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NO. COA11-960
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

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| v. CHARLA DEAN DAVIS, Defendant. | Gaston County Nos. 08 CRS 14067-70 08 CRS 61772 |
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Appeal by the State from order entered 23 May 2011 by Judge Marvin P. Pope, Jr. in Gaston County Superior Court. Heard in the Court of Appeals 10 January 2012.

Roy Cooper, Attorney General, by Kathryne E. Hathcock, Assistant Attorney General, for the State-appellant.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellee.

MARTIN, Chief Judge.

Defendant was convicted of reckless driving, driving while license revoked, second-degree murder, two counts of felony hit and run, two counts of assault with a deadly weapon inflicting serious injury, and driving while impaired. Defendant appealed to this Court in *State v. Davis*, ___ N.C. App. ___, 702 S.E.2d 507 (2010), which contains a detailed recitation of the facts in

this case, arguing in relevant part that the trial court committed reversible error in allowing the State's expert witness, Paul L. Glover, to give his opinion of defendant's blood alcohol concentration (BAC) at the time of an accident based on odor analysis. This Court held the odor analysis used was so unreliable that the trial court abused its discretion in admitting the testimony, and granted defendant a new trial on the charges of second-degree murder, the two counts of assault with a deadly weapon inflicting serious injury, driving while impaired, and reckless driving. *Id.* at ___, 702 S.E.2d at 514, 522.

In May 2011, before defendant's second trial, defendant moved in limine to exclude Mr. Glover's odor analysis testimony. After a hearing, the trial court granted the motion. The State appeals.

The sole issue on appeal is whether the trial court abused its discretion in granting defendant's motion in limine to exclude Mr. Glover's odor analysis testimony. For the following reasons, we affirm.

North Carolina Rule of Evidence 702 provides that, "[i]f scientific, technical or other specialized knowledge will assist

the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009) (amended 2011). However, "trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citing N.C. Gen. Stat. § 8C-1, Rule 104(a) (2003)). "In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Id.* (internal quotation marks omitted). Thus, we review the trial court's ruling for an abuse of discretion. *See id.*

Our courts employ a "three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Id.* (citations omitted) (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)). At issue in defendant's May 2011 motion in limine was

the reliability of Mr. Glover's method of proving defendant's BAC at the time of the accident.

In determining whether an expert's method of proof is sufficiently reliable as an area for expert testimony where the trial court is "without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques," the court should

generally focus on the following nonexclusive "indices of reliability" to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting [the] scientific hypotheses on faith, and independent research conducted by the expert."

Id. at 460, 597 S.E.2d at 687 (alteration in original) (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-53 (1990)).

Retrograde extrapolation is a mathematical analysis in which a known blood alcohol test result is used to determine what an individual's blood alcohol level would have been at a specified earlier time. The analysis determines the prior blood alcohol level on the bases of (1) the time elapsed between the occurrence of the specified earlier event (e.g., a vehicle crash) and

the known blood test, and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test.

State v. Cook, 362 N.C. 285, 288, 661 S.E.2d 874, 876 (2008).

Although "[o]ur Courts have recognized retrograde extrapolation as a reliable method of proving BAC," the objectionable portion of Mr. Glover's testimony did not involve the retrograde extrapolation itself, "but rather . . . the reported alcohol concentration upon which Mr. Glover based the extrapolation."

Davis, ___ N.C. App. at ___, 702 S.E.2d at 512. Mr. Glover based his retrograde extrapolation analysis on a report of Police Sergeant Richard Spry that defendant's breath smelled of alcohol at 8:14 a.m., more than ten hours after the accident. *Id.* at ___, 702 S.E.2d at 512. Mr. Glover used the lowest concentration of alcohol that is detectable by the human nose in determining, in his opinion, defendant's BAC at 8:14 a.m., and then used that figure to determine, in his opinion, defendant's BAC at the time of the accident. *Id.* at ___, 702 S.E.2d at 512.

When this case was previously before this Court, while considering certain indices of reliability, we noted that Mr. Glover failed to specify the texts providing the information to which he testified and the texts were not presented at trial, that "there was no evidence . . . Mr. Glover had performed any

independent verification of an odor analysis or 'smell test' of this type," and that, unlike the testifying expert in *State v. Corriher*, 184 N.C. App. 168, 645 S.E.2d 413 (2007), Mr. Glover had never submitted his method for peer review. *Davis*, ___ N.C. App. at ___, 702 S.E.2d at 513. Importantly, we discussed at length the statutory requirements for admission of chemical analyses of breath, blood, and urine under N.C.G.S. § 20-139.1, and noted Mr. Glover's odor analysis lacked any of the rigorous standards in that statute. *Id.* at ___, 702 S.E.2d at 513-14. We specifically noted that, under N.C.G.S. § 20-139.1(b)(1)-(2), "in order for the results of a breath analysis to be admissible, the analysis must be 'performed in accordance with the rules of [the Department of Health and Human Services]'" (DHHS) "as well as be performed by a person using an instrument for which a permit has been issued by DHHS," that "N.C.G.S. § 20-139.1(b2) provides that DHHS 'shall perform preventive maintenance on breath-testing instruments used for chemical analysis,'" that "N.C.G.S. § 20-139.1(b3) requires 'the testing of at least duplicate sequential breath samples,'" and that "[t]he results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol

concentration greater than 0.02." *Id.* at ___, 702 S.E.2d at 513 (alteration in original) (quoting and citing N.C. Gen. Stat. § 20-139.1(b)(1)-(2), (b2), (b3) (2009)).

On appeal, the State contends the trial court's Findings of Fact 14 and 15 in its order are unsupported by the evidence. Finding of Fact 14 states that "[n]o additional new evidence was offered to support the odor analysis rendered by Mr. Glover which differed from the evidence which was offered at the trial in June of 2009." The State points out that, before the May 2011 hearing, the State offered into evidence six texts and papers to corroborate Mr. Glover's testimony. However, the trial court's findings specifically refer to those six texts and papers, stating "Mr. Glover testified that the State's Exhibit Number 1, the six publications which he used to reach his conclusion concerning the odor analysis to get to the retrograde extrapolation . . . dated back to 1890" The trial court then found that "[t]he fact that [the six publications Mr. Glover used to reach his conclusion] were submitted into evidence does not alter the fact the [sic] opinion of Mr. Glover is highly questionable as to reliability." The trial court also found that "a person's ability to smell differs widely" as shown by the State's Exhibit 4, and that defendant's expert witness,

Dr. Andrew P. Mason, an expert in forensic toxicology, testified that "he had researched all the areas of odor analysis and found that it was a novelty type of procedure which had not been appropriately investigated and researched" and that "one of the only papers [relied on by Mr. Glover] directly on point with . . . the issue . . . indicated a significant number of false positives and incorrect answers given by trained law enforcement officers in the detection of the odor of alcohol on the breath." The State also contends Finding of Fact 15 is unsupported by the evidence. Finding of Fact 15 states that "[t]he only difference in Mr. Glover's testimony per his examination is that he would give the Defendant the benefit of the doubt and use the lowest standard which would render a blood alcohol content of .16 rather than the .18 that was testified to in June of 2009 by Mr. Glover." The State contends Mr. Glover's testimony at the May 2011 hearing was much more extensive than it had been previously. However, simply because Mr. Glover provided additional testimony about his method does not make that method any more reliable. Moreover, the State's brief fails to address other deficiencies in Mr. Glover's method previously identified by this Court, including that Mr. Glover had performed no tests to independently verify his odor analysis and that Mr. Glover's

method lacked any of the rigorous standards for chemical analysis of breath under N.C.G.S. § 20-139.1. The State's arguments are entirely without merit.

Affirmed.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).