NO. COA09-87

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

STATE OF NORTH CAROLINA

v. Montgomery County
No. 05-CRS-51494

JAMES JUNIOR COLLINS

Appeal by defendant from judgment entered 24 September 2008 by Judge V. Bradford Long in Montgomery County Superior Court. Heard in the Court of Appeals 18 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Tamara Zmuda, for the State.

Daniel F. Read for defendant-appellant.

HUNTER, JR., Robert N., Judge.

James Junior Collins ("defendant") appeals from a judgment of the trial court that denied his motion to suppress evidence obtained during a traffic stop for suspicion of impaired driving and impeding traffic. For reasons discussed herein, we affirm.

I. Background

At approximately 10:41 p.m. on Friday, 19 August 2005, Officer Robert George ("Officer George") of the Mt. Gilead Police Department was on patrol within the city limits of Mt. Gilead. As Officer George approached the intersection of Highway 73 and 109, he noticed defendant's car and followed it through the

intersection. Officer George followed defendant for 75 to 100 yards, and paced defendant's car at ten miles per hour. The speed limit on the three-lane highway was 35 miles per hour. The vehicles proceeding in defendant's lane of travel who were in front of defendant were accelerating away from him. The traffic behind Officer George, who was immediately behind defendant, was backing up due to defendant's slow rate of speed.

After following defendant for approximately a quarter of a mile, Officer George became suspicious of defendant's slow rate of speed and stopped defendant's vehicle. A chemical analysis of defendant's breath indicated an alcohol concentration level of 0.11. Defendant was arrested for driving while impaired (DWI) in violation of N.C. Gen. Stat. § 20-138.1.

On 7 June 2007, defendant was found guilty of DWI in the Montgomery County District Court. That same day, defendant gave notice of appeal to superior court for a trial de novo.

On 15 September 2008, defendant filed a motion to suppress in superior court. A hearing on the motion to suppress was held before Judge V. Bradford Long in Montgomery County Superior Court on 17 September 2008.

During the hearing, Officer George testified that he was familiar with the United States Department of Transportation's National Highway Traffic Safety Administration ("NHTSA") guidelines on visual detection of DWI motorists. Specifically, Officer George testified that the guidelines provide that one indicia of DWI is driving more than ten miles per hour below the speed limit.

Officer George also testified that he was familiar with N.C. Gen. Stat. § 20-141(h), which allows for the citation of a motorist who is impeding traffic. Furthermore, Officer George testified that he could have cited defendant for impeding traffic, but chose not to.

Officer George said that he began following defendant from a point just south of the intersection of Highway 73 and 109 and followed defendant for 75 to 100 yards, while defendant said that he backed out of C's Convenience Store, which is located north of the intersection, onto Highway 109 and was immediately stopped. Defendant stated that about the time he put his car in gear and started to accelerate, "the blue lights jumped behind [him]," and therefore, he never had the opportunity to get up to a normal rate of speed.

After the evidentiary hearing, Judge Long denied defendant's motion concluding that Officer George had reasonable suspicion to investigate DWI as well as reasonable suspicion to investigate a vehicle for impeding the flow of traffic under N.C. Gen. Stat. § 20-141(h). After preserving his right to appeal under *North Carolina v. Alford*[1], defendant pled guilty to DWI. Defendant was subsequently sentenced to 60 days in jail, which was suspended upon the condition that defendant pay $679.50 and complete 24 hours of community service.

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[1] In *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), the Court held that a defendant may enter a guilty plea containing a protestation of innocence when the defendant intelligently concludes that a guilty plea is in his best interest and the record contains strong evidence of actual guilt. *Id.* at 37-39, 27 L. Ed. 2d at 171-72.

II. Issues

Defendant asserts that the trial court erred by denying his motion to suppress on the grounds that (1) the trial court erred in making findings of fact 4, 5, and 6 that Officer George paced defendant's speed at ten miles per hour, and (2) the initial stop of defendant's car was not based on a reasonable and articulable suspicion of criminal activity.

III. Standard of Review

When reviewing a motion to suppress, the trial court's findings of fact are conclusive and binding on appeal if supported by competent evidence. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). The trial court's findings of fact "'"are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting."'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted). We review the trial court's conclusions of law *de novo*. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648.

IV. Evidentiary Findings

Defendant argues that the trial court erred in making findings of fact 4, 5, and 6 that Officer George paced defendant's speed at ten miles per hour. Defendant asserts that Officer George had insufficient opportunity to pace defendant's car as it traveled only a short distance through a major intersection, and therefore, these factual findings were unsupported by competent evidence. We disagree.

In the case *sub judice*, the trial court's findings of fact 4, 5, and 6 are:

> 4) On this occasion, Friday, 19 August 2005, at approximately 10:41 p.m. Officer George was on patrol within the city limits of Mt. Gilead. Officer George began observing the defendant's vehicle south of the intersection of Highway 73 and 109. As the defendant and Officer George went through the intersection, the light was at all times green in favor of the defendant and Officer George.
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> 5) Officer George followed the defendant from a point south of the intersection for approximately 75 to 100 yards. During the 75 to 100 yards that the officer was behind the defendant, the defendant's vehicle was paced at ten miles per hour. The defendant's vehicle was not picking up speed. The vehicles proceeding in the defendant's lane of travel who were in front of the defendant were pulling away from the defendant. There was traffic behind the officer who was immediately behind the defendant, and this traffic was backing up behind the officer by the defendant traveling at ten miles per hour. The posted speed limit where the defendant was traveling ten miles per hour was 35 miles per hour. This is an area of businesses within the city limits of Mt. Gilead. The defendant was traveling ten miles per hour on a three-lane highway that included a middle turning lane.
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> 6) After making the pace at the clock of ten miles per hour and making all of the observations set out above, the officer activated his blue lights and initiated a seizure of the defendant and his vehicle.

Defendant argues that finding of fact 4 is unsupported by competent evidence. Officer George testified that he followed defendant's vehicle from south of the intersection of Highways 73 and 109, through the green light at the intersection, and continued on Highway 109 until he stopped defendant's vehicle. Officer George's testimony provides competent evidence to support finding

of fact 4 despite conflicting testimony by defendant that he backed onto Highway 109 from a point north of its intersection with Highway 73, and that Officer George stopped him before he had ample time to get up to speed.

Defendant argues that findings of fact 5 and 6 are also unsupported by competent evidence because Officer George had insufficient opportunity to approximate defendant's speed at ten miles per hour. Defendant's argument is without merit as Officer George testified to the following:

> Q: What if anything unusual attracted your attention to [defendant's] vehicle?
>
> A: The speed it was traveling.
>
> Q: At what speed approximately was it traveling?
>
> A: I paced it at 10 miles per hour.
>
> Q: And what is the posted speed limit there?
>
> A: Thirty-five.
>
> * * * *
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> Q: . . . And how long did you follow this particular vehicle at that speed?
>
> A: Less than a quarter of a mile.

Based on Officer George's testimony, findings of fact 4, 5, and 6 are supported by competent evidence, and therefore, are binding on appeal.

V. Motion to Suppress Evidence

Defendant asserts that the trial court erred in concluding as a matter of law that Officer George had reasonable and articulable

suspicion to stop defendant's vehicle and thus erred in denying the motion to suppress. We disagree.

Our federal and state constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Seizures include brief investigatory detentions, such as those involved in the stopping of a vehicle. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994). Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). If the investigatory seizure is invalid, evidence resulting from the warrantless stop is inadmissible under the exclusionary rule in both our federal and state constitutions. *State v. Jones*, 96 N.C. App. 389, 394, 386 S.E.2d 217, 220 (1989), *appeal dismissed*, *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990).

Our Supreme Court has held that an investigatory stop must be justified by a "'reasonable, articulable suspicion that criminal activity is afoot.'" *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]" *Illinois*, 528 U.S. at 123, 145 L. Ed. 2d at 576. "The stop must 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." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906). A court must consider the totality of the circumstances in determining whether a reasonable suspicion existed. *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645, *cert. denied*, ___ U.S. ___, 172 L. Ed. 2d 198 (2008). "The only requirement is a minimum level of objective justification, something more than an 'unparticularized suspicion or hunch.'" *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

Officer George's basis for the stop of defendant's vehicle went beyond a "mere hunch." The trial court found that Officer George had served as a law enforcement officer since 1990, and had conducted over 100 DWI stops in his career. Officer George testified that he was familiar with the NHTSA guidelines on visual detection of DWI motorists. Specifically, Officer George testified that he was familiar that the guidelines provide that one indicia of DWI is driving more than ten miles per hour slower than the speed limit. The NHTSA publication entitled *The Visual Detection of DWI Motorists*, provides that "[i]mpaired drivers also can experience difficulty maintaining an appropriate speed. There is a good chance the driver is DWI if you observe a vehicle . . . [d]riven at a speed that is ten miles per hour or more under the speed limit."

Officer George observed defendant driving twenty-five miles under the posted speed limit at the exceptionally low speed of ten

miles per hour. Additionally, Officer George indicated that defendant failed to accelerate at any point during the 75 to 100 yards he was following defendant causing cars to back up behind defendant. Officer George's observations, based on his training, knowledge of the NHTSA guidelines of visual detection of DWI motorists, and over nineteen years of experience suggested that he was observing an impaired driver. "Reasonable suspicion is a commonsensical proposition, Courts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street." *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993).

There are a number of cases in North Carolina in which an officer was found to have reasonable suspicion to stop defendant's vehicle where defendant was traveling more than ten miles per hour below the speed limit. For example, in *State v. Bonds*, 139 N.C. App. 627, 533 S.E.2d 855 (2000), this Court held that the officer had reasonable suspicion to stop defendant's vehicle due to his traveling less than thirty miles per hour in a forty-mile-per-hour zone with his window down in twenty-eight-degree weather, while having a blank look on his face. Additionally, in *State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990), *appeal dismissed, disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991), this Court held that an officer had reasonable suspicion when defendant was driving only forty-five miles per hour on the interstate while weaving within his own lane. Similarly, reasonable suspicion was also found in *State v. Jones*,

96 N.C. App. 389, 386 S.E.2d 217 (1989), *appeal dismissed*, *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990), when defendant was driving twenty miles per hour below the speed limit, while weaving within his own lane.

Additionally, *Barnard*, 362 N.C. 244, 658 S.E.2d 643, stands for the proposition that one dominant factor can create reasonable suspicion given a particular set of facts and circumstances. The court in *Barnard* held that defendant's thirty-second delay at a green traffic light under the circumstances gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired. *Id.* at 248, 658 S.E.2d at 645.

Furthermore, defendant contends that Officer George had insufficient opportunity to observe defendant's vehicle. Defendant bases his contention on the fact that Officer George was behind him for 75 to 100 yards, and therefore, would have only had fifteen to twenty seconds[2] to follow defendant before initiating the stop. However, we have previously found that an officer had reasonable suspicion to stop a defendant's vehicle after following it for a relatively short period of time. *See State v. Watson*, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996) (concluding that a trooper's testimony that he observed defendant driving on the

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[2]Distance to time calculation: 1,760 yards/mile multiplied by 10 mph (defendant's speed)= 17,600 yards/hour divided by 60 minutes/hour= approximately 293 yards/minute. 75 yards observed divided by 293 yards/minute= about .25 minutes observed multiplied by 60 seconds/minute= *approximately 15 seconds*. 100 yards observed divided by 293 yards/minute= about .34 minutes observed multiplied by 60 seconds/minute= *approximately 20 seconds*. Therefore, Officer George followed defendant's vehicle for *approximately 15 to 20 seconds*.

center line and weaving back and forth within his lane for 15 seconds was sufficient to establish reasonable suspicion); *State v. Adkerson*, 90 N.C. App. 333, 336, 368 S.E.2d 434, 436 (1988) (holding that a trooper who followed defendant's car for about a quarter of a mile and within that distance observed the car weave back and forth in its lane five or six times and run off the road once had reasonable suspicion). Therefore, we find defendant's argument unpersuasive.

Defendant's sustained speed of ten miles per hour in a thirty-five-mile-per-hour zone coupled with Officer George's observation that defendant's speed was not necessary for the safe operation of his vehicle, and the fact defendant was blocking the flow of traffic, gave rise to a reasonable, articulable suspicion that defendant may have been driving while impaired. Because the stop of defendant's vehicle was constitutional, it is not necessary to address whether or not defendant violated the impeding traffic statute, pursuant to N.C. Gen. Stat. § 20-141(h).

V. Conclusion

Based on the aforementioned reasons, we affirm the order denying defendant's motion to suppress.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).