NO. COA13-135
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v. Anson County
No. 10 CRS 1744

CHARLES JUNIOR MOORE,
Defendant.

Appeal by defendant from judgment entered 26 September 2012 by Judge Kevin M. Bridges in Anson County Superior Court. Heard in the Court of Appeals 9 September 2013.

Roy Cooper, Attorney General, by John W. Congleton, Assistant Attorney General, for the State.

Mercedes O. Chut, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Charles J. Moore appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired. We find no error in his trial.

Defendant was charged with driving while impaired and consuming a malt beverage while driving. He was convicted of both charges in Anson County District Court, but appealed both

convictions to Anson County Superior Court. The State's evidence at trial tended to show the following: on 1 October 2010, Trooper Landric Reid observed an Acura traveling westbound on U.S. Highway 74 in Anson County, North Carolina, that appeared to be exceeding the speed limit. Trooper Reid activated his blue lights and stopped the Acura. Trooper Reid noticed a strong odor of alcohol coming from the vehicle when he approached the window. He spoke with defendant, the driver and sole occupant of the car, and noticed the odor of alcohol on defendant's breath. Upon further inspection, Trooper Reid saw a half-full, open bottle of beer in the center console and a six-pack of beer, which contained three empty bottles and one full beer.

Trooper Reid asked defendant to get out of the car and had defendant sit in the front seat of his patrol car for a few minutes so that he could "separate the smell of what's in the car and what's actually on his breath." Because he continued to detect the odor of alcohol on defendant and saw that his eyes were red and glassy, Trooper Reid asked defendant to perform field sobriety tests, but he refused. Defendant submitted to an alcosensor breath test, which indicated the presence of alcohol.

At this point, Trooper Reid arrested defendant for driving while impaired and took him to the local sheriff's office.

At the Anson County Sheriff's Office, Trooper Reid administered a breath test via an Intoximeter Model Intox EC/IR2 ("Intoxylizer"). Before administering the test to defendant, Trooper Reid ran a self-diagnostic test on the instrument, which it "passed." Defendant then provided two breath samples. The lowest sample showed a blood alcohol concentration of 0.08.

At trial, the court read the pattern jury instruction for the offense of driving while intoxicated:

> [t]he defendant is under the influence of an impairing substance when the defendant . . . consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of [0].08 or more grams of alcohol per 210 liters of breath . . . .
>
> The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.
>
> . . . .
>
> If you find from the evidence beyond a reasonable doubt . . . [that defendant] consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of [0].08 or more in the defendant's blood, it would be your duty to return a verdict of guilty.

Defendant requested additional language be added, stating that "[a]lthough the results of the chemical analysis admitted into evidence is prima facie evidence of the [d]efendant's alcohol concentration, the results of a [sic] the chemical analysis does [sic] not compel a verdict of guilt." The trial court denied defendant's request to read the special instruction.

On appeal, defendant contends the trial court erred in (I) failing to grant a special jury instruction requested by defendant and (II) denying defendant's motion to dismiss the charge of driving while impaired based on insufficient evidence.

I.

Defendant argues that the pattern jury instruction read by the court created an impermissible mandatory presumption in violation of the Due Process Clause of the Fourteenth Amendment because it "foreclosed independent jury consideration of whether the facts proved established certain elements of the offense." *See Carella v. California*, 491 U.S. 263, 266, 105 L. Ed. 2d. 218, 222, *reh'g denied*, 492 U.S. 263, 266, 105 L. Ed. 2d 686 (1989). We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C.

App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2011).

N.C.G.S. § 20-139.1(b), the statute governing chemical analyses in driving while impaired cases, states that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" as long as certain guidelines are followed; namely that the person who administered the test has a permit to do so and the test was "performed in accordance with the rules of the Department of Health and Human Services." N.C. Gen. Stat. § 20-139.1(b) (2011).

This Court reviewed the constitutionality of the language in N.C.G.S. § 20-138.1(b)(1) in *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008), *disc. review denied*, 363 N.C. 135, 674 S.E.2d 140, *cert. denied*, 558 U.S. 818, 175 L. Ed. 2d 26 (2009), which considered whether it created a presumption

which violated defendants' due process rights. Defendant argues that *Narron* held that because the statutory language "does no more than establish prima facie evidence of alcohol concentration," further clarification to the pattern jury instruction is now required. This argument is misplaced.

This Court held in *Narron* that the language "the results of a chemical analysis shall be deemed sufficient evidence of a person's alcohol concentration" did not create an impermissible presumption. *Narron*, 193 N.C. App. at 82–83, 666 S.E.2d at 864–65. Rather, "the statute simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant's alcohol concentration." *Id.* at 84, 666 S.E.2d at 866. Thus, the jury "may find it adequate proof of a fact at issue," but is not required to do so. *Id.* A defendant can argue against the chemical analysis results being admitted in the first place, present rebuttal evidence, and can impeach the credibility of the test or the weight of the results. *See id.* at 81, 666 S.E.2d at 864; *see also* N.C. Gen. Stat. § 20-138.1(b)(1) (2011). Based on this reasoning, the Court went on to consider whether the trial court erred by denying the defendant's motion for special jury instruction. The Court held that because

defendant's argument was "premised on his contention that the instruction given by the court created an impermissible presumption" and "we have rejected [that] argument," the court's instructions "adequately informed the jury of the law as applied to the evidence presented at trial." *Id.* at 86, 666 S.E.2d at 866–67.

The pattern jury instruction read in this case adequately explains the language of the statute by stating that "*if you find from the evidence beyond a reasonable doubt*" that defendant had a blood alcohol concentration of 0.08 or more "it would be your duty to return a verdict of guilty." This instruction does not require a guilty verdict; rather, it instructs the jury to consider all the evidence, including defendant's rebuttal evidence, and only if the jury finds from it that defendant had a blood alcohol concentration of 0.08 is it its duty to return a guilty verdict. Nothing would foreclose defendant from arguing that the results are unreliable or that the test did not comply with the statutory requirements. Therefore, we believe that this instruction is simply another way of stating that the results of the chemical analysis are prima facie evidence of defendant's blood alcohol concentration. Thus, because we find that this issue has already been decided in *Narron*, this issue

is overruled. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

II.

Defendant next contends the trial court erred by denying his motion to dismiss the charge of driving while impaired because there was insufficient evidence of legal impairment. Specifically, defendant argues that the only evidence of impairment is the result of the Intoxylizer test showing his blood alcohol concentration to be 0.08, a result which he contends is unreliable because the instrument only reports the concentration to the hundredths decimal place. We disagree.

"We review a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fraley*, 202 N.C. App. 457, 462, 688 S.E.2d 778, 783 (internal quotation marks omitted), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). "Substantial evidence is

evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, 198 N.C. App. 579, 588, 680 S.E.2d 254, 261 (2009).

Under N.C.G.S. § 20-138.1,

> [a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) [w]hile under the influence of an impairing substance; *or* (2) [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C. Gen. Stat. § 20-138.1(a)(1)-(2) (emphasis added). Thus there are two distinct ways by which the State can prove guilt; the State does not need to show impairment *and* a blood alcohol concentration of 0.08 or more.

Here, the State presented the report of defendant's blood alcohol concentration as obtained by the Intoxylizer to prove impaired driving under N.C.G.S. § 20-138.1(a)(2). Trooper Reid testified that he had a permit to conduct the tests, the tests were conducted properly, the Intoxylizer was functioning properly at the time of the test as shown by the diagnostic test, and defendant's lowest sample resulted in a 0.08 reading. Defendant did not object to the introduction of any of this evidence. Therefore, although the State arguably did present

additional evidence showing defendant's impairment—including testimony that he appeared to have been speeding, his breath smelled of alcohol, he had red, glassy eyes, and there was an open beer bottle and three empty bottles in his car—it was not required to do so for a conviction to stand under N.C.G.S. § 20-138.1(a).

Additionally, defendant argues that the Intoxylizer's results were "uncertain" because the instrument drops the third decimal, the thousandths place, when giving its final result. A similar argument was made in *State v. Shuping*, 312 N.C. 421, 430, 323 S.E.2d 350, 355 (1984), where the defendant contended that there was a 0.01 "margin of error" in the breathalyzer instrument which rendered her test results unreliable. In that case, as in this one, the so-called "margin of error" functions as a protection to the defendant. Trooper Reid explained this at trial when he said, "if you have a [0].09, it actually could have been anything higher than a [0].08. But it lowers it to [0].08. It gives the person blowing into the instrument the benefit of the doubt." Defendant presented no evidence that a margin of error actually existed with regard to his test results. The report notes that the device "passed" the diagnostic test and registered a 0.08 during the control test,

which uses a gas canister of a known alcohol concentration of 0.08. Therefore, there was substantial evidence of defendant's guilt and the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges GEER and STROUD concur.

Report per Rule 30(e).