NO. COA14-390

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2014

STATE OF NORTH CAROLINA

v. Buncombe County
No. 11 CRS 63608

MATTHEW SMITH SHEPLEY

Appeal by defendant from judgment entered 9 September 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper by Assistant Attorney General Joseph L. Hyde for the State.

Wait Law, P.L.L.C., by John L. Wait, for defendant-appellant.

STEELMAN, Judge.

The law enforcement officer's stop of defendant was justified by reasonable suspicion. Where the officer obtained a blood sample from defendant pursuant to a warrant, after defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under N.C. Gen. Stat. § 20-139.1(a). The procedures for obtaining the blood sample did not have to comply with the requirements of N.C. Gen. Stat. §

20-16.2, and defendant did not have a right to have a witness present. Because defendant pled guilty, he did not have a right to appeal the denial of his motions to dismiss the charges.

I. Factual and Procedural Background

Just before midnight on 22 November 2011, Deputy Dean Hannah was on patrol in Buncombe County, North Carolina, and saw Matthew Shepley (defendant) driving his moped on Smokey Park Highway. Defendant was wearing a bicycle helmet instead of a DOT approved helmet, and his moped did not have a taillight. After observing the helmet and the absence of a taillight, Officer Hannah illuminated his blue lights to initiate a traffic stop. Defendant initially sped up but stopped after traveling about 220 yards. When Officer Hannah approached defendant, he "immediately smelled a strong odor of alcoholic beverage on his breath."

Based on his observations during the stop, Officer Hannah arrested defendant for driving while impaired and failing to wear a DOT approved helmet, and took him to the Buncombe County Detention Center. Defendant requested that a witness be present to observe the breath testing procedures. When the witness arrived, defendant refused to give a breath sample. The law enforcement officer escorted the witness out of the room, obtained a search warrant, and a blood sample was drawn from

defendant outside the presence of the witness. The blood sample was sent to the State Bureau of Investigation where, after a substantial delay, it was determined that defendant had a .14 blood alcohol level.

On 14 May 2013 defendant was convicted in district court of driving while impaired and appealed to superior court. On 6 June 2013, defendant filed a motion to suppress the evidence against him, asserting that Deputy Hannah's stop of defendant violated his rights under the 4th Amendment because the stop was not supported by reasonable suspicion of criminal activity. Defendant also filed a motion to dismiss the charge based upon an alleged deprivation of his U.S. constitutional right to a speedy trial. On 8 July 2013 defendant filed a motion to suppress the results of the blood test and dismiss the charge against him because his witness had not been allowed to observe the drawing of his blood pursuant to the search warrant. The trial court denied defendant's motions in orders entered 12 July 2013. On 5 August 2013 defendant filed a motion asking the trial court to reconsider its ruling on the issue of whether Deputy Hannah's stop of defendant was supported by reasonable suspicion. The motion was based upon the assertion that at the original hearing on defendant's suppression motion Deputy Hannah testified that he had taken defendant's helmet into evidence,

but after the hearing Deputy Hannah determined that he had not confiscated the helmet. Following a hearing, the trial court orally denied defendant's motion. After defendant's motions were denied, he filed written notice of his intent to appeal the denial of his motions to suppress and dismiss.

On 9 September 2013 defendant pled guilty to driving while impaired, and reserved his right to appeal the denial of his suppression motions. The trial court imposed level two punishment, sentenced defendant to a term of twelve months, suspended the sentence, and placed him on probation for 18 months.

Defendant appeals.

II. Legal Analysis

A. Scope of Review

On appeal defendant argues that the trial court erred by denying his suppression motion and his motions to dismiss the charge against him. "'In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute.' A defendant who pleads guilty has a right of appeal limited to the following: . . . Whether the trial court improperly denied defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)[(2013)], 15A-1444(e) [(2013)][.]" *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47

(2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)). "Here, upon defendant's guilty plea, defendant has a right to appeal only the trial court's denial of his motion to suppress. . . . Defendant does not have a right to appeal the trial court's denial of his motion to dismiss[.]" *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008). Therefore, we do not address defendant's arguments pertaining to the denial of his motions to dismiss.

B. Suppression Motion

1. Right to Witness at Blood Drawing

In his first argument, defendant contends that the trial court erred by denying his motion to suppress the results of the blood test because he "was denied his statutory and constitutional right to have a witness present for the blood draw." We disagree.

N.C. Gen. Stat. § 20-16.2 provides in relevant part that:

> (a) Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. . . . Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst . . . or a law enforcement officer . . . who shall inform the person orally and also give the person a notice in writing that:
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> . . .

> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives[.]. . .
>
> (a1) Under this section, an "implied-consent offense" is an offense involving impaired driving, a violation of G.S. 20-141.4(a2), or an alcohol-related offense[.] . . .
>
> . . .
>
> (c) A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

"During the administration of a breathalyzer test, the person being tested has the right to 'call an attorney and select a witness to view for him the testing procedures.' This statutory right may be waived by the defendant, but absent waiver, denial of this right requires suppression of the results of the breathalyzer test." *State v. Myers* 118 N.C. App. 452, 454, 455 S.E.2d 492, 493 (1995) (quoting N.C. Gen. Stat. § N.C.G.S. § 20-16.2(a)(6), and citing *McDaniel v. Division of Motor Vehicles*, 96 N.C. App. 495, 497, 386 S.E.2d 73, 75 (1989), and *State v. Shadding*, 17 N.C. App. 279, 283, 194 S.E.2d 55, 57 (1973) (other citation omitted). However, as stated above, if a

defendant refuses to submit to the test designated by the law enforcement officer, no blood alcohol tests "may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law." The plain language of the statute limits its application to situations in which a defendant consents to take a breathalyzer or other test designated by the officer.

N.C. Gen. Stat. § 20-139.1(a) addresses the admissibility of chemical analyses of blood alcohol other than those performed pursuant to N.C. Gen. Stat. § 20-16.2, and provides in relevant part that "[i]n any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration . . . as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests."

The relationship between N.C. Gen. Stat. § 20-16.2 and N.C. Gen. Stat. § 20-139.1 has been addressed in several cases. In *State v. Drdak*, 101 N.C. App. 659, 400 S.E.2d 773 (1991), the defendant was injured in a motor vehicle accident and taken to the hospital, where his blood was tested for alcohol without first informing him of his right to consent or refuse the blood

test or of his rights under N.C. Gen. Stat. § 20-16.2. On appeal we held that the results of the blood test were inadmissible, because the blood test was not performed in accordance with N.C. Gen. Stat. § 20-16.2. The North Carolina Supreme Court reversed:

> The Court of Appeals held that the trial judge erred in denying defendant's motion to suppress because the blood test was not performed according to the procedure authorized under N.C.G.S. §§ 20-16.2 and 20-139.1. This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: "This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other chemical tests." This statute allows other competent evidence of a defendant's blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1. . . . [I]t is the holding of this Court that the obtaining of the blood alcohol test results in this case was not controlled by N.C.G.S. § 20-16.2(a) and did not have to comply with that statute because the test in question is "other competent evidence" as allowed by N.C.G.S. § 20-139.1.

State v. Drdak, 330 N.C. 587, 592-93, 411 S.E.2d 604, 607-08 (1992) (emphasis added). We hold that the argument advanced by defendant in the instant case has been rejected by our Supreme Court. Similarly, in *State v. Davis*, 142 N.C. App. 81, 542 S.E.2d 236 (2001), after the defendant refused to consent to a breath test of his blood alcohol level, the law enforcement officer obtained a search warrant and took urine and blood

samples from the defendant. On appeal, we upheld the admission of the results of these tests, citing *Drdak*:

> Here the defendant was given the opportunity to voluntarily submit to the testing. He refused, and the officer obtained a search warrant based on probable cause. We hold that testing pursuant to a search warrant is a type of "other competent evidence" referred to in N.C.G.S. § 20-139.1. In a similar case our Supreme Court . . . [held that] "it is not necessary for the admission of such 'other competent evidence' that it be obtained in accordance with N.C.G.S. § 20-16.2."

Davis, 142 N.C. App. at 86, 542 S.E.2d at 239 (quoting *Drdak*). Based on the language of N.C. Gen. Stat. § § 20-16.2 and 20-139.1, as well as the *Drdak* and *Davis* opinions, we conclude that after defendant refused a breath test of his blood alcohol level, he was not entitled to have a witness present at the blood test performed pursuant to a search warrant.

In arguing for a contrary result, defendant asserts that *Davis* is not controlling precedent because, although it held that evidence introduced under N.C. Gen. Stat. § 20-139.1(a) did not have to comply with the strictures of N.C. Gen. Stat. § 20-16.2, it did not enumerate the specific provisions of the statute. We disagree, given that its quote from *Drdak*, stating that when evidence is admitted under N.C. Gen. Stat. § 20-139.1(a) "'it is not necessary for the admission of such 'other competent evidence' that it be obtained in accordance with

N.C.G.S. § 20-16.2'" would necessarily include the right to have a witness present. Moreover, defendant does not acknowledge *Drdak*, in which our Supreme Court expressly held that the provisions of N.C. Gen. Stat. § 20-16.2 need not be followed if evidence of a defendant's blood alcohol is admitted under N.C. Gen. Stat. § 20-139.1(a) as "other competent evidence." We hold that, because defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, he did not have a right under N.C. Gen. Stat. § 20-16.2 to have a witness present.

2. Constitutionality of Stop of Defendant

In his second argument, defendant contends that the trial court erred by denying his motion to suppress because Deputy Hannah "did not have legal grounds to initiate" a traffic stop of defendant. We do not agree.

"The Fourth Amendment protects individuals 'against unreasonable searches and seizures.' U.S. Const. amend. IV. Traffic stops are permitted under the Fourth Amendment if the officer has 'reasonable suspicion' to believe that a traffic law has been broken.'" *State v. Hopper*, 205 N.C. App. 175, 177, 695 S.E.2d 801, 803 (2010) (quoting *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (internal quotation omitted). Reasonable suspicion exists if "[t]he stop . . . [is] 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 [the officer's] experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation omitted). Reasonable suspicion requires a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch[.]'" *State v. Steen*, 352 N.C. 227, 239, 536 S.E.2d 1, 8 (2000) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1, 10 (1989).

N.C. Gen. Stat. § 20-140.4(a)(2) provides in relevant part that "[n]o person shall operate a . . . moped upon a highway . . . [u]nless the operator and all passengers thereon wear on their heads, with a retention strap properly secured, safety helmets of a type that [comply] with Federal Motor Vehicle Safety Standard (FMVSS) 218." Violation of this statute is an infraction. N.C. Gen. Stat. § 20-140.4(c). Deputy Hannah testified that he observed defendant operating his moped without wearing a proper helmet. This observation clearly provided the officer with a reasonable suspicion that defendant had committed an infraction. Under N.C. Gen. Stat. § 15A-1113(b), a "law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a

reasonable period in order to issue and serve him a citation." Deputy Hannah's stop of defendant was supported by reasonable suspicion, and the trial court did not err by denying defendant's motion to suppress evidence.

Defendant concedes that Deputy Hannah testified to seeing defendant operating his moped with an improper helmet, but argues that because the officer could not confirm "whether or not the helmet was DOT approved until after he approached" defendant, the officer's belief that defendant's helmet was improper "cannot support reasonable suspicion[.]" However, our Supreme Court has held that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *Styles*, 362 N.C. at 415, 665 S.E.2d at 440. As a result, we are not persuaded by defendant's argument.

For the reasons discussed above, we conclude that the trial court did not err in denying defendant's motion to suppress and that its order should be

AFFIRMED.

Judges GEER and DIETZ concur.