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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-703

Filed: 21 February 2017

Haywood County, No. 14 CRS 053412, 14IFS703562

STATE OF NORTH CAROLINA

v.

GREGORY LAWRENCE MACE, Defendant.

Appeal by Defendant from judgments entered 3 December 2015 by Judge Jeffrey P. Hunt and order entered 8 March 2016 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Michael E. Casterline for the Defendant.

DILLON, Judge.

Gregory Lawrence Mace (“Defendant”) appeals from a judgment entered upon a jury verdict convicting him of driving while impaired and an order denying his motion to suppress evidence of the results of a breath alcohol content (“BAC”) test administered by law enforcement after his arrest.

I. Background

In August 2014, Defendant was pulled over by a police officer while driving on an interstate. The officer noted that shortly after the stop, Defendant had a slightly red face, glassy eyes, and slurred speech. Another officer testified that when he arrived on the scene, he observed Defendant to be unsteady on his feet with slow speech. Defendant told the officers that he suffered from diabetes. After performing field sobriety tests, the officers arrested Defendant for driving while impaired and transported him to the jail in order to administer a breath test.

At the jail, one of the officers explained the procedure for the breath test to Defendant, and Defendant was able to produce one sample sufficient for analysis on his third attempt. Defendant then attempted to produce a second sample, but despite several attempts, was not able to produce one before the machine used to process the sample “timed out.” The officer recorded the second test as a refusal because Defendant had failed to provide a sufficient sample. The first sample showed Defendant’s breath alcohol content to be .13.

Prior to trial, Defendant filed a motion to suppress the results of the breath test based on the fact that the officer had not obtained two samples and had marked Defendant as a refusal for the second sample. The trial court denied Defendant’s motion to suppress, and this evidence was subsequently introduced at Defendant’s trial.

At trial, Defendant was found guilty of driving while impaired and was given a suspended sentence of seven days and 12 months of supervised probation. Defendant timely appealed.

II. Analysis

On appeal, Defendant challenges both the trial court's denial of his motion to suppress and the trial court's denial of his request for a special jury instruction concerning the element of "impairment." We address each argument in turn.

A. Motion to Suppress

Defendant first challenges the trial court's denial of his motion to suppress. In its order denying the motion, the trial court concluded that Defendant had willfully refused to provide a second breath sample. Defendant contends that several findings of fact which supported this conclusion are not supported by the evidence presented at the suppression hearing. We disagree.

At the outset, we note that several of the findings challenged by Defendant are more aptly designated as conclusions of law rather than findings of fact. Our Supreme Court has stated that "findings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008). "The trial court's findings of fact following a suppression hearing . . . are conclusive and binding on the appellate courts when supported by competent evidence." *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585

(1994). Conclusions of law based on the trial court's findings of fact are "reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

Defendant first challenges finding of fact 30:

That [Defendant] was able to provide an adequate breath sample. The Court found the Defendant's first breath sample, as evidenced in State's Exhibit 3, to be determinative of this fact.

Finding of fact 30 was properly classified as a finding of fact, and is supported by the testimony of the police officer who administered the breath test to Defendant that "[he] got a reading on the third attempt." The officer further testified that the reading "was a .13."

Defendant also challenges finding of fact 15, in which the trial court found as follows:

... [T]here was no evidence that [Defendant] suffered from any respiratory, lung, or breathing issues. At no time did [Defendant] make either [officer] aware of any such issues. Additionally, there was no evidence to demonstrate that [Defendant] was suffering from any physical stress, broken bones, bleeding, or other injuries during the times in which he was requested to provide a breath sample.

Defendant contends that this finding of fact shifts the burden from the prosecution to Defendant to explain why the second breath sample was not obtained. However, this finding is supported by the testimony of both officers that Defendant indicated he suffered from diabetes, was hearing impaired, and had trouble with his knees.

Rather than shifting the burden to Defendant, this finding simply reflects evidence presented by the State at trial.

Defendant next challenges finding of fact 31, which is properly characterized as a conclusion of law:

That in accordance with *Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971), the Defendant's actions amounted to a refusal, in that the Defendant declined a request or demand and/or omitted to comply with some requirement of law as the result of a positive intention to disobey.

Essentially, the trial court concluded that as a matter of law, Defendant's actions amounted to a refusal. This conclusion is supported by ample facts found by the trial court. Specifically, the trial court found that the officer advised Defendant of his rights, that Defendant was able to provide one adequate breath sample, and that the officer requested a second breath sample which Defendant failed to provide. In addition, the trial court found that while Defendant indicated he had knee problems, diabetes, and was hearing impaired, he did not inform the officers that he had any respiratory issues or difficulty breathing. These findings support the trial court's ultimate conclusion that Defendant intentionally declined or failed to comply with the officer's instructions. *See Tedder v. Hodges*, 119 N.C. App. 169, 175, 457 S.E.2d 881, 885 (1995) ("Failure to follow the instructions of the breathalyzer operator is an adequate basis for the trial court to conclude that [a defendant] willfully refused to submit to a chemical [breath] analysis.").

Defendant also challenges finding of fact 34, which stated that “Defendant [] failed to follow the instructions of [the officer] in submitting to the [breath test].” This finding is supported by the officer’s testimony that he gave Defendant instructions regarding the procedure for the breath test, that Defendant produced one breath sample, and that despite being given the opportunity to blow into the machine several more times, Defendant did not provide another sample. The officer further testified that Defendant did not provide a breath sample long enough to register on the machine – specifically, that “Defendant [would] stop his flow of air and the instrument would not accept another sample.” This testimony supports finding of fact 34.

Finally¹, Defendant challenges finding of fact 32, in which the trial court determined that “Defendant was aware he had a choice to take or to refuse to take the test; he was aware of the time limit within which he needed to take the test; he voluntarily elected not to take the test; and he knowingly permitted the prescribed time limit to expire before he took the test.” These findings are supported by the officer’s testimony, as detailed previously, that Defendant was provided with instructions as to how to perform the test and the consequences of refusing the test.

¹ Defendant has also challenged finding of fact 33; however, regardless of its classification as a finding of fact or conclusion of law, it is irrelevant to the trial court’s ultimate decision regarding Defendant’s motion to suppress.

The officer also informed Defendant before every blow how to do so and that if the sample was not accepted “it will be a refusal.”

Additionally, the sections of finding 32 which are properly classified as conclusions of law are as follows: “. . . Defendant’s failure to provide a second subsequent sample was willful as defined in *Etheridge v. Peters*, 301 N.C. 76, 269 S.E.2d 133 (1980). . . . [T]he Defendant’s actions were without lawful excuse.” These conclusions of law are supported by the trial court’s findings of fact, including findings 15, 30, 31, and 34. Accordingly, we conclude that the trial court did not err in denying Defendant’s motion to suppress, despite the fact that the officers were only able to obtain one breath sample. *See State v. Summers*, 132 N.C. App. 636, 638, 513 S.E.2d 575, 577 (1999) (“Sequential intoxilyzer test results are required in order to be admitted into evidence to prove a person’s particular alcohol concentration; however, *a single breath analysis is admissible only if the subsequent breath sample is a “willful refusal[.]”*) (emphasis added).

B. Jury Instruction

In his second argument on appeal, Defendant contends that the trial court erred in denying his request for a special jury instruction. We review a trial court’s refusal to give a requested jury instruction *de novo*. *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146 (1992). With respect to errors in jury instructions, a defendant must demonstrate (1) error, and (2) “that such error was likely, in light of

the entire charge, to mislead the jury.” *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005).

In addition to the pattern jury instruction on impairment, Defendant’s trial counsel requested the following instruction:

A chemical analysis of defendant’s breath obtained from an Ec/IR-II which shows an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath is deemed sufficient to prove defendant’s alcohol concentration. However, such chemical analysis does not compel you to so find beyond a reasonable doubt. You are still at liberty to consider the credibility and/or weight to give such chemical analysis when considering whether defendant’s guilt has been proven beyond a reasonable doubt.

The trial court denied Defendant’s request. On appeal, Defendant argues that by giving the pattern jury instruction without adding Defendant’s proposed instruction, the trial court directed the jury to give more weight to the results of the chemical analysis than was appropriate. We disagree.

Our Court has previously considered similar requests and has uniformly concluded that the pattern jury instruction’s language, stating that the “results of a chemical analysis are deemed sufficient evidence to prove a person’s alcohol concentration[,] does *not* create an impermissible mandatory presumption.” *State v. Beck*, 233 N.C. App. 168, 172, 756 S.E.2d 80, 83 (2014). Rather, this language “simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant’s alcohol concentration.” *State v. Narron*,

193 N.C. App. 76, 84, 666 S.E.2d 860, 866 (2008). And as in *Beck*, the trial court in the present case instructed the jury to consider *all* of the evidence presented in the case and that it was the sole judge of the weight to be given to the evidence. *Beck*, 233 N.C. App. at 172, 756 S.E.2d at 83.

Defendant's request for a clarifying instruction, while "correct in law and supported by the evidence in the case," was unnecessary in light of the fact that "the language of the pattern jury instruction *contained [Defendant's] requested instruction in substance* because it explained to the jury that it must be convinced beyond a reasonable doubt that [Defendant's] alcohol concentration was above the legal limit." *Id.* at 171, 756 S.E.2d at 83. We are bound by our prior holdings on this issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, this argument is overruled.

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).