No. COA 14-591 DISTRICT 20A

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Anson County
	)	12-CRS-50891
KEITH A. LEAK,	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

No. COA 14-591 DISTRICT 20A

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Anson County
	)	12-CRS-50891
KEITH A. LEAK,	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WHERE THE OFFICER'S RETENTION OF THE DEFENDANT'S DRIVER'S LICENSE CONSTITUTED A SEIZURE WITHOUT REASONABLE SUSPICION?

STATEMENT OF THE CASE

Defendant Keith A. Leak was indicted for possession of a firearm by a felon and carrying a concealed weapon on 4 June 2012. (R pp. 4-6.) Mr. Leak filed a motion to suppress evidence, which was heard during the 5 August 2013 Criminal Session of Anson County Superior Court before the Honorable Tanya T. Wallace. (R pp. 8-12; T Vol. I pp. 1-3.)[1] On 7 August 2013, Judge Wallace denied the motion to suppress. (R pp. 13-17; T Vol. I pp. 60-66.)

Mr. Leak's case came on for hearing at the 11 November 2013 Criminal Session of Anson County Superior Court, before the Honorable Mark E. Klass. (T Vol. II pp. 1-3.) Mr. Leak pled guilty under *Alford* to the charge of felon possession of a firearm pursuant to an agreement in which the concealed weapon charge was dismissed and Mr. Leak retained his right to appeal the denial of his motion to suppress. (R pp. 20-23; T Vol. II pp. 3-24.) On 14 November 2013, Judge Klass sentenced Mr. Leak to 9-20 months of imprisonment, which was suspended, and placed Mr. Leak on supervised probation for 12 months. (R pp. 26-29; T Vol. II p. 24.) Mr. Leak gave notice of appeal in court on 14 November 2013

[1] The transcript for the proceedings on 6 and 7 August 2013 is referred to as Volume I and the transcript for the proceedings on 14 November 2013 is referred to as Volume II.

and filed a written notice of appeal of the judgment on 22 November 2013. (R pp. 30-32.)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Leak appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b), and 15A-1444(a) from a final judgment entered in Anson County Superior Court.

STATEMENT OF FACTS

At around 11:00 p.m. on 30 April 2012, Mr. Leak was parked in his vehicle off the side of a road in Lilesville, North Carolina. (T Vol. I pp. 5, 14; R p. 13). Mr. Leak had parked his car because he was sending a text message. (T Vol. I pp. 4-6; R p. 14.) Mr. Leak was parked lawfully. (T Vol. I p. 19.) Mr. Leak was alone and there was no else around him. (T Vol. I p. 25; R p. 14.)

Bobby Gallimore, Chief of the Lilesville Police Department, was patrolling that night and came upon Mr. Leak's vehicle. (T Vol. I pp. 5-6; R p. 13.) Although there was nothing unusual about the vehicle, Chief Gallimore wanted to check if anyone needed assistance and decided to approach the vehicle. (T Vol. I pp. 6, 20; R p. 14.) As he did, he ran the tag on the vehicle, discovering that it was registered to Keith Leak. (T Vol. I p. 6; R p. 14.) Chief Gallimore parked his patrol car

behind Mr. Leak's vehicle. (T Vol. I p. 7; R p. 14.) The patrol car's blue lights may or may not have been activated. (T Vol. I p. 8; R p. 14.)

Chief Gallimore, wearing a uniform and carrying a holstered firearm, walked up to Mr. Leak's vehicle. (T Vol. I pp. 8, 17, 25; R p. 14.) Mr. Leak assured the officer that he did not need assistance, and told him that he had pulled over to send text messages because he knew he could not do so while driving. (T Vol. I pp. 8-9; R p. 14.) Chief Gallimore admitted there was no safety concern at this point. (T Vol. I p. 19.)

Chief Gallimore asked Mr. Leak for his driver's license and vehicle registration. (T Vol. I pp. 9, 12; R p. 14.) Mr. Leak produced the documents, which were valid and confirmed his identity and the registration of his vehicle. (T Vol. I pp. 9, 22; R p. 14.) Chief Gallimore told Mr. Leak that his documents were fine. (T Vol. I p. 22.) Throughout this encounter, Mr. Leak was fully cooperative. (T Vol. I p. 12; R pp. 15-16.) He did not act suspiciously in any way. (T Vol. I p. 21.)

Nonetheless, Chief Gallimore decided to take Mr. Leak's documents back his patrol car in order to check whether Mr. Leak's license had been revoked and whether he had any outstanding warrants. (T Vol. I p. 9; R p. 14.) Another officer had also arrived by this point and was standing beside his own vehicle, which was behind Chief Gallimore's. (T Vol. I pp. 7, 12; R p. 15.) Chief Gallimore admitted,

and the trial court explicitly found that "there was no actual suspicion of criminal activity" at the time the officer retained Mr. Leak's documents to run computer checks. (T Vol. I pp. 19-20, 35; R p. 16.)

Chief Gallimore's computer check showed that Mr. Leak had an outstanding arrest warrant. (T Vol. I p. 9; R p. 15.) It took about two minutes for the initial warrant notification to come up and about twelve minutes for the officer to confirm the outstanding warrant. (T Vol. I pp. 10-11; R p. 15.)

Chief Gallimore arrested Mr. Leak based on the outstanding warrant. (T Vol. I p. 11; R p. 15.) When he asked Mr. Leak to exit his vehicle, Mr. Leak voluntarily disclosed that he had a .22 pistol in his pocket. (T Vol. I p. 11; R p. 15.) Mr. Leak carried the weapon for safety because he had previously been shot and one of the perpetrators had subsequently threatened him. (T Vol. II pp. 12-15.) The firearm found during Mr. Leak's arrest was the only evidence supporting the charges against him. (T Vol. II pp. 9-11.)

On 5 August 2013, Mr. Leak filed a motion to suppress the evidence recovered by Chief Gallimore on the basis that it was the result of an unlawful seizure under the Fourth Amendment and the North Carolina Constitution. (R pp. 8-12.) The trial court conducted a hearing on the motion on 6 August 2013, during which Chief Gallimore was the sole witness, and denied the motion on 7 August

2013. (R pp. 13-17; T Vol. I pp. 60-66.) Mr. Leak subsequently pled guilty to the felon possession of a firearm charge, which was predicated on a 1993 felony conviction, while preserving his right to appeal the denial of the suppression motion. (T Vol. II pp. 3-11; R pp. 20-23.)

ARGUMENT

The trial court erred in denying Mr. Leak's motion to suppress evidence because he was seized without reasonable suspicion in violation of the Fourth Amendment when Chief Gallimore retained his driver's license to run computer checks. Mr. Leak was not free to leave the encounter with the officer at that point because he could not lawfully drive away without his license. The officer admittedly did not have any basis to suspect Mr. Leak of criminal activity before he conducted the warrant check and did not have any safety concern that permitted the seizure. Therefore, this Court should reverse the trial court's order denying Mr. Leak's motion to suppress evidence that resulted from the seizure and vacate the judgment against him.

I. Standard of Review.

This Court's review of a trial court's denial of a motion to suppress is "limited to a determination of whether [the trial court's] findings are supported by

competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion.'" *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005) (quoting *State v. Reynolds*, 161 N.C. App. 144, 146–47, 587 S.E.2d 456, 458 (2003)). "However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct." *Id.*

II. When Chief Gallimore Retained Mr. Leak's Driver's License to Run Computer Checks in His Patrol Car, He Seized Mr. Leak Without Reasonable Suspicion in Violation of the Fourth Amendment.

The trial court erred in denying Mr. Leak's motion to suppress evidence because, before Mr. Leak was arrested, he was seized without reasonable suspicion in violation of the Fourth Amendment. Mr. Leak preserved his right to appeal the denial of the suppression motion as part of his plea agreement. (T Vol. II pp. 3-11; R pp. 20-23); *see State v. Hernandez*, 170 N.C. App. 299, 303, 612 S.E.2d 420, 423 (2005).

A. A Driver is Seized Under the Fourth Amendment When an Officer Retains His License and Registration.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is applicable against the States under the Due Process Clause and "applies to seizures of the person, including brief investigatory

detentions." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994). There are "generally two ways in which a person can be 'seized' for Fourth Amendment purposes: (1) by arrest, which requires a showing of probable cause; or (2) by investigatory detention, which must rest on a reasonable, articulable suspicion of criminal activity." *State v. Carrouthers*, 213 N.C. App. 384, 388, 714 S.E.2d 460, 463 (2011).

"[L]aw enforcement officers do not violate the Fourth Amendment's prohibition against unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." *State v. Harwood*, __ N.C. App. __, 727 S.E.2d 891, 897 (2012) (quoting *State v. Isenhour*, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008)). However, "such officers do effectuate a seizure for Fourth Amendment purposes when, 'by means of physical force or show of authority, they terminate or restrain a person's freedom of movement.'" *Id.* (quoting *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L.Ed.2d 132, 138 (2007)). "The operative question for purposes of determining if a seizure occurred is whether 'a reasonable person would feel free to terminate the encounter;' if so, 'then he or she has not been seized.'" *Id.* (emphasis added; quoting *United States v. Drayton*, 536 U.S. 194, 201, 122 S. Ct. 2105, 2110, 153 L.Ed.2d 242, 251 (2002)).

"A reviewing court determines whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter by examining the totality of circumstances." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009). Relevant circumstances include "the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *Id.* at 309, 677 S.E.2d at 827 (emphasis added). "Moreover, 'an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention . . . , if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave' or otherwise terminate the encounter." *Id.* (quoting *INS v. Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 80 L.Ed.2d 247, 255 (1984)).

This Court has held that when an officer takes away a driver's license, a reasonable person would not believe he was free to leave. In *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), an officer pulled over a vehicle based on the reasonable suspicion that the driver was operating the vehicle without a license. *Id.* at 238, 681 S.E.2d at 494. During the stop, the officer took the driver's license

and vehicle registration to her patrol car. *Id.* at 243, 681 S.E.2d at 497. After checking the license and finding no problems, the officer continued to ask the driver questions and eventually obtained consent to search the vehicle. *Id.* at 239, 681 S.E.2d at 494. At no point did the officer return the license and registration to the driver. *Id.* at 243, 681 S.E.2d at 497.

The Court concluded that though the officer had a reasonable suspicion to justify the initial traffic stop, the justification for any continued detention ceased when the officer confirmed that the driver had a proper license. *Id.* at 242, 681 S.E.2d at 496-97. Detention after that point must have been based on reasonable suspicion or been a consensual encounter to be constitutional. *Id.* at 242, 681 S.E.2d at 497. The Court held that the encounter was not consensual because "a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration." *Id.* at 243, 681 S.E.2d at 497 (emphasis added); *see also State v. Heien*, __ N. C. App. __, 741 S.E.2d 1, 5-6 (2013) *aff'd per curiam*, __ N.C. __, 749 S.E.2d 278 (2013) *cert. granted on other grounds*, 134 S. Ct. 1872 (U.S. 2014) ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."). Therefore, the extended detention of the

driver was unconstitutional and all evidence found as a result of the detention should have been suppressed. *Id.* at 243-44, 681 S.E.2d at 497-98.

Other courts have reached the same conclusion as the *Jackson* Court, reasoning that a driver whose license has been taken by a law enforcement officer would not reasonably feel free to drive away because it is unlawful to drive without a carrying a license. *See United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) (holding that driver "would not reasonably have felt free to leave or otherwise terminate the encounter with the agents because his driver's license had not been returned to him" and he "could not lawfully leave the parking lot in his car without his driver's license"); *United States v. Thompson*, 712 F.2d 1356, 1359 (11th Cir. 1983) (holding that driver whose license was taken would not reasonably feel free to leave because if he "had tried to drive away he could have been arrested for driving without a license"). As the Fourth Circuit colorfully summarized, "if an officer retains one's driver's license, the citizen would have to choose between the Scylla of consent to the encounter or the Charybdis of driving away and risk being cited for driving without a license." *United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002). "That is, of course, no choice at all." *Id.*

Accordingly, numerous federal and state courts have held that a driver is seized under the Fourth Amendment when an officer retains his license and

registration. *See, e.g.*, *United States v. Guerrero*, 472 F.3d 784, 786-87 (10th Cir. 2007) ("when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule, will not reasonably feel free to terminate the encounter"); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997) ("When a law enforcement official retains control of a person's identification papers, such as vehicle registration documents or a driver's license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart."); *United States v. Jordan*, 958 F.2d 1085, 1088 (D.C. Cir. 1992) ("The inevitable effect produced by the police action in holding his license was that he was not free to disregard the police and go about his business, which was to enter his car and drive away."); *United States v. Winfrey*, 915 F.2d 212, 216 (6th Cir. 1990); *United States v. Jefferson*, 906 F.2d 346, 350 (8th Cir. 1990); *Thompson*, 712 F.2d at 1360-61; *State v. Pollman*, 190 P.3d 234, 240 (Kan. 2008) ("a reasonable person would not have felt free to refuse the officer's request or otherwise terminate the encounter from the point Officer Walline retained Pollman's driver's license"); *State v. Thomas*, 955 P.2d 420, 423 (Wash. App. 1998) ("Once an officer retains the suspect's identification or driver's license and

takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred.").

B. Mr. Leak Was Seized Without Reasonable Suspicion Because There Was Absolutely No Evidence of Criminal Activity When Chief Gallimore Retained Mr. Leak's License.

In this case, based on the facts found by the trial court and undisputed facts in the record, it is clear that Mr. Leak was seized under the Fourth Amendment when Chief Gallimore retained his driver's license and took it back to his patrol car. Therefore, the trial court erred in denying Mr. Leak's motion to suppress.

Shortly after 11:00 p.m. on 30 April 2012, Chief Gallimore pulled behind and approached Mr. Leak's vehicle, which was lawfully parked on the side of a road. Mr. Leak was alone and there was no one else in the area. The officer initially asked Mr. Leak several questions and requested to see his license and registration. These actions alone did not constitute a seizure. *See Icard*, 363 N.C. at 309, 677 S.E.2d at 827.

However, Chief Gallimore then retained Mr. Leak's documents and took them back to his patrol car to conduct computer checks. Given that Mr. Leak was alone in his car at night, with no one else around, and with two officers parked behind his car, Mr. Leak was seized at this point because "a reasonable person under the circumstances would certainly not believe he was free to leave without

his driver's license and registration." *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497. Mr. Leak could not reasonably have risked driving away from the encounter with the officer without his license and registration. *See* N.C. Gen. Stat. § 20-7(a) (making it unlawful to drive without carrying a valid license); § 20-57(c) (making it unlawful to drive without carrying a vehicle registration); *Weaver*, 282 F.3d at 311; *Lambert*, 46 F.3d at 1068. Therefore, when the office retained Mr. Leak's documents for computer checks, the encounter ceased being consensual and became a temporary seizure that had to be justified by "a reasonable and articulable suspicion of criminal activity." *See Harwood*, 727 S.E.2d at 897; *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497.

Chief Gallimore admitted, and the trial court explicitly found that "there was no actual suspicion of criminal activity" at the time the officer retained Mr. Leak's documents to run computer checks. (T Vol. I pp. 19-20, 35; R p. 16.) Nor could there have been any basis for suspecting Mr. Leak of a crime because he had been parked lawfully, he was polite and cooperative at all times, and he did not act suspiciously in any way. (T Vol. I pp. 12, 19, 21; R pp. 15-16.) Without any reasonable and articulable suspicion to justify the officer's seizure of Mr. Leak, the seizure was unconstitutional. *See Icard*, 363 N.C. at 311, 677 S.E.2d at 828; *Harwood*, 727 S.E.2d at 900; *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497.

The State may argue that the Fourth Amendment is not implicated because Chief Gallimore did not initiate a traffic stop as Mr. Leak was already parked. This Court, however, has held that the driver of a parked vehicle can subsequently be seized under the Fourth Amendment if officers create "a situation in which a reasonable person would not have felt free to terminate the encounter." *See Harwood*, 727 S.E.2d at 897.

The State may also argue that the seizure of Mr. Leak was too brief to implicate the Fourth Amendment. The United States Supreme Court, however, has held that a person "may not be detained even momentarily without reasonable, objective grounds for doing so." *Florida v. Royer*, 460 U.S. 491, 498, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229 (1983) (emphasis added). Therefore, Mr. Leak's detention for about twelve minutes for the officer to check for outstanding warrants was unconstitutional. *See United States v. De La Cruz*, 703 F.3d 1193, 1197 (10th Cir.2013) ("Once reasonable suspicion has been dispelled, even a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment."); *Ramsey v. United States*, 73 A.3d 138, 149 (D.C. 2013) (holding that fact that warrant check only took a few minutes "did nothing to negate the fact that the warrant check turned the encounter into a seizure").

"Evidence that is discovered as a direct result of an illegal search or seizure is generally excluded at trial as fruit of the poisonous tree unless it would have been discovered regardless of the unconstitutional search." *Jackson*, 199 N.C. App. at 244, 681 S.E.2d at 497 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L.Ed.2d 441, 455 (1963)). Here, Mr. Leak's detention for a warrant check directly led to his arrest and the discovery of the firearm in his possession. There is no evidence that Mr. Leak's firearm was or could have been discovered "by means sufficiently distinguishable to be purged of the primary taint" of the unlawful seizure. *See State v. Barnard*, 184 N.C. App. 25, 40, 645 S.E.2d 780, 790 (2007). Therefore, the evidence of the firearm found in Mr. Leak's possession should have been suppressed. *See Jackson*, 199 N.C. App. at 244, 681 S.E.2d at 498.

III. The Seizure of Mr. Leak Cannot Be Justified by the Community Caretaker Exception.

The State may argue that Mr. Leak's seizure is constitutional under the community caretaker exception for the Fourth Amendment. The exception, however, is inapplicable because Chief Gallimore had fully addressed any safety concerns before he retained Mr. Leak's license and registration.

Under the community caretaker exception, a temporary seizure can be permitted in the absence of reasonable suspicion if the State proves that: "(1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual." *State v. Smathers*, __ N.C. App. __, 753 S.E.2d 380, 386 (2014). The exigency of the situation is a very significant factor in assessing the weight of the public interest and "this exception should be applied narrowly and carefully to mitigate the risk of abuse." *Id.*

In this case, Chief Gallimore may have had some caretaking interest when he first observed Mr. Leak's vehicle parked on the side of the road. When the officer first spoke to Mr. Leak, however, Mr. Leak assured him that he did not need assistance, and told him that he had pulled over to send text messages because he knew he could not do so while driving. (T Vol. I pp. 8-9; R p. 14.) As Chief Gallimore admitted, there was no remaining safety concern after this conversation. (T Vol. I p. 19.) Therefore, the community caretaker exception is inapplicable.

CONCLUSION

For the foregoing reasons, Mr. Leak respectfully requests that the Court reverse the trial court's order denying his motion to suppress evidence and vacate the judgment against him.

Respectfully submitted, this 30th day of June, 2014.

PATTERSON HARKAVY LLP

Electronically submitted
Narendra K. Ghosh
NC Bar No. 37649
100 Europa Dr., Suite 250
Chapel Hill, NC 27517
Tel: 919-942-5200
Fax: 919-942-5256
Email: nghosh@pathlaw.com

Counsel for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Defendant certifies that the foregoing brief, which is prepared using proportional font, is less than 8,750 words (excluding cover, index, table of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

This the 30th day of June, 2014.

Electronically submitted
Narendra K. Ghosh
NC Bar No. 37649
Patterson Harkavy LLP
100 Europa Dr., Suite 250
Chapel Hill, NC 27517
Tel: 919-942-5200
Fax: 919-942-5256
Email: nghosh@pathlaw.com

CERTIFICATE OF SERVICE

The undersigned counsel for the Defendant hereby certifies that a copy of Defendant-Appellant's Brief was sent via first class mail, postage prepaid, addressed as follows:

Ebony J. Pittman
Assistant Attorney General
Department of Transportation
Attorney General's Office
1505 Mail Service Center
Raleigh, NC 27699-1505

This the 30th day of June, 2014.

Electronically submitted
Narendra K. Ghosh
NC Bar No. 37649
Patterson Harkavy LLP
100 Europa Dr., Suite 250
Chapel Hill, NC 27517
Tel: 919-942-5200
Fax: 919-942-5256
Email: nghosh@pathlaw.com