NO. COA09-1601

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Brunswick County
No. 08 CRS 55535, 55619

SHELBY LEE BROWN,

Defendant.

Appeal by defendant from judgments entered 15 April 2009 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 13 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

Richard Croutharmel for defendant.

ELMORE, Judge.

Shelby Lee Brown (defendant) appeals from judgments entered on her convictions of driving with license revoked and habitual driving while impaired. We find no error.

Facts

The evidence tended to show the following. At 1:40 a.m. on 20 September 2008, North Carolina Highway Patrolman David Adams was on patrol near the town of Bolivia, where he witnessed defendant driving ten miles per hour under the speed limit and weaving within her lane. Trooper Adams ran the vehicle's license plate number

through the police database and found an insurance hold on the vehicle. He then initiated a traffic stop.

Upon speaking with defendant outside of defendant's vehicle, Trooper Adams detected a moderate odor of alcohol coming from defendant. He ran her name through the police database and found that her license was suspended. Defendant admitted to drinking six beers and two shots of vodka that evening, but stated that she had had her last drink around 9 p.m. Trooper Adams then performed a field sobriety test, consisting of an alcosensor and horizontal gaze nystagmus test (HGN test), and found defendant to be impaired. He placed defendant under arrest and took her to the police station in Bolivia in order to administer a blood alcohol content test. At 2:36 a.m., Trooper Adams attempted to initiate the test, but defendant verbally refused three times. He then administered three more field sobriety tests and, based on defendant's performance, determined that defendant was still impaired.

Prior to trial, counsel for defendant filed a motion to suppress Trooper Adams's testimony due to violations of defendant's Fourth Amendment rights. The trial court denied the motion to suppress based on a finding that Trooper Adams had articulable suspicion and probable cause to stop defendant.

At trial, defendant was found guilty of driving while impaired and driving with license revoked and sentenced to 120 days' imprisonment. The trial court found defendant to be a habitual impaired driver based on four prior convictions for driving while impaired. For this conviction, defendant was sentenced to eighteen

twenty-two 22 months' active time with twenty-eight days' credit for time served. Defendant gave notice of appeal in open court.

Defendant contends that (I) the trial court committed reversible error by denying defendant's motion to suppress the evidence of Trooper Adams because he lacked reasonable suspicion to believe that criminal activity was afoot; (II) defendant's counsel rendered ineffective assistance of counsel by failing to properly argue defendant's motion to suppress because counsel erroneously admitted that the arresting officer had the authority to stop the car defendant was driving based on an insurance hold despite the fact that defendant was not the owner of the car, defendant was female, and the owner of the car was a male; (III) the trial court abused its discretion by admitting evidence of the HGN test that the arresting officer performed on defendant after stopping her car because the State failed to lay a proper foundation for the admission of this evidence and the evidence substantially prejudiced the defendant in the eyes of the jury; and (IV) defendant's trial attorney rendered ineffective assistance of counsel by failing to properly object to the admission of evidence of the HGN test that the State used against defendant to show proof of her alcohol impairment. We find no error.

I

Defendant first contends that the trial court committed reversible error by denying defendant's motion to suppress. We find no error.

When reviewing a trial court's denial of a motion to suppress,

"the trial court's findings of fact are conclusive on appeal if supported by competent evidence," even if the record contains evidence that would support the contrary. *State v. Downing*, 169 N.C. App. 790, 793-94, 613 S.E.2d 35, 38 (2005) (quotations and citation omitted). "The conclusions of law, however, are reviewed *de novo*." *State v. Allen*, ___ N.C. App. ___, ___, 684 S.E.2d 526, 529 (2009) (quotations and citation omitted). When no findings of fact are made, as in the case before us, our Supreme Court has ruled that "the appropriate findings [can] be inferred by the trial court's conclusions and ultimate denial of the motion to suppress. So long as there is no material conflict in the evidence before the trial court, the absence of specific findings [does] not amount to prejudicial error *per se*." *State v. Rollins*, ___ N.C. App. ___, ___, 682 S.E.2d 411, 415 (2009) (citing *State v. Phillips*, 300 N.C. 678, 685-86, 268 S.E.2d 452, 457 (1980)). In this case, the only issue in conflict is whether or not Trooper Adams had reasonable suspicion to stop defendant; the evidence presented at the pretrial voir dire hearing is uncontroverted.

A traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quotations and citation omitted). The stop must also "be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* We must consider "the totality of the circumstances . . . in determining

whether a reasonable suspicion exists." *Id.* at 414, 665 S.E.2d at 440 (quotations and citation omitted).

Based on the totality of the circumstances, Trooper Adams had reasonable suspicion to stop defendant. Trooper Adams witnessed defendant driving ten miles under the posted speed limit, as well as weaving inside her lane of traffic. While neither of these factors, alone, is enough to create reasonable suspicion, this Court has held that weaving combined with driving excessively under the speed limit may give rise to reasonable suspicion for an officer to initiate a traffic stop to investigate whether a defendant is driving while impaired. *See State v. Aubin*, 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990) (reasonable suspicion existed when the defendant was weaving within lane, plus driving forty-five miles per hour on the interstate); *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989) (reasonable suspicion existed when the defendant was weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit).

The fact that there was an insurance hold on the vehicle has no effect on the reasonable suspicion analysis because reasonable suspicion existed even if there had been no insurance hold on the vehicle. The weaving, slow speed, and early morning hour were sufficient factors to warrant a stop. Therefore, the trial court properly denied defendant's motion to suppress. We find no error.

II

Defendant next contends that her trial counsel rendered

ineffective assistance of counsel by failing to properly argue her motion to suppress. We find no error.

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). "This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Defendant is not entitled to relief unless the record shows the existence of a reasonable probability that a different verdict would have been reached in the absence of the trial attorney's deficient performance. *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

No Fourth Amendment violation occurred because Trooper Adams had reasonable suspicion to stop defendant's vehicle. Because reasonable suspicion existed, the fact that trial counsel stated that it existed because of the insurance hold, and not because of other factors, had no bearing on the outcome of the trial. The motion to suppress was properly denied and therefore no reasonable probability exists that the trial court would have reached a different verdict but for trial counsel's statement. We find no error.

III

Defendant next contends that the trial court abused its discretion by admitting evidence of a horizontal gaze nystagmus test. We find no error.

Pursuant to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure, defendant failed to preserve this issue for appeal and, therefore, it is not appropriately before this Court for review. Rule 10(a)(1) requires that "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." N.C. R. App. P. 10(a)(1) (2010). Defendant not only failed to object to the tendering of Trooper Adams as an expert, she went so far as to stipulate to Trooper Adams's status as an expert in HGN. Once Trooper Adams was admitted as an expert the objection made at the State's attempt to admit the HGN test results was not timely. This assignment of error is overruled.

IV

Finally, defendant contends that trial counsel rendered ineffective assistance of counsel by failing to properly object to the admission of evidence of a horizontal gaze nystagmus test. We find no error.

The standard of review used in defendant's first ineffective assistance of counsel claim is applicable to this claim as well. Once again, a reasonable probability must exist that the jury would have entered a different verdict but for the actions of the trial counsel. *Braswell* at 563, 324 S.E.2d at 249. We again find no error.

Defendant relies on our Supreme Court's decision in *State v. Helms* to support her claim. In that case, the Supreme Court found

the admission of HGN test results required a showing that the HGN test was reliable in addition to testimony concerning the techniques used by the police officer and his qualifications to administer and interpret the test. *State v. Helms*, 348 N.C. 578, 581, 504 S.E.2d 293, 294 (1998). The Court ultimately held that:

> In order to establish prejudicial error in the erroneous admission of the HGN evidence, defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial. . . . [I]n light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of HGN test results not been erroneously admitted a different outcome would have been reached at trial.

Id. at 583, 504 S.E.2d 293 at 296 (citation omitted).

Helms is not, however, controlling in this case. After *Helms*, the General Assembly enacted N.C. Gen. Stat. § 8C-1, Rule 702(a1), which allows a properly qualified witness to "give expert testimony solely on the issue of impairment . . . relating to . . . the results of [an HGN test] when the test is administered by a person who has successfully completed training in HGN." N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1) (2009). As a result, the reliability issue addressed in *Helms* has been resolved by the enactment of the statute. *See State v. Smart*, 195 N.C. App. 752, 756, 674 S.E.2d 684, 686 (2009), *disc. rev. denied*, 363 N.C. 810, 692 S.E.2d 874 (2010) (stating that "[w]e interpret this amendment to Rule 702(a1) as obviating the need for the State to prove that the HGN testing method is sufficiently reliable"). In the instant case, Trooper Adams was tendered as an expert on HGN test results. Defendant

stipulated to Trooper Adams's expertise in HGN testing. The record evidence supports a finding that Trooper Adams possessed the necessary expertise. As a qualified expert, Trooper Adams could properly discuss the HGN test and its results. As such, Trooper Adams's testimony was admissible.

There is also no reasonable probability that the trial court would have reached a different verdict even if this testimony was excluded. Unlike in *Helms*, where there was no evidence in the record that the defendant had been drinking an alcoholic beverage, defendant in this case admitted to Trooper Adams that she had consumed six beers, two shots of vodka, and a Hydrocodone pill that evening. This admission coupled with all of the evidence presented at trial left no reasonable probability that a different verdict would have been reached. Therefore, defendant's claim is without merit. We find no error.

No error.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).