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NO. COA11-237
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Johnston County
No. 09 CRS 51328

DANNETTE UNDERWOOD-HOWELL

Appeal by defendant from judgment entered 28 October 2010 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for defendant-appellant.

STEELMAN, Judge.

Where defendant was asked investigatory questions at the scene of the accident by a State Trooper, the trial court properly concluded that defendant was not in custody for purposes of *Miranda* and denied her motion to suppress her statement concerning alcohol consumption. Where defendant failed to make a proper proffer of excluded evidence in this case, her arguments are dismissed. Where the State presented

evidence of impairment under both subsections of N.C. Gen. Stat. § 20-138.1, the trial court did not err in denying her motion to dismiss the charge of driving while impaired.

I. Factual and Procedural Background

On 28 February 2009 at approximately 12:30 p.m., Dannette Underwood-Howell (defendant) was operating a vehicle on Government Road in Johnston County. Defendant was traveling from the southeast, coming up a hill, and into a curve. No other traffic was on the road and it was drizzling rain. Defendant ran off the road, up an embankment, and flipped her vehicle over twice. The vehicle was upright when it finally came to rest.

Abraham Leak, Jr. (Leak) observed the accident, and ran to aid defendant. Leak spoke to defendant and offered to call emergency services. Defendant responded that she was not injured and requested that Leak call her ex-husband. Leak placed the call, but could not "get in touch with anybody." Leak drove defendant to her mother's residence.

Approximately fifteen to twenty minutes later, defendant returned to the scene of the accident. Shortly thereafter, Sergeant Bell of the North Carolina Highway Patrol arrived. Sergeant Bell directed defendant to get into her patrol car.

Defendant requested that she be permitted to leave to attend a funeral. This request was denied.

Approximately fifteen minutes later, Trooper Williams arrived to assist in the investigation of the accident. Defendant was instructed to sit in Trooper Williams' patrol car and "explain what happened[.]" Defendant gave Trooper Williams a handwritten statement indicating that she had lost control of her vehicle due to the rain. Defendant was not handcuffed, not told that she was under arrest, and she was not read her *Miranda* rights at that time.

Trooper Williams observed that defendant had "red, glassy eyes and . . . a moderate odor of alcohol on her breath when [he] was speaking with her[.]" Defendant's speech was also slightly slurred. Trooper Williams asked defendant if she had consumed any alcohol prior to the accident. Defendant responded that she had one drink of vodka. Trooper Williams formed an opinion that defendant had consumed a sufficient amount of an impairing substance to appreciably impair her mental or physical faculties. Trooper Williams placed defendant under arrest for driving while impaired and transported her to the Johnston County jail. Trooper Williams then administered the Intoximeter

to determine her blood alcohol content. The result of the Intoximeter was 0.13, an amount over the legal limit of 0.08.

On 28 October 2010, a jury found defendant guilty of driving while impaired. Defendant was adjudicated to be a level five offender and was sentenced to sixty days in the North Carolina Department of Correction. This sentence was suspended, and defendant was placed on unsupervised probation for twelve months. As a condition of her suspended sentence, defendant was ordered to pay a $100.00 fine, complete twenty-four hours of community service, and pay all related fees and court costs.

Defendant appeals.

II. Motion to Suppress

In her first and second arguments, defendant contends that the trial court erred in denying her motion to suppress her statement concerning alcohol consumption. We disagree.

Prior to the commencement of trial, defendant filed a motion to suppress the statements obtained by Trooper Williams during the accident investigation because they were the product of a custodial interrogation, without defendant first having been read her *Miranda* rights. At the conclusion of the suppression hearing, the trial court denied defendant's motion in open court. The trial court found that the statements made

by defendant "were made freely, voluntarily, [and] that the defendant was not in custody when said statements were made[.]" The trial court subsequently entered a written order containing findings of fact and conclusions of law.

A. Adequacy of Findings of Fact

Defendant first contends that the trial court erred by failing to make findings of fact in its written order that resolved material conflicts in the evidence at the suppression hearing in violation of N.C. Gen. Stat. § 15A-977(d) and (f).

N.C. Gen. Stat. § 15A-977(d) provides that if the motion to suppress "is not determined summarily the judge must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d) (2009). Subsection (f) provides that "[t]he judge must set forth in the record his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2009). If there is a conflict in the evidence, the trial judge must make specific findings of fact resolving the conflict. *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971).

Defendant contends that the trial court failed to resolve a material conflict in the evidence at the suppression hearing. However, the factual evidence presented by the State and

defendant regarding what had transpired at the scene of the accident was virtually identical. The trial court made the following findings of fact in its written order:

> 3. That Defendant had a one car accident on Government Road, in Clayton, NC that was investigated by the North Carolina State Highway Patrol.
>
> 4. That Trooper K. Bell arrived first on the scene and Trooper MD Williams arrived shortly after.
>
> 5. That Trooper Bell began investigation of the accident and detained Defendant.
>
> 6. That Trooper Williams took over the investigation and asked defendant if she had anything to drink to which Defendant stated she "had one drink earlier [vodka]".

The trial court did not violate the mandates of N.C. Gen. Stat. § 15A-977 in its written order denying her motion to suppress. This argument is without merit.

B. Determination of Whether Defendant was in Custody

Defendant next contends that the trial court erred by failing to suppress her statements to Trooper Williams on the grounds that she was in custody and he did not apprise her of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

1. Standard of Review

"Review of a trial court's denial of a motion to suppress

is strictly limited to a determination [of] whether the trial court's findings of fact are supported by competent evidence and whether those findings support the trial court's ultimate conclusion of law." *State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Id.*

2. Analysis

"*Miranda* warnings are required only when a defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (citation omitted), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001).

> Police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. The proper inquiry for determining whether a person is in custody for purposes of *Miranda* is based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.

State v. Waring, ___ N.C. ___, ___, 701 S.E.2d 615, 633 (2010) (internal quotations and alterations omitted). However, "[t]he *Miranda* rule is not concerned with the routine, investigative questioning of people at the scene of a motor vehicle accident." *Stalls v. Penny*, 62 N.C. App. 511, 514, 302 S.E.2d 912, 914 (1983). This Court has held that police questioning regarding ownership and operation of the vehicle involved and the facts leading up to the accident "is necessary for the purpose of preparing the official accident report which is required to be filed. They are investigatory and not accusatory." *State v. Gwaltney*, 31 N.C. App. 240, 242, 228 S.E.2d 764, 765, *disc. review denied and appeal dismissed*, 291 N.C. 449, 230 S.E.2d 767 (1976).

The trial court made several findings of fact in its written order. The only finding challenged by defendant is finding of fact 7, which states, "That Defendant was detained for purpose [sic] of investigation and answered preliminary questions asked by Trooper Williams."

Defendant contends that she was subjected to a custodial interrogation and focuses her argument on two factors: (1) her subjective belief that she "considered herself to be in

custody;" and (2) that she was told she was not free to leave after requesting permission to depart the accident scene.

First, defendant's subjective belief that she was in custody is irrelevant to this inquiry. *Waring*, ___ N.C. at ___, 701 S.E.2d at 633. Second, defendant was not permitted to leave the scene of the accident by virtue of N.C. Gen. Stat. 20-166 (2009), which provides, in part:

> (c) The driver of any vehicle, when the driver knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results:
>
> (1) Only in damage to property . . .
>
> shall immediately stop the vehicle at the scene of the crash. If the crash is a reportable crash, *the driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed*, unless remaining at the scene places the driver or others at significant risk of injury.

(Emphasis added.)

Trooper Williams arrived on the scene to assist in the investigation of the accident. Defendant was instructed to sit in Trooper Williams' patrol car and "explain what happened in this collision." Defendant gave Trooper Williams a handwritten statement indicating that she had lost control of her vehicle

due to the rain. Trooper Williams asked defendant if she had consumed any alcohol prior to the accident. Defendant responded that she had one drink of vodka. Defendant was not handcuffed, and was not told that she was under arrest.

We hold that the evidence supported the trial court's finding that defendant was detained for investigative purposes and answered preliminary questions asked by Trooper Williams regarding the facts leading up to the accident. *Gwaltney*, 31 N.C. App. at 242, 228 S.E.2d at 765. The trial court's findings of fact in turn support the conclusion that defendant was not in custody for purposes of *Miranda*. The trial court properly denied defendant's motion to suppress.

This argument is without merit.

III. Cross-examination of Trooper Williams

In her third and fourth arguments, defendant contends that the trial court denied her constitutional right of confrontation by limiting her cross-examination of Trooper Williams regarding the operation of the Intoximeter. Defendant further argues that the trial court compounded this error by refusing to allow Trooper Williams to answer defense counsel's questions for the record so that there could be meaningful appellate review. We disagree.

Defense counsel attempted to cross-examine Trooper Williams regarding his "knowledge of the science and operational theory of the Intoximeter machine." The trial court sustained the State's objections fourteen times. In the presence of the jury, defense counsel requested that Trooper Williams be allowed to "answer for the record." The trial court denied this request. Defendant contended that the trial court was impeding on her constitutional right to cross-examine the witness. The trial court then excused the jury from the courtroom. The following colloquy occurred between the trial judge and defense counsel outside of the presence of the jury:

> [Defense counsel]: Judge, I would say for the benefit of the record, under the North Carolina and Federal constitution, my client has a constitutional right to an effective cross—examin ation, and I have been shut down and not been able to do that.
>
> The Court: Well, [defense counsel], he has been -- the Department of Health, whatever it is, has certified him as an operator of this breathalyzer. I have no problem with cross-examination dealing with that, but going into the scientific . . .
>
> [Defense counsel]: Judge, with all due respect, had I not brought it out, you would have gone to the jury with a .13 not even knowing what that was.
>
> Now, it's not --
>
> The Court: You got a point there. I'm not --

> [Defense counsel]: All right.
>
> And all I'm saying to this Court is, now, I haven't -- my client has the right to -- since the State's [sic] introduced this, it goes to the credibility of this witness, how the durn thing works and what it shows. And that's what I'm trying to do.
>
> The Court: *Well, the way you're phrasing the question, sir, is the reason I sustained her objections*. *If you'll rephrase those questions in a proper manner, I will sustain -- I will allow you broad latitude*.
>
> And I will make the comment to the jury when they come back to please disregard my comments.
>
> [Defense counsel]: Thank you, Your Honor.
>
> The Court: And I -- you know where I'm coming -- and keep your questions in the form of questions.
>
> [Defense counsel]: Yes, sir.
>
> The Court: And then you can -- you have the document; if you want to introduce it or something, that's probably -- you aren't required to -- and argue it also.
>
> [Defense counsel]: Thank you, Your Honor.
>
> The Court: -- we'll be at recess for 15 minutes.

(Emphasis added.) The jury was brought back into the courtroom and the judge gave the following instructions:

> The Court: Ladies and gentlemen, I'm -- I made these comments earlier before all of

> the jurors were impaneled.
>
> It’s the duty of the -- of the attorneys to object when they feel that evidence is not admissible. It is not an obstructionist tactic.
>
> It’s the Court’s responsibility to make rulings. But the fact that an attorney objects to the Court’s ruling, that’s his responsibility or her responsibility. It has nothing to do with the guilt or innocence of the defendant or as to what weight you should give to the answer or the failure to answer.
>
> That’s the way our system works. It’s an adversary system. And it’s the responsibility of counsel to object. And it’s also the responsibility of counsel to vigorously defend his or her client in the superior court before a jury.
>
> Okay? All right. You may proceed, sir.
>
> [Defense counsel]: No other questions.

N.C. Gen. Stat. § 15A-1446(a) (2009) provides, in relevant part: “[W]hen evidence is excluded a record must be made in the manner provided in G.S. 1A-1, Rule 43(c), in order to assert upon appeal error in the exclusion of that evidence.” Rule 43(c) provides: “In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given.” N.C. Gen. Stat. § 1A-1, Rule 43(c) (2009). Our Supreme Court

has stated, "The best manner in which to do this is to excuse the jury from the courtroom and then allow the witness to answer the question for the record." *State v. McCormick*, 298 N.C. 788, 792, 259 S.E.2d 880, 883 (1979).

In the instant case, after the trial court sustained the State's objections to defense counsel's cross-examination of Trooper Williams, defense counsel requested that he be permitted to "answer for the record" in the presence of the jury. The trial court denied these requests. During a recess, the trial court clearly stated that it had sustained the State's objections based upon the phrasing of the questions and that if defense counsel would rephrase the questions, he would be given "broad latitude" with the witness. When the trial re-commenced and defense counsel was told he could proceed, he responded, "No other questions."

The trial court properly denied defense counsel's request that the witness be allowed to answer "for the record" in the presence of the jury. It is nonsensical for the trial court to sustain an objection and then allow the witness to answer the question in front of the jury. Had defendant desired to preserve this testimony so that on appeal we could determine if its exclusion was prejudicial, he should have made a proffer for

the record while the jury was outside of the courtroom. The transcript of the trial proceedings reveals that the jury was excused from the courtroom, and defense counsel had ample opportunity to place a proffer in the record. Defendant's contention that his request that the witness answer a question "for the record" in the presence of the jury was a request to place a proffer in the record is not correct.

In the absence of a proper proffer of the excluded evidence in this case, these arguments must be dismissed.

IV. Motion to Dismiss

In her fifth argument, defendant contends that the trial court erred by denying her motion to dismiss the charge of driving while impaired at the close of the evidence based upon the lack of substantial evidence that defendant engaged in impaired driving as defined by N.C. Gen. Stat. § 20-138.1. We disagree.

N.C. Gen. Stat. § 20-138.1 provides, in relevant part:

> (a) Offense. -- A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the

> driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

N.C. Gen. Stat. § 20-138.1(a) (2009). Thus, under the statute, there are two distinct methods by which the State can establish that a defendant was driving while impaired.

The State presented evidence of impairment under subsection (a)(1). Trooper Williams testified that at the scene of the accident, defendant had "red, glassy eyes and . . . a moderate odor of alcohol on her breath when [he] was speaking with her." Defendant's speech was also slightly slurred. Trooper Williams testified that based upon his observations at the scene of the accident, he formed the opinion that defendant had consumed a sufficient amount of an impairing substance to appreciably impair her mental and/or physical faculties. Defendant did not object to this testimony.

The State also presented evidence of impairment under subsection (a)(2). Trooper Williams administered the Intoximeter test and determined defendant's blood alcohol content was 0.13, an amount over the legal limit established by N.C. Gen. Stat. § 20-138.1(a)(2).

We hold that there was substantial evidence to submit the offense of driving while impaired to the jury under both subsections of N.C. Gen. Stat. § 20-138.1.

This argument is without merit.

NO ERROR IN PART; DISMISSED IN PART.

Judges HUNTER, Robert C. and MCCULLOUGH concur.

Report per Rule 30(e).