NO. COA14-124

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 10 CRS 230339

SUSAN DENISE SHAW

Appeal by defendant from judgment entered 25 February 2013 by Judge Sharon Tracey Barrett in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 August 2014.

Roy Cooper, Attorney General, by J. Rick Brown, Associate Attorney General, for the State.

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

DAVIS, Judge.

Susan Denise Shaw ("Defendant") appeals from her conviction of driving while impaired ("DWI"). On appeal, she contends that the trial court erred by denying her motion to suppress. After careful review, we affirm.

Factual Background

At approximately 12:30 a.m. on 26 June 2010, Officer Robert Gormican ("Officer Gormican") of the Charlotte-Mecklenburg

Police Department ("CMPD") was on patrol and participating in a "DWI saturation operation." This operation involved multiple CMPD officers working together to patrol areas where impaired driving was known to be prevalent. The operation called for two officers driving an undercover car to patrol a stretch of road near Freedom Drive and Morehead Street in Mecklenburg County. The undercover officers were tasked with identifying potentially intoxicated drivers and radioing officers in both marked and unmarked patrol cars to intercept them.

Officers E. Morales ("Officer Morales") and M. Wallin ("Officer Wallin") were operating one of the undercover CMPD vehicles as part of this operation when, at approximately 12:28 a.m., they radioed Officer Gormican and informed him that they "were behind a blue Mitsubishi on Freedom Drive coming up Morehead, and it was weaving outside its lane of travel several times." Officer Gormican was in an unmarked patrol car approximately one mile away and responded by traveling eastbound down Morehead Street toward Freedom Drive in order to locate the Mitsubishi. Upon approaching the traffic light at the intersection of Morehead Street and Freedom Drive, Officer Gormican spotted the Mitsubishi and the trailing undercover vehicle pass in front of him and continue traveling down Freedom Drive. From the far left lane on Morehead Street, Officer Gormican observed both vehicles to his right and noticed that

the Mitsubishi's tail lights were not illuminated. He activated his blue lights and initiated a traffic stop of the Mitsubishi.

After the Mitsubishi had pulled off the road into an empty parking lot, Officer Gormican approached the vehicle, which was occupied solely by Defendant. Upon asking Defendant for her driver's license and registration, Officer Gormican detected a strong odor of alcohol and ordered her out of her vehicle. Officer Gormican performed several field sobriety tests as well as two Alco-Sensor Breathalyzer tests and then placed Defendant under arrest for DWI.

Defendant was convicted of DWI on 28 April 2011 in Mecklenburg County District Court by the Honorable Theo X. Nixon. She appealed the district court's judgment to Mecklenburg County Superior Court. Defendant filed a pretrial motion seeking to suppress all evidence stemming from the traffic stop that ultimately led to her arrest on the ground that Officer Gormican lacked reasonable suspicion to stop her vehicle. A hearing on the motion to suppress was held on 22 February 2013.

During the hearing, Defendant entered into evidence Officer Gormican's Digital Motor Vehicle Recording, which showed that contrary to Officer Gormican's testimony, Defendant's tail lights were in fact operational and illuminated prior to the traffic stop.

On 28 February 2013, the trial court entered an order denying her motion that contained the following pertinent findings of fact:

> 1. On June 26, 2010 at approximately 12:30AM, Officer R. Gormican of the Charlotte Mecklenburg Police Department ("CMPD") was participating in a Driving While Impaired "saturation operation" in the vicinity of Freedom Drive and W. Morehead Street in Charlotte, Mecklenburg County, North Carolina.
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> 2. The area surrounding Freedom Drive and W. Morehead Street had been selected for a DWI saturation operation because of a high number of alcohol related motor vehicle crashes in that vicinity, as well as the fact that numerous establishments serving alcohol late into the night were located in that immediate area.
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> . . . .
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> 4. At approximately 12:30AM, Officers Morales and Wallin radioed to Officer Gormican that they had observed a blue Mitsubishi weave several times outside of its lane of travel on Freedom Drive near W. Morehead Street.
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> . . . .
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> 6. Officer Gormican testified that he observed that the brake-lights on the blue Mitsubishi appeared to be functional on June 26, 2010, but tail-lights on that vehicle did not. The defendant offered and the State consented to the admission of Officer Gormican's Digital Motor Vehicle Recording ("DMVR") in evidence at the suppression hearing. From a review of that recording in open court, it did not appear that the recording supported the Officer's testimony that the tail-lights were not functional,

> but this discrepancy did not substantially impeach the overall credibility of the officer's testimony.
>
> 7. Officer Gormican pursued the blue Mitsubishi a short distance on Freedom Drive and immediately initiated a traffic stop of that vehicle.

Based on these findings of fact, the trial court made the following pertinent conclusions of law:

> 2. Considering the totality of the circumstances, Officer Gormican had sufficient reasonable and articulable suspicion to justify the traffic stop of the defendant on or near Freedom Drive in Charlotte, North Carolina as a result of a traffic violation.
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> 3. Before placing the defendant under arrest for impaired driving, Officer Gormican had sufficient probable cause to believe that the defendant had committed that offense.
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> 4. Both reasonable suspicion to stop and probable cause to arrest may be based on the collective knowledge of law enforcement officers other than the stopping and/or arresting officer himself. *State v. Bowman*, 193 N.C. App. 104, 666 S.E.2d 831 (2008), *State v Battle*, 109 N.C. App. 367, 427 S.E.2d 156 (1993).

Following the denial of her motion to suppress, Defendant entered a conditional plea of guilty, reserving her right to appeal the trial court's denial of her motion to suppress. Defendant was sentenced to 30 days imprisonment. The sentence was suspended, and Defendant was placed on 12 months unsupervised probation. As a term of special probation,

Defendant was ordered to complete 24 hours of community service within the first 30 days of her probation. Defendant filed a timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying her motion to suppress.

> An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. This Court's review of the denial of a motion to suppress evidence is limited in scope to whether the underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial judge's conclusions of law are reviewed *de novo*.

State v. Hodges, 195 N.C. App. 390, 395, 672 S.E.2d 724, 728 (2009) (internal citations, quotation marks, and ellipses omitted).

I. Reasonable Suspicion

Defendant first argues that the trial court erred in denying her motion to suppress on the ground that Officer Gormican lacked reasonable suspicion to conduct a traffic stop of her vehicle. Specifically, Defendant asserts that the trial court's conclusion that reasonable suspicion existed to justify the traffic stop was improperly based on hearsay statements from

Officers Morales and Wallin to Officer Gormican that they had observed Defendant weave several times outside of her lane of travel. We disagree.

"[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L.Ed.2d 570, 576 (2000). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (internal citation and quotation marks omitted), *cert. denied*, 555 U.S. 914, 172 L.Ed.2d 198 (2008). Investigatory traffic stops "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). "A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion exists" to justify an officer's investigatory traffic stop. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012) (internal citation and quotation marks omitted).

This Court has held that an officer's observation of weaving, in conjunction with other factors, can create the requisite reasonable and articulable suspicion to justify an investigatory traffic stop. *State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 891-92 (2013), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). These other factors may include traveling at an unusual hour or driving in an area in close proximity to bars and nightclubs. *Id.* at __, 745 S.E.2d at 891. Moreover, our Supreme Court has ruled that a defendant's "weaving constantly and continuously [within her lane of travel] over the course of three-quarters of a mile" at 11:00 p.m. on a Friday night constituted reasonable suspicion to initiate a traffic stop. *Otto*, 366 N.C. at 138, 726 S.E.2d at 828 (internal quotation marks omitted).

In determining that Officer Gormican possessed reasonable suspicion to conduct the traffic stop, the trial court relied on the principle that reasonable suspicion may properly be based on the collective knowledge of law enforcement officers. This doctrine provides that

> [i]f the officer making the investigatory stop (the second officer) does not have the necessary reasonable suspicion, the stop may nonetheless be made if the second officer receives from another officer (the first officer) a request to stop the vehicle, and if, at the time the request is issued, the first officer possessed a reasonable suspicion that criminal conduct had

> occurred, was occurring, or was about to occur. . . . Where there is no request from the first officer that the second officer stop a vehicle, the collective knowledge of both officers may form the basis for reasonable suspicion by the second officer, if and to the extent the knowledge possessed by the first officer is communicated to the second officer.

State v. Battle, 109 N.C. App. 367, 370-71, 427 S.E.2d 156, 159 (1993) (internal citations omitted).

In *Battle*, the defendant moved to suppress his Breathalyzer test results on the ground that the arresting officer lacked the requisite reasonable suspicion to justify the initial stop of his vehicle. One officer radioed the arresting officer to "be on the lookout" for the defendant's vehicle based on his suspicion that the defendant was driving while impaired. *Id.* at 368-69, 427 S.E.2d at 157-58. The officer who radioed the arresting officer had earlier observed the defendant in a parking lot sitting behind the wheel of his parked car. He ordered the defendant out of the car and after performing two field sobriety tests and detecting a strong odor of alcohol on the defendant's breath formed the opinion that the defendant was impaired. He told the defendant not to drive and left the parking lot. *Id.* at 368, 427 S.E.2d at 157. However, believing that the defendant might nevertheless attempt to drive, the officer contacted the arresting officer and told him to be on the lookout for the defendant's car. The arresting officer

spotted and followed the defendant's vehicle for a few blocks without observing any conduct justifying a stop but nevertheless stopped the defendant's vehicle and arrested him for DWI. *Id.* at 368-69, 427 S.E.2d at 157-58.

On appeal, this Court reversed the trial court's order suppressing the evidence obtained as a result of the traffic stop on the ground that the first officer's radio report was sufficient to justify the second officer's stop of the vehicle. *Id.* at 372-73, 427 S.E.2d at 159-60. We held that an officer making a traffic stop need not have personally observed the defendant's conduct giving rise to reasonable suspicion if (1) "the officer making the stop has received a request to stop the defendant from another officer, if that other officer had, prior to the issuance of the request, the necessary reasonable suspicion"; or (2) "the officer making the stop received, prior to the stop, information from another officer, which, when combined with the observations made by the stopping officer, constitute the necessary reasonable suspicion." *Id.* at 371, 427 S.E.2d at 159.

In the present case, Officers Morales and Wallin observed Defendant's vehicle "weave several times outside of its lane of travel on Freedom Drive near W. Morehead Street," and radioed this information to Officer Gormican prior to his initiation of the stop. Defendant does not challenge the trial court's

findings that "[t]he area surrounding Freedom Drive and W. Morehead Street had been selected for a DWI saturation operation because of a high number of alcohol related motor vehicle crashes in that vicinity" or that "numerous establishments serving alcohol late into the night were located in that immediate area." Because these findings of fact have not been challenged by Defendant, they are binding on appeal. *See State v. Clark*, 211 N.C. App. 60, 65, 714 S.E.2d 754, 758 (2011) ("[A]ny findings of fact which the defendant fails to challenge on appeal are binding for purposes of appellate review."), *disc. review denied*, 365 N.C. 556, 722 S.E.2d 595 (2012).

We reject Defendant's contention that the trial court erred in considering evidence of the statements made by Officers Morales and Wallin to Officer Gormican based on the theory that these statements were hearsay. Defendant's argument is foreclosed by our decision in *State v. Gray*, 55 N.C. App. 568, 286 S.E.2d 357 (1982). In *Gray*, an officer conducted a traffic stop of the defendant relying solely on a radio report received from another officer that the defendant was driving with expired tags. *Id.* at 570, 286 S.E.2d at 359. The defendant moved to suppress evidence of drugs discovered as a result of the stop on the ground that the arresting officer's testimony concerning the statement received from the first officer was hearsay. *Id.* at 573, 286 S.E.2d at 361.

This Court affirmed the trial court's denial of the motion to suppress on the ground that the statement "was not offered to prove that defendant was driving with expired tags, but to prove that [the arresting officer] *was told* by a fellow officer that defendant was driving with expired tags." *Id.* We further concluded that "[t]he evidence tended to show that [the arresting officer] had received information which would justify his forming a reasonable suspicion that defendant was involved in criminal activity. As such, the evidence was not hearsay." *Id.*

The same reasoning applies in the present case. Officer Gormican testified that he was contacted by Officers Morales and Wallin, who told him that they had observed Defendant's vehicle "weaving outside its lane of travel several times." Officer Gormican therefore followed Defendant and initiated the traffic stop. As in *Gray*, his receipt of this information justified his reasonable suspicion that Defendant was driving while impaired, which in turn justified stopping Defendant's vehicle. Accordingly, Defendant's argument is overruled.

II. Confrontation Clause

Defendant's final argument on appeal is that Officer Gormican's testimony regarding the statements of Officers Morales and Wallin violated her Sixth Amendment rights under the Confrontation Clause. This argument also lacks merit.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L.Ed.2d 177, 194 (2004).

However, our Supreme Court has held that evidence admitted as nonhearsay does not trigger the protection of the Confrontation Clause. *See State v. Gainey*, 355 N.C. 73, 88, 558 S.E.2d 463, 473 ("[A]dmission of nonhearsay raises no Confrontation Clause concerns." (citations and internal quotation marks omitted)), *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002). Because we conclude that Officer Gormican's testimony as to the information he received from Officers Morales and Wallin was nonhearsay, we reject Defendant's argument on this issue.

Conclusion

For these reasons, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Judges HUNTER, Robert C., and DILLON concur.