 422 (2020).

First, we expand our holding that the first prong of the dual inquiry analysis was met–the detention lawful at its inception. Second, we will determine whether the continued detention was sufficiently limited in scope and duration to satisfy the investigative seizure.

"Our Supreme Court has . . . noted that the presence of an individual on a corner specifically known for drug activity and the scene of multiple recent arrests for drugs, coupled with evasive actions by defendant are sufficient to form reasonable

suspicion to stop an individual." *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (citation omitted).

In the instant case, the trial court's findings of fact reflect that Detective Ayers–who was in a high drug crime area and was familiar with defendant from a prior drug investigation–observed defendant sitting in a white Dodge Charger. A woman briefly approached defendant, and then walked away. Driving the Charger, defendant left the parking lot followed by a Nissan Altima. Detective Ayers continued his surveillance of the vehicles, following them toward Piney Grove Park and requested assistance from other law enforcement officers in determining if defendant was involved in drug activity. Law enforcement officers, responding to Detective Ayers request, located defendant and conducted a frisk of defendant and others "standing on the side of the road near the intersection of Britt Road and Blaze Street, not far from the Piney Grove Park, known to be a high drug crime area." The trial court specifically found:

> 11. That Corp. Cumbo observed the Nissan Altima and Dodge Charger to be parked nearby on the side of the road;
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> 12. That Corp. Cumbo approached the group to try to identify them and determine whether they were involved in drug activity;
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> . . . .
>
> 18. That Officer Oakley then walked to the two cars, saw nothing unusual about the Nissan, but noticed the Charger was unoccupied and left running; Officer Oakley further

> looked inside the Charger and saw . . . defendant's license in plain view in the center console;
>
> 19. That Corp. Cumbo then asked the group who was the owner of the Charger, but no one admitted either owning or driving the car[.]

While defendant did not attempt to leave the vicinity or avoid eye contact upon the approach of law enforcement officers, he was unwilling to acknowledge any connection to the white Dodge Charger parked near him–a vehicle which law enforcement officers had seen him driving recently; that was parked near him, still running; and which contained "his driver's license in plain view in the center console."

Given the totality of the circumstances, defendant's avoidance (or evasion) of any connection to the parked and running vehicle was sufficient to give the law enforcement officers–with their training and experience in narcotics investigations, knowledge that the area was a high drug crime area, and reports that defendant was involved in the distribution of heroin in Winston-Salem–a reasonable suspicion that defendant was currently engaged in illegal activity. *See Watson*, 119 N.C. App. at 398, 458 S.E.2d at 522. Thus, while this is sufficient to hold the detention of defendant was lawful at its inception, defendant's main challenge is to the scope and duration of the detention and whether it was sufficiently limited to satisfy the conditions of an investigative seizure.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods

employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *State v. Allison*, 148 N.C. App. 702, 706, 559 S.E.2d 828, 831 (2002) (emphasis omitted) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983)). "Where the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause, even in the absence of a formal arrest." *State v. Milien*, 144 N.C. App. 335, 340, 548 S.E.2d 768, 772 (2001) (citations omitted). However, the permissible scope and duration of a *Terry* stop will, to some extent, depend on the facts and circumstances of each case. *Id.* "[I]t is the State's burden to demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Reed*, 373 N.C. at 508, 838 S.E.2d at 422.

"One of the key elements of a valid *Terry* stop is brevity. . . . However, the Supreme Court has never adopted an outer limit to the permissible duration of a *Terry* stop." *State v. Thorpe*, 232 N.C. App. 468, 479–80, 754 S.E.2d 213, 222 (2014) (citing *United States v. Place*, 462 U.S. 696, 709 (1983); *Milien*, 144 N.C. App. at 340, 548 S.E.2d at 772). Where law enforcement officers *unnecessarily* prolong a seizure, a valid investigatory stop becomes a *de facto* arrest requiring the existence of probable cause. *Id.* at 480, 754 S.E.2d at 222.

In determining whether law enforcement officers could have minimized the intrusion of their investigation by more diligent means, "a reviewing court should 'examine whether [officers] diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.' " *Id.* (quoting *United States v. Sharpe*, 470 U.S. 675, 686, 84 L.Ed.2d 605 (1985)).

Per the unchallenged findings of fact, Officer Oakley asked the group, including defendant, who owned the parked and running Charger? When no one responded, "Officer Oakley requested a K9 unit to respond and conduct a sniff of the [white Dodge Charger] at 4:31pm[.] . . . [A law enforcement officer] deployed his K9 at 5:10pm; the K9 gave a positive alert on the Charger, after which defendant was detained in handcuffs[.]" After the K-9's positive alert, Corp. Cumbo requested the keys for the Charger. No one provided a key, and a search of defendant failed to produce the key fob detected earlier. Through the registration with a law enforcement database, officers determined the vehicle owner was defendant's mother, but they were unable to reach her. Officer Oakley then requested another officer respond to the scene with a lockout kit to unlock the vehicle door. Once the Charger was unlocked, law enforcement officers conducted a search of the vehicle and recovered defendant's driver's license, two digital scales, cash, and a draw string bag with contents that tested positive for heroin.

The findings of fact indicate that the law enforcement officers, who responded to Detective Ayers's request for aid in surveilling defendant–with no indication of advance notice–"diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Id.* We hold that the law enforcement officers' detention of defendant, while waiting for the arrival of the K-9 unit, was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Reed*, 373 N.C. at 507, 838 S.E.2d at 422 (citation omitted). Therefore, the trial court's findings of fact set forth in its 26 March 2019 order support its conclusions of law. *See Otto*, 366 N.C. at 136, 726 S.E.2d at 827. Accordingly, the trial court's 26 March 2019 order denying defendant's motion to suppress is

AFFIRMED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).