IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1050

Filed: 3 September 2019

Buncombe County, No. 17 CRS 85151

STATE OF NORTH CAROLINA

v.

BRANDON RICHARD ORR, Defendant.

Appeal by Defendant from judgment entered 22 February 2018 by Judge Gary M. Gavenus in Superior Court, Buncombe County. Heard in the Court of Appeals 21 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Sharon L. Smith for Defendant-Appellant.

McGEE, Chief Judge.

Brandon Richard Orr ("Defendant") appeals from judgment entered after a jury found him guilty of driving while impaired. On appeal, Defendant challenges the trial court's order denying his motion to suppress based upon lack of reasonable suspicion to justify the stop of his vehicle. Defendant argues the trial court erred in denying his motion to suppress because the officer lacked sufficient "reasonable

suspicion" to stop Defendant's vehicle, as "the stop was based solely on [Defendant] weaving within his own lane[,]" which Defendant argues is insufficient evidence to support an investigatory stop and violates his Fourth Amendment rights. We disagree and hold the trial court did not err in denying Defendant's motion to suppress the stop of Defendant's vehicle.

I. Factual and Procedural History

Defendant was charged with driving while impaired on 11 May 2017. Prior to trial, Defendant filed a motion on 19 February 2018 to suppress the stop of Defendant's vehicle based on the "lack of reasonable articulable suspicion." At the suppression hearing, Sergeant Michael Hinnenkamp ("Sergeant Hinnenkamp"), with the State Highway Patrol in Buncombe County, testified on behalf of the State.

In summary, the trial court's findings of fact demonstrate the following: Sergeant Hinnenkamp was on patrol on 11 May 2017 when he saw Defendant's vehicle "on the Fairview Road exit off of Highway 240." Sergeant Hinnenkamp testified he drove behind Defendant's vehicle for approximately four tenths of a mile, "off the exit ramp onto Fairview Road (U.S. Highway 70) and as [Defendant's vehicle] turned onto Swannanoa Road," and "did not observe any motor vehicle law violations" during that period of time.

However, Sergeant Hinnenkamp testified that, after Defendant turned onto Swannanoa Road, he observed Defendant's "vehicle beg[i]n to weave within its own

lane." The footage from the video camera on Sergeant Hinnenkamp's vehicle ("the video") showed that "Swannanoa Road is a narrow winding road with little to no shoulder." Sergeant Hinnenkamp's testimony, along with the video, confirmed that, for over the course of approximately one mile, "[D]efendant's vehicle weaved from the double yellow line dividing traffic then back to the far right fog line constantly and continuously[.]" Moreover, the video showed "[D]efendant continuously failed to properly navigate the curves in the road, each time riding the center line on curves to the left and then dramatically over compensating and driving the vehicle onto the fog line." On at least two occasions, Sergeant Hinnenkamp observed Defendant "dr[i]ve his vehicle onto the centerline so near to oncoming traffic as to cause concern for head-on collisions[,]" and cause the on-coming vehicles "to maneuver to their right in response" to Defendant's vehicle being on the centerline.

The video demonstrated Defendant's vehicle "rode on the center line on three occasions and ro[de] on or crossed the fog and white line on at least six occasions[]" over the approximately one-mile course. Defendant crossed the fog line and drove "very near to the curb as he came to a stop at the intersection of Swannanoa Road and Tunnel Road[.]" Based on the evidence presented, the trial court found:

> Defendant was not adequately able to control his vehicle as he operated his motor vehicle on a narrow winding road weaving continuously and constantly while riding on or near the center line and then over compensating and going all the way back onto and over the fog line. [] [D]efendant's vehicle would then cross back through his lane and did

> come dangerously close to oncoming traffic at least twice whereby two vehicles appeared to alter their course of travel to get out of [] [D]efendant's path of travel.

The trial court further found that "[D]efendant's erratic and continual weaving in his lane on a narrow winding road did constitute reasonable articulable suspicion for the stop of [his] vehicle[.]"

The trial court denied Defendant's 19 February 2018 motion to suppress in open court on 20 February 2018. In its order, the trial court made the following conclusions of law:

> (1) That Sergeant Hinnenkamp had sufficient reasonable articulable suspicion to stop the vehicle driven by [] [D]efendant.
>
> (2) That under the circumstances of this case constant and continual weaving in one's own lane on a very narrow winding road does constitute reasonable articulable suspicion to stop a vehicle.
>
> (3) That [] [D]efendant's constitutional rights were not violated by the stopping of his vehicle.

At trial, based on Defendant's 19 February 2018 motion to suppress, Defendant objected to Sergeant Hinnenkamp's testimony regarding the stop of Defendant's vehicle, and the trial court overruled Defendant's objections. A jury found Defendant guilty of driving while impaired on 22 February 2018. The trial court sentenced Defendant to a twelve-month term in the Misdemeanor Confinement Program and ordered Defendant to pay a $1,000.00 fine and a $600.00 lab fee. Defendant gave oral notice of appeal in open court on 22 February 2018.

II. Analysis

On appeal, Defendant argues the trial court erred in denying his motion to suppress the stop of his vehicle in that Sergeant Hinnenkamp lacked reasonable suspicion to stop Defendant's vehicle because "the stop was based solely on [Defendant] weaving within his own lane," which Defendant claims is insufficient evidence to support an investigatory stop and therefore violates his Fourth Amendment rights. We disagree.

A. *Standard of Review*

In reviewing a trial court's denial of a motion to suppress, this Court "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Mello*, 200 N.C. App. 437, 439, 684 S.E.2d 483, 486 (2009) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "A trial court's factual findings are binding on appeal 'if there is evidence to support them, even though the evidence might sustain findings to the contrary.'" *Mello*, 200 N.C. App. at 439, 684 S.E.2d at 486 (quoting *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001)). If a defendant does not assign error to a trial court's specific findings of fact, the findings of fact are not reviewable on appeal. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005). This Court reviews "a trial court's conclusions of law on a motion to suppress [] *de novo*." *State*

v. Chadwick, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (2002) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1991)).

Defendant does not assign error to the trial court's specific findings of fact in the court's order denying Defendant's motion to suppress. Therefore, "the findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Jones*, 96 N.C. App. 389, 392, 386 S.E.2d 217, 219 (1989) (internal quotations and citations omitted). Defendant challenges the trial court's conclusions of law that there was "sufficient reasonable articulable suspicion to stop the vehicle driven by [] [D]efendant[,]" that "constant and continual weaving in one's own lane on a very narrow winding road does constitute reasonable articulable suspicion[,]" and "that [] [D]efendant's constitutional rights were not violated by the stopping of his vehicle." We review the trial court's conclusions of law *de novo*.

B. *Motion to Suppress*

The United States Constitution protects the right of individuals "against unreasonable searches and seizures" without probable cause. U.S. Const. amend. IV. The Fourth Amendment "is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994) (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)) The Fourth Amendment protections extend "to seizures of the person, including brief investigatory detentions

such as those involved in the stopping of a vehicle." *Id.* at 441, 446 S.E.2d at 69-70 (citing *Reid v. Georgia*, 448 U.S. 438, 440 (1980)).

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *Id.* at 441, 446 S.E.2d at 69-79 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). To determine whether reasonable suspicion exists to justify an investigatory stop, "[a] court must consider the totality of the circumstances[.]" *Id.* (internal quotations and citations omitted). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* at 441-42, 446 S.E.2d at 70 (internal citations omitted). However, "[t]he only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'" *Id.* at 442, 446 S.E.2d at 70 (internal citations omitted).

Although "weaving can contribute to a reasonable suspicion of driving while impaired[,]" *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (2009), "[a] defendant's weaving within his lane, standing alone, is insufficient to support a reasonable suspicion that [the] defendant was driving under the influence[.]" *Fields* at 746, 673 S.E.2d at 769. For example, in *Fields*, the officer drove behind the defendant's vehicle for one and a half miles and observed the defendant's vehicle "swerve to the white line on the right side of the traffic lane." *Id.* at 741, 673 S.E.2d

at 766. Based on the officer's observations of the defendant swerving in this manner on three different occasions, the officer stopped the defendant's vehicle "under suspicion of driving while impaired." *Id.* The trial court denied the defendant's motion to suppress the stop of his vehicle, and this Court reversed the trial court's order because the findings of fact demonstrated the stop was based solely on the "defendant's weaving within his lane," which "d[id] not give rise to a reasonable, articulable, suspicion of criminal activity justifying the stop of [the] defendant's vehicle." *Id.* at 746, 673 S.E.2d at 769.

However, if an officer observes a defendant's vehicle weaving along with "additional specific articulable facts," the observation may support a reasonable suspicion of driving while impaired. *Id.* at 744, 673 S.E.2d at 768. *See*, *e.g.*, *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 440-41 (2004) (holding findings of fact demonstrating that the officer observed the defendant's vehicle at 1:43 a.m. "slowly weaving within its lane of travel touching the designated lane markers on each side" were sufficient to conclude the officer "had a reasonable, articulable suspicion to believe the operator of the vehicle was committing an implied consent offense[]" (internal quotation marks omitted)); *see also State v. Aubin*, 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990) (holding findings of fact demonstrating that the officer "observed [the] defendant . . . slowing his speed to approximately 45 miles per hour and weaving within his lane[]" were "sufficient to raise reasonable suspicion

that [the] defendant was operating his vehicle while under the influence"); *Jones*, 96 N.C. App. at 392, 395, 386 S.E.2d at 219, 221 (holding the officer's observations of the defendant's vehicle traveling "20 miles per hour below the posted speed limit . . . [and] weav[ing] from the white line next to the shoulder of the road to the center line" were sufficient to form "a suspicion of an impaired driver in a reasonable and experienced [officer's] mind" (internal brackets omitted)).

Moreover, in *State v. Otto*, the officer observed the defendant's vehicle "constantly weaving from the center line to the fog line[]" within his own lane. *State v. Otto*, 366 N.C. 134, 135, 726 S.E.2d 824, 826 (2012) (internal quotations omitted). After the officer followed the defendant's weaving vehicle for three-quarters of a mile, the officer stopped the vehicle. *Id.* Our Supreme Court reasoned the defendant's weaving in *Otto* "was constant and continual[,]" which was distinguishable from the defendant in *Fields*, who weaved "only three times over the course of a mile and a half." *Id.* at 138, 726 S.E.2d at 828 (citing *Fields*, 195 N.C. App. at 741, 673 S.E.2d at 766). Therefore, our Supreme Court upheld the trial court's order denying the defendant's motion to suppress the stop of his vehicle, holding that reasonable suspicion for the traffic stop existed based on the totality of the circumstances, which included the defendant's "weaving 'constantly and continuously' over the course of three-quarters of a mile[] . . . around 11:00 p.m. on a Friday night." *Otto*, 366 N.C. at 138, 726 S.E.2d at 828.

In the present case, Defendant argues the trial court failed to make findings of fact supporting its conclusion of law that Sergeant Hinnenkamp had sufficient reasonable suspicion to stop Defendant's vehicle because the stop was based solely on Defendant weaving within his own lane. We disagree. In its order, the trial court appropriately considered the totality of the circumstances and made additional findings of articulable fact, in addition to Defendant's weaving. Unlike the defendant in *Fields*, who weaved onto the white fog line on three different occasions over the course of a mile and a half, Defendant in the present case "continuously failed to properly navigate the curves in the road" for approximately one mile. In the present case, as in *Otto*, Defendant's weaving here was "constant and continual." The video captured Defendant's vehicle on the center line three times and "on or crossing the fog and white line on at least six occasions."

Besides Defendant's continuous weaving between and onto the centerline and fog line, "additional specific articulable facts" support the finding of reasonable suspicion. On one occasion, Defendant nearly struck the curb when he crossed the fog line. On at least two occasions, Defendant's vehicle crossed "onto the centerline so near to oncoming traffic as to cause concern for head-on collisions." In response to Defendant's crossing onto the centerline, the on-coming vehicles "maneuver[ed] to their right" to avoid Defendant's vehicle. In *Otto*, the defendant's continuous weaving for three-quarters of a mile in addition to the late time of night constituted "factors

[that] are sufficient to create reasonable suspicion." *Otto*, 366 N.C. at 138, 726 S.E.2d at 828. In this case, Defendant similarly weaved "constant[ly] and continu[ously]" for a mile while simultaneously coming very near to hitting the curb, crossing onto the centerline and almost causing multiple head-on collisions, and forcing on-coming drivers to move toward the right side of their lane. In viewing the totality of the circumstances, the stop was based on Defendant's continuous weaving along with "additional specific articulable facts[.]" *Fields*, 195 N.C. at 744, 673 S.E.2d at 768. Therefore, the trial court correctly concluded that Sergeant Hinnenkamp had sufficient reasonable suspicion to stop Defendant's vehicle and did not violate Defendant's constitutional rights.

III. Conclusion

For the reasons stated above, this Court holds the trial court did not err in denying Defendant's motion to suppress the stop of his vehicle because the totality of the circumstances warranted a reasonable articulable suspicion for the stop of Defendant's vehicle.

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).