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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1059

Filed: 15 May 2018

Graham County, Nos. 15 CRS 308-09, 319

STATE OF NORTH CAROLINA

v.

HUBERT WESLEY STROUPE

Appeal by defendant from judgments entered 1 December 2016 by Judge R. Gregory Horne in Graham County Superior Court. Heard in the Court of Appeals 7 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne Hathcock and Special Deputy Attorney General Neil Dalton, for the State.

Stephen G. Driggers for defendant appellant.

TYSON, Judge.

Hubert Wesley Stroupe ("Defendant") appeals from judgments entered upon his convictions of habitual impaired driving, aggravated felony serious injury by vehicle, and attaining habitual felon status. We find no error.

I. Background

On the night of 18 August 2013, Defendant and his son, Ronnie, were involved in a one-vehicle accident on U.S. Highway 129 in Graham County, North Carolina, between Robbinsville and Topton. Their pickup truck ran off the road and struck a guardrail several times before overturning onto the highway.

Defendant was able to crawl out from beneath the vehicle on the driver's side. Ronnie remained trapped inside the cab on the passenger side, unconscious, with his head pinned against the pavement. Rescue personnel were able to lift the truck off Ronnie and he was taken to the hospital by ambulance.

North Carolina Highway Patrol Trooper Kosal Thach ("Trooper Thach") was dispatched to the accident scene and conducted an investigation. A first responder directed Trooper Thach to Defendant, who was receiving medical attention in the back of an ambulance. When asked what had happened, Defendant "glared" at Trooper Thach and refused to speak to him about the accident. During his interaction with Defendant, Trooper Thach "could smell a strong odor of alcohol coming from his person." Trooper Thach also found a mason jar at the accident scene which held "a minute amount of liquid" with "a strong odor of alcoholic beverage." The liquid inside the mason jar registered positive for alcohol on Trooper Thach's alco-sensor device.

Because the overturned truck had "spun around" and was "facing the wrong direction" on the highway, Trooper Thach initially believed Ronnie was located in the driver's compartment. He prepared a citation charging Ronnie with driving while

impaired ("DWI") and received authorization from a magistrate to obtain a blood sample. Blood was drawn from Ronnie, who remained unconscious, at 11:43 p.m.

Trooper Thach visited Defendant at the hospital in an attempt "to determine 100 percent the driver of the vehicle itself." Defendant "still was uncooperative and did not say he was the driver, or the other person was the driver." Trooper Thach did not seek a blood sample from Defendant.

However, two days later on 20 August 2013, Trooper Thach obtained a written statement from Rita Etters, who averred Defendant was driving the truck when he and Ronnie had left her house approximately five minutes prior to the accident. Trooper Thach subsequently asked State Patrol Trooper Kelly Rhodes ("Trooper Rhodes") to visit Defendant at the hospital in an attempt to obtain additional information.

Trooper Rhodes interviewed Defendant during the morning of 23 August 2013. Defendant confirmed having arrived at Ms. Etters' residence and said that "he bought some Georgia Moon to try a trick on a friend . . . ." Though he claimed not to remember the accident, Defendant told Trooper Rhodes that if Ms. Etters said he was driving, then he "probably was" and "would admit to it if [Trooper Rhodes] needed him to."

Based upon all the evidence gathered in his investigation, Trooper Thach concluded Defendant was the driver of the truck on 18 August 2013, and that the

primary cause of the accident was Defendant's impairment by alcohol. On the afternoon of 23 August 2013, Trooper Thach "prepare[d] a Uniform Traffic Citation charging [Defendant] with driving while impaired" and appeared before a magistrate to obtain a warrant for Defendant's arrest. Trooper Thach did not arrest or detain Defendant or personally serve him with the citation.

Nearly two years and three months later, on 12 November 2015, a grand jury indicted Defendant for habitual DWI, aggravated felony serious injury by vehicle, and attaining habitual felon status. Orders for Defendant's arrest were issued the following day. Defendant was arrested and taken before a magistrate by Graham County Sheriff's Deputy Jesse Birchfield on 12 February 2016. He was brought to trial on the charges on 29 November 2016.

On 21 November 2016, Defendant filed a pretrial "Motion to Sup[p]ress/Dismiss" ("Motion to Suppress/Dismiss") seeking to "suppress *any and all evidence* gathered or obtained by law enforcement which the State intends to introduce as evidence against the Defendant in th[is] . . . action." (Emphasis supplied). Although Defendant purported to file the motion pursuant to N.C. Gen. Stat. § 20-38.6, this procedural statute applies only to cases tried in district court. *See State v. Fowler*, 197 N.C. App. 1, 27, 676 S.E.2d 523, 544 (2009) (emphasis altered) (noting that "all defendants charged with an implied-consent offense appearing *in district court* will be subject to the same procedural requirements established by

N.C.G.S. §§ 20-38.6(a), (f), and 20-38.7(a), as well as the other statutory provisions in the Article"), *appeal dismissed and disc. review denied*, 364 N.C. 129, 696 S.E.2d 695 (2010).

Because Defendant was tried by indictment in superior court on these felony charges, the procedures set out in N.C. Gen. Stat. § 15A, Article 53 govern his case. On appeal, Defendant refers to his filing as a motion to suppress and asserts a right of appeal from its denial pursuant to N.C. Gen. Stat. § 15A-979(b) (2017).

In his Motion to Suppress/Dismiss, Defendant alleged as follows:

> 1. The Defendant was arrested and charged with Driving While Impaired and Aggravated Felony Serious Injury by Vehicle . . . between on [sic] the 18th day and 26th day of August 2013.
>
> 2. [L]aw enforcement did not have a sufficient legal basis to take any enforcement action against the Defendant.
>
> 3. In addition, any evidence obtained by the police as a result of their actions were[] not justified by a reasonable suspicion, based on objective facts that the Defendant was involved in criminal activity. . . .
>
> 4. That at the time of the Defendant's arrest there was [sic] insufficient facts and circumstances to justify the arrest.
>
> . . . .
>
> 8. That insufficient evidence was presented to the Magistrate at the Defendant [sic] Initial Appearance to warrant further detention or prosecution.

(Internal citation and quotation marks omitted).

The trial court held a hearing upon Defendant's motion immediately prior to trial on 28 November 2016. After hearing the State's evidence, the court denied the motion as follows:

> [B]ased upon the totality of the circumstances, that being the extent and severity of the accident, the injury that [Trooper Thach] observed to [Ronnie], based upon the odor of alcohol that [Trooper Thach] smelled upon this defendant's person, based upon the container of -- mason jar that in the Trooper's opinion contained an alcoholic beverage, and based upon his investigation to include information from Ms. Etters, the Court would find that the Trooper possessed probable cause to charge the defendant with the offense of driving while impaired on the date he appeared in front of the magistrate; further that the Trooper had probable cause as to the warrant for aggravated felony injury by vehicle based upon the Trooper's observations and information available to him at that time. The Court, therefore, would respectfully deny the motion to suppress, motion to dismiss in this matter.

Defendant noted his exception to the court's ruling.

At trial, the State adduced testimony from Trooper Thach, who recounted the details of his investigation. The State also called Defendant's second cousin, Stephanie Carpenter, and her fiancé, Dean Sellers, who came upon the accident scene on the night of 18 August 2013, while driving to Murphy, North Carolina. Ms. Carpenter testified they stopped their vehicle, turned on their hazard lights, and called 911. Ms. Carpenter saw "a young person pinned beneath" the overturned truck and realized he was her "little cousin," Ronnie. She knelt beside Ronnie and spoke to him "just hoping that [her] voice was something for him to hold onto."

Ms. Carpenter returned to her vehicle to phone her mother when the ambulance arrived. She saw Defendant "standing, peering over Ronnie." Ms. Carpenter "could smell alcohol on [Defendant]." She heard Defendant "asking for everyone to get him out of there, and saying that he had warrants for his arrest. . . . And he then was denying that he knew who that boy that was laying in [the truck] -- who he was."

Mr. Sellers described his observations at the overturned truck as follows:

> I heard somebody hollering. And I went to the other side and there was -- a first responder finally got there, too. And I broke the door off. The top of the door where the window, you know, starts. I broke that and I [saw] he's unconscious. . . . And then, next thing I know, the guy on the driver's side, he got out of the vehicle. You know, he was wobbling, smelling of alcohol bad.

Mr. Sellers identified Defendant as the man who emerged from the driver's side of the vehicle and smelling of alcohol. He described Defendant's subsequent conduct as follows:

> He come out and then he come up to me. . . . And he asked me which one's your truck and everything and I didn't tell him and he said, you need to get me out of here, you know, and I said, I couldn't do that. Stephanie was talking to him and he said he didn't know who that was in that vehicle, you know, or nothing. He said he was just a hitchhiker trying to hitchhike a ride. . . . [T]he law got there, [the officer] was there, you know, and I was talking to him. And he asked [Defendant] if he was in the wreck and he said, no, and I said, yes, you was.

Dr. Michael Jaffe, who treated Defendant in the emergency room, testified that his "lab tests showed . . . [an] elevated alcohol level."

Outside of the jury's presence, Defendant admitted to prior DWI convictions pursuant to N.C. Gen. Stat. §15A-928(c)(1) for purposes of the charges of habitual impaired driving and aggravated felony serious injury to Ronnie by vehicle. He did not testify or present evidence. The trial court denied Defendant's motion to dismiss the charges at the conclusion of the evidence. Defendant also "renew[ed] all motions to suppress," which the trial court noted for the record.

After the jury found Defendant guilty of the substantive charges, he was separately tried and found guilty of attaining habitual felon status. The trial court sentenced him to two concurrent prison terms of 75 to 102 months. Defendant gave timely notice of appeal from the judgments.

II. Jurisdiction

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

III. Issue

Defendant challenges only the trial court's denial of his pre-trial Motion to Suppress/Dismiss. He contends the trial court's findings at the suppression hearing "do not support its conclusion that Trooper Thach had probable cause to charge [Defendant] with impaired driving or with aggravated felony serious injury by

vehicle." To the extent he failed to preserve this issue for appellate review under N.C.R. App. P. 10(a)(1), Defendant also assigns plain error to the court's ruling pursuant to N.C.R. App. P. 10(a)(4).

IV. Analysis

A. Denial of Motion to Suppress

Generally, N.C. Gen. Stat. § 15A-979(b) allows a defendant to appeal from the denial of a motion to suppress on appeal from the final judgment of conviction. Here, however, we conclude Defendant's Motion to Suppress/Dismiss did not assert a cognizable basis for the suppression of evidence under N.C. Gen. Stat. § 15A-974(a) (2017), or for the dismissal of the charges under either N.C. Gen. Stat. §§ 15A-954(a) or 15A-955 (2017).

In his Motion to Suppress/Dismiss, Defendant did not identify any evidence he alleged was unlawfully obtained by the State as a result of Trooper Thach's decision to charge him with impaired driving on 23 August 2013. *See* N.C. Gen. Stat. § 15A-974(a). Defendant instead sought to "suppress" the entirety of the State's case, i.e., "any and all evidence gathered or obtained by law enforcement which the State intends to introduce as evidence against the defendant in the . . . action," on the ground that the State lacked "a sufficient legal basis" to charge him with a crime. Likewise, in his brief to this Court, Defendant points to no particular evidence that is subject to suppression under N.C. Gen. Stat. § 15A-974(a).

B. District Court Proceedings

The sole indication of charges filed against Defendant in district court in the record on appeal is a motion for discovery dated 15 October 2013, which bears the district court file number 13 CR 50558. However, the motion provides no factual information about the case. The only other reference to district court proceedings appears at the conclusion of the trial transcript, when counsel informed the trial court that Defendant "has a total of 202 days of pretrial confinement. 181 of those days were done when the State dismissed these without leave in District Court and picked up on -- served with the indictments on February the 12th." *See* N.C. Gen. Stat. § 15A-931 (2017) (authorizing voluntary dismissals without leave). Presuming, *arguendo,* Defendant was arrested in August 2013, prior to being indicted in November 2015, Defendant has failed to show the State obtained any evidence against Defendant as a result of this prior arrest.

C. Record on Appeal

The record on appeal does not contain any citation issued upon Defendant by Trooper Thach, nor does it contain the warrant Trooper Thach purportedly obtained from the magistrate for Defendant's arrest on 23 August 2013. The record contains no evidence of Defendant's arrest, or of any search or seizure, prior to his indictment for the instant charges by the grand jury on 12 November 2015.

Absent any showing the State unlawfully obtained evidence against Defendant

as a result of the August 2013 charge, the grand jury's finding of probable cause to indict Defendant on 12 November 2015 for the current charges obviated any need to inquire into Trooper Thach's earlier charging decision. *See State v. Bass*, 280 N.C. 435, 450-51, 186 S.E.2d 384, 394-95 (1972).

V. Conclusion

Defendant has not asserted cognizable grounds for the suppression of evidence under N.C. Gen. Stat. § 15A-974(a). Moreover, Defendant's objection to the evidentiary basis for the charges against him does not constitute a valid basis to quash or dismiss the indictments under N.C. Gen. Stat. §§ 15A-954(a), -955. *See Bass*, 280 N.C. at 451, 186 S.E.2d at 395. His argument is overruled.

Defendant has failed to show any reversible errors in the jury's convictions and the judgments entered thereon. We find no error. *It is so ordered*.

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).