IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-428

Filed 12 September 2023

Forsyth County, Nos. 18CRS1973 and 18CRS56475

STATE OF NORTH CAROLINA

v.

TERRY NATHANIEL SANDERS, Defendant.

Appeal by Defendant from Order entered 7 February 2020 and Judgments entered 21 January 2020 by Judge Gregory R. Hayes in Forsyth County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Stephen G. Driggers, for Defendant-Appellant.

RIGGS, Judge.

Appellant Terry Nathaniel Sanders appeals the denial of his motion to suppress evidence in connection with his warrantless arrest for felony possession of marijuana, possession of marijuana paraphernalia, and indictment for habitual felon status. Mr. Sanders asks this Court to apply *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497 (1980), under Art. I, Sec. 20 of the North Carolina Constitution,

to ultimately conclude that Mr. Sanders was seized when law enforcement recovered a book bag that Mr. Sanders discarded while he was fleeing from law enforcement. After careful review of the record, we affirm the trial court's order denying Mr. Sanders' motion to suppress.

I. FACTS AND PROCEDURAL HISTORY

During the afternoon shift on 13 July 2018, police officers with the gang unit of the Winston-Salem Police Department patrolled the area near 905 E. Third Street, in an unmarked green Nissan Pathfinder. Corporal James Singletary ("Cpl. Singletary") was the driver of the vehicle; Officer Bracken ("Ofc. Bracken") was in the front passenger seat; and Corporal Reynolds ("Cpl. Reynolds") was in the back seat.[1] The officers wore plain clothes but had on tactical vests, with the word "police" written in large letters on the front and back of their vests. Cpl. Singletary had patrolled this area in the same vehicle within the past few months in connection with another arrest.

At approximately 4:00 PM, the officers approached a housing community located at 905 East Third Street, and "observed numerous individuals standing in the parking lot area, some in their vehicles, [and] some on the porch." As the officers pulled into the parking lot, "people started to vacate the area, some running, [and] some [leaving] in vehicles very quickly." Cpl. Singletary recognized two individuals

[1] Cpl. Singletary, Ofc. Bracken, and Cpl. Reynolds, collectively, will be referred to as "the officers."

standing in the parking lot who had been arrested or investigated by the gang unit on prior occasions for drug offenses.

The officers spotted Mr. Sanders standing in the parking lot approximately 70 feet away from the rest of the group. Mr. Sanders was wearing black sweatpants and a black shirt and carrying a book bag. Mr. Sanders began running in "head-long flight" in the opposite direction when he observed the officers pull into the parking lot. Cpl. Singletary pursued Mr. Sanders in his vehicle in an effort to cut off Mr. Sanders as he was running across the street toward another housing community. As Mr. Sanders was running, the Pathfinder drove in his path, causing him to "push off" the vehicle, change direction, and run back downhill towards Second Street. The officers observed Mr. Sanders stop between two apartment buildings and drop the book bag next to a power source or air conditioning unit. Mr. Sanders continued fleeing as the officers exited the vehicle. The officers then approached the book bag to look inside, and "observed a large amount of marijuana in a Tupperware container."

Cpl. Singletary and Ofc. Bracken then pursued Mr. Sanders on foot. Cpl. Reynolds gave pursuit in the unmarked vehicle to try to cut Mr. Sanders off at Highway 52. Mr. Sanders jumped a fence; Cpl. Singletary also jumped the fence to continue the foot pursuit. Cpl. Singletary instructed Ofc. Bracken to "stay just in case [Mr. Sanders] doubled back." During the pursuit, Cpl. Singletary yelled for Mr. Sanders to stop. Mr. Sanders looked back at Cpl. Singletary several times but

continued to run away from him. Mr. Sanders refused to comply with Cpl. Singletary's orders and fled to a wooded area, approximately half a mile from the site of the original encounter. A bystander directed Cpl. Singletary to the area where Mr. Sanders was hiding. Cpl. Singletary approached the wooded area where Mr. Sanders was hiding, and Mr. Sanders came out with his hands up. Cpl. Singletary pulled out his taser and "threw out a [t]aser on [Mr. Sanders]." Mr. Sanders surrendered and was arrested without incident.

On 3 June 2019, Mr. Sanders was charged in two indictments: (1) 18 CRS 564575 felony possession of marijuana and possession of marijuana paraphernalia; and (2) 18 CRS 1973 attaining habitual felon status. On 21 January 2020, Mr. Sanders filed a motion to suppress the State's evidence—the marijuana found in the abandoned book bag. The suppression hearing was held the same day. Cpl. Singletary and Cpl. Reynolds both testified at the hearing. Mr. Sanders argued there were no identifying items in the book bag indicating that it belonged to Mr. Sanders. Additionally, Mr. Sanders contended he "was illegally seized by an arrest not justified by probable cause in violation of the North Carolina constitution, Article 1, [S]ections 19 and 20 and the 4[th] and 14th Amendment of the United States Constitution[.]" Specifically, Mr. Sanders argued he was illegally seized "when law enforcement cut off . . . [his] direction of travel when . . . [he] left from an area that law enforcement officers was patrolling and was subsequently pursued by those officers in a vehicle."

The trial court denied Mr. Sanders' motion to suppress at the 21 January 2020

hearing (and by Order entered on 7 February 2020) finding:

> 3. That both Corporal Singletary and Corporal Reynolds testified to having approximately ten years of experience as police officers.
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> 4. That on July 13, 2018, both officers were together operating under the properly authorized "gang unit" of the Winston-Salem Police Department. Officer Bracken was also present on scene but did not testify in [sic] the hearing.
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> 5. That on that date at approximately four P.M. the officers were in an unmarked green Nissan Pathfinder. They pulled into the area of 905 E. Third Street, Winston-Salem, North Carolina, a location known by them to be associated with high gang, crime, and narcotics activity.
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> 6. That Corporal Singletary testified to making over one hundred narcotics arrests in his career. That he made several arrests specifically in the area of 905 E. Third Street.
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> 7. That all officers were wearing vests with the word "Police" written in large letters.
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> 8. That officers testified that 905 E. Third Street was a targeted area for drug activity. When the [sic] pulled into the area, Corporal Singletary noticed two individuals who he was familiar with and had previously arrested or been involved in arrest of in that same area[.] Both those individuals had been arrested in the same area for felony drug activity in the previous three to four months period.
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> 9. That Corporal Singletary testified to several other defendants who he had arrested or investigated in the area of 905 E. Third Street and knew by name[.]
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> 10. That Corporal Singletary was driving the unmarked police car when they pulled into [sic] area of 905 E. Third Street and probably had the best opportunity to view the parking lot and occupants thereof.

11. That Corporal Singletary noticed . . . [Mr. Sanders] in this parking lot wearing a black shirt and black pants and holding a bookbag. A number of individuals ran upon the arrival of the officers but one individual . . .[Mr. Sanders], took off at headlong run or a full sprint. He was running extremely quickly away from the area.

12. That there was some attempt to contain . . . [Mr. Sanders] in the immediate area by cutting him off with the officers' vehicle but that was unsuccessful, and . . . [Mr. Sanders] continued out of the area and went between two apartment buildings where the officers were able to observe him drop the bookbag.

13. That . . . [Mr. Sanders'] flight in addition to dropping the bookbag and then starting to walk away from the bookbag constituted the required additional facts needed for reasonable articulable suspicion to detain . . . [Mr. Sanders. Flight alone would not be enough to detain . . . [Mr. Sanders].

14. That once Corporal Singletary and Officer Bracken were able to catch up to . . . [Mr. Sanders] after he dropped the bookbag . . . [Mr. Sanders] took off running again.

15. That officers including Corporal Singletary and Corporal Reynolds went over to the bookbag before pursuing . . . [Mr. Sanders]. That they found a felony amount of what they recognized to be marijuana based on their training and experience.

16. That officers, including Corporal Singletary, continued to chase . . . [Mr. Sanders] on foot. That, in total, the chase spanned the distance of a [sic] less than one half mile.

17. That . . . [Mr. Sanders] looked back at Corporal Singletary during the chase and knew the police were following him.

18. That Corporal Singletary's testimony was corroborated by Corporal Reynolds. She testified that [she] saw . . . [Mr. Sanders] running at a full sprint towards Second Street

> and eventually Highway 52. Ultimately . . . [Mr. Sanders] ran twice; initially he ran when officers pulled in to [sic] parking lot. He ran a second time after he discarded the bookbag.
> . . . .
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> 20. That the officers' decision to chase . . . [Mr. Sanders] after he initially ran was bolstered after he discarded the bookbag, they found the marijuana and he ran again.

Based on the foregoing, the trial court concluded:

> 1. That . . . [Mr. Sanders] was not seized until the officers apprehended him in the wooded area. That based on *California v. Hodari D.* and *United States v. Stover* . . . [Mr. Sanders] was not seized until he surrendered to the officers' show of authority and in this case that was when he came out of hiding in the tree line and surrendered to Corporal Singletary. 499 U.S. 621 (1991); 808 F. 3d 991 (4th Cir. Dec. 18, 2015).
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> 2. That a seizure did not occur until there was a submission to the officers' show of authority. *Hodari D.*
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> 3. That *Hodari D.* established the broad principle that there must be a submission to the show of authority for a seizure to occur.
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> 4. That the Court does not have to reach the issue of whether there was reasonable articulable suspicion and or probable cause because the seizure did not occur until . . . [Mr. Sanders] was apprehended in the tree line.
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> 5. That . . . [Mr. Sanders] Motion to Suppress should be denied[.]

Mr. Sanders preserved his right to appeal at the suppression hearing and pleaded guilty. The trial court granted a mitigated sentence, with a sentence range between 31 and 50 months of imprisonment, with credit for time served. Mr. Sanders

entered a timely written notice of appeal.

During the pendency of Mr. Sanders' appeal, this Court remanded the case to the trial court to make additional findings in light of *Torres v. Madrid*, ___ U.S. ___, 209 L. Ed. 2d 190 (2021). Specifically, the trial court was ordered to "make findings with respect to whether officers used 'application of physical force to the body' of . . . [Mr. Sanders] 'with intent to restrain' at any point before officers observed the abandoned book bag and its contents." On remand, the trial court held an evidentiary hearing on 3 November 2022 to make additional findings as required by this Court's 27 July 2021 Order. Mr. Sanders and Cpl. Singletary both testified at the hearing. At the conclusion of the hearing, the trial court made the following additional findings and filed them with this Court, on 3 April 2023:

> 1. That there was absolutely no application of physical force to the body of . . . [Mr. Sanders] with the intent to restrain . . . [Mr. Sanders] at any point prior to . . . [Mr. Sanders] discarding the bookbag.
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> 2. That there was an attempt to at least cut off . . . [Mr. Sanders] with . . . [Cpl.] Singletary's vehicle, the Nissan Pathfinder. The attempt occurred in the first parking lot. There was no application of physical force to the body of . . . [Mr. Sanders] with the intent to restrain [him]. . . . [Mr. Sanders] continued to run across the street and never slowed down. . . . [Mr. Sanders] was unimpeded by the attempt to cut him off.
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> 3. The testimony of . . . [Mr. Sanders] in the evidentiary hearing was not supported by [Cpl.] Singletary's testimony today. Even if there was interaction between the Nissan Pathfinder and . . . [Mr. Sanders] as he exited the first parking lot and ran into the second parking lot, that was

> an accidental meeting. . . . [Mr. Sanders] had no memory of the make and model of . . . [Cpl. Singletary's] vehicle based on his own testimony. There was no physical force used to restrain . . . [Mr. Sanders]. To the extent that the contact occurred, it was accidental and does not violate *Torres v. Madrid*, 141 S.Ct. 989 (2021).

Based on the trial court's additional findings, this Court ordered the parties to file supplemental briefs on 13 July 2023 to address "the impact of the U.S. Supreme Court decision in *Torres* and the trial court's 3 April 2023 [findings] on the issues previously raised in [Mr. Sanders'] brief." The parties complied, filing supplemental briefs on 14 August 2023.

II. STANDARD OF REVIEW

This Court's review of the trial court's order denying Mr. Sanders' motion to suppress is *strictly limited* to determining whether "competent evidence" exists to support its findings of fact, 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) (emphasis added). The 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). "The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence." *State v. Gabriel*, 192 N.C. App. 517, 519, 665 S.E.2d 581, 584 (2008) (internal quotation and citation omitted).

III. ANALYSIS

On appeal, Mr. Sanders argues that this Court is required to apply *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497 (1980), under Art. I, Sec. 20 of the North Carolina Constitution to conclude he was seized at the time the police recovered the book bag. We first consider the facts of this case in light of the recent U.S. Supreme Court decision in *Torres v. Madrid*, ___ U.S. ___, 209 L. Ed. 2d 190 (2021) and then we consider the application of *Mendenhall* in the context of North Carolina appellate precedent. Ultimately, we hold that Mr. Sanders was not seized when he discarded the book bag and the trial court properly denied the motion to suppress.

First, in the supplemental briefing, Mr. Sanders correctly conceded he was not seized under *Torres*, at ___, 209 L. Ed. 2d at 203. In *Torres*, the United States Supreme Court announced a narrow rule: "a seizure by force—absent submission—lasts only as long as the application of force." *Id.*, at ___, 209 L. Ed. 2d at 203. The Fourth Amendment does not recognize any "*continuing* arrest during the period of fugitivity." *Id.* (emphasis in original) (quoting *California v. Hodari D.*, 499 U.S. 621, 625, 113 L. Ed. 2d 690, 696 (1991)).

The trial court found that there was no intentional physical contact between Cpl. Singletary and Mr. Sanders when Mr. Sanders discarded the book bag. At the evidentiary hearing, Cpl. Singletary testified that the vehicle did not physically touch Mr. Sanders, and that Mr. Sanders was still able to get away. Mr. Sanders testified that he slowed down and "pushed off" the officers' vehicle as it was attempting to stop.

However, Mr. Sanders discarded the book bag after this encounter but before his arrest. The officers retrieved the book bag after Mr. Sanders discarded it during his attempt to evade the officers. Even assuming *arguendo* that Mr. Sanders was seized at the moment that the Pathfinder and he made contact, forcing him to change direction, any seizure had ended before Mr. Sanders had discarded the book bag. Therefore, because the trial court found that there was no intentional physical contact between the officers and Mr. Sanders when he discarded the book bag, Mr. Sanders was not seized when he discarded the book bag according to the narrow holding in *Torres*. *Id.*

Second, we consider whether the test for a seizure identified in *Mendenhall* applies through Art. I, Sec. 20 of the North Carolina Constitution and compels us to hold Mr. Sanders was seized at the time the officers took possession of the book bag. Because we are bound by this Court's precedent, we must reject Mr. Sanders' argument on this front.

In *Mendenhall*, the Court emphasized that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." *Mendenhall*, 446 U.S. at 553, 64 L. Ed. 2d at 509 (1980). The Court held that "a person has been 'seized' within the meaning of the Fourth Amendment *only if*, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554, 64

L. Ed. 2d at 509 (emphasis added).

But *Mendenhall* was not the last word. The Supreme Court of the United States later clarified in *California v. Hodari D.* that the "only if" phrase in *Mendenhall* "states a *necessary*, but not a *sufficient*, condition for seizure—or, more precisely, for seizure effected through a 'show of authority.'" *Hodari D.*, 499 U.S. at 628, 113 L. Ed. 2d at 698 (1991) (emphasis in original). The Court held that with respect to a show of authority, a seizure does not occur until the subject yields to the show of authority. *Id.* at 626, 113 L. Ed. 2d at 697. Accordingly, items abandoned by the defendant after the show of authority but before the defendant yields to the show of authority are not the fruit of a seizure. *Id.* at 629, 113 L. Ed. 2d at 699.

While some states have afforded heightened privacy protection to citizens through their state constitutions, this Court has consistently applied *Hodari D.*'s standard for determining, under Art. I, Sec. 20 of the North Carolina Constitution, when a seizure occurs after a suspect refuses or fails to comply with an officer's show of authority. *See State v. Mangum*, 250 N.C. App. 714, 725, 795 S.E.2d 106, 116 (2016), *writ denied, review denied*, 369 N.C. 536, 797 S.E.2d 8, 9 (2017); *see also State v. Leach*, 166 N.C. App. 711, 717, 603 S.E.2d 831, 835 (2004) (holding the cocaine abandoned while the defendant was fleeing from the officers was not the fruit of a seizure); *State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 58 (1995) (declining "to reject the United States Supreme Court's *Hodari D.* standard[]" and recognizing that the defendant was not seized when he discarded a bag of drugs while fleeing from

officers that asked to frisk the defendant).

Because we are bound by this Court's precedent, we hold that Mr. Sanders was not seized within the meaning of the Fourth Amendment and Art. I, Sec. 20 of the North Carolina Constitution until he surrendered to Cpl. Singletary after the foot pursuit. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Mr. Sanders discarded his book bag in between "two apartment complexes near . . . an air condition [sic] or a power unit" after he was "cut off" by Cpl. Singletary's vehicle, but before he surrendered to Cpl. Singletary. Therefore, at the time when he discarded the book bag, Mr. Sanders was not seized under the Fourth Amendment and Art. I, Sec. 20 of the North Carolina Constitution. *See Mangum*, 250 N.C. App. at 726, 795 S.E.2d at 116-17 (concluding that even after the officer activated his blue lights and asserted his authority, the defendant was not seized until he in fact pulled over). Because Mr. Sanders discarded the book bag in a public area, Mr. Sanders can have no expectation of privacy in discarded property. *See State v. Williford*, 239 N.C. App. 123, 129, 767 S.E.2d 139, 143 (2015) ("It is well established that where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure.") (cleaned up).

Accordingly, we hold that at the time when Mr. Sanders discarded the book bag, he was not seized within the meaning of the Fourth Amendment and Art. I, Sec. 20 of the North Carolina Constitution. We affirm the trial court's order denying the motion to suppress the evidence found in the book bag.

IV. CONCLUSION

For the foregoing reasons, we affirm the order denying Mr. Sanders' motion to suppress evidence by the trial court.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).