An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-732

Filed: 21 August 2018

Buncombe County, No. 14 CRS 089850

STATE OF NORTH CAROLINA,

v.

GREGORY GARRISON COLE, Defendant.

Appeal by defendant from judgment entered on or about 15 September 2016 by Judge Charles Malcolm Viser in Superior Court, Buncombe County. Heard in the Court of Appeals 13 December 2017.

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

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

STROUD, Judge.

Defendant Gregory Garrison Cole ("defendant") appeals from his conviction of driving while impaired. On appeal, defendant raises several issues, including that the trial court erred in failing to grant his motion to dismiss the indictment for lack of jurisdiction, in failing to grant his motions to suppress, in failing to find a discovery violation because a DVD was destroyed, and in improperly sentencing him. After

review, we find no error on the issues defendant raised regarding the indictment or DVD, or with two of the motions to suppress, but we remand for the trial court to enter an order addressing the motion to suppress the results of the breathalyzer test with findings of fact to resolve material conflicts in the evidence. We also remand for correction of defendant's sentence.

Facts

On 19 October 2014, at 2:30 a.m., Officer Nick Shea of the Weaverville Police Department was on routine patrol in the north end of Weaverville, North Carolina. Officer Shea observed a white Ford Excursion pull out of an Ingles store parking lot onto Weaver Boulevard. The vehicle turned left onto the road, but instead of immediately turning into its own travel lane, it had both left-side tires in a turning lane for approximately 25 to 30 yards. Officer Shea began to follow the vehicle and observed it cross over the fog line on the right-hand side by approximately eight inches. He also watched the vehicle slowly, consistently, and continuously weave within its lane. Officer Shea initiated his blue lights and stopped the vehicle. After approaching the driver's side of the car, he observed defendant -- the driver of the vehicle -- with red bloodshot eyes and detected a light odor of alcohol. Defendant admitted to drinking alcohol with dinner and said he was just trying to get home. Officer Shea asked defendant to submit to a portable breath test, and he complied. Both readings were positive for alcohol. Officer Shea called another officer to

administer field sobriety tests. Multiple tests were administered, and based on defendant's performance during those tests, the officers formed the opinion that defendant was appreciably impaired by alcohol. Defendant was arrested and transported to the Buncombe County Jail for chemical analysis.

Officer Kenneth Merritt served as the chemical analyst and observed the 15 minute observation period before conducting the breath test on defendant. He testified that he never observed defendant reach for or place anything in his mouth during the observation period. Defendant testified that he had an antacid in his pocket that he took out and ingested during the observation period. Then defendant submitted to the chemical analysis and produced a blood alcohol concentration result of .15.

Defendant was issued a citation that same day, 19 October 2014, and charged with the misdemeanor offense of driving while impaired. The citation stated that defendant was to appear in District Court on 1 December 2014. On 6 June 2016, a grand jury signed a presentment, which was checked to indicate: "A TRUE PRESENTMENT by twelve or more grand jurors finding that probable cause exists to believe that Gregory Garrison Cole unlawfully and willfully did operate a motor vehicle on a street, highway, or public vehicular area while subject to an impairing substance in violation of G.S. 20-138.1." On 11 July 2016, a grand jury returned a

bill of indictment in Superior Court charging defendant with the offense of driving while impaired.

Defendant filed several motions between 9 and 12 September 2016, including a motion to quash and/or dismiss the indictment; a motion to dismiss and/or suppress evidence for destruction of exculpatory and/or impeachment evidence or in the alternative for discovery sanctions; a motion to dismiss for violation of double jeopardy; a motion to suppress the results of defendant's chemical breath test; a motion to suppress evidence seized from defendant's residence due to unlawful stop and seizure of the defendant and unlawful detention; and motions *in limine*. Defendant's case was called for trial in Superior Court on 12 September 2016, and the trial court ultimately denied all of defendant's motions prior to the beginning of the jury trial.

On 15 September 2016, the jury returned a verdict of guilty to the charge of driving while impaired. Defendant was sentenced as a Level Four offender to a suspended sentence of 180 days, subject to terms and conditions, and was placed on 12 months of unsupervised probation. Defendant timely appealed to this Court.

Discussion

Defendant raises several issues on appeal relating to his conviction of driving while impaired. He argues that the trial court erred in failing to grant his motion to dismiss the indictment for lack of jurisdiction; in failing to grant his motion to

suppress due to an unlawful stop of defendant's vehicle and for unlawful detention; in failing to suppress the results of his breath test; in concluding that the State's failure to preserve a jail video constituted a discovery violation; and in improperly sentencing defendant to a term of imprisonment that exceeds the statutory maximum. As explained in more detail below, we hold that the trial court did not err in denying defendant's motion to dismiss the indictment or in relation to the DVD, but we remand for the trial court to enter an order on the suppression motions and for correction of defendant's sentence.

I. Motion to Dismiss Indictment

Defendant first argues that the trial court erred in failing to grant defendant's motion to dismiss the indictment for lack of jurisdiction. "This Court reviews the trial court's denial of a motion to dismiss *de novo*. Questions of subject matter jurisdiction are reviewed *de novo*." *State v. Rogers*, __ N.C. App. __, __, 808 S.E.2d 156, 162 (2017) (citations and quotation marks omitted). When a defendant challenges jurisdiction, the State has the burden of proving jurisdiction beyond a reasonable doubt. *See State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502-03 (1977) ("[W]hen jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused.").

In his motion to dismiss, defendant stated the facts regarding the presentment and grand jury indictment issued in Superior Court. Defendant noted that the

indictment "was issued in the same file number as the misdemeanor proceeding, except that it is a 'CRS' file number" and alleged that "[t]he State has not dismissed the District Court proceeding. The citation issued in this mater [sic] remains active, although the case is not currently calendered [sic] in district court." Defendant argued that the law in North Carolina does not allow for the District Court and Superior Court to have simultaneous jurisdiction to try the same offense and that the State cannot demonstrate beyond a reasonable doubt that the Superior Court has jurisdiction.

The trial court held a hearing before trial to address -- among other things -- the motion to quash or dismiss the indictment. Defendant's counsel explained to the trial court there was previously a hearing in District Court regarding a motion to dismiss based on a videotape, and evidence was presented, but the District Court denied the motion and the case was continued because a witness was not present. The matter was continued again after another officer was unavailable, and then eventually was presented to the grand jury. The State argued that the events in District Court would only be a double-jeopardy issue "[i]f the defendant would have been arraigned prior to the proceeding with the witnesses giving testimony[.]"

After the trial judge asked whether the District Court case file was still pending, the State explained: "Judge, I looked it up and there is no dismissal but it shows up as a superseding indictment like it would for any other case that was

indicted from district court." But the State argued that defendant was never "put in jeopardy of conviction[,]" since the only hearing held in District Court related to an evidentiary suppression motion and attempt to dismiss the case; it was not a bench trial where evidence was presented on the DWI charge. The State explained that the reason it had not simply dismissed the District Court case file was because it had been superseded:

> [The State]: And Judge, and I looked at it this morning and that is something I, you know, I thought about. If that's the issue he's bringing up in the motion to dismiss I might as well just dismiss the district court and then we don't really have an argument to deal with this afternoon. But when I looked at it when I pulled it up in the computer system in ACIS it indicated that there is a superseding indictment for the district court case getting it's superseded just like any other felony that's in district court that's been indicted. And it's not an actual file that's floating around in district court waiting to be set or waiting to be heard. It's a case that's been superseded by this indictment and --
>
> THE COURT: And transferred to superior court.
>
> [The State]: -- and transferred to superior court. I believe the actual shuck from district court is in this file. So there's not an actual pending open district court case that's still floating around down in district court that the defendant is having to appear for or that the defendant is having to worry about. It's been superseded by this indictment just like a misdemeanor statement of charges would supersede any other prior citations in the same case file.

The trial court orally denied the motion to dismiss the indictment, stating: "I'm going to deny the motion to dismiss the indictment without saying anything else."

Under N.C. Gen. Stat. § 7A-271(a)(2) (2017), "(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor. . . (2) When the charge is initiated by presentment[.]" On appeal, defendant contends that the District Court exercised original jurisdiction over this case and the District Court case was never dismissed. Defendant relies in part on *State v. Gunter*, 111 N.C. App. 621, 422 S.E.2d 191 (1993). In *Gunter*, the defendant was charged with driving while impaired by a citation and ordered to appear in District Court on 19 March 1991. *Id.* at 623, 422 S.E.2d at 192. Then, on 28 May 1991, a grand jury issued a presentment, and on 24 June 1991, defendant was charged with the misdemeanor of DWI and the indictment was filed in Superior Court. *Id.* In *Gunter*, the State argued that N.C. Gen. Stat. § 7A-271(a)(2) "should be read to grant jurisdiction to the superior court in any action already properly pending in the district court if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court." *Gunter*, 111 N.C. App. at 624, 433 S.E.2d at 193. This Court agreed, noting that "[u]nder this interpretation, the action *sub judice* was properly under the jurisdiction of the district court and not the superior court when the citation was issued, but as soon as the

grand jury issued the presentment, the superior court acquired jurisdiction. The State correctly interpreted the statute." *Id*. This Court concluded that "the superior court action of DWI against [the] defendant was initiated by a presentment and was properly within the jurisdiction of the superior court pursuant to N.C.G.S. § 7A-271(a)(2)." *Gunter*, 111 N.C. App. at 625, 422 S.E.2d at 194. In *Gunter*, as in here, the prosecution in Superior Court was initiated by a presentment and was properly within the jurisdiction of the Superior Court. *Id*.

The State also argues that the Superior Court had proper jurisdiction to proceed because it was clear the State had abandoned its prosecution in District Court following the presentment and grand jury indictment in Superior Court. At the hearing in Superior Court, the State indicated there was no actual pending case in District Court because it was superseded by the indictment. The clerk of court similarly said "I don't know if we can dismiss it since it's got a superseding indictment." We agree. It is evident from the transcript that defendant was only prosecuted through the Superior Court action and that the District Court action was effectively dismissed -- even if no formal dismissal occurred. Defendant was not subject to the jurisdiction of two courts at one time. We hold that the Superior Court properly acquired jurisdiction to proceed with defendant's case and therefore denied defendant's motion to dismiss the indictment.

II. Motions to Suppress

Next, defendant argues that the trial court erred in failing to grant his motions to suppress due to an unlawful stop of defendant's vehicle, an unlawful detention after the stop, and in failing to suppress the results of his breathalyzer test.

A. Motion to Suppress: Breathalyzer Test

We first address defendant's argument regarding suppression of his breathalyzer test.

> [A] defendant is entitled to challenge the denial of a motion to suppress the result of a chemical test of his breath as having been obtained in violation of the applicable provisions of the General Statutes by means of a motion to suppress filed pursuant to N.C. Gen. Stat. § 15A-974. Our review of a denial of a motion to suppress by the trial court is 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. Roberts, 237 N.C. App. 551, 559, 767 S.E.2d 543, 550 (2014) (citations and quotation marks omitted).

Defendant contends that he presented evidence that he ingested an antacid during the observation period, resulting in a violation of the applicable administrative regulation, 10A N.C.A.C. 41B.0322, and the trial court thus erred in failing to grant his motion to suppress the results of the breath test. The trial court did not enter a written order on this (or any) suppression motions. Under N.C. Gen. Stat. § 15A-977 (2017), if a motion to suppress is not determined summarily, then

"the judge must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d). Furthermore, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f). If there is no material conflict in the evidence, findings of fact are not required, but if there is a conflict in the evidence, the trial court must resolve the conflict by making findings of fact:

> The general rule is that the trial court should make findings of fact to show the bases of its ruling. If there is a material conflict in the evidence the trial court must do so in order to resolve the conflict. However, if there is no material conflict in the evidence it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In these situations, the necessary findings are implied from the admission of the challenged evidence. Findings and conclusions are required in order that there may be a meaningful appellate review of the decision on a motion to suppress.

State v. Salinas, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66 (2012) (citations, quotation marks, brackets, ellipses, and emphasis omitted).

Here, regarding this motion to suppress, the trial court stated, after hearing arguments and testimony from both sides: "I'm going to deny the motion." The trial court did not make any findings of fact either orally or in a written order. Defendant argues there is a material conflict in the evidence because Officer Merritt testified he did not see defendant put anything in his mouth, and he was watching him during

the entire observation period. Defendant testified that he put an antacid tablet from his pocket into his mouth during the observation period, so the breath test was not done in compliance with the applicable regulations. This particular conflict in the evidence may depend more upon the determination of the credibility of the evidence, but this Court is unable to resolve issues of credibility. *See generally State v. Veazey*, 201 N.C. App. 398, 402, 689 S.E.2d 530, 533 (2009) ("Weighing the credibility of witnesses and resolving conflicts in their testimony is precisely the role of the superior court in ruling on a motion to suppress."). Because the trial court made no findings of fact on this conflicting testimony, we must remand the matter to the trial court to enter an order doing so. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 67 ("[W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand to the trial court.").

B. Motion to Suppress: Unlawful Stop

Defendant also argues that the trial court erred in failing to grant his motion to suppress due to an unlawful stop of defendant's vehicle. Defendant did not testify regarding this motion, and there does not appear to be any conflict in the evidence, so we may properly conduct appellate review. *See generally Salinas*, 366 N.C. at 123-24, 729 S.E.2d at 66.

> The Fourth Amendment protects individuals against unreasonable searches and seizures, U.S. Const. amend. IV, and the North Carolina Constitution provides similar protection, N.C. Const. art. I, § 20. A traffic stop is

> a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot.
>
> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances -- the whole picture in determining whether a reasonable suspicion exists.

State v. Styles, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citations, quotation marks, ellipses, and brackets omitted).

Defendant contends that Officer Shea's observations of defendant driving in a turning lane, weaving, and crossing the fog line were not enough to justify the stop of defendant's vehicle. We disagree. Defendant's argument -- which separately addresses and analyzes each of his driving behaviors individually -- ignores the fact that we evaluate the basis for the stop under the totality of the circumstances, not through an isolated lens looking at each individual behavior. *See, e.g. Styles*, 362 N.C. at 414, 665 S.E.2d at 439.

Here, around 2:30 a.m. Sunday morning, in an area where many establishments served alcohol, defendant made a turn, but instead of turning immediately into the travel lane, he continued to travel with his wheels in a turn lane for approximately 25 to 30 yards. Officer Shea then observed defendant consistently and repeatedly weaving within his lane, and he crossed the fog line with both of his passenger-side wheels going over the line by approximately eight inches. Generally, weaving within a travel lane has been found to support reasonable suspicion only when accompanied by some other factor. *See, e.g., State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768 (2009) ("We have previously held that weaving can contribute to a reasonable suspicion of driving while impaired. However, in each instance, the defendant's weaving was coupled with additional specific articulable facts, which also indicated that the defendant was driving while impaired."); *cf. State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 827 (2012) ("A court must consider the totality of the circumstances -- the whole picture in determining whether a reasonable suspicion exists. The totality of the circumstances here lead us to conclude that there was reasonable suspicion for the traffic stop." (Citation and quotation marks omitted)). When all of defendant's faulty driving behaviors are viewed together with the context of when and where these behaviors were observed -- very early on a Sunday morning in an area with many drinking establishments -- it was reasonable for Officer Shea to suspect defendant might be driving while impaired. These factors,

taken cumulatively, are sufficient to support the trial court's finding that Officer Shea had reasonable suspicion to stop defendant.

C. Unlawful Detention

Defendant also argues that the trial court erred in failing to grant his motion to suppress for unlawful detention after the stop. Again, defendant did not testify as to this motion, and with no material conflict in the evidence, we may properly address it on appeal. *See Salinas*, 366 N.C. at 123-24, 729 S.E.2d at 66. The United States Supreme Court has held that an officer may conduct "certain unrelated checks during an otherwise lawful traffic stop" but "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez v. United States*, __ U.S. __, __, 191 L. Ed. 2d 482, 499, 135 S. Ct. 1609, 1615 (2015).

Defendant's argument focuses solely on the administration of the alcosensor test and a claim that "the officer detained the defendant almost exclusively due to the numeric result of the alcosensor[.]" Defendant relies on *State v. Overocker*, 236 N.C. App. 423, 436, 762 S.E.2d 921, 929 (2014), where this Court pointed out that "[t]he plain language of N.C. Gen. Stat. § 20-16.3(d) (2013) prohibits the actual alcohol concentration result of an alcohol screening test from being used by a law enforcement officer in determining if there are reasonable grounds for believing that the driver has committed an implied-consent offense under G.S. 20-16.2, such as

driving while impaired." (Citations, quotation marks, brackets, and ellipses omitted). In context, however, the statute states:

> The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, . . 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)(1)-(2) (2017). While Officer Shea could not rely on the actual numerical value on the test to determine if there were reasonable grounds to detain defendant, he could use the fact that defendant had a positive test result, and he could consider this information along with the other information he had at that point – the location and time, defendant's driving, the odor of alcohol, defendant's appearance, and his admission he had been drinking. And here, Officer Shea testified simply that he received a positive result on both samples he received from defendant using the alcosensor test.

Defendant even concedes in his brief that Officer Shea "stated that he did not consider the numeric result of the test," yet argues that his testimony "clearly demonstrated a consideration of the numeric results." We disagree with defendant's characterization of Officer Shea's testimony. Officer Shea testified that after pulling over the vehicle, he approached the driver's side and came into contact with

defendant. He immediately smelled a light odor of alcohol. Officer Shea explained that a few years earlier he had lost his sense of smell when he was injured in a car wreck, so a "light odor" for him would be a bit stronger for others. Officer Shea explained to defendant why he had been stopped and asked if he had been drinking. Defendant admitted to drinking earlier that evening. Officer Shea could also see that defendant's eyes were bloodshot and glassy. After making these observations, Officer Shea obtained two positive alcosensor test results. All of these factors combined provided ample reasonable suspicion to further detain defendant. We therefore hold that the trial court did not err in denying defendant's motion to suppress for unlawful detention.

III. Failure to Preserve Jail Video: Discovery Violation

Though we remand for the trial court to enter an order regarding the motion to suppress the results of the breathalyzer test, we briefly will address the remaining issues defendant raises. Defendant also contends that the trial court erred in concluding that the State's failure to preserve a video from the jail constituted a discovery violation.

> A determination of the extent, if any, to which the State failed to comply with its obligation to provide discovery to a criminal defendant is a decision left to the sound discretion of the trial court. For that reason, this Court reviews a trial court's ruling on discovery matters for an abuse of discretion. The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been

> the result of a reasoned decision. When discretionary rulings are made under a misapprehension of the law, however, this may constitute an abuse of discretion.

State v. Foushee, 234 N.C. App. 71, 76-77, 758 S.E.2d 47, 52 (2014) (citations, quotation marks, and brackets omitted).

Defendant alleges that he asked officers to preserve the video of defendant in the "Intoxilyzer room" where he completed the breath test while the case was pending in District Court. But defendant did not subpoena the video or obtain any court order. His attorney argued

> that becomes the subject of some consternation because the procedure that was in place at that time through the detention center was that they didn't want us -- they instructed us a subpoena was not necessary. All we needed to do was call the lieutenant and he would set it aside and make it available to us.

Defendant's former counsel from the hearing in District Court testified before trial in Superior Court that a hearing was held in District Court regarding the video, and that court denied the motion. At some point while the matter was pending before the District Court, before the presentment and indictment, the video was destroyed.

This Court has noted that "[i]n North Carolina, no statutory right to discovery exists for criminal cases originating in district court." *State v. Cornett*, 177 N.C. App. 452, 455, 629 S.E.2d 857, 859 (2006). No one contests that the video was destroyed before the case ever reached Superior Court. And defendant has shown no evidence that the video was destroyed with any malicious intent by the State. And once again,

in his appellate brief, defendant has not argued that he was prejudiced by the deletion of the video. We hold that the trial court did not abuse its discretion in failing to find that the State committed a discovery violation by failing to preserve the video.

IV. Sentence Beyond Statutory Maximum

Defendant's final contention of error is that the trial court erred in sentencing him to 180 days imprisonment, when the statute he was sentenced under provides a maximum sentence of 120 days. The State concedes this error. We therefore remand to the trial court for resentencing of defendant consistent with the guidelines provided in N.C. Gen. Stat. § 20-179(j) (2017).

Conclusion

While we find no error on the majority of the issues raised on appeal, we remand for entry of an order on the motion to suppress and for resentencing.

NO ERROR IN PART; REMANDED IN PART.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).