IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-831

Filed: 20 August 2019

Johnston County, No. 16 CRS 051059

STATE OF NORTH CAROLINA

v.

PATRICK LEWIS BARNETT, Defendant.

Appeal by Defendant from judgment entered 24 January 2018 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

A trial court does not err in denying a motion to suppress evidence obtained from an arrest supported by probable cause. Here, the Defendant: (1) had been driving 22 miles per hour above the posted speed limit on a rural two-lane road into a sharp curve; (2) was emanating a "strong odor" of alcohol; (3) told the officer that he had consumed "a lot" of alcohol the night before, had awoken an hour earlier

feeling "hungover[,]" and had consumed a beer shortly before he was stopped; and (4) two portable breathalyzer tests ("PBTs") indicated the presence of alcohol. This information, known to the officer at the time, was sufficient to permit an arrest for driving while impaired. Accordingly, we find no error.

BACKGROUND

On 20 February 2016 in Johnston County, Trooper Daniel Sharpe of the North Carolina Highway Patrol observed a silver Mercedes-Benz driven by Defendant, Patrick Lewis Barnett. Trooper Sharpe, through use of a radar gun, registered the vehicle traveling 67 mph while approaching a sharp curve on a rural two-lane road with a 45 mph speed limit. Trooper Sharpe pulled the vehicle over and, upon approaching it, noticed a strong odor of alcohol emanating from the vehicle.

After asking Defendant to step out of the vehicle, Trooper Sharpe determined the smell of alcohol was coming from Defendant. Defendant admitted to drinking heavily the prior night and to consuming one beer upon waking, which he stated was about one hour before the traffic stop. Concerned about the Defendant's proximity to the road, Trooper Sharpe opted not to perform a field sobriety test, but instead asked Defendant to perform two PBTs. On both occasions, the tests registered a positive presence for alcohol. Given the positive PBTs, the strong odor of alcohol, Defendant's speeding into a sharp curve, and his admission to both drinking heavily the night before and consuming a beer shortly before the traffic stop, Trooper Sharpe concluded

Defendant's faculties were impaired due to alcohol consumption. Defendant was arrested for driving while impaired ("DWI") and speeding. After Defendant was transported to the Johnston County Jail, he agreed to submit to breathalyzer tests on the Intoximeter EC/IR-II to determine his blood alcohol concentration ("BAC"). Both tests showed Defendant had a BAC of 0.10.

On 28 June 2017, Defendant pled guilty to DWI and speeding. That same day, Defendant was sentenced and gave notice of appeal to Superior Court. On 22 November 2017, Defendant filed a motion to suppress any and all evidence obtained from his arrest, claiming Trooper Sharpe lacked probable cause for the arrest. On 23 January 2018, the trial court denied Defendant's motion. After the motion was denied, a jury found Defendant guilty of speeding and DWI. Defendant appeals.

ANALYSIS

A. Standard of Review

Defendant challenges both (1) the trial court's denial of his motion to suppress the breathalyzer results obtained following his arrest and (2) the admission of that evidence at trial. Defendant claims his arrest was not supported by probable cause because the arresting officer did not observe any indicia of impairment. Defendant argues the trial court plainly erred in admitting breathalyzer evidence obtained after an arrest that was not supported by probable cause. Defendant also contends the

jury attached improper weight to the evidence despite otherwise "weak" evidence of impairment, which likely led to a different result at trial. We disagree.

Defendant fully litigated the motion to suppress but concedes he failed to object to the evidence's introduction at trial. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402, S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2019). An unpreserved issue "may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2019). Our plain error standard sets a high burden on defendants:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (internal quotation marks and citations omitted).

B. Probable Cause

"An officer may lawfully arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense." *State v.* Jackson, 821 S.E.2d 656, 662 (N.C. App. 2018) (quoting N.C.G.S. § 15A-401(b)(2) (2017)) (internal quotation marks omitted). Probable cause is a flexible standard allowing an officer to exercise discretion where "a reasonable ground of suspicion" is supported by circumstances sufficient to "warrant a cautious person in believing the accused to be guilty." *State v. Daniel*, 814 S.E.2d 618, 619 (N.C. App. 2018) (internal quotation marks omitted). Without probable cause to arrest "evidence obtained as a result of that arrest and any evidence resulting from the defendant[ ] having been placed in custody, should be suppressed." *State v. Tappe*, 139 N.C. App. 33, 36-37, 533 S.E.2d 262, 264 (2000).

Impaired driving occurs where:

> A person . . . 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.

N.C.G.S. § 20-138.1 (2017). In arrests for driving while impaired the fact that a driver has consumed alcohol is not *per se* probable cause to arrest for DWI. Rather "[t]he effect[s] must be *appreciable* . . . sufficient to be recognized and estimated" to find a defendant was impaired. *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852,

855 (1985) (emphasis added).[1] "[P]ositive [PBT] results [and] driver admit[ting] drinking liquor" have been upheld as appreciable indicia of impairment. *Moore v. Hodges,* 116 N.C. App. 727, 728, 449 S.E.2d 218, 219 (1994). Appreciable effects when manifested along with faulty driving amount to a *prima facie* showing of impaired driving. *State v. Shelton*, 824 S.E.2d 136, 141 (N.C. Ct. App. 2019); *see also State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965) ("The fact that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties is sufficient *prima facie* to show [impaired driving]."). Additionally, substantial speeding in an inappropriate setting has been upheld as an indicator of impaired driving. *See Rock v. Hiatt*, 103 N.C. App. 578, 584-85, 406 S.E.2d 638, 642-43 (1991) (holding evidence a defendant's vehicle exited a parking lot "running fast" plus additional indicia of impairment amounted to sufficient probable cause of impairment).

In *State v. Townsend*, we stated that "the odor of alcohol on a defendant's breath, coupled with a positive [PBT] result, is sufficient for probable cause to arrest a defendant for driving while impaired." *State v. Townsend*, 236 N.C. App. 456, 465, 762 S.E.2d 898, 905 (2014). Defendant argues in his reply brief that *Townsend* is

[1] Some appreciable indicators of impairment include: "severity of the [car] accident," *Steinkrause v. Tatum,* 201 N.C. App. 289, 295, 689 S.E.2d 379, 383 (2009), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010) (Memorandum); "slurred speech[,] [or] diminished motor skills," *State v. Teate,* 180 N.C. App. 601, 607, 638 S.E.2d 29, 33 (2006); and "glassy, watery eyes." *Tappe,* 139 N.C. App. at 38, 533 S.E.2d at 264.

fatally reliant on *State v. Rogers*, 124 N.C. App. 364, 369-70, 477 S.E.2d 221, 224 (1996), *superseded by statute*, 2006 N.C. Sess. Laws 253, § 7, *as recognized in State v. Overocker*, 236 N.C. App. 423, 436, 762 S.E.2d 921, 929 (2014), *disc. review denied*, 367 N.C. 802, 766 S.E.2d 686 (2014). We disagree.

In *Rogers*, the arresting officer observed the numerical result of the defendant's PBT when deciding whether probable cause existed for impaired driving.[2] However, we found there was a sufficient factual basis for probable cause aside from the numerical PBT result because the trooper in *Rogers* "had an opportunity to observe [the] defendant[,] . . . spoke with him, and smelled a strong odor of alcohol about his person." *Id.* at 369-70, 477 S.E.2d at 224. Although the numerical result of a PBT may not be used at trial, that does not "rob [the officer] of the probable cause that these facts and circumstances furnished [her]." *Id.* at 370, 477 S.E.2d at 224. Nothing about our opinion in *Rogers* renders *Townsend* invalid or unpersuasive.

In the instant case, Defendant contends he exhibited no indicia of faulty driving given the Trooper Sharpe's statement that he "did not notice anything troubling about [his] driving as he came to a complete stop." Additionally, Defendant did not possess some of the classic indicia of impairment; specifically, he was not weaving as he drove, did not appear unsteady on his feet, and spoke clearly to Trooper

[2] The current statute, N.C.G.S. § 20-16.3(d) (2017), prevents a PBT's numerical result from being introduced at trial. Instead, only a positive or negative result is allowed to show the presence or absence of alcohol.

Sharpe during the traffic stop. However, the Defendant (1) was emanating a "strong odor" of alcohol; (2) told the officer that he had consumed "a lot" of alcohol the night before, had awoken an hour earlier feeling "hungover[,]" and had recently consumed a beer; and (3) tested positive on two PBTs, which indicated the presence of alcohol. Additionally, Defendant was driving at 67 mph into a sharp curve on a rural two-lane road with a speed limit of 45 mph. This excessive speed while traveling into a curve on a rural two-lane road is indicative of faulty driving. In conjunction with Defendant's "strong" odor of alcohol, his admissions to drinking "a lot" the night before and drinking a beer upon waking an hour prior are sufficient to form probable cause. *See Rock*, 103 N.C. App. at 585, 406 S.E.2d at 642-43; *see also Shelton*, 824 S.E.2d at 141.

CONCLUSION

Defendant's emanating a strong odor of alcohol, his admissions regarding alcohol consumption, the two positive PBTs, and faulty driving are sufficient probable cause to support an arrest for DWI. It was not error, much less plain error, for the trial court to deny Defendant's *Motion to Suppress* and admit the breathalyzer evidence.

NO PLAIN ERROR.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).