IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-817

Filed: 6 August 2019

Stanly County, No. 17CRS700160

STATE OF NORTH CAROLINA

v.

SHAWN PATRICK ELLIS, Defendant.

Appeal by Defendant from judgment entered 13 March 2018 by Judge Karen Eady-Williams in Stanly County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General, Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for the Defendant.

DILLON, Judge.

Defendant Shawn Patrick Ellis appeals the trial court's judgment entered upon his guilty plea to resisting, delaying, and/or obstructing a public officer during a stop. Defendant contends that the trial court erred in denying his motion to suppress evidence. After careful review, we find no error.

I. Background

This case arises from Defendant's failure to provide identification to a trooper during a traffic stop. The trooper had initiated the stop after witnessing Defendant, a passenger in a vehicle traveling on a public highway, wave and then extend his middle finger in the trooper's general direction. Defendant moved to have evidence obtained during the stop suppressed, contending that the stop was illegal or was illegally prolonged. Based on the trooper's testimony, which was the only evidence offered at the suppression hearing, the trial court orally denied Defendant's motion. Defendant then pleaded guilty to resisting, delaying, and/or obstructing a public officer during a stop. Defendant appeals.

II. Standard of Review

Typically, we review the denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015). However, in this case, the trial court did not enter any written findings or conclusions. Rather, following testimony from the trooper and arguments from the parties, the trial court *orally* denied Defendant's motion to suppress, stating as follows:

> Based on a review of the evidence, the Court does find reasonable suspicion for the stop. In addition, based on the totality of the evidence the Court does find probable cause for the arrest.

Our Supreme Court has held that the lack of specific findings in an order is not fatal to our ability to conduct an appellate review if the underlying facts are not in dispute. *State v. Nicholson*, ___ N.C. ___, ___, 813 S.E.2d 840, 843 (2018) (stating that "when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court"). And at the suppression hearing in this matter, there was no conflict in the evidence, as the only evidence was the trooper's testimony. Therefore, we *infer* the factual findings based on the trooper's testimony. *See Nicholson*, ___ N.C. at ___, 813 S.E.2d at 843 ("[W]e consider whether the inferred findings arising from the uncontested evidence presented by [the officer] at the suppression hearing support the trial court's conclusion that reasonable suspicion existed to justify defendant's seizure.").[1]

Also, the lack of written conclusions of law is not fatal to meaningful appellate review, as we review a trial court's conclusions of law *de novo* anyway. *See State v. McNeill*, 371 N.C. 198, 220, 813 S.E.2d 797, 813 (2018) ("We review conclusions of

[1] It could be argued that it would be more appropriate to remand the matter to the trial court to make findings, even where the trooper's testimony is uncontradicted. Indeed, it is the State's burden to prove that the evidence obtained during a stop is admissible. *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 636-37 (1983). And, without findings, there is no way a reviewing court can be sure whether the trial court believed *all* of the trooper's testimony. It is possible that the trial court may have made its decision to suppress evidence while believing only *a portion* of the trooper's testimony. And it may be that a reviewing court would determine that the portion of testimony that the trial court found credible is not sufficient to support reasonable suspicion. But, based on *Nicholson*, we must assume that the trial court believed *all* of the trooper's testimony.

law de novo."). That is, the lack of written conclusions does not inhibit our ability to determine whether the findings inferred from the trooper's testimony support a conclusion that the stop was illegal or was illegally prolonged.

III. Motion to Suppress

The trial court orally concluded that the trooper had reasonable suspicion to initiate the stop and, therefore, denied Defendant's motion.

The trial court's inferred findings based on the trooper's testimony tend to show the following:

The trooper was assisting a stalled motorist on the side of U.S. Highway 52 in Albemarle County. While assisting the motorist, the trooper noticed a group of passing vehicles, including an SUV. The trooper observed Defendant stick his arm out of the passenger window of the SUV and make a hand-waving gesture in the trooper's general direction. The trooper then observed Defendant change the gesture to an up-and-down pumping motion with his middle finger extended. The trooper was unsure at whom Defendant was gesturing. In any event, the trooper returned to his patrol car, pursued the SUV, and pulled the SUV over.

The trooper approached the SUV and observed Defendant and his wife, who was in the driver's seat, take out their cell phones to record the traffic stop. The trooper knocked on Defendant's window, whereupon Defendant partially rolled it down. The trooper asked Defendant and his wife for their identification. Defendant

and his wife, however, asked the trooper why they had been stopped and stated that the trooper had no right to stop them. Eventually, Defendant's wife gave the trooper her license, but Defendant refused to comply.

The trooper requested that Defendant step out of the vehicle, and Defendant eventually stepped out onto the side of the road. The trooper then handcuffed Defendant and placed him into his patrol car. While in the patrol car, Defendant gave the officer his name. The trooper ran warrants checks and obtained no results for Defendant nor his wife. The trooper then issued Defendant a citation for resisting, delaying, and obstructing an officer and allowed Defendant and his wife to leave.

We conclude that the trooper had reasonable suspicion to initiate the stop. We note Defendant's contention that the trooper's stop was unreasonable from the outset because it is not a crime for one to raise his middle finger at a trooper, as such conduct is simply an exercise of free speech protected by the First Amendment of the United States Constitution.[2] U.S. Const. amend. I ("[The legislature] shall make no law . . . abridging the freedom of speech[.]"). Indeed, there are a number of decisions from courts across the country where it was held that one cannot be held criminally liable for simply raising his middle finger at an officer.[3]

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[2] As applied to the states via the Fourteenth Amendment of the United States Constitution.

[3] *See, e.g., Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) ("Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment."); *Freeman v. State*, 302 Ga. 181, 186, 805 S.E.2d 845, 850 (2017) ("[A] raised middle finger, *by itself*, does not, without more, amount to fighting words[.]" (emphasis added)); *Duran v.*

But the issue here is *not* whether Defendant's conduct as witnessed by the trooper – Defendant displaying a middle finger – constitutes a crime. Indeed, Defendant was not charged for any crime based on that particular conduct.

Rather, the issue is whether the trooper had *reasonable suspicion* that criminal activity was afoot. *See State v. Barnard*, 362 N.C. 244, 246-47, 658 S.E.2d 643, 645 (2008) (stating that an officer may initiate a stop based on specific and articulable facts that "criminal activity is afoot").

Our Supreme Court has explained that the standard for "reasonable suspicion" is lower than for "probable cause," and does not require that there be a preponderance of the evidence that a crime has even occurred:

> The reasonable suspicion standard is less demanding that probable cause and requires a showing considerably less than preponderance of the evidence. Police officers must simply be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. The reasonable suspicion standard is therefore satisfied if an officer has some minimal level of objective justification for making the stop . . . [based on] the totality of the circumstances.

Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990) (holding vehicle passenger's obscene gesture at an officer through an open window, though "inarticulate and crude," was an expression of disapproval that "fell squarely within the protective umbrella of the First Amendment"); *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) (finding no reasonable suspicion for a stop where "[t]he only act [the officer] had observed prior to the stop that prompted him to initiate the stop was [the defendant's] giving-the-finger gesture.); *Cook v. Board of County Commissioners*, 966 F. Supp. 1049 (D. Kan. 1997) (holding that a private citizen has stated a claim for wrongful prosecution for disorderly conduct where the only evidence against him was that he engaged in a single gesture of displaying his middle finger towards a police officer).

State v. Johnson, 370 N.C. 32, 34, 803 S.E.2d 137, 139 (2017) (internal citations and marks omitted). Further, our Supreme Court has instructed that an officer's subjective reason for making a stop matters not; that is, it does not matter if the officer initiates a stop merely out of anger. Rather, the reasonable suspicion standard is "viewed from the standpoint of an *objectively* reasonable police officer[.]" *Id.* at 35, 803 S.E.2d at 139 (emphasis added).

Here, without having to determine whether Defendant's conduct of extending his middle finger, in itself, constituted a crime, we conclude that the trooper had *reasonable suspicion* to initiate the stop of Defendant. The trooper saw Defendant make rude, distracting gestures while traveling on a highway in a moving vehicle in the vicinity of other moving vehicles. A reasonable, objective officer having viewed Defendant's behavior could believe that a crime had been or was in the process of being committed. For instance, the crime of disorderly conduct in North Carolina is committed where a person "makes or uses any . . . gesture . . . intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2) (2017). Defendant's actions, both his waving and middle finger taken together, aimed at an unknown target could alert an objective officer to an impending breach of the peace.

Again, the reasonable suspicion standard may be satisfied even if the trooper did not witness an actual crime but only enough to infer a need to investigate further.

See Styles, 362 N.C. at 415, 665 S.E.2d at 440 (clarifying that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected"). Indeed, as our Supreme Court has stated, even the higher "probable cause" standard does not require proof of guilt:

> [T]he evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable [officer] acting in good faith [to believe the defendant to be guilty].

State v. Bone, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001).

The facts of this case are similar to the facts present in *In re V.C.R.*, in which the defendant loudly spoke an obscenity toward an officer while standing on a public street. *See In re V.C.R.*, 227 N.C. App. 80, 86, 742 S.E.2d 566, 570 (2013). This Court held that a defendant's yelling of obscenities in public, though it "may be protected speech," does not preclude a determination that the officer had reasonable suspicion to seize the defendant, as such conduct could lead to a breach of the peace in violation of Section 14-288.4(a)(2) of our General Statutes. *Id.*

Having concluded that the stop was justified, we further conclude that the trooper was justified in detaining Defendant further based on Defendant's refusal to provide identification during the lawful stop, which is a crime. *See State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014) (holding that "the failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of N.C. Gen. Stat. § 14-223").

Therefore, the trial court did not err in denying Defendant's motion to suppress.

We note that the State made no argument on appeal that the trooper's stop was justified by the presence of "reasonable suspicion." Specifically, in its brief and during oral argument, the State essentially contends *only* that the trooper's traffic stop was justified under the "community caretaking" exception, which allows an officer to initiate a stop even without the presence of reasonable suspicion of criminal conduct. *State v. Sawyers*, ___ N.C. App. ___, ___,786 S.E.2d 753, 758 (2016). But it is hard for us to fathom why the trooper would have believed that Defendant and his wife were in need of care at the point that Defendant refused to provide his identification. Indeed, the middle finger is, universally, not a sign of distress. And even if there was some basis to make the initial stop based on some concern for Defendant's or his wife's safety, any such concern rapidly dissipated when the officer observed their filming and protesting the stop as he approached the SUV, well before he asked Defendant for his identification.

Under our appellate rules, though, since the State is the appellee, the "reasonable suspicion" argument is not deemed abandoned on appeal. Rather, it is our duty to affirm the trial court's ruling if there is *any* legal reason to justify that trial court's ruling, even if that reason was not argued by the appellee. Indeed, it is our duty to consider all possible legal bases to affirm the trial court even if the State,

as appellee, had not filed a brief at all. But had the trial court ruled *against* the State and the State was the appellant, then under our appellate rules, our review would be limited to the State's arguments made in its brief.

IV. Sentencing

Defendant argues that the trial court erred in calculating his Prior Record Level ("PRL") as III. Specifically, Defendant contends that the trial court improperly counted a past conviction based on an error in the State's PRL worksheet.[4] The State concedes this point and agrees that Defendant should have been sentenced at PRL II.

Our review of the record shows that Defendant, indeed, should have been sentenced at PRL II. The State bears the burden of proving the existence of a defendant's prior convictions, but that burden may be satisfied by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.21(c) (2017). "Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense." *State v. Arrington*, ___ N.C.___, ___, 819 S.E.2d 329, 333 (2018). A PRL is a question

[4] Defendant did not object to his sentencing at trial, but his arguments are still preserved. Failure to appeal sentencing does not waive appellate review where a defendant argues that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." *State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018) (quoting N.C. Gen. Stat. § 15A-1446(d)(18) (2017)).

of law and we review the trial court's calculation *de novo*. *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013).

When determining a PRL in misdemeanor sentencing, level II is achieved when a defendant has between one and four prior convictions, while level III requires at least five prior convictions. N.C. Gen. Stat. § 15A-1340.21(b) (2017). Here, the parties stipulated that a prior conviction for "Expired Operators' License" was a level 2 misdemeanor, making it the fifth prior conviction in Defendant's history. In reality, at the time of Defendant's current offense, possession of an expired operator's license was an infraction. *See* N.C. Gen. Stat. § 20-35(a2) (2017); N.C. Gen. Stat. § 15A-1340.21(b) (2017) ("In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor[, but not an infraction,] at the time the offense for which the offender is being sentenced is committed."). Without this infraction, Defendant's history only shows four prior felony or misdemeanor convictions.

We note that, in light of our Supreme Court's recent decision in *State v. Arrington*, it would appear that the parties' stipulation to the classification of Defendant's conviction as a misdemeanor is binding on this Court. Our Supreme Court in *Arrington* held that the defendant's stipulation to the existence of a prior conviction in tandem with its classification was "properly understood to be a stipulation to the facts of his prior offense and that those facts supported its []

classification," and was therefore binding on the courts as a factual determination. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 335.

However, *Arrington* is distinguishable from the present circumstance. In *Arrington*, the defendant stipulated to the appropriate classification of his prior conviction where two possible classifications existed depending on the offender's factual conduct in carrying out the offense. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 333. Here, there is no such ambiguity. As a matter of law, no misdemeanor category crime for possession of an expired operators' license existed at the time Defendant was sentenced for his current offense. Therefore, there is no factual basis which would support a misdemeanor classification for this conviction and, as a matter of law, the parties may not stipulate to the same. Our *de novo* review shows that this conviction should not have been included in determining Defendant's PRL.

After removing Defendant's conviction for Expired Operators' License from consideration, we conclude that the trial court properly considered Defendant's remaining four prior convictions, giving him a PRL of II.[5] N.C. Gen. Stat. § 15A-1340.21(b) ("The prior conviction levels for misdemeanor sentencing are: . . . Level II - - At least 1, but not more than 4 prior convictions[.]").

[5] The worksheet stipulated to by the parties shows five additional convictions, apart from the Expired Operators' License infraction. But Defendant was convicted of two of these offenses on the same day, and the trial court rightfully considered only one in calculating his PRL. N.C. Gen. Stat. § 15A-1340.21(d) (2017) ("[I]f an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.).

V. Conclusion

We do not reach whether Defendant's speech/conduct in extending a middle finger towards a trooper constitutes a crime. However, we hold that based on the totality of the circumstances as inferred from the trooper's unchallenged testimony, the trooper had reasonable suspicion to initiate a stop of Defendant's SUV. And we hold that the trooper was justified in further detaining Defendant when he failed to provide his identification during the stop. As such, we conclude that the trial court did not err in denying Defendant's motion to suppress. However, Defendant should have been sentenced at PRL II, rather than III. We, therefore, remand to the trial court for the limited purpose of resentencing accordingly.

AFFIRMED IN PART; REMANDED IN PART.

Judge BRYANT concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissents.

Because I do believe there was insufficient evidence to support a traffic stop of the car in which defendant was riding as a passenger, I dissent.

I. Facts

Defendant was arrested on 9 January 2017, after he refused to provide a highway patrol officer his identification when the trooper stopped a car driven, by his wife, in which he was the passenger. The trooper initiated the traffic stop after defendant extended his middle finger in the trooper's direction, forming the gesture colloquially known as "shooting him the bird." At the time of the incident, the trooper was helping someone else on the side of the road as the defendant and his wife passed him in their vehicle. The trooper admitted that he did not witness any traffic violation but testified that his reason for the stop was two-fold: (1) he believed they may have been motioning to him for assistance; and (2) he believed they may have been engaging in disorderly conduct by provoking other vehicles on the road to violence.

When the trooper approached the car and attempted to open the passenger door, he saw that both the driver and defendant were videotaping the incident on their phones. The driver and defendant said repeatedly, "You're being recorded. What did we do wrong?" and "This is not a stop-and-ID state." The trooper insisted on taking identification from both of them so he could run warrants checks, and he cited defendant for resisting a public officer when he refused to identify himself.

II. Standard of Review

Defendant filed a motion to suppress, claiming the traffic stop was unlawful and therefore his resistance was lawful. The trial court orally denied the motion without entering any written findings or conclusions.

> In evaluating a trial court's denial of a motion to suppress when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court.

State v. Nicholson, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018) (footnote omitted).

III. Discussion

The State argued in its brief that the trooper's traffic stop was justified under the "community caretaking" exception. The majority properly rejects that argument. This Court has found that hearing "mother f****r" yelled from a moving vehicle was not an objectively reasonable basis for a traffic stop under the "community caretaking" exception. *State v. Brown*, ___ N.C. App. at ___, 827 S.E.2d 534 (2019). As in *Brown*, where the deputy heard the obscenity and unreasonably stopped the passing car, here, the trooper stopped the car after defendant shot him the bird.

I therefore agree with the majority that there is no reasonable basis for the "community caretaking" argument put forth by the State. However, I disagree with the majority's conclusion that a "reasonable suspicion" argument could justify the

lower court's ruling.

"The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures." *State v. Smathers*, 232 N.C. App. 120, 123, 753 S.E.2d 380, 382 (2014) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). "Traffic stops are recognized as seizures under both constitutions." *Id.* "[T]raffic stops are analyzed under the 'reasonable suspicion' standard created by the United States Supreme Court[.]" *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

"[A] brief, investigatory [traffic] stop" is permitted if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow,* 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Id.* "A court sitting to determine the existence of reasonable suspicion must require the [trooper] to articulate the factors leading to that conclusion . . . ." *United States v. Sokolow*, 490 U.S. 1, 10, 104 L. Ed. 2d 1, 12 (1989).

"[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one–whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the

interference in the first place." *Terry*, 392 U.S. at 19-20, 20 L. Ed. 2d at 905. To determine whether an officer acted reasonably, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27, 20 L. Ed. 2d at 909. A court must consider the totality of the circumstances to determine whether a reasonable suspicion exists. *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

Here, the majority concludes that the trooper had a reasonable, articulable suspicion that defendant was committing the crime of disorderly conduct. The inquiry is two-fold: whether the trooper had a minimal objective justification to make the stop and whether the stop was reasonably related in scope to the perceived disorderly conduct.

The majority relies on *In re V.C.R.*, 227 N.C. App. 80, 742 S.E.2d 566 (2013), in which the juvenile defendant loudly spoke an obscenity toward an officer on a public street during the night-time hours. This Court held it reasonable for the officer to seize defendant to ensure a public disturbance would not ensue, but once she was separated from the group and "calmly discussing matters while answering the officer's questions, the basis for continuing the seizure was rapidly dissipating." *Id.* at 87, 742 S.E.2d at 570. In that case, the fact that defendant was amongst a group

of juveniles at night made it more likely that she could cause a public disturbance. *Id.* at 82-83, 742 S.E.2d at 568-69.

Those facts do not exist here. In the case *sub judice*, the adult defendant was in a moving car at midday, and there was no danger of a gathering crowd creating a public disturbance. There is also no testimony or indication that anyone other than the trooper, the person to whom the obscene gesture was directed, saw it. There was also no indication that the vehicle was creating any danger to other motorists on the road.

Even viewing the evidence in a light most favorable to the State, what we have here is a passenger in a vehicle making an uncalled-for obscene gesture. While defendant's actions were distasteful, they were, in my opinion, within the realm of protected speech under the First Amendment of the United States Constitution. Given that this was protected speech, I believe that the stop was not supported under the reasonable suspicion test of the Fourth Amendment.

I do not believe that this action was sufficient to justify the trooper in becoming alert "to a potential, future breach of the peace," because he did not see any evidence of aggressive driving or other interactions between the vehicles on the road that would suggest road rage. If that was truly his concern he could have followed the vehicle further to see if there was evidence of some road rage toward other vehicles. He did not do so, nor did he testify that he saw any improper driving. He chose not

to take any actions to determine if road rage was occurring. Instead, he initiated an improper search and seizure to engage in an improper fishing expedition to find a crime with which to charge the defendant who had directed an obscene gesture to him moments earlier.

In conclusion, extending one's middle finger to a police officer from a moving vehicle, while tasteless and obscene is, in my opinion, protected speech under the First Amendment and therefore cannot give rise to a reasonable suspicion of disorderly conduct. "[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Houston v. Hill*, 482 U.S. 451, 472, 96 L. Ed. 2d 398, 418 (1987).

Therefore, I dissent and vote to reverse the trial court's order denying the motion to suppress and would vacate the conviction.