NO. COA07-1387

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v. Lenoir County
No. 06CRS053705

CORNELIUS LAMONT BARNES

Appeal by defendant from judgment entered 18 July 2007 by Judge Benjamin Alford in Lenoir County Superior Court. Heard in the Court of Appeals 21 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tamara S. Buda, for the State.

Richard Croutharmel for defendant-appellant.

HUNTER, Judge.

Cornelius Lamont Barnes ("defendant") appeals from the judgment entered 18 July 2007 following his conviction for driving while impaired. For the reasons discussed below, we find no error.

The State presented evidence at trial tending to show the following: On 12 August 2006, North Carolina Highway Patrol Trooper Gary Douglas Ipock ("Trooper Ipock") was part of a DWI checkpoint in Kinston. At approximately 12:05 a.m., he observed a driver on a scooter who approached the checkpoint at a fast speed and then made an abrupt stop. Trooper Ipock identified defendant

in open court as the driver. On the basis of defendant's behavior and appearance and the odor of alcohol, Trooper Ipock arrested defendant and transported him to the courthouse for an intoxilyzer test.

Upon arriving in the intoxilyzer room, Trooper Ipock read defendant his rights at 12:20 a.m. and asked if he wanted to call a witness or an attorney. Defendant responded that he did not want to call anyone. When asked during cross-examination whether there was something in the "yes" block for that question on the test record ticket, Trooper Ipock testified he made a clerical error by marking that block. He explained that he had marked out the "yes" response and had initialed the change. After proceeding to observe defendant for the requisite observation period, Trooper Ipock requested that defendant submit to the intoxilyzer test at 12:37 a.m.

Trooper Ipock testified that defendant's first breath sample produced a test result of 0.09 at 12:39 a.m. He asked defendant to blow a second time in order to get a sequential breath sample, but testified that "[d]efendant could not or would not produce a sufficient breath sample to get a reading on the second test." Trooper Ipock then pushed a button on the intoxilyzer to indicate a refusal by defendant. Although Trooper Ipock could not remember how many attempts defendant made, he testified "I probably did give him two or three chances. I make it a habit to do that." The State introduced the test record strip which was printed out at the end of the intoxilyzer test into evidence without objection.

At the close of the State's evidence, defendant made a motion to dismiss the charge. Following the trial court's denial of his motion, defendant testified on his own behalf. Defendant stated that when Trooper Ipock asked if he wanted a witness present, he asked to call a friend and gave the telephone number to Trooper Ipock. Because defendant's hands were handcuffed behind him, Trooper Ipock dialed the number and then told him that there was no answer. Trooper Ipock refused to call his friend again and told defendant that he was going to start the test.

Defendant testified he "blew into the machine maybe six (6) or seven (7) times I know." He further testified that Trooper Ipock "was kind of like coaching me to blow[,]" but "after [he tried] it maybe six (6) or seven (7) times, [Trooper Ipock] pushed the thing and he said: refused." Defendant said he could not see the result of his first breath sample, and he never asked what the first reading was because he "wasn't concerned really because I knew I hadn't drinked [sic] that many beers." Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court again denied the motion.

During its instructions to the jury, the trial court stated "[t]he evidence shows that a chemical test . . . was offered to the defendant by a law enforcement officer and that the defendant refused to take the test." Defendant did not object to this jury instruction. After some deliberation, the jury sent an inquiry to the trial court concerning "the validity of the machine and reliance on only one reading[.]" The trial court responded by

quoting N.C. Gen. Stat. § 20-139.1(b3), and the jury resumed deliberating. Defendant did object to this additional instruction by the trial court. The jury subsequently found defendant to be guilty of driving while impaired, and the trial court sentenced defendant to a term of twelve months imprisonment.

Defendant first contends the trial court committed plain error by instructing the jury that he had refused to submit to the intoxilyzer test. He asserts that he had controverted the issue and made it a question of fact. Defendant's argument is not persuasive.

As an initial matter, defendant seeks review of this issue pursuant to the "plain error" rule because he failed to object to the trial court's instruction. *See* N.C.R. App. P. 10(b)(1) and 10(c)(4). "'To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result.'" *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted).

"If any person charged with an implied-consent offense refuses to submit to a chemical analysis . . . , evidence of that refusal is admissible in any criminal, civil, or administrative action against the person." N.C. Gen. Stat. § 20-139.1(f) (2007). Although a "'willful refusal' is required before a driver's license is revoked under N.C. Gen. Stat. [§] 20-16.2," a willful refusal is not required under N.C. Gen. Stat. § 20-139.1(f). *State v. Pyatt*, 125 N.C. App. 147, 150-51, 479 S.E.2d 218, 220 (1997). Trooper

Ipock testified to giving defendant two or three chances to produce a second breath sample, and defendant himself testified to blowing into the intoxilyzer machine six or seven times before Trooper Ipock pressed the refusal button. Although defendant notes the matter was a question of fact, *see State v. O'Rourke*, 114 N.C. App. 435, 440, 442 S.E.2d 137, 139-40 (1994), we are not convinced that the jury probably would have reached a different verdict absent the trial court's purported error given his own testimony of multiple unsuccessful attempts to provide a second breath sample. Defendant has thus failed to show plain error.

In his second argument, defendant contends the trial court committed plain error by not suppressing the evidence of his intoxilyzer test results because Trooper Ipock's actions were tantamount to refusing to let him call a witness to observe the test. He argues that the intoxilyzer test results should have been inadmissible due to Trooper Ipock's refusal to wait a few minutes and make a second attempt to call a witness. We disagree.

An individual may "select a witness to view the testing procedures" pursuant to N.C. Gen. Stat. § 20-16.2(a)(6) (2007). "This statutory right may be waived by the defendant, but absent waiver, denial of this right requires suppression of the results of the breathalyzer test." *State v. Myers*, 118 N.C. App. 452, 454, 455 S.E.2d 492, 493 (citations omitted), *disc. review denied*, 340 N.C. 362, 458 S.E.2d 195 (1995). Trooper Ipock's testimony indicates that defendant waived his statutory right to select a witness to view the testing procedure. Defendant neither moved to

suppress the results of the testing procedure nor objected to Trooper Ipock's testimony regarding waiver of his statutory right to select a witness. *See* N.C. Gen. Stat. § 15A-975 (2007); *see also* N.C.R. App. P. 10(b)(1). Had defendant taken either action to present the question to the trial court, Trooper Ipock's testimony would nevertheless have been competent evidence to support a decision by the trial court to admit the test results. *See State v. Coley*, 17 N.C. App. 443, 445, 194 S.E.2d 372, 373, *cert. denied*, 283 N.C. 258, 195 S.E.2d 690 (1973). The trial court therefore did not commit error, much less plain error, by admitting Trooper Ipock's subsequent testimony about the intoxilyzer test results.

Defendant failed to set out his remaining assignments of error in his brief. Because he has neither cited any authority nor stated any reason or argument in support of those assignments of error, they are deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Defendant received a fair trial, free from prejudicial error.

No error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).