Review of Recent Juvenile Cases (2007)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

[Out of North Carolina] A generalized suspicion that a [juvenile] is engaged in criminal activity is inadequate to create a reasonable suspicion to justify stop.[In the Matter of J.L.B.M.](07-2-9)

On March 21, 2006, the North Carolina Court of Appeals held that a generalized suspicion that [juvenile] engaged in criminal activity was inadequate to create reasonable suspicion to justify stop and was therefore an unreasonable intrusion upon the juvenile's *Fourth Amendment* right to privacy.

¶ 07-2-9. **In the Matter of J.L.B.M.**, No. CO A05-500, 627 S.E.2d 239, 2006 N.C. App. Lexis 590 (N.C.Ct.App., 3/21/06).

Facts: While on patrol at approximately 6:00 p.m. on 6 July 2004, Officer D.H. Henderson (Officer Henderson) responded to a police dispatch of a "suspicious person" at an Exxon gas station in Burlington, North Carolina. The only description given of the person was "Hispanic male." Officer Henderson saw a person in the gas station parking lot, later identified as the juvenile, who fit the description of the person. When the juvenile saw Officer Henderson, he walked over to a vehicle in the parking lot, spoke to someone, and then began walking away from Officer Henderson's patrol car. Officer Henderson pulled up beside the juvenile in an adjoining restaurant parking lot and stopped the juvenile. Upon getting out of the patrol car and speaking with the juvenile, Officer Henderson noticed a bulge in the juvenile's pocket. Officer Henderson patted down the juvenile for weapons. Officer Henderson found and seized a dark blue, half-empty spray can of paint and a box cutter with an open blade. In response to being asked his name, the juvenile replied, "Oscar Lopez."

Officer Henderson transported the juvenile to a nearby shopping center where graffiti had recently been sprayed. Officer Henderson testified that the graffiti, which was blue, read: "Sir 13, Mr. Puppet 213." Officer Henderson testified that the juvenile initially said that "Mr. Puppet" had done the graffiti, and that the juvenile later identified himself as "Mr. Puppet."

Officer Henderson drove the juvenile to the police station, again patted him down, and found fireworks in the juvenile's pocket. Officer Henderson let the juvenile keep the fireworks. The juvenile was placed in an interview room, where several officers questioned him about his name. The juvenile continued to give the name "Oscar Lopez." Officer Wendy P. Jordan (Officer Jordan) recognized the juvenile's face and called him by his real name, "J----." The juvenile replied, "[M]y name is J---- L-- mother f----- M-----. You found me out."

The juvenile was eventually left alone in the interview room with the door ajar. Officer R.V. Marsh (Officer Marsh) testified that he noticed the room "got real quiet," and he looked into the room. Officer Marsh saw the juvenile trying to light something with a lighter, then saw a two to three-foot flame come out of the floor and

up the wall. Officer Jordan testified that she saw sparks flying. The fireworks left black soot on the floor and wall.

The juvenile presented no evidence. At the close of the hearing, the juvenile made a motion to dismiss, which was denied by the trial court. The trial court adjudicated the juvenile delinquent and entered a disposition committing the juvenile to a period of indefinite commitment. The juvenile appeals.

Held: Affirmed in part, reversed in part.

Opinion: The juvenile first argues the trial court erred in denying his motion to suppress evidence obtained after the juvenile was stopped and searched by Officer Henderson. The juvenile contends there were insufficient grounds for stopping the juvenile, and therefore any evidence obtained as a result of the stop was inadmissible and should have been suppressed.

A trial court's findings of fact made after a suppression hearing are binding on the appellate courts if supported by competent evidence. *State v. Brooks, 337 N.C. 132, 140, 446 S.E.2d 579, 585 (1994)*. A trial court's conclusions of law are reviewed *de novo* on appeal. *State v. Kincaid, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001)*.

In the present case, the trial court made the following relevant findings of fact:

> that on or about July 6, 2004 . . . Officer Henderson, a 27 year veteran of the Burlington Police Dept. had received a call of a suspicious activity at Coy's Exxon on the corner of Graham-Hopedale Rd. and N. Church St. That location has had numerous calls for shoplifting[,] fights[,] and other activity. Also there is numerous gang and graffiti activity at that end of town. The call was for a suspicious person being a Hispanic male. The officer went specifically to that location and the juvenile matches the description of being a Hispanic male[,] and[,] according to the officer's testimony, he was wearing gang attire, large baggy clothes.

We uphold the trial court's findings, with the exception of the finding that the dispatch call was about "suspicious activity," because Officer Henderson testified that the dispatch was about a "suspicious person" at the Exxon gas station. Officer Henderson testified as follows:

A [T]he [dispatch] call was a suspicious person at the [Exxon] station at the corner of Graham-Hopedale and Church Street.

> . . . .
>
> Q What time of the day or night was that?
>
> A It was right before 6 o'clock p.m.
>
> . . . .
>
> A . . . I saw a person fitting [the] description in the parking lot at Coy's. When he saw me, he walked over to a vehicle in the parking lot, spoke to somebody and immediately began walking away. As I approached, [I] stopped him in the parking lot next door of Kentucky Fried Chicken.
>
> Q Do you recall the description that you were given of that suspicious person?

A No, I do not, other than Hispanic male.

Officer Henderson continued his testimony during a *voir dire:*

Q Officer, at the time you got the call about suspicious activity [sic], was any criminal activity alleged?

A Not from what our dispatcher gave us, no.

Q Okay. And did you, up to the point where you stopped [the juvenile], did you ever see him committing any illegal act?

A No, sir.

Q Okay. And you, he was walking away from you, and you asked him to stop and patted him down?

A He looked in my direction and then turned and walked away. Yes, sir.

. . . .

Q And nothing [criminal] in particular with [regard to] [the juvenile] that you know of?

A Other than he was wearing gang attire.

Q What kind of attire was that?

A Large baggy clothes.

Q Is that it?

A I guess that's it.

The trial court further found there was a "reasonable, [articulable] suspicion that some criminal activity may have taken place" and distinguished the present case from *State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992)*. Although labeled as findings, these determinations are actually conclusions of law, in that they require the exercise of judgment and application of legal principles. See *In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)*. As such, they are reviewable *de novo* on appeal. See *Kincaid, 147 N.C. App at 97, 555 S.E.2d at 297*.

The *Fourth Amendment* protects the right of individuals to be free from "unreasonable searches and seizures." *U.S. Const. amend. IV*. This protection is applicable to the states through the *Due Process Clause of the Fourteenth Amendment*. *Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 1090, 86 Ohio Law Abs. 513 (1961).* The right to be free from unreasonable searches and seizures applies to seizures of the person, including brief investigatory stops. *Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 903-905 (1968)*. "An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *State v. Watkins, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)* (quoting *Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357, 362 (1979))*. Whether an

officer had a reasonable suspicion to make an investigatory stop is evaluated under the totality of the circumstances. *Id*. (citing *U.S. v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621, 629 (1981)*).

The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Id., 337 N.C. at 441-42, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1, 10 (1989)*) (other citations omitted).

The juvenile argues that the facts of this case are analogous to those in *Fleming*. In *Fleming*, our Court held that a stop and frisk was unjustified where an officer relied solely on the fact that a defendant was standing in an open area between two apartment buildings shortly after midnight and chose to walk away from a group of officers. *Fleming, 106 N.C. App. at 171, 415 S.E.2d at 785*. From those facts, our Court held that the officer in *Fleming* had only a "generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar in the area." *Id*. The defendant's actions "were not sufficient to create a reasonable suspicion that [the] defendant was involved in criminal conduct, it being neither unusual nor suspicious that [the defendant] chose to walk in a direction which led away from [a] group of officers." *Fleming, 106 N.C. App. at 170-71, 415 S.E.2d at 785*.

In the present case, the dispatch did not allege that the "suspicious person" was engaged in any criminal activity. *Cf*. *In re Whitley, 122 N.C. App. 290, 292, 468 S.E.2d 610, 612*, *disc. review denied*, *344 N.C. 437, 476 S.E.2d 132 (1996)* (holding that articulable facts sufficient to support a stop included a telephone call that two black males were selling drugs at a particular location, discovery of the juvenile at that location with another black male, and the juvenile's nervous body reflexes); *State v. Wilson, 112 N.C. App. 777, 779, 437 S.E.2d 387, 388 (1993)* (holding that an officer responding to a call that individuals were dealing drugs had more than a generalized suspicion); *State v. Cornelius, 104 N.C. App. 583, 585-588, 410 S.E.2d 504, 506-508 (1991)*, *disc. review denied*, *331 N.C. 119, 414 S.E.2d 762 (1992)* (holding that an officer had reasonable suspicion to justify an investigatory stop of an automobile where the officer received a dispatch that a black male in a black BMW with a temporary license tag was selling controlled substances, and the officer observed a person in an automobile fitting that description less than one minute later). Rather, the dispatch specified only that there was a suspicious person described as a Hispanic male. There was no approximate age, height, weight or other physical characteristics given as part of the description, nor was there a description of any specific clothing worn by the suspicious person. *Cf*. *State v. Lovin, 339 N.C. 695, 703-04, 454 S.E.2d 229, 234 (1995)* (holding circumstances supporting reasonable suspicion included a description of a suspicious person with "a 'lot of hair,' a gold watch and large frame glasses"); *State v. Jordan, 120 N.C. App. 364, 367-68, 462 S.E.2d 234, 237*, *disc. rev*iew *denied*, *342 N.C. 416, 465 S.E.2d 546 (1995)* (holding specific articulable facts sufficient to justify a stop included a description of the defendants' clothing).

Moreover, Officer Henderson did not observe the juvenile committing any criminal acts, nor had there been other reports of any criminal activity in the area that day. *Cf*. *State v. Thompson, 296 N.C. 703, 707, 252 S.E.2d 776, 779*, *cert. denied*, *444 U.S. 907, 100 S. Ct. 220, 62 L. Ed. 2d 143 (1979)* (holding circumstances supporting reasonable suspicion for an investigatory stop of occupants of a van included that the van was located near the vicinity where officers had reports earlier that evening of break-ins involving a van). Although the trial court found that police had received calls for shoplifting, fights, "and other activity" from the gas station, and that "that end of town" had gang and graffiti activity, the State offered no evidence of whether any past calls of shoplifting, fights, or other activity had led to any actual arrests. *Cf*. *State v. Butler, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992)* (holding circumstances supporting reasonable suspicion to make a stop included that the defendant was on a corner on which recent, multiple drug-related arrests had been made). Moreover, the

juvenile was stopped at approximately 6:00 p.m. on a summer evening in front of an open business. *Cf*. *State v. Rinck, 303 N.C. 551, 555-560, 280 S.E.2d 912, 916-20 (1981)* (holding circumstances supporting a reasonable basis for a stop included that the defendants were walking along a road at an "unusual hour" of approximately 1:35 a.m.);*State v. Blackstock, 165 N.C. App. 50, 59, 598 S.E.2d 412, 418 (2004),disc. review denied*, *610 S.E.2d 208 (2005)* (holding reasonable and articulable suspicion existed to support an investigatory stop of a vehicle where the defendant and driver were observed loitering at a closed shopping center shortly before midnight, no other vehicles were in the parking lot, and the two men abruptly and hurriedly returned to their vehicle, which was parked out of general public view).

The State argues "[i]t is clear from the record that Officer Henderson had a reasonable suspicion that the juvenile was involved in suspicious activity." However, the rule is clear under both federal and state law that an officer must have a reasonable and articulable suspicion of "criminal activity," not merely suspicious activity. See *Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357, 362 (1979)*; *Watkins, 337 N.C. at 441, 446 S.E.2d at 70*. Even viewed through the eyes of a reasonable, cautious officer, *see id.*, the facts relied on by Officer Henderson are inadequate to show more than an unparticularized suspicion or hunch that the juvenile was involved in criminal activity.

We hold that in the present case, like in *Fleming*, the stop was unjustified. Officer Henderson relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the "Hispanic male" description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car. Officer Henderson was not aware of any graffiti or property damage before he stopped the juvenile, and he testified that he noticed the bulge in the juvenile's pocket after he stopped the juvenile.

From those facts, we find that Officer Henderson had only a "generalized suspicion that the [juvenile] was engaged in criminal activity[.]" *Fleming, 106 N.C. App. at 171, 415 S.E.2d at 785*. Even viewed as a whole picture, the facts and circumstances were inadequate to create a reasonable suspicion that the juvenile was involved in criminal activity. The stop was therefore an unreasonable intrusion upon the juvenile's *Fourth Amendment* right to privacy. The trial court erred in denying the juvenile's motion to suppress evidence obtained thereby. See *Mapp, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513*

Conclusion: The court affirmed the trial court order with respect to the adjudication order as to the resisting arrest and burning the building charge, reversed it as to the weapons charge, and remanded it for further findings as to whether the juvenile was in custody for purposes of the damage to property charge. The court vacated the order of commitment and the denial of release from custody pending appeal, and they were remanded for further proceedings.