NO. COA01-1511

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v. Alamance County
No. 00 CRS 55005

JOHN ALBERT LEE JACKSON,
Defendant-appellant.

Appeal by defendant from judgment entered 31 May 2001 by Judge Ronald L. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 11 September 2002.

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

*Gilda C. Rodriguez, for defendant-appellant.*

BRYANT, Judge.

Defendant, John Albert Lee Jackson, appeals from his conviction of impaired driving. On 6 June 2000 defendant was operating his motor vehicle on a four-lane road in Burlington, North Carolina. A motorist, Richard Thomas Jones, noted defendant's erratic driving when he and yet another motorist were forced to take evasive action to avoid a collision with defendant's vehicle. Jones called the police and followed defendant's vehicle to the parking lot of the Alamance/Caswell Mental Health Center. Officer Kenneth Barker of the Burlington Police Department arrived and stopped defendant as he was walking toward the building.

Officer Barker performed several sobriety tests, including an alco-sensor test which indicated that defendant had consumed alcohol.

Officer Barker placed defendant under arrest for driving while impaired and transported him to the Burlington Police Department. Defendant was informed of his rights with respect to the chemical breath test (Intoxilizer) which included the right to "have a qualified person of [his] own choosing administer a chemical test or tests in addition to any test administered at the direction of the charging officer." At some point prior to receiving his Intoxilizer rights, defendant requested a blood test and was told he could get a blood test on his own after his release but that a chemical breath test would be administered at the police station. As his rights were read to him defendant indicated that he did not want a blood test. After his rights were read to him defendant asked to contact his attorney. A telephone and telephone book were on the table next to defendant. Defendant used the telephone to call his attorney, but his attorney was not available. When asked by Officer Barker if he wanted to call anyone else defendant "just appeared kind of mad. He said no. Just sat there." Defendant submitted to the Intoxilizer test which indicated a blood alcohol content (B.A.C.) of .12.

Defendant was indicted on 5 March 2001 for driving while impaired and habitual impaired driving. The case came on for trial in Alamance County Superior Court on 29 May 2001. Defendant moved to dismiss the charges on the grounds that the magistrate failed to advise him of his statutory rights under N.C.G.S. §§ 15A-511(b),

15A-533(b) and 15A-534(c), or, in the alternative, to suppress the Intoxilizer results for failure of the charging officer to assist defendant in obtaining a blood test. After a suppression hearing defendant's motions were denied. The jury returned a verdict of guilty of impaired driving on 31 May 2001. Defendant was sentenced as an habitual impaired driver to 18 to 22 months imprisonment. Defendant appealed.

Defendant presents two assignments of error for review: 1) whether the trial court erred in failing to suppress the Intoxilizer results; and 2) whether the trial court erred in allowing the prosecution to present evidence prejudicial to defendant and to which defendant was not afforded an opportunity to discover. We find no error by the trial court.

**I.**

Defendant first argues that the trial court erred in denying his motion to suppress the results of the Intoxilizer test because the arresting officer failed to perform his statutory duty to help defendant arrange for a blood test. When reviewing a trial court's ruling on a motion to suppress, this Court is bound by the trial court's findings of fact if supported by competent evidence, even if there is evidence to the contrary. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001), *opinion after remand*, 355 N.C. 264, 559 S.E.2d 785, *reconsideration denied*, 355 N.C. 495, 563 S.E.2d 187 (2002). If there is competent evidence in support of the trial court's findings, this Court determines whether those

findings support the trial court's conclusions of law. *State v. Tappe*, 139 N.C. App. 33, 38, 533 S.E.2d 262, 265 (2000).

A person charged with impaired driving "may choose a qualified person to administer a chemical test or tests in addition to any test administered at the direction of the charging officer." N.C.G.S. § 20-16.2(a)(5) (2001). Specifically, the person who submitted to a chemical test

> may have a qualified person of his own choosing administer an additional chemical test or tests, or have a qualified person withdraw a blood sample for later chemical testing by a qualified person of his own choosing. Any law-enforcement officer having in his charge any person who has submitted to a chemical analysis shall assist the person in contacting someone to administer the additional testing or to withdraw blood, and shall allow access to the person for that purpose. The failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis.

N.C.G.S. § 20-139.1(d) (2001).

Our courts follow the majority rule that "when an accused is entitled to an independent test he must only be given reasonable opportunity to procure one." *State v. Bumgarner*, 97 N.C. App. 567, 573, 389 S.E.2d 425, 428 (1990). Furthermore, our jurisdiction like most, "draw the line between police *interference* and police *assistance*, usually demanding no more than that the defendant be allowed a phone call." *Id.* *See also State v Tappe*, 139 N.C. App. at 43, 553 S.E.2d at 267 (___) (quoting *Bumgarner* and holding that law enforcement officers' constitutional duties go no further than

allowing access to telephone and allowing medical personnel access to custodial defendants).

In the instant case, defendant argues that "[t]he law enforcement officer in this case failed to meet the minimum requirements of assistance as envisioned in N.C.G.S. § 20-139.1(d) and interpreted in *Bumgarner* and *Tappe*." We disagree. Our holdings in *Bumgarner* and *Tappe* indicate law enforcement officers must: 1) provide drivers being held for impaired driving access to a telephone; and 2) allow medical personnel access to the driver. *Tappe*, 139 N.C. App. at 43, 533 S.E.2d at 267. Further, officers may not hinder a driver from obtaining an independent sobriety test. *Id.* Here, defendant was given the opportunity to use the telephone and telephone book, but contacted only his attorney. Defendant indicated that he did not want to contact anyone else. Defendant was not prevented from contacting a doctor or hospital or anyone else to assist with a blood test. Likewise, the law enforcement officer was under no additional statutory or common law duty to provide any further assistance to defendant.

We note that had the officer failed to provide the assistance contemplated under the statute, the results of the Intoxilizer test would nevertheless have been admissible. N.C.G.S. § 20-139.1(d) states in pertinent part that "[t]he failure or inability of the person who submitted to a chemical analysis to obtain any additional test or to withdraw blood does not preclude the admission of evidence relating to the chemical analysis." N.C.G.S. § 20-139.1(d) (2001). *State v. Bunton*, 27 N.C. App. 704, 708, 220

S.E.2d 354, 356-57 (1975) (stating that even assuming officers failed to assist defendant to contact a qualified person to perform a chemical analysis, N.C.G.S. § 20-139.1(d) negates the exclusionary rule). Accordingly, this assignment of error is overruled.

**II.**

Defendant next argues that the trial court erred in allowing the prosecution to present evidence of a breath test experiment to which defendant was not afforded an opportunity to discover and that defendant was therefore prejudiced by its admission. Our General Statutes provide for disclosure of evidence by the State. N.C.G.S. § 15A-903(e), governs the discovery of "Reports of Examinations and Tests," and provides in pertinent part:

> [U]pon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

N.C.G.S. § 15A-903(e) (2001). "While the statute requires the State upon motion to provide defendant with written reports, nowhere does it require that such reports be made." *State v. Fleming*, 350 N.C. 109, 138, 512 S.E.2d 720, 740, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

In the case *sub judice*, the State conducted a test during a lunch recess at defendant's trial whereby an intern in the District Attorney's office swished Perioguard in his mouth for twenty to

thirty seconds. Perioguard Oral Rinse (chlorhexidine gluconate) is apparently used to treat gingivitis. The intern then blew into the Intoxilizer two times, resulting in .00 B.A.C. each time. This test was performed at the request of the District Attorney by Officer Barker, who testified as to the results on the same day as there was no written report of the test. Defendant's attorney did not know about the test in advance and was not present. However, the trial court permitted extensive cross-examination of Officer Barker on voir dire and in front of the jury.

We find no abuse of discretion in allowing this testimony. First, defendant cites to § 15A-903(e) in support of his argument that the test was discoverable. Section 15A-903(e), however, governs written reports. Second, Paul Glover, a training specialist and scientific researcher at the Forensic Test for Alcohol branch of the North Carolina Department of Health and Human Services testified for the State that if a person swished gingivitis medication such as Perioguard in his mouth before submitting to a breath test, the results should reflect a B.A.C. of .00. This testimony is substantially similar to that of Officer Barker, and was not objected to by defendant. Thus defendant cannot show that a different result would have been reached at trial had the testimony of Officer Barker regarding the Periogard experiment been excluded. Accordingly, this assignment of error is overruled.

Based on the foregoing, we hold that defendant received a fair trial free of error.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).