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NO. COA05-957

NORTH CAROLINA COURT OF APPEALS

Filed: 2 May 2006

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 04 CRS 241584

PHILLIP BROWN

Defendant

Appeal by defendant from a judgment entered 19 May 2005 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 March 2006.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery, III, for the State.

Joseph L. Ledford for defendant-appellant.

BRYANT, Judge.

Phillip Brown (defendant) appeals from a judgment entered consistent with a jury verdict finding him guilty of driving while impaired (DWI). This matter was initially tried in district court on 18 November 2004, where defendant was found guilty of DWI. Defendant appealed to the superior court for a trial *de novo*.

The evidence presented at trial tended to show that in the early morning hours of 11 September 2004, Agent Dale Anthony Chesser of the Mecklenburg County Alcohol Beverage Control Unit was participating in a DWI checkpoint on Providence Road. At

approximately 1:30 a.m. defendant drove up to the check point in a Dodge pick-up truck. When Agent Chesser approached the truck, he noticed an order of alcohol emitting from defendant's mouth and that defendant's eyes were glassy and blood shot. Agent Chesser also noticed a cup containing a yellowish liquid in the console of the truck. Defendant admitted that he had consumed alcohol, so Agent Chesser asked defendant to step out of his truck. After observing defendant perform some field sobriety tests, Agent Chesser formed the opinion that defendant had consumed a sufficient amount of an impairing substance to appreciably impair defendant's physical and mental faculties. Agent Chesser arrested defendant and escorted defendant to a mobile unit to perform an intoxilyzer test. The intoxilyzer tests, which were administered at 2:18 a.m. and 2:19 a.m., showed that defendant had an alcohol concentration of 0.09.

During the charge conference, the State requested the standard instructions including the driving while impaired instruction. Defendant requested that the trial court not define "relevant time" to the jury when instructing on the offense of driving while impaired. The trial court declined defendant's request, responding that it would follow the pattern jury instructions. In its charge to the jury on the offense of driving while impaired, the trial court stated: "A relevant time is any time after the driving that the driver still has in his body alcohol consumed before or during the driving." Defendant subsequently renewed his objection regarding the "relevant time" portion of the instructions and the

trial court overruled the objection.

The jury found defendant guilty of driving while impaired. The trial court sentenced defendant to thirty days in the custody of the Sheriff of Mecklenburg County, suspended the sentence and placed defendant on twelve months unsupervised probation. Defendant appeals.

Defendant assigns error to the trial court overruling his objection to the instructions given to the jury. Defendant argues that by defining "relevant time" for the jury, the trial court "removed from the jury's consideration one of the essential elements of the crime charged."

The trial court instructed the jury on the offense of impaired driving as follows:

First, that the defendant was driving a vehicle;

Second, that he was driving that vehicle upon a street or public vehicular area within the State;

And, third, that at the time the defendant was driving that vehicle he was (a) under the influence of an impairing substance, and alcohol is an impairing substance.

. . .

Or (b) had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of .08 or more grams of alcohol per two hundred and ten liters of breath.

A relevant time is any time after the driving that the driver still has in his body alcohol consumed before or during the driving.

As defendant concedes, the jury instruction given in the present case was consistent with the North Carolina Pattern Jury Instructions, which incorporate the definition of "relevant time" set out in the Motor Vehicles Chapter of the General Statutes. See N.C.P.I., Crim., 270.20 (2001); N.C. Gen. Stat. § 20-4.01(33a) (2005) ("Relevant Time after the Driving. -- Any time after the driving in which the driver still has in his body alcohol consumed before or during the driving."). Contrary to defendant's argument, the General Assembly is not precluded from defining the point in time at which an alcohol concentration of 0.08 constitutes an offense. Our Supreme Court has held:

A person whose blood-alcohol concentration, as a result of alcohol consumed before or during driving, was at some time after driving [0.08] or greater must have had some amount of alcohol in his system at the time he drove. The legislature has decreed that this amount, whatever it might have been, is enough to constitute an offense. This it may constitutionally do.

State v. Rose, 312 N.C. 441, 447, 323 S.E.2d 339, 343 (1984). Defendant has not shown that the trial court erred in denying his request. Accordingly, we conclude that the trial court's instruction was proper and defendant's assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).