NO. COA02-709

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 01 CRS 055384

GARY D. INGLE

Appeal by defendant from judgment dated 14 November 2001 by Judge Loto G. Caviness in Buncombe County Superior Court. Heard in the Court of Appeals 30 December 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

James N. Freeman, Jr. for defendant appellant.

GREENE, Judge.

Gary D. Ingle (Defendant) appeals from a judgment dated 14 November 2001 entered consistent with a jury verdict finding him guilty of driving while impaired and driving while license revoked and from his plea of guilty to habitual impaired driver status.

The evidence presented at trial tends to show at approximately 2:20 a.m. on 5 May 2001, Officer Thomas Whitehead (Officer Whitehead) and other officers of the Asheville Police Department were conducting a driver's license checkpoint when a vehicle operated by Defendant approached and stopped. Officer Whitehead

asked Defendant to produce his driver's license. Defendant responded he did not have it. Officer Whitehead directed Defendant to park his vehicle in a nearby parking lot where further investigation could be conducted. The officers ran a license check and learned Defendant's license had been revoked. While talking to Defendant, Officer Whitehead detected an odor of alcohol on Defendant's breath. Also, Defendant's eyes were bloodshot and his speech was somewhat slurred. Defendant admitted to Officer Whitehead he had been drinking. Defendant performed poorly on field sobriety tests conducted by Officer Whitehead. Having formed the opinion Defendant was impaired, Officer Whitehead transported Defendant to the detention center, where Defendant was administered the Intoxilyzer 5000 test by Officer James Wright (Officer Wright). No evidence indicates whether Officer Wright possessed a permit to operate the Intoxilyzer 5000 machine. The test revealed Defendant had an alcohol concentration of 0.12.

Prior to trial, Defendant filed a motion to suppress evidence obtained from the license check, arguing the license checkpoint "did not comport with minimal constitutional requirements." At a pre-trial hearing, Officer Whitehead testified he obtained permission from his supervisor to conduct the license checkpoint and the officers conducting the checkpoint stopped every approaching car from both directions on the road during the time the checkpoint was conducted. The trial court then denied the motion to suppress.

At trial, Defendant objected to the admission of the

Intoxilyzer 5000 test, arguing the State failed to lay a proper foundation. The trial court overruled the objection and allowed the test to be introduced into evidence. Defendant did not present any evidence, and the jury subsequently returned its guilty verdict.

The issues are whether: (I) the license checkpoint stopping all oncoming traffic in both directions was constitutionally permissible and (II) the State failed to lay a proper foundation for the admission of the Intoxilyzer 5000 test results in failing to establish Officer Wright possessed a Department of Health and Human Services permit to operate the machine.

I

Defendant first contends the trial court erred by denying his motion to suppress on the ground he was subjected to an unreasonable search and seizure in violation of his state and federal constitutional rights. He argues the driver's license checkpoint constituted an unreasonable search and seizure because no guidelines were followed by the Asheville Police Department in conducting the checkpoint. He also argues the stop did not comply with the guidelines of N.C. Gen. Stat. § 20-16.3A. Finally, he argues the trial court erred by failing to make findings of fact and conclusions of law at the end of the suppression hearing.

A license checkpoint, stopping vehicles without suspicion of any wrongdoing, is constitutionally permissible if all oncoming traffic is systematically stopped. *See State v. VanCamp*, 150 N.C.

App. 347, 351, 562 S.E.2d 921, 925 (2002). Further, there is no requirement the State introduce written guidelines for conducting license checkpoints. *See State v. Tarlton*, 146 N.C. App. 417, 422, 553 S.E.2d 50, 54 (2001). License checkpoints not set up to be driving while impaired checkpoints are not governed by section 20-16.3A of the North Carolina General Statutes. *Id.*; N.C.G.S. § 20-16.3A (2001). The making of findings of fact and conclusions of law is not required when there is no material conflict in the evidence presented at the suppression hearing, *State v. Riddick*, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976), and the necessary findings are implied from the admission of the evidence, *State v. Whitley*, 288 N.C. 106, 110, 215 S.E.2d 568, 571 (1975).

In this case, there was no material conflict in the evidence. The only conflict concerned whether or not Officer Whitehead had worn a vest. Although the trial court did not sign a written order, it did make findings for the record at the conclusion of the hearing. The trial court found Officer Whitehead had permission from his supervisor to conduct the license checkpoint and the police vehicles had their lights illuminated. The trial court also found the checkpoint area was marked and every vehicle in both directions was stopped. Thus, the license check was proper and Defendant's motion to suppress was properly denied.

II

Defendant next contends the trial court erred by admitting the Intoxilyzer 5000 results over Defendant's objections without laying a foundation establishing Officer Wright had a valid permit issued

by the Department of Health and Human Services to conduct the test.

Before the results of a chemical analysis of breath may be admitted into evidence, it must be shown the analysis was "performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Health and Human Services for that type of chemical analysis." N.C.G.S. § 20-139.1(b) (2001). The possession of a current permit may be shown in one of three ways: (1) by stipulation of the parties; (2) by offering the permit into evidence; or (3) by presenting any other evidence which shows the person administering the test held a valid permit issued by the authorized agency. *State v. Mullis*, 38 N.C. App. 40, 41, 247 S.E.2d 265, 266 (1978). Testimony one has graduated from a school providing training in the operation of a chemical analysis machine or has a license to administer the test is insufficient. *State v. Caviness*, 7 N.C. App. 541, 544-45, 173 S.E.2d 12, 14-15 (1970). Similarly, testimony one has a certificate to operate a Breathalyzer instrument is insufficient. *State v. Franks*, 87 N.C. App. 265, 268, 360 S.E.2d 473, 475 (1987). The admission of the results without a showing the operator possessed a valid permit issued by the authorized agency is prejudicial error unless the jury verdict shows that it is based upon appreciable impairment of driving rather than the test result. *State v. Roach*, 145 N.C. App. 159, 163-64, 548 S.E.2d 841, 845 (2001).

The State argues a foundation was laid in the form of the test results sheet, which showed Officer Wright had a permit number of

133550. However, this form does not identify the issuer of the permit or when it was issued. It does not show Officer Wright possessed a valid permit issued by the Department of Health and Human Services as required by N.C. Gen. Stat. § 20-139.1(b). As in *Roach*, the verdict does not specify whether the jury's finding of guilt was based upon the test results or evidence of appreciable impairment. Based upon the foregoing authorities, we hold the trial court committed prejudicial error by admitting the Intoxilyzer 5000 test results.

Accordingly, Defendant is entitled to a new trial on the charges of driving while impaired and habitual driving while impaired.

No error – Driving while license revoked.

New trial – Driving while impaired / Habitual driving while impaired.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).