NO. COA07-974

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v. Forsyth County
No. 06CRS050046

BOBBY RAY WILSON

Appeal by defendant from judgment entered 21 March 2007 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 21 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ashby T. Ray, for the State.

Richard E. Jester for defendant-appellant.

HUNTER, Judge.

On 2 January 2006, Bobby Ray Wilson ("defendant") was cited for driving while impaired. On 25 May 2006, defendant was convicted in Forsyth County District Court. Defendant gave notice of appeal and a trial *de novo* was held in Forsyth County Superior Court. The case was tried at the 19 March 2007 Criminal Session of Forsyth County Superior Court.

Defendant was convicted of impaired driving and sentenced to twelve months' imprisonment. The trial court suspended defendant's sentence and placed him on supervised probation for eighteen months. Additionally, as a condition of special probation, the

trial court ordered defendant to serve three months in the custody of the Forsyth County Sheriff. Defendant appeals. After careful review, we find no error in defendant's trial.

The evidence presented at trial tended to show the following: On 2 January 2006, Sergeant Michael Weaver of the Winston-Salem Police Department was on duty and had initiated a license checkpoint in Winston-Salem, North Carolina. Defendant pulled up to the checkpoint and Sergeant Weaver asked to see his driver's license. Defendant gave him an ID card, and when he did so, Sergeant Weaver "noticed a strong odor of alcohol, glassy eyes, and [defendant] was visibly shaking." Sergeant Weaver instructed defendant to pull over to the side of the road so that officers could conduct further investigation.

After defendant pulled over, Officer Harry White of the Winston-Salem Police Department took over the investigation. Upon speaking with defendant, Officer White "noticed a moderate to strong odor of alcohol on his breath" and asked defendant if he had been drinking. Defendant responded that "he had been drinking at his friend's house." Officer White asked defendant to step out of the car so that he could perform field sobriety tests. Officer White testified that defendant "did not perform [the field sobriety tests] to [his] satisfaction[,]" and it was his opinion that "defendant had consumed a sufficient amount of an impairing substance, in this case . . . alcohol, to appreciably impair his mental and physical faculties." Accordingly, Officer White

arrested defendant for driving while impaired and transported him to the magistrate's office so he could perform an intoxilyzer test.

At the magistrate's office, Officer Kevin C. Bell of the Winston-Salem Police Department informed defendant of his intoxilyzer rights. Officer Bell gave defendant a copy of his rights in writing, but defendant refused to sign the form. Defendant then told Officer Bell he wanted a blood test to be performed "simultaneously while he was blowing into the Intoxilyzer." Officer Bell explained to the defendant that his request was unreasonable. Officer Bell allowed defendant to call the hospital, but stated that the hospital was "a little bit perplexed over the telephone . . . because [defendant] was not there, he was down at the jail, in custody." During this time, Officer Bell noticed that defendant's eyes were "red and glassy[,]" and defendant had a "distinct odor" of alcohol on his breath. After the observation period ended, defendant refused to submit to the intoxilyzer test.

Defendant first argues that the trial court violated statutory mandates when it sentenced him to special probation. As noted previously herein, the trial court suspended judgment and placed defendant on special probation, with the condition that defendant serve three months in prison. Defendant served the three-month sentence immediately after judgment was entered. Defendant asserts that his split sentence should have been stayed by operation of law, and that the trial court erred by failing to set an appeal bond. *See* N.C. Gen. Stat. § 15A-1451(a)(4) (2007). However, we

decline to review defendant's argument. In the instant case, defendant failed to request that the trial court set an appeal bond or grant a stay of his sentence. Therefore, defendant failed to preserve this argument for appellate review. *See* N.C.R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("[i]t is well settled that an error . . . that defendant does not bring to the trial court's attention is waived and will not be considered on appeal"), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003).

Defendant next argues that the trial court erred in ruling that police had probable cause to arrest him. Defendant contends that his physical infirmities prevented him from passing field sobriety tests, and notes that police ignored a handicapped placard that was displayed on his windshield. We disagree.

At trial, defendant made a motion to dismiss, arguing that officers lacked probable cause to arrest him and to require him to take an intoxilyzer test. "Without probable cause a warrantless arrest is illegal under G.S. 15A-401(b), and as a general rule, G.S. 15A-974, evidence obtained therefrom is inadmissible." *State v. McNeill*, 54 N.C. App. 454, 455, 283 S.E.2d 565, 566 (1981). N.C. Gen. Stat. § 15A-974(1) (2007) requires the suppression of evidence if the exclusion of the evidence "is required by the

Constitution of the United States or the Constitution of the State of North Carolina[.]" "The *exclusive method* of challenging the admissibility of evidence upon the grounds specified in G.S. § 15A-974 is a motion to suppress evidence which complies with the procedural requirements of G.S. § 15A-971 *et seq.*" *State v. Conard*, 54 N.C. App. 243, 244, 282 S.E.2d 501, 503 (1981) (emphasis added); *see also State v. Howie*, 153 N.C. App. 801, 802, 571 S.E.2d 245, 246 (2002) ("[a] motion to suppress made before or during trial is required to properly preserve for appeal an objection to the admissibility of evidence"), *cert. denied*, 357 N.C. 167, 581 S.E.2d 64 (2003). "The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of G.S. § 15A-971 *et seq.*; failure to carry that burden waives the right to challenge evidence on constitutional grounds." *Conard*, 54 N.C. App. at 245, 282 S.E.2d at 503.

"As a general rule, motions to suppress *must be made before trial*." *State v. Satterfield*, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) (citing N.C. Gen. Stat. § 15A-975(a) and Official Commentary). "A defendant may move to suppress evidence at trial *only* if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence[.]" *Id.* (emphasis added). Here, however, as in *Conard*, "[t]here is nothing in the record . . . to indicate that defendant has sustained his burden of

showing why he should be entitled to make a motion to suppress during trial rather than before trial[.]" *Conard*, 54 N.C. App. at 245, 282 S.E.2d at 503. Thus, because defendant's "motion to dismiss" was not in compliance with N.C. Gen. Stat. § 15A-971 *et seq.*, any argument that the evidence should have been excluded was properly denied.

Defendant next argues that the trial court erred by denying his motion to dismiss on the ground that the State failed to present sufficient evidence to meet its burden of proof. We are not persuaded.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). Furthermore, upon a motion to dismiss, "'[t]he trial court must . . . resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility.'" *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (citations omitted), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002).

Pursuant to N.C. Gen. Stat. § 20-138.1(a) (2007):

> 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:

> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. . . .

In the instant case, defendant admitted to Officer White that he had been drinking at a friend's house. Additionally, the State presented evidence that (1) defendant smelled of alcohol; (2) his eyes were red and glassy, and he was visibly shaking; (3) defendant was unable to pass several field sobriety tests; and (4) most significantly, he refused to submit to an intoxilyzer test. "A defendant's refusal of this test is admissible as substantive evidence of a defendant's guilt." *State v. Allen*, 164 N.C. App. 665, 668, 596 S.E.2d 261, 263 (2004) (citing N.C. Gen. Stat. § 20-139.1(f) (2003). Thus, a jury could properly conclude that defendant operated a vehicle while impaired.

Finally, defendant argues in his brief that he was denied the right to have his blood tested in accordance with N.C. Gen. Stat. § 20-16.2. However, defendant failed to preserve this issue for appellate review because he did not make the argument the subject of an assignment of error. *See* N.C.R. App. P. 10(a), 10(c)(1), 28(b)(6). Therefore, we decline to review defendant's argument. Accordingly, we find no error.

No error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).