NO. COA14-175

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Pitt County
No. 12 CRS 50689

JAMES M. ROBERTS

Appeal by defendant from judgment entered 27 June 2013 by Judge Christopher W. Bragg in Pitt County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant.

ERVIN, Judge.

Defendant James M. Roberts appeals from a judgment entered based upon his conviction for driving while subject to an impairing substance. On appeal, Defendant argues that the trial court erred by allowing the use of an unconstitutional mandatory presumption regarding the effect of the results of the chemical analysis of Defendant's breath that was admitted into evidence, allowing the admission of evidence concerning the result of a chemical analysis of his breath, erroneously instructing the jury concerning the extent to which the chemical analyst had

complied with the applicable regulations and the extent to which the time stamps shown on a video introduced into evidence accurately reflected the amount of time that elapsed during the time that certain events occurred, denying his motion to dismiss the charge that had been lodged against him based upon the State's failure to prosecute other similarly situated defendants using the presentment process, failing to intervene without objection to preclude the prosecutor from making inappropriate comments during her final argument, and placing him in jeopardy twice for the same offense by using the results of a chemical analysis of his breath to establish both the factual basis needed to support his guilty plea and as the primary support for the aggravating factor that the jury found to exist for sentencing-related purposes. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

At approximately 8:00 p.m. on 26 January 2012, Defendant was seen in the parking lot of a Harris Teeter grocery store. At that time, Defendant was walking in a slow, unsteady manner and appeared to be having trouble locating his vehicle. After

making these observations, Robert Aiken approached Defendant for the purpose of ascertaining if he needed assistance. However, Defendant failed to make eye contact with or otherwise acknowledge Mr. Aiken's presence. According to Mr. Aiken, Defendant was "wasted."

After noticing that Defendant had purchased beer, Mr. Aiken enlisted the help of another man in an attempt to prevent Defendant from getting in his car and driving away. As this was occurring, Trooper William Brown of the North Carolina State Highway Patrol arrived in the parking lot. Mr. Aiken flagged Trooper Brown down and told Trooper Brown what he had observed. As Mr. Aiken talked with Trooper Brown, Defendant reached his automobile, placed a bag in the vehicle's interior, and walked away.

After learning of Defendant's condition from Mr. Aiken, Trooper Brown waited to see if Defendant would return to his vehicle. About 30 minutes later, Defendant returned to the parking space in which his automobile was located, entered his vehicle, and began driving out of the parking lot. While following Defendant, Trooper Brown observed that Defendant crossed the fog line twice and ran a red light. As a result, Trooper Brown stopped Defendant's vehicle, placed Defendant under arrest for driving while subject to an impairing

substance, and transported Defendant to the Pitt County Detention Center for the purpose of chemically testing Defendant's breath for the presence of alcohol.

After Trooper Brown and Defendant reached the testing room, Trooper Brown removed Defendant's handcuffs and asked Defendant if he had anything in his mouth. In response, Defendant mentioned "Copenhagen," raked his finger between his lips and his teeth, and displayed a tin of Copenhagen chewing tobacco. Trooper Brown did not, however, see anything in Defendant's mouth. Although Defendant wanted to wash his mouth out before the chemical test of his breath was administered, Trooper Brown refused to allow Defendant to do so.

At 9:22 p.m., Trooper Brown advised Defendant of his rights relating to the testing process and began the statutory observation period, during which he was required to ensure that Defendant did not put anything in his mouth, regurgitate, vomit, smoke, eat, or drink. At 9:33 p.m., Defendant exercised his right to call someone in an attempt to obtain the presence of a witness during the testing process. Shortly thereafter, Trooper Brown left the testing room with Defendant for the purpose of allowing Defendant to use the restroom. After Trooper Brown and Defendant returned to the testing room, Defendant placed his fingers in his mouth, causing Trooper Brown to place Defendant

in handcuffs and initiate a new observation period, which began at 9:52 p.m.

At 10:06 p.m., Trooper Brown and Defendant left the testing room for the purpose of ascertaining if Defendant's witness had arrived. During that process, Defendant wiped his mouth on his jacket on two separate occasions. Upon returning to the testing room, Trooper Brown took three samples of Defendant's breath, after which he reported that Defendant had a 0.19 blood alcohol level.

B. Procedural History

On 26 January 2012, a citation charging Defendant with driving while subject to an impairing substance was issued. On 13 August 2012, the Pitt County grand jury returned a presentment requesting the District Attorney to investigate the underlying circumstances and submit a bill of indictment charging Defendant with driving while subject to an impairing substance. On that same date, the Pitt County grand jury returned a bill of indictment charging Defendant with driving while subject to an impairing substance.

The charge against Defendant came on for trial at the 24 June 2013 criminal session of the Pitt County Superior Court. On 25 June 2013, the trial court summarily denied Defendant's Motion to Suppress Evidence (*Miranda*) and denied in part and

granted in part Defendant's Motion in *Limine* and/or Motion to Prohibit the State From Introducing Any Expert Testimony. On 26 June 2013, the trial court denied Defendant's Motion to Dismiss, Motion to Suppress Chemical Analysis of Breath, and Motion to Suppress Evidence (Investigatory Stop & Seizure).[1] After the trial court announced its rulings with respect to Defendant's pre-trial motions, Defendant entered a plea of guilty to driving while subject to an impairing substance while preserving his right to seek appellate review of the denial of his pretrial motions. After concluding that there was a factual basis for Defendant's plea, the trial court accepted his plea of guilty.

On 26 June 2013, the issue of whether Defendant had a blood alcohol concentration of 0.15 or more within a relevant time after driving came on for hearing before the trial court and a jury. On 27 June 2013, the jury returned a verdict finding the existence of the aggravating factor delineated in N.C. Gen. Stat. § 20-179(d)(1). At the conclusion of the ensuing sentencing hearing, the trial court determined that Level III punishment should be imposed and entered a judgment sentencing Defendant to a term of 90 days imprisonment in the custody of the Sheriff of Pitt County, suspending Defendant's sentence, and placing Defendant on supervised probation for 12 months on the

[1]The trial court entered written orders denying these motions on 13 August 2013.

condition that he pay the court costs and a $1,000 fine, surrender his driver's license and not operate a motor vehicle until properly licensed to do so, complete 72 hours of community service within 60 days, abstain from alcohol consumption for a period of 60 days as verified by a continuous alcohol monitoring system, and comply with the usual terms and conditions of probation.[2] Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

A. Validity of Breath Test Result Presumption

In his first challenge to the trial court's judgment, Defendant contends that language added to N.C. Gen. Stat. § 20-179(d)(1) in 2007 creates an unconstitutional mandatory presumption. More specifically, Defendant contends that the statutory provision to the effect that the result of a chemical test of a defendant's breath for the presence of alcohol "shall be conclusive, and shall not be subject to modification by any party" for purposes of determining that Defendant's sentence should be enhanced violates his federal and state constitutional rights not to be deprived of liberty without due process of law

[2]According to the transcript developed during the trial of this case, the judgment was entered on 27 June 2013. However, the judgment included in the record on appeal is dated 25 June 2013, a clerical error that creates the necessity for us to remand this case to the trial court for correction.

and to have the existence of an aggravating factor proven beyond a reasonable doubt. N.C. Gen. Stat. § 20-179(d)(1). We do not believe that Defendant is entitled to relief from the trial court's judgment on the basis of this contention.

"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), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766-67 (2010); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (stating that "*de novo* review is ordinarily appropriate in cases where constitutional rights are implicated"). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

According to N.C. Gen. Stat. § 20-179(d)(1), an aggravated sentence can be imposed following a defendant's conviction for driving while subject to an impairing substance in the event that there is:

> Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after driving. For purposes of this subdivision, the results of a chemical analysis presented at trial or

> sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court.

The trial court did not, however, include the language to which Defendant's constitutional challenge is directed in its instructions to the jury concerning the extent, if any, to which the jury should find that Defendant's sentence should be enhanced pursuant to N.C. Gen. Stat. § 20-179(d)(1). Instead, the trial court instructed the jury that:

> when a defendant denies the existence of an aggravating factor, he is not required to prove that the aggravating factor does not exist. It is presumed that the aggravating factor does not exist. The State must prove to you beyond a reasonable doubt that the aggravating factor exists.

In addition, the trial court instructed the jury that, although "the testing procedures and test results are admissible . . . you are the sole judges of the credibility and weight to be given to any evidence, and you must determine the importance of this evidence in light of all other believable evidence." Finally, the trial court instructed the jury that:

> The defendant having pled guilty to Driving While Impaired, you must now consider the following question: Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor?

> The defendant had an alcohol concentration of .15 or more at the time of the offense or within a relevant time of the driving involved in this offense.
>
> If you find from the evidence beyond a reasonable doubt that the aggravating factor exists, then you will write "yes" in the space after the aggravating factor on the verdict sheet. If you have found the existence of the aggravating factor and have written "yes" in the space after the aggravating factor, then you will also answer Issue One "yes" and write "yes" in the space after Issue One on the verdict sheet.

As a result, instead of instructing the jury in accordance with the portion of N.C. Gen. Stat. § 20-179(d)(1) upon which Defendant's constitutional challenge to the trial court's judgment is based, the trial court refrained from incorporating any reference to the allegedly impermissible mandatory presumption into its instructions and specifically instructed the prosecutor to refrain from making any reference to the challenged language in the presence of the jury.

A criminal defendant lacks standing to challenge the constitutionality of a specific statutory provision in the absence of a showing he has suffered, or is likely to suffer, an injury stemming from the application of the challenged provision in the case in which he is involved. *See Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (stating that "[s]tanding to challenge the constitutionality of

a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement") (internal quotation marks and citation omitted); *State v. Fredell*, 283 N.C. 242, 247, 195 S.E.2d 300, 304 (1973) (stating that, "[u]niformly, the accused has been permitted to assert the invalidity of the law only upon a showing that his rights were adversely affected by the particular feature of the statute alleged to be in conflict with the Constitution"). In the absence of such a showing, the defendant is precluded from attacking the constitutionality of the relevant statutory provision. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) (stating that "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter") (citations omitted). Defendant has not directed our attention to any portion of the record which tends to suggest that the jury's decision to find the existence of the aggravating factor set out in N.C. Gen. Stat. § 20-179(d)(1) was in any way affected by the statutory provision upon which Defendant's constitutional argument rests. As a result, Defendant lacks the standing necessary to support a challenge to

the constitutionality of the statutory provision discussed in his brief and is not, for that reason, entitled to relief from the trial court's judgment on the basis of this argument.

B. Admissibility of the Breath Test Results

Secondly, Defendant argues that the trial court erred by failing to suppress the results of the chemical analysis of his breath that Trooper Brown performed following Defendant's arrest. More specifically, Defendant contends that, since Trooper Brown failed to satisfactorily comply with the statutory requirement that there be a fifteen minute "observation period" prior to the administration of the chemical test of Defendant's breath mandated by N.C. Gen. Stat. § 20-139.1, the trial court should have granted his motion to suppress the breath test results and refused to allow the admission of the chemical analysis results into evidence. Defendant's argument lacks merit.

1. Standard of Review

As this Court has previously recognized, a defendant is entitled to challenge the denial of a motion to suppress the result of a chemical test of his breath as having been obtained in violation of the applicable provisions of the General Statutes by means of a motion to suppress filed pursuant to N.C. Gen. Stat. § 15A-974. *State v.* Hatley, 190 N.C. App. 639, 642-

44, 661 S.E.2d 43, 45-46 (2008). "Our review of a denial of a motion to suppress by the trial court is '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. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 538 U.S. 1040, 123 S. Ct. 2087, 155 L. Ed. 2d 1074 (2003).

2. Applicable Legal Principles

N.C. Gen. Stat. § 20-139.1(b)(1) provides that a chemical analysis of a defendant's breath is admissible if "[i]t is performed in accordance with the rules of the Department of Health and Human Services." According to 10A N.C.A.C. 41B.0322(2), which governs testing performed using equipment designed to analyze a defendant's breath, the analyst must have ensured that the applicable "observation period requirements have been met." The applicable regulations define "observation period" as:

> a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the

> collection of a breath specimen. The chemical analyst may observe while conducting the operational procedures in using a breath-testing instrument. Dental devices or oral jewelry need not be removed.

10 N.C.A.C. 41B.0101(6). According to well-established North Carolina law, the State bears the burden of proving compliance with the "observation period" requirement set out in N.C. Gen. Stat. § 20-139.1. *State v. Drdak*, 101 N.C. App. 659, 664, 400 S.E.2d 773, 775 (1991), *rev'd on other grounds*, 330 N.C. 587, 411 S.E.2d 604 (1992); *State v. Gray*, 28 N.C. App. 506, 507, 221 S.E.2d 765, 765 (1976). In his brief, Defendant argues that Trooper Brown violated the "observation period" requirement by leaving Defendant alone on two occasions, failing to observe that Defendant had wiped his face or mouth on his jacket twice, and focusing his attention on unrelated activities, and that these violations of the "observation period" requirement should have led to the suppression of Defendant's breath test results. We do not find this argument persuasive.

3. Evidentiary Analysis

As an initial matter, Defendant was accompanied by Trooper Brown on both of the occasions when he left the chemical testing room. For that reason, we are unable to find any record support for Defendant's contention that Trooper Brown left him alone on two occasions during the required observation period. In

addition, Defendant fails to specify the exact conduct in which Trooper Brown engaged at the time that he allegedly focused his attention on irrelevant matters. However, Trooper Brown did acknowledge that there were "split second[s]" when his eyes were not trained directly on Defendant and that there were times during which his "attention [was both] on [Defendant] and where [he was] going." As a result, Defendant's contention that Trooper Brown failed to satisfy the observation requirement hinges upon the fact that, when Trooper Brown and Defendant left the testing room at 10:06 p.m. in order to ascertain if Defendant's witness had arrived, Trooper Brown allowed Defendant to walk behind him and may have failed to observe that Defendant wiped his mouth on his jacket on two occasions.

According to Defendant, the term "to observe" means "to watch carefully[,] especially with attention to details or behavior for the purpose of arriving at a judgment." *Merriam-Webster Dictionary*. Although we agree with Defendant that the concept of "observation" as outlined in 10A N.C.A.C. 41B.0322(2) contemplates the maintenance of a careful watch over the subject to be tested, a proper resolution of Defendant's challenge to the trial court's ruling must necessarily depend on the purpose for which the observation period requirement was imposed. As we have already noted, the observation period requirement was

adopted to ensure that "a chemical analyst observes the person or persons to be tested *to determine* that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen." 10A N.C.A.C. 41B.0101(6). As a result, since the analyst is supposed to focus his or her observations on the extent, if any, to which any event that might affect the accuracy of the test has occurred, nothing in the relevant regulatory language requires the analyst to stare at the person to be tested in an unwavering manner for a fifteen minute period prior to the administration of the test.[3] Thus, given that the record shows that Trooper Brown observed Defendant over the course of a period of 21 minutes, during which Defendant did not "ingest[] alcohol or other fluids, regurgitate[], vomit[], eat[], or smoke[]," 10A N.C.A.C. 41B.0101(6), and during which Trooper Brown only lost direct sight of Defendant for very brief intervals in the course of attempting to ensure that Defendant's right to the presence of a witness was adequately protected, we are unable to conclude that

[3]Our determination to this effect is reinforced by the fact that the applicable regulations were amended in 2001 so as to allow a single officer to observe multiple subjects simultaneously. Should an analyst be required to act in the manner described in Defendant's brief, an analyst could never, as the 2001 amendment allows, properly observe more than one subject at a time.

the trial court erred by determining that Trooper Brown failed to comply with the applicable observation period requirement. As a result, Defendant is not entitled to relief from the trial court's judgment based upon the denial of his motion to suppress the results of the chemical analysis of his breath.

C. Trial Court's Instructions

Thirdly, Defendant argues that the trial court erred by instructing the jury that the trial court had previously determined that the breath test upon which the State relied had been performed in accordance with the applicable regulations, so that the test results were admissible, and that the video footage of Defendant's activities in the breath testing room did not reflect the actual elapsed time because of the manner in which the video camera in question operated. According to Defendant, the challenged instructions constituted an impermissible expression of opinion and lacked adequate evidentiary support. We do not find Defendant's arguments persuasive.

1. Admissibility of the Chemical Test Results

In his first challenge to the trial court's instructions, Defendant argues that the trial court erred by stating that:

> earlier in this case and out of your presence[,] the Court heard evidence regarding the chemical analysis testing of the Defendant . . . by Trooper Brown. The

> Court has concluded that Trooper Brown followed the North Carolina Department of Health and Human Services regulations and standards regarding the chemical analysis of the Defendant's breath and that the testing procedures and test results are admissible for purposes of this trial.

The trial court delivered the challenged instruction in light of the State's objection to the "attack on the chemical analysis" made in Defendant's opening argument. Although the trial court allowed Defendant's trial counsel to attack the credibility of and the weight to be given to the chemical analysis, it concluded that an instruction to the effect that the trial court had deemed the chemical test results to be admissible would be appropriate in order to eliminate any concern that the jury might have about the admissibility of the breath test results.

In his brief, Defendant contends that the trial court's instruction violated N.C. Gen. Stat. § 15A-1222, which provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury," and N.C. Gen. Stat. § 15A-1232, which provides that, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." Although the relevant statutory

provisions prohibit the trial court from "express[ing] any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury," *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 733 (internal quotation marks and citation omitted), *cert. denied*, 528 U.S. 941, 120 S. Ct. 351, 145 L. Ed. 2d 274 (1999), we are not persuaded that the trial court expressed such an opinion in this instance. On the contrary, the challenged portion of the trial court's instruction related to the admissibility of the chemical test, which is a legal determination to be made by the trial court, *see* N.C. Gen. Stat. § 8C-104(a), rather than an issue of fact to be determined by the jury. In addition, Defendant's argument overlooks the trial court's subsequent statement that, "[a]s I have previously instructed you, you are the sole judges of the credibility and the weight to be given to any evidence and you must determine the importance of this evidence in light of all other believable evidence." After carefully analyzing the trial court's instructions in their entirety, we are unable to see how the challenged instruction in any way impinged on the jury's right to make a determination concerning the credibility of or the weight to be given to the chemical test results. As a result, we do not believe that the trial court expressed an opinion about a matter of fact that the jury was required to

decide in order to determine whether the aggravating factor set out in N.C. Gen. Stat. § 20-179(d)(1) existed.

2. Testing Room Camera

Secondly, Defendant challenges the appropriateness of the trial court's instruction that:

> on the video that you watched concerning [Defendant] and Trooper Brown in the Intox room in the Pitt County Sheriff's Detention Center, that the numbers on the bottom of that indicate the length of the tape. Okay? It is not a true or accurate reflection of the time. The reason being is the cameras in the Intox room are . . . motion activated. If someone walks into the room, the camera will begin to record automatically. In fact, it will start and record ten seconds before. When someone walks out of the room, ten seconds later the camera will stop. It does not—and then when someone walks back into the room, whether it's a minute, two minutes, 10 minutes, or 30 minutes later, the camera will resume recording from where it stopped. So it does not show accurate reflections of the length of the time. That number on the bottom is the total amount of recorded time.

In challenging this instruction, Defendant contends that the record did not contain any support for the trial court's comments. Once again, we do not find Defendant's argument persuasive.

The testing room video was introduced into evidence at the hearing concerning the existence of the aggravating factor set out in N.C. Gen. Stat. § 20-179(d)(1) by Defendant, rather than

by the State. Admittedly, the State did introduce the testing room video during the hearing held in connection with Defendant's motion to suppress the test results, at which counsel for both parties stipulated to the video's authenticity and acknowledged that the video did not accurately depict the amount of time that actually transpired during the events depicted on the resulting footage given that the camera used to produce the video stopped recording 10 seconds after any persons in the testing room left and resumed recording when someone re-entered the room. As a result, the parties both appeared to have agreed during an earlier stage of this proceeding that the durational information shown on the video did not accurately reflect the time that actually elapsed during the events depicted on the resulting video footage.

In the course of his closing argument, Defendant's trial counsel implied that the video accurately depicted the amount of time covered in the recording. More specifically, Defendant's trial counsel argued that:

> Now here's what we know for absolute sure if you look at the video, look at the time. From the time Trooper Brown and [Defendant] walk out to go to that bathroom until the time that they come back in is 35 seconds—35 seconds. So he is gone, walked out, gone down to the bathroom down the hallway, done all these horrible things he's described and come back, and he's in the room in about 34—

> it would be 34 seconds if you look at the video.

After the State objected to the argument being made by Defendant's trial counsel and requested the trial court to deliver a curative instruction, the trial court told Defendant's trial counsel that "You're saying that these things are true when I know them not to be true, and you're saying because the State didn't prove that, I can argue that they're not true or didn't offer evidence on that. And . . . I can't accept that." As a result, the trial court gave the curative instruction about which Defendant now complains.

As a general proposition, "one who causes . . . the court to commit error is not in a position to repudiate his action and assign it as ground for a new [sentencing hearing]." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971); *see also* N.C. Gen. Stat. § 15A-1443(c) (stating that "[a] defendant is not prejudiced . . . by error resulting from his own conduct"). In view of the fact that the argument advanced by Defendant's trial counsel conflicted with Defendant's earlier assertions concerning the manner in which the timing mechanism on the testing room video equipment operated, we see no error of law in the trial court's decision to correct the record using information to which Defendant had, in effect, previously stipulated. As a result, Defendant is not entitled to relief

from the trial court's judgment on the basis of the alleged instructional errors discussed in his brief.

D. Prosecution by Presentment

Fourthly, Defendant argues that the State deprived him of the equal protection of the laws by initiating the present proceeding using a presentment instead of prosecuting him in reliance upon the issuance of a citation.[4] More specifically, Defendant, who is a licensed attorney, argues that he was denied his right to equal protection of the laws given that other attorneys who had been charged with driving while subject to an impairing substance had been charged using a citation rather than the presentment process. Defendant is not entitled to

[4]As an aside, we note that, although the argument heading contained in the relevant portion of his brief makes reference to a due process violation, Defendant did not advance any argument in the body of his brief to the effect that he had been deprived of his liberty without due process of law as the result of the State's reliance upon the presentment process. For that reason, Defendant has abandoned any due process claim that he might have intended to assert. N.C. R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Viar v. North Carolina Dep't of Transportation*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts . . . to create an appeal for the appellant"). Thus, the discussion in the text of this opinion will focus entirely on Defendant's equal protection claim.

relief from the trial court's judgment on the basis of this argument.[5]

As a result of the fact that, as Defendant acknowledges, attorneys practicing in Pitt and surrounding counties do not constitute a suspect class, the challenged governmental conduct must be upheld if "there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State University v. American Assoc. of University Professors*, 526 U.S. 124, 128, 119 S. Ct. 1162, 1163, 143 L. Ed. 2d 227, 231 (1999) (citing *Heller v. Doe*, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 2639, 125 L. Ed. 2d 257, 266 (1993)). In other words, in the present context, "the burden is on the one attacking the [act] to negate every conceivable basis which might support it." *Heller*, 509 U.S. at 320, 113 S. Ct. at 2643, 125 L. Ed. 2d at 271 (internal quotation marks and citations omitted). As a result, in order to obtain relief from the trial court's judgment on the basis of this claim, Defendant

[5]Although the State has not addressed this issue in its brief, we question whether Defendant waived his right to challenge the denial of his dismissal motion on appeal by pleading guilty. *State v. White*, 213 N.C. App. 181, 183, 711 S.E.2d 862, 864 (2011) (holding that a defendant is entitled to challenge only a limited number of issues after entering a plea of guilty, with the denial of a dismissal motion not being included among them) (citations omitted). However, given that the parties have not addressed this issue in their briefs in any detail and the fact that Defendant's contention lacks merit as a substantive matter, we will simply assume, without in any way deciding, that Defendant's contention is properly before us.

must show that there was no rational basis for proceeding against him utilizing the presentment process rather than using a citation as the charging instrument.

As the record clearly reflects, Defendant is an attorney who lives and practices in Pitt County and who has had dealings with the court system and the District Attorney's Office. For this reason, the district court and superior court judges residing in Pitt County recused themselves from presiding over Defendant's case and the District Attorney's Office recused itself from prosecuting the charge that had been lodged against Defendant. For that reason, Defendant was prosecuted by a special prosecutor and the trial of this case was presided over by a jurist brought in from a different division. As the State notes, considerations of judicial economy justified the use of the presentment process, given that proceeding against Defendant by presentment rather than citation obviated the necessity for utilizing a special prosecutor and a non-resident trial judge on two occasions, rather than one. As a result, given that the State clearly had a rational basis for proceeding against Defendant by means of a presentment rather than on the basis of a citation, Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

E. Prosecutor's Final Argument

Next, Defendant argues that several comments made during the prosecutor's final argument were so grossly improper that the trial court should have intervened in the absence of an objection to preclude the making of those comments. More specifically, Defendant contends that, as a result of the trial court's failure to preclude the making of these improper prosecutorial arguments, he was deprived of his state and federal constitutional right not to be deprived of liberty without due process of law. Once again, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

"[A]rguments of counsel are left largely to the control and discretion of the trial judge," with counsel being "granted wide latitude in the argument of hotly contested cases." *State v. Fullwood*, 343 N.C. 725, 740, 472 S.E.2d 883, 891 (1996), *cert. denied*, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997). As a result of the fact that Defendant only lodged contemporaneous objections to two of the comments that he now challenges on appeal and the fact that the trial court sustained both of Defendant's objections,[6] appellate "review [of Defendant's challenges to the prosecutor's jury argument] is

[6]Defendant has not contended that he is entitled to any relief on the basis of the arguments to which the trial court sustained Defendant's objection.

limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685, *cert. denied*, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

In his brief, Defendant challenges the prosecutor's reference to Defendant as "an alcoholic"; her statement that Defendant "can tolerate his booze"; her contention that Defendant sought to "make [Trooper Brown] out to be a liar"; her question as to whether "it seem[s] reasonable that [Trooper Brown] would give up his career, his integrity, his family, his livelihood just to get that guy"; her contention that Trooper Brown "was fair and because he's honest and because he's decent," "he's telling the truth"; that Trooper Brown "was out protecting and serving you" and "did not come in this room and lie about it"; that the "judge has already told you [that the time shown on the video footage] is not an accurate time"; that the "[b]reath test is in. It's done. It's absolutely done"; and that "the only way you can find [that the breath test results] didn't happen is if you pretend." Although the prosecutor might have been better advised to refrain from making some of the challenged comments, we do not believe that Defendant has established that "the [prosecutor's] argument was

so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *Gladden*, 315 N.C. at 417, 340 S.E.2d at 685.

A number of the prosecutorial comments to which Defendant's argument is addressed relate to Defendant's status as an alcoholic and the extent to which he had developed a tolerance for alcoholic beverages, neither of which appear to us to be directly relevant to the issue of whether Defendant had a blood alcohol level sufficient to trigger application of the relevant aggravating factor. In addition, we have already held that, given the unusual circumstances present in this case, it was not error for the trial court to instruct the jury that the time stamp on the video footage that the jury saw at the hearing held for the purpose of determining whether the aggravating factor set out in N.C. Gen. Stat. § 20-179.1(d)(1) existed did not accurately reflect the time that actually elapsed during the events depicted on that footage. A considerable number of the comments upon which Defendant's contention is based stemmed from the prosecutor's efforts to rebut Defendant's contention that the jury should conclude that Trooper Brown's testimony was not credible.[7] Although a number of the comments that the prosecutor

[7]For example, Defendant's trial counsel argued to the jury that "[t]hat should raise you some concerns . . . about Mr. Brown's credibility" and stated, "[h]ow's his balance and

made in the course of defending Trooper Brown's credibility may lack adequate evidentiary support, we are unable to say that the making of those comments rendered the hearing fundamentally unfair given the strength of the evidence in favor of the existence of the aggravating factor upon which the State relied.[8] Finally, the prosecutor's suggestion that the jury would have to "pretend" in order to refrain from accepting the validity of the breath test results strikes us as nothing more than a permissible argument that Defendant's challenge to the validity

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coordination? Is it consistent with what Trooper Brown said? Because I say that's a credibility issue[.]"

[8]In support of his challenge to the prosecutor's defense of Trooper Brown's credibility, Defendant cites our decision in *State v. Potter*, 69 N.C. App. 199, 202-04, 316 S.E.2d 359, 360-64, *disc. review denied*, 312 N.C. 624, 323 S.E.2d 925 (1984), in which we granted the defendant a new trial based, at least in part, on the trial court's failure to sustain Defendant's objections to the prosecutor's repeated suggestion that the arresting officers risked being prosecuted for perjury, being fired from their jobs, and losing their retirement benefits if they were untruthful, and asked the jury to "form some opinion in your mind as to who has the most to lose by not telling the truth in this case." *Id.* at 202, 316 S.E.2d at 360. Although the prosecutor in this case did assert that Trooper Brown would not "give up his career, his integrity, his family, his livelihood just to get that guy," Defendant's trial counsel did not object to that statement. In addition, the argument made at Defendant's hearing did not tend to place any juror "in the moral dilemma of either convicting the defendant or, in the alternative, causing the officers to suffer the grievous penalties suggested by the prosecutor." *Id.* at 204, 316 S.E.2d at 362. As a result, given the absence of an objection to the challenged prosecutorial argument and the fundamental difference between the argument at issue in *Potter* and the argument at issue in this case, *Potter* provides no basis for awarding Defendant any relief.

of the breath test results had no merit. Thus, for all of these reasons, we are unable to conclude that the prosecutor's argument was so grossly improper as to have necessitated *ex mero motu* intervention by the trial court. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of his challenge to the prosecutor's jury argument.

F. Defendant's Double Jeopardy Claim

Finally, Defendant argues that the trial court violated his right not to be placed in jeopardy twice for the same offense given that the State used the breath test result to assist in establishing the factual basis for Defendant's plea and to support the aggravating factor used to enhance Defendant's punishment. We do not find Defendant's argument persuasive.

"The constitutional prohibition against double jeopardy protects a defendant from additional punishment and successive prosecution for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (internal quotation marks and citation omitted). Put another way, the double jeopardy clause protects criminal defendants against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). Although

Defendant appears to claim that he has been subjected to multiple punishments for the same offense, his argument to this effect cannot succeed given that, instead of being punished twice, he has been subjected to a more severe punishment for an underlying substantive offense based upon the fact that his blood alcohol level was higher than that needed to support his conviction for that offense.[9] Defendant had not cited any case in support of his contention that a double jeopardy violation occurs in the event that the same item of evidence is used once to prove an element of a substantive offense and a second time to support the imposition of an enhanced sentence, particularly when the evidence in question is used to support different factual determinations in each instance. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the final argument set out in his brief.

III. Conclusion

[9]According to N.C. Gen. Stat. § 20-138.1(a), a defendant is guilty of driving while subject to an impairing substance in the event that he or she is under the influence of an impairing substance or has an alcohol concentration of at least 0.08 at any relevant time after driving. According to N.C. Gen. Stat. § 20-179(d), an aggravating factor that can be used to enhance the sentence to be imposed upon a person convicted of driving while impaired exists in the event that the defendant had an alcohol concentration of at least 0.15 within a relevant time after the driving. N.C. Gen. Stat. § 20-179(d)(1). As a result, one blood alcohol level suffices to support a finding of the defendant's guilt of the substantive offense and a different, and higher, blood alcohol level suffices to support the enhancement of the defendant's sentence.

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed, except that the judgment should be, and hereby is, remanded to the trial court for the correction of a clerical error.

NO ERROR. REMANDED TO TRIAL COURT FOR CORRECTION OF CLERICAL ERROR.

Judges Robert C. HUNTER and MCCULLOUGH concur.