NO. COA09-1658

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. Person County
No. 09 IFS 700039

JULIUS C. ISAAC

Appeal by defendant from judgment entered 16 September 2009 by Judge W. Osmond Smith, III, in Person County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Robert D. Croom, for the State.

Julius C. Isaac, pro se, defendant appellant.

HUNTER, JR., Robert N., Judge.

Julius C. Isaac ("defendant") was cited for speeding seventy miles per hour in a fifty-five miles per hour zone. Defendant argued at trial and on appeal that the speed limit was invalid because federal law preempts state law from establishing a speed limit unless an "[e]ngineering [s]tudy had been done to properly establish the posted speed zone." After careful review, we disagree that N.C. Gen. Stat. § 20-141 (2009) has been preempted by the 2003 edition of the Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"). Accordingly, we affirm.

I. BACKGROUND

On 5 January 2009, Trooper Emerson Morris was patrolling U.S. Highway 501 in Person County, North Carolina. He was traveling north not far from the Durham County line, outside any municipal limits, where the posted speed limit is fifty-five miles per hour.

Trooper Morris observed a black sports utility vehicle traveling south on Highway 501. Because this vehicle was traveling in the opposite direction to Trooper Morris, he only observed the vehicle for about four to five seconds. Based on this observation and his training and experience, Trooper Morris formed an opinion that the vehicle was traveling between sixty-five and seventy miles per hour.

Trooper Morris corroborated his opinion of the vehicle's speed by using a Golden Eagle Radar System. Trooper Morris was trained in using this system and had performed an accuracy check of the radar system that evening when he went to work. The radar system indicated the speed of the vehicle was seventy miles per hour.

Trooper Morris stopped the vehicle, saw that defendant was the driver, obtained his license and registration, and cited defendant for operating a motor vehicle on a street or highway at a speed of seventy miles per hour in a fifty-five miles per hour zone.

On 30 June 2009, defendant, appearing *pro se*, pled not guilty to the speeding charge, and the district court granted defendant a prayer for judgment continued. On 7 July 2009, defendant made a motion for appropriate relief. After considering the motion, the district court set aside the prayer for judgment continued, and

entered a judgment requiring defendant to pay court costs and a fine. Defendant appealed to the superior court.

Defendant's appeal in superior court was heard on 16 September 2009, and defendant waived his right to a trial by jury. Upon hearing the evidence, Judge Smith found defendant guilty of speeding sixty-five miles per hour in a fifty-five miles per hour zone. Defendant gave notice of appeal to this Court.

Defendant argues on appeal that the trial court erred by: (1) failing to grant defendant's motion to dismiss at the close of the State's evidence, (2) failing to grant defendant's motion to dismiss at the close of all the evidence, (3) failing to grant defendant's motion to dismiss on the grounds that N.C.G.S. § 20-141 is in conflict with the MUTCD, (4) failing to find N.C. Gen. Stat. § 136-30 (2009) requires conformance to the MUTCD, (5) sustaining a hearsay objection excluding Defense Exhibit D2, (6) failing to conclude that the MUTCD preempts N.C.G.S. § 20-141, and (7) reaching a verdict that violates the "fruit of the poisonous tree doctrine."

II. ANALYSIS

A. Motion to Dismiss

Defendant argues that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. Defendant contends that the State's evidence was insufficient to establish "substantial evidence of every element of the charged offense." We disagree.

"As an initial matter, we note that defendant moved for a dismissal on two separate occasions – once at the conclusion of the State's case and again at the conclusion of all of the evidence. Because defendant introduced evidence at trial on his own behalf, he waived his right to complain on appeal of the denial of his initial motion to dismiss at the conclusion of the State's evidence." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990); N.C. Gen. Stat. § 15-173 (1983). Accordingly, we consider whether the trial court erred in denying defendant's motion to dismiss following the presentation of all evidence.

An appellate court "reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114,

117 (1980). "'The motion to dismiss should be denied if there is substantial evidence supporting a finding that the offense charged was committed.'" *State v. Poag*, 159 N.C. App. 312, 318, 583 S.E.2d 661, 666 (2003)(citation omitted).

To prove a speeding violation, there must be evidence to show defendant was operating a motor vehicle upon the highways of the state at a rate greater than the designated speed limit. *State v. Spellman*, 40 N.C. App. 591, 593, 253 S.E.2d 320, 322 (1979). Taken in the light most favorable to the State, the evidence showed that Trooper Morris, a nineteen-year veteran with the N.C. Highway Patrol, was patrolling U.S. Highway 501 South on 5 January 2009. U.S. Highway 501 South is a highway "that is open to the use of the public as a matter of right for the purposes of vehicular traffic." N.C. Gen. Stat. § 20-4.01(13) (2009). Trooper Morris testified that he observed defendant's vehicle on U.S. 501 South for "four or five seconds." Additionally, Trooper Morris made an in-court identification of the defendant as the person driving the vehicle he stopped.

Defendant does not dispute the Trooper's visual estimation. Rather, defendant argues that the court should have dismissed his case because of alleged inaccuracies of the radar system used to corroborate the Trooper's visual estimation. "[E]vidence of radar speed measurement is admissible . . . to corroborate testimony based on visual observation." *State v. Jenkins*, 80 N.C. App. 491, 495, 342 S.E.2d 550, 552 (1986). Excessive speed of a vehicle may be established by a law enforcement officer's opinion as to the

vehicle's speed after observing it. N.C.R. Evid. 701 (2010); *State v. Barnhill*, 166 N.C. App. 228, 233, 601 S.E.2d 215, 218 (2004). "'Absolute accuracy, however, is not required to make a witness competent to testify as to speed.'" *State v. Clayton*, 272 N.C. 377, 382, 158 S.E.2d 557, 561 (1968) (citation omitted).

N.C.G.S. § 20-141(b)(2) declares that it is unlawful to operate a vehicle in excess of fifty-five miles per hour outside municipal corporate limits. N.C.G.S. § 20-141(b)(2). Trooper Morris testified that U.S. 501 has "visible" signs posting a fifty-five miles per hour speed limit. Trooper Morris further testified that the defendant "wasn't near any city limits," when he was observed driving at an estimated "65 [to] 70 miles per hour."

Trooper Morris's opinion of defendant's speed, based on his visual observation and corroborated by the radar results, is "substantial" evidence that defendant was traveling between sixty-five to seventy miles per hour in a fifty-five mile per hour zone. Therefore, the State's evidence was sufficient to survive defendant's motion to dismiss under the standard of review in this case. This argument is overruled.

B. Conflict between Federal and State law

On appeal, defendant argues the trial court erred by denying his motion to dismiss because N.C.G.S. § 20-141(b)(2) "is in conflict with" the 2003 Edition of the Manual on Uniform Traffic Control Devices for Streets and Highways. In addition, defendant argues N.C.G.S. § 20-141 is preempted by the 2003 Edition of the MUTCD. By these two arguments, defendant contends that states may

not establish a posted speed limit unless an engineering study has been completed and filed pursuant to federal law, i.e., the MUTCD. Defendant argues that there were "no grounds for issuing a citation due to the fact that no engineering study had been done to properly establish the posted speed zone" in accordance with the MUTCD. We disagree.

Section 2B.13 of the 2003 MUTCD reads in pertinent part:

> Speed Limit Sign (R2-1)
> Standard:
> After an engineering study has been made in accordance with established traffic engineering practices, the Speed Limit (R2-1) sign (see Figure 2B-1) shall display *the limit established by law, ordinance, regulation, or as adopted by the authorized agency*. The speed limits shown shall be in multiples of 10 km/h or 5 mph.
>
> Guidance:
> At least once every 5 years, States and local agencies should reevaluate non-statutory speed limits on segments of their roadways that have undergone a significant change in roadway characteristics or surrounding land use since the last review.
>
> No more than three speed limits should be displayed on any one Speed Limit sign or assembly.

Manual on Uniform Traffic Control Devices for Streets and Highways § 2B.13 (2003 ed.) (emphasis added).

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your*

House of Raleigh, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). "Where the language of a statute is clear, the courts must give the statute its plain meaning; however, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent." *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009).

Given that statutes should be sensibly rather than liberally construed, and their meaning kept within the limits of what the words themselves allow, we believe the cited subsection is clear in its language. *Grocery Co. v. R. R.*, 170 N.C. 241, 243, 87 S.E. 57, 58 (1915). The subsection above provides that "the [s]peed [l]imit . . . sign . . . shall display the limit established by law, ordinance, regulation, or as adopted by the authorized agency." Manual on Uniform Traffic Control Devices for Streets and Highways § 2B.13 (2003 ed.). N.C.G.S. § 20-141 sets the State's speed restrictions. Section 2B-13 of the MUTCD clearly allows North Carolina to set the limit to be posted on the sign. Thus, defendant has failed to demonstrate that the State is precluded from authorizing or adopting a speed limit without first conducting a speed study. Moreover, we fail to find that Congress deemed, or intended, that the MUTCD preempts the State's ability to adopt or authorize speed limits.

Section 2B.13 of the 2009 edition of the MUTCD states:

> Standard: Speed zones *(other than statutory speed limits)* shall only be established on the basis of an engineering study that has been performed in accordance with traffic

> engineering practices. The engineering study shall include an analysis of the current speed distribution of free-flowing vehicles.

Manual on Uniform Traffic Control Devices for Streets and Highways § 2B.13 (2009 ed.) (emphasis added). Here, the MUTCD plainly acknowledges statutory speed limits, and addresses engineering studies only in the absence of a statutory speed limit. Contrary to defendant's contentions, we fail to see how the MUTCD invalidates the State's statutory powers to set speed limits.

Defendant argues N.C.G.S. § 20-141(b)(2) "is in conflict with" the MUTCD. "In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 715 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459 (1947)). It is well established that implied conflict preemption occurs only when there is an actual and direct conflict between the state and federal laws. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 85 L. Ed. 2d 714, 721 (1985). "[P]reemption will . . . be implied if state or local law 'actually conflicts with federal law.'" *Southern Blasting Services v. Wilkes County*, 288 F.3d 584, 590 (4th Cir. 2002) (citations omitted).

An "actual or direct conflict" can be proven by showing that "'compliance with both federal and state regulations is a physical

impossibility,'" or by proving that "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough*, 471 U.S. at 713, 85 L. Ed. 2d at 721 (citations omitted). Evidence that the State has "additional requirements above a federal minimum is unlikely to create a direct and positive conflict with federal law. Rather, a conflict is more likely to occur when a state . . . provides that compliance with a federal standard is not mandated, or when compliance with federal law actually results in a violation of local law." *Southern Blasting*, 288 F.3d at 591-92.

Defendant has failed to show an actual and direct conflict between federal and state laws. First, defendant has failed to show that all state speed limits are regulated by the MUTCD. Section 20-141(b)(2) declares that it is unlawful to operate a vehicle in excess of fifty-five miles per hour outside municipal corporate limits. N.C.G.S. § 20-141(b)(2). Section 2B.13 of the MUTCD states that "the Speed Limit . . . sign . . . shall display the limit established by law, ordinance, regulation, or as adopted by the authorized agency." Manual on Uniform Traffic Control Devices for Streets and Highways § 2B.13 (2003 ed.). We fail to see how the MUTCD conflicts with this statutory speed limit. Morever, defendant has failed to show when an engineering study is required by the MUTCD, or what is required for an engineering study to comply with the MUTCD. Defendant has not met his burden of proving actual and direct conflict between federal and state laws;

therefore, the presumption against preemption stands. *See Southern Blasting*, 288 F.3d at 590. These arguments are overruled.

C. Hearsay

Defendant argues that the trial court erred when it sustained the State's objection to the introduction of a letter from a traffic engineer with the North Carolina Department of Transportation. The letter addressed defendant's request for information concerning speed studies conducted on the southbound lanes of US 501/NC 57. It stated that a speed study was not "on file" for US 501/NC 57, but that "North Carolina's statutory speed limit is 55 mph outside municipal corporate limits." We disagree.

On appeal, the standard of review of a trial court's decision to admit or exclude evidence is abuse of discretion. *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (2005). An abuse of discretion will be found only when the trial court's decision "was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 678, 606 S.E.2d at 439 (internal quotation marks and citation omitted). Some decisions from this Court have held that the proper standard of review for a trial court's decision on the admissibility of hearsay is *de novo*. *See, e.g.*, *State v. Wilson*, __ N.C. App. __, 676 S.E.2d 512 (2009). We need not resolve this seeming inconsistency to resolve this case, however, because under either standard the evidence was properly excluded.

"Hearsay evidence consists of the offering into evidence of a statement, oral or written, made by a person other than the witness

for the purpose of establishing the truth of the matter so stated." *Wilson v. Indemnity Corp.*, 272 N.C. 183, 188, 158 S.E.2d 1, 5 (1967). Hearsay is inadmissible except when allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2009). One exception to the hearsay rule is the business record exception, which provides that business records of regularly conducted activity are not excluded by the hearsay rule, even though the declarant is unavailable as a witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2009). A business record includes:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Id. A qualifying business record is admissible when "a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). While the foundation must be laid by a person familiar with the records and the system under which they are made, there is "'no requirement that the records be authenticated by the person who made them.'" *In re S.D.J.*, 192 N.C. App. 478, 482-83,

665 S.E.2d 818, 821 (2008) (quoting *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985)). Additionally, the foundational requirements of Rule 803(6) may be satisfied through the submission of the following:

> "An affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]"

Id. at 483, 665 S.E.2d at 822 (quoting *In re S.W.*, 175 N.C. App. 719, 725, 625 S.E.2d 594, 598 (2006)).

In the present case there is no testimony or affidavit from a custodian or other qualified person offered to support the authenticity and validity of the record. Moreover, there is no testimony to indicate that the letter is a memorandum, report, record, or data compilation, in any form, that was kept in the course of a regularly conducted business activity and that it was a regular practice to create such letters. Therefore, the trial court did not err when it sustained the State's objection to the introduction of defendant's letter from the traffic engineer. This argument is overruled.

D. Defendant's Further Arguments

Defendant's sixth argument is a restatement of his argument concerning his motion to dismiss. For the reasons discussed *supra*, we conclude that the trial court's findings of fact are supported by competent evidence. The State presented substantial evidence regarding each element of the offense of speeding and that defendant

was the person driving the vehicle Trooper Morris observed speeding on 5 January 2009. Moreover, defendant does not dispute the Trooper's visual estimation of the offense. Based on the evidence before the court, the judge found that defendant was responsible for traveling sixty-five miles per hour in a fifty-five mile per hour zone. This argument is overruled.

In his final argument, defendant contends that he was denied due process through the trial court's reliance on Trooper Morris's testimony which was based on enforcing a state traffic law that was not in compliance with the MUTCD. This argument concerns an alleged constitutional violation; however, defendant failed to offer this constitutional objection at trial. Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *State v. Mobley*, __ N.C. App. __, __, 684 S.E.2d 508, 510 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010). This argument is overruled.

III. CONCLUSION

Based on the foregoing, we affirm.

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).