

NO. COA14-255

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Wake County  
No. 10CRS228769

MARGARITO CHAVEZ,  
Defendant.

Appeal by defendant from judgment entered on or about 11 October 2013 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 26 August 2014.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Angel E. Gray, for the State.*

*Katy Strait Chavez, for defendant-appellant.*

STROUD, Judge.

Defendant appeals judgment for impaired driving arguing his motion to suppress evidence from his blood draw should have been allowed. For the following reasons, we find no error.

I. Background

The facts of this case are not in dispute: On 5 December 2010, defendant was involved in a two car automobile accident and was cited for "failing to yield the right of way in obedience to a duly erected flashing red light" and driving

"[w]hile subject to an impairing substance." Defendant called his wife, an attorney, at 2:46 a.m.; she was in Florida at the time. Officer A. D. Johnson arrived at the accident scene and after conducting an investigation arrested defendant. At 3:10 a.m., the passenger in defendant's vehicle called defendant's wife to let her know he had been arrested. Defendant's wife began calling various people in Wake County, seeking a witness for defendant. At 3:20 a.m., defendant was informed of his rights and refused to take a breathalyzer test; he asked to call his wife and attorney. Defendant called his wife at 3:20 a.m. At 4:02 a.m., defendant's wife spoke with Ms. Rebecca Moriello, also an attorney, and asked her to observe "the blow and the -- everything." At 4:03 and 4:04 a.m., defendant refused to submit to a breathalyzer test. At 4:14 a.m., a warrant was issued for defendant's blood to be drawn. Ms. Moriello arrived at the jail around 4:20 a.m., and she was informed that she was too late to witness the breathalyzer test. By 4:22 a.m., Ms. Moriello had called defendant's wife to inform her that she was too late to witness the testing procedures. Defendant's blood was drawn at 4:34 a.m. Defendant was ultimately released at 6:19 a.m.

On or about 28 June 2012, defendant filed various motions ultimately requesting that the trial court "dismiss the charge

against him [or] . . . [i]n the alternative, . . . that any and all evidence beyond the arrest of the Defendant be suppressed[.]” Defendant’s motions were based upon (1) violation of defendant’s Sixth Amendment right because Ms. “Morielo was not allowed to see the Defendant while he was confined in the Wake County Jail[,]” (2) a *Ferguson* violation because Ms. “Morielo was not allowed to view the testing procedures under N.C.G.S. § 20-16.2[,]” (3) a *Knoll* violation because “his release from detention was unreasonably delayed[,]” and (4) lack of “probable cause to believe that a crime had been committed and that he had committed it.”

The Honorable Judge Howard Manning heard the defendant’s motions during the 24 April 2013 session of Criminal Court, and in open court announced his rulings, which were ultimately typed onto AOC-CR-305, Rev. 7/95, “JUDGMENT/ORDER OR OTHER DISPOSITION” as:

MOTION TO SUPPRESS PROBABLE CAUSE DENIED

MOTION TO SUPPRESS THE FERGUSON ISSUE IS  
DENIED

KNOLL MOTION TO DISMISS IS DENIED

6<sup>TH</sup> AMENDMENT PARTIALLY ALLOWED AS TO ANY  
STATEMENTS MADE BY THE DEFENDANT AFTER THE  
BLOOD DRAW

ADA MARK STEVENS WILL PREPARE THE ORDER

COURT REPORTER: GINA MACCHIO

On or about 11 October 2013, defendant pled guilty, by an Alford plea, to impaired driving but reserved the right to appeal the trial court's denial of his motions. Defendant appeals.

## II. Preservation of Appeal

The State argues that "[d]efendant [f]ailed to [p]reserve an [a]rgument [t]hat [h]e is [e]ntitled to [r]elief [b]ecause [n]o [o]rder [e]xists in the [r]ecord on [a]ppeal." While the "JUDGMENT/ORDER OR OTHER DISPOSITION" does note that "ADA MARK STEVENS WILL PREPARE THE ORDER[,]" which apparently did not occur, the document in our record still substantively rules on defendant's multiple motions and was signed by the presiding judge; this document constituted "entry" of the order. See *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) ("*Entering* a judgment or an order is a ministerial act which consists in spreading it upon the record. (quotation marks and citation omitted) (emphasis in original)). In addition to *entering* the "JUDGMENT/ORDER OR OTHER DISPOSITION[,]" Judge Manning *rendered* judgment by announcing the rationale for each of his rulings in open court at the conclusion of the hearing on the motions. *Id.* ("*Rendering* a judgment or an order means to pronounce, state, declare, or announce the judgment or order,

and is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy." (citations, quotation marks, and brackets omitted) (emphasis in original)). As we noted in *State v. Barlett*,

N.C. Gen. Stat. § 15A-977(f) (2011), requires that the judge must set forth in the record his findings of facts and conclusions of law. However, N.C. Gen. Stat. § 15A-977(f), has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing. If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress.

A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.

\_\_\_ N.C. App. \_\_\_, \_\_\_, 752 S.E.2d 237, 239 (2013) (citations, quotation marks, and brackets omitted).

There is no material conflict in the evidence presented, the trial judge clearly rendered the order by stating the rationale for his rulings at the conclusion of the hearing, and the order was ministerially entered by the filing of the "JUDGMENT/ORDER OR OTHER DISPOSITION" which addresses each of defendant's multiple issues raised in his motion at trial, including the ones made on appeal. See *id*; *Oates*, 366 N.C. at

266, 732 S.E.2d at 573. Thus, defendant has preserved this issue for appeal.

### III. Defendant's Rights

Despite the multiple grounds for defendant's pretrial motions, on appeal, defendant raises only two issues. First, defendant contends that he "had his rights violated when his attorney witness was not allowed to observe the blood draw and his condition even though she arrived before the blood draw had occurred." (Original in all caps.) Essentially, defendant argues that the trial court should have allowed his *Ferguson* motion to dismiss based upon a constitutional violation of his rights, and, without citation of any authority, defendant asks that we apply the rights to have a witness present for blood alcohol testing performed under North Carolina General Statute § 20-16.2 to blood draws taken pursuant to a search warrant. In addition, defendant contends that a failure to do so is a violation of his constitutional rights. The defendant's statutory and constitutional arguments are conflated but whether we review for a constitutional or a statutory violation, the standard of review is still *de novo*. See *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) ("Alleged statutory errors are questions of law, and as such, are reviewed

*de novo.*" (citation omitted)); *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), ("The standard of review for alleged violations of constitutional rights is *de novo.*"), *disc. review denied*, 363 N.C. 857, \_\_\_\_ S.E.2d \_\_\_\_, *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

Here, the facts, including the timing of when defendant was informed of his rights, defendant's refusal of the breathalyzer, the issuance of the search warrant, and the blood draw, are not in dispute. Defendant states,

The Trial Court implied that part of the reasoning behind its denial of the motion to suppress or dismiss was that the blood draw was made pursuant to a warrant issued by the magistrate. An example offered by the Court was that a search warrant could not be delayed until an attorney arrived. However the reasoning in this argument is flawed. The testing in this case did not have to be delayed at all to accommodate the witness.

Actually, the trial court did not just imply that the reasoning behind the denial of the motions was that the blood draw was made pursuant to a warrant – that is actually what the trial court ruled, and properly so. Defendant had no constitutional right to have a witness present for the execution of the search warrant, which in this situation was performing a blood test,

and the timing of Ms. Moriello's arrival is irrelevant to the issue defendant has presented on appeal.<sup>1</sup>

Defendant directs our attention to North Carolina General Statute § 20-16.2(a) regarding his right to have an attorney and/or witness present for his chemical analysis. See N.C. Gen. Stat. § 20-16.2 (2009). Defendant then cites case law, and his arguments regarding each case are contingent upon the applicability of North Carolina General Statute § 20-16.2 to his blood test. However, North Carolina General Statute § 20-16.2 is not applicable to this case because defendant's blood was drawn pursuant to a search warrant.

Our Supreme Court determined in *State v. Drdak*,

The Court of Appeals held that the trial judge erred in denying defendant's motion to suppress because the blood test was not performed according to the procedure authorized under N.C.G.S. §§ 20-16.2 and 20-139.1. This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: This section does not limit the introduction of other competent evidence as to a defendant's alcohol concentration, including other

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<sup>1</sup> Under North Carolina General Statute § 20-16.2(a), there is a 30 minute waiting period allowed for a witness "to view the testing procedures" performed under that statute, N.C. Gen. Stat. § 20-16.2(a)(6) (2009), usually an breathalyzer test. The undisputed evidence showed that Ms. Moriello arrived after the 30 minute period had expired; also, defendant has abandoned his *Ferguson* argument on appeal.



chemical tests. This statute allows other competent evidence of a defendant's blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1.

. . . .  
Basically, the defendant's constitutional arguments must fail because of defendant's flawed contention that the State is limited to evidence of blood alcohol concentration which was procured in accordance with the procedures of N.C.G.S. § 20-16.2. This defective argument results from the failure of the defendant to recognize the other competent evidence clause provided in N.C.G.S. § 20-139.1(a). We hold that none of the constitutional rights of the defendant have been violated.

330 N.C. 587, 592-94, 411 S.E.2d 604, 607-08 (1992) (quotation marks omitted). In *State v. Davis*, this Court relied on *Drdak*, and noted, "We hold that testing pursuant to a search warrant is a type of other competent evidence referred to in N.C.G.S. § 20-139.1." 142 N.C. App. 81, 85-86, 542 S.E.2d 236, 239 (quotation marks omitted), *disc. review denied*, 353 N.C. 386, 547 S.E.2d 818 (2001). While *Davis* went on to conclude that the officers ultimately had complied with North Carolina General Statute § 20-16.2, *id.* at 84-87, 542 S.E.2d at 238-40, under *Drdak* and *Davis*, if there is "other competent evidence[,]" we need not consider issues as to compliance with North Carolina General Statute § 20-16.2. *Davis*, 142 N.C. App. at 85-86, 542 S.E.2d at 239; *Drdak*, 330 N.C. at 592-94, 411 S.E.2d at 607-08.

Furthermore, *Davis* plainly states that "a search warrant is a type of other competent evidence[.]" 142 N.C. App. at 86, 542 S.E.2d at 239.

The relevant portion of North Carolina General Statute § 20-139.1 provides,

In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. *This section does not limit the introduction of other competent evidence as to a person's alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.*

N.C. Gen. Stat. § 20-139.1(a) (2009) (emphasis added). As defendant's blood draw was performed pursuant to a valid search warrant, we conclude that the trial court properly denied defendant's motion to suppress the blood evidence and to dismiss the impaired driving charge. *See State v. Shepley*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (Nov. 4, 2014) (No. COA14-390) ("We hold that, because defendant's blood was drawn pursuant to a search warrant obtained after he refused a breath test of his blood alcohol level, [defendant] did not have a right under N.C. Gen. Stat. § 20-16.2 to have a witness present."). This argument is overruled.

Secondly, we have thoroughly reviewed defendant's argument

based upon *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), that defendant "was denied the opportunity to have a witness observe [his] condition and that lost opportunity cause[d] prejudice[.]" We conclude that defendant fails to show prejudice on the facts in this case. This argument is overruled.

#### IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Chief Judge MCGEE and Judge BRYANT concur.