



Police Law Bulletin



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NORTH CAROLINA COURT OF APPEALS



Defendant's Flight From Officer Who Had Ordered Defendant to Stop and For Whom Officer Had Reasonable Suspicion to Make Investigative Stop Provided Probable Cause to Arrest Defendant for Resisting, Delaying or Obstructing Officer Under G.S. 14-223

State v. Washington, No. COA08-217 (18 November 2008).

On September 28, 2005, at approximately 2:00 p.m., two Jacksonville police detectives were conducting surveillance, from an unmarked vehicle, of the residence of Jerry Carr. The detectives possessed several outstanding arrest warrants for Carr. At approximately 2:45, the defendant arrived in a white four-door vehicle and entered the residence. A license plate check of the vehicle showed that its registration plate had expired and that the vehicle was not properly insured. About five minutes later, Carr and the defendant exited the residence and drove off in the white vehicle. Defendant was driving and Carr was sitting in the front passenger seat. Defendant stopped at a gas station. The detectives parked next to the defendant, ordered Carr out of the vehicle, and placed him under arrest. In the meantime, defendant exited the vehicle and started walking towards the door of the gasoline station. One of the detectives told defendant she needed to speak with him. The defendant asked why and the detective replied that they had warrants for Carr. The defendant continued to walk away and replied, "If ya'll want to talk with him, you don't need me." The detective told defendant to stop at least three times. The defendant reached into his right front pocket and began to run down the street. The detective gave chase. During the foot chase, the officer never saw defendant remove his hand from his pocket or throw anything down. Defendant ran behind a wood line and the detective lost sight of him for about 30 seconds. The officer kept shouting for defendant to stop and lie down. Defendant came out of the woods and got down on his knees. The detective placed him under arrest for resisting, delaying and obstructing an officer. (Defendant was not arrested for operating a vehicle with no insurance and with having an expired registration because, during the foot chase, the officer was able to ascertain that the vehicle belonged to a female). However, having now obtained the defendant's name, the officer ran his license and found that his license had been revoked. When the detective searched the wooded area where she had lost sight of the defendant, she found a small bag containing marijuana. The defendant was transported to the police department and searched incident to arrest. A small amount of cocaine and marijuana was found in his pants pocket.

Defendant was indicted for possession of marijuana, possession of drug paraphernalia and unlawfully resisting, obstructing or delaying a public officer. In a separate indictment, defendant was charged with felony possession of cocaine, driving while license revoked, and for being a habitual felon. Defendant filed a motion to suppress the evidence obtained by the arresting officer on the grounds that the officer did not lawfully arrest defendant. The trial court denied defendant's motion. Defendant pled guilty to felony possession of cocaine and to being a habitual felon. The remaining charges were dismissed. Defendant appealed the denial of his motion.

The trial court concluded that the detective had a right to briefly stop defendant for the purpose of attempting to question him about his transportation of a person wanted for several felony offenses *and* based upon his operation of a vehicle with no insurance and with an expired registration plate. However, the Court of Appeals found that there was no evidence that defendant was involved in criminal activity based on his association with Carr and that the officer had no right to stop defendant because he was transporting Carr. However, the officer had a right to stop defendant based upon his operation of a vehicle with no insurance and an expired plate.

Defendant also argued that the trial court erred by concluding that the officer had probable cause to arrest him for resisting, obstructing and delaying an officer. Defendant asserted that he did not flee from the officer's lawful attempt to make an investigatory stop, but rather that the encounter was consensual. The Court of Appeals stated that flight from a lawful investigatory stop may provide probable cause to arrest an individual for violation of N.C.G.S. 14-223. The Court concluded that the officer had a right to stop defendant based upon his operation of a vehicle with no insurance and with an expired registration plate. Because the investigatory stop was legal, defendant's encounter with the officer was not consensual and defendant did not have the right to resist. Accordingly, defendant's flight from the stop provided probable cause that defendant was in violation of N.C.G.S. 14-223.

**Insufficient Evidence to Support Conviction of Resisting, Delaying or Obstructing Officer;
Officer Did Not Have Reasonable Suspicion for Investigative Stop;
Sufficient Evidence to Support Conviction of Possession of Cocaine**

State v. Sinclair, No. COA08-103 (5 August 2008).

Detective Davis was the lead detective of the Washington Police Department's drug enforcement division. Davis knew the defendant, having had between ten and twelve conversations with him. On August 6, 2006, Davis, other police officers, and one ALE agent went to the bowling alley where defendant worked because Davis had "received information about drug activity." The bowling alley was "a local hangout," and a known drug activity area. When the officers arrived at the bowling alley, Davis saw defendant sitting outside among six to ten other people. Davis and the ALE agent approached defendant, and Davis said, "...let me talk to you." Defendant stood up and said, "Oh, you want to search me again, huh?" (Davis had searched defendant on two prior occasions but defendant was never charged with any offenses as a result of these encounters). Davis replied, "Yes, sir." Defendant shoved both of his hands in his front pockets and then removed them. As Davis got closer, Defendant stated, "Nope. Got to go" and took off running across an adjacent vacant lot. All of the officers chased defendant across the lot. The lot was very unkempt with grass 18"-24" tall and lots of junk. After running 150 feet, Defendant laid down in a street and the officers took him into custody and searched him. The only items discovered during the search were a pack of cigarettes and \$170. in cash. A couple of minutes later, one of the officers approached Davis with a clear plastic bag containing a substance that appeared to be crack cocaine. Although Davis never saw defendant throw or drop anything during the chase, the officer who

retrieved the bag testified that he found it on top of the path of bent grass, that it was clean and undisturbed, and not weathered or soiled like the other items in the lot.

Defendant was indicted on charges of possession with intent to sell or deliver cocaine, resisting a public officer, and having attained the status of a habitual felon. At the close of trial, defendant made a motion to dismiss the case due to lack of evidence. The trial court denied the motion. The jury convicted defendant of possession of cocaine, resisting a public officer and having attained the status of a habitual felon. Defendant appealed.

Defendant first argued that the trial court erred in denying his motion to dismiss the charge of resisting a public officer because there was no evidence that the officer was discharging or attempting to discharge a duty of his office, and because he was under no duty to submit to a search, he did not resist, delay or obstruct the officer by running away. The Court began its analysis of this issue by addressing whether the encounter between defendant and Davis was consensual, or whether Davis was attempting to effectuate an investigatory stop. If the encounter was consensual, defendant was at liberty to disregard the police and go about his business. If, on the other hand, Davis was attempting an investigatory stop, the Court would then have to determine whether the stop was lawful. If the stop was unlawful, there would be insufficient evidence that Davis was discharging or attempting to discharge a duty of his office; if it was lawful, there would be substantial evidence that defendant resisted, delayed or obstructed the officer.

After considering the totality of the circumstances, the Court concluded that the encounter between Davis and defendant was consensual. There was no evidence that Davis made any show of force or otherwise communicated to defendant that cooperation was required. Davis merely approached defendant, asked if he could talk to him, and informed defendant that he wanted to search him. Although defendant's subsequent flight might have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying a subsequent investigatory stop, defendant's flight from a consensual encounter cannot be used as evidence that defendant was resisting, delaying or obstructing Davis in the performance of his duties. Defendant's conduct was not unlawful – without justification or excuse.

The Court went on to note that even if Davis was attempting to effectuate an investigatory stop, there would have been insufficient reasonable suspicion to justify such a seizure. The only facts articulated were that the officers "received information about drug activity", the scene of the attempted stop was a known drug activity area, and Davis had made prior arrests in the area. These facts did not give Davis reasonable suspicion that defendant was involved in criminal activity. Thus, even if Davis was attempting an investigatory stop at the time he first approached and spoke to defendant, such a stop would have been unlawful and Davis could not be considered to have been discharging or attempting to discharge a lawful duty of his office.

Next, defendant argued that the trial court erred in denying his motion to dismiss the possession charge because there was insufficient evidence that he possessed the crack cocaine. Possession can be proven by showing either actual or constructive possession. Constructive possession exists when the defendant, while not having actual possession, has the intent and capability to maintain control and dominion over the narcotics. Furthermore, if the defendant's control of the premises where the contraband is found is non-exclusive, constructive possession of the contraband may be inferred from other incriminating circumstances. Because the cocaine was not found in defendant's actual possession, the Court evaluated defendant's argument in the context of constructive possession. Incriminating circumstantial evidence of defendant's possession of the cocaine included: defendant fled upon learning that Davis wanted to search him; the bag was found on the precise route defendant took while being chased by the officers; the bag was found on top of the grass that was bent during the chase; and the bag was clean and undisturbed. The

Court held that these circumstances created a reasonable inference that the crack came from the defendant. Therefore, the trial court properly denied defendant's motion on this issue.

Resistance to Unlawful Arrest Excessive Thereby Justifying Arrest for Assault on a Law Enforcement Officer

State v. Branch, No. COA08-20 (2 December 2008).

A Fayetteville officer stopped the defendant's car because he could not read the expiration date on the temporary license plate. The plate was valid and the defendant's license and registration were in order, but the defendant seemed nervous and the area was known for drug activity, so the officer asked for consent to search the defendant's car. The defendant declined, and the officer detained him, telling him that he would need to wait for 10 minutes until a drug dog could check the vehicle. The defendant put his car in drive, and the officer reached in the car, at which point the defendant hit the accelerator to try to escape. The officer clung to the car while the defendant drove over 700 feet. The defendant eventually stopped and was arrested for assault on a government officer; a search incident to arrest turned up drugs.

Before trial, defendant moved to suppress, arguing that the officer did not have reasonable suspicion to detain him after checking his license and registration, and that he was exercising his right to resist an unlawful arrest, and that his arrest for assault on a government officer was without probable cause. The trial judge denied the motion, finding that while North Carolina protects the right to resist unlawful arrests, resistance must be with reasonable force, and concluding that the force used by the defendant was excessive, so that the arrest for assault was proper.

The Court of Appeals affirmed, noting that G.S. 15A-401(f)(1) prohibits the use of deadly force to resist even an unlawful arrest by someone known to the arrestee to be an officer.

Insufficient Evidence to Support Conviction of False Report to Law Enforcement Agency or Officer Because State Failed to Prove That False Report Was Made With a Purpose Set Out In Statute

State v. Dietze, No. COA07-1066 (6 May 2008).

Defendant and Nicholas Hernandez worked at the Duke Eye Center. Defendant accused Hernandez of sexual harassment, but the Eye Center determined the claim was unfounded. Sometime afterwards, the defendant left her position at the Eye Center. She was later charged with making harassing phone calls to employees at the center, including Mr. Hernandez. About 15 months afterwards, defendant filed a police report accusing Hernandez of misdemeanor stalking. After investigating defendant's complaint against Hernandez, the State decided that defendant's claims were baseless and dismissed the charges prior to trial. During the period of investigation, defendant called a Duke University police officer up to 32 times a day, as well as regularly calling and leaving messages for the assistant district attorney who was assigned to prosecute the case against Hernandez. Defendant likewise constantly telephoned the Durham Police Department sergeant in charge of her case. After dismissing the charges against Hernandez, the assistant district attorney charged defendant with filing a false police report.

After being convicted in district court, defendant appealed to superior court where she was found guilty by a jury. Defendant appealed.

The North Carolina Court of Appeals noted that under North Carolina law, filing a false report to the police is not, by itself, a crime. Rather, the false report is unlawful only if made “for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties.” The court held that in this case, although the State presented sufficient evidence that defendant willfully made a false report to the police that she had been stalked by Hernandez, there was no evidence that she did so “for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties.” Defendant’s conduct undoubtedly had the *effect* of interfering with the work of the police, as investigating her complaint took time and manpower away from work on actual crimes. However, there was no testimony or other evidence that she acted with the requisite malicious purpose. In fact, the court noted that the transcript of the tape-recorded conversation between defendant and the Durham police Department sergeant that was introduced at trial suggested that the defendant believed she had been stalked by Hernandez.



Disorderly Conduct by Abusive Language

Generally, offensive gestures and profanity are insufficient to rise to the level of a criminal offense because of the protections of the First Amendment. As the United States Supreme Court recognized, the First Amendment on the whole offers broad protection for speech, be it unpleasant, disputatious, or downright offensive. *Terminiello v. City of Chicago*, 337 U.S. 1, 69 S.Ct. 894 (1949).

The courts have declared that for words to amount to a criminal offense they must rise to the level of fighting words. Fighting words are defined as those that by their very utterance inflict injury or tend to incite an immediate breach of the peace. To be punishable, words must do more than bother the listener; they must be nothing less than “an invitation to exchange fisticuffs.” *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989).

When charging an individual with disorderly conduct under G.S. 140-288.4(a)(2), an officer must place the actual words in quotes because the words are an element of the offense. If the violation was a gesture, the gesture must be described and the gesture itself should present an imminent likelihood to incite a breach of the peace.

The threshold for a criminal offense becomes even higher when the words or gestures are directed at police. The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. Speech directed at officers is often provocative and challenging, but is nevertheless protected against censorship or punishment. North Carolina courts have upheld disorderly conduct directed at officers when there is an actual threat to the officer (“get your g* d* a** out of the way before I run you over”) or when the action attempts to incite others to act against the police. Criticizing an officer, calling the officer an “a***” or “son of a b*”, have been held insufficient for disorderly conduct.