

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-122
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v.

Richmond County
No. 06 CRS 4202

CHARLES VINCENT HAYES

Appeal by defendant from order entered 12 August 2008 by Judge John L. Holshouser, Jr. denying defendant's motion to suppress, and judgment entered 25 August 2010 by Judge Tanya T. Wallace following vacation of the original judgment pursuant to a motion for appropriate relief in Richmond County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to file an affidavit with his motion to suppress he has waived his right to seek suppression of the evidence obtained as a result of the stop of his vehicle.

Assuming *arguendo* that defendant had properly filed his motion to suppress, the trial court did not err in denying defendant's motion to suppress because his traffic violation gave Lieutenant Burns reasonable suspicion for the stop of defendant's vehicle.

I. Factual and Procedural History

On 14 September 2006, Mike Burns, a Lieutenant with the Richmond County Sheriff's Office (Lieutenant Burns), was facing west monitoring traffic on U.S. Highway 74 at the Pee Dee River Bridge. At about 4:00 p.m. Lieutenant Burns saw a black Ford Taurus cross the bridge heading east driving slightly below the posted speed limit. The driver of the Taurus, later identified as Charles Vincent Hayes (defendant), was driving with his hands at ten and two positions on the steering wheel. When defendant made eye contact with Lieutenant Burns he quickly averted his eyes. Lieutenant Burns pulled onto U.S. Highway 74, headed east, and followed defendant, without activating his blue lights or siren. Lieutenant Burns ran the license plate on the Taurus through his computer and determined that it was a rental car. Defendant proceeded in the right lane for eastbound traffic, and Lieutenant Burns in the left lane. At the last minute defendant made an abrupt right turn onto Exit 308, crossing the white divider markers at the exit. There are no service stations

located on this exit, and it is predominantly used to access a rock quarry. Lieutenant Burns followed defendant, exiting U.S. Highway 74. Lieutenant Burns noticed defendant looking at him in his rearview and side mirrors when they stopped at a stop sign at the end of the exit ramp. As defendant turned left he noticed that a portion of the covering over defendant's right taillight was broken and missing. Lieutenant Burns activated his blue lights and siren, and pulled defendant over to the shoulder of the roadway. When asked why he took Exit 308, defendant indicated he was going to the Tobacco Warehouse located on the other end of the road. This stop led to the discovery of cocaine in defendant's vehicle.

On 6 November 2006, defendant was indicted for trafficking cocaine by transportation. On 7 March 2008, defendant filed a motion to suppress the evidence that resulted from the traffic stop. Defendant's motion to suppress was denied by Judge Holshouser in open court on 12 August 2008. Following the denial of his motion to suppress, defendant entered an *Alford* plea, and was sentenced on 14 August 2008 to an active prison term of 175 to 219 months.

Defendant appealed to this Court on 28 August 2008.

Defendant failed to preserve his right to appeal the denial of his motion to suppress when he entered his *Alford* plea. Defendant subsequently petitioned this Court to issue a writ of *certiorari* to review the denial of his motion to suppress. In an opinion filed 4 August 2009, this Court dismissed defendant's appeal and denied defendant's petition for writ of *certiorari* without prejudice to defendant's right to raise the issue of ineffective assistance of counsel in a motion for appropriate relief to be filed in the trial court. *State v. Hayes*, No. COA09-144, 2009 N.C. App. LEXIS 1268 (unpublished).

On 25 August 2010, Judge Wallace vacated the 14 August 2008 judgment in open court. Defendant then re-entered his *Alford* plea, preserving his right to appeal the denial of his motion to suppress. Defendant was sentenced to an active term of 175 to 219 months imprisonment.

Defendant appeals the denial of his motion to suppress.

II. Motion to Suppress

In his only argument, defendant contends that the trial court erred when it denied defendant's motion to suppress. We disagree.

A. Failure to File an Affidavit

A defendant who seeks to suppress evidence upon a ground specified in N.C. Gen. Stat. §

15A-974 must comply with the procedural requirements outlined in Article 53, Chapter 15A of the North Carolina General Statutes. *State v. Satterfield*, 300 N.C. 621, 624, 268 S.E.2d 510, 513 (1980); *State v. Holloway*, 311 N.C. 573, 576, 319 S.E.2d 261, 264 (1984), *habeas corpus granted*, *Holloway v. Woodard*, 655 F. Supp. 1245 (1987). Specifically, N.C. Gen. Stat. § 15A-977(a) states that a motion to suppress evidence made before trial "must be accompanied by an affidavit containing facts supporting the motion." See *Holloway*, 311 N.C. at 577, 319 S.E.2d at 264. The burden is upon the defendant to show that he has complied with the procedural requirements of Article 53. *Satterfield*, 300 N.C. at 624-25, 268 S.E.2d at 513-14. In the instant case, defendant failed to file an affidavit to support the motion to suppress. Therefore, he has waived his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant. *Holloway*, 311 N.C. at 577-78, 319 S.E.2d at 264.

State v. Creason, 123 N.C. App. 495, 499, 473 S.E.2d 771, 773, (1996), *aff'd per curium*, 346 N.C. 165, 484 S.E.2d 525 (1997).

"An affidavit is '[a] written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.'" *In re Ingram*, 74 N.C. App. 579, 580, 328 S.E.2d 588, 589 (1985) (quoting *Ogburn v. Sterchi Brothers Stores, Inc.*, 218 N.C. 507, 508, 11 S.E.2d 460, 461 (1940)); BLACK'S LAW DICTIONARY 62 (8th ed.

2004) ("affidavit. A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public."). Defendant's trial counsel filed a motion to suppress on 7 March 2008. Accompanying the motion to suppress was a document styled as "Affidavit" and signed by defendant's attorney. However, the document contained in the record was not verified by a notary public, and therefore, was not an affidavit. Because defendant failed to file an affidavit with his motion to suppress as required by N.C. Gen. Stat. § 15A-977(a) (2006), he has waived his right to seek suppression of the evidence seized pursuant to Lieutenant Burn's stop of his vehicle. See *Creason*, 123 N.C. App. at 499, 473 S.E.2d at 773.

Defendant's appeal is dismissed.

B. Reasonable Suspicion to Stop Defendant

Assuming *arguendo* that defendant had properly presented his motion to suppress, we would affirm the trial court's denial of his motion to suppress.

i. Standard of Review

[T]he standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions

of law are subject to *de novo* review.

State v. Allen, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (quotation and citation omitted).

When the trial court conducts an evidentiary hearing regarding the competency of the evidence, the trial court is required to make findings of fact if there is a conflict in the evidence. When, however, there is no conflict in the evidence, findings are not required, although it is preferable for the trial court to make them.

State v. Stitt, 201 N.C. App. 233, 240, 689 S.E.2d 539, 546 (2009) (quotation omitted), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 920 (2010).

The trial court held a hearing upon defendant's motion to suppress on 12 August 2008, and orally denied defendant's motion, finding that Lieutenant Burns had a reasonable suspicion to stop defendant. The facts in the instant case are not in dispute. Lieutenant Burns was the only individual to testify at the hearing upon defendant's motion to suppress. Therefore, we will only review this matter to determine if the trial court correctly concluded as a matter of law that the defendant's motion to suppress should be denied.

ii. Analysis

Traffic stops are permitted if the officer making the stop has reasonable suspicion that criminal activity is afoot. *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008).

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that [t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.

Id. at 414, 665 S.E.2d at 439 (quotation omitted). An officer's observation of the commission of a traffic violation has been held by the North Carolina Supreme Court to give the officer the required reasonable suspicion to stop a defendant. *See Id.* at 417, 665 S.E.2d at 441.

We hold that the uncontested facts in this case reveal that defendant violated N.C. Gen. Stat. § 136-89.58(4) (2006). Lieutenant Burns testified as follows concerning defendant's exit from U.S. Highway 74, "[w]e actually passed the exit, and at the last minute he makes an abrupt turn onto the exit, crossing the white markers, you know, indicating that's not the path to take." N.C. Gen. Stat. § 136-89.58(4) states:

On those sections of highways which are or

become a part of the National System of Interstate and Defense Highways and other controlled-access facilities it shall be unlawful for any person:

(4) To drive any vehicle into the main travel lanes or lanes of connecting ramps or interchanges except through an opening or connection provided for that purpose by the Department of Transportation.

We take judicial notice that U.S. Highway 74 is part of the National System of Interstate and Defense Highways. See *State v. Davis*, 20 N.C. App. 252, 254, 201 S.E.2d 198, 200 (1973). When defendant crossed the white lines when exiting U.S. Highway 74 he failed to exit through the "opening or connection provided for that purpose," and thereby violated N.C. Gen. Stat. § 136-89.58(4). Defendant's traffic violation provided Lieutenant Burns with the required reasonable suspicion to stop defendant. The trial court did not err in denying defendant's motion to suppress.

DISMISSED.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).