NO. COA09-1198

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 08 CRS 935
08 CRS 58243

ALFORD LENORD GRAY,
Defendant.

Appeal by defendant from judgment entered 1 April 2009 by Judge James E. Hardin, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 23 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jay Osborne, for the State.

James N. Freeman, Jr. for defendant-appellant.

GEER, Judge.

Defendant Alford Lenord Gray appeals from the trial court's denial of his motion to suppress evidence obtained as a result of a traffic stop. Defendant contends that the officer lacked sufficient grounds to perform the traffic stop. Although the trial court improperly applied a probable cause standard rather than the reasonable suspicion test, we hold that the trial court's finding, based on competent evidence, that defendant was speeding is sufficient to support the trial court's conclusion that the traffic stop did not violate defendant's constitutional rights. The trial

court, therefore, did not err in denying defendant's motion to suppress.

Facts

In the early morning hours of 28 July 2008, Officer J.M. Cross and Detective Michael Knight of the Winston-Salem Police Department were patrolling a particular block when they observed a vehicle sitting stationary in one of the lanes of a traffic circle. As the officers proceeded around the circle, the vehicle remained stationary for approximately one minute. When the patrol car pulled behind the vehicle, it began to move, and the officers followed.

The posted speed limit on the road was 25 miles per hour. As the officers followed the vehicle, they gauged its speed by comparing it to the speedometer of the patrol car. When the patrol car reached 35 miles per hour, the vehicle in front was continuing to put more distance between it and the patrol car, indicating the vehicle was traveling faster than 35 miles per hour. Officer Cross estimated the vehicle's speed to be about 40 miles per hour. While following the vehicle, Officer Cross could see the driver and thought he was not wearing a seatbelt. Officer Cross activated his blue lights to initiate a traffic stop based on the vehicle's having stopped in the lane of travel, speeding, and the driver's not wearing his seatbelt.

When Officer Cross activated his blue lights, the vehicle slowed down and eventually stopped. As Officer Cross approached

the car, he noticed a lot of movement inside the vehicle. By the time Officer Cross actually reached the car, defendant, the driver, was wearing his seatbelt. Officer Cross asked defendant for his license and registration. Defendant opened the glove compartment, retrieved the registration, and immediately closed the glove compartment. As defendant opened the glove compartment, Officer Cross and Detective Knight, who had approached the passenger side of the car, saw a plastic bag containing a white powdery substance that they believed to be cocaine. When Officer Cross asked defendant to re-open the glove compartment, defendant refused.

Officer Cross ordered defendant and his passenger out of the vehicle, placed defendant under arrest, and searched him. The officers found $358.00 in cash in defendant's right front pocket and a small bag of marijuana in his left front pocket. During a search of the vehicle, in addition to the bag in the glove compartment, the officers found a small bag of marijuana under the driver's seat and a bottle of beer, approximately half full, in the middle console. Testing by the State Bureau of Investigation established that the powdery substance in the plastic bag from the glove compartment was cocaine.

Defendant was charged with possession with intent to sell and deliver cocaine, possession of marijuana, and being a habitual felon. He filed a motion to suppress all evidence obtained after the traffic stop, contending that the officers lacked sufficient grounds for the stop. In an order entered 20 July 2009, the trial court denied the motion to suppress, concluding that defendant's

actions in blocking a lane of travel and speeding "were sufficient to establish probable cause for the subject law enforcement officers to execute a stop and seizure of the defendant's vehicle and contents therein."

The case proceeded to trial, and the jury found defendant guilty of possession with intent to sell and deliver cocaine and possession of marijuana. Defendant subsequently pled guilty to being a habitual felon. The trial court imposed a mitigated-range sentence of 107 to 138 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant's sole contention on appeal is that the trial court erred in denying his motion to suppress the evidence obtained as a result of the traffic stop. Because defendant, following the denial of his motion to suppress, failed to object at trial to the actual admission of the evidence, we must review for plain error only. *See State v. Patterson*, 194 N.C. App. 608, 616, 671 S.E.2d 357, 362 ("Therefore, the general rule remains: To preserve the matter for appeal, a defendant must object to the admission of evidence at trial despite a previously submitted motion *in limine*."), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009).

As the Supreme Court has explained:

> "[T]he plain error rule . . . is 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 a 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 or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)). The first question, in this analysis, is whether the trial court committed any error at all.

"The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231, 122 S. Ct. 1323 (2002).

Defendant challenges portions of the following findings of fact as unsupported by the evidence:

> 1. That on July 28, 2008, at approximately 4:12 a.m., Winston Salem [sic] Police Department Officers J. M. Cross (referred to herein as Cross) and M. C. Knight (referred to herein as Knight) were on patrol while operating a marked police vehicle and while wearing police uniforms. At that time, the officers were traveling in the 2800 block

of Piedmont Circle. While at this location, Officers Cross and Knight saw the Defendant operating a Ford Taurus which was stopped, for no apparent reason, in a lane of travel in Piedmont Circle. The vehicle that the Defendant was operating stayed in the travel lane of Piedmont Circle for between 30 seconds to one minute or more. Officer Cross then moved the vehicle he was operating to a position behind the Defendant's vehicle, and at that point, he [Cross] observed the defendant "pull off." Officers Cross and Knight, while in there [sic] vehicle, continued behind the Defendant and observed him [the Defendant] operate his vehicle at a speed of 35-40 miles per hour in a 25 mile per hour zone while driving on Piedmont Circle. The Defendant then drove the vehicle he was operating from Piedmont Circle turning right onto 29th Street. Officer Cross observed that the Defendant was not wearing a safety belt. Officers [sic] Cross activated the blue lights, signaling the Defendant to pull over and stop. The Defendant did not immediately comply and stop, but finally slowed and parked his vehicle. Officers Cross and Knight then executed a stop of the Defendant's vehicle. As he [Cross] approached the vehicle, he saw the Defendant making a great deal of movement in the front of the vehicle.

2. That once Officer Cross got to the driver's side window of the Defendant's vehicle, he [Cross] took the keys from the ignition. Officer Cross did this for safety reasons and because of the "suspicious" actions of the Defendant, part of which was based on the length of time it took the Defendant to stop his vehicle. Also, Officer Cross asked the Defendant for his license and registration once he [Cross] got to the driver's window. The Defendant was also told that he was being stopped for blocking a lane of travel, speeding, and not wearing a safety belt. Once Officer Cross asked for the Defendant's license and registration, the Defendant asked for the keys to the ignition back from the officers so that he could open the glove box to get some "papers". This was done, and as the Defendant retrieved the "papers," he [the Defendant] immediately shut the glove box door. As the Defendant closed

> the glove box door, Officers Cross and Knight saw, in plain view, a plastic bag with a white powder substance in the glove box. After the Defendant shut the glove box door, Officer Cross asked him to re-open it. The Defendant responded, "no" to Officer Cross' request.

In arguing that the trial court erred in finding that the officers stopped defendant for speeding and blocking a lane of travel, defendant points to a videotape that recorded Detective Knight telling defendant that he stopped him for only a seatbelt violation. At the hearing on the motion to suppress, however, Officer Cross testified that although one of the reasons he stopped defendant was because it appeared defendant was not wearing his seatbelt, the officer had additional reasons for stopping defendant, including the fact that defendant had stopped his car in a lane of travel and the fact that he was speeding. Detective Knight testified that "[he] gave [defendant] one of the reasons" for the stop.

Defendant's argument that the videotape should prevail over Officer Cross' testimony goes to the questions of weight and credibility of the evidence. "It is the duty of the trial court to weigh, and resolve any conflicts in, the evidence." *State v. Stanley*, 175 N.C. App. 171, 177, 622 S.E.2d 680, 684 (2005). "'If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.'" *State v. Veazey*, ___ N.C. App. ___, ___, 689 S.E.2d 530, 532 (2009) (quoting *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982)), *disc. review denied*, 363 N.C. 811, 692

S.E.2d 876 (2010). Accordingly, since the trial court, as the fact-finder, could assign whatever weight and credibility it chose to the officer's testimony, we must uphold this portion of the finding of fact as supported by competent evidence.

Defendant also argues that the evidence does not support the trial court's finding that defendant was speeding because Officer Cross testified only that he estimated defendant's speed as over the speed limit. In *State v. Barnhill*, 166 N.C. App. 228, 233, 601 S.E.2d 215, 218, *appeal dismissed and disc. review denied*, 359 N.C. 191, 607 S.E.2d 646 (2004), however, this Court held that "[e]xcessive speed of a vehicle may be established by a law enforcement officer's opinion as to the vehicle's speed after observing it." The trial court could, therefore, base its finding that defendant was speeding on Officer Cross' testimony. Defendant's arguments regarding why Officer Cross' testimony was not credible were issues for the trial court to resolve.

The remainder of findings of fact 1 and 2 are unchallenged by defendant and, therefore, are binding on appeal. The next question is whether these findings of fact support the trial court's conclusions of law, which stated in pertinent part:

> 2. That none of the Defendant's Constitutional rights, either Federal or State, have been violated in the method or procedure by which the Defendant's vehicle was stopped, the Defendant was arrested and by which items were seized from him and from the vehicle that he was operating[] by law enforcement officers on July 28, 2008.
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> 3. That the law enforcement officers involved in the subject matter committed no substantial violations of rules of criminal

> law or procedure in the method or procedure used by which the Defendant's vehicle was stopped, the Defendant arrested and items seized from him and from the vehicle that he was operating on July 28, 2008.
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> 4. That the traffic stop [vehicle seizure] complained of here was "...made on the basis of a readily observed traffic violation such as speeding or running a red light [and] is governed by probable cause. Probable cause is a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaging in criminal activity." See *State of North Carolina vs. McClendon*, 350 N.C. 630, 517 S.E.2d 128, 132 (1999) and *State of North Carolina vs. Wilson*, 155 N.C. App. 89, 94-95, 574 S.E.2d 93, 97-98 (2002), *disc. rev. denied*, 356 N.C. 693, 579 S.E.2d 98, *cert. denied*, 540 U.S. 843, 124 S. Ct. 113, 157 L. Ed. 2d 78 (2003). The defendant's violations of Chapter 20 of the North Carolina General Statutes (blocking a lane of travel and speeding) were sufficient to establish probable cause for the subject law enforcement officers to execute a stop and seizure of the defendant's vehicle and contents therein.

An initial question raised by conclusion of law 4 is whether the trial court properly required a showing of probable cause. Defendant argues, citing *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006), that the trial court properly concluded that when a stop is made for an observed traffic violation, the officer must have probable cause to believe a violation was committed. As the State points out, however, *Ivey* was overruled by the Supreme Court in *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008), where the Court held that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected."

In *Styles*, as here, the lower courts had applied the more stringent probable cause standard. The Supreme Court, after concluding that the proper standard was reasonable suspicion, proceeded to determine whether the trial court's findings of fact were sufficient to establish reasonable suspicion. *Id.* at 416, 665 S.E.2d at 441. The Court concluded that the trial court's finding that the officer had observed the defendant failing to signal in violation of N.C. Gen. Stat. § 20-154(a) (2009), was sufficient to support the trial court's "conclusion of law that defendant's constitutional rights were not violated by the stop." *Styles*, 362 N.C. at 417, 665 S.E.2d at 441.

Here, we have upheld the trial court's finding of fact that defendant was speeding. That finding is sufficient to support a determination that the officers had reasonable suspicion to stop defendant and, therefore, that the stop was constitutional. *See State v. Burton*, 108 N.C. App. 219, 226, 423 S.E.2d 484, 488 (1992) ("The State presented evidence that Sergeant Tiffin observed defendant traveling at a speed estimated to be twenty m.p.h. greater than the posted speed limit. On the basis of his observation and training, Sergeant Tiffin had at least reasonable suspicion to stop defendant's vehicle."), *appeal dismissed and disc. review denied*, 333 N.C. 576, 429 S.E.2d 574 (1993).

The trial court, therefore, did not err in denying defendant's motion to suppress and admitting the evidence. As the remainder of defendant's arguments hinge on the traffic stop's being unconstitutional, we need not address them.

No error.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).