IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-238

Filed: 21 March 2017

Cabarrus County, No. 12 CRS 051930

STATE OF NORTH CAROLINA,

v.

DEVRIE LERAN BURRIS, Defendant.

Appeal by defendant from judgment entered on or about 7 October 2015 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Andrew Yu for defendant-appellant.

STROUD, Judge.

Defendant Devrie Leran Burris ("defendant") appeals from the trial court's judgment finding him guilty of impaired driving. On appeal, defendant raises several issues, including that the trial court erred in denying his motion to suppress self-incriminating statements made after his driver's license was retained and without *Miranda* warnings. Because we find that defendant was not free to leave at the time his license was retained, we agree and remand to the trial court for a new trial.

Facts

On 13 April 2012, Christopher Hill of the Kannapolis Police Department ("Detective Hill") responded to a suspicious person call at a Fairfield Inn in Cabarrus County. After pulling in to the hotel parking lot, Detective Hill observed a red Ford Explorer "parked in front of the hotel kind of in the unloading area under the overhang." A woman was standing outside of the Explorer and defendant was sitting in the driver's seat. Detective Hill spoke to the woman standing outside of the car and to defendant through the passenger side window, which was rolled down. The vehicle's engine was not running.

Detective Hill asked "what they were doing there" and "for their identifications." Defendant and the woman responded that they were trying to get a room, and defendant got out of the driver's seat to walk around the car to Detective Hill to hand him his identification. Detective Hill noticed a "strong odor of alcohol beverage" from defendant when he handed over his driver's license. He told defendant and the woman to "hang tight there in the parking lot area" while he went inside to talk to the hotel clerk. He learned that the clerk had called because of a concern that the actions of defendant and the woman were similar to "a robbery that happened in a neighboring hotel a night or two before." [1]

[1] Detective Hill did not say what the clerk told him, if anything, regarding the specifics of any "actions" of defendant or the woman which aroused his suspicions of a potential robbery. As relevant to the issues in this case, there is no evidence that the hotel clerk reported anything about when the Explorer arrived at the hotel or who had been driving it.

Based on his conversation with the hotel clerk, Detective Hill went back outside to ask defendant if he was the one driving the vehicle, to which he responded "yes." He then began asking defendant questions about where he was traveling and the route he had taken to the hotel. At some point, Detective Hill checked the registration on the vehicle and determined that it was registered in defendant's name. Detective Hill asked defendant whether he had anything to drink that night, and defendant responded that he had "a couple drinks." Defendant told Detective Hill that he had not had anything to drink since arriving at the hotel. Detective Hill did not observe any open or unopened containers in or around the red Ford Explorer.

Detective Hill asked defendant "to submit to field sobriety testing," and performed those tests in the parking lot. Defendant "showed some signs of impairment on them." Detective Hill then asked defendant to submit to a portable breath sample test, and he obliged, resulting in a reading of .10. At that point, Detective Hill placed defendant under arrest for driving while impaired and transported him to the Kannapolis Police Department.

After arriving at the police station, Detective Hill attempted to perform a breath test on defendant, but he refused. Since defendant refused a breath test, Detective Hill took defendant to the hospital to request a blood draw for analysis. Detective Hill did not seek a warrant for the blood draw. After arriving at the hospital, Detective Hill informed defendant of his implied consent rights. Defendant

exercised his right to contact a witness, but 30 minutes later, the witness still had not arrived. After defendant refused to submit to a blood draw, Detective Hill directed a nurse to draw blood samples from defendant's arm. After the blood draw, Detective Hill transported defendant to the magistrate's office, where he was processed and placed in jail.

Defendant was charged with impaired driving. He was convicted and sentenced in district court on 15 April 2014. Defendant appealed to the superior court. Defendant filed a motion to dismiss on 23 July 2015, and in the motion asked for suppression of

> any statements made by Defendant as the officer engaged in a custodial interrogation of the Defendant without advising the Defendant of his right to refrain from answering any questions or advising the Defendant of his constitutional right to counsel during questioning or any other federal, state or statutory rights of an accused in police custody regarding the effect of any statement on future proceedings.

On 17 August 2015, a hearing was held on defendant's motion and the trial court orally denied the motion to suppress statements in open court.

Following the 17 August 2015 hearing, the trial court entered an order and a subsequent amended order denying defendant's motion. In the amended order, the court concluded in relevant part:

> 2. Miranda warnings and a waiver of those rights apply only before officers begin a custodial interrogation Miranda v. Arizona, 384 U.S. 436.

> Without facts showing both "custody" and "interrogation," the Miranda rule is inapplicable.
>
> 3. The U.S. Supreme Court has ruled that a person is in custody under the Miranda rule when officer [sic] have formally arrested the person or have restrained a person's movement to a degree associated with a formal arrest. Berkemer v. McCarty, 468 U.S. 420.
>
> 4. The North Carolina Supreme Court has made clear that it follows the U.S. Supreme Court on the meaning of custody. State v. Buchanan, 353 [N.C.] 332.
>
> 5. In the present case, the Defendant falls short of the test for custody, therefore the statements made before arrest should not be suppressed.
>
> 6. Under the totality of the above-referenced circumstances, the Defendant's Motion to Suppress should be denied.

An additional order denying defendant's motion to suppress was entered regarding the warrantless blood draw, finding "exigent circumstances to support a warrantless blood draw." A jury trial was held from 5 October to 7 October 2015, with the jury finding defendant guilty of driving while impaired. Defendant timely appealed to this Court.

Discussion

On appeal, defendant argues (1) that his motion to suppress self-incriminating statements should have been granted because he was seized and in custody at the time the statements were made yet he received no *Miranda* warnings; (2) that his

motion to suppress the blood draw should have been granted because the warrantless blood draw was completed outside of any exigent circumstances; and (3) that the trial court erred in denying his motion to dismiss the charges because there was insufficient evidence to support a conviction.

I. Motion to Suppress Self-Incriminating Statements

Defendant first argues on appeal that the trial court erred in denying his motion to suppress self-incriminating statements made without *Miranda* warnings. Specifically, defendant argues that he was seized and in custody when Detective Hill engaged in a "custodial interrogation" and that he was "entitled to *Miranda* warnings before [Detective] Hill's ensuing questions." We agree.

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

Defendant does not frame his argument as a challenge to any particular findings of fact but rather simply argues that he should have received *Miranda*

warnings after his license was retained and before Detective Hill asked questions, because he was seized and under custodial interrogation at that time. Defendant's argument does, however, direct us to a portion of the findings of fact as unsupported by the evidence, so we will briefly address those relevant findings.

The trial court found in part that:

> 4. Detective Hill asked the Defendant and the female for identification. The Defendant got out of the vehicle and gave identification to Detective Hill.
>
> 5. During this interaction, Detective Hill noticed that the Defendant had a strong odor of alcohol about his person *and the Defendant admitted to driving*.
>
> 6. Detective Hill directed both subjects to remain where they were while he went into the hotel to speak with the desk clerk. Detective Hill could not specifically recall, but believes he retained possession of the Defendant's identification (driver's license) when he left to enter the hotel.

(Emphasis added). Although the timing of events is not entirely clear from the wording of Finding No. 5, it could be understood to mean that defendant admitted to driving the vehicle *before* Detective Hill went inside the hotel to speak to the clerk. If that was the intended meaning -- and it may not have been -- it is not supported by the evidence. Detective Hill's testimony at the suppression hearing sets forth the correct order of events. At the hearing, Detective Hill testified on direct examination by the State:

> Q And what did you observe once you arrived on

the scene?

A. When I pulled into the parking lot, I observed a red Ford Explorer. . . .

Q What did you do at that point?

A At that point I exited my patrol vehicle. I walked over to where the female was standing. I made contact with her, and the window was down in the passenger side so I was speaking to both her and the male and just asked what they were doing there and asked for their identifications.

Q What was the nature of the conversation with the defendant?

A At that point it was just when I asked what they were doing there, they said they were trying to get a room.

Q And what happened next?

A When I asked for the identifications . . . [defendant] got out of the driver seat of the vehicle and walked around to me and handed me his identification as well.

. . . .

Q Did you make any observations about him at that time?

A At that time when he walked around to me and while we were just engaging in some short conversation, I detected a strong odor of alcoholic beverage coming from him.

. . . .

> Q What did you do at that point?
>
> A At that point I just asked him to kind of hang tight there in the parking lot area while I went inside to speak with the hotel clerk. I went inside, spoke with her.
>
> Q And what did you do based on that conversation?
>
> A Based on that conversation, *I went back outside to speak to [defendant] and I asked him if he was the one who was driving the vehicle, and he responded to me yes.*

(Emphasis added). Detective Hill testified that it was not until after he went inside to speak to the hotel clerk and came back out that he asked defendant whether he had been driving. There is no evidence of any other order of events. Accordingly, we conclude that to the extent that Finding No. 5 could be understood as finding that Detective Hill asked defendant about driving *before* he took his driver's license and told him to "hang tight," the trial court's finding is not supported by competent evidence.

The crux of defendant's argument on appeal deals with the trial court's conclusion that defendant "falls short of the test for custody[.]" In *Miranda v. Arizona*, the United States Supreme Court held that statements stemming from a custodial interrogation of the defendant may not be used unless the prosecution "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 16 L. Ed 2d 694, 706, 86 S. Ct. 1602,

1612 (1966). Our Supreme Court has since clarified that "[t]he rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by police only applies to custodial interrogation." *State v. Brooks*, 337 N.C. 132, 143, 446 S.E.2d 579, 586 (1994).

As this Court has previously noted in other Fourth Amendment cases:

> The seizure of an individual can take place through the application of physical force or without the officer ever laying his hands on the person seized. An individual is seized by an officer and falls within the protection of the Fourth Amendment when officer conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. In determining whether a reasonable person would feel free to decline an officer's request to communicate, a reviewing court must examine the totality of the circumstances. This test focuses on the coercive effect of police conduct, taken as a whole.

State v. Marrero, __ N.C. App. __, __, 789 S.E.2d 560, 564 (2016) (citations and quotation marks omitted). "[O]ur Supreme Court has held the definitive inquiry in determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Portillo*, __ N.C. App. __, __, 787 S.E.2d 822, 828 (2016) (citation, quotation marks, and brackets omitted).

In this case, Detective Hill asked for defendant's driver's license, retained it, and told defendant to "hang tight there in the parking lot area while [he] went inside

to speak with the hotel clerk." According to Detective Hill's own testimony at the suppression hearing, as well as the trial court's findings of fact in this regard, defendant was not free to leave. He did not return the driver's license to defendant before beginning to question him. A reasonable person would not feel free to leave when he is in a hotel parking lot in his car but a police officer has taken his driver's license -- so he could not legally drive away -- and directed him not to leave. *See, e.g.*, *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) ("As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration, [the officer's] continued detention and questioning of [the driver] after determining that [the driver] had a valid driver's license was not a consensual encounter. Accordingly, the extended detention of Defendant was unconstitutional and [the driver's] eventual consent to search the vehicle was tainted by the illegality of the extended detention, thus rendering [the driver's] consent ineffective to justify the search."). Since defendant was not free to leave when he was questioned, it was a custodial interrogation and thus Detective Hill should have read defendant his *Miranda* rights before engaging in the questioning.

Furthermore, the only evidence of defendant's operation of a motor vehicle was defendant's admission, which we have concluded should have been suppressed. This Court has previously found that "one 'drives' within the meaning of [N.C. Gen. Stat.

§ 20-138.1] if he is in actual physical control of a vehicle which is in motion or which has the engine running." *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). Although defendant was sitting in the driver's seat of the car in the hotel parking lot, Detective Hill testified that the vehicle's engine was not running at the time he approached the vehicle. There was no circumstantial evidence that defendant had recently driven the Explorer to the spot where Detective Hill found him. Many cases have recognized that circumstantial evidence can support an inference that the defendant had been driving a particular vehicle. For example, in *State v. Foreman*, 133 N.C. App. 292, 298, 515 S.E.2d 488, 493 (1999), *aff'd as modified*, 351 N.C. 627, 527 S.E.2d 921 (2000), the officer observed the vehicle on public roads and in a residential driveway, and after pulling in behind the vehicle and shining its lights, the officer saw the defendant "sitting in the driver's seat and the keys to the vehicle were in the ignition." In *State v. Crawford*, 125 N.C. App. 279, 282, 480 S.E.2d 422, 424 (1997), this Court found probable cause to arrest the defendant where

> the deputy found defendant alone in a car parked on the shoulder of a rural side road. Defendant was in the driver's seat in a semiconscious state, his pants were undone, and he had been drooling. Defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted to the deputy he had been drinking . . . On a night when the temperature was 26 degrees, the hood felt warm, indicating the car had been recently driven. There were no other passengers in the car . . . . Defendant had possession and control of the ignition key.

In *State v. Mack*, 81 N.C. App. 578, 583, 345 S.E.2d 223, 226 (1986), this Court found sufficient circumstantial evidence for the jury to infer that the defendant drove on a public street where the officer observed "the headlights of the car on, the key in the ignition, the warm hood, [and] the defendant asleep in the driver's seat[.]"

Here, the only evidence prior to defendant's admission was that Detective Hill observed defendant sitting in the driver's seat. There was no other evidence of when the Explorer had arrived at the hotel parking lot. The engine was not running and the car was parked at the time Detective Hill arrived. There was no evidence that the car's lights were on or that the engine was warm and no evidence regarding who had the keys to the car or where they were. The woman who was with defendant could possibly have driven to the hotel. Without his admission that he had driven to the hotel, there was no evidence that defendant had driven the Explorer at any relevant time. Thus, defendant "has established he was prejudiced by the trial court's error in refusing to exclude his statement." *State v. Crook*, __ N.C. App. __, __, 785 S.E.2d 771, 778 (2016). Accordingly, we hold that the trial court erred when it denied defendant's motion to suppress his statements.

II. Motion to Suppress Blood Test Evidence

Next, defendant argues that the trial court erred in denying his motion to suppress the blood test evidence because Detective Hill obtained a warrantless blood draw outside of exigent circumstances.

The United States Supreme Court held in *Schmerber v. California*, 384 U.S. 757, 768, 16 L. Ed. 2d 908, 918, 86 S. Ct. 1826, 1834 (1966) that the Fourth Amendment prohibits the warrantless seizure of a blood sample where such intrusion is "not justified in the circumstances" or is made in an "improper manner." More recently, in *Missouri v. McNeely*, __ U.S. __, __ 185 L. Ed. 2d 696, 715, 133 S. Ct. 1552, 1568 (2013), the Supreme Court held, in the context of a blood draw performed over a defendant's objection in impaired driving cases, that the dissipation of alcohol in a person's blood stream standing alone "does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."

This Court addressed *McNeely* in *State v. Dahlquist*, 231 N.C. App. 100, 103, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. review denied*, 367 N.C. 331, 755 S.E.2d 614 (2014), noting that "after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." In *Dahlquist*, the trial court found that: (1) the defendant pulled up to a checkpoint and an officer noticed an odor of alcohol; (2) the defendant admitted to drinking five beers; (3) field sobriety tests indicated that the defendant was impaired; and (4) the officer went to the hospital directly because he knew that it was 10 to 15 minutes away and typically not too busy on Saturday mornings, but that on a weekend night "it would take between four and five hours to obtain a blood sample

if he first had to travel to the Intake Center at the jail to obtain a warrant." *Id.* at 103, 752 S.E.2d at 665. This Court evaluated the totality of the circumstances and held that "the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Id.* at 104, 752 S.E.2d at 668. *See also State v. Romano*, __ N.C. App. __, __, 785 S.E.2d 168, 174, *disc. review allowed*, __ N.C. __, 794 S.E.2d 315 (2016) ("Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable.").

Although we normally would have to review the totality of the circumstances in the present case to determine whether the warrantless blood draw was objectively reasonable, we need not address the issue further in this particular case, because the warrantless blood draw here is inadmissible as fruit of the poisonous tree.

> The fruit of the poisonous tree doctrine, a specific application of the exclusionary rule, provides that when evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the fruit of that unlawful conduct should be suppressed. Only evidence discovered as a result of unconstitutional conduct constitutes fruit of the poisonous tree. This limitation on the fruit of the poisonous tree doctrine is known as the independent source rule, which applies when a later, lawful seizure is genuinely independent of an earlier, tainted one. Under such circumstances, the independent source rule provides that evidence obtained illegally should not be suppressed if it is later acquired pursuant to a constitutionally valid search or seizure.

State v. McKinney, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (citations, quotation marks, and brackets omitted).

Here, Detective Hill noticed the smell of alcohol on defendant's breath before he took his license and directed defendant to remain where he was, but he did not yet have any evidence to indicate probable cause to believe that defendant had driven while impaired. It was only after defendant's statement admitting that he had driven the vehicle that Detective Hill had defendant complete the roadside tests and later executed the warrantless blood draw. No evidence presented to the trial court indicates a constitutional independent source for the warrantless blood draw. Accordingly, we conclude that evidence of the blood test result was fruit of the poisonous tree and should have been be excluded.

III. Motion to Dismiss

Finally, defendant argues that the trial court erred in denying his motion to dismiss the impaired driving charge at the close of the State's evidence and at the close of all evidence because the State failed to present substantial independent circumstantial or direct evidence -- other than defendant's statement -- to establish that defendant was operating a motor vehicle at any relevant time. Since we remand this case for a new trial based on the suppression issues, we need not address this remaining issue further on appeal.

Conclusion

Accordingly, we hold that the trial court erred by denying defendant's motions to suppress his statement and the results of the warrantless blood test. We reverse and remand for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR NEW TRIAL.

Chief Judge McGEE and Judge INMAN concur.