NO. COA13-527
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Alleghany County
No. 11 CRS 50487

DOUGLAS EDWARDS MCMILLAN

Appeal by defendant from judgment entered 8 October 2012 by Judge R. Stuart Albright in Alleghany County Superior Court. Heard in the Court of Appeals 14 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Edward Eldred, for defendant-appellant.

CALABRIA, Judge.

Douglas Edwards McMillan ("defendant") appeals pursuant to N.C. Gen. Stat. § 15A-979(b) (2011) from an order denying his motion to suppress. We affirm.

On Saturday, 9 July 2011, at approximately 10:30 p.m., Sergeant Jimmy Cox ("Sergeant Cox") of the North Carolina State Highway Patrol observed defendant traveling northbound on US Highway 21 between Roaring Gap and Sparta on a moped. This part

of the road is one of the few portions of straight road in Alleghany County. Sergeant Cox followed the moped for about forty-five seconds and observed the vehicle weave continuously during that time. Although the vehicle never crossed the center line, it crossed the white "fog line" on the right side of the road and then immediately moved back towards the center of the road three times in a "serpentine motion." Sergeant Cox followed defendant for approximately one-third of a mile while he observed the moped weaving. Based on his observations, Sergeant Cox initiated a traffic stop. After Sergeant Cox spoke briefly with defendant, he formed an opinion that defendant was impaired.

On 19 March 2012, defendant was indicted for one count of impaired driving and one count of habitual impaired driving On 10 July 2012, defendant filed a motion to suppress the traffic stop based on a lack of reasonable suspicion to initiate the stop. After a hearing on 6 August 2012, the trial court denied defendant's motion. The court concluded that Sergeant Cox had reasonable suspicion to make an investigative stop to determine whether defendant was driving while impaired or to make other reasonable inquiry

On 8 October 2012, defendant pled guilty to one count of habitual impaired driving. As part of his plea agreement, defendant preserved his right to appeal the denial of his motion to suppress. The trial court sentenced defendant to a minimum of 12 months to a maximum of 15 months in the North Carolina Division of Adult Correction. Defendant appeals.

Defendant's sole argument on appeal is that the trial court's findings of fact do not support its conclusion of law that Sergeant Cox had reasonable suspicion to make an investigatory stop of the moped. We disagree.

This Court's review of an order denying a motion to suppress evidence is limited to determining whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). Defendant does not challenge the findings of fact and thus they are binding. *State v. Brown*, 199 N.C. App. 253, 256-57, 681 S.E.2d 460, 463 (2009).

A traffic stop is a constitutionally permissible seizure if the officer making the stop has a "reasonable, articulable suspicion that criminal activity is afoot." *State v. Barnard*, 362 N.C. 244, 246-47, 658 S.E.2d 643, 645 (2008). The reasonable 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." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). The standard is the same "regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). A 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 (internal quotations and citations omitted).

In *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012), our Supreme Court held that a law enforcement officer's personal observation of a vehicle traveling fifty-five miles per hour and weaving constantly and continually over a course of three-fourths of a mile at 11:00 p.m. on a Friday night provided reasonable suspicion for an investigatory stop. As this Court has recently explained,

> [i]n *Otto*, the Supreme Court relied primarily on the defendant's "weaving constantly and continuously over the course of three-quarters of a mile" to find that the trooper had a reasonable suspicion of the commission of a crime. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828. The fact that it was approximately 11:00 p.m. on a Friday also contributed to that conclusion, but was not dispositive.

State v. Derbyshire, ___ N.C. App. ___, ___, 745 S.E.2d 886, 893 (2013).

In the instant case, the trial court found that Sergeant Cox observed defendant's moped "travel 30 mph or less for 45 seconds," during which time he saw the vehicle "cross the fog line 3 times . . . and continue to weave within [defendant's] lane . . . ." Furthermore, Sergeant Cox observed the moped over the course of one-third of a mile on a straight stretch of roadway. When taking into account the differences in speeds between the vehicle in *Otto* and the moped in the instant case, Sergeant Cox observed defendant's moped driving erratically for essentially the same length of time as the officer in *Otto*. Thus, consistent with *Otto*, the trial court properly concluded that, based upon the totality of the circumstances, Sergeant Cox had reasonable suspicion to stop defendant's vehicle. *See Otto*, 366 N.C. at 138, 726 S.E.2d at 828; *see also State v. Hudson*, 206 N.C. App. 482, 486, 696 S.E.2d 577, 581 (2010)(holding that

the defendant crossing the center lines and fog lines twice provided probable cause to conduct a traffic stop).

Defendant additionally argues that the cases cited above, which involve automobiles, should not apply because defendant "was operating a moped and . . . operating a moped is inherently different than driving a car with a steering wheel." However, defendant provides no legal or evidentiary support for treating a moped differently than an automobile in the context of our motor vehicle laws. As a result, it is unnecessary to consider this argument.

We hold that the trial court's findings of fact support its conclusion of law that Sergeant Cox had reasonable articulable suspicion to stop defendant's vehicle. Accordingly, we affirm the trial court's order denying defendant's motion to suppress.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).