

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-157

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

STATE OF NORTH CAROLINA

v.

Haywood County  
No. 08 CRS 51804

DUSTIN LEE CAMPBELL

Appeal by defendant from judgment entered 15 October 2008 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 20 July 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Kathryn E. Hathcock, for the State.*

*Michael E. Casterline for defendant-appellant.*

BRYANT, Judge.

Defendant appeals from a judgment entered against him after a jury found him guilty of habitual driving while impaired. Defendant was sentenced to a minimum of sixteen months and a maximum of twenty months imprisonment in the North Carolina Department of Correction. On appeal, defendant contends that the trial court erred when it denied his motion for a mistrial. We find no error.

*Facts*

The State's evidence tended to show that at 6:30 p.m. on 2 May 2008, a manager at an Arby's restaurant on Champion Drive noticed

that the drive-thru line of cars was being held up by a small red pickup truck. The male driver of the truck was leaning over away from the window and his eyes were closed. When the manager and an employee roused the driver, the driver began mumbling and the truck started to roll backwards. The driver then cranked the vehicle and "took off and went straight through the drive-thru."

Around 6:34 p.m., Officer Robert Swanger of the Canton Police Department received a dispatch call to be on the lookout for a suspected impaired driver in a red pickup truck traveling near the Arby's on Champion Drive. Officer Swanger, who was already on Champion Drive, looked in his rearview mirror and noticed a red Toyota pickup truck behind his patrol vehicle. After allowing the truck to pass him, Officer Swanger followed the truck for approximately three quarters of a mile. Officer Swanger observed the truck cross the double yellow line into oncoming traffic, roll through a red light without coming to a complete stop, and signal a left turn where that option was not available. When Officer Swanger activated his patrol vehicle's blue lights, the driver stopped in a parking lot.

Officer Swanger was joined by Officer Steven Moore at the scene of the stop. Both officers approached the red truck and observed that defendant was seated in the driver's seat. Officer Moore and Swanger observed a strong odor of alcohol coming from the vehicle. The officers further observed that defendant was uncoordinated, had bloodshot and glassy eyes, and had slurred speech. When asked to produce his driver's license, defendant

handed Officer Swanger a North Carolina identification card. Officer Moore asked defendant to submit to several field sobriety tests, which defendant did not perform to Officer Moore's satisfaction. Based on his observations and conversations with the defendant, Officer Moore formed the opinion that defendant was appreciably impaired, arrested him, and took defendant to the Haywood County Law Enforcement Center for chemical analysis of his breath. After being notified of his rights, defendant refused to submit to the breath test.

Defendant's sister, Randi Hatherlee, testified on defendant's behalf. Hatherlee testified that she happened to drive by during the traffic stop of her brother. She pulled over and the officers allowed her to speak to defendant while he was still inside his truck. Hatherlee testified that she did not believe defendant was impaired by alcohol on the evening of his arrest. She further testified that the confusion, bloodshot eyes, and slurred speech were consistent with symptoms she had observed defendant to have after suffering one of his seizures.

In his sole argument on appeal, defendant contends the trial court erred by denying his motion for a mistrial made on the grounds that the prosecution failed to provide him with complete discovery material. Defendant asserts information contained in Officer Swanger's trial testimony added significant facts, which were not contained within his police report provided to the defense.

Whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court. *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995) (citation omitted). The trial court's ruling will only be reversed for abuse of discretion upon a showing that "its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 667 (1987). See also *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) ("Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."). Even if abuse of discretion is shown due to the trial court's denial of a motion for relief based on discovery violations, defendant is entitled to a new trial only if he can show he was prejudiced as a result of the trial court's errors. *State v. Cook*, 362 N.C. 285, 661 S.E.2d 874 (2008).

For noncompliance with a discovery request a court may impose several sanctions, including the declaration of a mistrial. N.C. Gen. Stat. § 15A-910 (a)(3a) (2007). The decision whether or not to impose sanctions "is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 748, 370 S.E.2d 363, 372 (1988) (citations omitted).

The record shows that during direct examination, Officer Swanger read into evidence his supplemental police report, which he had submitted a week after the traffic stop. In addition to the

information contained in his police report, Officer Swanger testified, without objection, that he observed a strong odor of alcohol about defendant's person, that defendant's eyes were bloodshot and glassy, that defendant's speech was slurred, that defendant's movements were uncoordinated, and that defendant was unable to produce a North Carolina driver's license. Officer Swanger further testified, this time over defendant's objection, that he observed defendant perform the field sobriety tests and that in his opinion, defendant did not satisfactorily complete the tests.

During cross-examination, Officer Swanger admitted that his observations and opinions of defendant at the stop were not in his supplementary police report. Defense counsel then asked Officer Swanger at what point in time did he convey these additional observations to the State. Officer Swanger replied that a person from the District Attorney's Office interviewed him one week prior to trial and that he conveyed his additional observations to the State at that time. After cross-examining Officer Swanger, defense counsel moved for a mistrial "regarding the testimony of Officer Swanger that greatly added facts to the discovery that [defense counsel] had been provided." The prosecutor informed the trial court that he was unaware of the District Attorney's Office interview until Officer Swanger testified about it at trial and that he was unaware of Officer Swanger's additional observations until Officer Swanger responded to direct examination in court.

Upon hearing additional arguments from counsel, the trial court denied defendant's motion for mistrial.

Assuming *arguendo* that a violation of discovery was committed, defendant has failed to show that the trial court abused its discretion in denying defendant's motion for a mistrial. "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), sentence vacated on other grounds, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990).

We conclude defendant has not made any showing that he was prejudiced by Officer Swanger's testimony. First, defendant only objected to Officer Swanger's opinion regarding defendant's performance of the field sobriety tests. Defendant did not object to Officer Swanger's testimony that he observed a strong odor of alcohol about defendant's person, that defendant's eyes were bloodshot and glassy, that defendant's speech was slurred, that defendant's movements were uncoordinated, or that defendant was unable to produce a North Carolina driver's license. More importantly, Officer Moore testified he observed that defendant had glassy eyes, slurred speech, and an odor of alcohol about him. Officer Moore also testified that, in his opinion, defendant performed poorly on the field sobriety tests. Therefore, defendant's case was not prejudiced by Officer Swanger's testimony as to additional observations when Officer Moore testified without

objection to the same observations. The trial court did not abuse its discretion in denying defendant's motion for mistrial. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e) .