

NO. COA14-738

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Cleveland County  
Nos. 12 CRS 3427  
12 CRS 56061

JIMMY SCOTT SISK

Appeal by defendant from judgment entered 22 November 2013  
by Judge J. Thomas Davis in Cleveland County Superior Court.  
Heard in the Court of Appeals 5 November 2014.

*Roy Cooper, Attorney General, by Neil Dalton, Special  
Deputy Attorney General, for the State.*

*Leslie C. Rawls for defendant-appellant.*

DAVIS, Judge.

Jimmy Scott Sisk ("Defendant") appeals from his convictions  
for habitual impaired driving and attaining the status of an  
habitual felon. On appeal, he contends that the trial court  
erred by admitting the results of his blood test into evidence.  
After careful review, we conclude that Defendant received a fair  
trial free from error.

**Factual Background**

The State's evidence at trial tended to establish the

following facts: At approximately 5:10 p.m. on 20 October 2012, Trooper Ben Sanders ("Trooper Sanders") of the North Carolina Highway Patrol was on duty driving his marked patrol vehicle southbound on N.C. Highway 10 in Cleveland County. Defendant was driving a motor home in the opposite direction. Trooper Sanders observed Defendant's vehicle veer into Trooper Sanders' lane and then swerve back into Defendant's original lane. Trooper Sanders turned his patrol car around in pursuit and activated his blue lights and siren.

Trooper Sanders drove for some distance before he caught up with Defendant's vehicle. Defendant then abruptly turned into a convenience store parking lot and drove through a carwash stall, causing minor damage to both the stall and the motor home. Trooper Sanders followed Defendant and then exited his patrol car. As Trooper Sanders approached Defendant's vehicle, Defendant exited the driver's side door and then stumbled back against the motor home. Trooper Sanders noticed that Defendant smelled strongly of alcohol, his speech was slurred, and he was unsteady on his feet. Trooper Sanders also observed several open beer cans on the front floorboard of the motor home. Defendant was arrested for driving while impaired.

Defendant was then transported to the intoxilyzer room of the Cleveland County Law Enforcement Center where Trooper

Sanders read and gave Defendant a copy of his implied consent rights. Defendant acknowledged his awareness of his rights and "stated that he would not take a breath test, but that he would give a blood test[.]" Approximately 23 minutes later, Trooper Sanders asked Defendant to give a breath sample, and Defendant refused. Trooper Sanders then told Defendant that he would be transported to the hospital for a blood test, and Defendant said "[o]kay."

At the Cleveland County Hospital emergency room, Defendant was placed in a waiting room, where he laid down on a gurney and fell asleep. When the technician came in, Defendant was awakened and informed that his blood was about to be drawn. Defendant made no comment or objection but "offered his arm out, and [the technician] took a blood sample from his left arm." The test results showed that Defendant's blood alcohol level was .16.

On 13 November 2012, Defendant was indicted for habitual impaired driving and attaining the status of an habitual felon. On 15 November 2013, Defendant filed a pretrial motion to suppress the results of his blood test. The trial court denied Defendant's motion.

A jury trial was held in Cleveland County Superior Court on 19 November 2013. At trial, the blood test results were

admitted over Defendant's objection. The jury convicted Defendant of both charges. The trial court sentenced Defendant to 117 to 153 months imprisonment. Defendant gave notice of appeal in open court.

### **Analysis**

Defendant's sole argument on appeal is that the trial court erred in admitting his blood test results into evidence. Specifically, Defendant contends that Trooper Sanders' failure to readvise him of his implied consent rights before the blood draw violated both N.C. Gen. Stat. § 20-16.2 and N.C. Gen. Stat. § 20-139.1(b5). We disagree.

Because Defendant objected to the introduction of the evidence at trial, this issue is preserved for appellate review. See N.C.R. App. P. 10(a)(1) ("[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). "The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008) (citation omitted), *appeal dismissed and disc. review denied*, 363 N.C. 131, 675 S.E.2d 660, *cert. denied*, 558 U.S. 865, 175 L.E.2d 111 (2009).

N.C. Gen. Stat. § 20-16.2(a) states, in pertinent part, as follows:

(a) Basis for Officer to Require Chemical Analysis; Notification of Rights. - Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

(1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.

. . . .

(3) The test results, or the fact of your refusal, will be admissible in evidence at trial.

(4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you

are under the age of 21.

N.C. Gen. Stat. § 20-16.2(a) (2013).

N.C. Gen. Stat. § 20-139.1(b5) states, in pertinent part, that

[a] person may be requested . . . to submit to a chemical analysis of the person's blood . . . in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer. . . . If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).

N.C. Gen. Stat. § 20-139.1(b5) (2013).

On appeal, Defendant does not dispute the fact that he told Trooper Sanders in the intoxilizer room that he was willing to submit to a blood test. Nor does he claim that he objected to the blood draw at the hospital. Instead, he argues that Trooper Sanders was required under N.C. Gen. Stat. § 20-139.1(b5) to readvise him of his implied consent rights prior to the blood draw. In making this argument, Defendant relies on our decision in *State v. Williams*, \_\_ N.C. App. \_\_, 759 S.E.2d 350, *disc. review denied*, \_\_ N.C. \_\_, 762 S.E.2d 201 (2014). We believe his reliance on *Williams* is misplaced.

In *Williams*, the defendant was arrested and charged with driving while impaired. He was taken to the sheriff's office where he was read and given a copy of his implied consent

rights, which he acknowledged and signed. *Id.* at \_\_\_, 759 S.E.2d at 351. An officer subsequently asked the defendant to submit to a breath test, which he refused. The officer then requested that a blood testing kit be brought in for the defendant. The officer gave the defendant a consent form for the blood test – which the defendant signed – but failed to readvise the defendant of his implied consent rights with respect to the blood test. A paramedic then proceeded to draw the defendant's blood. *Id.*

The defendant filed a motion to suppress the results of his blood test, which was granted by the trial court. *Id.* On appeal, this Court affirmed, holding that the blood test results were inadmissible because of the officer's failure to readvise the defendant of his rights prior to the blood draw. *Id.* at \_\_\_, 759 S.E.2d at 354. In reaching this conclusion, we noted that "[w]here a defendant refuses to take a breath test . . . the State may then seek to administer a different type of chemical analysis such as a blood test pursuant to [N.C. Gen. Stat. § 20-139.1(b5).]" *Id.* at \_\_\_, 759 S.E.2d at 353. However, we concluded that "the State was required, pursuant to the mandates of [N.C. Gen. Stat.] § 20-16.2(a) and as reiterated by [N.C. Gen. Stat.] § 20-139.1(b5), to re-advise defendant of his implied consent rights before requesting he take a blood test."

*Id.* at \_\_\_, 759 S.E.2d at 354.

We believe that *Williams* is distinguishable from the present case. Here, unlike in *Williams*, Defendant – without any prompting – *volunteered* to submit to a blood test. Because the prospect of Defendant submitting to a blood test originated with Defendant – as opposed to originating with Trooper Sanders – we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered. See N.C. Gen. Stat. § 20-139.1(b5) ("If a subsequent chemical analysis is *requested* pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).") (emphasis added)). Therefore, we conclude that the trial court did not err in admitting evidence of the results of Defendant's blood test. Accordingly, Defendant's argument is overruled.

### **Conclusion**

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ELMORE and ERVIN concur.