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NO. COA11-120
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Anson County
No. 10 CRS 51070

ENRIQUE SANTOS MENDEZ,
Defendant.

Appeal by defendant from order entered 22 October 2010 by Judge Tanya T. Wallace in Anson County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General, Amar Majmundar, for the State.

Unti & Lumsden LLP, by Sharon L. Smith, for defendant-appellant.

Tin, Fulton, Walker & Owen, PLLC, by W. Rob Heroy, for defendant-appellant, amicus curiae.

HUNTER, Robert C., Judge.

Enrique Santos Mendez ("defendant") appeals from the trial court's denial of his motion to suppress evidence seized during a search of his vehicle. After denial of his motion, defendant entered a guilty plea to one count of trafficking in marijuana,

preserving his right to appeal under *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). After careful review of the record, we affirm the trial court's denial of the motion to suppress.

Background

The evidence presented at a hearing on defendant's motion to suppress tended to establish the following. In the late afternoon of 5 June 2010, defendant was driving a white "box truck" east on U.S. Highway 74 through Wadesboro in Anson County. Wadesboro Police Officer Scott Gulledge and Anson County Sherriff's Deputy Joshua Davidson were stationed on the side of the highway "running stationary front radar" when defendant drove by. Defendant was driving in the left lane, the passing lane, at a speed of 54 miles per hour ("mph") in a 55 mph zone. As defendant passed by, Officer Gulledge noticed that defendant and his passenger were both looking straight ahead and were wearing their seatbelts.

Officer Gulledge and Deputy Davidson decided to follow defendant and pulled onto the highway, behind defendant. At this point, Officer Gulledge noticed defendant's brake lights illuminate and his speed drop to 25 mph while still in the passing lane and in the 55 mph zone.

Suspecting that defendant was impaired, Officer Gulledge continued to follow defendant to observe his driving. The

officer followed defendant for approximately 4.5 miles over the next 18 minutes. Defendant pulled into the right-hand lane, increased his speed to 30 mph, and held his speed at 30 mph while in the 55 mph zone. Officer Gulledge pulled alongside defendant and noticed the driver's hands were at the "ten-two" position on the steering wheel; he was wearing his seatbelt and was looking straight ahead, but did not appear relaxed. The officer also noticed an air freshener on the review mirror and that the passenger was also wearing his seatbelt. Officer Gulledge moved behind defendant and continued to follow as he ran defendant's license plate.

Eventually, the vehicles entered a 35 mph zone. Defendant began to pull away, and Officer Gulledge testified he fell back behind defendant——a quarter of a mile or less——while Deputy Davidson pulled alongside defendant. Officer Gulledge then clocked defendant via radar driving 10 mph over the speed limit and radioed Deputy Davidson that he could stop defendant for speeding.

Once stopped, Officer Gulledge approached defendant and explained the reason for the stop. At this point, the officer noticed additional air fresheners in the passenger compartment, as well as trash and beverage cans on the floor. Officer Gulledge also noticed the back wall of the passenger compartment appeared to have been modified such that a door to the cargo

area was missing, a door that he was accustomed to seeing on vehicles similar to defendant's box truck. To the officer, the modification did not appear to have been completed by the manufacturer.

Officer Gulledge asked defendant to step out of the vehicle and walk to the officer's vehicle parked behind defendant's truck. Upon watching defendant walk, Officer Gulledge concluded defendant was not impaired, but then questioned defendant about where he was driving and why.

Defendant stated he owned a lawn care business and he was driving from Huntersville to Lumberton to mow one yard. Thinking the answer was unusual, Officer Gulledge asked a second time and defendant replied that he was driving from Huntersville to Lumberton to "'look at a yard.'" Officer Gulledge testified that, "'At that time it raised my suspicion that there may be some type of criminal activity.'" The officer also noticed defendant was wearing a Santa Muerte charm on a necklace—a charm other police officers had told him was worn by individuals involved in criminal activity.

Officer Leviner of the Wadesboro Police department arrived on the scene and began to question defendant's passenger. Defendant's passenger told the officer that they were driving from Indian Trail, North Carolina to "the beach." As defendant and his passenger provided different stories, Officer Gulledge

asked defendant for permission to search the vehicle. Officer Gulledge testified that, as a matter of routine, he asked for defendant's consent twice. Defendant consented each time and opened the door to the cargo area upon the officer's request. Officer Gulledge testified that approximately 15 minutes had passed from stopping defendant's vehicle to the time defendant opened the cargo door.

As defendant opened the door, Officer Gulledge noticed a strong odor of marijuana. Inside the cargo area, hidden in a shop vac, Officer Leviner found a clear bag of what appeared to be marijuana. Concluding that the small bag was insufficient to produce the strong odor of marijuana, Officer Gulledge radioed for a drug-sniffing dog to be brought to the scene. The dog signaled that there were drugs behind the front wall of the cargo area, which appeared to the officers to have been modified. Further investigation revealed a compartment behind the wall, in which more marijuana was hidden. In total, the police seized 200 pounds of marijuana from defendant's vehicle.

Defendant was indicted on two counts of felony trafficking in marijuana and one count of felony maintaining a vehicle for keeping and selling a controlled substance. Defendant filed a motion to suppress, which was heard in the 2 September 2010 Criminal Session of the Anson County Superior Court. The trial court denied defendant's motion. Defendant then entered an

Alford guilty plea to one count of trafficking in marijuana, preserving his right to appeal the denial of his motion to suppress. Defendant was sentenced to a minimum of 25 months and a maximum of 30 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

Defendant argues he is entitled to a new trial based on the trial court's error in denying his motion to suppress evidence seized during an unconstitutional search of his vehicle. Specifically, defendant argues the police officers did not have reasonable suspicion to justify stopping his vehicle. Defendant further argues that once he was stopped the police detained him for an unreasonable length of time without reasonable suspicion that criminal activity was afoot. Defendant also contends the traffic stop was motivated solely by his race, violating his constitutional right to equal protection under the law. Lastly, defendant argues he did not intelligently and knowingly consent to the search of his vehicle due to his limited understanding of the English language.

In our review of the trial court's order, we are mindful that "[a]n appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any

conflicts in the evidence." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994). Our review is limited to determining if competent evidence supports the trial court's findings of facts and whether those findings support its conclusions of law. *Id.* The trial court's conclusions of law, however, are subject to *de novo* review. *State v. Barnhill*, 166 N.C. App. 228, 230, 601 S.E.2d 215, 217 (2004).

A. Admissibility of the Radar Instrument Readings

Initially, defendant argues that trial court erred in admitting into evidence the testimony that defendant was speeding based on the readings from Officer Gulledge's radar instrument. Defendant contends the State failed to establish a proper foundation for the evidence in accordance with the requirements of N.C. Gen. Stat. § 8-50.2 (2009). Because defendant did not object to this evidence at trial, the issue was not preserved for appeal, and defendant's argument is dismissed. N.C.R. App. P. 10(a)(1) (2011).

B. Racial Discrimination

Defendant and *amicus curiae* argue the trial court erred in denying defendant's motion to suppress because the police violated defendant's right to equal protection under the law by stopping defendant based on his race. We disagree.

The Equal Protection Clause of the Fourteenth Amendment of our federal constitution "prohibits selective enforcement of the

law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 98 (1996). Our state constitution, in Article I, section 19, also mandates equal protection under the law for all persons. *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). Accordingly, our Supreme Court has expressly affirmed that discriminatory application of the law will not be tolerated by our courts. *State v. Ivey*, 360 N.C. 562, 564, 633 S.E.2d 459, 461 (2006), *abrogated by State v. Styles*, 362 N.C. 412, 415-16 n.1, 665 S.E.2d 438, 440 n.1 (2008) (holding that reasonable suspicion is necessary to justify a traffic stop and disavowing any interpretation of *Ivey* that would imply probable cause was required).

Defendant argues the circumstances leading to the traffic stop demonstrate selective enforcement of the law based on defendant's race. Specifically, defendant emphasizes there was no evidence that defendant had violated any traffic laws at the time Officer Gulledge decided to follow defendant. The officer verified that defendant's license and registration were valid, and yet Officer Gulledge followed defendant for more than four miles before executing a traffic stop.

Defendant points to Officer Gulledge's testimony that while defendant was driving 54 mph in the passing lane of a 55 mph speed limit zone, "[n]ormally vehicles travel in the passing

lane at 60 or higher." From this testimony, defendant concludes that speeding is routinely tolerated in that area, and his stop was a pretext for investigating other criminal activity because of his race.

Additionally, defendant argues Officer Gulledge has a practice of targeting Hispanic drivers who are not committing any traffic violations. For support, defendant points to the citation produced by Officer Gulledge, which listed defendant and his passenger, both Hispanic, as being Asian. The officer was also questioned as to why he listed another Hispanic male as being "white" on his citation when he was stopped by Officer Gulledge three days after stopping defendant. Officer Gulledge responded that because he stopped many individuals, he did not remember the specifics of that incident. But, he explained, errors sometimes occur because the race of the person being cited is automatically entered on the citation from data in the police computer system.

"In order for a selective enforcement claim to prevail, the defendant must show the prosecutorial system was motivated by a discriminatory purpose and had a discriminatory effect." *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not

prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465, 134 L. Ed. 2d 687, 699 (1996).

We conclude the evidence in the record before this Court is insufficient to support defendant's claim of selective enforcement of the law based on race. Rather, competent evidence supports the trial court's findings that when the police began to follow defendant he immediately applied his brakes and slowed to 25 mph in a 55 mph zone, raising the officer's suspicion of impaired driving, and that defendant was ultimately stopped for speeding. Defendant's argument is overruled.

C. Duration of Defendant's Stop

Defendant next argues the trial court erred in concluding that the length of defendant's detention was reasonable under the circumstances. We disagree.

As this Court has previously stated, when a police officer detains an individual on the suspicion of criminal activity, generally, "the scope of the detention must be carefully tailored to its underlying justification." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998) (citation and quotation marks omitted). Additionally, "[o]nce the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *Id.*

In the present case, the evidence tended to show defendant was initially stopped for speeding and suspicion of impaired driving. Officer Gulledge testified, however, that when he observed defendant exit his vehicle and walk a short distance he concluded defendant was not intoxicated. Once the officer's suspicion of impairment was removed, defendant contends, the only reason Officer Gulledge had to further detain defendant was to issue a speeding citation. However, instead of immediately issuing the citation, the officer began asking defendant questions about where he was driving and for what purpose. This additional questioning, defendant argues, was without justification as the officer did not have reasonable suspicion of further criminal activity.

Defendant cites this Court's decision in *State v. Myles* for support of his argument. 188 N.C. App. 42, 654 S.E.2d 752, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008). In *Myles*, the officer observed the defendant's car weaving in its lane and the driver looking into the rearview and side mirrors, raising the officer's suspicion that the driver was impaired. 188 N.C. App. at 43, 45, 654 S.E.2d at 753, 755.

After stopping the car, the officer found no evidence of impairment and the driver's license proved to be valid. *Id.* at 45, 654 S.E.2d at 755. At that point, the officer "considered the traffic stop 'completed' because he had 'completed all [his]

enforcement action of the traffic stop.'" *Id.* Therefore, the *Myles* Court concluded the officer had to have either "consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' *before* he questioned [the] defendant." *Id.* (citation omitted). As the officer did not learn any additional information as grounds for reasonable suspicion during his *lawful* detention of the defendant, the Court concluded the officer unreasonably detained the defendant. *Id.* at 51, 654 S.E.2d at 758. Because the extended detention was unconstitutional, the defendant's subsequent consent to the search of his vehicle was involuntary. *Id.*

The present case is distinguishable from *Myles*. In arguing that the officer had no basis for continuing to question defendant after he determined defendant was not impaired, defendant fails to address Officer Gulledge's testimony that he observed the altered back wall of the passenger compartment, numerous air fresheners, and defendant's nervous behavior before he asked defendant to exit the truck. Therefore, before excluding the possibility of impairment, Officer Gulledge had grounds for reasonable suspicion that defendant was engaged in some criminal activity other than speeding and driving while impaired. Thus, the trial court did not err in concluding defendant's detention was constitutional and defendant's argument is overruled.

D. Consent to Search Defendant's Vehicle

Defendant next argues the search of his vehicle was unconstitutional because he was unable to intelligently and knowingly consent to the search due to his limited understanding of the English language. We disagree.

"'Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress, or fraud, consented to the search.'" *State v. Medina*, __ N.C. App. __, __, 697 S.E.2d 401, 404, *rev. denied*, __ N.C. __, 701 S.E.2d 250 (2010) (citation omitted). Whether consent was given voluntarily is determined under the totality of the circumstances. *Id.* As such, even nonverbal conduct may suffice as communicating consent to a search. *State v. Graham*, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002) (concluding the defendant voluntarily consented to a search of his person by his actions of standing and raising his hands coupled with a gesture the officer understood to indicate consent). Finally, that a defendant knew he could decline to consent to the search does not have to be established to determine the consent was voluntary. *Medina*, __ N.C. App. at __, 697 S.E.2d at 404 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 232-34, 36 L. Ed. 2d 854, 866-67 (1973) (rejecting the argument that knowledge of the defendant's right to refuse consent must be established to determine the consent was

voluntary, and stating the absence of coercion is of paramount concern)).

Although defendant argues he is a native Spanish speaker and has a limited understanding of English, competent evidence supports the trial court's conclusion that defendant freely and voluntarily consented to the search of his vehicle. Officer Gulledge's testimony established that defendant answered his questions in English, responding in complete sentences. Defendant did not appear to have any problem understanding the officer and did not ask the officer to repeat his questions. Deputy Davidson and Officer Leviner provided similar testimony. Officer Leviner testified that while defendant's passenger demonstrated trouble understanding English, defendant appeared to understand their conversation and spoke in grammatically correct English. Additionally, Officer Gulledge asked defendant twice for consent to search the vehicle, and defendant consented twice. When the officer asked, "Would you raise the back door for me?", defendant opened the door to the cargo area without protest.

We conclude the trial court did not err in determining defendant voluntarily consented to the search of his vehicle. Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude the trial court did not err in denying defendant's motion to suppress. The trial court's order is affirmed.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).