IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1203

Filed: 16 August 2016

Buncombe County, No. 13 CRS 062573

STATE OF NORTH CAROLINA

v.

ALEXANDER RAMESH MUNJAL

Appeal by defendant from judgment entered 30 March 2015 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 13 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

McCULLOUGH, Judge.

Alexander Ramesh Munjal ("defendant") appeals from judgment entered upon his plea of guilty to driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and for speeding in violation of N.C. Gen. Stat. § 20-141(j1). Defendant argues that the trial court erred by denying his motion to suppress and erred by entering a written judgment that differed from the sentence rendered in open court. Based on the reasons stated herein, we affirm in part and remand in part.

I. Background

On 2 November 2013, defendant was arrested and issued a citation for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and for speeding in violation of N.C. Gen. Stat. § 20-141(j1).

On 16 March 2015, defendant filed a motion to suppress any evidence of chemical testing or the reported results of such testing. Defendant argued that he was denied the opportunity to have a witness observe his breath test although he called witnesses to be present and the witnesses arrived at the jail prior to the test being administered.

A hearing on defendant's motion to suppress was held at the 23 March 2015 criminal session of Buncombe County Superior Court, the Honorable Jeffrey Hunt, presiding. Trooper Kevin Glenn ("Trooper Glenn") of the North Carolina Highway Patrol testified that on 2 November 2013, he pulled defendant over for speeding. Veronica Limeberry ("Ms. Limeberry") and Sonia Munjal ("Ms. Munjal"), defendant's sister, were passengers in defendant's vehicle. Defendant was given breathalyzer tests at about 2:05 a.m. and 2:12 a.m. and subsequently arrested. Defendant was transported to the Buncombe County Detention Facility Intoxilyzer room. At 2:47 a.m., defendant signed a form indicating that he understood his rights. At 3:07 a.m., defendant was able to reach Ms. Limeberry's mother by phone. Trooper Glenn testified that he did not recall defendant informing him that he had someone on the

way to witness his test. Before conducting defendant's breath tests, Trooper Glenn asked the jail staff or asked the jail staff to ask the magistrate to see if there was a witness outside for defendant. Trooper Glenn was not informed that defendant had a witness present for the test. Trooper Glenn testified that at the jail, there were signs on doors providing that "if you're a witness for a test do this, exactly what to do to actually notify the jail staff. Whether or not they come out and ask, they're supposed to their self take it upon themselves to notify the jail I'm here for a witness." Defendant submitted to breath tests at 3:29 and 3:32 a.m., 42 and 45 minutes, respectively, after he was informed of his rights. The results of defendant's Intoxilyzer test revealed an alcohol concentration of 0.11.

Ms. Limeberry testified that after defendant was arrested, she asked Trooper Glenn where defendant would be taken. Trooper Glenn informed her that they were headed to the Buncombe County Detention Center. Ms. Limeberry told Trooper Glenn that she was headed to the detention center and asked for directions. Ms. Limeberry headed directly to the jail and it took approximately 20 minutes to arrive there. She testified that she arrived at the jail "about 2:30." Once Ms. Limeberry and Ms. Munjal entered the jail, they spoke with the magistrate and provided defendant's name and charge. Ms. Limeberry testified that:

> So we were both in there with the magistrate and we told her we were for [defendant]. We, you know, didn't know what we could do. If we talked to [defendant] what would we need to do for [defendant]. How much would it cost to

> get him out of jail. And at this point she couldn't find his name in the system at all, but she told us how much she thought it would cost, how much it usually did cost, and told us it would be about $300 and then told us that, you know, we should just go wait and sit and wait and she would come and get us when she needed to.

Thereafter, Ms. Limeberry left the jail to obtain $300 from a bank automatic teller machine ("ATM") while Ms. Munjal remained in the waiting room of the jail. After Ms. Limeberry withdrew money out of the ATM, she returned to the jail. Ms. Limeberry received a call from her mother. Ms. Limeberry's mother informed her that she had received a call from defendant and was making sure "that someone was there for [defendant]." Ms. Limeberry saw defendant through the glass window at the jail and checked in with the magistrate "to see if there was anything that we needed to do at that point." The magistrate told her to "sit and wait." Ms. Limeberry testified that she checked back with the magistrate once or twice and that the magistrate continued to state, "sit and wait, I'll come get you." She conceded that she had never specifically told the magistrate that she was there to witness a breath test.

Ms. Munjal also testified at defendant's hearing. Her testimony was consistent with Ms. Limeberry's testimony.

Defendant testified that on 2 November 2013, he was driving on Interstate 26 toward Johnson City from Asheville, North Carolina, when he was stopped and arrested by Trooper Glenn. Once he arrived at the jail, defendant was advised that he could call an attorney or witness. Defendant attempted to call Ms. Limeberry and

Ms. Munjal but neither call went through. Defendant accessed his cell phone to obtain local phone numbers. However, none of these calls was successful. Finally, defendant was able to reach Ms. Limeberry's mother. Defendant testified as follows:

> I just said, I don't know, you know, what's going on. I just need somebody here, because, I mean, I didn't explain the details of needing a witness. I just said that I needed somebody there. I didn't want to worry her any more than necessary.

Defendant did not make any phone calls after getting in touch with Ms. Limeberry's mother. Immediately prior to his breath tests being conducted, defendant asked "if Ms. Limeberry was there. Those were my exact words, is Ms. Limeberry here? And I received a no in response. Officer Glenn shook his head, shrugged his shoulders and then said no."

At the conclusion of the hearing, the trial court denied defendant's motion to suppress. The trial court orally entered the following findings of fact, in pertinent part:

> [1] [D]efendant claims his rights to access to a witness to the breath tests administered to him in this matter were violated pursuant to GS Section 20-139.1 and Section 20-16.2(a)(6) -- I think that's right -- and the Constitution.
>
> . . . .
>
> [4] On November 2nd[,] 2013 defendant was arrested for possible DWI.
>
> [5] At approximately 2:47 AM November 2nd, 2013 the defendant was advised of his rights, including the right to

have a witness present for the chemical analysis breath test within 30 minutes.

[6] The defendant submitted to the chemical analysis breath test about 3:32 AM.

[7] The trooper assisted the defendant in making phone calls at the jail and assisted Ms. Limeberry and defendant's sister in getting directions from I26 to the jail to which the defendant was transported.

[8] At 3:07 AM the defendant succeeded in connecting with one call and that was to Ms. Limeberry's mother.

[9] Although the defendant made those calls in the presence of the arresting trooper, the defendant never mentioned to Ms. Limeberry's mother anything about wanting a witness to his breath test or that he wanted Ms. Limeberry to be that witness.

[10] At 2:47 AM the defendant signed the rights form informing the trooper that the defendant wanted a witness, but not stating who would be arriving to act as that witness, nor stating or confirming if anyone had ever successfully been contacted to come and act as the witness to his test, and thus who should be expected at the jail, at the front desk of the jail to be the witness for the defendant's test.

[11] The trooper delayed the test from 2:47 AM at which time the defendant signed the rights form until 3:32 AM at which time the defendant submitted to the first test, breath test.

[12] The defendant failed to alert anyone other than the trooper of his desire to have a witness to the test and who they should expect at the front desk to be arriving in order to act as that witness.

[13] [S]igns were posted on the glass doors of the jail

through which Ms. Limeberry and the defendant's sister entered the lobby and were likewise posted separately in the lobby waiting room area which informed them, and anyone else who read those signs, the follow [sic]: "If you are a witness and need access to the DWI breath test room and the person arrested, you must go through these doors, past the magistrates office and turn left down the hall. Press the intercom button on the wall at the end of the hall. State your name and that you are a witness for an arrestee."

[14] Ms. Limeberry and the defendant's sister failed to read these posted signs and failed to tell anyone they were potential witnesses to the defendant's tests; nor did either of them follow the procedure outlined in these signs.

[15] The signs at the time were openly displayed and visible.

[16] Ms. Limeberry and the defendant's sister first asked the magistrate upon their arrival how much bail would be required and could they see and talk to the defendant.

[17] They were told by the magistrate to wait in the lobby waiting room.

[18] One or the other were at the lobby waiting room at all times since the time of their arrival at the jail which occurred before 3:10 AM when Ms. Limeberry received a phone call from her mother, which call was prompted by the defendant's phone call to Ms. Limeberry's mother.

. . . .

[20] Ms. Limeberry and the defendant's sister were both unaware that the defendant wanted a witness to the test or that he wanted either of them as that witness.

[21] No one ever called on them or asked them if they had come to be the defendant's witness to the test.

> [22] The lobby waiting room could not be viewed from the Intoxilyzer room where the defendant's breath test was administered by the trooper.
>
> [23] The trooper's practice and habit at the time was to ask a staff member at the Intoxilyzer room to in turn ask a magistrate if a witness for the defendant was present in the waiting room, or to use the phone there at the Intoxilyzer room to call the magistrate at the front desk and speak to the magistrate directly. The trooper's testimony indicated that he remembers that he did not place a direct call to the magistrate.

Based on the foregoing, the trial court entered the following conclusions of law:

> [1] That the trooper did everything reasonable to assist the defendant to successfully arrange for, and have a witness present for the defendant's tests.
>
> [2] Once making the trooper aware of the defendant's desire to have a witness present, the defendant failed to take reasonable steps to accomplish this by failing to tell Ms. Limeberry's mother, who he had reached by phone (with the trooper's assistance), one, that he could have a witness, two, that he wanted the witness to be Ms. Limeberry, and three, that time was of the essence.
>
> [3] Having reasonably assisted the defendant in making phone calls and in delaying the test for 45 minutes, the trooper did not have the duty to actually make the specific arrangements to secure the presence of the witness for the defendant at the test.
>
> [4] Although Ms. Limeberry and the defendant's sister arrived at the jail in a timely manner, they failed to make reasonable efforts to gain access to the defendant before 3:32 AM in that neither one of them took the opportunity to read the posted and well visible signs (State's Exhibit 1, 2 and 3) or to discuss with the magistrate the signs and

> their instructions, or to discuss with anyone else with the authorities at that location what the meaning of the signs was in regards to their possible access to the defendant to act as either a witness or otherwise.
>
> [5] The magistrate would have been reasonable in understanding that these two parties were present in order to post the defendant's bond and then have access to the defendant rather than act as his witness during the test.
>
> [6] Even though Trooper Glenn called the duty magistrate at the front desk before the test was administered, he would not have been advised that either Ms. Limeberry or the defendant's sister were present in order to act as the defendant's witness to this test.
>
> [7] That no one with the authorities [sic] at the jail or otherwise acted or failed to act to deny the defendant his right to a witness for his breath test.
>
> [8] That the defendant was not denied his rights (statutory or constitutional) to have a witness present for his chemical analysis breath tests.
>
> [9] The trooper was unaware of the presence of Ms. Limeberry or the defendant's sister in the waiting room at 3:32 AM.
>
> Now, therefore, it is ordered[,] adjudged and decreed that the defendant's motion to suppress the defendant's chemical analysis breath test is hereby denied.

On 30 March 2015, defendant pled guilty to driving while impaired and speeding, while reserving the right to appeal the denial of his motion to suppress. Defendant was sentenced to 60 days imprisonment, suspended for 12 months of supervised probation. Defendant gave oral notice of appeal.

II. Discussion

On appeal, defendant argues that the trial court erred by (A) denying his motion to suppress and (B) committing a clerical error or violating defendant's right to be present at sentencing by ordering supervised probation in the written judgment. We address each argument in turn.

A. Motion to Suppress

First, defendant argues that the trial court erred by denying his motion to suppress where his statutory rights to have a witness observe his breath test pursuant to N.C. Gen. Stat. § 20-16.2 were violated. Defendant argues that the holding in *State v. Hatley*, 190 N.C. App. 639, 661 S.E.2d 43 (2008), is controlling. We do not find defendant's arguments convincing.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court]'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 [court]'s ultimate conclusions of law." *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (citation omitted). Since defendant does not challenge the findings of fact on appeal, they are binding on appeal. *State v. Fuller*, 196 N.C. App. 412, 418, 674 S.E.2d 824, 829 (2009). However, "[t]he 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).

N.C. Gen. Stat. § 20-16.2(a) provides as follows, in pertinent part:

> Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> . . . .
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

N.C. Gen. Stat. § 20-16.2(a) (2015).

In *Hatley*, the defendant appealed the denial of her motion to suppress the results of an intoxilyzer test. *Hatley*, 190 N.C. App. at 640, 661 S.E.2d at 43. The defendant was arrested for driving while impaired and transported to the sheriff's office for the purpose of administering an intoxilyzer test. *Id.* at 640, 661 S.E.2d at 44. The trial court found that the defendant was advised of her rights at 3:01 a.m. At 3:04 a.m., the defendant indicated that she wanted a witness to observe her breath test and was successful in reaching her daughter at approximately 3:04 a.m. *Id.* The

defendant informed the officer that her daughter was on the way. *Id.* at 641, 661 S.E.2d at 44. The arresting officer's normal procedure was to inform the front desk duty officer that a witness was expected, however, the officer could not recall whether she had done so in this case. *Id.* The test was delayed 34 minutes before the defendant was asked to submit to a breath test. Receiving no indication that her daughter had arrived, the defendant submitted to the test and the test concluded at 3:37 a.m. *Id.* The trial court found that the defendant's daughter had arrived at the sheriff's office approximately 15 minutes after she had received the call from her mother. *Id.* The daughter had informed the front desk duty officer that she was there for the defendant but did not specify that she had been summoned to witness an intoxilyzer test. *Id.* at 641-42, 661 S.E.2d at 44-45. The trial court concluded that because the defendant's daughter failed to tell the officer she was there to be a witness, the defendant's statutory rights pursuant to N.C. Gen. Stat. § 20-16(a) were not violated and the defendant's motion to suppress was denied. *Id.* at 642, 661 S.E.2d at 45.

Our Court in *Hatley* provided that "A witness who has been selected to observe the testing procedures must make reasonable efforts to gain access to the defendant." *Id.* at 642-43, 661 S.E.2d at 45. Our Court stated as follows:

> [The officer] knew not only that [the d]efendant had contacted a witness but also that the witness was on her way to the Sheriff's office to observe the test. [The officer] testified that she could not recall whether she alerted the

> front desk officer of the witness's impending arrival, but the State contends that she was under no duty to take any positive action to ensure the witness was admitted to the intoxilyzer room. Assuming without deciding that [the officer] was not, at a minimum, required to alert the front desk officer that a witness was coming to view the administration of the intoxilyzer test, we conclude that [the defendant's daughter] timely arrived and made reasonable efforts to gain access to [the d]efendant, and that, therefore, [the d]efendant's statutory right to have a witness observe the testing procedures was violated.

Id. at 643-44, 661 S.E.2d at 46. Furthermore, our Court noted that there was no authority for the proposition that "a potential witness to an intoxilyzer test must state unequivocally and specifically that he or she has been called to view the test before the witness is permitted to observe the test." *Id.* at 644, 661 S.E.2d at 46. Because the officer had knowledge that a witness had been contacted and was en route to observe the test, the potential witness timely arrived, and the potential witness told the front desk officer that she was there to see defendant who was there for a "DUI," our Court held that the trial court erred in denying the defendant's motion to suppress. *Id.*

After careful review, we find our present case to be distinguishable from *Hatley*. Here, defendant was able to reach Ms. Limeberry's mother by telephone, but admitted that he "didn't explain the details of needing a witness. I just said that I needed somebody there." There was no evidence that defendant instructed Ms. Limeberry's mother to communicate to Ms. Limeberry that he desired a witness to be

present to observe his breath test. Defendant did not communicate to Trooper Glenn that he had secured a potential witness or that a potential witness was on his or her way to observe his breath test. Moreover, neither Ms. Limeberry nor Ms. Munjal made reasonable efforts to gain access to defendant. Although Ms. Limeberry and Ms. Munjal informed the magistrate of defendant's charge and provided his name, similar to the defendant's daughter in *Hatley*, they did not take any action to reach defendant in the Intoxilyzer room despite the openly visible signs hanging on the walls of the waiting room that provided detailed instructions for witnesses needing access to the "DWI breath test room[.]" Based on the foregoing circumstances, we hold that the trial court did not err by denying defendant's motion to suppress.

B. Sentencing

In his second and final issue on appeal, defendant argues that the trial court committed a clerical error by ordering supervised probation in the written judgment. Alternatively, defendant argues that the trial court's imposition of supervised probation violated his right to be present at sentencing.

Our Court has held that

> [A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. Thus, [a]nnouncement of judgment in open court merely constitutes rendering of judgment, not entry of judgment. If the written judgment conforms generally with the oral judgment, the judgment is valid. However, if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the

transcript, the transcript is considered dispositive.

In re J.C., 236 N.C. App. 558, 562, 783 S.E.2d 202, 205 (2014) (internal citations and quotation marks omitted).

In the case before us, the trial transcript reflects that at defendant's sentencing hearing, the trial court suspended defendant's sentence and stated in open court that defendant was placed on "unsupervised probation for 12 months." However, on the written judgment, the trial court placed defendant on "supervised probation for 12 months[.]" Given this discrepancy, the transcript is deemed dispositive. This matter should be corrected upon remand to the trial court. *See State v. Smith* 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.") (citation and internal quotation marks omitted).

III. Conclusion

For the reasons stated above, we affirm the denial of defendant's motion to suppress, but remand for correction of defendant's written judgment.

AFFIRMED IN PART; REMANDED IN PART.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).