IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-724

No. COA20-925

Filed 21 December 2021

Wake County, No. 16 CRS 223679

STATE OF NORTH CAROLINA

v.

HUSSINA JACQUELIN PAKTIAWAL, Defendant.

Appeal by defendant from judgment entered 28 February 2020 by Judge Andrew H. Hanford in Wake County Superior Court. Heard in the Court of Appeals 20 October 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for State-Appellee

Sandra Payne Hagood for Defendant-Appellant

CARPENTER, Judge.

¶ 1 Hussina Jacquelin Paktiawal ("Defendant") appeals from judgment entered upon a jury's verdict finding her guilty of driving while impaired. Defendant requests this Court to exercise its discretion in granting her petition for writ of certiorari ("PWC") and to perform an *Anders* review of the record. After careful review, we deny Defendant's PWC and dismiss the appeal.

I. Factual and Procedural Background

¶ 2 The evidence presented at trial tends to show the following: on the night of 17 December 2016, Defendant was stopped by Deputy Matthew Johnson ("Deputy Johnson") of the Wake County Sheriff's Office. At the intersection of Oberlin Road and Glenwood Avenue, Deputy Johnson was traveling northbound in a lane opposite Defendant, who was traveling southbound, when Deputy Johnson witnessed Defendant stop at the stoplight. Deputy Johnson testified Defendant's vehicle drew his attention because its "front tires were completely over the [white] stop bar," in violation of North Carolina law. Shortly thereafter, Deputy Johnson made a U-turn onto Glenwood Avenue to further observe Defendant. He then saw Defendant's vehicle "strike the center median, driving on top of the median and then correcting back into the lane of travel." Defendant's two traffic violations—stopping over the stop bar and striking the median curb—caused him to pursue Defendant.

¶ 3 Deputy Johnson testified that as he followed Defendant, he observed Defendant's car "cross over the center yellow line with both passenger tires," which she straddled for a "short distance" before correcting her vehicle. At this point, he decided to conduct a traffic stop on Defendant's vehicle. After Deputy Johnson activated his blue lights, Defendant again drove her vehicle over the center line before properly stopping about fifty yards down the road.

¶ 4 Deputy Johnson further testified that while advising Defendant of the reason

he stopped her, he noticed strong odors of burnt marijuana and alcohol coming from the vehicle. Based on the odors, Defendant's bloodshot eyes, and slow slurred speech, Deputy Johnson asked Defendant how much she had to drink, to which she responded, "none." Deputy Johnson initiated standardized field sobriety testing on Defendant. In conducting the Horizontal Gaze Nystagmus ("HGN") test, Deputy Johnson observed four of six clues that are relevant in the standardized administration of the HGN. Following Deputy Johnson's testimony regarding HGN testing, the trial court admitted him as an expert in HGN testing. After administering the HGN test on Defendant, he asked her "if she was under the influence of any medications like Xanax" and "inquired about the odor of burned marijuana." Defendant admitted to taking a total of one milligram of Xanax over the course of the day—.5 milligrams at 11:00 a.m. and .5 milligrams at 2:00 p.m.—and smoking marijuana earlier that night. Defendant took the stand at trial and confirmed she split the normal dosage of her prescribed Xanax during the day, taking half the dose in the morning and the other half in the afternoon, but denied telling Officer Johnson that she had smoked marijuana that day. Deputy Johnson testified regarding the other field sobriety tests administered on Defendant, including a walk-and-turn test and a one-leg-stand test as well as a portable breath test. The portable breath test for alcohol returned a negative result for the presence of alcohol. After performing the tests, considering the totality of the circumstances, Deputy Johnson

was of the "opinion that [D]efendant had consumed a sufficient quantity of an impairing substance so as to appreciably impair her mental and/or physical faculties." He placed Defendant under arrest and issued a citation to Defendant for driving while impaired. After Defendant was taken into custody, Deputy Johnson obtained a search warrant to conduct a chemical analysis of her blood after she refused to consent to the test.

¶ 5 Irvin Lee Allcox, a forensic chemist with the City-County Bureau of Identification, testified for the State and was admitted by the trial court as an expert in forensic chemistry and forensic toxicology. Mr. Allcox received Defendant's blood sample for analysis. His analysis identified the presence of amphetamine, cannabinoids, cocaine, and Xanax in Defendant's blood sample.

¶ 6 At the 5 December 2018 session of Wake County District Court, Defendant was convicted and sentenced to ten days of imprisonment in the Misdemeanant Confinement Program, which was suspended for twelve months of unsupervised probation. Defendant appealed her conviction to the Wake County Superior Court.

¶ 7 Defendant filed a pretrial motion to suppress evidence attained after the stop alleging Deputy Johnson lacked reasonable suspicion to stop her, lacked probable cause to arrest her, and had not Mirandized her before she made the incriminating statements. The superior court denied Defendant's motion to suppress because: (1) stopping past the stop bar was a traffic infraction, giving Deputy Johnson reasonable

suspicion to stop her; (2) the totality of circumstances gave Deputy Johnson probable cause to arrest her; and (3) none of Defendant's constitutional rights had been violated as probable cause was apparent without evidence of her admissions.

¶ 8 A jury trial began on 24 February 2020 in the Wake County Superior Court before the Honorable Andrew H. Hanford, judge presiding. At the close of the State's case, defense counsel moved to dismiss the matter. The trial court denied the motion. At the close of all evidence, defense counsel renewed its motion to dismiss, which was also denied. On 28 February 2020, the jury found Defendant guilty of driving while impaired. The trial court imposed a Level 5 punishment and sentenced Defendant to ten days' imprisonment in the Misdemeanant Confinement Program, suspended for twelve months of unsupervised probation. Defendant filed a PWC on 10 March 2021.

II. Jurisdiction

¶ 9 Defendant filed a PWC believing she likely waived her right of appeal by failing to give oral notice of appeal at trial and by failing to file a written notice with the clerk within fourteen days as required by Rule 4(a) of the North Carolina Rules of Appellate Procedure.

¶ 10 Defendant first contends this Court should grant the PWC because her "attempt to give notice demonstrates" her intent to appeal. Under the judgment's order of commitment section, the trial court checked the box indicating "[t]he defendant gives notice of appeal from the judgment of the Superior Court to the

appellate division." Additionally, the record includes a copy of Administrative Office of the Courts (AOC) Form No. CR-350 – Appellate Entries, which was signed by the trial court judge on 28 February 2020.

¶ 11 Our Court has previously held that a failure to comply with Rule 4 "precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008); *see State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778–79 (2011) (holding a defendant did not preserve his right to appeal pursuant to Rule 4 although the record contained appellate entries). Thus, we conclude Defendant failed to properly give notice of appeal from the trial court's judgment under Rule 4. *See* N.C. R. App. P. 4.

¶ 12 Alternatively, Defendant requests this Court issue this writ in its discretion pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure. Rule 21 allows our Court to issue a writ of certiorari "in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1). For this Court to issue the writ, the petition "must show merit or that error was probably committed below." *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (2013) (citations omitted). As a discretionary writ, certiorari is only to be issued for "good and sufficient cause shown." *Id.* at 564, 741 S.E.2d at 471. *Compare cf. State v. Rouson*, 226 N.C. App. 562, 741 S.E.2d 470

(2013) (denying a PWC for lack of merit where the trial court's conclusions of law were fully supported by its findings of fact), *with cf. State v. Posner*, 2021-NCCOA-147 (granting a meritorious PWC due to the trial court's incorrect application of the law).

¶ 13 Lastly, Defendant asserts we should grant the PWC to "protect [Defendant's] right to review in accordance with *Anders v. California*, 386 U.S. 738[, 87 S. Ct. 1396, 18 L. Ed. 2d 493] (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985)", as well as her statutory right to review under N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a), which would otherwise be lost. For the reasons set forth below, we conclude Defendant has failed to "show merit or that error has probably been committed." *See Rouson*, 226 N.C. App. at 563 –64, 741 S.E.2d at 471.

III. *Anders* Brief

¶ 14 Counsel appointed to represent Defendant "is unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal" and requests this Court conduct a full examination of the record on appeal for possible prejudicial error pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

¶ 15 Under *Anders*,

> a defendant may appeal even if defendant's counsel has determined the case to be "wholly frivolous." In such a situation[,] counsel must submit a brief to the court

> "referring to anything in the record that might arguably support the appeal." Counsel must furnish the defendant with a copy of the brief, the transcript, and the record and inform the defendant of his or her right to raise any points he or she desires and of any time constraints related to such right.

State v. Dobson, 337 N.C. 464, 467, 446 S.E.2d 14, 16 (1994) (citing *Anders*, 386 at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498). We conclude counsel for Defendant complied with the requirements of *Anders* and *Kinch* by advising Defendant of her right to submit her own written arguments to this Court and by giving Defendant copies of the documents necessary to do so.

¶ 16 Defendant's counsel directs our review to whether: (1) Deputy Johnson had reasonable suspicion to justify the traffic stop; (2) Deputy Johnson had probable cause to arrest Defendant; (3) the trial court erred in admitting Defendant's incriminating statements where Defendant made the statements without receiving *Miranda* warnings; (4) the trial court erred in allowing Deputy Johnson to testify regarding HGN testing and other field sobriety testing techniques; (5) the trial court erred in denying Defendant's motions to dismiss; (6) the trial court erred in admitting the portion of Deputy Johnson's dashboard camera footage which appeared to portray Defendant swallowing something; (7) the trial court erred by allowing the jury to review the dashboard camera footage during deliberations and by reinstructing the jury on illustrative evidence; and (8) the trial court erred in calculating Defendant's

sentence. We consider each issue in turn.

A. Reasonable Suspicion

¶ 17 "A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff'd*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed. 2d 198 (2008) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1875, 20 L. Ed. 2d 889, 906 (1968)). Reasonable suspicion must be "based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) (citations and internal quotation marks omitted). The existence of reasonable suspicion is considered in the "totality of the circumstances." *State v. Cooper*, 186 N.C. App. 100, 103, 649 S.E.2d 664, 666 (2007), *disc. rev. denied*, 362 N.C. 476, 666 S.E.2d 761 (2008).

¶ 18 Here, Deputy Johnson witnessed Defendant stop her car over the stop bar at a traffic light and saw Defendant's vehicle cross a yellow line. Further, Deputy Johnson testified he saw Defendant "strike the [curb of the] center median, driving on top of the median and then correcting back into the lane of travel." Since stopping across a stop bar and crossing a yellow line are both traffic violations, both facts independently provided Deputy Johnson with the requisite reasonable suspicion to warrant stopping Defendant. *See* N.C. Gen. Stat. § 20-158(b)(5) (2019); N.C. Gen. Stat. § 20-146(c)

(2019); *Johnson*, 370 N.C. at 38, 803 S.E.2d at 141. Further, Deputy Johnson witnessing Defendant strike a curb, in the totality of the circumstances, gave rise to a reasonable suspicion that Defendant was under the influence. *See State v. Wainwright*, 240 N.C. App. 77, 86–87, 770 S.E.2d 99, 106 (2015) (reasoning weaving coupled with driving dangerously near pedestrian traffic was sufficient for the officer to find reasonable suspicion and to justify a traffic stop).

B. Probable Cause

¶ 19 Probable cause to effectuate a warrantless arrest exists when the "facts and circumstances within an officer's knowledge . . . are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Robinson*, 221 N.C. App. 267, 272–73, 727 S.E.2d 712, 717 (2012) (internal citations and quotation marks omitted); *see State v. Parisi*, 372 N.C. 639, 656, 831 S.E.2d 236, 247–48 (2019). Probable cause to arrest for driving while impaired can arise from the defendant's appearance, odor, speech, and/or performance on field sobriety tests. *State v. Townsend*, 236 N.C. App. 456, 465, 762 S.E.2d 898, 905 (2014).

¶ 20 Here, Defendant demonstrated driving characteristics that led Deputy Johnson to suspect impaired driving, Defendant performed poorly on three field sobriety tests, had bloodshot eyes, and had slow, slurred speech. These facts are sufficient to support a finding of probable cause to arrest Defendant. *See Parisi*, 372 N.C. at 656, 831 S.E.2d at 247–48 (holding officer had probable cause to arrest a

defendant where defendant performed poorly on multiple field sobriety tests, smelled moderately of alcohol, had red and glassy eyes, and had admitted to drinking three beers).

C. Failure to Give *Miranda* Warnings

¶ 21 Our Supreme Court has clarified the "free to leave" standard used for determining whether a suspect is in custody for *Miranda* purposes. *See State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). The Court stated, "the appropriate inquiry in determining whether a defendant 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.'" *Id.* at 339, 543 S.E.2d at 828.

¶ 22 Here, Deputy Johnson testified at the suppression hearing as to Defendant's statement in which she admitted to taking Xanax and smoking marijuana earlier that day. The trial court asked Deputy Johnson if Defendant was free to leave during his questioning, to which Office Johnson responded, "[n]o." Additionally, the trial court allowed the statement to be admitted during the trial, over defense counsel's objection. Deputy Johnson testified that after he performed the HGN test, he asked Defendant follow-up questions to determine if Defendant was under the influence of any medication, and he inquired about the burnt marijuana odor. Defendant was neither under formal arrest nor had her freedom of movement been restrained to the

degree associated with a formal arrest at this point during the *Terry* stop. *See Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. Because we find Defendant was not in custody for purposes of *Miranda*, we conclude the trial court did not err in admitting Defendant's incriminating statements. *See State v. Braswell*, 222 N.C. App. 176, 181, 729 S.E.2d 697, 701 (2012) (holding *Miranda* safeguards did not apply to a *Terry* stop where the defendant was asked about his involvement in a recent car crash and about his medications before officers subjected him to standardized field sobriety tests).

D. Deputy Johnson as an Expert on Field Sobriety Testing

¶ 23 Rule 702 of the North Carolina Rules of Evidence provides:

> a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to . . . (1) [t]he results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1) (2019).

¶ 24 Before the trial began, the trial court made clear to the prosecutor and to defense counsel that Deputy Johnson was not to testify regarding the ultimate issue of impairment, although he could testify as to the clues he observed. During trial, Deputy Johnson testified he had completed a forty-hour course on standardized field sobriety testing, four hours specifically on drugged driving, and he had been certified

to administer the standardized field sobriety tests. The course also included training on HGN testing. He also testified regarding the clues he observed during Defendant's HGN test. The trial court admitted Deputy Johnson as an expert in HGN testing. Deputy Johnson further testified as to other field sobriety tests, his training and experience with those tests as an officer, the instructions to be given for those tests, as well as the instructions he gave Defendant, and the clues he observed in administering those tests to Defendant. We find no error.

E. Denial of Defendant's Motions to Dismiss

¶ 25 "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).

¶ 26 "Upon [a] 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. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

¶ 27 Pursuant to N.C. Gen. Stat. § 20-138.1, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) [w]hile under the influence of an impairing substance." N.C. Gen. Stat. § 20-138.1(a)(1) (2019). An "impairing substance" has been defined by statute as "[a]lcohol, controlled substance under Chapter 90 of the

General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. Gen. Stat. § 20-4.01(14a) (2019).

¶ 28 In this case, the State presented substantial evidence of each essential element of the crime charged for driving while impaired. Deputy Johnson testified Defendant was driving her vehicle on Glenwood Avenue, a "street" within the State of North Carolina. *See* N.C. Gen. Stat. § 20-138.1(a)(1). Thus, the first element is met. Deputy Johnson administered three different standardized field sobriety tests, all on which Defendant performed poorly. Following the administration of the tests, Deputy Johnson opined that Defendant had consumed a sufficient quantity of an impairing substance so as to appreciably impair her mental and/or physical faculties. Next, Defendant admitted to taking her prescribed Xanax medication and to smoking marijuana earlier that day. Finally, the analysis on Defendant's blood samples revealed she had tested positive for amphetamine, cannabinoids, cocaine, and Xanax—all of which are controlled substances under Chapter 90. Considered in the light most favorable to the State, there is substantial evidence Defendant was "under the influence of an impairing substance"; thus, the second element is met. *See* N.C. Gen. Stat. § 20-138.1(a)(1). It is undisputed Defendant was the operator of the vehicle involved in the offense. *See Scott*, 356 N.C. at 595, 573 S.E.2d at 868. Therefore, the trial court did not err in denying Defendant's motions to dismiss. *See id. at* 591, 595,

573 S.E.2d at 868.

F. Admission of Video Footage Capturing Defendant in Patrol Car

¶ 29 "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Because relevancy is not a discretionary ruling, it is subject to plain error review and "given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398 (1992), *cert. denied*, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 241 (1992).

¶ 30 Here, Defendant did not object to the jury viewing the portion of the dashboard camera video which captures her trying to swallow something. The video was relevant because it is evidence that has a tendency to make a fact of consequence, Defendant's impairment, more or less probable than without the evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 401. Thus, we find the trial court did not err by allowing the jury to watch this segment of the video.

G. Jury's Review of Video during Deliberations

¶ 31 N.C. Gen. Stat. § 1233 provides:

> [i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury

> and may permit the jury to reexamine in open court the requested materials admitted into evidence.

N.C. Gen. Stat. § 15A-1233(a) (2019).

¶ 32 Here, the jury asked the trial court if it could review a portion of the dashboard camera video again. The trial court notified the prosecutor and Defendant, and then made a discretionary decision to allow the jury to review the video evidence again.

¶ 33 The jury also asked the court during deliberations whether it could "use the video as evidence to determine the level of impairment[.]" The trial court had a bench conference with the prosecutor and defense counsel regarding the jury's request, and the trial court instructed the jury again on illustrative evidence. Because Defendant did not object to the reinstruction, she is entitled to plain error review only. Our review of the record reveals no "fundamental error" occurred. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Therefore, we find no prejudicial error with the trial court's instructions to the jury.

H. Sentencing

¶ 34 N.C. Gen. Stat. § 20-179(k) provides:

> [a] defendant subject to Level Five punishment may be fined up to two hundred dollars ($200.00) and shall be sentenced to a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended. However, the suspended sentence shall include the condition that the defendant:

> (1) Be imprisoned for a term of 24 hours as a condition of special probation; or
> (2) Perform community service for a term of 24 hours; or
> . . .
> (4) Any combination of these conditions.

N.C. Gen. Stat. § 20-179(k) (2019). "The judge may impose any other lawful condition of probation." N.C. Gen. Stat. § 20-179(k)(4) (2019).

¶ 35 Here, the trial court imposed a Level 5 punishment after finding the mitigating factor of Defendant's safe driving record outweighed any other aggravating factors for consideration. The trial court then entered a ten-day sentence, suspended for twelve months and placed Defendant on unsupervised probation. Defendant was ordered to pay costs totaling $602.50, attorney's fees totaling $1,430, a $100 fine, a $60 appointment fee, and a community service fee. The trial court also imposed special conditions on Defendant's probation, including that she must complete twenty-four hours of community service during the first ninety days of probation and surrender her driver's license. We find no error with the sentence the trial court imposed on Defendant or the special conditions placed on her probation. *See* N.C. Gen. Stat. § 20-179(k).

I. Defendant's *Pro Se* Brief

¶ 36 Defendant filed an eighteen-page *pro se* brief with this Court on 5 April 2021, in which she brings forward nineteen arguments, most of which we have already discussed above. Since we conclude Defendant's remaining arguments have no

meritorious basis and did not show error was probably committed by the trial court, we decline to consider them in detail, and we deny the PWC. *See Rouson*, 226 N.C. App. at 563–6, 741 S.E.2d at 471.

IV. Conclusion

¶ 37 For the reasons stated above, we deny Defendant's PWC because she has shown neither merit nor that the trial court committed prejudicial error in its proceedings. Therefore, we dismiss the appeal.

PETITION DENIED & APPEAL DISMISSED.

Judges GRIFFIN and JACKSON concur.

Report per Rule 30(e).