NO. COA10-414

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Montgomery County
No. 08 CRS 51716

MICHAEL T. BUTLER

Appeal by the State of North Carolina from an order entered 24 November 2009 by Judge Lindsay R. Davis, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 14 October 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellee.

JACKSON, Judge.

The State appeals from an order entered on 24 November 2009, granting Michael T. Butler's ("defendant") motion to suppress evidence. For the reasons set forth below, we remand.

At approximately 7:45 p.m. on 8 November 2008, Sergeant Johnny Scarborough ("Sergeant Scarborough") of the Mount Gilead Police Department ("MGPD") supervised a license and registration checkpoint at the four-way intersection of North Carolina Highway

109 and North Carolina Highway 731. The checkpoint was to be operated in accordance with MGPD standard procedures. Sergeant Scarborough testified that the MGPD standard procedures required the presence of at least two officers; a well-lit location; the officers' wearing of traffic vests; the display of patrol vehicle blue lights; the stop of every passing vehicle; the request for license and registration cards; and the observation of other motor vehicle law violations and other crimes.

Sergeant Scarborough requested that North Carolina Highway Trooper Michael Dwight Holyfield ("Trooper Holyfield") assist him and Mount Gilead Police Officer Kevin Bowman ("Officer Bowman")[1] with the checkpoint. Trooper Holyfield joined the checkpoint at approximately 8:00 p.m. He activated his patrol vehicle's blue lights and positioned himself in the roadway. At approximately 8:20 p.m., Trooper Holyfield observed defendant's vehicle approaching the checkpoint. Trooper Holyfield "blinked" his flashlight at defendant to alert him to stop. Defendant did not stop, and Trooper Holyfield stepped back to avoid being hit by defendant's vehicle. Trooper Holyfield yelled for defendant to stop, and defendant did so approximately forty feet past the checkpoint.

Trooper Holyfield approached defendant's vehicle and smelled a strong odor of alcohol coming from defendant's vehicle when

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[1] The trial court's order refers to a "Trooper Bowman." It is unclear whether the trial court is referring to Trooper Holyfield or Officer Bowman. This ambiguity is immaterial to our holding, but we clarify because we refer to the respective law enforcement officers in our own analysis.

defendant rolled down his window. Trooper Holyfield observed that defendant's eyes were red and glassy. He also observed that defendant was unsteady and swaying on his feet as they walked approximately thirty-five feet from defendant's vehicle to Trooper Holyfield's patrol car. Defendant refused to submit to field sobriety tests. Trooper Holyfield arrested defendant for driving while impaired and possession of an open container of alcohol in the passenger area of his vehicle.

On 5 August 2009, defendant moved to suppress evidence on the basis of an unlawful "checkpoint." On 16 November 2009, defendant's motion came on for hearing. The trial court granted defendant's motion to suppress on 24 November 2009. The State appeals.

Preliminarily, we note that the State failed to articulate grounds for appellate review in its appellate brief. North Carolina Rule of Appellate Procedure 28(b)(4) requires the appellant to set forth a statement of the grounds for appellate review, which "shall include a citation of the statute or statutes permitting appellate review." N.C. R. App. P. 28(b)(4) (2009). Our Supreme Court has held Rule 28(b) to be a nonjurisdictional set of requirements. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). "Noncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction." *Id.*

On appeal, the State argues that the trial court erred in granting defendant's motion to suppress because the trial court erred in concluding that the checkpoint did not comply with North Carolina General Statutes, section 20-16.3A. We agree.

> When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court determines whether the challenged findings of fact are supported by (1) competent evidence and (2) whether those findings support the trial court's conclusions of law. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 711, 714 (2010) (internal citations and quotation marks omitted) (brackets in original). "'Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.'" *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

On appeal, the State's sole assignment of error is to the trial court's conclusion of law number one. Therefore, the findings of fact are presumed to be supported by competent evidence and are binding upon appeal. *Id.* Conclusion of law number one provides that "[t]he checkpoint was not set up as required by N.C.G.S. § 20-16.3A(a)(2a), in that there was no evidence from which the Court could determine whether the checkpoint was set up pursuant to a written policy, or what the written policy provides." North Carolina General Statutes, section 20-16.3A(a)(2a) (2007)

requires that a law enforcement agency must "[o]perate under a written policy that provides guidelines for the pattern, which need not be in writing. . . ."[2]

The only finding of fact that references MGPD's policy is finding of fact number six. Finding of fact number six provides:

> The checkpoint was to be operated in accordance with Mt. Gilead Police Department *standard procedures*, which required:
>
> a. Presence of at least two officers;
>
> b. A location that was well-lit (which the court presumes is applicable to night-time checkpoints);
>
> c. The display of patrol vehicle blue lights;
>
> d. That every vehicle passing through be stopped;
>
> e. Request for display of license and registration; and
>
> f. Observation for any other motor vehicle law violations and other crimes.

(Emphasis added).

Finding of fact number six does not indicate whether the MGPD's "standard procedures" are written, but the finding does include several specific requirements of the MGPD standard procedures. No other findings of fact reference the MGPD policy, and no other findings either clarify or otherwise support conclusion of law number one. Without more, we must hold that

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[2] Our Supreme Court previously has held that the lack of a written policy was not fatal to the constitutionality of a license checkpoint. *State v. Mitchell*, 358 N.C. 63, 67, 592 S.E.2d 543, 546 (2004). In the case *sub judice*, the trial court declined to reach the question of the constitutionality of the checkpoint and rested its analysis on statutory compliance.

conclusion of law number one is not supported by the findings of fact. *See Johnson*, ___ N.C. App. at ___, 693 S.E.2d at 714 (when reviewing a trial court's ruling on a motion to suppress, we review whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact and are legally correct). Accordingly, we remand to the trial court for additional findings of fact.

We note that the parties devoted substantial portions of their respective briefs to a discussion of whether Sergeant Scarborough's testimony regarding the MGPD checkpoint procedures was admitted merely to show why he took certain actions, or whether it was admitted to substantiate the existence of a written policy. At the hearing, the following exchange occurred:

> [PROSECUTOR:] What was the purpose of the checkpoint?
>
> [SERGEANT SCARBOROUGH:] It was some random license check point that we do which our policy states that --
>
> [DEFENSE COUNSEL]: Well, objection, unless he has the policy, I object to its admission into evidence.
>
> THE COURT: Well, is it offered for the purpose of explaining why he did something?
>
> [PROSECUTOR]: Yes, sir.
>
> THE COURT: Overruled.
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> [PROSECUTOR]: Thank you, Your Honor.
>
> [PROSECUTOR:] All right, go ahead. You have a policy?
>
> [SERGEANT SCARBOROUGH:] Yes, sir. Our policy states that to do a license check point it has to be two or more officers present. . . .

Furthermore, on cross-examination, the following exchange occurred:

> [DEFENSE COUNSEL:] Sergeant, do you have a written check point plan?
>
> [SERGEANT SCARBOROUGH:] Yes, sir, my department has a standard procedure check point.

Based upon the foregoing colloquy, it is unclear whether the trial court intended to allow testimony regarding the policy only to show "why [Sergeant Scarborough] did something" — a non-substantive use — or whether the trial court intended to permit Sergeant Scarborough's testimony to provide a substantive evidentiary basis for the policy. Although the trial court did not clarify this ambiguity at the hearing or in its written order, and such clarification could weigh on the court's conclusions, the parties' attention to the foregoing does not cure the gap between the court's unchallenged current findings and the questioned conclusion of law.

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Remanded.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).