NO. COA02-277

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 98CRS035222

BARBARA ANN MARTIN

Appeal by defendant from judgment entered 4 December 2001 by Judge Jack W. Jenkins in New Hanover County Superior Court. Heard in the Court of Appeals 30 October 2002.

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

Samuel L. Bridges for defendant-appellant.

HUNTER, Judge.

Barbara Ann Martin ("defendant") appeals a judgment finding her guilty of driving while impaired ("DWI") and unsafe movement pursuant to North Carolina General Statutes Sections 20-138.1 and 20-154(a) respectively.

On 19 December 1998, defendant was arrested and charged with DWI and for unsafe movement. Her driver's license was subsequently revoked on 15 February 1999 for thirty days pursuant to Section 20-16.5. On 25 May 2000, defendant was tried in district court and found guilty as charged. She gave notice of appeal to superior court. However, prior to defendant's appeal being heard, she filed

a motion to dismiss the case arguing that since she had already been punished by having her license revoked, "further prosecution against [her] for . . . alleged impaired driving on December 19, 1998 violate[ed] her state and federal protections against double jeopardy." The motion was denied.

Defendant's appeal was heard in the Superior Court of New Hanover County on 3 and 4 December 2001. The State's evidence tended to show as follows: On 19 December 1998, Danny Byrd ("Byrd") was stopped at a red light at the intersection of Murrayville Road and N.C. 132 at approximately 6:55 p.m. While there, Byrd noticed defendant's vehicle slowly entering the intersection towards him. As defendant's vehicle came within approximately ten feet of Byrd's vehicle, Byrd began flashing his lights and honking his horn. Nevertheless, defendant's vehicle hit Byrd's vehicle head on. Byrd's vehicle received minor damage.

Approximately fifteen minutes after the accident, Trooper Randy Moreau ("Trooper Moreau"), of the North Carolina State Highway Patrol, arrived at the scene. Upon seeing defendant, Trooper Moreau testified that he recognized her as a woman he had known for six years as an employee of a restaurant where he and his squad took their morning breaks. The trooper placed both defendant and Byrd inside his patrol car while he completed an accident report. Trooper Moreau testified that once defendant was inside the car, he "began to smell the strong odor of alcohol" on her. He also noticed defendant's speech was slurred and her eyes were red and bloodshot. Byrd testified that while defendant was inside the

patrol car, she "started crying and started talking crazy" and that her behavior appeared "erratic." Byrd had noticed nothing unusual about defendant's behavior prior to her placement inside the car.

After gathering the information needed for the accident report, Trooper Moreau administered an Alco-Sensor test to defendant. Without objection from defense counsel or intervention from the court, Byrd testified that "the state trooper . . . said she had blew over the legal substance[.]" Thereafter, Trooper Moreau transported defendant to the hospital for a blood test. At the hospital, Trooper Moreau observed that she was very unsteady on her feet. He proceeded to read defendant her chemical testing rights, after which defendant consented to her blood being drawn. The sample was sent to the State Bureau of Investigation ("SBI") for analysis and revealed that defendant's blood alcohol concentration was 0.21. Trooper Moreau did not administer any other physiological tests to defendant.

Once the State rested, defendant did not put on any evidence. Defendant did make a motion to dismiss at the close of the State's evidence and at the close of all the evidence, but chose not to be heard on either motion. Both motions were denied.

Defendant was found guilty of DWI and unsafe movement. She was sentenced on the DWI count to a minimum and maximum active term of six months suspended on condition of twenty-four months of unsupervised probation, twenty-four hours of community service, and payment of fines and costs in the amount of $392.00. Defendant was

also fined an additional $10.00 on the unsafe movement count. Defendant appeals.

I.

By her first assignment of error, defendant argues the trial court erred in not dismissing charges against her due to insufficiency of the evidence. Specifically, defendant contends that no physiological tests were administered to her by which to make an objective determination regarding the accuracy of the Intoxilyzer results.

When determining whether to dismiss a criminal action, the trial court is to consider the evidence in the light most favorable to the State, which entitles the State "to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]" *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The evidence considered must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *Id.* at 65-66, 296 S.E.2d at 651. "If substantial evidence exists, whether direct, circumstantial, or both, supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury." *State v. Matias*, 354 N.C. 549, 551-52, 556 S.E.2d 269, 270 (2001).

In the case *sub judice*, there was substantial evidence by which the trial court could deny defendant's motion to dismiss in the absence of any physiological tests. The evidence showed that

Trooper Moreau observed defendant (1) had red and bloodshot eyes, (2) smelled of alcohol, (3) had slurred speech, and (4) was unsteady at the hospital. Based on these observations, Trooper Moreau testified that in his opinion defendant had "consumed a sufficient quantity of an impairing substance to cause her to lose the normal control of both her mental and bodily faculties to such a degree that both her faculties were appreciably impaired." Furthermore, Byrd observed defendant's "crazy" and "erratic" actions in the patrol car. Finally, and probably most pertinent, there was evidence that defendant's blood sample indicated her alcohol concentration was 0.21. This result is clearly a *per se* violation of Section 20-138.1 of our statutes which provides *inter alia* "[a] person commits the offense of impaired driving if [s]he drives any vehicle . . . [a]fter having consumed sufficient alcohol [resulting in] an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a)(2) (2001). Therefore, it was unnecessary for Trooper Moreau to administer physiological tests to defendant when there was other substantial evidence presented by the State to support the case being left for the jury.

II.

By defendant's second assignment of error she argues the trial court erred in failing to dismiss the DWI charge against her because her driver's license had already been revoked. Defendant contends that Section 20-16.5, which allows for an individual's driver's license to be revoked prior to a DWI conviction, is unconstitutional because it is punitive in nature. *See* N.C. Gen.

Stat. § 20-16.5 (2001). As such, defendant argues her subsequent criminal prosecution for DWI violates double jeopardy provisions of the United States and North Carolina Constitutions. We disagree.

This issue has previously been addressed by this Court and our Supreme Court, most recently in *State v. Evans*, 145 N.C. App. 324, 550 S.E.2d 853 (2001). In *Evans*, we rejected "defendant's argument that . . . the driver's license revocation found in N.C.G.S. § 20-16.5 constitutes punishment for purposes of double jeopardy analysis under both the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution." *Id.* at 334, 550 S.E.2d at 860. *Evans* ultimately held that "N.C.G.S. § 20-16.5 is neither punitive in purpose nor effect[]" thereby making it constitutional. *Id.* We are bound by the prior decision of another panel of this Court. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Thus, the trial court did not violate any double jeopardy provisions by refusing to dismiss the DWI charge against defendant.

III.

By defendant's final two assignments of error she argues the trial court committed plain error in allowing (1) inadmissible hearsay into evidence from Byrd that defendant "blew over the legal substance[;]" and (2) an inadmissible opinion from Trooper Moreau that "[a]fter speaking to [defendant], talking to [defendant] and administering the alco-sensor test, it was clear to [him] she was impaired[.]"

Before addressing these assigned errors, we note that defendant's failure to object to either the statement or the opinion during the trial resulted in neither question being preserved for appellate review. *See* N.C.R. App. P. 10(b)(1). Nevertheless, to prevent the harshness of this rule, this Court may review defendant's assigned errors using the "plain error" rule. *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983). The "plain error" rule:

> "[I]s 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 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[.]"'"

Id. (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Here, defendant has failed to demonstrate the trial court committed error, much less plain error. Nevertheless, assuming such a showing had been made, any error would be harmless considering the overwhelming and substantial evidence presented against defendant. Therefore, these two assignments of error are without merit.

For the aforementioned reasons, there was no error in the trial of defendant.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

Report per Rule 30(e).