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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-583

Filed 2 April 2024

Wake County, No. 18 CRS 207555

STATE OF NORTH CAROLINA

v.

JAMES EDWARD HARRELL, JR.

Appeal by Defendant from Judgment rendered 17 August 2022 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Mark Hayes for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Edward Harrell, Jr. (Defendant) appeals from a Judgment for Habitual Impaired Driving entered following a jury verdict finding him guilty of Driving While Impaired. The Record before us tends to show the following:

On 22 April 2018, North Carolina Highway Patrol officers set up a driver's

license checkpoint, stopping all cars going each direction on a two-lane road to ensure each driver had a valid driver's license. Five or six officers were standing in the road wearing reflective vests and carrying flashlights. Their vehicles were on the side of the road, including a marked patrol car with its lights on. Defendant approached the checkpoint driving his vehicle and proceeded past the troopers without slowing down. Trooper Donald Cuff testified at trial that troopers were indicating with their flashlights for Defendant to stop, but he continued past them. As Defendant drove past them, several officers yelled for him to stop. Defendant drove approximately twenty feet past the checkpoint before slamming on his brakes.

When Trooper Cuff approached the vehicle, he smelled "the strong odor of alcohol coming from the vehicle." Trooper Cuff asked Defendant to exit the car and administered three field sobriety tests. During the first test, the Horizontal Gaze Nystagmus, Defendant failed to follow instructions three times. During the second test, the walk and turn test, Defendant exhibited four out of eight clues, indicating Defendant had consumed enough alcohol to impair his judgment. During the third test, the one-leg stand test, Defendant exhibited one out of four clues indicating impairment. Defendant declined to submit to a preliminary breath test.

Based on his interactions with Defendant, including the clues Defendant exhibited during the field sobriety tests, Trooper Cuff arrested Defendant for Driving While Impaired. On or about 14 August 2018, Defendant was indicted for Driving While Impaired and Habitual Impaired Driving pursuant to N.C. Gen. Stat. § 20-

138.5.

On 25 May 2022, Defendant filed a Motion to Suppress, seeking to exclude evidence gathered by law enforcement pursuant to the stop. On 1 August 2022, the trial court entered an Order Denying Defendant's Motion to Suppress for Lack of Probable Cause to Arrest. The trial court made several Findings of Fact, notably including the following: "Trooper Cuff observed the Defendant pass through the checkpoint location without stopping for any of the five law enforcement officers who were wearing reflective vests and instructing [D]efendant to pull over with their flashlights."

Defendant's case proceeded to trial on 16 August 2022. On 17 August 2022, the jury rendered a verdict finding Defendant guilty of Driving While Impaired. Defendant stipulated to being a Habitual Impaired Driving offender. The trial court rendered a Judgment sentencing Defendant to 21 to 35 months of imprisonment. The trial court noted Defendant may be eligible for work release after serving twelve months and ordered Defendant be on continuous alcohol monitoring while on post-release supervision. Defendant gave oral Notice of Appeal in open court.

<u>Appellate Jurisdiction</u>

The trial court rendered Judgment and sentenced Defendant on 17 August 2022. The Record also reflects a written Judgment signed by the trial court on 17 August 2022, but the Judgment is neither file-stamped nor certified by the Clerk. Rule 4 of the North Carolina Rules of Appellate Procedure provides appeal from a

judgment *rendered* in a criminal case must be given either orally at trial or by filing written notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of judgment. N.C.R. App. P. 4 (2021). Here, the Record reflects the written Judgment was signed by Judge Keith O. Gregory on 17 August 2022, and Defendant gave oral Notice of Appeal in open court on 17 August 2022. There is no dispute between the parties that Judgment was in fact entered and Defendant's oral Notice of Appeal was timely. Therefore, this Court has appellate jurisdiction over this appeal.[1]

Issue

The issues on appeal are whether (I) Defendant received ineffective assistance of counsel (IAC) when his trial counsel failed to object to the constitutionality of the checkpoint; and (II) the trial court plainly erred by admitting evidence gathered during the traffic stop.

Analysis

I. Ineffective Assistance of Counsel

Defendant raises an IAC claim based on his trial counsel's failure to challenge the constitutionality of the setup of the checkpoint. In general, claims of IAC should

[1] Nevertheless, we urge all parties in future to comply with Rule 9(b)(3) of the North Carolina Rules of Appellate Procedure, which provides: "Every pleading, motion, affidavit, or other document included in the printed record should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination should show the date on which it was entered." N.C.R. App. P. 9(b)(3) (2023).

be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415."). However, "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted).

In order to prevail on an IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. I, §§ 19 and 23).

Here, Trooper Cuff testified at the suppression hearing that although several officers signaled for Defendant to stop, Defendant drove twenty feet past the

checkpoint and "slammed on the brakes and just stopped in the middle of the street" once officers yelled for him to stop. Based on this testimony, the trial court made the following Finding of Fact: "Trooper Cuff observed the Defendant pass through the checkpoint location without stopping for any of the five law enforcement officers who were wearing reflective vests and instructing [D]efendant to pull over with their flashlights." Defendant has not challenged this Finding. Consequently, it is binding on appeal. *State v. Brown*, 199 N.C. App. 253, 256, 681 S.E.2d 460, 463 (2009) (Defendant failed to challenge any findings of fact in motion to suppress, thus, "[a]s a result, the findings of fact are binding on appeal[.]" (citations omitted)).

Based on the trial court's Finding that Defendant passed through the checkpoint, Defendant could not have challenged the validity of the checkpoint. In *White v. Tippett*, this Court stated "the constitutionality of certain types of checkpoints . . . applies only where the petitioner or defendant has in fact been stopped at a checkpoint." 187 N.C. App. 285, 288, 652 S.E.2d 728, 730 (2007). There, although the petitioner did not challenge the validity of the checkpoint, "petitioner's avoidance of the checkpoint is relevant to her next argument[.]" *Id.* The Court then concluded as to the second issue:

> [A]n officer pursued a person who had evaded—intentionally or by accident—a checkpoint and come to a stop in a residential driveway. The officer then approached the stopped car and spoke to the occupants. At that point, from a combination of the driver's evasion of a checkpoint, the odor of alcohol surrounding the driver, and a brief conversation with the driver, the officer had

> reasonable grounds to believe that the driver had committed an implied-consent offense.

Id. at 289, 652 S.E.2d at 730 (citation omitted).

Similarly, in *State v. Collins*, the defendant drove toward a police checkpoint but turned into a residential driveway about 100 yards before the checkpoint. 219 N.C. App. 374, 375, 724 S.E.2d 82, 83 (2012). A trooper left the checkpoint and parked behind the defendant with his lights flashing. *Id.* The trooper noticed a strong odor of alcohol when he approached the defendant, and the defendant could not produce his driver's license when asked. *Id.* at 376, 724 S.E.2d at 83. The defendant's motion to suppress evidence was denied by the District Court; however, the Superior Court on appeal held the checkpoint violated Highway Patrol guidelines and reversed, granting the defendant's motion to suppress. *Id.* at 376-77, 724 S.E.2d at 83-84. This Court concluded *White* was controlling and explained *White* "squarely held that the validity of a checkpoint is not relevant in deciding whether an officer had reasonable grounds to stop a driver when the driver was not actually stopped at the allegedly invalid checkpoint." *Id.* at 378, 724 S.E.2d at 84. Thus, when a defendant evades or attempts to evade a checkpoint, he cannot then challenge the validity of the checkpoint.

In this case, as in *White* and *Collins*, Defendant did not stop at the checkpoint. Rather, the trial court found Defendant drove through the checkpoint and did not stop until after officers yelled for him to stop. Defendant did not challenge the trial

court's Finding of Fact establishing that. "Unchallenged findings of fact are binding on appeal." *State v. Byrd*, 287 N.C. App. 276, 279, 882 S.E.2d 438, 440 (2022) (citing *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015)). Because Defendant drove through the checkpoint, he could not have challenged the validity of the checkpoint under *White* and *Collins*. Consequently, Defendant's IAC claim fails because he cannot show counsel's alleged error—failing to contest the validity of the checkpoint—prejudiced him.

II. Plain Error

Defendant contends, in the alternative, the trial court committed plain error by admitting the evidence obtained after Defendant was stopped past the checkpoint. Defendant's argument rests entirely on the validity of the checkpoint.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the

accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Even if Defendant were able to challenge the validity of the checkpoint, and thus the admission of evidence on that basis, any alleged error here does not rise to the level of plain error. Our precedent establishes the act of driving past a checkpoint can give rise to a reasonable suspicion to justify a stop under the totality of the circumstances. Our Supreme Court has held "an officer, in light of and pursuant to the totality of the circumstances or the checkpoint plan," may stop a vehicle which has attempted to evade a checkpoint "within its perimeters for reasonable inquiry to determine why the vehicle turned away." *State v. Foreman*, 351 N.C. 627, 632-33, 527 S.E.2d 921, 924 (2000). Thus, driving through a checkpoint may, in the totality of the circumstances, give rise to reasonable suspicion justifying a stop.

In this case, the trial court found Defendant drove through the checkpoint. This was consistent with trial testimony by Trooper Cuff that Defendant drove twenty feet past the checkpoint, past multiple officers wearing reflective vests and using flashlights to instruct him to pull over, before slamming on his brakes. These circumstances, under our caselaw, gave Trooper Cuff reasonable suspicion to stop Defendant. *See id.* Given our precedent, Defendant could not have challenged the validity of the traffic stop, and his attempt to evade the checkpoint, under the totality of the circumstances, gave rise to reasonable suspicion sufficient to conduct a stop. Thus, Defendant cannot meet his burden to show an error occurred at trial.

Therefore, the trial court did not commit plain error by admitting evidence gathered pursuant to the stop. Consequently, the trial court did not err in accepting the jury verdict, imposing judgment, and sentencing Defendant as a Habitually Impaired Driving offender.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).