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NO. COA14-91
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 10 CRS 230954

JEFFREY GENE DIPPEL

Appeal by defendant from judgment entered 23 May 2013 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

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

CALABRIA, Judge.

Jeffrey Gene Dippel ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired ("DWI"). We find no error in part, but remand for further findings of fact regarding defendant's motion to dismiss.

I. Background

Beginning at 11:00 p.m. on 29 June 2010, officers of the Cornelius Police Department ("CPD") operated a DWI checkpoint at the intersection of Westmoreland Road and West Catawba Avenue in Mecklenburg County. The checkpoint was conducted according to a plan that had previously been drafted by Sergeant William Roper ("Sgt. Roper") and Officer Doucette of the CPD. The plan required officers to stop every vehicle entering the checkpoint from any of the three main roads in the intersection and speak with the driver to determine whether the driver showed signs of impairment.

At approximately 1:00 a.m. on 30 June 2011, defendant was operating a motor vehicle accompanied by Nick Lewis ("Lewis") and Everardo Garcia and approached the checkpoint. While processing defendant through the checkpoint, CPD Officer John Martin ("Officer Martin") noted a strong odor of alcohol emanating from defendant. As a result, Officer Martin asked defendant to exit his vehicle.

Officer Martin had defendant perform multiple field sobriety tests. Based upon defendant's performance on those tests, Officer Martin formed an opinion that defendant was impaired. Defendant submitted to two preliminary breath tests on the officer's AlcoSensor unit, and both breath samples were

positive for the presence of alcohol. Officer Martin placed defendant under arrest.

Defendant was then taken to the mobile breath alcohol vehicle located at the checkpoint, where he provided breath samples which indicated he had a breath alcohol concentration ("BAC") of 0.10 at 1:50 a.m. Consequently, defendant was placed in the custody of the Mecklenburg County Sherriff's Office for transport to the Mecklenburg County Jail. Officer Martin did not accompany defendant to the jail.

Defendant was processed and detained in a holding area, where he waited to see a magistrate until 3:51 a.m. The magistrate set a secured bond in the amount of \$1,000. At 5:02 a.m., defendant met with Lewis through a glass partition for approximately five minutes.

At 6:26 a.m. defendant swiped his credit card in order to satisfy the terms of his secured bond. Defendant's credit card payment was received by the Jail Central Finance Department at 8:35 a.m. Defendant was then taken to the jail's release post, where he exited the jail at 9:05 a.m.

After a bench trial, defendant was found guilty of DWI in Mecklenburg County District Court on 7 April 2011. Defendant appealed his conviction and sought a *de novo* jury trial in

Mecklenburg County Superior Court. Prior to trial, defendant filed a motion to suppress the evidence obtained from the checkpoint on the basis that the checkpoint violated defendant's constitutional rights, a motion to suppress defendant's arrest for lack of probable cause, and a motion to dismiss pursuant to *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). The trial court conducted a *voir dire* hearing on the motions on 21 May 2013. All of the motions were denied.

Beginning 21 May 2013, defendant was tried by a jury for DWI. On 23 May 2013, the jury returned a verdict finding defendant guilty. The trial court sentenced defendant to 30 days in the custody of the Mecklenburg County Sheriff. That sentence was suspended and defendant was placed on unsupervised probation for a period of 12 months. Defendant appeals.

II. Motions to Suppress

Defendant argues that the trial court erred in denying his motions to suppress based upon the alleged unconstitutionality of the checkpoint and upon the lack of probable cause for his arrest. We disagree.

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). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. Constitutionality of Checkpoint

Defendant first contends that the trial court erred by denying his motion to suppress the evidence obtained from the checkpoint. Specifically, defendant argues that the checkpoint's primary programmatic purpose was unconstitutional and that the checkpoint was unreasonable.

When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. . . . Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint . . . [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.

State v. Veazey, 191 N.C. App. 181, 185-86, 662 S.E.2d 683, 686-87 (2008) (internal quotations and citations omitted). "Our Court has previously held that where there is no evidence in the

record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose." *Id.* at 187, 662 S.E.2d at 687. However, "where contradictory evidence exists as to the actual primary purpose of a checkpoint program, the trial court must examine the available evidence to determine the actual purpose, because bare assertions of a constitutional purpose cannot be allowed to mask actual purposes that are unconstitutional." *State v. Burroughs*, 185 N.C. App. 496, 501, 648 S.E.2d 561, 565 (2007).

In the instant case, defendant contends that the State presented insufficient evidence that the primary purpose of the checkpoint was to check for DWI violations. However, at the hearing on the motion to suppress, Sgt. Roper testified that the purpose of the checkpoint was to look for intoxicated drivers and that he chose the checkpoint location based upon his personal experience arresting drunk drivers near the intersection and his personal knowledge of vehicle crashes in the area. Since Sgt. Roper's testimony supports the trial court's finding that the primary purpose of the checkpoint was to target Chapter 20 motor vehicle offenses including, but not limited to, DWI, and there was no evidence presented to the

contrary, the trial court did not err in its determination of the checkpoint's primary programmatic purpose. See *id.* at 503, 648 S.E.2d at 565-66.

"After finding a legitimate programmatic purpose, the trial court must determine whether the roadblock was reasonable and, thus, constitutional." *State v. Townsend*, ___ N.C. App. ___, ___, 762 S.E.2d 898, 907 (2014).

To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest. In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 50, 61 L. Ed. 2d 357, 361, 99 S. Ct. 2637, 2640 (1979). Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure[;] [2] the degree to which the seizure advances the public interest[;] and [3] the severity of the interference with individual liberty.

Id. at ___, 762 S.E.2d at 907-08 (internal quotations and citations omitted).

The first factor, the gravity of the public concerns served by the seizure, "is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public." *State v. Rose*, 170 N.C. App. 284, 294, 612 S.E.2d 336, 342 (2005). Since our Supreme Court

has held that “[o]ur state’s interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist,” *State v. Foreman*, 351 N.C. 627, 633, 527 S.E.2d 921, 924-25 (2000), the primary programmatic purpose found by the trial court in the instant case indicates the checkpoint was reasonable under the first prong of *Brown*.

Under the second *Brown* prong, the trial court must decide whether “the police appropriately tailored their checkpoint stops to fit their primary purpose.” *State v. Kostick*, ___ N.C. App. ___, ___, 755 S.E.2d 411, 421 (2014) (internal quotations and citation omitted). To determine whether a checkpoint is appropriately tailored, this Court has considered several non-exclusive factors including: whether law enforcement planned the checkpoint or conducted it spontaneously; whether law enforcement offered reasons for choosing the checkpoint location; whether the starting and ending time of the checkpoint was predetermined; and whether there was a reason for choosing that time frame. *Id.*

In the instant case, the trial court found that Sgt. Roper planned the checkpoint prior to the date on which it was conducted, that he chose the location because there had been

several alcohol-related crashes in the checkpoint area, one of which resulted in a fatality, and that he had arrested DWI offenders nearby. The court further found the checkpoint started at 11:00 p.m. on 29 June 2010 and ended at 3:00 a.m. on 30 June 2010. Each of these findings was supported by the testimony of Sgt. Roper, and “[s]uch findings do indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose” *Id.* at ___, 755 S.E.2d at 421. Thus, the second *Brown* prong also suggests the checkpoint was reasonable.

Finally, in considering the third *Brown* prong, the severity of the interference with individual liberty, “courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint’s objectives.” *Veazey*, 191 N.C. App. at 192, 662 S.E.2d at 690-91. When analyzing this factor previously, this Court has identified several non-exclusive factors that are relevant, including: the checkpoint’s interference with normal traffic flow; whether drivers were put on notice of the approaching checkpoint; whether a law enforcement supervisor chose the checkpoint location; whether law enforcement stopped

every vehicle, or used a set pattern to stop vehicles; whether law enforcement displayed signs of their authority; whether guidelines, written or oral, governed the checkpoint; whether a law enforcement supervisor was on scene; and whether a supervisor gave permission for officers to conduct the checkpoint. *Id.* at 193, 662 S.E.2d at 691.

In the instant case, the trial court found that there were signs in every direction approaching the checkpoint as well as a patrol vehicle with blue lights flashing to put drivers on notice of the checkpoint. The court further found that individual officers did not have discretion to deviate from the pattern of stopping every vehicle that passed through the checkpoint, but that the officer in charge was permitted to deviate from the checkpoint pattern if the checkpoint substantially interfered with the flow of traffic. Finally, the trial court found that the officers were briefed on the checkpoint plan authored by Sgt. Roper prior to operating the checkpoint. These findings, which were all supported by the testimony of Officer Martin and Sgt. Roper, demonstrate that the checkpoint was reasonable pursuant to the third prong of *Brown*.

Ultimately, the trial court's order denying defendant's motion to suppress contained adequate findings of fact,

supported by competent evidence, to identify the primary programmatic purpose of the checkpoint and to satisfy the three prongs of the *Brown* reasonableness test. These findings in turn support the trial court's determination that defendant's constitutional rights were not violated by the checkpoint. This argument is overruled.

B. Probable Cause

Defendant additionally argues the trial court erred in denying his motion to suppress his arrest. Specifically, defendant contends that the evidence presented at the suppression hearing did not support the court's determination that Officer Martin possessed the requisite probable cause to arrest defendant.

"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." *State v. Tappe*, 139 N.C. App. 33, 36, 533 S.E.2d 262, 264 (2000) (citation omitted). When determining whether a warrantless arrest was supported by probable cause, 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." *Id.* Probable cause cannot be precisely quantified,

as it depends upon the totality of the circumstances. *State v. Teate*, 180 N.C. App 601, 607, 638 S.E.2d 29, 33 (2006).

In the instant case, the trial court found that Officer Martin noticed a strong odor of alcohol on defendant's breath at the checkpoint and that Officer Martin observed four out of six clues of impairment on the horizontal gaze nystagmus test, three out of seven clues of impairment on the "walk and turn" test, and one out of four clues of impairment on the "one leg stand" test. The court further found defendant provided two breath samples that were positive for alcohol on Officer Martin's AlcoSensor unit. Based upon these findings, the court found Officer Martin's observations of defendant led him to form an opinion that defendant had consumed a sufficient quantity of alcohol to appreciably impair his mental and physical faculties. In his brief, defendant takes issue with these findings, highlighting testimony from Officer Martin that calls into question how accurately he performed some of the sobriety tests. Defendant further argues that the video evidence of the stop, which was presented at trial and is part of the record on appeal, contradicts Officer Martin's testimony.

However, it is well established that "[e]ven if evidence is conflicting, the trial judge is in the best position to resolve

the conflict.” *State v. Derbyshire*, ___ N.C. App. ___, ___, 745 S.E.2d 886, 889 (2013) (internal quotations and citation omitted). Each of the trial court’s findings of fact regarding defendant’s impairment was supported by testimony or evidence presented during the suppression hearing. These findings, including that defendant smelled strongly of alcohol, that Officer Martin observed what he believed were signs of impairment in each sobriety test performed by defendant, and that defendant’s breath registered positive for the presence of alcohol on two AlcoSensor tests,¹ were sufficient to support the trial court’s conclusion that Officer Martin had probable cause to arrest defendant. See *Teate*, 180 N.C. App. at 607, 638 S.E.2d at 33 (holding that the trial court’s conclusion regarding the existence of probable cause was supported by findings that, *inter alia*, the defendant had an odor of alcohol on her as she passed through a checkpoint, had slurred speech and diminished motor skills, and gave two positive breath samples on the officer’s AlcoSensor). This argument is overruled.

¹ Pursuant to N.C. Gen. Stat. § 20-16.3(d) (2013), a positive result from an AlcoSensor device may be considered by an officer determining whether there is probable cause to arrest a defendant for DWI. See *Teate*, 180 N.C. App. at 606, 638 S.E.2d at 33.

III. Knoll Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss pursuant to *State v. Knoll*. Specifically, defendant contends that the trial court erred by finding that defendant's statutory rights were not violated. We agree, and remand the case for additional findings of fact.

When a defendant alleges he has been denied his right to communicate with counsel, family, and friends, the trial court must conduct a hearing on defendant's motion to dismiss and make findings and conclusions. On appeal, the standard of review is whether there is competent evidence to support the findings and the conclusions. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982). "If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *Id.*

State v. Lewis, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001).

Pursuant to N.C. Gen. Stat. § 15A-534, a magistrate who imposes a secured bond "must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a)." N.C. Gen. Stat. § 15A-534(b) (2013). In the instant case, the State conceded during closing arguments of the

motions hearing that the magistrate violated the policy established in Mecklenburg County pursuant to N.C. Gen. Stat. § 15A-535(a) by failing to make findings to justify defendant's secured bond. Consequently, the magistrate "substantially violated defendant's statutory right to pretrial release, and the trial court erred by its conclusion of law to the contrary." *State v. Labinski*, 188 N.C. App. 120, 127, 654 S.E.2d 740, 745 (2008) (holding there was a statutory violation when the magistrate failed to make written findings of fact to justify a secured bond).

Once it is determined that defendant's statutory rights were violated, "we must next consider whether the violation of defendant's statutory right caused irreparable prejudice to the preparation of her defense. [P]rejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *Id.* (internal quotations and citation omitted). In the instant case, the trial court found: (1) that defendant was arrested for DWI and his breath sample indicated an alcohol content of 0.10 at 1:50 a.m.; (2) that defendant was a resident of Watkinsville, Georgia at the time of his arrest; (3) that the magistrate set defendant's conditions of release at

3:51 a.m. and set a secured bond in the amount of \$1,000; (4) that defendant met with Lewis at the jail for approximately five minutes at 5:02 a.m.; (5) that defendant swiped his credit card to post his bail at 6:26 a.m. and that the Jail Central Finance Department received confirmation of the payment from that transaction at 8:35 a.m.; and (6) that defendant met his conditions for release at 8:42 a.m. and was released at 9:05 a.m. The trial court's findings were all supported by testimony during the hearing on the motion to dismiss.

However, we conclude that the trial court's findings are insufficient for us to determine whether defendant was prejudiced by the magistrate's statutory violation. While the trial court's findings reflect that defendant was provided access to Lewis at 5:02 a.m., there are no findings as to whether defendant sought access to witnesses prior to that time, such as at the time he provided his breath sample or during the time between when defendant provided his breath sample and the time when his bond was set. Finally, there are no findings as to whether the magistrate informed defendant of his rights at the time the bond was set. Accordingly, we remand this case for additional findings of fact regarding any potential prejudice

suffered by defendant as a result of the magistrate's statutory violation.

IV. Conclusion

The trial court made adequate findings of fact and conclusions of law to justify its denial of defendant's motions to suppress based upon the constitutionality of the checkpoint and the existence of probable cause. The magistrate failed to make written findings to justify the imposition of a secured bond as required by Mecklenburg County policy and by statute. The trial court's order denying defendant's motion to dismiss does not include sufficient findings of fact for this Court to determine whether defendant was prejudiced by this statutory violation. We remand for additional findings of fact on that issue.

No error in part and remanded.

Judges BRYANT and GEER concur.

Report per Rule 30(e).