

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1221

Filed: 5 June 2018

Wilkes County, No. 14 CRS 50858

STATE OF NORTH CAROLINA

v.

JEFFREY ROBERT PARISI

Appeal by the State from orders entered 13 January 2016 by Judge Michael D. Duncan in Wilkes County Superior Court and 11 March 2016 by Judge Robert J. Crumpton in Wilkes County District Court. Heard in the Court of Appeals 1 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

CALABRIA, Judge.

Where the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop. We reverse and remand.

I. Factual and Procedural Background

On 1 April 2014, Jeffrey Parisi ("defendant") was cited for driving while impaired by Officer Gregory Anderson ("Officer Anderson") of the Wilkesboro Police

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Department. At a 17 June 2015 hearing in Wilkes County District Court, defendant made an oral pretrial motion to suppress the stop that resulted in the citation, alleging a lack of probable cause, and a motion to dismiss. The district court granted defendant's motions, and the State provided oral and written notice of appeal. The court subsequently entered its written "Preliminary Order of Dismissal" ("the Preliminary Order"), which, despite its caption, only granted defendant's motion to suppress. Again, the State provided written notice of appeal.

The appeal was heard in Wilkes County Superior Court on 13 November 2015. Following the hearing, the court entered an order on 11 January 2016 affirming the decision of the district court to grant defendant's motions ("the Superior Court Order"). The matter was remanded, and on 11 March 2016, the district court entered a "Final Order Granting Motion to Suppress and Motion to Dismiss" ("the Final Order"), granting defendant's motions. The State once more appealed to superior court. On 6 April 2016, the superior court affirmed the Final Order.

The State appealed the matter to this Court. On 7 February 2017, this Court entered its opinion, dismissing in part, vacating in part, and remanding the matter. *State v. Parisi*, ___ N.C. App. ___, ___ S.E.2d ___, COA16-635 (2017). In this decision, we held that "the superior court erred in its review of the district court's preliminary determination to suppress, when it remanded the case to the district court with instructions to dismiss the case." We further held, however, that the State had no

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right to appeal the district court's final order granting defendant's motion to suppress, which remained undisturbed. We noted that the suppression of the stop did not mandate the dismissal of the case, vacated the orders of dismissal, and remanded for further proceedings.

On 28 July 2017, the State filed a petition for writ of certiorari, seeking this Court's review of the Superior Court Order and the Final Order. We granted this petition on 16 August 2017.

II. Motion to Suppress

In its sole argument on appeal, the State contends that the trial court erred in concluding that Officer Anderson lacked probable cause to stop defendant, and in granting defendant's motion to suppress. We agree.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

B. Analysis

At trial, Officer Anderson testified that, on 1 April 2014, he was operating a check point on a public street. Defendant was driving the vehicle and, as it approached, Officer Anderson “kind of heard a disturbance between the occupants of the vehicle.” He said that he could not hear what they were saying, but it sounded like they were arguing. After the vehicle stopped at the check point, Officer Anderson approached the driver’s door and saw “an open box of alcoholic beverage[]” on the passenger floorboard. He did not see any open individual containers. Officer Anderson testified that defendant had “glassy, watery eyes[,]” and emitted “an odor of alcohol[.]” When asked whether he had consumed alcohol, defendant told Officer Anderson that he had consumed three beers earlier in the evening.

Officer Anderson administered the horizontal gaze nystagmus test (“HGN”), a test of impairment, and found that defendant demonstrated six “clues” indicating impairment. Officer Anderson also administered a “walk and turn” test, and defendant missed multiple steps, also an indicator of impairment. Lastly, Officer Anderson administered a “one leg stand” test, and defendant used his arms and swayed, also indicators of impairment. As a result, Officer Anderson concluded that defendant was impaired.

In the Preliminary Order, the district court found that defendant arrived at the check point, that Officer Anderson noticed defendant’s glassy eyes and an open container of alcohol, and that Officer Anderson administered multiple field sobriety

tests. However, the court went on to find that Officer Anderson “did not observe any other indicators of impairment during his encounter with Defendant, including any evidence from Defendant’s speech[,]” and concluded that “[t]he fact[s] and circumstances known to Anderson as a result of his observations and testing of Defendant are insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe Defendant had committed the offense of driving while impaired.” Likewise, the Superior Court Order noted Anderson’s observations, but concluded that they were insufficient. The Final Order incorporated the findings and conclusions of the Superior Court Order by reference.

The State offers ample case law to suggest that the findings of the lower courts did not support an ultimate conclusion that Officer Anderson lacked probable cause. Particularly relevant is the case of *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014). In *Townsend*, the officer stopped the defendant at a check point, and immediately noticed the defendant’s bloodshot eyes and odor of alcohol. Two alco-sensor tests yielded positive results, and the defendant exhibited clues indicating impairment on three field sobriety tests. We held that this was sufficient to establish probable cause. *Id.* at 465, 762 S.E.2d at 905. In the instant case, as in *Townsend*, Officer Anderson noticed defendant’s glassy eyes and odor of alcohol, and defendant exhibited clues indicating impairment on three field sobriety tests. And while no

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alco-sensor test was administered in the instant case, defendant himself volunteered the statement that he had been drinking earlier in the evening.

Our Supreme Court has held that while the odor of alcohol, standing alone, is not evidence of impairment, the “[f]act that a motorist has been drinking, when considered in connection with . . . other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138.” *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)). Once again, in the instant case, Officer Anderson was presented with the odor of alcohol, defendant’s own admission of drinking, and multiple indicators on field sobriety tests demonstrating impairment.

The superior court, in the Superior Court Order, cited the unpublished case of *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650 (2015) (unpublished), as part of its reasoning in finding a lack of probable cause. We note first that, as an unpublished decision, *Sewell* is not binding upon the courts of this State. Additionally, while many such cases are extremely fact-specific, it is crucial to note that *Sewell* is easily distinguished from the instant case. The officer in *Sewell* did not identify the defendant as the source of the odor of alcohol. The defendant in *Sewell* exhibited no clues of impairment during the “one leg stand” and “walk and turn” tests. In the instant case, by contrast, Officer Anderson clearly identified defendant as the source

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of the odor of alcohol, and defendant exhibited clues of impairment during all three field sobriety tests. Further, in each of their orders, the lower courts found as much.

Upon our review, it seems clear that the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired. Accordingly, we hold that the trial court erred in granting defendant's motion to suppress the stop. We reverse the lower courts' orders and remand for further proceedings.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I respectfully dissent from the majority reversing the trial courts' grants of Defendant's motion to suppress. Instead, I would affirm the trial courts' orders.

"The standard of review in evaluating a trial court's ruling on 'a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law.'" *State v. Hammonds*, 370 N.C. 158, ___, 804 S.E.2d 438, 441 (2017) (quoting *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015)). "If no exceptions are taken to findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks and citation omitted). "Where the findings of fact support the conclusions of law, such findings and conclusions are binding upon us on appeal." *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (citation omitted). "[T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998) (citation omitted).

Both Defendant and the State cite to numerous cases addressing probable cause to arrest for driving while impaired. The State, and the majority, primarily rely on *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014). While the

findings of fact *sub judice* are analogous to *some* of the findings of fact in *Townsend*, differences between the orders are critical.

In *Townsend*, an officer stopped defendant at a checkpoint. *Id.* at 458, 762 S.E.2d at 901. The officer noticed defendant’s “bloodshot eyes” and smelled a “moderate odor of alcohol about his breath.” *Id.* at 458, 465, 762 S.E.2d at 901, 905. Defendant told the officer he drank “a couple of beers earlier” and stopped drinking an hour before the stop. *Id.* at 465, 762 S.E.2d at 905. The officer administered two alco-sensor tests, both which tested position for alcohol. *Id.* at 458, 465, 762 S.E.2d at 901, 905. Additionally, defendant “exhibited clues” of impairment during three different field sobriety tests. *Id.* at 458, 465, 762 S.E.2d at 901, 905.

The trial court denied defendant’s motion to suppress for lack of probable cause, and defendant appealed. *Id.* at 459, 762 S.E.2d at 901-02. Our Court cited the facts stated *supra* and the trial court’s acknowledgement of the officer’s twenty-two years’ of experience. *Id.* at 465, 762 S.E.2d at 905. Accordingly, our Court concluded the officer had probable cause to arrest defendant. *Id.* at 465, 762 S.E.2d at 905.

Here, unlike in *Townsend*, the trial courts entered several findings weighing against a conclusion of probable cause.¹ First, Officer Anderson did not administer an alco-sensor test. Regarding Defendant’s admission of drinking the night of the

¹ The State does not challenge any of the findings of fact. Thus, the findings are binding on appeal. *Baker*, 312 N.C. at 37, 320 S.E.2d at 673 (citation omitted). In his appellee brief, Defendant challenges two findings of fact. However, Defendant did not cross-appeal.

checkpoint, the order contains no findings of *exactly when* Defendant drank in the night. *Cf. id.* at 465, 762 S.E.2d at 905 (the trial court found defendant admitted to drinking “a couple of beers” and stopped drinking an hour before officers stopped him). Moreover, the trial courts found no facts about Officer Anderson’s experience, distinguishing this case from *Townsend*. *See id.* at 465, 762 S.E.2d at 905. Of significant importance, while Officer Anderson testified as to the number of “clues” indicating impairment during the horizontal gaze nystagmus test, the trial courts entered no findings on the number of clues. Indeed, the finding regarding the horizontal gaze nystagmus test states Officer Anderson “found clues of impairment[,]” without stating the number. In addition to the findings of fact included in the majority, the trial courts found Defendant did not slur his speech, did not drive unlawfully or “bad[ly,]” answered Officer Anderson’s questions, and was not “unsteady” on his feet.

The uncontested findings of fact support the trial courts’ conclusions Officer Anderson lacked probable cause to arrest Defendant. Additionally, *Townsend*, as distinguished from the case *sub judice*, does not mandate reversal. Affording the trial courts “great deference” on the ruling on a motion to suppress, I would affirm the trial courts’ orders. *McClendon*, 130 N.C. App. at 377, 502 S.E.2d at 908. Accordingly, I respectfully dissent.