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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-255

No. COA20-354

Filed 1 June 2021

Cleveland County, No. 18CRS595

STATE OF NORTH CAROLINA

v.

MARCIA CARSON FINNEY, Defendant.

Appeal by Defendant from judgment entered 23 October 2019 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant.

INMAN, Judge.

¶ 1 Defendant Marcia Carson Finney ("Defendant") appeals from a judgment entered following convictions for driving while intoxicated ("DWI") and habitual impaired driving. Defendant contends that the trial court erred in denying her motion to suppress her blood alcohol concentration results on the ground that police lacked probable cause to arrest her for DWI. After careful review, we hold Defendant

has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The evidence introduced at trial tends to show the following:

¶ 3 On 17 October 2017, at about 8:00 a.m., Shelby City Police Officer Jason Torres, accompanied by Detective Scott Hamrick, responded to a disturbance call at a Waffle House concerning a group of disruptive customers upset about cold food. Upon arrival, Officer Torres saw Defendant, her father, and her boyfriend leaning against the wall of the Waffle House. The manager of the Waffle House told Officer Torres that Defendant and her companions were the disruptive patrons that prompted the call to police.

¶ 4 Officer Torres reviewed the surveillance footage from the Waffle House, which showed Defendant drive through several parking spots, ignore the traffic pattern for the lot, and park the car before exiting the vehicle with her father and boyfriend. A witness at the scene told Officer Torres that Defendant's car hit the curb as she was parking the vehicle.

¶ 5 Officer Torres noted that Defendant, her father, and her boyfriend were all visibly impaired. He saw three open alcoholic beverage containers in their car and smelled a noticeably strong odor of alcohol from Defendant's breath. Detective Hamrick likewise observed a strong odor of alcohol from Defendant's breath. Officer Torres further noted that their car was parked slightly crooked, albeit within the

lines of its parking space. Based on the video, witness statements, and his observations of Defendant indicating intoxication, Officer Torres began investigating Defendant for DWI.

¶ 6 Officer Torres asked Defendant if she had consumed any alcohol and Defendant responded that she had the previous night. When asked what time she consumed the alcohol, Defendant gave four different answers, telling Officer Torres that she had a drink at 7:00, 8:00, 9:00, and, finally, 10:00 p.m. Officer Torres observed that Defendant's eyes were red and glassy. Following questioning, Defendant offered to take a breathalyzer test, so Officer Torres contacted another officer and requested he bring a portable breathalyzer to the scene.

¶ 7 While waiting for the breathalyzer to arrive, Officer Torres conducted a simple dexterity test with Defendant—requiring her to touch each fingertip to her thumb while counting aloud—which she passed. Defendant dropped her phone on the ground and, after picking it up, returned it to her back pocket after a few attempts. Officer Torres then asked Defendant if she knew her alphabet; before he could finish speaking, Defendant began reciting the alphabet. Officer Torres asked her to stop so he could finish his question, and asked Defendant to recite the alphabet starting with the letter "F" and ending with the letter "N." Defendant started with the wrong letter. Officer Torres stopped Defendant and repeated his request. Defendant again failed to comply, starting with "L" and ending with "O." Officer Torres repeated his request

a third time, and Defendant recited the letters of the alphabet consistent with his request.

¶ 8 After the alphabet test, Defendant offered to "walk the line" and then proceeded to twirl, which Officer Torres considered peculiar given that she was currently being questioned by police about driving while impaired. Detective Hamrick, too, observed that Defendant's motor skills seemed normal but that she was unusually animated and carefree considering the circumstances. A short time later, an officer with the portable breathalyzer arrived and Officer Torres administered two tests. After both tests returned positive results for alcohol, Officer Torres placed Defendant under arrest for DWI. Defendant was then taken to the county detention center, where test results showed her blood alcohol concentration as .24, three times the legal limit.

¶ 9 Defendant was indicted on one count each of DWI and habitual impaired driving. Prior to trial, Defendant moved to suppress all evidence obtained from the stop at the Waffle House for lack of probable cause. The trial court heard Defendant's motion on 21 October 2019 and heard *voir dire* testimony from Officer Torres and Detective Hamrick. The trial court also viewed footage from Officer Torres's and Detective Hamrick's body cameras, as well as the Waffle House surveillance video. Defendant testified in support of her motion.

¶ 10 During cross-examination by Defendant's counsel, Officer Torres testified that he had never performed a DWI stop before the date he investigated Defendant, had never conducted any sobriety tests outside of training, and had not been trained to conduct standardized field sobriety tests like the horizontal gaze nystagmus or walk-and-turn tests. Defendant's counsel also solicited answers showing Officer Torres's testimony included specific details that were not found in his written report, despite his testifying earlier that his report was "complete."

¶ 11 At the conclusion of the pre-trial hearing and after hearing arguments of counsel, the trial court made oral findings of fact and concluded Officer Torres had probable cause to arrest Defendant under the totality of the circumstances. Specifically, the trial court found:

> Upon his initial talking to [Defendant], [Officer Torres] did note . . . as also noted by Detective Hamrick, a strong odor of alcohol from [Defendant's] breath [and] that she . . . drove across spaces to pull into the space that she pulled into . . . .
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> That she . . . parked crooked, I think, over-emphasizes her parking. It's clear that her parking was not perfect. . . . [T]he parking crooked, based on what the Court saw in the video . . . is almost minimal to the point of being ignored, but the officer noted that she wasn't parked completely straight.
>
> She was leaning against the wall. And even after the officer asked her to stop leaning against the wall, she leaned . . . against the wall again . . . during the course of his talking to her.

> She admitted drinking alcohol. She said it was the night before and . . . had been drinking between, between 7:00, 8:00, 9:00, and then finally said 10:00 p.m. last night. . . . The officer observed that she had red, glassy eyes.
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> . . . [D]uring . . . his test of requesting to perform the alphabet, . . . she started early, and twice she performed that alphabet test wrong. She started early twice, performed it wrong. The officer then—which the Court . . . gives credence to—formed an opinion that her mental faculties were appreciably impaired by . . . alcohol.
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> She did appear—to the officer and in the video that the Court saw—somewhat, somewhat jovial, animated, and not nervous. She did indeed, when the officer asked her to step away from the . . . place where she was questioned . . . she did indeed drop her phone, which is another indicia of a totality of circumstances of, of probable cause of impairment.
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> She did test—she did test positive two times on the . . . portable breath test. There were open containers of alcohol in the vehicle and Officer Hamrick, upon watching pretty much the whole interaction with [Defendant], in which he was the training officer for Officer Torres, did indeed concur in, in Officer Torres's assessment that [Defendant] was appreciably impaired by alcohol.

¶ 12 Defendant was tried before a jury and found guilty of DWI. She then pled guilty to habitual impaired driving. The trial court sentenced Defendant to 13 to 25 months imprisonment, and Defendant gave oral notice of appeal.

II. ANALYSIS

¶ 13 Defendant contends the trial court erred in denying her motion to suppress

and challenges—as either improper or unsupported by the evidence—several of the trial court's factual findings supporting its determination of probable cause. When these findings are discarded, Defendant then asserts that the remaining factual findings are inadequate to support probable cause. Because our review of the record discloses evidence supporting the trial court's findings and this Court is prohibited from reweighing the reliability or credibility of that evidence, we hold Defendant has failed to demonstrate error.

1. Standard of Review

¶ 14 "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State to determine whether the facts are supported by competent evidence and whether those factual findings in turn support legally correct conclusions of law." *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted). Unchallenged findings "are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). Challenged findings are binding "if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (quoting *State v. Peterson*, 347 N.C. 253, 255, 491 S.E.2d 223, 224 (1997)). In other words, "a trial court's resolution of a conflict in the evidence will not be disturbed on appeal." *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000).

¶ 15 Probable cause is determined from the totality of the circumstances, *State v. Jackson*, 262 N.C. App. 329, 335, 821 S.E.2d 656, 662 (2018), and exists if "a prudent officer in [the arresting officer's] position would reasonably have believed defendant's mental or physical faculties to have been appreciably impaired as the result of the consumption of an intoxicant." *State v. Parisi*, 372 N.C. 639, 650, 831 S.E.2d 236, 244 (2019).

2. The Challenged Findings Are Supported by the Evidence

¶ 16 Defendant asserts the following findings are unsupported by the evidence: (1) Defendant had a strong odor of alcohol coming from her breath; (2) Defendant failed to follow the parking lot's traffic pattern; (3) Defendant parked the vehicle crooked; (4) Defendant was constantly leaning against the wall of the Waffle House; and (5) Defendant was animated, too relaxed, and not nervous. All of these findings are supported by competent evidence in the record.

a. Odor of Alcohol

¶ 17 Officer Torres testified at *voir dire* that Defendant had a "pretty strong" odor of alcohol "coming from her breath" when she was speaking with him. Detective Hamrick likewise testified he "smell[ed] a strong odor of alcoholic beverage coming from her breath." This evidence unquestionably supports the trial court's finding that police smelled a strong odor of alcohol coming from Defendant's breath. Defendant's arguments to the contrary, which effectively ask us to reweigh the evidence and make

a different factual finding based on her contention that the trial court erroneously considered Officer Torres "credible," are without merit. *Steen*, 352 N.C. at 237, 536 S.E.2d at 7.

b. Parking Lot Traffic Pattern

¶ 18 Defendant argues the trial court's finding that she ignored the parking lot's traffic pattern before pulling into her parking space is unsupported by the evidence based on her assertion that Officer Torres did not testify to that effect in the suppression hearing. However, the transcript of the suppression hearing shows that Officer Torres testified Defendant was "not driving through the lanes [and was] going through the parking spots. . . . She's not following the traffic pattern." Further, the trial court received into evidence and viewed video footage of Defendant ignoring the traffic pattern of the parking lot while driving. The trial court's finding was thus supported by competent evidence.

c. Defendant's Parking

¶ 19 Defendant next asserts the trial court erroneously found as a fact that Defendant parked "crooked." This overstates the finding of the trial court:

> That she . . . parked crooked, I think, over-emphasizes her parking. *It's clear that her parking was not perfect*. . . . [T]he parking crooked, based on what the Court saw in the video . . . is almost minimal to the point of being ignored, *but the officer noted that she wasn't parked completely straight*.

(emphasis added). In other words, the trial court found that Defendant did not park "perfect[ly]," and that Officer Torres observed Defendant "wasn't parked completely straight." Officer Torres's testimony, as well as the video evidence played for the trial court, supports the finding of fact as made by the trial court.

d. Defendant's Leaning

¶ 20 Defendant also overstates this finding, contending: (1) the trial court found she was "constantly leaning" throughout her interactions with police; and (2) such a finding is unsupported given the numerous instances in which Defendant was not leaning against a wall. However, the trial court actually found that "[Defendant] was leaning against the wall. And even after the officer asked her to stop leaning against the wall, she leaned, leaned against the wall again . . . during the course of his talking to her." This finding is supported by the evidence before the trial court. Officer Torres testified Defendant was leaning against the wall when they began conversing, and Defendant's own counsel admitted that Officer Torres's body camera showed "at some point she may lean back up against the wall[;]" given this statement by Defendant's counsel, and considering the fact that we must view the evidence in the light most favorable to the State, *Moore*, 152 N.C. App. at 159, 566 S.E.2d at 715, we hold this finding is supported by competent evidence.

e. Defendant's Body Language and Demeanor

¶ 21 Officer Torres testified that Defendant, after completing the alphabet test on her third attempt, "did a twirl or a twist. It was—it was, kind of, very . . . peculiar that she did that. . . . Typically, people don't do that when we're talking to them. It, it just seemed kind of odd." Detective Hamrick testified:

> I thought she was a little bit animated in her actions. . . . [H]ow she kind of turned around, and then she was kind of dancing out there at one time. And she seemed pretty calm and, and laid-back . . . . [U]sually people are, are nervous . . . when they're being questioned. . . . I think she was at ease because of having consumed some kind of impairing substance."

After viewing the video evidence, the trial court found that "[s]he did appear—to the officer and in the video that the Court saw—somewhat, somewhat jovial, animated, and not nervous." The trial court's findings concerning Defendant's demeanor and body language are supported by competent evidence.

¶ 22 Defendant also argues that, even if this finding is supported by the evidence, it cannot be used to support a determination of probable cause because nervousness is sometimes used to support probable cause in other circumstances. We note, however, that Defendant was more than "not nervous," but also "jovial" and "animated." She also cites no case law for the proposition that a person's overly-relaxed and animated demeanor in the face of police questioning cannot, under certain circumstances, contribute to probable cause—particularly when that person

is suspected of being intoxicated and to have lowered inhibitions.[1] Probable cause is determined from the totality of the circumstances presented by the facts, *Steinkrause*, 201 N.C. App. at 293, 689 S.E.2d at 381, and, given the circumstances here, we hold the trial court's findings as to Defendant's demeanor and body language support its conclusion of probable cause.

3. The Trial Court's Findings Support Its Conclusion on Probable Cause

¶ 23 Defendant relies on *State v. Overocker*, 236 N.C. App. 423, 435, 762 S.E.2d 921, 929 (2014) to argue that the facts found by the trial court do not support probable cause. In *Overocker*, the defendant met with police in a bar parking lot after he backed his SUV into a motorcycle that was illegally parked and out of his line of sight. 236 N.C. App. at 424, 762 S.E.2d at 922. Police suspected the defendant was intoxicated because he was "talking loudly," but "did not observe anything unusual about the [d]efendant's appearance, smell, walking, balance, eyes, or speech, other

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[1] Detective Hamrick testified to this effect, telling the trial court "I think she was at ease because of having consumed some kind of impairing substance." Further, none of the cases cited by Defendant in which nervousness supported probable cause involved arrests of individuals for DWI. *See generally State v. Young*, 242 N.C. App. 679, 778 S.E.2d 104, 2015 WL 4898652 (2015) (unpublished) (defendant arrested for possession with intent to sell or deliver cocaine); *State v. Watkins*, 220 N.C. App. 384, 725 S.E.2d 400 (2012) (defendant arrested for trafficking in opium or heroin, intent to deliver controlled substances, possession of controlled substances, maintaining a vehicle used for keeping and selling a controlled substance, and driving while license revoked); *State v. Galati*, 214 N.C. App. 562, 714 S.E.2d 867, 2011 WL 3569970 (2011) (unpublished) (defendant arrested for trafficking in marijuana by transportation and possession); *State v. Morton*, 204 N.C. App. 578, 694 S.E.2d 432 (2010) (defendant arrested for possession of drug paraphernalia).

than he was talking loudly." *Id.* at 426, 762 S.E.2d at 923. One of the officers spoke with the defendant, who gave different answers to how much he had drunk in the bar; in the course of their conversation, the officer noticed a "not real strong, light" odor of alcohol coming from the defendant. *Id.* at 426, 762 S.E.2d at 923. Another officer noticed the defendant had "a faint odor of alcohol on his person and red, glassy eyes." *Id.* at 427, 762 S.E.2d at 924. The defendant then performed two standardized field sobriety tests without difficulty, and he did not slur his speech when conversing with police. *Id.* He did, however, test positive for alcohol in two portable breathalyzer tests, leading police to arrest him for impaired driving. *Id.* Based on these facts, the trial court granted the defendant's motion to suppress and dismissed the charges against him, and we affirmed the trial court's order on appeal. *Id.* at 436, 762 S.E.2d at 930.

¶ 24 This case is different. The trial court here found facts including a strong odor of alcohol observed by two witnesses, open containers of alcohol in the car Defendant was driving, and repeated failed attempts to follow instructions on a field sobriety test. Although Defendant in this case, like the defendant in *Overocker*, showed little outward impairment to her physical motor skills, the trial court's other findings support a determination of probable cause under the totality of the circumstances. *See State v. Townsend*, 236 N.C. App. 456, 465, 762 S.E.2d 898, 905 (2014) ("[the defendant] argues that because he did not exhibit signs of intoxication such as slurred

speech . . . or physical instability, there was insufficient probable cause . . . . We are not persuaded; as this Court has held, the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired." (citations omitted)).[2]

III. CONCLUSION

¶ 25 For the foregoing reasons, we hold Defendant has failed to demonstrate reversible error.

NO ERROR.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).

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[2] Defendant also relies on an unpublished decision, *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650, 2015 WL 67193 (2015) (unpublished), for support. That case is not binding on this court and is distinguishable given that Officer Torres smelled a strong odor of alcohol coming from Defendant's breath. *See, e.g., State v. Lindsey*, 249 N.C. App. 516, 523, 791 S.E.2d 496, 502 (2016) (declining to follow *Sewell* for these reasons).