IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-91

Filed: 6 September 2016

New Hanover County, No. 08 CRS 51854

STATE OF NORTH CAROLINA

v.

ZACHARY HUNT WILCOX

Appeal by defendant from judgment entered 11 June 2015 by Judge Ebern T. Watson, III in New Hanover County Superior Court. Heard in the Court of Appeals 8 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant.

DIETZ, Judge.

Defendant Zachary Hunt Wilcox appeals from his conviction for driving while impaired. Wilcox challenges the constitutionality of the traffic checkpoint where law enforcement stopped and arrested him.

As explained below, we affirm the trial court's determination that the checkpoint was constitutional. The trial court found that the checkpoint was for the lawful programmatic purpose of checking driver's licenses and registrations of

passing vehicles and that the checkpoint was reasonable in light of the factors this Court has identified in its precedent. Those findings are supported by competent evidence in the record. Accordingly, we reject Wilcox's argument.

Wilcox also filed a motion for appropriate relief in this Court, arguing that the State failed to give him proper notice of its intent to use aggravating factors at sentencing. As explained below, even assuming the State failed to provide the required notice, Wilcox cannot show prejudice. The State already had provided Wilcox with notice of the aggravating factors in district court and, when Wilcox pleaded guilty in superior court, he knew the State intended to use those same aggravating factors again. Thus, Wilcox failed to show a reasonable possibility that, but for the alleged error, the result of his sentencing would have been different.

Facts and Procedural History

On 10 February 2008, state troopers set up a traffic checkpoint at an intersection in Wilmington to verify driver's licenses and vehicle registrations. During the checkpoint, officers stopped Defendant Zachary Wilcox and, after determining that he was appreciably impaired, arrested him for driving while impaired.

In district court, Wilcox moved to suppress on the ground that the checkpoint violated the Fourth Amendment. The district court granted the motion but later vacated the decision. Wilcox then pleaded guilty and appealed to superior court.

Wilcox moved to suppress in superior court and the court denied the motion. Wilcox pleaded guilty at his next court appearance while preserving his right to appeal the denial of the motion to suppress.

Analysis

I. Denial of Motion to Suppress

Wilcox first challenges the denial of his motion to suppress. That motion challenged the constitutionality of the traffic checkpoint where law enforcement arrested him.

In reviewing the denial of a motion to suppress, this Court must determine "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).

In assessing the constitutionality of a checkpoint, reviewing courts "must judge [the] reasonableness [of a checkpoint stop] . . . on the basis of individual circumstances." *State v. Mitchell*, 358 N.C. 63, 66, 592 S.E.2d 543, 545 (2004) (alteration in original). This process first requires a determination of the primary programmatic purpose of the checkpoint. *State v. Veazey*, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008). If the trial court finds a legitimate primary programmatic purpose for the checkpoint, the court must then determine whether the checkpoint

was reasonable by conducting a "balancing inquiry." *Id.* at 185-86, 662 S.E.2d at 686-87 (2008). This inquiry requires the court to weigh "the gravity of the public concerns served by the seizure," "the degree to which the seizure advances the public interest," and "the severity of interference with individual liberty." *Id.* at 186, 662 S.E.2d at 687.

Wilcox first argues that there is no evidence to support the trial court's findings that there was a lawful primary programmatic purpose for the checkpoint. Wilcox contends that the "HP14" form prepared by the supervising officer lists the checkpoint date as 9 February 2008 instead of 10 February 2008 and that, because the arresting officer testified that the purpose of the checkpoint was "marked on the HP14," there is insufficient evidence of programmatic purpose because the form is for a checkpoint on a different day.

We reject this argument. The arresting officer testified multiple times regarding the purpose for the checkpoint actually conducted the night of 10 February 2008. On direct examination, the officer testified that the purpose of the checkpoint was "checking for driver's license and registration." The trial court later posed the same question and the officer again replied, "[i]t would be driver's license and registration. That was marked on the HP14." The HP14 form confirmed this testimony, indicating in the corresponding box on the form that the "Primary Purpose" of the checkpoint is to check "Driver's License" and "Registration." The

officer also testified that the conflicting date on the HP14 likely was a typographical error. The trial court accepted that testimony in its findings. Thus, the evidence offered to the trial court was more than sufficient to support its findings on primary programmatic purpose. *See Veazey*, 191 N.C. App. at 187, 662 S.E.2d at 687-88 ("[W]here 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.").

Wilcox next challenges the trial court's determination that the checkpoint was reasonable and, in particular, the court's determination that the checkpoint was "appropriately tailored" to fit important investigatory needs. In assessing "the degree to which the seizure advance[d] the public interest," the trial court is required to determine whether law enforcement "appropriately tailored their checkpoint stops to fit their primary purpose." *Id.* at 191, 662 S.E.2d at 690 (alteration in original). This Court has identified a non-exhaustive list of factors to be considered by the trial court in considering whether a checkpoint was appropriately tailored and advanced the public interest:

> [W]hether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Id.

Here, the trial court made extensive findings about those factors, all of which are supported by unchallenged, competent evidence in the record:

> 6. The troopers did not act spontaneously and they did not decide to set up the checking station on a "whim": Trooper Alphin was designated by Sergeant A.E. Morris of the North Carolina State Highway Patrol to conduct the checking station at a time and place certain, as was corroborated by the presence of two other troopers, each in uniform, at least one marked patrol vehicle, and at least one operating emergency blue light present in the area that could be seen by oncoming motorists.
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> 8. The predetermined starting time for the checking station was 11:00 PM.
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> 23. Troopers Alphin, Middleton, and Wyrick were operating the checking station pursuant to a written checking station plan.
> 24. The checking station plan was contained within a HP-14, a checking station authorization form signed by a supervisor.
> 25. The supervisor who approved this checking station was Sergeant Morris.
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> . . . .
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> 28. To his knowledge, Trooper Alphin followed the checking station plan and the checking station policy in establishing and conducting the checking station on 10 February 2008.

These findings are sufficient to support the trial court's conclusion that the checkpoint was appropriately tailored under the second prong of the constitutional test. The trial court did not address "all of the non-exclusive factors suggested by

Veazey," nor was it required to do so. *See State v. Jarrett*, 203 N.C. App. 675, 680, 692 S.E.2d 420, 425 (2010). The court's findings are sufficient if they "indicate that the trial court considered appropriate factors to determine whether the checkpoint was sufficiently tailored to fit its primary purpose." *Id.* at 680-81, 692 S.E.2d at 425. We hold that the trial court did so here. Indeed, this Court repeatedly has affirmed trial court orders that made similar findings. *See, e.g.*, *State v. Townsend*, 236 N.C App. 456, 470, 762 S.E.2d 898, 908 (2014); *State v. Kostick*, 233 N.C. App. 62, 76-77, 755 S.E.2d 411, 421 (2014); *State v. Nolan*, 211 N.C. App. 109, 121-22, 712 S.E.2d 279, 288 (2011); *Jarrett*, 203 N.C. App. at 680-81, 692 S.E.2d at 425.

Finally, Wilcox argues that the trial court failed to make sufficient findings concerning the checkpoint's interference with liberty and, in particular, the discretion of the officers at the checkpoint. In evaluating this argument, the trial court again should consider a "non-exclusive" list of factors identified by this Court:

> [T]he checkpoint's potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint.

Veazey, 191 N.C. App. at 193, 662 S.E.2d at 691.

Here, based on the arresting officer's unchallenged testimony, the trial court made findings that traffic was consistently light on the evening of the checkpoint; that a patrol car activated its blue lights and could be seen by oncoming motorists; that the location, date, purpose, and time for the checkpoint were selected by a supervising officer; that, in accordance with the checking station plan, the arresting officer and the two other officers stopped every vehicle passing through the checkpoint; that the officers had at least two uniformed troopers and a patrol car present at all times to demonstrate lawful police authority; that the officers were given oral and written orders and guidelines for the driver's license and registration checkpoint by their supervisor; that their supervisor gave the officers permission to conduct the checkpoint; that there was a written checking station plan contained within a checking station authorization form and signed by a supervisor; and that the arresting officer followed the checking station plan contained on the authorization form and the written checking station policy of the North Carolina Highway Patrol.

The factors to be considered in determining interference with liberty are not exhaustive, and the trial court's findings of fact based on the officer's testimony established all but one of the listed factors a trial court may consider. These factors are not "lynchpin[s], but instead . . . circumstance[s] to be considered as part of the totality of the circumstances." *State v. Rose*, 170 N.C. App. 284, 298, 612 S.E.2d 336,

345 (2005). We hold that the trial court's findings satisfied this factor of the constitutional test.

In sum, the trial court's findings of facts are supported by competent evidence in the record and those findings, in turn, support the court's conclusions of law concerning the constitutionality of the checkpoint. Accordingly, we affirm the trial court's denial of the motion to suppress.

II. Motion for Appropriate Relief

Wilcox also filed a Motion for Appropriate Relief with this Court, arguing that the State failed to provide him adequate notice of its intent to submit a grossly aggravating factor to the court for sentencing in accordance with N.C. Gen. Stat. § 20-179(a1)(1). That statute provides that if "the State intends to use one or more aggravating factors . . . the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days *prior to trial*." N.C. Gen. Stat. § 20-179(a1)(1) (emphasis added). Here, the State provided notice of the aggravating factors on the same day that Wilcox announced to the court that he was pleading guilty. The trial court sentenced him later that day.

The State argues that, because other similar aggravating factor statutes require notice before "trial or the entry of a guilty or no contest plea," *see, e.g.*, N.C. Gen. Stat. § 15A-1340.16(a6), the General Assembly (for some unknown reason) must

have intended to restrict the notice requirement in the DWI context solely to those cases where the defendant chose to go to trial rather than plead guilty.

We need not address this argument because, even assuming the trial court erred, Wilcox suffered no prejudice. *See State v. Geisslercrain*, 233 N.C. App. 186, 193, 756 S.E.2d 92, 97 (2014). Wilcox argues he was prejudiced because "[i]f the court had not found the grossly aggravating factor," Wilcox would have received a lesser sentence. The flaw in this argument is that Wilcox does not challenge the applicability of this aggravating factor, but only his failure to receive sufficient notice of it. *See id*. at 193, 756 S.E.2d at 97. Thus, our prejudice analysis asks whether there is a reasonable possibility that, had Wilcox received the notice he was due, the outcome of sentencing would have been different.

Here, Wilcox does not argue that the lack of notice actually prejudiced him in that regard, nor can he. Wilcox knew before pleading guilty that the State intended to assert this grossly aggravating factor, and he had ample time to prepare a defense to that factor because the State informed him of it in the original district court proceeding long before his sentencing in superior court. Thus, even assuming the State violated its obligation to provide at least ten days' notice of its intent to use aggravating factors, Wilcox has not shown a reasonable possibility that, had the State not made that error, the result of his sentencing would have been different.

Conclusion

We affirm the trial court's judgment and deny the motion for appropriate relief.

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).