IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-644

Filed: 6 August 2019

Cumberland County, No. 16 CRS 64352

STATE OF NORTH CAROLINA

v.

CELESTIO LAFRANZ HARRINGTON

Appeal by defendant from order entered 8 December 2017 by Judge Claire V. Hill and judgment entered 12 January 2018 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General William A. Smith, for the State.

Stephen G. Driggers for defendant-appellant.

BRYANT, Judge.

Where there was competent evidence to support essential findings of fact and those findings provide that based on law enforcement officers' observations, rational inferences, and the totality of the circumstances, the law enforcement officers had a reasonable suspicion to warrant a traffic stop of defendant's vehicle. Where the trial

court labeled a statutorily mandated $600.00 court cost as restitution, we deem the restitution label a scrivener's error and remand for correction.

On 5 November 2016, law enforcement officers working with the Cumberland County Alcohol Beverage Control ("ABC") Board arrested defendant Celestio Lefranz Harrington in Cumberland County and charged him with felony possession with intent to sell and deliver marijuana, felony maintaining a vehicle for the purpose of keeping and selling a controlled substance, and misdemeanor possession of drug paraphernalia. Defendant was indicted on these offenses by a Cumberland County grand jury on 13 February 2017. On 22 November 2017, defendant filed a motion to suppress evidence seized as a consequence of his vehicle traffic stop. A suppression hearing was held in Cumberland County Superior Court on 30 November 2017 before the Honorable Clarie V. Hill, Judge presiding.

The evidence presented during the suppression hearing tended to show that on 5 November 2016, ABC Officers Douglas Austin and Walter Rea were positioned in a plaza parking lot outside of an ABC store located near the intersection of South Reilly Road and Cliffdale Road. The officers were stationed in separate vehicles, communicating with each other via cell phone, "conducting surveillance in the parking lot to make sure the people were complying with any of the alcohol related laws." From their distinct vantage points, both officers observed defendant's vehicle parallel parked in a fire lane two stores away from the ABC store.

An adult male walked down the sidewalk of the plaza strip mall with a clear "Solo type" cup, filled with less than an inch of liquid. The pedestrian stopped next to the occupied vehicle parked in the fire lane. Officer Rea observed the pedestrian lean over and extend his cup inside the vehicle. "A few moments later, the cup came back out and [Officer Rea] could tell there was probably an inch and a half of liquid, if not more, in the cup. So something was added to it inside the vehicle." After a brief conversation between the pedestrian and the vehicle occupants, Officer Rea observed a green bottle, which he identified as a "Green Apple" liquor bottle, being handed from the vehicle to the pedestrian on the side walk. The pedestrian deposited the bottle in a nearby trash can. Officer Rea "made a determination that an open container of alcohol had come out of the vehicle." After the bottle was thrown away, the vehicle departed the plaza parking lot. Both officers followed the vehicle onto South Reilly Road and initiated a traffic stop.

During the stop, Officer Austin approached the vehicle on the driver's side, while Officer Rea approached on the passenger side. Inside the vehicle, Officer Austin observed a bottle of cranberry juice in the back seat and a white coffee mug containing liquid in the center console. Officer Austin testified to his presumption that the contents of the bottle thrown away at the plaza was mixed with the cranberry juice and transferred to the coffee mug. The law enforcement officers requested the cranberry juice bottle and the coffee mug for testing. Back in a law enforcement

vehicle, Officer Rea swirled the contents of the cranberry juice bottle and the contents of the coffee mug to conduct an alco-sensor test on the vapors created. The alco-sensor test results indicated the presence of alcohol in the coffee mug but not in the cranberry juice bottle. Based on this positive indication for the presence of alcohol, the officers asked defendant and the passenger to exit the vehicle to allow the officers to conduct a search for other alcoholic beverages. Inside the vehicle, near the driver's side floorboard, Officer Austin noticed an odor of marijuana. As he worked through the search, he discovered two bags of marijuana and a digital scale in the vehicle center console. Officer Austin also searched a book bag in the back seat and discovered a large vacuum sealed package full of marijuana. "I hastily looked at it and surmised it was in excess of a pound."

On 8 December 2017, Judge Hill entered an order denying defendant's motion to suppress. Following the denial, defendant entered into an agreement with the State wherein he would plead guilty to felony possession with intent to manufacture, sell or deliver marijuana, preserving his right to appeal the denial of his motion to suppress and the State would dismiss the charges of maintaining a vehicle used to keep and sell a controlled substance and possession of drug paraphernalia. On 12 January 2018, the Honorable Gale M. Adams, Judge presiding, accepted the agreement; defendant pled guilty; and in accordance with the plea agreement, the court entered judgment against defendant on one count of possession with intent to

manufacture, sell or deliver marijuana, and sentenced defendant to an active term of 6 to 17 months. That sentence was suspended, and the trial court placed defendant on supervised probation for a period of 18 months. As a monetary condition of the judgment, the court imposed upon defendant an assessment of $1,002.50, including $600.00 in restitution. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) denying his motion to suppress and (II) ordering defendant to pay $600.00 in restitution to the crime lab.

I

First, defendant argues that the trial court erred by denying his motion to suppress where Officers Austin and Rea lacked reasonable suspicion to believe he committed a criminal offense. More specifically, defendant contends that (A) there was insufficient evidence to support findings of fact essential to the trial court's conclusions of law and (B) the findings do not support a conclusion of reasonable suspicion of criminal activity. We disagree.

Standard of Review

In reviewing the denial of a motion to suppress, our Court

> is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. [I]f so, the trial court's conclusions of law

> are binding on appeal. If there is a conflict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal.
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> *State v. Veazey*, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). [T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found. We review the trial court's conclusions of law *de novo*.

State v. Brown, 217 N.C. App. 566, 571, 720 S.E.2d 446, 450 (2011) (alterations in original) (citations omitted).

Analysis

A.

Defendant contends that the trial court lacked competent evidence to support its findings of fact. Of the trial court's eighteen findings of fact, defendant challenges three.

> 2. The defendant, on November 5, 2016 was observed in the driver's seat of a vehicle that was parked in the fire lane next to the sidewalk near in the parking lot of the plaza that contains the ABC store located at 700 S. Reilly Rd.
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> . . . .
>
> 5. The driver handed the subject a liquor bottle with a green label (green apple) from the driver's window and it was discarded by that subject in the trash.

> 6. The driver of the vehicle and the passenger never changed places.

1.

As to findings of fact 2 and 6, defendant contends that there was no evidence he was in the driver's seat of the vehicle while parked in the plaza parking lot or that the vehicle driver and passenger did not changes places.

The evidence presented during the suppression hearing indicates that on 5 November 2016, Officer Rea was sitting in a marked law enforcement vehicle positioned in the plaza parking lot using a pair of binoculars to conduct surveillance. Officer Rea observed a pedestrian holding a clear cup lean in on the driver's side of the vehicle and "handed his cup in. A few moments later, the cup came back out and you could tell . . . something was added to it inside the vehicle." After the cup was returned to the man on the sidewalk, Officer Rea observed "what [he] identified as a liquor bottle" being handed from the vehicle interior to the man on the sidewalk before the vehicle left the parking lot.

When asked if the vehicle occupants got out of the vehicle at any time before leaving the plaza parking lot, Officer Rea testified, "They stayed in the vehicle the entire time." At the time of the traffic stop, defendant was in the driver's seat of the vehicle.

We hold that the evidence was competent to support the trial court's finding that on 5 November 2016, "defendant . . . was observed in the driver's seat of the

vehicle" and "[t]he driver of the vehicle and the passenger never changed places." *See Brown*, 217 N.C. App. at 571, 720 S.E.2d at 450. Accordingly, we overrule defendant's challenge to the trial court's findings of fact numbers 2 and 6.

2.

Defendant also challenges, finding of fact number 5.

> 5. The driver handed the subject a liquor bottle with a green label (green apple) from the driver's window and it was discarded by that subject in the trash.

Defendant contends there was insufficient evidence to support the finding that "the bottle with the green label was a 'liquor' bottle or that it was a 'green apple' bottle." We disagree.

The evidence presented provides that Officers Austin and Rea were positioned in the plaza parking lot to observe behavior outside of establishments which sold alcohol. Officer Rea observed a pedestrian with a cup lean in on the driver's side of the vehicle and extend his cup inside the vehicle. Moments later, the cup reappeared with some amount of liquid having been added. Officer Rea then observed a bottle being handed from inside the vehicle to the pedestrian, who deposited it in a trash can. "It looked like there was . . . what I identified as a liquor bottle. Green apple is what I thought it was, had a green label on it . . . ."

We hold that the evidence was sufficient to support the trial court's finding that Officer Rea observed "a liquor bottle with a green label (green apple)." *See id.*

Accordingly, we overrule defendant's challenge to the trial court's finding of fact that Officer Rea observed a liquor bottle with a green label—a Green Apple label—being passed from inside the vehicle to the pedestrian standing on the sidewalk to be discarded in the trash.

B.

Defendant further contends that the trial court erred by denying his motion to suppress because there was no reasonable suspicion of criminal activity. Defendant contends that there was no reasonable suspicion (1) General Statutes, Chapter 18B had been violated or (2) of an open container violation.

Standard of Review

"[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found. We review the trial court's conclusions of law *de novo*." *Id.*

Analysis

> Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citations omitted).

> [T]he stop must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S.

> at 21, 88 S. Ct. at 1880 (citations omitted). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989) (internal quotation marks omitted)).

State v. Otto, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012).

1.

In its conclusions of law, the trial court stated the following:

> 1. The State has shown by a preponderance of the evidence that reasonable suspicion existed for the stop based on the observations of the [sic] Officer Austin and Rea of a [sic] North Carolina General Statutes, [Chapter] 18B violation(s), specifically 18B-301(f) and 18B-102(a).

Defendant challenges the conclusion that there was reasonable suspicion of a Chapter 18B violation.

General Statutes, Chapter 18B is entitled "Regulation of Alcoholic Beverages." Pursuant to Section 102, "General Prohibition.—It shall be unlawful for any person to manufacture, sell, transport, import, deliver, furnish, purchase, consume, or possess any alcoholic beverages except as authorized by the ABC law." N.C. Gen. Stat. § 18B-102(a) (2017). Section 301 ("Possession and Consumption of Fortified Wine and Spirituous Liquor") provides as follows:

> Unlawful Possession or Use.—As illustration, but not limitation, of the general prohibition stated in G.S. 18B-102(a), it shall be unlawful for:

> (1) Any person to consume fortified wine, spirituous liquor, or mixed beverages or to offer such beverages to another person at any of the following places:
>
> . . . .
>
> c. On any *public road, street, highway*, or sidewalk . . . .

Id. § 18B-301(f)(1)c. (emphasis added).

Defendant argues that, as defined by Chapter 18B, fortified wine[1] and spirituous liquor[2] require an alcohol content of at least 16%, or distilled spirits or ethyl alcohol. Defendant contends that as the law enforcement officers did not investigate the contents of the cup that the pedestrian passed back and forth from the vehicle or the bottle that was discarded at the plaza, the officers had no reasonable suspicion that the liquid offered by the vehicle occupants to the pedestrian on the sidewalk constituted fortified wine or spirituous liquor.

We look to the trial court's findings of fact.

> 2. The defendant, on November 5, 2016 was observed in the driver's seat of a vehicle that was parked in the fire lane next to the sidewalk near in the parking lot of the plaza that contains the ABC store located at 700 S. Reilly Rd.

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[1] Pursuant to General Statutes, section 101, " 'Fortified wine' means any wine, of more than sixteen percent (16%) and no more than twenty-four percent (24%) alcohol by volume . . . ." N.C. Gen. Stat. § 18B-101(7) (2017).

[2] Pursuant to General Statutes, section 101, " 'Spirituous liquor' or 'liquor' means distilled spirits or ethyl alcohol, including spirits of wine, whiskey, rum, brandy, gin and all other distilled spirits and mixtures of cordials, liqueur, and premixed cocktails, in closed containers for beverage use regardless of their dilution." *Id.* § 18B-101(14).

> 3. Officer Rea observed a subject on the sidewalk holding a clear solo type cup with about an inch of liquid inside that cup inside the driver's window.
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> 4. The subject later removed the cup from the driver's window and it appeared to have more liquid inside it after it was removed.
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> 5. The driver handed the subject a liquor bottle with a green label (green apple) from the driver's window and it was discarded by that subject in the trash.
>
> . . . .
>
> 7. The vehicle left the parking lot and traveled on to Reilly Road and Officer Austin initiated a traffic stop on the vehicle on Reilly Road based on the Officers' observations of a violation of the North Carolina General Statutes, 18B-301/401.

Reviewing the trial court's unchallenged or competently supported findings of fact, we hold Officers Austin and Rea had particularized and objective facts, along with the rational inferences of those facts, to suspect that one or more of the suspect vehicle occupants consumed fortified wine, spirituous liquor, or mixed beverages while on a public road, street, or highway in violation of General Statutes, section 18B-301. *See* N.C. Gen. Stat. § 18B-301(f)(1)c.; *Otto*, 366 N.C. at 137, 726 S.E.2d at 827. Thus, defendant's argument is overruled.

Because we uphold the trial court's 8 December 2017 order denying defendant's motion to suppress on the basis that law enforcement officers had a reasonable suspicion to investigate a violation of General Statutes, sections 18B-102 and -301,

we need not address defendant's challenge to the traffic stop for an open container violation.

II

Next, defendant argues that the trial court erred by ordering defendant to pay $600.00 in restitution to the crime lab. We remand this matter to correct a scrivener's error.

Writ of Certiorari

Defendant petitions this Court for a writ of certiorari to address his challenge to the trial court's imposition of restitution to the North Carolina Crime Lab following his guilty plea. *See* N.C. Gen. Stat. § 15A-1444(e) (2017) ("Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari."); *see also State v. Murphy*, ___ N.C. App. ___, 819 S.E.2d 604 (2018) (reviewing a challenge to restitution imposed following the defendant's guilty plea); *State v. Griffin*, No. COA17-195, 2017 WL 3480960, at *1 (N.C. Ct. App. Aug. 15, 2017) (unpublished) ("In order to raise the issue of whether the amount of restitution is supported by evidence, [the] Defendant must file a petition for writ of certiorari, which he has done. *See* N.C. R. App. P.

21(a)(1). We . . . exercise our discretion to allow [the] Defendant's petition for writ of certiorari and consider the merits of [the] Defendant's argument. *See id*."). We grant defendant's petition for a writ of certiorari.

Preservation

"While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A–1446(d)(18).[3]" *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citation omitted). *See also* State v. Davis, 206 N.C. App. 545, 551, 696 S.E.2d 917, 921 (2010) ("[I]t is well established that a restitution order may be reviewed on appeal despite no objection to its entry.") (citation omitted).

Analysis

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[3] Pursuant to General Statutes, section 15A-1446,

> [e]rrors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
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> . . . .
>
> (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (2017). *See also State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018) ("Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court,[] subdivision (18) is not one of them.").

The $600.00 fee the trial court imposed on defendant for use of the services of the North Carolina State Crime Laboratory facilities amounted to a court cost applicable to criminal actions.

Pursuant to General Statutes, section 7A-304 ("Costs in criminal actions"),

> [i]n every criminal case in the superior . . . court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, . . . the following costs *shall be assessed and collected*. . . .
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> . . . .
>
> (7) For the services of the North Carolina State Crime Laboratory facilities, the . . . superior court judge *shall*, upon conviction, order payment of the sum of six hundred dollars ($600.00) to be remitted to the Department of Justice for support of the Laboratory. This cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratories have performed . . . analysis of any controlled substance possessed by the defendant . . . .

N.C. Gen. Stat. § 7A-304(a)(7) (2017) (emphasis added).

During the plea hearing, the State presented a factual basis for the offenses charged. In his recitation, the State prosecutor stated that a search of defendant's vehicle yielded two bags of marijuana found in the center console as well as vacuum sealed packages of marijuana found in a book sack in the back seat. "What appeared to be marijuana was sent to the lab for testing and was confirmed to be marijuana."

The trial court rendered the following judgment at the conclusion of the plea hearing.

> THE COURT: This will be the judgment of the Court. . . . During the time that [defendant's] on probation he's ordered to pay the cost of court. He's also ordered to obtain a Tasc assessment within 60 days and follow any recommended treatment. He's also ordered to pay $600 in restitution to the Crime Lab.

Though the trial court stated that $600.00 was to be paid to the Crime Lab as restitution, this amount is a court cost made mandatory by statute "in cases in which, as part of the investigation leading to the defendant's conviction, the laboratories have performed . . . analysis of any controlled substance possessed by the defendant . . . ." *Id.*

As the requirements were met to impose $600.00 in court costs for use of the Crime Lab and the labeling of the $600.00 cost as restitution appears to be a scrivener's error, we remand this matter to the trial court to amend the judgment and include the $600.00 payable to the Crime Lab as a cost rather than as restitution.

NO ERROR IN PART; REMANDED IN PART.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).