NO. COA06-1198

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 03 CRS 253130-31

BRIAN WEBB

Appeal by defendant from judgments entered 28 February 2006 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2007.

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

D. Tucker Charns for defendant-appellant.

STEELMAN, Judge.

Where the State presented evidence that defendant had an odor of alcohol on his breath, had to support himself against his vehicle upon exiting the vehicle, had red and bloodshot eyes, was unable to completely recite the alphabet, and refused to take an intoxilyzer test, the trial court did not err in denying defendant's motion to dismiss the charge of driving while impaired.

The evidence of the State tends to show that at approximately 10:00 p.m. at night on 4 November 2003, Officer M.J. LaPointe of the Charlotte-Mecklenburg Police Department observed a burgundy Pontiac Bonneville bearing an expired registration plate traveling north on Mallard Creek Road. Officer LaPointe drove his police

cruiser directly behind the Bonneville. Upon confirming that the registration sticker was expired, he activated his blue lights and siren. There were no vehicles between his police cruiser and the Bonneville, and the officer's vehicle was no more than one or two car lengths behind the Bonneville. Although there were a number of places where the Bonneville could have stopped, the vehicle continued to proceed northbound. At least four times, during the course of following the vehicle for more than a mile, Officer LaPointe used the public address system of the cruiser and directed the driver of the Bonneville to stop. The vehicle ultimately made a right turn onto Grace Street and stopped.

Officer LaPointe approached the driver of the vehicle, whom he identified as Brian Webb, and asked him why he did not stop the vehicle. Defendant responded that he had the radio on. Officer LaPointe observed that the radio was not playing at that time. Officer LaPointe then asked defendant to produce an operator's license. Defendant responded that he did not have one. Defendant produced a North Carolina identification card. Officer LaPointe also asked defendant to produce a registration card for the vehicle. Defendant located a registration card which listed defendant as the owner of the vehicle.

Officer LaPointe observed a "moderate odor of alcoholic beverage about [defendant's] breath. He had red glossy, blood shot eyes." Defendant told the officer that he had consumed three beers at a sports bar. Officer LaPointe asked defendant to step out of his vehicle. The officer noted that defendant used the vehicle

"for balance, by laying on it." Officer LaPointe asked defendant whether he had any problems with his knees or legs. Defendant replied that he had a high school football injury. Officer LaPointe asked defendant to recite the alphabet. Defendant stated the letters of the alphabet and stopped at the letter "V."

Based upon his observations and investigation, Officer LaPointe formed the opinion that defendant was appreciably impaired by alcohol. The officer arrested defendant for driving while impaired and transported defendant to the intake center for processing.

Officer LaPointe brought defendant before Deputy John Malone of the Mecklenburg County Sheriff's Department for administration of a chemical breath test. Deputy Malone was a licensed operator of the Intoxilyzer 5000 used to measure the alcohol concentration of a person's breath. Malone advised defendant of his rights. Defendant signed the intoxilyzer rights form stating that he understood his rights. Defendant made a telephone call about twelve minutes later. After waiting approximately thirty-two minutes, Officer LaPointe asked defendant to submit to the test. Defendant responded that he would not take the test without first talking to an attorney. Defendant declined to submit to the intoxilyzer test.

Defendant moved to dismiss the charges, did not present any evidence, and renewed his motion to dismiss. The court denied the motions to dismiss.

In his only argument, defendant contends the trial court erred by denying his motions to dismiss on the grounds that the evidence was insufficient to show all of the elements of each of the two offenses. We disagree.

A motion to dismiss requires a court to consider the evidence in the light most favorable to the State and determine whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-67, 296 S.E.2d 649, 651-52 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In reviewing the evidence, the court must give the State the benefit of every reasonable inference that may be deduced from the evidence and must leave contradictions or discrepancies for the jury to resolve. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

I: Failure to Heed Light or Siren

Chapter 20 of the General Statutes mandates that:

> [u]pon the approach of any law enforcement or fire department vehicle . . . giving warning signal by appropriate light and by audible bell, siren or exhaust whistle . . . the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb, clear of any intersection of streets or highways, and shall stop and remain in such position unless otherwise directed by a law enforcement or traffic officer until law enforcement or fire department vehicle or public or private

> ambulance or rescue squad emergency service vehicle shall have passed.

N.C. Gen. Stat. § 20-157(a) (2005). The failure of a motorist to comply is a Class 2 misdemeanor. *Id.* As applied to this case, to convict defendant of this offense the State was thus required to prove that defendant failed to stop his vehicle immediately when it was approached by a law enforcement vehicle that had its warning lights and sirens operating.

Viewed in the light most favorable to the State, the evidence in this case shows that defendant, despite Officer LaPointe's continuous operation of his flashing blue lights, siren and public address system, continued to operate his vehicle for more than one and one half miles, through more than five intersections, without stopping for Officer LaPointe's vehicle. This occurred at 10:00 p.m. at night, at a time when Officer LaPointe's blue lights would have been obvious regardless of defendant's contention that he could not hear the siren and loudspeaker over the radio. There were no cars separating Officer LaPointe from defendant.

Based upon the foregoing evidence, we conclude that the State presented substantial evidence of each element and that a jury could reasonably find that defendant violated N.C. Gen. Stat. § 20-157(a) by failing to pull over and stop in response to the lights and siren of Officer LaPointe's vehicle.

II: Impaired Driving

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular

area within this State while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a) (2005). A person is under the influence of an impairing substance if "his physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b). Thus, to convict a defendant of the offense of driving while impaired, the State must prove "that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired." *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997).

> While a showing of a slight effect on defendant's faculties is insufficient for a conviction of driving while impaired, *State v. Hairr*, 244 N.C. 506, 94 S.E.2d 472 (1956), one need not be "drunk" to be found guilty. *State v. Felts*, 5 N.C. App. 499, 168 S.E.2d 483 (1969). Rather, a "noticeable," "perceptible," "obvious," "detectable" or "apparent" impairment may be sufficient to find appreciable impairment of mental and/or physical faculties. *State v. Combs*, 13 N.C. App. 195, 185 S.E.2d 8 (1971).

State v. Roach, 145 N.C. App. 159, 163, 548 S.E.2d 841, 844-45 (2001). Evidence showing an appreciable impairment may include an officer's opinion that a defendant is appreciably impaired, when the opinion is based upon the officer's personal observations of the defendant and of faulty driving or other manifestations of impairment. *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002). Evidence that the defendant refused to submit to an intoxilyzer test is also substantive evidence of guilt of the offense. *State v. Allen*, 164 N.C. App. 665, 668, 596 S.E.2d 261, 263 (2004).

Viewed in the light most favorable to the State, the evidence shows that Officer LaPointe detected the odor of alcohol on defendant's breath when defendant stopped his vehicle. He also observed that defendant had to support himself against his vehicle to maintain his balance, that defendant's eyes were red and bloodshot, and that defendant was unable to complete a recitation of the alphabet. Based upon his observations of defendant, Officer LaPointe formed the opinion that defendant was appreciably impaired. In addition, defendant refused to submit to the intoxilyzer test.

Based upon the foregoing evidence, we conclude that the State presented substantial evidence of each element of the offense and that a jury could reasonably find that defendant violated N.C. Gen. Stat. § 20-138.1(a) by operating a motor vehicle while impaired by alcohol.

We hold the court properly denied defendant's motion to dismiss the charges. Defendant failed to argue his remaining assignments of error in his brief, and they are deemed abandoned. *See State v. Elliott*, 360 N.C. 400, 427, 628 S.E.2d 735, 753 (2006); N.C. R. App. P. 28(b)(6) (2006).

NO ERROR.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).