No. COA24-1036 FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Carteret County

)

)

JOSE FELIX PARDO )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUE PRESENTED**

**Did the trial court err by denying the motion to suppress the warrantless search of Mr. Pardo’s bag because it was not abandoned?**

**STATEMENT OF THE CASE**

On 13 March 2023, the Carteret County Grand Jury indicted Mr. Pardo for two counts of trafficking methamphetamine, possession with intent to manufacture, sell and deliver marijuana, and manufacturing marijuana. (R pp. 3-5) On 7 March 2024, Mr. Pardo filed a motion to suppress. (R pp. 6-17) The matter came on for hearing at the 8 April 2024 Criminal Session of Carteret County Superior Court, the Honorable Clinton D. Rowe presiding.

 The trial court heard evidence and arguments regarding Mr. Pardo’s motion to suppress. The trial court denied the motion to suppress. (R pp. 36-42) Mr. Pardo pled guilty to the charged offenses as part of a plea arrangement. The arrangement being that Mr. Pardo has the right to appeal the denial of the motion to suppress. (R p. 45)

 In file number 21CRS51751, the trial court consolidated one count of trafficking methamphetamine, possession with intent to sell and deliver marijuana, and manufacturing marijuana for judgment. The trial court sentenced Mr. Pardo to 70 to 93 months imprisonment. As to the second count of trafficking methamphetamine, the trial court sentenced Mr. Pardo to a consecutive sentence of 70 to 93 months imprisonment in file number 21CRS51752. (R pp. 51-54) Mr. Pardo entered oral notice of appeal. (R pp. 55-56)

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

 Mr. Pardo appeals pursuant to N.C.G.S. §§ 7A-27(b)(4) and 15A-979(b). If this Court determines the notice of appeal was defective, Mr. Pardo asks this Court to issue its Writ of Certiorari for the reasons stated in the contemporaneously filed Petition for Writ of Certiorari.

**STATEMENT OF THE FACTS**

 On 13 July 2021, Mr. Pardo and Ms. Lawrence went to Best Buy to purchase a cell phone. (T p. 7) They arrived around 6:42 p.m. and went to the cell phone kiosk near the middle of the store. Mr. Pardo was carrying a fountain drink and a black camera bag. (State’s Exhibit 2[[1]](#footnote-1), Walks in with bag, 6:42:27; T p. 7) Mr. Pardo placed the bag in a chair and placed his drink on a table. (State’s Exhibit 2, Suspect in Mobile, 6:56:40-6:56:49) Mr. Pardo opened the bag, took out money, and closed the bag. (State’s Exhibit 2, Suspect in Mobile, 6:56:50-6:57) As Mr. Pardo was going in his bag, a Best Buy employee stood directly beside Mr. Pardo and spoke to him. (State’s Exhibit 2, Suspect in Mobile, 6:56:50-6:57:03) Around 6:57 p.m., Mr. Pardo briefly walked away from the kiosk and returned by 6:59 p.m. (State’s Exhibit 2, Suspect in Mobile, 6:57:51-6:57:55; Bag Left in Mobile, 6:59:11)[[2]](#footnote-2)

 Officers Clark and Millea arrived at Best Buy around 6:59 p.m. because an employee reported that Mr. Pardo and Ms. Lawrence were at the store and that they had shoplifted days earlier. (T pp. 5-6, 8) When Ms. Lawrence saw the police in the store, her and Mr. Pardo discussed the fact that he was carrying a gun as previously convicted felon. Ms. Lawrence did not want Mr. Pardo to get in trouble, so she took the gun from Mr. Pardo’s waistband and put it in her bag. When Ms. Lawrence walked to the front of the store to put the gun in the car, she was stopped by Officer Clark. (T pp. 43-46; State’s Exhibit 1, Officer Millea Body Cam, 2:50-3:01)

While Ms. Lawrence was with the police, Mr. Pardo remained at the cell phone kiosk while the Best Buy employee rang up his items. Mr. Pardo took $1300 from his wallet and handed it to the cashier. (State’s Exhibit 2, Bag left in Mobile, 6:59:33-7:01:26; T p. 8) While the Best Buy employee was counting the money and waiting for a counterfeit detection pen, Mr. Pardo walked away from the cell phone kiosk at 7:04 p.m. and left his bag in the chair. (State’s Exhibit 2, Bag Left in Mobile, 7:01:24-7:04:35; T pp. 8-9) The items Mr. Pardo intended to purchase were still on the counter behind the register. (State’s Exhibit 2, Bag left in Mobile, 6:59:33-7:04:42)

Mr. Pardo walked to the front of the store toward Officer Millea. Officer Millea stopped Mr. Pardo and asked him whether he previously stole from Best Buy. (State’s Exhibit 1, Officer Millea Body Cam, 7:25-7:38; T p. 9) At 7:05 p.m., Officer Millea took Mr. Pardo to the loss prevention office at the front of the store and continued to question him. (State’s Exhibit 2, Bag Left in Mobile, 7:04:29-7:05:54[[3]](#footnote-3); State’s Exhibit 1, Officer Millea Body Cam 8:09-8:32; T pp. 9, 15) Officer Millea confronted Mr. Pardo with a video of himself in Best Buy three days earlier. (T p. 9) Mr. Pardo denied stealing from the store and consented to a search. Mr. Pardo did not have any stolen property. (T pp. 9, 22) Officer Millea had Mr. Pardo in the loss prevention office for about 17 minutes. (State’s Exhibit 1, Officer Millea Body Cam, 8:33-25:14)

Officer Millea had Mr. Pardo step out of the office and Officer Millea went to the register at the front of the store speak to a Best Buy Employee about pressing charges, paying restitution, and banning Mr. Pardo from the store. (State’s Exhibit 1, Officer Millea Body Cam 25:13-26:47) The Best Buy Employee told Officer Millea they still had Mr. Pardo’s money and he did not complete his transaction. The money is visible on camera. (State’s Exhibit 1, Officer Millea Body Cam, 26:47-26:54) Officer Millea walked back toward the loss prevention office where Mr. Pardo was standing with another officer and spoke to him about paying the restitution. Officer Millea also told him he would be banned. (State’s Exhibit 1, Officer Millea Body Cam, 28:09-29:23) Officer Millea pointed to the front register and told Mr. Pardo, “go right over there to that lady and take care of that.” (State’s Exhibit 1, Officer Millea Body Cam 29:23; State’s Exhibit 1, Officer Lewis Body cam, 20:32-20:40) Mr. Pardo was also allowed to finish purchasing his cellphone. Mr. Pardo was not free to leave because Officer Millea was going to issue him a citation for misdemeanor larceny. (T pp. 17, 36)

 Officer Millea testified Mr. Pardo was not escorted when he went to the registers, and nobody was watching him. (T p. 19) Officer Lewis also testified Mr. Pardo stood at the register unsupervised for about 10 minutes. (T p. 38) However, body camera footage shows Mr. Pardo only stood at the register by himself within view of the police officers for about 3 minutes before Officer Clark was sent to stand with him. (State’s Exhibit 1, Officer Millea Body Cam, 29:24-32:53) Under Officer Millea’s instruction, Mr. Pardo walked over to the front register to pay, and he could be seen in the background of both Officer Millea and Officer Lewis’s body cameras. (State’s Exhibit 1, Officer Millea Body Cam, 29:24-30:06; State’s Exhibit 1, Officer Lewis Body Cam, 20:40-21:19) A Best Buy employee walked over to the officers and Mr. Pardo remained visible in the background of the body camera footage. (State’s Exhibit 1, Officer Millea Body Cam, 30:07-31:22) Officer Millea walked to the front register with the employee and Mr. Pardo where he once again discussed Mr. Pardo being charged and paying restitution. (State’s Exhibit 1, Officer Millea Body Cam 31:23-32:42)

 Officer Millea walked back to the other officers and told one of them to go stand with Mr. Pardo while he went to write citations. (State’s Exhibit 1, Officer Millea Body Cam, 32:52) Officer Clark walked to the front register and stood with Mr. Pardo while he completed his purchase. Officer Clark never left Mr. Pardo. (State’s Exhibit 1, Officer Millea Body cam, 32:53-33:03; State’s Exhibit 1, Officer Lewis Body Cam, 24:01-37:46; State’s Exhibit 2, Phone Purchase at Register, 7:30:51-7:39:44; State’s Exhibit 2, Suspect Bag Search and Detention, 7:43:30-7:44:39) While Mr. Pardo and Officer Clark were standing at the front register, a Best Buy employee told her Mr. Pardo and Ms. Lawrence left a bag at the kiosk. (T p. 53) Shortly thereafter, Officer Lewis joined Officer Clark and Mr. Pardo at the front of the store. Officer Clark told Officer Lewis, “They actually have another bag with them. It’s a little camera bag. I want to search it before we leave too.” (State’s Exhibit 1, Officer Lewis Body Cam, 37:40-37:45) Officer Lewis testified that after hearing Officer Clark wanted to search the bag, Mr. Pardo gave a “very wide-eyed look towards Mr. Lawrence.” (T p. 33)

 Despite Officer Lewis’s testimony that he asked Mr. Pardo if the bag was his after retrieving it, body camera footage shows Officer Lewis asked Mr. Pardo if the bag was his before it was brought to the front of the store. In response to Officer Lewis’s question, Mr. Pardo nodded his head yes. (T pp. 36-37, 40; State’s Exhibit 1, Officer Lewis Body Cam, 38:02-38:07).[[4]](#footnote-4) Ms. Lawrence also testified Mr. Pardo told the officers the bag was his prior to the search. (T p. 50)

Mr. Pardo told Officer Lewis the bag was “back there” and pointed towards the center of the store. (State’s Exhibit 1, Officer Lewis Body Cam, 38:07-38:10) A Best Buy employee handed Officer Clark the bag at 7:44 p.m. (State’s Exhibit 2, Suspect Bag Search and Detention, 7:44:39) Officer Clark placed the bag on the counter and asked Mr. Pardo if it contained anything that would poke her. Mr. Pardo responded, “no, not that I know of.” (State’s Exhibit 1, Officer Lewis Body Cam, 38:34-38:38) Officer Lewis stated, “it’s your bag. You know exactly what’s in there.” (State’s Exhibit 1, Officer Lewis Body Cam, 38:44-38:49) Officer Clark never asked for permission to search the bag. (State’s Exhibit 1, Officer Lewis Body Cam 37:40- 39:22; T p. 53)

When Officer Clark began searching the bag, Mr. Pardo once again stated the bag was his. (State’s Exhibit 1, Officer Lewis Body Cam 39:22) The bag contained vacuum sealed marijuana, vacuum sealed methamphetamine, and approximately $64,000 cash. (T p. 32; R p. 47)

Prior to the Best Buy employee telling the police about the bag, Mr. Pardo did not mention he needed to go get his bag and the police did not ask him whether he had a bag. (T pp. 23, 30-31, 37, 39) According to Officer Lewis it would have taken Mr. Pardo “a few seconds” to go get his bag and there were no cops preventing him from “going anywhere in the store.” (T pp. 38-40) However, according to Officer Millea, Mr. Pardo was not free to walk around the store. (T pp. 22-23) Officer Lewis also testified he would have looked for Mr. Pardo if he turned around and could not find him. (T p. 39)

Following the presentation of evidence, the State argued the search was lawful because Mr. Pardo abandoned the bag when he walked away from it and there is no reasonable expectation of privacy in abandoned property. (T pp. 54-57) Defense counsel argued Mr. Pardo did not abandon his bag because he continued to purchase his cellphone even after he saw the police. Once Mr. Pardo was stopped and detained by the police, he could not return to his bag. (T pp. 58-60) The State responded to defense counsel’s argument stating it did not matter that Mr. Pardo claimed the bag because it was already abandoned, and Mr. Pardo could have asked for the bag even though he was detained. (T pp. 62-63)

The trial court denied the motion to suppress and ultimately issued a written order with findings of facts and conclusions of law. (T p. 64; R pp. 36-42) The trial court concluded Mr. Pardo “relinquished his reasonable expectation of privacy in the bag,” and he “intended to abandon the camera bag containing contraband.” (R p. 42)

**STANDARD OF REVIEW**

 In reviewing the denial of a motion to suppress, this Court determines whether the findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. *State v. Heath*, 281 N.C. App. 465, 468 (2022) (citation omitted). If the trial court’s findings of fact are supported by competent evidence, they are conclusive on appeal. The trial court’s conclusions of law are subject to *de novo* review. Under *de novo* review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Id.*

**ARGUMENT**

**The trial court erred by denying the motion to suppress the warrantless search of Mr. Pardo’s bag because it was not abandoned.**

The police violated Mr. Pardo’s Fourth Amendment right to be free from unlawful searches when they searched his bag without a warrant or consent. In denying Mr. Pardo’s written motion to suppress, the trial court incorrectly concluded Mr. Pardo intended to abandon his bag even though he claimed ownership of the bag prior to and simultaneous to the warrantless search. Mr. Pardo never disclaimed ownership of the bag, nor did he discard it while fleeing from the police. Instead, Mr. Pardo simply stepped away from the kiosk where his bag was placed while he was waiting for an employee to finish processing his $1,300 transaction. Mr. Pardo intended to return to the kiosk and his bag, but the police prevented him from doing so because they stopped and seized him for 40 minutes before the illegal search occurred.

The trial court erred by denying the motion to suppress. This Court should reverse the order denying the motion to suppress and vacate the resulting judgment.

1. **Preservation**

Following the denial of the motion to suppress, Mr. Pardo properly preserved his statutory right to appeal by including it in the transcript of plea. (R p. 45) Additionally, prior to the entry of the guilty plea, the State agreed that Mr. Pardo preserved his right to appeal. (T p. 65) Therefore, Mr. Pardo’s right to appeal is preserved. *See* N.C.G.S. § 15A-979(b); *see also State v. Tew*, 326 N.C. 732, 734-735 (1990).

1. **Several of the trial court’s findings of fact are not supported by competent evidence.**
2. **Excerpt from Finding of Fact 4**

“The bag in the chair sat below the top of the desk and out of the view of the associate in the kiosk.” (R p. 37)

This sentence from Finding of Fact 4 is not supported by competent evidence. The Best Buy associate stood directly beside Mr. Pardo and spoke to him while Mr. Pardo dug through his bag in the chair. (State’s Exhibit 2, Suspect in Mobile, 6:56:50-6:57:03) The bag was not tucked under the desk. The surveillance footage shows the bag is clearly visible from behind the kiosk when the point of view is higher than the desk and the chair. The Best Buy associate was taller than the desk. (State’s Exhibit 2, Bag Left in Mobile, 7:04-7:19:29)

1. **Excerpt from Finding of Fact 12**

“Pardo was in the loss prevention office for approximately 30 minutes with Millea and Ms. Cannon-Vilchez.” (R p. 38)

This sentence from Finding of Fact 12 is not supported by competent evidence. Officer Millea’s body camera footage shows there was no one else in the loss prevention office with him and Mr. Pardo. The body camera footage also shows Officer Millea and Mr. Pardo were inside the loss prevention office for about 17 minutes. (State’s Exhibit 1, Officer Millea Body Cam, 8:33-25:14)

1. **Finding of Fact 15**

Officer Millea tells Pardo to head right over there for his purchases and Pardo walks away toward the front registers unescorted by law enforcement. Pardo is free to go about the store and complete his phone purchase. Pardo makes no attempt to go toward the kiosk where his bag is still sitting and where he had already given that clerk money for the phone purchase early [t]hat evening. To go to the register where his bag was left would have taken “mere seconds” according to Officer Lewis. Pardo instead goes to the front registers and is seen standing alone, looking back at Lawrence and the officer talking to her.

(R p. 15)

 This finding of fact is partially unsupported by the evidence and is misleading because it failed to include pertinent information from the record. Mr. Pardo was not “free to go about the store” because he was seized or detained by the police. Officer Millea pointed to the front register and explicitly instructed Mr. Pardo to “go right over there to that lady and take care of that.” (State’s Exhibit 1, Officer Millea Body Cam, 29:23). Mr. Pardo followed Officer Millea’s order and went straight to the front register. *See* *Brendlin v. California*, 551 U.S. 249, 254 (2009) (“A police officer may make a seizure by a show of authority without the use of physical force, but there is no seizure without actual submission[.]”) Officer Millea also testified Mr. Pardo was not free to go about the store and the State stipulated that Mr. Pardo was detained. (T pp. 22-23; 41) During the three minutes that Mr. Pardo stood at the register alone, Officer Millea was watching Mr. Pardo. The body camera footage suggests Officer Millea was shifting back and forth to have an unobstructed view of Mr. Pardo standing at the register while Officer Millea remained near the loss prevention office. (State’s Exhibit 1, Officer Millea Body Cam, 29:43-30:05)

The evidence further suggested Mr. Pardo was not free to walk around the store because he was ultimately accompanied by the police. Officer Millea walked over to Mr. Pardo and once again discussed paying restitution and being charged. Officer Millea then walked back to the other officers and instructed Officer Clark to go stand with Mr. Pardo. (State’s Exhibit 1, Officer Millea Body Cam 31:23-32:52) Officer Clark stood with Mr. Pardo during the duration of his transaction and for a total of 14 minutes before the camera bag was brought to the front of the store for the search. (State’s Exhibit 1, Officer Lewis Body, 24:01-37:46; State’s Exhibit 2, Phone Purchase at register, 7:30:51-7:39:44; State’s Exhibit 2, Suspect Bag Search and Detention, 7:43:30-7:44:39)

 Finally, this finding of fact is misleading and partially unsupported because it states “[Mr.] Pardo makes no attempt to go toward the kiosk where his bag is still sitting and where he had already given the clerk money for the phone purchase…” The money Mr. Pardo gave the clerk was already at the front register that he was instructed to go to. (State’s Exhibit 1, Officer Millea Body Cam, 26:47-29:23) Additionally, the cell phone kiosk was not on the way to the front register. The cell phone kiosk was in the middle of the store while the front register was a straight, parallel path from where Mr. Pardo and the officers were standing outside the loss prevention office. (State’s Exhibit 1, Officer Millea Body Cam, 29:24-30:06; State’s Exhibit 1, Officer Lewis Body cam, 20:40-21:19) The front register was to the left of the store’s entrance and the loss prevention office was to the right of the entrance. (T p. 15)

1. **Findings of Fact 20 and 21**

“Regarding the bag, during this 40-minute period, Pardo never returned to it, *never evidenced any intention to return to it*, nor did he ever mention its presence or existence to the officers.” (R p. 40) (emphasis added).

“There is no evidence nor is there any allegation by Pardo that he had forgotten his bag or *that he had any intention to retrieve the bag from the kiosk while the officers were present*.” (R p. 40) (emphasis added).

These findings of fact are unsupported by competent evidence because Mr. Pardo intended to return to his bag. Mr. Pardo placed his bag in the chair at the kiosk while he was waiting to purchase his cell phone before the police arrived at the store. After becoming aware of the police officers’ arrival, Mr. Pardo allowed Ms. Lawrence to take his gun and attempt to carry it out of the store but he did not give her his bag. Even after seeing the police, Mr. Pardo continued with his transaction by handing the Best Buy employee $1,300. Mr. Pardo stepped away from the kiosk while he was waiting for the employee to finish processing the transaction. Mr. Pardo had not even received the items he paid for as they were still on the counter behind the register. The fact that Mr. Pardo stepped away from the kiosk during the middle of the transaction demonstrated he intended to return to the kiosk and his bag. Mr. Pardo failed to return to the kiosk because he was seized by the police.

1. **Finding of Fact 22**

Pardo had the clear ability to retrieve his bag when he was instructed by Officer Millea to ‘go pay,’ but made a conscious decision not to do so. Pardo also could, at any time, have informed either store personnel or the officers about the bag, but made a conscious decision not to do so.

(R p. 40) This finding of fact is not supported by competent evidence. Mr. Pardo did not have the clear ability to retrieve his bag when he was instructed by Officer Millea to go pay. The evidence shows Mr. Pardo was seized by police because he was under explicit instructions to go to a specific cash register to complete the appropriate transactions. *See Brendlin,* 551 U.S. at 254. Officer Millea pointed to the front register and explicitly instructed Mr. Pardo to “go right over there to that lady and take care of that.” (State’s Exhibit 1, Officer Millea Body Cam, 29:23)

Moreover, the kiosk where the bag was located was not on the way to the front register. The cell phone kiosk was in the middle of the store while the front register was a straight, parallel path from where Mr. Pardo and the officers were standing outside the loss prevention office. (State’s Exhibit 1, Officer Millea Body Cam, 29:24-30:06; State’s Exhibit 1, Officer Lewis Body cam, 20:40-21:19) The front register was to the left of the store’s entrance and the loss prevention office was to the right of the entrance. (T p. 15)

1. **Finding of Fact 23**

“Pardo made no request of the store clerk at the kiosk to either ‘safekeep,’ hold or secure the bag for him before walking away from it as the officers came into the store….” (R p. 40)

The above referenced part of Finding of Fact 23 is not supported by the evidence. The surveillance video of Mr. Pardo standing at the kiosk does not have any audio. (State’s Exhibit 2, Bag Left in Mobile, 6:59:10-7:04:35) Therefore, the trial court could not determine what Mr. Pardo said to the Best Buy employee when he was standing at the register with his bag in the chair based on the video.

The store clerk did not testify and none of the officers who testified said whether or not Mr. Pardo asked a clerk to watch his bag. The evidence from the hearing only showed that Mr. Pardo did not ask any Best Buy employees to grab his bag while he was in the presence of police officers, and he never asked the police about his bag. (T pp. 18-19, 30-31)

Finally, Mr. Pardo did not walk away from the bag as the officers came into the store. The police arrived at 6:59 p.m. Mr. Pardo did not step away from the kiosk and his bag until 7:04 p.m. (State’s Exhibit 2, Bag Left in Mobile, 7:04:35)

1. **Finding of Fact 26**

The Court finds that Pardo relinquished any “reasonable expectation of privacy” in the bag based upon the foregoing. The Court finds that the following specific facts and circumstances demonstrate that Pardo’s intent to abandon the bag containing contraband [sic]:

A) The court finds that it would be unreasonable for Pardo, an indigent defendant, to simply “forget” that he left a bag containing $65,000 in cash unattended in a public place where store employees and customers had access to it;

B) The defendant knew the bag contained large amounts of contraband and left the bag, never to return to it, shortly after law enforcement arrived;

C) Shortly before abandoning the bag…

D) Pardo never returned to the bag, never evidenced any intention to return to it, nor did he ever mention its presence or existence to officers;

E) Pardo made no request of the store clerk at the kiosk to either “safekeep,” hold or secure the bag for him before walking away from it as the officers came into the store;

F) Pardo made no attempt to retrieve the bag, which he could have done on his way to pay for his items at the front register when he was free to “go pay for his phone;” and,

G) Pardo never alleged, testified to or articulated an intent to retrieve the bag prior to it being seized…

(R pp. 41-42)

 “Finding of Fact 26” is a conclusion of law and should be reviewed de novo. *See Williams v. Allen*, 383 N.C. 664, 672-673 (2022) (explaining a conclusion of law requires the exercise of judgment or application of legal principles).

The alphabetically labeled subparts of “Finding of Fact 26” are properly labeled as findings of fact and the pertinent findings are addressed below.

Findings of Fact 26 B, C, D, and G are not supported by competent evidence. These findings are not supported by competent evidence because Mr. Pardo did not abandon his bag and he intended to return to it. Mr. Pardo placed his bag in the chair at the kiosk while he was waiting to purchase his cell phone before the police arrived at the store. After becoming aware of the arrival of the police, Mr. Pardo allowed Ms. Lawrence to take his gun and attempt to carry it out of the store but he did not give her his bag. Even after seeing the police, Mr. Pardo continued with his transaction by handing the Best Buy employee $1,300. Mr. Pardo stepped away from the kiosk while he was waiting for the employee to finish processing the transaction. Mr. Pardo had not even received the items he paid for as they were still on the counter behind the register. The fact that Mr. Pardo stepped away from the kiosk during the middle of the transaction demonstrated he intended to return to the kiosk and his bag. Mr. Pardo failed to return to the kiosk because he was seized by the police.

Finding of Fact 26 E is not supported by competent evidence. There is no evidence that Mr. Pardo did not ask the “store clerk at the kiosk” to watch or hold his bag. The store clerk did not testify and none of the police officers who testified said whether or not Mr. Pardo asked a store clerk to watch his bag. The evidence from the hearing showed Mr. Pardo never asked a Best Buy employee to grab his bag while he was in the presence of the police officers, and he never asked the police about his bag. (T pp. 18-19, 30-31) Finally, the surveillance video of Mr. Pardo standing at the kiosk does not have any audio. (State’s Exhibit 2, Bag Left in Mobile, 6:59:10-7:04:35) Therefore, the trial court could not determine what Mr. Pardo said to the Best Buy employee when he was standing at the register with his bag in the chair.

Finding of Fact 26 F is not supported by competent evidence. Mr. Pardo could not have retrieved his bag from the cell phone kiosk on his way to the front register. Mr. Pardo was under explicit instructions to go to the front register to pay the restitution. (State’s Exhibit 1, Officer Millea Body Cam, 29:23) Mr. Pardo was not free to walk around the store and he was being watched. The cell phone kiosk was located in the middle of the store and was not on the way to the front register. Mr. Pardo was already at the front of the store near the loss prevention office. The loss prevention office was to the right of the Best Buy entrance while the front register was to the left of the entrance. Therefore, the front register was a straight shot from where Mr. Pardo was standing.

1. **The trial court’s conclusion that Mr. Pardo intended to abandon the camera bag and relinquished his reasonable expectation of privacy was unsupported by the remaining findings of fact.**

The Fourth Amendment protects individuals from unlawful searches where an individual has a reasonable expectation of privacy in the place or thing to be searched. U.S. Const. amend. IV; N.C. Const. art. I, § 20. An individual has a reasonable expectation of privacy under the Fourth Amendment when: (1) they have exhibited a subjective expectation of privacy; and (2) that individual’s expectation “viewed objectively, is justifiable under the circumstances.” *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation and citation omitted); *see also State v. Tarantino*, 83 N.C. App. 473, 478 (1986).

 A search that is conducted without a warrant is generally unlawful unless an exception applies. *State v. Borders*, 236 N.C. App. 149, 162 (2014). For example, when property has been abandoned at the time of the search, the Fourth Amendment’s protection does not apply. *See Abel v. United States*, 362 U.S. 217, 241 (1960) (holding search of abandoned property was lawful where “at the time of the search petitioner had vacated the room.”); *see also State v. McKinney*, 361 N.C. 53, 56-57 (2006). When a person voluntarily abandons their property, they no longer have a legitimate expectation of privacy in the property. *Borders*, 236 N.C. App. at 165. Therefore, the police can search abandoned property without a warrant or probable cause. *Id.*

 “A finding of abandonment is based not on whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned.” *United States v. Small*, 944 F.3d 490, 502 (4th Cir. 2019). In determining whether a defendant maintains a reasonable expectation of privacy in an item, a reviewing court must conduct an “objective analysis which considers the defendant’s actions and intentions.” *Id.* (internal quotations and citation omitted). The intent to abandon property “may be inferred from words spoken, acts done, and other objective facts.” *Id.* (internal quotations and citation omitted).

1. **Mr. Pardo had a reasonable expectation of privacy in his camera bag.**

In *Bond v. United States*, 529 U.S. 334 (2000) the U.S. Supreme Court held the defendant, who was a passenger on a bus, had a reasonable expectation of privacy in his luggage. The Court noted the defendant “sought to preserve privacy by using an opaque bag and placing that bag directly above his seat.” *Id.* at 338. The Court also explained that society recognizes this reasonable expectation of privacy because passengers would expect their bag could be moved “for one reason or another[,]” but passengers wouldn’t expect the bag to be felt “in an exploratory manner.” *Id.* at 339.

Similar to *Bond*, Mr. Pardo had a reasonable expectation of privacy in his black camera bag. The bag was opaque, and Mr. Pardo took the time to ensure he zipped the bag shut after going inside of it. The bag was placed beside Mr. Pardo where he could keep his eyes on it. (State’s Exhibit 2, Suspect in Mobile, 6:56:40-6:56:49; Finding of Fact 6, R p. 37) A reasonable person would not expect their bag to be opened and searched while they were standing directly beside it. Therefore, Mr. Pardo had a reasonable expectation of privacy in his black camera bag.

1. **The bag was not abandoned at the time of the warrantless search because Mr. Pardo claimed ownership of the bag prior to and simultaneous to the search.**

 This Court has held that a defendant abandons property by explicitly disclaiming ownership of the property. *See State v. Johnson*, 98 N.C. App. 290, 296 (1990). In *Johnson* SBI officers boarded a Greyhound bus that was traveling from Florida to New York. *Id.* at 291. The officers questioned passengers about where they were going and which bags they owned. *Id.* One bag was unclaimed, and the officers asked all the passengers if it was their bag. *Id.* at 292. None of the passengers claimed the bag. Upon searching the bag, the police found cocaine and a traffic citation issued to the defendant. *Id.* at 292-293. After removing the defendant from the bus, the officers asked him if the bag belonged to him. The defendant denied owning the bag. *Id.* at 292.

 In addressing the trial court’s conclusion that the defendant abandoned the luggage, this Court rejected the defendant’s argument that a “‘disclaimer of ownership does not necessarily constitute an abandonment….’” *Id.* at 296 (*citing State v. Cooke*, 54 N.C. App. 33 (1981)). This Court noted, the defendant denied ownership of the luggage during lawful police activity. *Id.* at 296. Therefore, the defendant abandoned the luggage and lost “any legitimate expectation of privacy he may have had….” *Id.* at 296. This Court affirmed the denial of the defendant’s motion to suppress. *Id.* at 297.

 The present case is distinguishable from *Johnson*. Unlike *Johnson*, where the defendant disclaimed ownership of the luggage twice, Mr. Pardo claimed ownership of the bag at least two times. Prior to the search and before the bag was even retrieved, Mr. Pardo claimed ownership of the bag when Officer Lewis asked him if the bag was his by nodding his head yes. (State’s Exhibit 1, Officer Lewis Body Cam, 38:02-38:07; T pp. 50-51) The police acknowledged the bag was Mr. Pardo’s prior to the search. (State’s Exhibit 1, Officer Lewis Body Cam, 38:44-38:49) When Officer Clark began searching the bag, Mr. Pardo once again stated the bag was his. Mr. Pardo never disclaimed ownership of the bag. (State’s Exhibit 1, Officer Lewis Body Cam 39:22) Therefore, unlike *Johnson*, Mr. Pardo retained a reasonable expectation of privacy at the time of the search.

1. **Mr. Pardo did not intend to abandon the bag when he walked away from it during his $1,300 transaction. Mr. Pardo intended to return to the kiosk and the bag.**

 Items that are voluntarily discarded in public are deemed abandoned and not subject to Fourth Amendment protections. *See State v. Cromartie*, 55 N.C. App. 221, 222-223 (1981) (holding defendant abandoned aspirin box containing heroin when he threw it on the ground after being stopped by police). However, even if an individual “temporarily abandons property, an intent to return will give rise to a reasonable expectation of privacy.” *McKinney*, 361 N.C. at 57.

In *United* *States v. Mulder*, 808 F.2d 1346 (9th Cir. 1987) the Ninth Circuit Court of Appeals addressed whether a defendant had an intent to return to his property and therefore maintained a reasonable expectation of privacy. In *Mulder*, the defendant checked into a hotel for one night and intended to check out on November 25th. *Id.* at 1347. When the hotel staff went to the room on the 25th, they discovered the defendant’s personal items including a locked brown bag. On the 26th, hotel staff removed the items from the room and opened the locked brown bag. The bag contained plastic bags of tablets, so hotel security called the police. On November 27th the DEA collected the bag. The same day, the defendant returned to the hotel looking for his bag. The defendant also contacted the police and arranged a meeting to pick up his bag on December 2nd. *Id.* Before the defendant could pick up the bag, the police tested the tablets and learned they were methaqualone. *Id.* at 1348.

 The Ninth Circuit Court of Appeals explained the defendant did not abandon his bag by leaving it in the hotel because: (1) he returned to the hotel less than 48 hours after he was supposed to check out; (2) the defendant’s credit card was billed for an additional day; (3) and the defendant called the police and asked for his bag before the “search” or chemical tests were conducted. *Id.* Therefore, the Court reversed the denial of the motion to suppress. *Id.* at 1349.

 In contrast to *Mulder*, the Fourth Circuit Court of Appeals held a defendant abandoned his apartment and had no intention of returning when the defendant: (1) disclaimed ownership of the apartment by referring to himself as the former renter; and (2) transferred ownership of his personal items left in the apartment. *United States v. Stevenson*, 396 F.3d 538, 541-548 (4th Cir. 2005).

 Unlike *Cromartie* and *Stevenson*, Mr. Pardo did not discard his bag while fleeing from the police, nor did Mr. Pardo evidence an intent not to return to his bag by disclaiming ownership. Mr. Pardo’s bag was placed in the chair at the kiosk before the police arrived at the store. Mr. Pardo had already stepped away from the bag once and returned to it during his transaction. After becoming aware that the police arrived at the store, Mr. Pardo did not even give Ms. Lawrence his bag to take to the car when she was attempting to take his gun out of the store. Even after seeing the police, Mr. Pardo continued with his transaction by handing the Best Buy employee $1,300. While Mr. Pardo was waiting for the employee to finish processing his transaction, Mr. Pardo stepped away from the kiosk and his bag. Mr. Pardo had not even received the items he paid for at that point. The fact that Mr. Pardo stepped away during the middle of a transaction suggests he intended to return to the kiosk and his bag.

Moreover, following the trial court’s logic in Finding of Fact 25[[5]](#footnote-5), Mr. Pardo completed an affidavit of indigency under oath; therefore, it is unlikely that Mr. Pardo did not intend to return to the kiosk to complete his $1,300 transaction and to collect his bag containing $65,000.

 Finally, similar to *Mulder*, Mr. Pardo told the police the bag was his prior to the search. Mr. Pardo also claimed ownership of the bag simultaneous to the search. As in *Mulder*, Mr. Pardo intended to return to the kiosk and the bag. Therefore, Mr. Pardo maintained his expectation of privacy and the bag was not abandoned at the time of the search. The trial court erred by concluding Mr. Pardo intended to abandon his bag.

**4. Mr. Pardo’s prolonged separation from the bag did not amount to a voluntary abandonment because it was the result of the police officers’ actions.**

 While not directly on point, the holding from the following case provides useful guidance on this issue. This Court has recognized that when property is disclaimed or discarded as a result of illegal police activity, it is not voluntarily abandoned. Therefore, an individual retains a reasonable expectation of privacy in the property. *See State v. Cooke*, 54 N.C. App. 33 (1981); *see also State v. Joe*, 222 N.C. App. 206, 212-213 (2012) (holding defendant did not voluntarily abandon contraband when it was the result of an illegal arrest).

 In *Cooke*, the defendant gave his suitcase to a friend he was traveling with for “safekeeping” while he went somewhere else in the airport. *Cooke*, 54 N.C. App. at 45. The police unlawfully stopped the friend, and the friend stated the suitcase belonged to the defendant. The defendant’s name was on the suitcase and the friend did not give the police permission to search the suitcase. The defendant returned to his friend and the suitcase while the police were in the process of searching the friend’s suitcase. After being questioned by the police, the defendant denied owning the suitcase with his name on it. *Id.* When the defendant and the friend asked to go to the bathroom, the police took both the friend and defendant’s suitcases and searched them. *Id.* at 38-39.

 On appeal, this Court rejected the State’s argument that the defendant’s disclaimer of ownership amounted to a voluntary abandonment. *Id.* at 40-44. This Court noted the defendant’s disclaimer of ownership was a “direct result” of the police’s illegal stop and seizure and “*threat that an illegal search was about to take place*.” *Id.* at 44 (emphasis in original). This Court noted, “[d]efendants who disclaim ownership of property or reflexively discard property in their possession when alarmed by or suspicious of illegal police activity do so without necessarily abandoning all expectations of privacy in the property.” *Id.* Therefore, this Court concluded the defendant did not voluntarily abandon his suitcase and he retained his reasonable expectation of privacy. *Id.* at 45.

 Following the principles gleaned from *Cooke,* Mr. Pardo did not voluntarily abandon his bag because it was the police who prevented Mr. Pardo from returning to the kiosk. Mr. Pardo’s failure to return to his bag was a direct result of being seized by the police. Mr. Pardo was not free to leave the store nor was he free to walk around the store because Officer Millea was going to issue him a citation and ban him from Best Buy. Officer Millea explicitly instructed Mr. Pardo to go to a specific cash register when he pointed and said, “go right over there to that lady and take care of that.” (State’s Exhibit 1, Officer Millea Body Cam 29:23; State’s Exhibit 1, Officer Lewis Body Cam, 20:32-20:40) Mr. Pardo was thereby seized by Officer Millea because Mr. Pardo submitted to the officer’s authority when he walked over to front register as directed. *See California v. Hodari D.*, 499 U.S. 621, 626-629 (1991) (holding a seizure under the 4th Amendment includes a submission to a show of authority); *see also Brendlin*, 551 U.S. at 254.

 Furthermore, Officer Millea sent Officer Clark to stand with Mr. Pardo at the front register. A reasonable person in Mr. Pardo’s situation would not have felt free to leave the front register and walk around the store because he was under explicit instruction to go to the front register, and he was under the direct supervision of a police officer. *See generally State v. Isenhour*, 194 N.C. App. 539, 543-544 (2008)(explaining a person is seized “if in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.”) Thus, similar to *Cooke* and *Joe*, Mr. Pardo’s failure to return to his bag was not a voluntary abandonment because it was a direct result of police activity. In fact, Mr. Pardo likely would have returned to the kiosk to get his bag after he completed his transaction at the front register, but the bag was brought to the front of the store.

 Because Mr. Pardo did not voluntarily abandon his bag, he maintained a reasonable expectation of privacy. Mr. Pardo’s Fourth Amendment right was violated when the police searched his bag without a warrant.

**CONCLUSION**

The trial court erred by denying Mr. Pardo’s motion to suppress. Mr. Pardo respectfully requests this Court reverse the order denying the motion to suppress and vacate the resulting judgment.

 Respectfully submitted, this the 3rd day of February, 2025.

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**CERTIFICATE OF COMPLIANCE WITH RULE 28(J)**

Undersigned counsel hereby certifies that this brief complies with North Carolina Rule of Appellate Procedure 28(j), in that it is printed in 13-point Century Schoolbook font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare this brief.

 This the 3rd day of February, 2025.

 By Electronic Submission:

 Candace Washington

 Assistant Appellate Defender

**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of Defendant-Appellant’s Brief has been duly served by sending it electronically to Mr. John A. Payne, Deputy Assistant Attorney General at jpayne@ncdoj.gov.

 This the 3rd day of February, 2025.

 By Electronic Submission:

Candace Washington

Assistant Appellate Defender

1. State’s Exhibit 2 contains multiple video files. Citations to State’s Exhibit 2 will include the file name and time stamp. [↑](#footnote-ref-1)
2. There is no video footage showing what happened between 6:57:55 and 6:59:10. [↑](#footnote-ref-2)
3. Mr. Pardo and the officers are seen on the right-hand side of the screen. [↑](#footnote-ref-3)
4. The State also stipulated that Mr. Pardo said the bag was his prior to the search. (T p. 51) [↑](#footnote-ref-4)
5. “Pardo’s Affidavit of Indigency (State’s Exhibit 3), signed under oath showed that Pardo had no more than $1,500.00 in assets to his name, yet the bag contained $65,000 in cash. The court finds that it would be unreasonable for Pardo to simply “forget” that amount of cash and leave it unattended.” (R p. 41). [↑](#footnote-ref-5)