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Police Law Bulletin

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NORTH CAROLINA COURT OF APPEALS

Anonymous Tip Did Not Provide Reasonable Suspicion for Stop of Defendant

State v. Blakenship, COA12-1560 (15 October 2013).

At approximately 2:00 a.m. on 15 July 2012, Officer Jones and Officer Kanupp of the Asheville Police Department received a be-on-the-lookout ("BOLO") message from the Asheville communications and dispatch operator ("911 operator"). A taxicab driver anonymously contacted 911 via his personal cell phone. The 911 operator did not ask the taxicab driver his name or phone number. However, when an individual calls 911, the 911 operator can determine the phone number used to make the call. Therefore, the 911 operator was later able to identify the taxicab driver as John Hutchby. Hutchby reported that he observed a red Mustang convertible with a black soft top driving erratically, running over traffic cones and continuing west on Patton Avenue. Hutchby followed the Mustang westbound to the intersection of Patton Avenue and Louisiana Avenue and provided the 911 operator with the Mustang's license plate letters and numbers, "XXT-9756." Less than two minutes after the BOLO was broadcast, a red Mustang with a black soft top and an "X" in the license plate passed directly in front of Officers Jones and Kanupp, heading westbound on Patton Avenue. The officers jumped in their vehicles to attempt to follow the Mustang. When the officers caught up to the vehicle, they observed the driver turning left onto Asheville School Road. The Mustang approached a security gate that was blocking the entrance to the Asheville Private School's campus. As the Mustang's driver, defendant, attempted to open the gate, the officers activated their blue lights and stopped defendant. Although the officers did not observe defendant violating any traffic laws or see any evidence of improper driving that would suggest impairment, when Officer Jones spoke to defendant he detected a strong odor of alcohol and asked defendant to perform field sobriety tests.

Based on defendant's performance on the tests, Officer Jones placed defendant under arrest. After defendant's performance on a chemical analysis test, Officer Jones charged him with driving while impaired ("DWI").

Defendant pled guilty to DWI and then appealed his judgment. He filed a motion to suppress the evidence, claiming Officer Jones did not have reasonable suspicion to stop the vehicle. The trial court denied defendant's motion to suppress, finding that the arresting officers had reasonable suspicion to stop defendant's vehicle. Defendant pled guilty to DWI but reserved the right to seek appellate review of the denial of his motion to suppress. The trial court sentenced defendant to a 30-day suspended sentence and placed him on supervised probation for twelve months. Defendant appealed arguing that the trial court erred by denying his motion.

In order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity. An informant's tip may provide the reasonable suspicion necessary for an investigative stop. When the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster firsthand and thus confirm whether the tip possesses sufficient indicia of reliability. An anonymous tip can provide reasonable suspicion to justify a warrantless stop as long as it exhibits sufficient indicia of reliability ... and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made.

As an initial matter, the officers did not have the opportunity to judge Hutchby's credibility firsthand or confirm whether the tip was reliable, because Hutchby had not been previously used and the officers did not meet him face-to-face. Since the officers did not have an opportunity to assess his credibility, Hutchby was an anonymous informant. Therefore, to justify a warrantless search and seizure, either the tip must have possessed sufficient indicia of reliability or the officers must have corroborated the tip. In the instant case, the officers did not corroborate the tip. At the suppression hearing, the court found that the officers "did not have sufficient time to observe the vehicle being operated by defendant due to defendant's actions in turning left and going into the actual school property. When they caught up to defendant and observed him approaching the security gate, they activated their blue lights and stopped him because they did not have the access code to the school. Since they did not observe him violating any traffic laws, they were unable to corroborate the tip and the only issue to determine is whether Hutchby's tip exhibited sufficient "indicia of reliability" to provide the officers with reasonable suspicion to stop defendant. To create the requisite reasonable suspicion, an anonymous tip must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. The court found the instant case had some limited but insufficient indicia of reliability. The anonymous caller described defendant's vehicle and the car's license plate letters and numbers. Hutchby also was unable to describe defendant, or indicate whether the driver was a male or a female. In addition, Hutchby did not provide any way for the officers to assess his credibility. Although Hutchby did relay to the 911operator the location of the vehicle and the direction the Mustang was traveling, he did not include any information concerning defendant's future actions. While the direction of travel can provide some indicia of reliability to support a stop, the North Carolina Supreme Court has held that a tipster's confirmation that a defendant was heading in a general direction "is simply not enough detail in an anonymous tip situation."*Hughes*, 353 N.C. at 210, 539 S.E.2d at 632. Since Hutchby's anonymous tip did not possess sufficient indicia of reliability, Officers Jones and Kanupp did not possess reasonable, articulable suspicion to stop defendant's car. Consequently, the trial court improperly denied defendant's motion to suppress.

Defendant Was Seized By Officers; Seizure Not Supported By Reasonable Suspicion

State v Knudsen, __ N.C. App. __, __ S.E.2d __ (20 August 2013).

On July 28, 2011, Officer Williams, a bicycle officer with the Winston-Salem Police Department, was on routine patrol in the downtown area. Corporal Necessary was also on patrol in the same area in a marked vehicle. At approximately 11:10 p.m., Corporal Necessary observed Defendant get into the driver's side of a vehicle while holding a cup that looked similar to cups that were commonly used at downtown bars

to serve mixed drinks. The vehicle was parked near Finnegan's, a local restaurant and pub although defendant was not seen exiting that or any other bar. Corporal Necessary noticed that the headlights of the vehicle had come on. After passing by the vehicle, Corporal Necessary spotted Officer Williams in the street on his bicycle. Corporal Necessary stopped, relayed to Officer Williams what he had seen, and asked Officer Williams if he would ride by the vehicle and determine if the cup contained alcohol. After speaking with Officer Williams, Corporal Necessary then turned his police cruiser around, passed by the vehicle again, and turned right. Officer Williams approached the vehicle and noticed that its lights were on and that the engine was running. Officer Williams was in his police uniform. According to Officer Williams' testimony, he rode past the vehicle at an arm's length distance and observed two men sitting in the front seat. Defendant, who was sitting in the driver's seat, was holding a clear, light-colored, Solo-type cup. After passing by the vehicle, Officer Williams contacted Corporal Necessary and relayed what he had just seen. As he was doing so, the two males exited the vehicle, and began walking down the sidewalk. Officer Williams moved his bicycle from the roadway to the sidewalk in an effort to initiate contact with the Defendant. The Officer positioned his bicycle in such a way as to block the Defendant's normal path of travel on the sidewalk. At the same time, Corporal Necessary pulled his patrol car directly behind Officer Williams. Officer Williams' purpose in initiating contact with the Defendant was to make a determination as to whether there was any alcohol in the cup that the Defendant was holding. As Defendant walked towards Officer Williams and was approximately an arm's length away, Officer Williams asked Defendant, "what do you have in the cup?" Defendant replied, "water" and handed the cup to Officer Williams, who determined that the cup contained water. Officer Williams stated that Defendant's clothes were not messy, but that his eyes appeared "a little glazy and his face was kind of flush." Both Officer Williams and Corporal Necessary admitted that, prior to speaking with Defendant, they did not know where Defendant had been, where he was going, or what was in the cup that had first drawn their attention.

Defendant was eventually charged with driving while impaired. Defendant pleaded guilty in District Court. On that same day, he appealed to Superior Court and filed a "Motion to Dismiss for Lack of Reasonable Suspicion." The trial court held that Defendant was illegally stopped and seized in violation of the Fourth Amendment. All evidence resulting from that seizure was suppressed as "fruit of the poisonous tree." The State appealed.

The United States Supreme Court has held that a law enforcement officer does not offend the Fourth Amendment merely by approaching an individual in a public place and by putting questions to him. However, a person is seized under the Fourth Amendment when, by means of physical force or a show of authority, the defendant's freedom of movement is restrained. Since there was no physical force employed by Officer Williams or Corporal Necessary to restrain Defendant in this case, a seizure occurred if, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. When there has been no physical force or attempt to leave, examples of circumstances that might indicate a seizure include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Several North Carolina Supreme Court opinions have also found the fact that an officer was in uniform to be a significant factor to consider when determining whether a seizure has occurred.

In the present case, the Court of Appeals noted the encounter began with Corporal Necessary slowly passing by Defendant's vehicle, stopping just over a car length beyond, and talking with another officer. Both officers were wearing police uniforms and wore weapons as part of those uniforms. After Corporal Necessary passed by Defendant for a second time, Officer Williams, at Corporal Necessary's request, rode past Defendant's vehicle against traffic and "made it obvious" that he was looking into Defendant's

vehicle. After observing Defendant exit his vehicle and walk down the sidewalk, in an effort to initiate contact with Defendant, Officer Williams moved his bicycle from the street onto the sidewalk impeding Defendant's continued movement. Corporal Necessary, by parking his cruiser behind Officer Williams, necessarily blocked the sidewalk with his cruiser. Corporal Necessary exited the cruiser and joined Officer Williams on the sidewalk, directly in Defendant's path of travel. Officer Williams then demanded of Defendant, "what do you have in the cup," which in the context of the entire encounter constituted police conduct which would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Thus, the court concluded, Defendant was seized within the meaning of the Fourth Amendment.

Reasonable suspicion has been defined by the United States Supreme Court as some minimal level of objective justification. The officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch. In determining reasonable suspicion, the court must account for the totality of the circumstances. In the case at hand, Officer Williams and Corporal Necessary observed Defendant walking down the sidewalk with a clear plastic cup in his hand filled with a clear liquid. Defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle, and began walking down the sidewalk, where he was stopped by the officers. The court held that this did not rise to reasonable suspicion.

Officer Lacked Reasonable Suspicion to Stop Defendant's Vehicle for DWI

State v. Derbyshire, No. COA12-1382 (6 August 2013).

Sergeant Turner had been employed by the City of Raleigh as a police officer for 15 years. On November 8, 2006, around 10:05 p.m., Sgt. Turner first came into contact with Defendant, who was driving northbound on Glenwood Avenue. Sgt. Turner's attention was drawn to Defendant's vehicle when she observed what she believed to be Defendant operating his vehicle with the high beam headlights activated. Sgt. Turner testified that as is customary among motorists, she flashed her own high beam headlights roughly three times to inform Defendant to dim his headlights. She further testified that Defendant did not appear to acknowledge this message and that, in addition, she observed that Defendant had a blank stare when she passed him. Sgt. Turner then began to follow Defendant's vehicle after which point she observed Defendant's vehicle weave in and out of his traffic lane, with the right tires crossing the dividing lane line. She then activated her blue lights to initiate a traffic stop of Defendant's vehicle. Defendant was arrested and charged with driving while impaired.

On June 30, 2008, Defendant was convicted in Wake County District Court and entered notice of appeal to Wake County Superior Court for a trial *de novo*. On February 25, 2009, Defendant filed a motion to suppress alleging that no reasonable and articulable suspicion existed to justify the stop of his vehicle. Defendant's motion was denied. Defendant pled guilty to the offense of driving while impaired, but reserved his right to appeal. On appeal, Defendant argued that the trial court erred by failing to make written findings of fact to support its denial of his motion to suppress. The Court of Appeals agreed and remanded the case back to the Wake County Superior Court. A new evidentiary hearing was held on May 31, 2011.Thereafter, the trial court denied Defendant's motion to suppress by written order. In that order, the court found that based upon the totality of the circumstances, there was a sufficient basis upon which to form an articulable suspicion of impaired driving in the mind of a reasonable and cautious officer. Defendant again appealed, arguing, in part, that Sgt. Turner did not have a reasonable and articulable suspicion necessary to justify the stop of Defendant's vehicle. The Court of Appeals agreed.

On a number of occasions, the Court of Appeals has determined that an officer has the reasonable suspicion necessary to justify an investigatory stop after observing an individual's car weaving in the

presence of certain other factors. This has been referred to as the "weaving plus" doctrine. In *State v. Watson*, 122 N.C. App. 596, 472 S.E.2d 28 (1996), the Court determined that reasonable suspicion sufficient to justify a stop was present at approximately 2:30 one morning on a road near a nightclub when the defendant was driving on the center line and weaving back and forth within his lane for 15 seconds. Eight years later, in *State v. Jacobs*, 162 N.C. App. 251, 590 S.E.2d 437 (2004), the Court upheld the denial of the defendant's motion to suppress when an officer had observed the defendant's vehicle slowly weaving within its lane of travel touching the designated lane markers on each side for three quarters of a mile at 1:43 on a Thursday morning in an area near bars. The Court noted in *Jacobs* that the facts were nearly indistinguishable from *Watson* in that, although the defendant's weaving within his lane was not a crime, that conduct combined with the unusual hour and the location was sufficient to raise a reasonable suspicion of impaired driving. Without these "plus" factors, the Court has, until recently, failed to conclude that a reasonable and articulable suspicion sufficient to justify a stop exists in "weaving only" circumstances. In *State v. Fields*, 195 N.C. App. 740, 673 S.E.2d 765, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 390 (2009),for example, the defendant was pulled over at approximately 4:00 on a Thursday afternoon after the officer observed his car "swerve to the white line on the right side of the traffic lane" on three separate occasions. Noting that there must be additional specific articulable facts beyond mere weaving in order for there to be reasonable suspicion — *e.g.*, driving at an unusual hour or in an area with drinking establishments — the Court reversed the trial court's order denying the defendant's motion to suppress. Just two months later, in *State v. Peele*, 196 N.C. App. 668, 675 S.E.2d 682, *disc.review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009), the Court applied a similar line of reasoning. There the defendant was pulled over at approximately 7:50 on a Saturday evening after the officer — who was responding to a dispatch alerting him to "a possible careless and reckless, D.W.I." — observed the defendant's car "weave into the center, bump the dotted line, and then fade to the other side and bump the fog line, and then go back into the middle of the lane. Noting that the defendant was not driving late at night and that there was no evidence that he was close to any bars, the Court reversed the trial court's order denying the defendant's motion to suppress.

Three years later, however, the Court indicated that weaving only can be sufficient to arouse a reasonable suspicion of criminal activity when it is particularly erratic and dangerous to other drivers. Distinguishing the 2009 *Fields case* and *Peele*, the Court determined that the officer had a reasonable suspicion sufficient to justify a stop of the defendant's vehicle when he described the defendant's car as "like a ball bouncing in a small room." *State v. Fields*, __ N.C. App. __, __, 723 S.E.2d 777, 779 (2012). Characterizing the defendant's driving as "so erratic that . . . other drivers — in heavy traffic — [were forced to take] evasive maneuvers to avoid [the] defendant's car," the Court affirmed the trial court's denial of the defendant's motion to suppress. Most recently, in June of 2012, the NC Supreme Court held that a state trooper had a reasonable and articulable suspicion sufficient to initiate a traffic stop when the defendant was "weaving constantly and continuously [within her own lane] over the course of three-quarters of a mile" and did so at 11:00 on a Friday night. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828. In so holding, the Supreme Court distinguished the weaving plus cases described above primarily on grounds that the defendant in *Otto* "was weaving constantly and continuously over the course of three-quarters of a mile." The Court also noted that the late hour contributed to the reasonableness of the officer's suspicion.

The circumstances in the present case include one instance of weaving, in which the right side of Defendant's tires crossed into the right-hand lane, and two conceivable "plus" factors — the fact that Defendant was driving at 10:05 on a Wednesday evening and the fact that Sgt. Turner believed Defendant's bright lights were on before she initiated the stop. The Court, however, found that driving at 10:05 on a Wednesday evening and the fact that Sgt. Turner believed Defendant's bright lights were on, were not sufficiently uncommon to constitute valid "plus" factors. The difference between 10:05 on a Wednesday and 11:00 p.m. on a Friday is slight, but not insubstantial. In addition, the Court noted that

many vehicles on the road today use the same sort of headlights that Defendant had — very bright halogen headlights. An increase in the likelihood that an individual may be subjected to a *Terry* stop merely because that person owns a car that sits high off the ground (Defendant's vehicle was a Range Rover) or that was built with brighter headlights, would constitute an irrational inference of criminal activity, which the Court declined to adopt. Accordingly, the Court held that the fact that Defendant was driving on a Wednesday evening at 10:05 in a vehicle which had "different," brighter lights merely constitutes "conduct falling within the broad range of what can be described as normal driving behavior" and, therefore, cannot be considered in a reasonable officer's determination to initiate a *Terry* stop.

The Court then addressed whether Sgt. Turner could have developed a reasonable suspicion that Defendant was in the process of committing a crime when he weaved only once, causing the right side of his tires to cross the dividing line in his direction of travel. Because one instance of weaving is neither (1) erratic and dangerous nor (2) constant and continuous under *Fields 2012* and *Otto*, respectively, the Court held that Sgt. Turner lacked a reasonable and articulable suspicion of the commission of a crime and, thus, that the trial court erred in denying Defendant's motion to suppress.

Stop of Vehicle Not Supported by Reasonable Suspicion

State v. Coleman*, *COA12-1173 (18 June 2013).

On April 2, 2010, Officer Lampe with the Raleigh Police Department received a "be on the lookout" call ("BOLO call") from his communications center. The communications center had issued the BOLO call after receiving a tip from an anonymous citizen. The caller reported that there was a cup of beer in a gold Toyota sedan parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. The caller stated the license plate number of the car was VST-8773. Although the complainant wished to remain anonymous, the communications center obtained the caller's name, Kim Creech, and phone number. It is unclear from the record whether the caller willingly provided that information or if the communications center was able to obtain that information independently. Ms. Creech did not provide any identifying information about the driver of the vehicle. After receiving the BOLO call, Officer Lampe responded to the gas station parking lot and observed a vehicle that he believed fit the description of the car in Ms. Creech's tip. As defendant began pulling out of the parking lot, Officer Lampe got behind him and followed him onto Wake Forest Road. Then, Officer Lampe initiated his emergency lights and pulled defendant over; defendant pulled into a TGI Friday's parking lot. Prior to pulling defendant over, Officer Lampe did not observe defendant commit any traffic violations. Officer Lampe administered a chemical analysis test to defendant, and defendant was subsequently charged with and arrested for DWI.

After defendant pled guilty in district court and appealed his conviction, defendant filed a motion in Wake County Superior Court to suppress all evidence obtained as a result of his stop. The trial court denied defendant's motion. Defendant then pled guilty to DWI but reserved his right to appeal the denial of his motion to suppress. The trial court sentenced him to 30 days imprisonment, but suspended the sentence and placed him on unsupervised probation for 12 months. Defendant appealed.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, defendant contends that Ms. Creech's tip lacked sufficient indicia of reliability, and Officer Lampe did not have reasonable suspicion to stop him. The Court of Appeals agreed.

An officer must have a reasonable suspicion of criminal activity before conducting an investigatory stop of a vehicle. A tip from a confidential and reliable informant or a tip from an anonymous informant may provide an officer reasonable suspicion to initiate a *Terry* stop. However, the Supreme Court has noted

that a "tip [must] be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." In this case, Officer Lampe's sole reason for stopping defendant was the information contained in Ms. Creech's tip. He testified that he did not observe defendant commit any traffic violations or see any evidence of improper driving that would suggest impairment prior to initiating the stop. Thus, in determining whether Ms. Creech's tip was reliable in its assertion of illegality, we must first determine whether defendant's alleged behavior, i.e., possessing an open container of alcohol in the Kangaroo gas station parking lot, was illegal. While it is illegal to possess an open container of alcohol in the passenger area of a vehicle while the motor vehicle is on the highway or the highway right-of-way, possessing an open container of alcohol in a gas station parking lot is not illegal. Accordingly, Ms. Creech'stip contained no actual allegation of criminal activity. Even if it had, the court concluded that Ms. Creech's tip lacked sufficient indicia of reliability to provide Officer Lampe reasonable suspicion to stop defendant. While the fact that Ms. Creech's tip provided the license plate number and location of defendant's car may have provided some limited indicia of reliability, she did not identify or describe defendant, did not provide any way for Officer Lampe to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions. Accordingly, the court stated that even if it had concluded that Officer Lampe's mistaken belief of law was reasonable, it would have reversed the trial court's order and remanded for a new trial because Ms. Creech's anonymous tip lacked the sufficient indicia of reliability necessary to establish reasonable suspicion.

Based on the foregoing reasons, the Court of Appeals reverse the trial court's order denying defendant's motion to suppress and remand for a new trial.

Nervous Behavior Alone Is Insufficient To Establish Reasonable Suspicion

State v. Phifer, NO. COA12-1124 (2 April 2013).

Around 2:00 P.M. on 16 January 2011, Officer Lane of the Salisbury Police Department was driving his patrol car on East Cemetery Street when he observed two men walking in the road around the 500 block. That portion of the road was known as a high crime area with shootings, drug complaints, drug transactions, and fights. There had also been numerous complaints of people walking down the middle of the road and not moving for oncoming traffic. Officer Lane approached the men, and asked them to stand in front of his patrol car. One of the men complied with Officer Lane's command; the other man, who was later identified as defendant, did not. Rather, defendant kept moving around, and he asked Officer Lane the reason for the stop. Officer Lane explained that a city ordinance and state law mandated that a person may not walk in the street or impede traffic. Defendant kept moving back and forth and refused to stand still. According to Officer Lane, defendant appeared "hyper" and was "pacing" nervously. Officer Lane told both men that he was going to give them a warning and check for outstanding warrants, of which he found none. Officer Lane then informed both men that he was going to frisk them for weapons. He asked defendant if he had any weapons on him, and defendant replied "yes, but it's not mine." Officer Lane then asked defendant to put his hands on the hood of the car, handcuffed him, and patted him down. Officer Lane found a firearm in defendant's pocket, and he placed defendant under arrest. Defendant was later indicted with possession of a firearm by a felon and of habitual felon status.

Defendant filed a motion to suppress evidence relating to the firearm found on his possession. In that motion, defendant argued that his seizure was not justified by reasonable suspicion. The trial court entered an order denying defendant's motion. In that order, the trial court concluded that the stop and arrest were legitimate because defendant violated G.S. 20-174.1, a statute which prohibits a person from standing in the street in such as a manner as to impede the regular flow of traffic. Defendant then pled guilty, preserving his right to appeal. Defendant was sentenced to 70-96 months imprisonment, and then appealed.

In *Terry v. Ohio,* the Supreme Court fist recognized an officer's ability to detain and frisk a person if the officer could first articulate reasonable suspicion that the person was involved in criminal activity, and reasonable suspicion that the person was armed and dangerous. Since *Terry*, the North Carolina Supreme Court has elaborated that in North Carolina, "[a]n officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts."

Here, the trial court's findings of fact establish that Officer Lane stopped defendant to warn him about impeding the flow of traffic. After issuing this warning, Officer Lane "wanted to frisk the defendant because of his suspicious behavior." That suspicious behavior was that defendant appeared to be nervous and kept moving back and forth. In *State v. Pearson*, our Supreme Court held that a nonconsensual search of the person is not justified by the mere presence of "nervous and excited" behavior around police. 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998). In *Pearson*, not only was the suspect nervous, but he also made inconsistent statements to police when questioned and had an odor of alcohol on his breath. Regardless, our Supreme Court nonetheless held that the officers lacked reasonable articulable suspicion that the defendant was armed and dangerous. In addition, the North Carolina Court of Appeals has previously held that while extreme nervousness can be a factor considered by police in examining the totality of the circumstances, nervous behavior alone is not sufficient to establish reasonable suspicion. *See*,*e.g.*, *State v. Myles*, 188 N.C. App. 42, 50, 654 S.E.2d 752, 757-58, *aff'd,* 362 N.C. 344, 661 S.E.2d 732 (2008) ("Although our Supreme Court previously has stated nervousness can be a factor in determining whether reasonable suspicion exists, our Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances.").

In the case at hand, there is no mention of any factors in addition to defendant's nervousness which might have given rise to reasonable suspicion for the search. Therefore, the Court of Appeals agreed with defendant that the nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street, is insufficient to warrant further detention and search. Accordingly, the court reversed the trial court's denial of defendant's motion to suppress.

Reasonable Suspicion Supported Warrantless Stop;
Seizure of Cocaine Justified Under "Plain Feel" Doctrine

State v. Reid, No. COA12-340 (4 December 2012).

On July 19, 2010, Detective McKeon, a Raleigh Police detective, received a phone call from "Jim," a confidential informant who had in the past provided McKeon with reliable information leading to several drug arrests. Jim told McKeon that Defendant was obtaining cocaine in Winston-Salem and Greensboro and "purchasing large amounts of cocaine" to bring to the Raleigh area. Jim also gave McKeon defendant's address in Raleigh and told him defendant drove a white Ford pick-up truck. Following this tip, McKeon began surveillance of defendant's residence. McKeon also searched DMV records which revealed a Ford pick-up truck registered in defendant's name. Over the next several weeks, McKeon observed defendant at his residence. He also observed defendant's pick-up truck in the driveway.

On August 6, 2010, McKeon received a phone call from "Ned," a second informant who had also provided McKeon with reliable information in the past. Ned corroborated Jim's information. McKeon and Jim planned a fictitious drug deal during which defendant would use Jim's vehicle to obtain cocaine in Winston-Salem, meet at Jim's hotel room in Durham, and then return to Raleigh with Jim to sell one

ounce of cocaine to Jim's friend. McKeon testified he planned to arrest defendant with the cocaine prior to sale. McKeon asked Jim's permission to place a GPS unit on Jim's vehicle, and Jim consented.

Around noon on August 9, 2010, Jim called McKeon and told him defendant was on his way to Jim's Durham hotel room. Two hours later, Jim told McKeon that defendant was now on his way to Winston-Salem in Jim's vehicle. McKeon tracked defendant's trip to Winston-Salem via GPS. As planned, defendant obtained cocaine in Winston-Salem and returned to Jim's hotel room, where he showed Jim the cocaine. However, defendant suddenly decided to abandon the prearranged drug sale. Instead, he drove his pick-up truck to a friend's apartment at 1301 Durlain Drive in Raleigh. Jim followed defendant and gave the address to McKeon. He also told McKeon that defendant's pick-up truck was parked on the side of the apartment building.

Detective McKeon, Sergeant Core, and Detective Gibney drove to 1301 Durlain Drive without a search warrant. As Jim predicted, they saw defendant's white Ford pickup truck parked at the side of the building. The officers waited, watching the truck. Twenty to thirty minutes after their arrival, defendant exited the building and walked toward his truck. Once defendant opened the truck's door, McKeon, Core, and Gibney identified themselves as police officers and approached defendant. Gibney immediately smelled a very strong odor of marijuana. Gibney detained defendant and McKeon began to frisk defendant for weapons. During the frisk, McKeon felt a "large bulge" in defendant's pocket. He testified that given his "training and experience," he "knew exactly what it was once [he] felt it." He said "[i]t was packaged like narcotics would be packaged." He removed a white plastic grocery bag that contained two smaller plastic bags. The smaller bags were vacuum-sealed, which Gibney testified is a common technique in the drug trade to mask the smell of drugs from police dogs. McKeon then arrested defendant for possession of cocaine.

On September 27, 2010, defendant was indicted for trafficking in cocaine. Defendant filed a motion to suppress the cocaine. The trial court denied defendant's motion. The jury found Defendant guilty of trafficking in cocaine. Defendant was sentenced to a minimum prison term of 35 months and a maximum term of 42 months. Defendant appealed.

On appeal, defendant argued, in part, that the trial court erred in denying his motion to suppress evidence gathered from the warrantless search and seizure because the information provided by Jim and Ned did not provide reasonable suspicion for a stop of defendant, and the warrantless seizure of the cocaine from his pockets was unlawful.

"*Terry v. Ohio"* and its progeny have taught us that in order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity. An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability. A tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration. Moreover, "a tip from an informant 'known to [the officer] personally and [who] had provided him with information in the past' is sufficient to provide reasonable suspicion for a stop."

According to the plain feel doctrine, when conducting a *Terry* frisk for weapons, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. The officer may seize the object if he or she has probable cause to believe it is contraband.
In the case at hand, the Court of Appeals found that McKeon had reasonable suspicion to conduct a warrantless stop and frisk. McKeon received information from two informants who had in the past

provided him with reliable information that led to several arrests. The informants provided information about defendant's criminal activity, location, and appearance. Officers conducted surveillance corroborating information provided to them. Moreover, when McKeon and his team approached defendant, Gibney testified that he exuded a strong odor of marijuana. McKeon's subsequent frisk of defendant then created probable cause for seizure of the cocaine under the "plain feel" doctrine. While searching defendant, McKeon "felt a large bulge in defendant's cargo pants' pocket. . . . [He] knew exactly what it was once [he] felt it. . . . It was packaged like narcotics would be packaged." Consequently, when McKeon identified the bag as containing narcotics, he had probable cause to arrest Defendant. The trial court's rulings were affirmed.

Reasonable Suspicion Justified Extending Traffic Stop

***State v. Williams*, No. 384A11 (14 June 2012), affirming ___ N.C. App. ___, 714 S.E.2d 835 (16 August 2011).**

At approximately 10:55 a.m., Sergeant Cass stopped a SUV travelling on I-77 in Iredell County for a window tint violation. He asked the driver, Michelle Perez, to step out of the car and towards the front of his cruiser. Perez told the officer that the SUV belonged to defendant and that she was driving because defendant did not have a license. When asked where she was coming from, Perez said that she had just "flew out of Houston." Sergeant Cass advised her that she was driving south on I-77 and that Houston was to the south. Perez responded that she was not sure where she was going; she said she was driving defendant so defendant could DJ somewhere. Perez told the officer to ask the defendant where they were going because she "knows everything."

Sergeant Cass approached the passenger side of the SUV to question defendant. Defendant declared that she did not own the SUV, but had arranged to purchase it from a friend. Defendant produced the SUV's registration and two state-issued identification cards from different states and with different addresses. In talking to Sergeant Cass, defendant stated that they were traveling from Louisville, Kentucky, and that she was going to Club Kryptonite in Myrtle Beach, South Carolina. When asked how she knew Perez, defendant stated that the two were cousins.

Sergeant Cass returned to Perez to ask her additional questions. She stated that she had flown from Tucson, Arizona to Houston and met the defendant at the airport. Perez initially said that she and defendant were cousins, but then said that they simply refer to each other as cousins due to their long-standing relationship.

Sergeant Cass returned to defendant and asked how she and Perez were cousins. Defendant first stated they were first cousins on her dad's side, then said they were cousins on her grandmother's side, and finally said they just basically grew up together.

Sergeant Cass asked Perez to have a seat in his cruiser. While in the car, he described Perez as becoming nervous. He checked whether the SUV had been reported stolen, as well as whether Perez and defendant had any outstanding warrants. At approximately 11:15 a.m., after learning that the vehicle was not reported stolen and that the two had no outstanding warrants, he returned defendant's identification cards, and then motioned for Perez to exit his vehicle. He handed Perez a warning citation for the tint violation and returned her driver's license. He asked for consent to search the vehicle which Perez declined. Sergeant Cass then requested that both Perez and defendant wait by his cruiser until a canine team arrived. The team arrived at approximately

11:28 a.m. The dog alerted at the rear of the SUV, and law enforcement conducted a search finding approximately 65 pounds of marijuana inside.

Based upon the foregoing facts, the trial court concluded that the officer had reasonable suspicion to detain the vehicle while awaiting the arrival of a canine unit. The defendant appealed to the North Carolina Court of Appeals. The court affirmed the decision of the trial court. Defendant appealed again to the North Carolina Supreme Court which also affirmed the lower court's decision.

The North Carolina Supreme Court found that several factors supported the trial court's determination that reasonable suspicion supported extending the stop. First, the driver told the officer that she and the defendant were coming from Houston, Texas, which was illogical given her direction of travel. Second, the defendant's inconsistent statement that they were coming from Kentucky and were traveling to Myrtle Beach "raises a suspicion as to the truthfulness of the statements." Third, the driver's inability to tell the officer where they were going, along with her illogical answer about driving from Houston, permitted an inference that she "was being deliberately evasive, that she had been hired as a driver and intentionally kept uninformed, or that she had been coached as to her response if stopped." Fourth, the fact that the defendant initially suggested the two were cousins but then admitted they just called each other cousins based on their long-term relationship "could raise a suspicion that the alleged familial relationship was a prearranged fabrication." Finally, the vehicle had illegally tinted windows and was owned by a third person. The court concluded: "Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived."

Officer Lacked Reasonable Suspicion to Justify Investigatory Stop; Flight from Consensual Encounter Does Not Provide Probable Cause to Arrest for Resisting a Public Officer

State v. White, No. COA10-1143 (16 August 2011).

Detective Edwards and Sergeant Austin with the Southern Pines Police Department were on patrol in an unmarked white Dodge Durango. Sometime after dark, they received a report from dispatch of loud music near the corner of Coates Street and Shaw Avenue. The identity of the person who made the complaint was unknown to the officers. The location is at the center of Brookside Park Apartments, but the report did not identify the apartment complex or a specific apartment within it as the source of the music complaint. Additionally, Coates Street intersects Shaw Avenue at two locations, but the report did not specify either intersection as the subject of the complaint.

One of the officers testified that he had been to Brookside Park Apartments on "several occasions throughout the evening" and that he had made between fifty and one hundred drug arrests there in the past.

Responding to the loud music complaint, Detective Edwards saw three to four men standing near a dumpster near the intersection of Coates and Shaw Streets. Although the detective did not hear any music, nor see any noise-producing device near the men, the officer decided to stop his vehicle about thirty-five feet away on the opposite side of the dumpster, and approach the men in order to question them about the loud music. As Detective Edwards exited his vehicle and turned

to close the door, he heard Sergeant Austin yell, "Stop! Police." He observed Sergeant Austin chasing a black male up Shaw Avenue. Detective Edwards gave pursuit behind Sergeant Austin. After running approximately 150 yards, defendant tripped and fell to the ground. Detective Edwards then "Jumped on top of him," and handcuffed him. After defendant stood, Sergeant Austin noticed a small bag of crack on the ground. Defendant was charged with possession with intent to sell and deliver cocaine, possession of cocaine, and resisting, delaying and obstructing a public officer.

Defendant filed motions to suppress arguing that on the night in question he was not engaging in any activity that would provide reasonable suspicion necessary to justify his detention, nor probable cause to justify his arrest. The trial court denied defendant's motion to suppress finding that defendant's unprovoked flight from the scene provided reasonable suspicion to detain the defendant and that his failure to abide by the officer's commands to stop for the detention provided probable cause to arrest him for resisting, delaying and obstructing a public officer. Defendant appealed.

The Court of Appeals found that the State failed to establish a nexus between defendant's flight and the police officers' presence. The court noted that the officers arrived in an unmarked car, after dark, and parked thirty-five feet away from defendant on the opposite side of the dumpster from where defendant was standing. There was no testimony to indicate that defendant knew the police were present before he began running. There was no testimony that defendant made eye contact with the officers, or even looked in the direction of the officers. Because the State failed to provide any evidence that defendant's flight was in response to the officers' presence, the only articulable facts to support a detention of the defendant were that the police had received a complaint of loud music in the area, and that the detective regarded the location as a high-crime area in which previous drug arrests had been made. However, the detective testified that he did not see the defendant engaged in any suspicious activity, did not hear any music coming from the area, and did not see any device capable of producing loud music near the defendant. These facts do not provide reasonable suspicion necessary to justify an investigatory stop. As such, any encounter with the defendant would have been a consensual encounter, an encounter that defendant was free to ignore. Had the officers attempted an investigatory stop on these facts, the stop would be unlawful. Defendant's subsequent flight from a consensual encounter or from an unlawful investigatory stop cannot be used to justify his arrest for resisting, delaying or obstructing a public officer. Therefore, the Court of Appeals reversed the trial court's denial of defendant's motions to suppress.