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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-54

Filed: 1 September 2020

Guilford County, Nos. 17 CRS 30095, 81133

STATE OF NORTH CAROLINA

v.

JOSHUA RODGER KIM

Appeal by defendant from judgment entered 16 August 2019 by Judge John O. Craig III in Guilford County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard Bradford, for the State.

Culbertson & Associates, by K.E. Krispen Culbertson, for defendant.

ARROWOOD, Judge.

Joshua Rodger Kim (“defendant”) appeals from judgment entered upon his conviction for driving while impaired (“DWI”), arguing error in several evidentiary rulings of the trial court. For the following reasons, we hold that defendant’s trial was free of error.

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I. Background

On 5 March 2018 defendant was charged with DWI and habitual impaired driving. Defendant filed motions to suppress the results of a chemical analysis of his blood alcohol level and other evidence obtained incident to his arrest on the grounds that the investigating officer lacked probable cause to believe that defendant had driven a vehicle while in an impaired state. After hearing evidence and arguments of counsel on 6 August 2019, the trial court denied both motions and the case proceeded to trial.

The State's evidence tended to show the following. Captain Keith Collins of the Greensboro Fire Department testified that, just after 1:00 a.m. on 22 July 2017, a firefighting team was dispatched to the scene of what was initially reported as a brush fire off McConnell Road. Upon arrival, they observed an overturned truck ablaze in a gully thirty yards downhill in the woods alongside the road. Skid marks on the road and gouge marks in the grass shoulder appeared to indicate that the truck had run off the road, overturned, and rolled downhill into the gully.

Defendant, who was the only civilian observed at the scene, was discovered lying within the gouge marks approximately thirty feet before the vehicle's resting place. Defendant was covered in dirt and abrasions. Based upon this information Captain Collins formed an opinion that defendant had been ejected from the truck. He further opined that the truck had been burning for quite some time because it was

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fully engulfed in flames. He believed that the overturned truck had simply caught fire and noted no evidence that it had exploded.

Trooper Kevin Bailey of the North Carolina State Highway Patrol arrived at the scene soon after the firefighters. Captain Collins relayed the foregoing information to Trooper Bailey, who commenced his investigation of the crash scene. Trooper Bailey talked to defendant, who had gathered himself and was sitting on the rear bumper of the fire truck. Trooper Bailey noted that defendant exhibited red, glassy eyes, slurred speech, and a strong odor of alcohol. Defendant claimed that he did not know the truck's owner. He offered that he heard the wreck from his nearby home, approached the truck on foot to investigate, and was thrown back when the truck exploded after he touched it.

Near the truck Trooper Bailey found twenty to thirty business cards bearing defendant's name and a cell phone, which defendant admitted was his. A DMV records search of defendant's driver's license information and the truck's plate number revealed that defendant's license was currently revoked and the truck was registered to his home address, less than a mile down McConnell Road. Based on the skid marks, it appeared that the truck was headed toward defendant's home when it lost control.

Defendant was transported by EMS to the hospital to receive medical attention. Trooper Bailey met him there at 3:00 a.m. Trooper Bailey again detected

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the odor of alcohol on him. Based on his observation of defendant, Trooper Bailey formed the opinion that defendant was appreciably impaired by alcohol at the time of the accident. Defendant refused to submit to chemical testing for intoxicants and refused to sign the form acknowledging his attendant rights. Based upon probable cause for DWI, Trooper Bailey obtained warrants authorizing defendant's arrest and procurement of a sample of defendant's blood for testing. Subsequent testing indicated that defendant had a BAC of 0.14, above the legal limit.

At the close of the State's evidence, defendant moved to dismiss the DWI charge for insufficient evidence of his identity as the driver of the truck. The trial court denied the motion. Defendant proceeded to put on his own evidence. Defendant's sister and her friend testified that his sister was driving the truck with defendant as a passenger when it flipped. They left the scene because she was barred by court order from operating any vehicle without an ignition interlock. Defendant later returned to the truck. The trial court denied defendant's second motion to dismiss at the close of all evidence. The jury convicted defendant of DWI. Defendant stipulated that, based on his prior record level, this conviction rendered him guilty of the remaining charge of habitual impaired driving. The trial court sentenced defendant upon his convictions and defendant gave oral notice of appeal.

II. Discussion

Defendant argues that the trial court erred in: (a) denying his Motion To Suppress the results of his blood test and admitting said results at trial; (b) denying his Motion to Suppress evidence obtained incident to his arrest; (c) denying his Motion to Dismiss the charges against him; and (d) admitting evidence that his license was revoked during the relevant time. For the following reasons, we find no error.

A. Motion to Suppress Blood Test Results

Defendant argues that the trial court erred in denying his Motion to Suppress his blood test results because Trooper Bailey's search warrant application and attached affidavit contained false statements deliberately made in bad faith that were essential to the magistrate's finding of probable cause, in violation of *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667 (1978). This argument is without merit.

"This Court's role in reviewing a trial court's order on a motion to suppress is simply to determine whether the trial court's findings of fact are supported by the evidence and whether those findings support the court's conclusions of law. Our review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts. Unchallenged findings are deemed supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo*." *State v. Fields*, __ N.C. App. __, __, 836 S.E.2d 886, 890 (2019) (alterations, internal quotation marks, and citations omitted).

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“A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. . . . [T]ruthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.” N.C. Gen. Stat. § 15A-978(a) (2019).

“Truthful,” however, does not mean that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge. Instead, “truthful” means that the information put forth is believed or appropriately accepted by the affiant as true. A defendant must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. Only the affiant’s veracity is at issue in the evidentiary hearing. Furthermore, a claim under the *Franks* case is not established by presenting evidence which merely contradicts assertions contained in the affidavit or shows the affidavit, contains false statements. Rather, the evidence presented must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

State v. Severn, 130 N.C. App. 319, 322, 502 S.E.2d 882, 884 (1998) (alterations and internal quotation marks omitted) (citing *Franks*, 438 U.S. at 165, 57 L. Ed. 2d at 678); *State v. Fernandez*, 346 N.C. 1, 13-14, 484 S.E.2d 350, 358 (1997)).

Defendant takes issue with the following aspects of Trooper Bailey’s characterization of events in his search warrant application and affidavit: (1) the statement that defendant had no seatbelt marks, whereas Trooper Bailey testified at

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the hearing that he never checked under defendant's clothing for seatbelt marks; (2) the omission of the fact that defendant denied driving the truck to Trooper Bailey at the scene; (3) stating that defendant was the only individual at the scene of the accident, whereas the firemen were present upon Trooper Bailey's arrival; and (4) the omission of any description of defendant's injuries or the condition of the truck. Defendant argues that these statements and omissions, when viewed in light of the totality of the information Trooper Bailey chose to include, evince a bad faith effort to portray events in an unduly incriminating manner in order to obtain the requested warrant. We disagree.

As an initial matter, Trooper Bailey did not omit defendant's denial of driving the truck. In his affidavit, he averred that defendant told him that he had heard the wreck and walked to the scene to investigate. There was no need to include his second statement explicitly denying operation of the vehicle. Moreover, the evidence adduced at the hearing on defendant's motions makes clear that defendant was the only person at the scene of the accident that was not a first responder. It would defy logic to require Trooper Bailey to include this fact in apparent suspicion of the firefighters who arrived to extinguish defendant's vehicle.

As for the remaining purported defects in Trooper Bailey's affidavit, defendant has failed to make any showing that Trooper Bailey made these false statements and omissions in bad faith. In any event, they were unnecessary to the trial court's

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conclusion that probable cause justified the issuance of a warrant to test defendant's blood for alcohol. "Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *State v. Flowers*, 12 N.C. App. 487, 492, 183 S.E.2d 820, 823 (internal quotation marks and citation omitted), *cert. denied*, 279 N.C. 728, 184 S.E.2d 885 (1971).

As found by the trial court in its order denying defendant's motion, Trooper Bailey averred that when he responded to the single vehicle collision at 1:17 a.m., he surmised that defendant had been "ejected from the vehicle," "was the only person around the vehicle," exhibited "red glassy eyes, slurred speech, and a strong odor of alcohol," and "refused to submit to a chemical analysis." Defendant has not challenged these findings of fact on appeal. They are therefore binding for purposes of our review. *Fields*, __ N.C. App. at __, 836 S.E.2d at 890 (citation omitted).

Defendant contends that Trooper Bailey lacked probable cause to arrest him because neither he nor the responding firefighters observed defendant within the truck. In some cases, probable cause to arrest an intoxicated suspect for DWI may be lacking where there is a paucity of evidence placing the suspect within a recently driven vehicle before his encounter with law enforcement. *See, e.g., id.* at __, 836 S.E.2d at 893 (upholding order finding no probable cause to arrest defendant for DWI

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based on lack of evidence on identity of defendant as driver of vehicle, where unchallenged findings established that officers responded to report of truck driving erratically, spotted truck in motion and circled around block, returned to find truck parked and empty, defendant approached officers on foot from nearby street, *group of other intoxicated individuals was nearby truck*, and officers were unaware truck belonged to defendant at time of arrest) (emphasis added). In contrast to the facts in *Fields*, here the trial court's findings establish that defendant was the only individual present at the scene of the accident other than first responders and appeared to have been recently ejected from a moving vehicle. We therefore hold the trial court's findings sufficient to support its conclusion of law that the information before the magistrate established probable cause to issue a warrant for a sample of defendant's blood.

B. Motion to Suppress Evidence Gathered Incident to Defendant's Arrest

Defendant next argues that the trial court erred in denying his motion to suppress evidence gathered incident to his arrest for DWI because Trooper Bailey's affidavit did not establish probable cause that defendant was driving the vehicle involved in the accident. The trial court's order denying this motion mirrored its first order in all material respects. Therefore, for the reasons discussed *supra*, we also uphold the trial court's second order denying defendant's motion to suppress.

C. Motions to Dismiss

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Defendant contends that the trial court erred in denying his motions to dismiss the DWI charge due to a lack of substantial evidence that he had recently driven the vehicle involved in the accident. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “‘Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “The trial court is not required to determine that the evidence excludes every reasonable hypothesis of

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innocence before denying a defendant's motion to dismiss." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (citation omitted).

To survive defendant's motions to dismiss in the instant case, the State was required to put forth substantial evidence that defendant "dr[ove] any vehicle upon any highway . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2019). Viewed in a light most favorable to the State, the evidence at trial established that a firefighting team responded to a report of a forest fire and observed an overturned truck ablaze in the woods near a public highway. When the team arrived to the rural stretch of road after midnight, defendant lay in a roadside ditch atop gouge marks left in the grass by the overturned truck, approximately thirty yards before the truck. Based upon defendant's position and the cuts, scrapes, and dirt covering his body, he appeared to have been ejected from the truck before it caught fire.

Defendant was the only person present when the firefighters arrived. When Trooper Bailey arrived at the scene, defendant exhibited slurred speech, red, glassy eyes, and a strong odor of alcohol. Defendant denied ownership of the truck. The truck was later determined to be registered to his home address, less than a mile away. Business cards bearing his name were strewn about the scene of the accident. Defendant refused to take a breathalyzer test. He claimed that he heard the wreck

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at his nearby home and approached on foot to investigate, and when he got close to the truck it exploded and knocked him into the ditch. Firefighters found no evidence of an explosion. Defendant was taken to the hospital for treatment, where Trooper Bailey obtained a sample of his blood for chemical analysis. Subsequent testing of the sample indicated his blood alcohol concentration was 0.14.

This amounts to substantial evidence that defendant drove the truck upon a public highway while his blood alcohol concentration exceeded the legal limit of 0.08, in violation of N.C. Gen. Stat. § 20-138.1(a). The trial court did not err in denying defendant's motion to dismiss.

D. Testimony on Defendant's Revoked License

In his final argument on appeal, defendant argues that the trial court violated N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019) by allowing Trooper Bailey to testify that defendant's license was revoked during the relevant time. However, the same information was later elicited from defendant's two witnesses without objection. "It is a well-settled rule that if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence." *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986) (citations omitted). We therefore deem defendant's initial objection waived and refuse to review the merits of this argument.

III. Conclusion

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For the foregoing reasons, we find no error in defendant's trial.

NO ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).