

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-330
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 10 CRS 260984

CHRISTOPHER MICHAEL POMPOSO

Appeal by defendant from judgment entered 7 August 2013 by Judge Susan E. Bray in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2014.

Roy Cooper, Attorney General, by Matthew L. Boyatt, Assistant Attorney General, for the State.

Arnold & Smith, PLLC, by Laura M. Cobb, for defendant-appellant.

DAVIS, Judge.

Christopher Michael Pomposo ("Defendant") appeals from his conviction for driving while impaired. On appeal, he argues that the trial court erred in (1) denying his motion to suppress; and (2) excluding portions of the National Highway Traffic Safety Administration ("NHTSA") manual from being read

into evidence. After careful review, we determine that Defendant received a fair trial free from prejudicial error.

Factual Background

On 23 December 2010 at approximately 2:20 a.m., Officer Charles Strong ("Officer Strong") of the Charlotte-Mecklenburg Police Department was stationed in his patrol car at the intersection of Tippah Park Drive and Central Avenue in Charlotte, North Carolina. From his location, he was able to observe vehicles leaving downtown Charlotte. Officer Strong noticed Defendant's vehicle and estimated that it was traveling at a speed of approximately 50 miles per hour in a 35 mile-per-hour zone. Officer Strong proceeded to use a radar device to "lock in" Defendant's speed, and the device indicated that Defendant's vehicle was traveling 52 miles per hour.

Officer Strong activated his blue lights and siren and pursued Defendant's vehicle. Defendant made "an abrupt left-hand turn onto Logie Avenue" and then turned again onto a side street. When Officer Strong reached Defendant's vehicle to initiate a traffic stop, the vehicle was stopped in front of a house, and a passenger was exiting the car. Officer Strong approached the car and asked for Defendant's license and registration.

During this interaction, Officer Strong noticed "a very strong odor of alcohol coming from the vehicle." He also observed that Defendant's eyes were red and glassy and his speech was slurred. Officer Strong asked Defendant if he had consumed any alcohol, and Defendant replied affirmatively. Officer Strong then requested that Defendant exit his vehicle. He administered three field sobriety tests: the horizontal gaze nystagmus ("HGN") test, the walk-and-turn test, and the one-leg stand test. Officer Strong also utilized an Intoximeter FST to conduct a portable breath test, and both of Defendant's breath samples yielded positive results for alcohol. Based on Defendant's performance on these tests, Officer Strong "formed the opinion that both [Defendant's] mental and physical faculties were noticeably and appreciably impaired" and placed Defendant under arrest for driving while impaired.

On 8 May 2013, Defendant filed a motion to suppress all evidence and statements made by him on 23 December 2010 based on his contention that "the seizure and arrest of the Defendant's person was made without probable cause or reasonable suspicion." The trial court denied Defendant's motion to suppress by order entered 5 August 2013. Following the denial of Defendant's motion to suppress, a jury trial was held, and on 7 August 2013,

the jury found Defendant guilty of driving while impaired. The trial court sentenced Defendant to 12 months imprisonment, suspended the sentence, and placed Defendant on 24 months of supervised probation. Defendant appealed to this Court.

Analysis

I. Grounds for Appellate Review

We must initially address whether this Court has jurisdiction to consider Defendant's appeal. Rule 4 of the North Carolina Rules of Appellate Procedure requires the appealing party in a criminal action to either (1) give oral notice of appeal at trial; or (2) file a written notice of appeal with the clerk of superior court and serve all other parties within 14 days of the entry of the judgment or order, in order to invoke this Court's jurisdiction. N.C.R. App. P. 4(a). While Defendant contends in his brief that he filed a timely notice of appeal on 8 August 2013, the record does not contain any documentation of a proper oral or written notice of appeal. See *State v. Parker*, 214 N.C. App. 190, 192, 713 S.E.2d 770, 772 (2011) ("It is well established that it is the appellant's duty and responsibility to see that the record is in proper form and complete." (citation, internal quotation marks, and brackets omitted)).

Generally, an appealing party's failure to show compliance with Rule 4 results in this Court's dismissal of the appeal. *Id.*; see also *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 779 (2011). However, "[t]his Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari and grant it in our discretion." *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (citation and internal quotation marks omitted). As such, in our discretion, we elect to treat Defendant's appeal as a petition for writ of certiorari and review the merits of Defendant's arguments.

II. Denial of Motion to Suppress

Defendant first argues that the trial court erred in denying his motion to suppress evidence and statements stemming from his arrest on 23 December 2010 for lack of probable cause because "there are no facts in the case . . . that would lead a reasonable, cautious person to believe that Defendant was driving while impaired." 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).

Probable cause for an arrest is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed. The existence of such grounds is determined by the practical and factual considerations of everyday life on which reasonable and prudent people act. If there is no probable cause to arrest, evidence obtained as a result of that arrest and any evidence resulting from the defendant's having been placed in custody, should be suppressed.

State v. Tappe, 139 N.C. App. 33, 36-37, 533 S.E.2d 262, 264 (2000) (internal citations and quotation marks omitted).

Here, the trial court concluded that there was probable cause to arrest Defendant based on its findings that (1) when Officer Strong initiated the traffic stop of Defendant for exceeding the speed limit, he immediately noticed Defendant's red, glassy eyes and a strong odor of alcohol emanating from the vehicle; (2) when Defendant stepped outside of the vehicle, Officer Strong observed that the odor of alcohol was coming from Defendant's breath; (3) Defendant admitted to Officer Strong

that he had been consuming alcohol after work; and (4) upon Officer Strong administering three field sobriety tests, Defendant failed to comply with his instructions as to two of the tests by failing to walk heel to toe in the walk-and-turn test and failing to count "one thousand one, one thousand two, one thousand three," as directed in the one-leg stand test. The trial court also found that (1) Defendant submitted to a portable breath test and his breath tested positive for alcohol; (2) Defendant failed to lift his leg six inches off the ground in the one-leg stand as required and only kept his foot two to three inches off the ground during the administration of the test; and (3) when "Officer Strong administered the HGN [test] in substantial compliance with the way he was trained to do the test, . . . Defendant exhibited six of the six clues for lack of smooth pursuit, onset prior to 45 degrees and maximum deviation."

Defendant does not challenge these findings - which are supported by Officer Strong's testimony at the suppression hearing - but rather contends that probable cause to arrest him was nevertheless lacking because (1) the results of the HGN test should not be accorded any weight since the test was not conducted in accordance with current guidelines; and (2) Officer

Strong acknowledged that Defendant "exhibit[ed] a low number of clues" of impairment when performing the field sobriety tests. We are not persuaded.

With regard to the HGN test, Officer Strong testified that since 23 December 2010, the night of Defendant's arrest, he has received updated training on how to administer the HGN test. He explained that he now conducts two passes per eye and holds the eye at maximum deviation for four seconds. He testified that on the night of Defendant's arrest, however, he only conducted one pass per eye and held the eye out for "a few seconds" to check for nystagmus based upon his original training.

We believe that even without the evidence regarding the HGN test, there was sufficient record evidence to establish probable cause. As this Court recently held in *State v. Townsend*, ___ N.C. App. ___, ___, 762 S.E.2d 898, 905 (2014), bloodshot eyes, the odor of alcohol on one's breath, yielding positive results on a portable breath test, and exhibiting several clues of impairment on field sobriety tests taken together constitute sufficient probable cause to arrest a defendant for driving while impaired.

While Defendant emphasizes that he exhibited "a low number of clues" of impairment in his performance of the field sobriety

tests, Defendant's failure - or inability - to obey Officer Strong's instructions during the tests and the fact that his steps were not heel to toe in the walk-and-turn test and his foot was raised only two or three inches off the ground rather than six during the one-leg stand test - when considered along with the other circumstances indicating impairment - provided Officer Strong with a reasonable ground to believe that Defendant had committed the offense of driving while impaired. See *State v. Childers*, 154 N.C. App. 375, 380, 572 S.E.2d 207, 211 (2002) (explaining that warrantless arrests must be supported by probable cause and "[i]n making an arrest without a warrant, it is not essential that the officer show an offense has actually been committed, it is only necessary that the officer show he has reasonable grounds to believe an offense has been committed"), *cert. denied*, 356 N.C. 682, 577 S.E.2d 899 (2003); see also *Townsend*, ___ N.C. App. at ___, 762 S.E.2d at 905 ("[T]his Court has held [that] the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired.").

Because there was competent evidence presented that Defendant had bloodshot eyes and the odor of alcohol on his

breath, exhibited clues of impairment in the walk-and-turn test and the one-leg stand test, admitted he had "a few drinks," and yielded positive results for alcohol on both of his breath samples, we conclude that there was probable cause to support Defendant's arrest. We therefore affirm the trial court's denial of Defendant's motion to suppress.

III. National Highway Traffic Safety Administration Manual

Defendant next contends that the trial court erred by prohibiting his trial counsel from reading into evidence portions of the NHTSA training manual on field sobriety tests during his cross-examination of Officer Strong. Specifically, Defendant argues that this evidence would have illustrated Officer Strong's noncompliance with applicable guidelines on the proper method of administering the HGN test.

It is well established that

evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial. The same rule applies to exclusion of evidence. Evidentiary error is prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. Defendant bears the burden of showing prejudice.

State v. Jacobs, 363 N.C. 815, 825, 689 S.E.2d 859, 865-66 (2010) (internal citations and quotation marks omitted).

Defendant asserts that without the admission of portions of the NHTSA training manual, "he was unable to show to the jury the extent to which Officer Strong's HGN test differed from the prescribed testing methods outlined in the NHTSA manual." Based upon our review of the transcript, however, it is evident that defense counsel was able to elicit testimony from Officer Strong on cross-examination acknowledging that his administration of the HGN test on Defendant was not in accordance with the current guidelines regarding how to properly conduct the test. Thus, even assuming - without deciding - that the trial court erred, we do not believe Defendant has demonstrated that any such error was prejudicial. See *State v. Garcia*, 358 N.C. 382, 420, 597 S.E.2d 724, 750 (2004) ("The erroneous exclusion of evidence is not prejudicial when the same or substantially the same testimony is subsequently admitted into evidence." (citation and quotation marks omitted)), *cert. denied*, 543 U.S. 1156, 161 L.Ed.2d 122 (2005).

During cross-examination, Officer Strong admitted that (1) he only conducted one pass per eye on Defendant instead of the two passes dictated by the guidelines; (2) he now knows "it to take exactly one to two seconds" to determine whether there is a lack of smooth pursuit; (3) he was informed in his updated

training that the eye should be "held out for four seconds for distinct nystagmus at maximum deviation"; and (4) the way he conducts the test now is different from how he conducted the test on Defendant in December 2010. As such, because Defendant was able to elicit testimony from Officer Strong admitting that he did not conduct the HGN test in accordance with NHTSA guidelines, we conclude that Defendant was not prejudiced by the exclusion of the NHTSA manual itself. Therefore, Defendant's argument on this issue is overruled.

Conclusion

For the reasons stated above, we affirm the trial court's denial of Defendant's motion to suppress and conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).