An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-154
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Forsyth County
No. 11 CRS 052412

RICHARD BERNARD HALL

Appeal by defendant from order entered 5 December 2012, *nunc pro tunc* 25 September 2012 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Carrie D. Randa, for the State.

The Dummit Law Firm, by Brian P. Simpson, for defendant.

HUNTER, JR., Robert N., Judge.

Richard Hall ("Defendant") filed pre-trial motions in Forsyth County Superior Court to dismiss a charge of driving while impaired ("DWI") and suppress the breathalyzer test results. On 25 September 2012, Forsyth County Judge John O. Craig III heard Defendant's pre-trial motion to dismiss and

motion to suppress, entering an order on 5 December 2012, *nunc pro tunc* 25 September 2012. Defendant subsequently entered a guilty plea for the DWI charge. The trial court imposed a Level III punishment, sentencing Defendant to 6 months imprisonment, suspended. Defendant appeals from the trial court's order denying his motions to dismiss and suppress. We affirm the trial court.

I. Facts & Procedural History

On 12 March 2011, Defendant was charged with one count of DWI, a violation of N.C. Gen. Stat. § 20-138.1 (2011). Defendant pled guilty to the DWI charge on 29 November 2011, and the court imposed a Level III punishment. In considering the level of punishment, the District Court found several aggravating factors: Defendant was found to have a blood alcohol level of at least .15 and Defendant was driving with a revoked license at the time of arrest. Defendant was sentenced to 6 months incarceration with the Forsyth County jail, suspended for 24 months of supervised probation.

Defendant gave notice of appeal on 29 November 2011, and the District Court judgment was vacated. Defendant then filed motions to dismiss and suppress on 28 March 2012. Superior Court Judge John O. Craig III heard these motions and entered an

order finding no violation of Defendant's constitutional rights and denying the motions on 5 December 2012 *nunc pro tunc* 25 September 2012. Following the order, Defendant pled guilty to a DWI, speeding, and driving with a revoked license. Defendant again received a Level III punishment. Defendant was sentenced to a six-month minimum, six-month maximum sentence in the North Carolina Division of Adult Corrections which was suspended for 24 months of supervised probation. Defendant orally entered notice of appeal on 25 September 2012 of the trial court's order. Testimony presented during the hearing on the Motion to Dismiss and the Motion to Suppress tended to show the following facts.

On 12 March 2011, at approximately 11:05 p.m., North Carolina State Highway Patrol Trooper R.E. Speas ("Trooper Speas") stopped a vehicle driven by Defendant for speeding and weaving within its lane of travel. A female passenger, Shonia Linville ("Ms. Linville"),[1] accompanied Defendant in the stopped vehicle. Trooper Speas "clocked the vehicle" at 82 miles per hour using stationary radar. When Trooper Speas approached the vehicle, he noticed an odor of alcohol. Trooper Speas asked

---

[1] Ms. Linville's name is spelled "Shawna" by the State in its brief, and "Shonia" by Defendant in his Motions to Dismiss and Suppress and Judge Craig's order denying Defendant's motions. We proceed using the spelling used on the affidavit and order.

Defendant to exit the car, and thereafter Trooper Speas administered the horizontal gaze nystagmus test and an alco-sensor test to Defendant. Trooper Speas then arrested Defendant for DWI. Trooper Speas spoke to Ms. Linville before he transported Defendant to the Forsyth County detention center ("Detention Center"), but the record contains no evidence that he told Ms. Linville that Defendant was charged with DWI.

Thereafter, Trooper Speas took Defendant to the Detention Center's intoxilyzer room ("DCIR") to conduct a chemical analysis of Defendant's breath. Pursuant to Defendant's statutory right under N.C. Gen. Stat. § 20-16.2 (2011), he requested that a witness be present to view the testing procedure. On 13 March 2011, Defendant called his mother, Mildred Hall ("Ms. Hall"), to serve as a witness to the testing procedure. Ms. Hall testified that this phone call was at approximately 11:50 p.m. Trooper Speas testified that the phone call occurred at 12:17 a.m. Trooper Speas testified that he read Defendant his rights at 12:16 a.m. and waited until 12:46 a.m. to administer the breathalyzer test. Trooper Speas also testified that he checked the lobby to see if there was anyone waiting for Defendant before administering the test at "approximately" 12:50 a.m.

Ms. Linville testified that she made attempts to contact Defendant, specifically that she arrived at the DCIR waiting area between 12 a.m. and 12:10 a.m. on 13 March 2011 and spoke to a magistrate at the front desk who stated that Defendant was "not in the log." Ms. Linville also testified that Ms. Hall reached the DCIR waiting area at "12:15-about 12:15, 12:20, somewhere in there." Ms. Linville testified that she approached the front desk on three separate occasions and was not able to reach Defendant.

Trooper Speas testified that inside the DCIR waiting area was a sign directing prospective witnesses for breath tests to push a button, so as to notify officers of their arrival. However, Trooper Speas stated that no person pushed the button during the requisite waiting period. Trooper Speas further testified that he checked the DCIR waiting area for witnesses at 12:50 a.m., but the waiting room was empty.

The trial court found that Defendant submitted to the breath test at 12:54 a.m. and again at 12:57 a.m. Defendant registered two samples of .18. Trooper Speas then transported Defendant to Magistrate Dawn Kelly ("Magistrate Kelly"), at which time Trooper Speas observed Ms. Linville in the DCIR waiting area.

Magistrate Kelly imposed a secured bond on Defendant for the charge of DWI. However, she did not complete the required secured bond findings form as required by N.C. Gen. Stat. § 15A-534 (2011) and Forsyth County's local pre-trial release policies. Defendant was unable to make bond, and was informed in writing by Magistrate Kelly pursuant to N.C. Gen. Stat. § 20-38.4 (2011) of his right to have others observe his condition or administer an additional chemical analysis. At 3:10 a.m., Defendant indicated on the AOC-CR-271 form that he wished to contact Willie Hall ("Willie") and Ms. Hall. Defendant remained in custody without making contact with Willie, Ms. Hall, or Ms. Linville until 12:00 p.m. on 13 March 2011, when he was released from the detention center to Ms. Linville's custody.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to consider Judge Craig's order denying Defendant's motion to dismiss and motion to suppress pursuant to N.C. Gen. Stat. §§ 15A-979(b), 15A-1442(4) (2011).

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the

judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982); *see also State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001). Defendant does not assign error to any of the trial court's findings of fact. Thus, "these facts are presumed to be correct and are binding on appeal." *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (citation omitted).

III. Analysis

A. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss on the basis that Magistrate Kelly's statutory violation irreparably harmed the preparation of his defense. We disagree.

A dismissal of an impaired driving charge is proper pursuant to N.C. Gen. Stat. § 20-138.1(a)(2) if a defendant

makes "a sufficient showing of a substantial statutory violation and of prejudice arising therefrom." *Id.* An individual charged with DWI has "the same constitutional right of access to counsel and witnesses and to confront accusers as any other accused. The analysis focuses on whether *access* to counsel, family and friends was denied." *Id.* at 317, 395 S.E.2d at 704. Defendant must exhibit that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost." *State v. Knoll*, 322 N.C. 535, 547, 369 S.E.2d 558, 565 (1988) (citations and quotation marks omitted). A lost chance to "secure independent proof of sobriety" would amount to such prejudice. *Id.* "[P]rejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Id.* at 545, 369 S.E.2d at 564. Dismissal of charges for violations of statutory rights "is a drastic remedy which should be granted sparingly." *State v. Rasmussen*, 158 N.C. App. 544, 549, 582 S.E.2d 44, 50 (2003) (citation and quotation marks omitted).

Magistrate Kelly violated Defendant's statutory rights when she failed to fill out the "secured bond findings" form, which

was required by N.C. Gen. Stat. § 15A-534 and Forsyth County's local pre-trial release policies. This violation resulted in Defendant's custody until 12:00 p.m. on 13 March 2011. However, we disagree with Defendant that this statutory violation irreparably prejudiced his case.

In *Rasmussen*, we concluded that the defendant was not denied his right to communicate with family and friends because a testifying witness was present at the "dinner before the accident, at the accident scene, in the Intoxilyzer room, and at the time of his release[,]" and this interaction allowed the witness enough contact with the defendant so as to allow "her to form an opinion as to his impairment or lack thereof." *Id.* at 554, 582 S.E.2d at 52. Additionally, the witness testified that the defendant "looked fine, had no odor of alcohol about his person, and did not appear flushed, glassy-eyed, or light-headed." *Id.* (internal quotation marks omitted). Further, in *State v. Labinski*, 188 N.C. App. 120, 654 S.E.2d 740 (2008), this Court found a substantial violation of the defendant's pretrial release rights, but there was no prejudice to the preparation of the defendant's defense. *Id.* at 128, 654 S.E.2d at 745. Prejudice was not found because the defendant in that case had an opportunity to contact witnesses before submitting

to a breathalyzer test, was informed of that right, and was not denied access to friends and family who could serve as witnesses. *Id.*

Here, Ms. Linville was with Defendant for a substantial period of time on the day of his arrest. She testified:

> A: We had been together all day.
>
> Q: Okay.
>
> A: Well, after he got off work.
>
> Q: And where were you all right before you got into the car?
>
> A: We were in Greensboro.
>
> Q: Okay. And where were you in Greensboro?
>
> A: At a girlfriend of mine's house.
>
> Q: Okay. And was that where Mr. Hall was drinking?
>
> A: Yeah. He had -- yeah.

Ms. Linville did not specifically testify as to whether Defendant appeared impaired at the time of his arrest. She observed Defendant's driving and his mental/physical faculties from the time she entered Defendant's vehicle until the time Defendant was inside the DCIR. Accordingly, Ms. Linville's presence provided Defendant with an independent witness at the critical time Trooper Speas formed probable cause to arrest

defendant for his alleged appreciable impairment. *See State v. Hill*, 277 N.C. 547, 553, 178 S.E.2d 462, 466 (1971) (holding that the right to have family and friends observe a defendant is particularly important for driving while impaired cases because "[d]efendant's guilt or innocence depends upon whether he was intoxicated at the time of his arrest," and "time is of the essence" due to the temporary nature of impairment).

Moreover, Defendant failed to show that any alleged lost evidence or testimony would have been helpful to his defense. Defendant argues that "[he] was confined during the crucial time period where he *could have* gathered evidence." Without more, Defendant has not made a showing that he was in fact prejudiced. For the foregoing reasons, we hold that the trial court's factual findings support the trial court's ultimate conclusions of law and the trial court did not err in denying Defendant's motion to dismiss.

B. Motion to Suppress

Defendant argues the trial court erred in denying his Motion to Suppress. We disagree. Defendant points in part to N.C. Gen. Stat. § 20-16.2(a)(6) (2011), which provides:

> You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed

> for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Defendants may waive the right to select a witness, but if the right is denied, the results of the breathalyzer test may not be admitted as evidence against the defendant. *State v. Myers*, 118 N.C. App. 452, 454–55, 455 S.E.2d 492, 494 (1995).

A selected witness of the breathalyzer test is required to make timely and reasonable efforts to gain access to a defendant. *State v. Ferguson*, 90 N.C. App. 513, 519, 369 S.E.2d 378, 382, *appeal dismissed and disc. review denied*, 323 N.C. 367, 373 S.E.2d 551 (1988). If reasonable efforts are made by a witness, but the defendant was prevented from receiving access, then the results of the breathalyzer test should be suppressed. *State v. Hatley*, 190 N.C. App. 639, 643, 661 S.E.2d 43, 46 (2008) (finding that defendant's wife was present, identified herself as defendant's witness that he requested, but was denied access). A defendant's witness is not required to state "unequivocally and specifically" that they were called to view the test before being permitted to view the test. *Id.* at 644, 661 S.E.2d at 46.

Defendant cites *Hatley* in support of his motion to suppress. We hold this case is distinguishable from *Hatley*. In *Hatley*, the defendant's witness "timely arrived; identified and described to the front desk officer the person she was there to see; and told the front desk officer that the person was there for 'a DUI.' " *Id.* The officer in *Hatley* also was aware that the defendant's witness was en route to the Sheriff's office to observe the breathalyzer test, but still administered the test. *Id.* Additionally, the defendant's witness in *Hatley* was directed to a waiting room upon arriving at the Sheriff's office and promptly identified herself. *Id.* Ultimately, in *Hatley* the defendant's witness made no statement that she was present "unequivocally and specifically" to observe a test, but the actions of defendant's witness to i.) timely arrive; ii.) clearly identify the person she was intending to see, the defendant; and iii.) identify the type of proceeding she was present to observe, namely a "DUI," placed officers on notice that the defendant's witness was present and should be allowed to witness the breathalyzer test. *Id.* Similar actions by Defendant's witness were not taken here.

First, Defendant's called witness, Ms. Hall, provided conflicting testimony over when she precisely arrived at the

police station and asked the magistrate about Defendant. Ms. Hall testified that "I was in bed I think when I got the call. It was about 11:50[.]" Ms. Hall also provided testimony concerning when she arrived at the Sheriff's office:

> Q. So approximately what time did you leave your home?
>
> A. Say at 12. I got downtown about ten after.
>
> Q. So then you left your house at 12, and you got downtown at 12:10?
>
> A. Mm-hmm.
>
> Q. Ma'am, you wrote -- you filled out an affidavit in this, is that correct?
>
> A. Yes.
>
> Q. And in that affidavit it actually says you
> approximately arrived at 12:15?
>
> A. It was between 12:10, 12:15.
>
> Q. And then on direct examination you said it was between 12 and 12:10?
>
> And it's very important in this case we get the exact time. So was it --
>
> A. It was --
>
> Q. Ma'am, once again, was it at 12? Was it at
> 12:05, 12:10, or 12:15 that you –
>
> A. It was between 12:10 and 12:15.

> Q. Thank you.

Shortly after, Ms. Hall contradicted herself on cross-examination:

> Q. Miss Hall, you are Mr. Hall's mother, is that correct?
>
> A. Yes.
>
> Q. Okay. And so your son then called you to come down to the magistrate's office; is that correct, ma'am?
>
> A. Mm-hmm.
>
> Q. Okay. And you came down, and you arrived there at approximately 12:30 a.m., is that correct?
>
> A. When I arrived?
>
> Q. Yes. At 12:30?
>
> A. Yes.

Further, Trooper Speas testified that Defendant indicated a desire to have Ms. Hall present at 12:17 a.m. Trooper Speas also testified that thirty minutes had passed since Defendant exercised his right to have a witness present for the breathalyzer test, that Defendant was asked to submit a breath sample at 12:46 a.m., and that Trooper Speas checked the public lobby before administering the test, finding nobody present.

Thus, there is conflicting evidence concerning whether Ms. Hall arrived in a timely fashion, or within the thirty-minute

period allowed by N.C. Gen. Stat. § 20-16.2(a). The time at which i.) Defendant invoked his right to have a witness present for the breathalyzer test and ii.) Ms. Hall arrived to witness the test both contain conflicting facts; thus the trial court's determination should be upheld. "The trial court resolved the conflict in favor of the state; we are bound by that resolution." *Chamberlain*, 307 N.C. at 144, 297 S.E.2d at 548. This case is distinct from *Hatley*, where "[u]ncontradicted evidence show[ed] that the witness timely arrived." *Hatley*, 190 N.C. App. at 644, 681 S.E.2d at 46.

Second, the trial court found that "there was no evidence that the witnesses identified that they were there to witness the breath tests or that the witnesses pressed the button to alert Trooper Speas that they were present for the test" and there was thus no violation of Defendant's statutory rights under N.C. Gen. Stat. § 20-16.2. Trooper Speas testified that Defendant invoked his statutory right to call a witness, and that he chose to call his mother, Ms. Hall. There was also no testimony to indicate that Defendant's passenger from the underlying traffic stop, Ms. Linville, or Ms. Hall were planning to witness the test. There is also no testimony showing Trooper Speas would know either was en route to the Sheriff's office

prior to administering the test. This fact also distinguishes the present case from *Hatley*, where the officer "knew not only that Defendant had contacted a witness but also that the witness was on her way to the Sheriff's office to observe the test." 190 N.C. App. at 643, 661 S.E.2d at 46. In *Hatley*, there were also statements made by the defendant's called witness indicating the person she was there to see, as well as the reason she was present. *Id.*

Ms. Linville was not called by Defendant to witness his breathalyzer test; Ms. Hall appears to have been the person he chose to call as his witness. Ms. Linville testified that she asked the officer at the reception desk whether Defendant was present and that she asked to see Defendant three separate times. Ms. Linville's testimony is similar to the facts of an unpublished decision of this Court, *State v. Lyle*, 157 N.C. App. 718, 580 S.E.2d 97, 2003 WL 21180780 (2003) (unpublished). In *Lyle*, a defendant was arrested by the state highway patrol for driving while impaired, and then transported to a law enforcement facility. *Id.* at *1. The defendant in *Lyle* attempted to call his wife as a witness, but was unsuccessful. *Id.* at *2. Defendant's wife, however, was in a waiting area outside a dispatcher's office at the law enforcement facility,

which neither the arresting state trooper nor the defendant knew. *Id.* at *1-2. The defendant's wife also announced to a dispatcher at the facility that she "was there to see the defendant," but was not allowed access to the defendant. *Id.* at *1. This Court held that because neither the state trooper nor the defendant in *Lyle* had knowledge of the wife's presence at the law enforcement facility and because the dispatcher did not know that the wife was there to witness a breathalyzer test, the defendant's rights under the statute were not violated. *Id.* at *2-3; *cf. Hatley*, 190 N.C. App. at 643, 661 S.E.2d at 46 (distinguishing *Lyle* from the facts of Hatley and noting that the officer in Hatley had knowledge that the defendant's witness was on the way). While there was a call to Ms. Hall in this case, there was not a call by Defendant to Ms. Linville to observe his breathalyzer test.

The person Defendant did call, Ms. Hall, did not announce her presence to anyone nor request to see Defendant while at the Sheriff's office. Ms. Hall was the only witness selected by Defendant to view the breathalyzer test, and she made no direct contact with any member of law enforcement seeking to see her son. As there was not a clear identification of Defendant made

by Ms. Hall, Defendant's called witness, the second element of *Hatley* is not met.

Third, presence in a law enforcement facility to observe a breathalyzer test is not enough; a witness must make "reasonable efforts to gain access to [a] defendant." *Ferguson*, 90 N.C. App. at 519, 369 S.E.2d at 382. Ms. Linville's announcing of her presence and request to see Defendant, without a stated reason or guidepost provided to the officer for her request, does not constitute a reasonable effort to gain access to Defendant. Neither Ms. Linville's testimony nor Ms. Hall's testimony show any reason an officer would know *why* they were present at the Sheriff's office, save Ms. Linville's statement that she wanted to see someone not listed in the magistrate's official log. Neither Ms. Linville nor Ms. Hall provided any indication that they were there for a driving under the influence charge. *Compare Hatley*, 190 N.C. App. at 644, 661 S.E.2d at 46 ("Uncontradicted evidence shows that the witness . . . told the front desk officer that the person was there for 'a DUI.' "). Further, Trooper Speas testified that there was a clearly marked sign in the lobby which directed witnesses to press a "buzzer" to notify the appropriate officer. The record does not show that Ms. Hall or Ms. Linville chose to

use this clearly marked method to announce their presence to Trooper Speas. Beyond these opportunities for communication in the thirty-minute window, Trooper Speas testified that he checked for Ms. Hall in the waiting area before administering the breathalyzer test, and saw "no one in the lobby." For these reasons, we affirm the trial court.

IV. Conclusion

We affirm the trial court's 5 December 2012, *nunc pro tunc* 25 September 2012 order denying Defendant's motion to dismiss because Defendant failed to show irreparable prejudice resulting from Magistrate Kelly's statutory violation. We also affirm the trial court's 14 December 2012 order denying Defendant's motion to suppress because the trial court properly concluded that Defendant's statutory right to a witness pursuant to N.C. Gen. Stat. § 20-16.2(a)(6) was not violated.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).