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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-310

Filed: 15 January 2019

Gaston County, Nos. 15CRS63902, 15CRS709499

STATE OF NORTH CAROLINA

v.

SHILLER PIERRE AGUILH, Defendant.

Appeal by Defendant from Judgment entered 16 August 2017 by Judge Lisa C. Bell in Gaston County Superior Court. Heard in the Court of Appeals 2 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Everson Law Firm, PLLC, by Cynthia E. Everson, for Defendant-Appellant.

INMAN, Judge.

Defendant Shiller Pierre Aguilh ("Defendant") appeals from a judgment entered following a jury verdict finding him guilty of driving while impaired, with a revoked license, and with an expired registration. Defendant argues the trial court erred in denying a renewed motion to suppress raised during trial. After careful review, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

On the evening of 12 December 2015, Defendant was driving a Ford Thunderbird southbound on US-321 in Gaston County when Trooper B.D. Michael of the North Carolina Highway Patrol ("Trooper Michael") pulled up behind him at a stoplight. Trooper Michael followed Defendant through the light after it turned green and observed that the Thunderbird's registration had expired. As Defendant pulled into a nearby gas station parking lot, Trooper Michael decided to turn on his emergency lights and initiate a traffic stop. Defendant, who was also travelling with a passenger, stopped his vehicle at one of the station's gas pumps, and the two waited in the car for Trooper Michael to approach.

Trooper Michael approached the driver's side of the car and explained to Defendant that he had been stopped for an expired tag. He and Defendant then conversed for a few minutes; during this conversation, Trooper Michael asked Defendant for his license several times and Defendant, at some point, informed Trooper Michael that he did not have a driver's license. As the two spoke, Trooper Michael observed "an odor of alcohol coming from the vehicle while speaking with [Defendant]" and an unopened container of alcohol in the car, leading him to believe Defendant may have been intoxicated. Defendant eventually produced a state-issued identification card, and Trooper Michael returned to his cruiser to run Defendant's information through his onboard computer. When the records search returned results showing Defendant's license had been revoked for driving while impaired,

Trooper Michael retrieved a portable breath testing instrument and approached the Thunderbird a second time.

With the portable breath testing instrument in hand, Trooper Michael asked Defendant if he had been drinking; Defendant responded that he had not. Defendant then agreed to submit to a breath test, which returned a positive result for alcohol. Trooper Michael, believing Defendant was driving on a revoked license while impaired, went back to his patrol car and called a tow truck to seize the Thunderbird. While the tow truck was on its way, Trooper Michael asked Defendant to perform a horizontal gaze nystagmus test, and Defendant demonstrated four of six clues indicating impairment.[1] Trooper Michael then performed a second breath test, which again tested positive for alcohol. At that time, Defendant confirmed to Trooper Michael that he had consumed two beers and fallen asleep a few hours earlier. Trooper Michael concluded the stop by placing Defendant under arrest, placing him in the patrol car, and driving him to the Gaston County Jail. The entire stop was recorded on Trooper Michael's dashboard camera and a microphone on his person.

[1] The horizontal gaze nystagmus test requires the officer administering the procedure to pass a stimulus, such as a pen or finger, in front of the eyes of the subject as part of six different tests. Each of these six tests is to be performed twice for each eye. In the instant case, Trooper Michael only performed one pass per test per eye, as he did not believe it would be safe given the location of the stop to take the added time to perform two passes. He also refrained from performing any other field sobriety tests for this reason. Trooper Michael testified these deviations from standard procedure were allowed by National Highway Traffic Safety Administration guidelines.

Defendant was charged in district court with driving while impaired, driving while license revoked, no inspection, and expired registration on the night of his arrest. On 15 July 2016, Defendant filed a motion to suppress all evidence obtained from the traffic stop based on, among other things, the lack of reasonable suspicion under the Fourth Amendment to the United States Constitution. The district court denied the motion, and Defendant pled guilty while giving notice of appeal to superior court.

On appeal, Defendant filed his motion to suppress anew. At the hearing on that motion, Judge Todd Pomeroy heard testimony from Trooper Michael consistent with the above recitation of the facts and received the video and audio recorded during the stop into evidence. Trooper Michael's testimony included the following line of questioning:

> [THE STATE:] Was [Defendant] able to produce a license for you?
>
> [TROOPER MICHAEL:] He kept looking for paperwork on the vehicle, and then I finally told him, you know, I can get information off the tag but I need your ID. I think I asked him two or three times for his license. I think at that time he had told me that, if I recall, that he didn't have a license. He may have produced an ID card.
>
> [THE STATE:] Approximately, how long was it from the time you first asked for this paperwork that you finally told [Defendant] to give you his ID card and you would look it up yourself?
>
> [TROOPER MICHAEL:] From the time I originally asked

> for it, maybe 30, 45 seconds.

Judge Pomeroy ultimately found as a fact in his written order denying the motion that Defendant had difficulty producing his license to Trooper Michael; from this and other findings, Judge Pomeroy concluded that Trooper Michael had reasonable suspicion to extend the stop and investigate Defendant for driving while impaired.

Defendant's case came on for jury trial on 15 August 2017, this time before Judge Lisa Bell. Trooper Michael was once again the only testifying witness. Of that testimony, Defendant directs us to the following exchange as pertinent to this appeal:

> [THE STATE:] Did you ask [Defendant] for identification in the form of a driver's license?
>
> [TROOPER MICHAEL:] I did.
>
> [THE STATE:] What was his response to you?
>
> [TROOPER MICHAEL:] His statement was that he did not have one.

Following the testimony excerpted above, the trial court called a lunch recess. Once court was back in session but before the jury was called into the courtroom, Defendant's counsel sought to renew the pre-trial motion to suppress:

> Your Honor, I just do have something briefly to address. I am assuming we are at the stage where we are going to get into the Intoximeter and the arrest, and I did want to revisit the suppression motion. It appears there has been materially different testimony today as opposed to what was testified during the suppression hearing. I wanted to bring that to your Honor's information for purposes of the record.

> . . . .
>
> Your Honor, if you will look at the finding of facts [from Judge Pomeroy's order denying the pre-trial motion to suppress] . . . they all refer to the difficulty of the defendant to locate his license upon being asked. The testimony today was that immediately upon being asked to produce his license he said, I don't have one. The trooper testified to that as well. So there are those three findings of fact that are inconsistent with today's testimony as well as conclusion of law that is based on that finding of fact. It appears that Judge Pomeroy relied on that testimony in making his decision. It is mentioned both in the finding of fact based solely on Trooper Michael's testimony as well and in the conclusion of law as well which is inconsistent to what he has testified to here before your Honor today, and that is the basis for me asking the Court to revisit the suppression hearing.

Judge Bell denied the motion after further argument but without conducting *voir dire* or receiving any additional evidence, reasoning that because she was not the judge presiding at the suppression hearing, she was not "in a position to say [Trooper Michael's testimony] was different or there was not sufficient evidence at this time, that the testimony had changed. I think that is too great of a leap to make not having been the judge that heard the suppression motion." Defendant's counsel accepted the ruling but asked the trial court to "note my continuing objection." The jury was called back into the courtroom shortly thereafter.

Although Defendant's counsel objected to the introduction of the printed breath test results into evidence, Defendant made no further objections pertaining to the

renewed motion to suppress.[2] Trooper Michael subsequently testified to the results of the breath test himself without objection.

Following the presentation of evidence, closing arguments, instruction from Judge Bell, and deliberations, the jury returned guilty verdicts on driving while impaired, driving while license revoked, and expired registration. The trial court arrested judgment on the charge of driving while license revoked and consolidated the remaining convictions for sentencing. Defendant received a sentence confinement in the Misdemeanant Confinement Program for twelve months; that sentence was suspended, however, for 24 months of supervised probation, which included as special conditions 60 days of active confinement in the county jail, 72 hours of community service, a surrender of his driver's license, and payment of $3,262.50 in court fees and a $250 fine. Defendant appeals.

II. ANALYSIS

Defendant argues that the trial court erred in summarily denying his renewed motion to suppress raised at trial without conducting *voir dire* or reviewing any other evidence. The State counters, asserting that Defendant failed to preserve review of the issue by not objecting before the trial court when Trooper Michael testified

[2] A review of the transcript reveals Defendant's counsel's objections were limited to: (1) authentication issues; (2) the introduction of Defendant's breath test results on the video of the stop and a printout; (3) Trooper Michael's qualifications as an expert witness on the horizontal gaze nystagmus test; (4) testimony unresponsive to questioning; and (5) questioning from the State on re-direct that was outside the scope of cross-examination.

following denial of the motion. We agree with the State; "when, as here, evidence is admitted over objection, but the same or similar evidence . . . is later admitted without objection, the benefit of the objection is lost." *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) (citations omitted).

Although Defendant renewed the motion to suppress and objected to the introduction of the printed breath test results, he failed to object when Trooper Michael testified about the results of the test before the jury. And, although Defendant's counsel requested a "continuing objection" outside the presence of the jury following the denial of the renewed motion to suppress, the allowance of a continuing or standing objection does "not relieve[a party] of his obligation to make a contemporaneous objection." *State v. Mays*, 158 N.C. App. 563, 578, 582 S.E.2d 360, 370 (2003) (citation omitted).

Even if we were to assume, *arguendo*, that Defendant preserved the issue for review, we hold that the trial court did not err in summarily denying the renewed motion to suppress. A party may renew a previously denied pre-trial motion to suppress:

> If . . . the judge is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, . . . if not possible because of the time of discovery of alleged new facts, during trial.

N.C. Gen. Stat. § 15A-975(c) (2017). Here, Defendant renewed his objection due to a perceived substantial change in testimony by Trooper Michael between the pre-trial suppression hearing and during trial before the jury, arguing that Trooper Michael had changed his testimony to now state that Defendant immediately acknowledged he did not have a driver's license. No such conflict in the testimony exists, however. Pre-trial, Trooper Michael was asked directly how long it took Defendant *to say* he did not have a license; during trial, Trooper Michael was only asked what Defendant's response was to the request for him to *produce* a license. In other words, the trial testimony did not address the length of time it took Defendant to answer Trooper Michael's inquiry.[3] This absence of testimony does not equate to "additional pertinent facts . . . which . . . could not have [been] discovered with reasonable diligence before the determination of the [pre-trial] motion" giving rise to a renewed motion to suppress during trial. N.C. Gen. Stat. § 15A-975(c). Thus, Judge Bell did not err in summarily denying the renewed motion.

[3] Although one could possibly infer from Trooper Michael's testimony on direct examination at trial that Defendant's response to his request was immediate, Defendant was permitted to and did cross-examine Trooper Michael on the length of time it took Defendant to respond to the request for a license. Further, while Defendant argues the audio recording of the stop—which Defendant admits is of poor quality—could support a finding that Defendant immediately stated he did not have a license, that audio was played for Judge Pomeroy at the first suppression hearing, and therefore does not give rise to facts "which . . . could not have [been] discovered with reasonable diligence before the determination of the [pre-trial] motion." N.C. Gen. Stat. § 15A-975(c). We further note that Defendant does not challenge any of Judge Pomeroy's factual findings regarding Defendant's difficulty in producing a license, nor does he argue that that order was entered erroneously; rather, his appeal merely challenges Judge Bell's summary dismissal of the renewed motion.

Defendant also asserts plain error in his principal brief; however, he provides no pertinent law for support.[4] Further, his argument centers on apparent conflicts in the video and audio recording of the stop and Trooper Michael's testimony—issues that were for the finders of fact to resolve. *See, e.g., State v. Villeda*, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004) (noting that the trial court serves as the finder of fact on a motion to suppress, and "has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom"); *State v. Cox*, 190 N.C. App. 714, 720, 661 S.E.2d 294, 299 (2008) ("The jury resolves any conflicts in the evidence." (citation omitted)). Finally, Defendant's principal brief does not assert that the alleged error resulted in prejudice under the plain error standard such that the denial of the motion to suppress "had a probable impact on the jury's finding that the defendant was guilty," *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted), instead arguing that it impacted his defense and allowed the jury to receive conflicting evidence as to a material fact. Assuming *arguendo* that

[4] The only law cited in support of Defendant's plain error argument, beyond those citations establishing the plain error standard, appears in his reply brief, and consists of an unpublished decision by the Fourth Circuit reviewing the grant of judgment as a matter of law under the Federal Rules of Civil Procedure in a civil case, *Sawyer v. Asbury*, 537 Fed. Appx. 283, 290 (4th Cir. 2013), an unpublished decision by this Court affirming the grant of a motion to dismiss, *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650, No. COA14-269 (Jan. 6, 2015), and a published decision from a split panel of this Court reversing the grant of a motion to suppress, *State v. Parisi*, ___ N.C. App. ___, 817 S.E.2d 228, *writ of supersedeas allowed*, ___ N.C. ___, 818 S.E.2d 107 (2018). None of these cases involves plain error review.

Defendant's arguments were sufficient to assert plain error, our review of the record reveals that they lack merit and are overruled.

NO ERROR.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).