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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1375

Filed: 20 September 2016

Wayne County, No. 13 CRS 53473

STATE OF NORTH CAROLINA

v.

ANGELA LADAWN McDONALD

Appeal by defendant from judgment entered 27 May 2015 by Judge Arnold O. Jones II in Wayne County Superior Court. Heard in the Court of Appeals 25 May 2016.

Roy Cooper, Attorney General, by J. Rick Brown, Associate Attorney General, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for defendant-appellant.

DAVIS, Judge.

Angela Ladawn McDonald (“Defendant”) appeals from a judgment entered upon a jury verdict finding her guilty of driving while impaired. On appeal, Defendant argues that the trial court erred (1) by denying her motion to suppress evidence obtained during a traffic stop of her vehicle; and (2) in the alternative, by failing to make sufficient findings of fact in connection with her motion to suppress. After careful review, we dismiss Defendant’s appeal.

Factual Background

On 23 July 2013, Jean-Luc Adams was working as a security guard at the main gate to Seymour Johnson Air Force Base in Goldsboro, North Carolina. Seymour Johnson Air Force Base is a closed base, meaning that drivers seeking to enter the base must present a military identification. At approximately 3:00 a.m., Defendant's vehicle approached the gate. Before Adams could say anything, Defendant stated that "they took my military ID." Adams leaned toward Defendant's vehicle to tell her that she needed military identification in order to enter the base. As he did so, Adams detected a slight odor of alcohol emanating from the vehicle. As Defendant fully opened the window to her car, Adams distinctly smelled the odor of alcohol. In conformity with established protocol, Adams told Defendant to turn off her vehicle's ignition, and he contacted the Goldsboro Police Department. Defendant complied with Adams's request and waited in the area adjacent to the main gate.

Officer Andrew Cox of the Goldsboro Police Department arrived shortly thereafter. After conferring with Adams, Officer Cox approached Defendant's vehicle to speak with her. He could smell the odor of alcohol and asked her to step away from the vehicle so that he could ascertain whether the odor was coming from Defendant. He determined that Defendant was, in fact, the source of the odor. Upon noticing that her eyes were bloodshot, Officer Cox then conducted three field sobriety tests. Based on Defendant's performance during these tests, he concluded that "there was

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alcohol present in her system.” He then obtained a breath sample from her that tested positive for alcohol. Defendant was issued a citation for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

On 26 May 2015, Defendant filed a motion in Wayne County Superior Court to suppress evidence obtained during the stop of her vehicle. In the motion to suppress, Defendant stated the following:

1. On July 23, 2013, the Defendant was charged with Driving While Impaired (N.C. Gen. Stat. § 20-138.1) (hereinafter “DWI”) by Officer E. McIntyre of the Goldsboro Police Department on July 23, 2013 at approximately 3:10 a.m.
2. Defendant was driving on Berkeley Boulevard near the intersection of Elm Street and Berkeley Boulevard.
3. Defendant was at the main gate for Seymour Johnson Air Force Base (“main gate”).
4. At the main gate, Defendant was stopped by Jean-Luc Adams, a Department of Defense employee who worked as law enforcement at Seymour Johnson Air Force Base.
5. All potential civilian criminal matters at Seymour Johnson Air Force Base are referred to local law enforcement.
6. Local law enforcement (i.e. Goldsboro Police Department and Wayne County Sheriff’s Department) have concurrent jurisdiction with the Air Force, and this is why potential civilian criminal matters are referred to local law enforcement.
7. [Adams], by serving as law enforcement for the Department of Defense on Seymour Johnson Air Force

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Base, was acting as an agent for local law enforcement because it was the policy of his law enforcement agency (the Air Force) to refer potential civilian criminal matters to local law enforcement.

8. By stopping motor vehicles on a regular basis, Adams was operating a check point as defined by N.C. Gen. Stat. § 20-16.3A.

9. Because this was a checkpoint pursuant to North Carolina law, the checkpoint/checking station must operate under a written policy in compliance with North Carolina law.

10. Because no policy existed, said checkpoint was illegal, and any evidence obtained from said stop should be suppressed.

11. Adams contacted Goldsboro Police Department after stopping Defendant.

12. Defendant was not free to leave at this time. Adams detained Defendant. No reasonable person would have felt as if he or she was able to leave the situation. As such, Defendant was in law enforcement custody.

13. Defendant was not “Mirandized” and advised against the right of self-incrimination until later that morning.

14. Officers E. McIntyre and A.L. Cox were the investigating and arresting officers for Goldsboro Police Department.

15. Upon arrival at the main gate, Defendant was ordered to perform field sobriety testing (Horizontal Gaze Nystagmus testing, the Walk-and-Turn Test and the One-Leg-Stand Test) in conjunction with a portable breath test. Defendant was then arrested and charged with DWI.

16. The charging officer lacked probable cause to charge

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Defendant with DWI because the officers did not witness any driving by Ms[.] McDonald, nor did evidence of driving or impairment exist because all evidence obtained should be suppressed as outlined above.

17. The charging officer lacked probable cause to detain and subsequently arrest Defendant.

18. A supporting affidavit from Defendant's counsel, Gary E. "Gene" Britt, II, is included.

WHEREFORE, Defendant prays that the Court issue an order summarily suppressing all evidence obtained after the initiation of an unlawful traffic stop and/or dismiss this matter due to lack of probable cause to arrest.

On 27 May 2015, the trial court denied Defendant's motion to suppress without making any written findings of fact or conclusions of law.¹ A jury trial was held that same day, and the jury found Defendant guilty of driving while impaired. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred in denying her motion to suppress because when Adams told her to "turn off her car, took her license, and had her remain at the gate while he called the Goldsboro Police Department to investigate[,] he lacked the "required reasonable suspicion of criminal activity." In response, the State contends that Defendant failed to preserve in the trial court the issue she is now raising on appeal. We agree.

¹ The transcript reflects that the trial court instead verbally summarized the basis for its ruling.

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It is well established that “the law does not permit parties to swap horses between courts in order to get a better mount” before an appellate court. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and quotation marks omitted). Therefore, where a defendant presents one argument in support of a motion in the trial court, she may not assert an entirely different ground on appeal as the basis for her challenge to the denial of that same motion. *See State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 (“When a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived.”), *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007).

In the present case, Defendant’s motion to suppress did not allege that Adams lacked reasonable suspicion to detain her vehicle. Instead, Defendant argued in her motion that (1) the military gate was an illegal checkpoint because no written policy existed for the checkpoint as required by N.C. Gen. Stat. § 20-16.3A; (2) she was never given her *Miranda* rights; and (3) Officer Cox lacked probable cause to charge her with driving while impaired because he never actually observed her driving the vehicle. These grounds are separate and distinct from the argument Defendant now seeks to raise on appeal — that Adams lacked reasonable suspicion to detain her based solely on the smell of alcohol emanating from her vehicle. Thus, Defendant has waived her right to appellate review of that issue. *See State v. Holliman*, 155 N.C. App. 120, 124, 573 S.E.2d 682, 686 (2002) (“At trial, defendant argued that the

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statement should be suppressed, because it was coerced. For the first time on appeal, defendant asserts that the statement should be suppressed for lack of probable cause to effectuate his seizure. Because defendant impermissibly presents a different theory on appeal than argued at trial, this assignment of error was not properly preserved. Therefore, it is waived by defendant.”).

Conclusion

For the reasons stated above, we dismiss Defendant’s appeal.

DISMISSED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).