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NO. COA01-655

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 00 CRS 11845

ERIK L. ELLENBERG,
Defendant.

Appeal by defendant from judgment entered 9 February 2001 by Judge Ola M. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 May 2002.

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

Culler & Culler, P.A., by Richard A. Culler, for defendant appellant.

McCULLOUGH, Judge.

On 18 July 2000, defendant was found guilty of impaired driving in Mecklenburg County District Court. He then appealed his conviction to the superior court. On 17 November 2000, defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 15A-954 (1999), N.C. Gen. Stat. § 15A-511 (1999), and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). Judge Ola M. Lewis heard the motion on 30 January 2001 and denied it in an order entered 9 February 2001. A jury subsequently found defendant guilty of

driving while impaired, and the trial court imposed a suspended sentence of thirty days.

At the hearing on defendant's motion to dismiss, the following evidence was presented: At 5:50 p.m. on 21 March 2000, Trooper James R. Pickard, III, charged defendant with the offense of driving while impaired and transported him to the Arrest Processing Center at the Mecklenburg County Jail. Trooper Pickard advised defendant of his rights with respect to chemical analysis, and defendant elected not to request a witness for chemical testing. Defendant did call his wife after 6:29 p.m. to advise her of his arrest and his potential need for a bond to secure his release. He submitted to chemical analysis of his breath at 6:51 and 6:52 p.m., which revealed an alcohol concentration of 0.08.

Defendant's wife arrived at the jail at approximately 7:15 p.m. Deputies took defendant for fingerprinting at 7:20 p.m., but the fingerprinting machine was not operating correctly. Defendant was next taken to the image capturing machine at 7:26 p.m., then to the Magistrate's Hall at 7:32 p.m. Defendant's wife, after waiting in line for about forty minutes following her arrival, asked about defendant's status at the magistrate's window. She was advised that they did not have any paperwork for defendant and that she would have to wait. His wife inquired a second time approximately one hour later at the magistrate's window. She was advised that the fingerprinting machine was down and that she would be notified when defendant was returned to the Magistrate's Hall from processing.

Defendant's paperwork, which was necessary for processing, arrived at the Magistrate's Hall at 8:44 p.m. He was returned to the fingerprint area to be reprinted at 9:05 p.m. The magistrate entered a release order at 9:08 p.m., and defendant was released at 9:20 p.m. on an unsecured bond. Defendant testified he did not seek further testing upon his release because he believed he was sober and further testing would not be of any benefit. His wife testified she thought defendant had no evidence of impairment at the time of his release.

Deputy Ronald Hill testified it was jail policy that inmates were not permitted to see visitors in the bonding room until after the magistrate had seen the inmates. His review of the logbook at the Arrest Processing Desk did not reveal a signature from defendant's wife to indicate she had inquired there about defendant's status. There was no evidence that defendant had expressed a desire for further testing, and he did not seek further testing upon his release.

After making findings of fact in accordance with the preceding evidence, the trial court concluded that "[d]efendant has been unable to show any constitutional violation or any statutory violation based upon the events surrounding his arrest and subsequent release at the Mecklenburg County Jail[.]" The trial court also concluded "[d]efendant did not suffer irreparable prejudice by virtue of his processing at the Mecklenburg County Jail[.]" Upon concluding defendant had "failed to meet his burden of proof with respect to the Motion to Dismiss[,]" the trial court

denied the motion to dismiss. From the trial court's judgment, defendant appeals.

Defendant contends the trial court erred by denying his motion to dismiss the impaired driving charge. He argues the Mecklenburg County Arrest Processing Center has established a policy which denies a D.W.I. arrestee an opportunity to develop evidence in his defense. We are not persuaded by defendant's argument.

Initially we note defendant has failed to assign error to any of the trial court's findings of fact. As a result, those findings of fact "are presumed to be correct and are binding on appeal." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990). This Court's review shall therefore be limited to whether those findings support the trial court's conclusions. *Id.* "In order to sustain a dismissal of a charge under G.S. 20-138.1(a)(2)[,] North Carolina law requires a defendant to show a substantial statutory violation and prejudice arising therefrom." *State v. Ham*, 105 N.C. App. 658, 661, 414 S.E.2d 577, 579 (1992). Because a chemical analysis of 0.08 or more is sufficient on its face for conviction, "a violation of defendant's statutory rights is not *per se* prejudicial." *Id.* at 661, 414 S.E.2d at 579. A "[d]efendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost." *Id.* at 662, 414 S.E.2d at 579 (quoting *State v. Dietz*, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976)).

Defendant's release occurred three and one-half hours after he

was charged with driving under the influence. The trial court found that the fingerprinting procedure "ensures the safety of the public and assures that the Defendant can be properly identified, checked for warrants and released in a proper fashion." Because of the malfunctioning of the fingerprinting machine during the time defendant was being processed, the trial court found the "[d]elay in completion of the processing in the Defendant's case was reasonable and necessary[.]"

While defendant did advise his wife of his arrest, he did not request a witness for the chemical analysis. His wife arrived more than twenty minutes after the chemical analysis had been completed, and there was no record of her inquiring about defendant at the Arrest Processing Desk. Defendant was released on an unsecured bond within fifteen minutes of being successfully fingerprinted. While defendant and his wife expressed their belief that defendant was sober at the time of his release, he failed to introduce any evidence to support that claim. Defendant did not seek further chemical testing upon his release, nor did he present any medical evidence or expert testimony to show no alcohol would have remained in his body at the time of his release. It was defendant's own decision not to seek further chemical testing which potentially deprived him of evidence helpful to his defense. He has failed to show the requisite substantial statutory violation and prejudice arising therefrom to support his motion to dismiss the charge. Accordingly, defendant's assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).