NO. COA10-260

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Brunswick County
No. 08 CRS 52430

KIM KENNETH KOTECKI

Appeal by defendant from judgment entered 3 September 2009 by Judge Franklin Lanier in Brunswick County Superior Court. Heard in the Court of Appeals 13 September 2010.

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

Anne Bleyman, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Kim Kenneth Kotecki appeals from a judgment entered upon a jury verdict finding him guilty of impaired driving. We find no error.

On the evening of 24 April 2008, Officer Nowell, a road patrolman with the Brunswick County Sheriff's Office, was traveling northbound on Highway 17 in Brunswick County in response to a dispatch concerning a nearby disturbance. His emergency lights and siren were activated. As he approached the intersection of Highway 17 and Ocean Isle Beach Road, the dispatch was cancelled, so he decreased his speed and deactivated his emergency lights and siren.

At that time, he observed defendant, traveling southbound on Highway 17, move his pickup truck into the left turn lane. Defendant then crossed the northbound lanes of traffic, turning left onto Ocean Isle Beach Road, and Officer Nowell had to swerve around his truck to avoid a collision. Officer Nowell activated his blue lights, and turned to follow defendant to conduct a traffic stop. As he followed defendant, he observed the passenger-side wheels of defendant's truck touch the fog line. Although Officer Nowell's blue lights had been on since he turned to follow defendant, he had to sound his siren twice before defendant pulled over. Upon approaching defendant, Officer Nowell could smell the odor of alcohol on his breath. Officer Nowell called the Highway Patrol, which was responsible for handling drunk driving incidents. When the trooper arrived, he conducted field sobriety tests on defendant. Defendant refused to submit to a preliminary Alco-Sensor breath test, and was arrested and taken to the Brunswick County Jail. The Intoximeter test administered there registered a concentration of .11 grams of alcohol per 210 liters of defendant's breath. Defendant was charged with impaired driving.

In district court, defendant executed, and Judge Thomas V. Aldridge, Jr. certified, a waiver of counsel form. Defendant appeared *pro se* at his bench trial in district court, and was convicted of impaired driving and sentenced to a minimum and maximum term of 60 days in the custody of the Sheriff of Brunswick County. The court suspended the sentence and placed defendant on

unsupervised probation for 24 months. Defendant gave oral notice of appeal.

In superior court, defendant executed a second waiver of counsel form, and Judge Ola M. Lewis certified it. Defendant then filed a *pro se* motion to suppress. When his case was called for trial, defendant executed a third waiver of counsel form, and Judge Franklin Lanier certified it. Defendant proceeded *pro se*, the court heard and denied his motion to suppress, and a jury found defendant guilty of impaired driving. Defendant was sentenced to a minimum and a maximum term of six months in the custody of the North Carolina Department of Correction. Defendant appeals.

I.

Defendant first contends Judge Lanier failed to conduct the thorough inquiry required by N.C.G.S. §§ 15A-1242 and 7A-457(a) to ensure that he knowingly, intelligently, and voluntarily waived his right to counsel before allowing him proceed *pro se* at his trial in superior court. We disagree.

Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has the right to represent himself and proceed *pro se* in any state or federal court. *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975). Our Supreme Court has also "long recognized the state constitutional right of a criminal defendant to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes." *State v. Moore*, 362 N.C. 319, 321, 661

S.E.2d 722, 724 (2008) (internal quotation marks omitted). Before allowing a defendant to waive in-court representation by counsel, the trial court must ensure that the waiver of the right to counsel and election to proceed *pro se* is expressed "clearly and unequivocally." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (internal quotation marks omitted). Next, the trial court must ensure "the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476 (citing *Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 581-82). "In order to determine whether the waiver meets that standard, the trial court must conduct a thorough inquiry." *Id.* "This Court has held that the inquiry required by N.C.G.S. § 15A-1242 satisfies constitutional requirements." *Id.* Section 15A-1242 provides that

> [a] defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> > (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
> >
> > (2) Understands and appreciates the consequences of this decision; and
> >
> > (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2009). "The inquiry under N.C.G.S. § 15A-1242 is mandatory, and failure to conduct it is prejudicial error." *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. In addition,

if a defendant is indigent, N.C.G.S. § 7A-457(a) provides, in relevant part, that

> [a]n indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel . . . if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

N.C. Gen. Stat. § 7A-457(a) (2009). "The inquiry required under § 7A-457 is similar to the inquiry required under N.C.G.S. § 15A-1242 and may be satisfied in a like manner." *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (internal quotation marks omitted). The inquiry may be completed at a preliminary stage of a proceeding, and does not have to be conducted by the judge who presides at a defendant's trial. *State v. Kinlock*, 152 N.C. App. 84, 88-89, 566 S.E.2d 738, 741 (2002), *aff'd*, 357 N.C. 48, 577 S.E.2d 620 (2003). Furthermore, a "trial in the district court and [a] further trial of the case in the superior court on appeal together constitute[] one in-court proceeding." *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540 (1974).

In *Kinlock*, the defendant signed a waiver of counsel form following a pre-trial proceeding before a different judge than the one who subsequently presided at his trial. *Id.* at 89, 566 S.E.2d at 741. This Court, recognizing "a presumption of regularity accorded the official acts of public officers[,]" held that "[w]hen

a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *Id.* at 89-90, 566 S.E.2d at 741 (internal quotation marks omitted); *see also State v. Wall*, 184 N.C. App. 280, 285, 645 S.E.2d 829, 833 (2007) ("[D]efendant's assertion alone is insufficient to rebut the presumption of validity of the waivers under *Kinlock*[.]").

At the time he executed the waiver of counsel form before Judge Lanier, defendant had previously executed two waiver of counsel forms, one in district court before Judge Aldridge and one in superior court before Judge Lewis. Both judges certified the waivers, attesting that defendant had been informed of the requirements set forth in N.C.G.S. § 15A-1242. On appeal, defendant fails to challenge either of those waivers. Indeed, defendant acknowledges that "[t]here is no record of how thorough an inquiry was made before [he] signed either earlier waiver of counsel form." Therefore, we hold that defendant has failed to rebut the presumption that his prior certified waivers were knowing, intelligent, and voluntary.

II.

Defendant next contends the superior court erred by denying his motion to suppress the evidence obtained as a result of the stop of his vehicle. We disagree.

The United States and North Carolina Constitutions protect individuals against unreasonable searches and seizures. *State v.*

Harris, 145 N.C. App. 570, 580, 551 S.E.2d 499, 505 (2001) (citing U.S. Const. amend. IV; N.C. Const. art. 1, §§ 19, 20), *disc. review denied and appeal dismissed*, 355 N.C. 218, 560 S.E.2d 146 (2002). "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.'" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979)). An officer making a traffic stop must have a "'reasonable, articulable suspicion that criminal activity is afoot.'" *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). The suspicion 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." *Id.* (internal quotation marks omitted). A reviewing court "must consider the 'totality of the circumstances--the whole picture' in determining whether a reasonable suspicion exists." *Id.* at 414, 665 S.E.2d at 440 (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)).

Defendant failed to object when the evidence that was the subject of his motion to suppress was introduced at trial. Because "a pretrial motion to suppress . . . is not sufficient to preserve for appeal the issue of admissibility of evidence," *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001), defendant failed to preserve this issue for review. Thus, as both parties recognize, our review

of this matter is restricted to determining whether the trial court committed plain error in denying the motion to suppress. Because "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all[,]" *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986), we first consider whether the trial court erred by denying defendant's motion to suppress.

"In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). The trial court's "conclusions of law regarding whether the officer had reasonable suspicion . . . to detain a defendant [are] reviewable *de novo*." *State v. Hudson*, ___ N.C. App. ___, ___, 696 S.E.2d 577, 580 (2010) (omission and alteration in original) (internal quotation marks omitted). The "conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001), *reconsideration denied*, 355 N.C. 495, 563 S.E.2d 187 (2002) (internal quotation marks omitted). Defendant assigned error to several of the trial court's findings of fact, but abandoned them when he failed to argue them in his brief. *See* N.C.R. App. P. 28(b)(6) (2009). We therefore deem the trial court's unchallenged findings to be supported by competent

evidence and binding on appeal. *See State v. White*, 184 N.C. App. 519, 523, 646 S.E.2d 609, 611 (When "the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding[.]" (internal quotabgtion marks omitted)), *appeal dismissed and disc. review denied*, 361 N.C. 702, 653 S.E.2d 160 (2007). In denying defendant's motion to suppress, the trial court recited, in relevant part, the following findings:

> Deputy Nowell observed a vehicle coming . . . southbound on highway 17 and . . . cross[] the northbound lane of highway 17 in front of [him].
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> . . . Deputy Nowell had to swerve to his left not to hit the [defendant's] vehicle . . . .
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> . . . Deputy Nowell missed the [defendant's] vehicle . . . [by] just a few feet.
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> . . . Deputy Nowell turned his vehicle around in the median of highway 17 and activated his blue lights immediately upon seeing the vehicle turn in front of him.
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> . . . Deputy Nowell went a mile or half a mile or a mile, after catching up to the vehicle of the defendant[,] and observed the vehicle of the defendant touch the fog line on the right side of the highway.
>
> . . . Deputy Nowell hit his siren on two occasions before the defendant pulled over.
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> . . . Deputy Nowell, at all times after turning around in the median, had his blue lights activated.
>
> . . . Deputy Nowell had his blue lights activated, proceeding north on highway 17, when he first observed the vehicle of the defendant traveling south in [its] regular traveled lane.

The trial court then recited the following conclusion of law:

> [The officer had] reasonable articulable suspicion in which to make the stop, based on the turn across the northbound lane by the defendant and the touching of the fog line and the fact that the siren had to be hit on two occasions to make the defendant pull over.

On appeal, defendant asserts only that his touching the fog line was an insufficient ground on which to stop his vehicle, and ignores the remaining grounds for the trial court's conclusion of law. The trial court's finding that defendant turned across the northbound lane of traffic immediately in front of Officer Nowell causing Officer Nowell to have to swerve around defendant's vehicle to avoid a collision, a violation of several sections of North Carolina's Motor Vehicle Act,[1] was alone sufficient to give Officer Nowell the required reasonable articulable suspicion to stop defendant's vehicle. *See Styles*, 362 N.C. at 417, 665 S.E.2d at 441 ("[The officer's] observation of defendant's traffic violation gave him the required reasonable suspicion to stop defendant's vehicle."). On that basis, the trial court did not err, or commit plain error, by denying defendant's motion to suppress.

No error.

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[1]N.C.G.S. § 20-153(b) provides that "after entering the intersection, the left turn shall be made so as to leave the intersection in a lane lawfully available to traffic moving in the direction upon the roadway being entered[,]" N.C. Gen. Stat. § 20-153(b) (2009); N.C.G.S. § 20-155(b) provides that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard[,]" N.C. Gen. Stat. § 20-155(b) (2009); and N.C.G.S. § 20-154(a) provides that "[t]he driver of any vehicle upon a highway . . . before starting, stopping or turning from a direct line shall first see that such movement can be made in safety[.]" N.C. Gen. Stat. § 20-154(a) (2009).

Judges STROUD and ERVIN concur.

Report per Rule 30(e).