An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1094

Filed: 15 May 2018

Washington County, Nos. 15 CRS 50069-70

STATE OF NORTH CAROLINA

v.

THOMAS RAY TWINE

On writ of certiorari to review judgments entered 24 August 2016 by Judge Wayland J. Sermons, Jr. in Washington County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Bradford Sneeden, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

TYSON, Judge.

A jury found Thomas Ray Twine ("Defendant") guilty of possession of cocaine and possession of a firearm by a convicted felon. The trial court sentenced him to consecutive active prison terms of 8 to 19 months for the drug offense and 15 to 27

months for possessing the firearm. By order entered 14 December 2016, we allowed Defendant's petition to review the judgments by writ of *certiorari*. We find no error.

I. Background

In the early morning of 8 February 2015, Plymouth Police Officer Jonathan Berry was stationary on Mackey's Road near East Main Street in Jackson Heights, North Carolina. Police had received multiple complaints about speeding in the area, and Officer Berry was "watching for speeders." At approximately 12:45 a.m., he observed two vehicles round a corner on Mackey's Road driving toward him. Using radar, he measured the first vehicle's speed as 40 m.p.h., five m.p.h. above the speed limit. As the vehicles continued traveling toward his direction, the second vehicle "accelerated" and "closed the distance on the first vehicle." Officer Berry estimated the second vehicle came "within a car length" of the first vehicle.

The two vehicles proceeded to a stop sign at the corner of East Main Street and Mackey's Road. After the first vehicle turned right at the intersection, "[t]he second vehicle came to a stop, put its left blinker on, sat there for a little while, put his right blinker on and then made a right turn on to East Main Street." Based upon his training and experience, Officer Berry believed the conduct of the second vehicle was suggestive of the driver's possible impairment. He turned his marked patrol car to follow the second vehicle down East Main Street and activated his blue lights to initiate a traffic stop near Jen Pettigrew Drive. The vehicle, a blue Ford Crown

Victoria, purportedly and initially disregarded Officer Berry's lights and sirens and continued down East Main Street at a speed of 25 m.p.h. for "between a quarter and a half a mile before stopping."

As Officer Berry left his patrol car and approached the Crown Victoria on the driver's side, he noticed two occupants sitting in the front seat. In the back seat of the car, Officer Berry saw "two containers" of Heineken beer, "one appeared to be empty and one was in a white plastic bag." The driver, later identified as Defendant, opened his door and explained that his window did not work. From the open car door, Officer Berry "detected the odor of alcohol emitting from the vehicle." He asked Defendant for his driver's license. Defendant said that he did not have a license, before clarifying that his license was suspended. Officer Berry then asked Defendant to turn off the car and step outside. Advised that he had been stopped for following another vehicle too closely, Defendant "stated that he was following the car in front of him and that's why he was following it so close." Defendant displayed no signs of impairment and did not smell of alcohol.

Officer Berry informed Defendant and his passenger that they were not under arrest, but were being detained while the open container was removed from the vehicle. He brought Defendant over to his patrol car and conducted a pat-down search for weapons. He felt "a large wad of cash" in Defendant's right front pocket, but left it undisturbed. Though Defendant claimed not to have a wallet, Officer Berry

"felt what appeared to be a wallet . . . stuffed down in his pants between a pair of shorts he had on." He retrieved the wallet and obtained Defendant's driver's license. A records check confirmed it was suspended.

Officer Berry brought the passenger out of the vehicle to join Defendant by the side of the patrol car. As the passenger was being detained, a second officer arrived at the scene. After obtaining the passenger's consent to search his person, Officer Berry found a "folded up dollar bill" in the passenger's pocket. Unfolding the bill, he found a "white powdery substance" appearing to be cocaine and placed the passenger under arrest. He then placed Defendant under arrest for driving while license revoked and placed the two suspects in the two patrol cars.

Officer Berry next removed the Heineken beer bottles from the back seat of the Crown Victoria. Upon opening the front driver's side door, he saw "the butt of a handgun sticking out" below the driver's seat. He seized the handgun, a loaded "Highpoint C-9, nine millimeter Luger," and secured it in the trunk of his patrol car. Officer Berry resumed his search of the vehicle and discovered a large plastic bag containing "a white powdery substance . . . in the driver's side door panel." Subsequent analysis by the State Crime Laboratory determined the substance was cocaine. Defendant offered no evidence in response to the State's case. The trial court granted Defendant's motion to dismiss the charge of possession of a stolen firearm.

II. Jurisdiction

An appeal of right lies in this Court from a final judgment from the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

On appeal, Defendant claims he received ineffective assistance of counsel ("IAC") in violation of his Sixth Amendment rights, because his defense counsel failed to file a pre-trial motion to suppress the evidence obtained from the traffic stop executed by Officer Berry. Alternatively, if we conclude the record on appeal does not permit a review of his IAC claim, Defendant asks that we dismiss the claim without prejudice to be raised in a motion for appropriate relief in the trial court. *See State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995).

IV. Analysis

In order to obtain relief for IAC, Defendant must show both (1) unreasonably deficient performance by his counsel and (2) a reasonable probability of a more favorable outcome at trial but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for purposes of N.C. Const. art. 1, §§ 19, 23). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not

determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

"A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment." *Heien v. North Carolina*, __ U.S. __, __, 190 L. Ed. 2d 475, 482 (2014). "Our Supreme Court has held that 'reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected.'" *State v. Osterhoudt*, 222 N.C. App. 620, 631, 731 S.E.2d 454, 461 (2012) (quoting *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008)).

"Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). It requires only "a 'minimal level of objective justification, something more than an unparticularized suspicion or hunch'" of unlawful activity. *Osterhoudt*, 222 N.C. App. at 631, 731 S.E.2d at 461 (quoting *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994)). "[T]he proper inquiry is not the subjective reasoning of the officer, but whether the objective facts support a finding that [a reasonable suspicion] existed to stop the defendant." *State v. Ivey*, 360 N.C. 562, 564, 633 S.E.2d 459, 460-61 (2006), *overruled on other grounds by Styles*, 362 N.C. at 415, 665 S.E.2d at 440. The officer's subjective motivations for performing the stop are

immaterial. *See Whren v. United States*, 517 U.S. 806, 813, 135 L. Ed. 2d 89, 98 (1996) (rejecting "argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

Here, Officer Berry stopped Defendant for following another vehicle too closely in violation of N.C. Gen. Stat. § 20-152(a). The statute provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." N.C. Gen. Stat. § 20-152(a) (2017); *see also* N.C. Gen. Stat. § 20-176(a) (2017) (making violation an infraction). Defendant notes the determination of whether a vehicle is following too closely under N.C. Gen. Stat. § 20-152(a) requires the officer to consider the speed of the vehicles, traffic, and condition of the road.

Defendant asserts uncontroverted testimony demonstrates Berry did not have a reasonable, articulable suspicion to justify the stop of Defendant's car. Officer Berry testified as follows:

> A. I observed two vehicles coming around the corner[] section of the road in my direction. The first vehicle was clocked by my front stationary radar going approximately 40 miles per hour in a 35 zone.
>
> Q. What was it that drew your attention to the vehicles?
>
> A. The vehicle that was following the first vehicle that I was [sic] clocked accelerated to the point that it

> closed the distance on the first vehicle. Coming upon my location I could not see the headlights of the vehicle so I determined it was following too closely.
>
> Q. So if I understand correctly you're saying this second vehicle got so close to the back of the first one started off you could see the headlights but you couldn't see the closer it got?
>
> A. Correct.
>
> Q. And how close would you estimate or approximate that that second vehicle got in relation to the first one?
>
> A. I would say within a car length. Less than eight feet.

He observed the vehicles traveling in this manner at approximately 12:45 a.m.

Officer Berry's "uncontroverted" account of Defendant traveling at a rate above the posted speed limit, at night, and accelerating to within a single car length of the vehicle in front of him constitutes at least the minimal level of objective justification required to stop Defendant for a suspected violation of N.C. Gen. Stat. § 20-152(a). Nothing in Officer Berry's testimony, on direct or cross-examination, casts doubt on the objective reasonableness of his decision. Defendant accepts the record does not contain any factual disputes as to the reason for the stop. Defendant does not posit the existence of any other such evidence, and accessible to his defense counsel, which lies outside the record on appeal.

V. Conclusion

"We have held that failure to file a motion to suppress is not ineffective assistance of counsel where the search or stop that led to the discovery of the evidence was lawful." *State v. Canty*, 224 N.C. App. 514, 517, 736 S.E.2d 532, 535 (2012), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013). Nothing in the record before us shows that Officer Berry performed an unlawful traffic stop. We find no reasonable probability that Defendant would have prevailed in a motion to suppress.

As Defendant cannot demonstrate the prejudice necessary to support an IAC claim, his argument is overruled. We find no error in the Defendant's jury convictions or in the judgments entered thereon. *It is so ordered*.

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).