IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1304

Filed: 17 June 2018

Wake County, No. 16CRS213853

STATE OF NORTH CAROLINA

v.

JOSHUA TIM COLESON, Defendant.

Appeal by Defendant from judgment entered 22 February 2017 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for the Defendant.

DILLON, Judge.

Joshua Tim Coleson ("Defendant") appeals from the trial court's judgment finding him guilty of driving while impaired ("DWI"). Defendant argues that the trial court erred by instructing the jury that it could consider his refusal to submit to a "portable breath test" as substantive evidence of guilt. We find no reversible error.

I. Background

This case arises from a traffic stop in Cary. The evidence at trial tended to show as follows:

In the early morning of 8 July 2016, a motorist called the Cary Police Department to report Defendant, whom the motorist believed was intoxicated. The motorist had observed Defendant stumbling, struggling to keep his center of balance, slurring his speech, and operating a motorcycle without its headlights on.

An officer who specialized in DWI investigations arrived on the scene and observed Defendant standing next to his motorcycle. The officer noticed Defendant was unsteady on his feet, smelled strongly of alcohol, had slurred speech, and had red, glassy eyes. Defendant admitted to the officer that he had consumed a twenty-four (24) ounce beer. The officer administered several field sobriety tests to Defendant and requested that Defendant submit to a portable breath test (PBT). Defendant declined to take the PBT, stating that he did not know if he would blow under or over.

The investigating officer arrested Defendant, took him to the Cary Police Department, and requested Defendant submit to an Intoxilyzer breath test. Defendant refused to submit to the Intoxilyzer test. The officer then obtained a warrant to draw Defendant's blood, and the analysis showed a blood alcohol concentration (BAC) of 0.13.

At trial, the State requested jury instructions specifically referencing Defendant's refusal to take both the PBT and the Intoxilyzer test. The trial court granted the State's request over objection by Defendant. The jury found Defendant guilty of DWI. Defendant admitted to prior DWI offenses, raising his case to habitual status. Defendant gave oral notice of appeal in open court.

II. Analysis

Defendant argues the trial court erred by instructing the jury that his refusal to submit to an Intoxilyzer and a PBT could be considered as substantive evidence of guilt. For the reasons stated below, we hold that the trial court did not err in this regard.

At trial, the State requested that a portion of Section 270-20A of the North Carolina Pattern Jury Instructions be read in regard to Defendant's refusal to take the alcohol breath tests. During the charge conference, Defendant's counsel objected to the instruction, but did not state any basis for his objection. The jury received the following instruction explaining that they could consider Defendant's refusal as evidence of his intoxication:

> If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the Defendant by a law enforcement officer and that the Defendant refused to take the test or the Defendant refused to perform a field sobriety test known as a portable breath test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the Defendant was under the influence of an impairing substance at the time

> the Defendant allegedly drove a motor vehicle.

This instruction stems from Section 20-16.3(d) of the North Carolina General Statutes.

Defendant's argument in this case proffers an interpretation of the following language from Section 20-16.3(d):

> The fact that a driver showed a positive or negative result on an alcohol screening test, *but not the actual alcohol concentration result*, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing:
>
> (1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and
>
> (2) That the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration. . . .

N.C. Gen. Stat. § 20-16.3(d) (2017) (emphasis added). Defendant argues the statute prohibits the admission of a driver's *refusal* to submit to an alcohol screening test as substantive evidence of guilt.

Defendant misreads the statute. Section § 20-16.3(d) makes two types of evidence admissible as substantive evidence of intoxication: (1) the fact that the defendant took an alcohol screening test, and whether the result was *qualitatively* positive or negative; and (2) the fact that a defendant refused to take an alcohol screening test. The language "but not the actual alcohol concentration result"

restricts the first type of evidence, ensuring that no *quantitative* measurements are admitted under this rule. The "not" in this line restricts only quantitative results evidence.

The General Assembly has expressly provided that a defendant's refusal to submit to testing may be used as evidence of guilt:

> If any person charged with an implied-consent offense refuses . . . to perform field sobriety tests at the request of an officer, evidence of that refusal is admissible in any criminal, civil, or administrative action against the person.

N.C. Gen. Stat. § 20-139.1(f) (2015). Further, our holding today is consistent with prior holdings by our Court in which we held that the *refusal* to take a test is admissible as substantive evidence of guilt. *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) ("The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge."); *State v. Pyatt*, 125 N.C. App. 147, 150-51, 479 S.E.2d 218, 220 (1997) (holding that the trial court did not err in instructing the jury on the defendant's refusal to submit to an intoxilyzer test).

Defendant cites *State v. Bartlett* and *State v. Teate* in support of his interpretation of the statute. However, each of these cases is distinguishable from the case at hand. *Bartlett* concerned the introduction of the *results* of an alcosensor test as substantive evidence, *State v. Bartlett*, 130 N.C. App. 79, 82, 502 S.E.2d 53, 55 (1998), not the *refusal* by the defendant to take the test, as is the case here. Likewise, *Teate* did not involve evidence of the defendant's *refusal* to take a test, but

rather the *results* of the test. *See State v. Teate*, 180 N.C. App. 601, 606, 638 S.E.2d 29, 33 (2006).

We further note that there was sufficient evidence to warrant the instruction. Specifically, the investigating officer offered Defendant the opportunity to take a PBT. Defendant declined to take the PBT. The investigating officer testified that Defendant declined the PBT because "[Defendant] didn't know if he would blow under or over." The investigating officer later requested that Defendant take an Intoxilyzer, and again Defendant refused. The jury instructions given referenced only Defendant's refusal to take the alcohol screening tests and did not present a quantitative result to the jury.

In conclusion, we hold that the trial court did not err in its instructions because it was proper for the jury to consider Defendant's refusal to submit to the Intoxilyzer and PBT in determining Defendant's guilt.

NO ERROR.

Judges DAVIS and INMAN concur.

Report per Rule 30(e)