IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-585

No. COA22-65

Filed 16 August 2022

Rutherford County, No. 19CRS051114

STATE OF NORTH CAROLINA

v.

DEMIEN PERCELL PRICE, Defendant.

Appeal by defendant from order and judgment entered 10 June 2021 by Judge Daniel A. Kuehnert in Rutherford County Superior Court. Heard in the Court of Appeals 7 June 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Grace R. Linthicum, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

GORE, Judge.

¶ 1 Two issues are presented in this appeal from the trial court's denial of defendant Demien Percell Price's Motion to Suppress Evidence and Statements of the Accused and sentences imposed upon his guilty plea: whether law enforcement had reasonable articulable suspicion to prolong a traffic stop; and whether law enforcement had probable cause to seize defendant and search his vehicle. We affirm

the trial court's order.

¶ 2 Generally, a defendant who pleads guilty is not entitled to an appeal as a matter of right. *See* N.C. Gen. Stat. § 15A-1444(e) (2021). However, § 15A-979(b) provides an exception for a defendant appealing from a final order denying a motion to suppress evidence. § 15A-979(b) (2021) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."). Defendant must also comply with an additional notice requirement to invoke this statutory right to appeal. *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979) ("[W]hen a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute.").

¶ 3 Prior to the entry of his guilty plea, defendant filed a Notice of Exception to the trial court's ruling, orally reserved his right to appeal, and expressly reserved the right to appeal the Judgment and the denial of his Motion to Suppress in his written transcript of plea. Thus, this Court has jurisdiction to hear defendant's appeal pursuant to § 15A-979(b).

I.

¶ 4 On the evening of 16 April 2019, Officer Joshua French of the Forest City Police

Department was parked on the roadside running license plates. Shortly after 10:00 p.m., defendant's vehicle drove by with plates indicating the registered owner's license was suspended. Officer French stopped the vehicle and spoke with defendant. He did not notice any odor coming from defendant's vehicle or anything unusual. Defendant's demeanor was normal. Officer French returned to his patrol car and confirmed defendant's license was suspended.

¶ 5 When Officer French returned to defendant's vehicle a second time, he noticed an odor of what he believed to be marijuana. Officer French asked defendant if there was any marijuana in the vehicle to which defendant denied. Defendant commented that his cousin drove his vehicle and that he "smokes all the time." Moments later, defendant stated, "I know it's like ashes and stuff in this ashtray," and produced a "roach" from the ashtray showing it to Officer French. Officer Aaron Boyd arrived on scene shortly thereafter when defendant was asked to step out of his vehicle. Officer Boyd also noticed the smell of marijuana, and later testified that based on his training and experience, "a 'roach' is a marijuana cigarette, a small one that has usually been burned."

¶ 6 Officer French received ARIDE training in 2015, which taught him how to detect drugs in a vehicle. He has made over sixty controlled substance arrests in his career. Officer Boyd attended Criminal Interdiction Training School, where he learned to identify and find illegal drugs traveling on the highway. Officer Boyd has

eighty to one hundred controlled substance arrests over his career. Officer French knew that hemp had been legalized, and he had no training to differentiate between the odor of marijuana and hemp. He was unaware of any field tests that allow an individual to test for the difference between marijuana and hemp.

¶ 7 While hesitating to exit his vehicle, defendant freely stated he did not want to incriminate himself and confirmed he was "sure there's something in here." Defendant eventually exited his vehicle after Officer French informed him that he had probable cause to search his vehicle. Defendant was detained without handcuffs at the rear of his vehicle while Officer French performed a search.

¶ 8 Officer Boyd noticed defendant appeared nervous while walking to the rear of his vehicle. Officer Boyd described defendant's nervousness as breathing quickly, fidgeting, moving his hands, and shifting his position. When asked what was in defendant's right hand as he was exiting his vehicle, defendant said, "That's the roach that I just pulled out of the ashtray."

¶ 9 Shortly after Officer French began his search, he discovered a sealed glass canister containing 26 grams of a leafy green material, which was hidden beneath clothing in the backseat. Officer French also found a large quantity of empty sandwich baggies and a set of digital scales. The officers placed defendant in custody just under twenty-two minutes after the traffic stop began.

¶ 10 On 9 December 2019, defendant was indicted for possession with the intent to

sell or deliver marijuana, possession of marijuana paraphernalia, and driving while license was revoked. Defense counsel filed a Motion to Suppress the evidence seized from defendant's vehicle and to suppress the statements he made incident to the seizure on 25 June 2020. The State filed a Motion to Dismiss Defendant's Pre-Trial Motions on 28 May 2021.

¶ 11 At hearing, Dr. Frederic Whitehurst, an expert in forensic chemistry, testified about the different tetrahydrocannabinol ("THC") levels in hemp and marijuana and the characteristics of both substances. Dr. Whitehurst explained it is impossible for humans, or canines, to determine the level of THC in a plant based upon smell alone; and the only method with which to differentiate between hemp and marijuana is a liquid chromatography test. Presently, North Carolina has no field test to distinguish between hemp and marijuana and none was used here.

¶ 12 In closing arguments, defense counsel argued probable cause cannot exist on the smell of marijuana alone because officers are unable to differentiate between marijuana and hemp. Defense counsel also argued the officer's reasonable suspicion ended once defendant claimed no marijuana was in the vehicle, thus resulting in an unconstitutional extension of a traffic stop. Lastly, defense counsel argued defendant was illegally interrogated after he exited the vehicle.

¶ 13 In response, the State argued that defendant was not in custody at the time he made incriminating statements. Regarding probable cause, the State asserted a

totality of the circumstances must be considered.

¶ 14 The trial court agreed with the State that under a

> [t]otality of the circumstances, in particular the smell and the statements of the defendant while in the car talking about having smoked marijuana and having ashes in his ashtray and at some point mentioning the roach in the ashtray, which pretty clearly justified the search . . . there is certainly enough for the officer to act in a reasonable manner to search the vehicle.

Additionally, the trial court found that defendant's statements were voluntarily made and not the result of an interrogation.

¶ 15 At the close of the hearing, the trial court made oral findings of fact and conclusions of law denying defendant's Motion to Suppress. Those findings of fact and conclusions of law were reduced to a written order on 10 June 2021. Defendant filed a Notice of Exception to the Court's Ruling on Defendant's Motion to Suppress later that day. Defendant entered guilty pleas for all charges while reserving his right to appeal the denial of his Motion to Suppress. The State reported that approximately 26.7 grams of marijuana were found and that lab results confirmed the substance was marijuana. However, neither the State nor defense counsel saw the lab results.

¶ 16 The trial court consolidated the offenses into a single judgment and commitment, found mitigating factors, and sentenced defendant to 3-13 months incarceration, suspended for a period of 18 months supervised probation. The trial

court further imposed $600.00 in attorney's fees and gave defendant the opportunity to be heard on the matter. Defendant gave oral Notice of Appeal in open court on 10 June 2021.

II.

¶ 17 The standard of review on appeal from a denial of a motion to suppress is whether the trial court's findings of fact are supported by competent evidence. *State v. Brooks*, 337 N.C. 132, 140, 446 S.E.2d 579, 585 (1994). We then determine whether the findings of fact support the conclusions of law. *Id.* at 141, 446 S.E.2d at 585. "[T]he trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005) (citation omitted).

III.

¶ 18 We first address the issue of whether Officer French lacked reasonable articulable suspicion to prolong the traffic stop.

¶ 19 The Fourth Amendment to the United States Constitution states, "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The North Carolina Constitution provides coextensive substantive protections against unreasonable searches and seizures. *See State v. Hendricks*, 43 N.C. App. 245, 251-52, 258 S.E.2d 872, 877 (1979). A traffic stop is a seizure within the meaning of the Fourth Amendment. *Whren v. United*

States, 517 U.S. 806, 809-10, 135 L. Ed. 2d 89, 95 (1996).

¶ 20 "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* at 810, 135 L. Ed. 2d at 95. However,

> [t]raffic stops have "been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." Under *Terry* and subsequent cases, 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) (internal citations omitted).

¶ 21 Under the reasonable suspicion standard,

> an officer simply must reasonably conclude in light of his experience that criminal activity may be afoot. The officer must be able to point to specific and articulable facts, and to rational inferences from those facts, that justify the search or seizure. To determine whether reasonable suspicion exists, courts must look at the totality of the circumstances as viewed from the standpoint of an objectively reasonable police officer.

State v. Bullock, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (*purgandum*).

¶ 22 The propriety of a traffic stop is analyzed in two parts: (1) "whether the police officer's action was justified at its inception"; and (2) "whether the police officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop." *United States v. Digiovanni*, 650 F.3d 498, 506 (4th Cir. 2011),

abrogated in part on other grounds by Rodriguez v. United States, 575 U.S. 348, 191 L. Ed. 2d 492 (2015); *see also Terry v. Ohio,* 392 U.S. 1, 20 L. Ed. 2d 889 (1968).

¶ 23 Here, there is no dispute as to *Terry*'s first prong. Officer French lawfully seized defendant's vehicle based upon the reasonable suspicion that defendant was driving with a suspended license. *See United States v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008) (a police officer's actions in stopping a driver are justified if the officer observes the driver commit a traffic violation).

¶ 24 Defendant argues Officer French stopped him for a traffic violation—driving on a suspended license—but abandoned the mission of the stop to investigate what he believed to be the smell of marijuana. Defendant further contends this on-scene investigation lacked reasonable articulable suspicion and was an unconstitutional seizure which did not justify his detention beyond the completion of the traffic stop.

¶ 25 In support of his position, defendant primarily relies upon *Rodriguez* for the general precept that a traffic stop may not: (i) last longer than the time necessary to effectuate the purpose of the stop; and (ii) be prolonged to pursue an on-scene investigation into unrelated criminal activity. 575 U.S. at 357, 191 L. Ed. 2d at 501. Defendant does not challenge any specific findings on this issue. The trial court's order did not explicitly address counsel's *Rodriguez* argument that the seizure was unlawfully extended in the absence of reasonable articulable suspicion. However, the written order upholding the search infers the trial court rejected counsel's unlawful

extension and lack of reasonable suspicion argument.

¶ 26 *Rodriguez* addressed "whether police routinely may extend *an otherwise-completed traffic stop*, absent reasonable suspicion, in order to conduct a dog sniff." *Id.* at 353, 191 L. Ed. 2d at 498 (emphasis added). In this case, defendant's assertion that law enforcement unlawfully prolonged the traffic stop begs the question of whether the mission of the traffic stop had in fact been completed.

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.

Arizona v. Johnson, 555 U.S. 323, 333, 172 L. Ed. 2d 694, 704 (2009). "The reasonable duration of a traffic stop . . . includes more than just the time needed to write a ticket." *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Rodriguez*, 575 U.S. at 355, 191 L. Ed. 2d at 499 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408, 160 L. Ed. 2d 842, 847 (2005)) (alteration in original).

¶ 27 Here, Officer French lawfully seized defendant's vehicle based upon the reasonable suspicion that defendant was driving with a suspended license. Officer French confirmed that defendant was driving with a suspended license and approached the vehicle a second time to inform defendant that he would be issuing a

citation. During the traffic stop, and *prior to the completion of* the traffic violation mission, Officer French noticed the smell of what could be marijuana and inquired about the presence of marijuana in defendant's vehicle. Defendant voluntarily commented that his cousin uses his vehicle and he "smokes all the time." He voluntarily produced a roach from the ashtray and showed it to Officer French. Defendant then made the statement, "I'm sure there's something in here," upon existing the vehicle and talking with the officers. Officer French and Officer Boyd both have extensive training and experience in the detection of illegal substances. Officer Boyd also smelled what he believed to be marijuana and testified defendant appeared nervous throughout the encounter.

¶ 28 Under the totality of the circumstances, law enforcement lawfully extended the traffic stop upon reasonable suspicion of illegal activity. *See State v. Campola*, 258 N.C. App. 292, 292, 812 S.E.2d 681, 683 (2018) ("When a police officer initiates a traffic stop and, in the course of accomplishing the mission of the stop, develops reasonable suspicion that the driver or passenger is engaged in illegal drug activity, the officer may prolong the stop to investigate that suspicion without violating the passenger's Fourth Amendment rights.").

IV.

¶ 29 Next, defendant raises the issue of whether Officer French lacked probable cause to seize and search his vehicle. Defendant does not challenge any specific

finding of fact but challenges the trial court's conclusion of law that, "based on the totality of the circumstances . . . the other factors, in addition to the odor [of marijuana], gave the officer probable cause to search the vehicle.

¶ 30 Defendant argues his incriminating statements—"the other factors"—as referenced in the trial court's order, were inadmissible. Defendant was instructed by both Officer French and Officer Boyd that, "We were going to [do] [a] probable cause search and that he had to exit the vehicle." Defendant asserts his statements were involuntary because they were obtained through an invalid claim of authority to search his vehicle based on the odor of marijuana alone. In support of his position, defendant cites to *State v. Cottrell*, 234 N.C. App. 736, 750, 760 S.E.2d 274, 284 (2014) (the defendant's consent to a search was invalid when obtained by an officer's unlawful justification for the search).

¶ 31 In *Cottrell*, the officer accomplished the mission of the traffic stop but further detained the defendant without reasonable articulable suspicion of criminal activity to perform a drug sniff. *Id.* at 746, 760 S.E.2d at 281. A canine was not immediately available on scene, and the officer had not called for one. *Id.* at 750, 760 S.E.2d at 284. We held that the defendant's consent to a search was involuntary as a matter of law because his continued detention was an unlawful seizure, the officer did not have the legal authority to conduct a drug sniff, and "the State did not establish that [the officer] could have completed the dog sniff in a *de minimis* period of time." *Id.* at

751, 760 S.E.2d at 284.

¶ 32 In the case *sub judice*, we are not presented with analogous facts. Here, officers had not accomplished the primary purpose of the traffic stop before inquiring about the odor of marijuana coming from defendant's vehicle. Defendant was not in custody when he made the statements at issue, and Officer French did not effectuate a search based on consent.

¶ 33 This case, as the State argues, is analogous to *State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217 (for a comprehensive discussion of probable cause and the legalization of hemp, see Section (II)(2)(b)). In *Parker*, we determined that it was unnecessary to address whether the smell of marijuana alone provided officers with probable cause to perform a vehicular search because additional factors were present. *Id.* at 541, 2021-NCCOA-217, ¶ 31. The evidence presented supporting probable cause was "(1) the scent of what [the officer] believed to be burnt marijuana emanating from the vehicle; (2) [the defendant's] admission that he had just smoked marijuana; and (3) the partially smoked marijuana cigarette which [the defendant] produced from his sock." *Id.* at 541-42, 2021-NCCOA-217, ¶ 32.

¶ 34 Here, we are also presented with the following factors as summarized in the trial court's Order:

> 2. [T]he officer noticed the odor of marijuana upon approaching the vehicle a second time.

> 3. [T]he officer asked the Defendant if he had any marijuana in the vehicle and the Defendant stated he did not.
>
> 4. [T]he officer again mentioned he could smell marijuana and the defendant made a statement to the officer that he let his cousin use the vehicle and that his cousin smokes.
>
> 5. [T]he defendant also pulled out ashes from the ashtray and what the officers testified to as a marijuana roach from the ashtray and showed these to the officer.
>
> 6. [A]fter exiting the vehicle, the Defendant also refers to the item shown to the officer as a "roach".
>
> 7. [D]efendant made the statement "I'm sure there's something in here" upon existing the vehicle and talking with the officers.

¶ 35 Officer French informed defendant that he could perform a search based on the smell of marijuana alone, but he did not perform that search until after defendant had offered additional evidence to establish probable cause. Like in *Parker*, Officer French's "subjective belief that the substance he smelled was marijuana was additional evidence supporting probable cause—even if his belief might ultimately have been mistaken." *Id.* at 542, 2021-NCCOA-217, ¶ 33.

V.

¶ 36 For the foregoing reasons, the trial court properly denied defendant's Motion to Suppress Evidence and Statements of the Accused.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).