An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-746

Filed: 7 May 2019

Madison County, No. 17 CRS 50129

STATE OF NORTH CAROLINA

v.

NICKOLAS N. CASE

Appeal by defendant from judgment entered 6 November 2017 by Judge Mark E. Powell in Madison County Superior Court. Heard in the Court of Appeals 12 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton III, for the State.

Richard J. Costanza for defendant.

DIETZ, Judge.

Defendant Nickolas Case appeals his conviction for driving while impaired. He argues that the trial court plainly erred by denying his motion to suppress evidence that, he contends, was obtained following his arrest without probable cause.

As explained below, we reject this argument. In the order denying the motion to suppress, the trial court found that the arresting officer personally observed Case

driving while smelling strongly of alcohol and having slurred speech and red, glassy eyes. Case admitted to the officer that he had been drinking but claimed he had not had "enough to worry about." The officer also saw beer cans on the floorboards of Case's car.

These unchallenged findings are sufficient to support the trial court's conclusion that the arresting officer had probable cause. Accordingly, the trial court did not err—and certainly did not plainly err—in denying Case's motion to suppress. We thus find no error in the trial court's judgment.

Facts and Procedural History

On 14 February 2017, Defendant Nickolas Case and his girlfriend, Kristin Breining, celebrated Valentine's Day by going out to dinner, where they drank some wine. That evening, they went home in separate cars. Case arrived home before Breining and called her on his cell phone while she was driving. During their phone conversation, Breining crashed her car. Case drove over to the crash site, where local law enforcement, the State Highway Patrol, EMS, and the fire department had already arrived.

One of the highway patrol officers, Trooper Michael Weaver, was interviewing Breining when he noticed Case reaching inside the wrecked car. Trooper Weaver approached Case and ordered him to exit the wrecked vehicle because it was part of

the active crash investigation. Throughout this interaction, Trooper Weaver noticed Case had slurred speech, "red, glassy eyes and a strong odor of alcoholic beverage."

Officer Patrick Wilde saw Case standing by an ambulance and also noticed he had red eyes and a "strong odor of alcohol on his breath." About fifteen minutes later, Officer Wilde saw Case driving outside the normal path of traffic. Law enforcement had directed Case to park his car off the roadway, so Officer Wilde went over to assist him. As Officer Wilde approached Case's car, he noticed "empty cans of what appeared to be alcoholic beverages or beer" in the backseat.

Trooper Weaver had been watching Officer Wilde's interaction with Case, but could not hear what they were saying. Moments later, Officer Wilde called out to Trooper Weaver, saying "come check this out, we have open containers." Trooper Weaver approached the two men and saw Case lean up against his car immediately after stepping out of it. Trooper Weaver later testified that, in his eleven years of Highway Patrol experience, "oftentimes when somebody exits a vehicle and immediately leans against the vehicle, it's because they are somewhat off balance or unsteady on their feet."

Trooper Weaver examined the empty cans by shining a flashlight through the car windows. He was able to clearly read the can labels and determined they were cans of beer. When Trooper Weaver asked Case about the empty beer cans, Case said "not to worry about them . . . they were not from tonight or anytime recent." Trooper

Weaver noticed that Case still had the same strong odor of alcohol, slurred speech, and red, glassy eyes he had observed earlier that evening. He also noticed Case was "slightly unsteady on his feet."

When Trooper Weaver began questioning Case about his alcohol consumption, he observed that Case became "somewhat argumentative" and "he stated really quickly that, my attorney is going to have a field day with you." After initial resistance, Case admitted that he had consumed some wine at dinner and consented to a breath analysis test. Case tested positive for alcohol consumption. Trooper Weaver then arrested Case for driving while impaired. Testing later confirmed that Case had a blood alcohol level of 0.08.

Case pleaded not guilty to the DWI charge at trial before the district court. The court found Case guilty and Case appealed to the superior court. Case moved to suppress in superior court, arguing that law enforcement lacked probable cause to arrest him and any evidence obtained after his arrest should be suppressed, but the court denied the motion. On 6 November 2017, the jury found Case guilty of DWI. The court sentenced Case to 60 days in jail but suspended the sentence and ordered twelve months of unsupervised probation. Case timely appealed.

Analysis

I. Petition for a Writ of Certiorari

Case acknowledges that the record on appeal does not contain evidence that he timely appealed the district court judgment to superior court, which is necessary to convey subject matter jurisdiction on the superior court. *State v. Phillips*, 149 N.C. App. 310, 313–14, 560 S.E.2d 852, 855 (2002); N.C. R. App. P. 4(a). Case petitioned for a writ of certiorari and attached an affidavit from his trial counsel with an accompanying exhibit showing that Case timely made an oral notice of appeal at the district court proceeding. In light of this evidence, and in our discretion, we allow Case's petition for a writ of certiorari and review the merits of this appeal. N.C. R. App. P. 21.

II. Probable Cause

Case challenges the trial court's denial of his motion to suppress. Although Case timely moved to suppress, after the court denied that motion Case failed to object to the challenged evidence at trial, meaning his argument is not preserved for ordinary appellate review. *State v. Miller*, __ N.C. __, __, 814 S.E.2d 81, 85 (2018). But "both sides have fully litigated the suppression issue at the trial court stage," and we are thus able to review Case's arguments for plain error. *Id.*

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial" and that "the error 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). Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

Case's motion to suppress is based on his argument that law enforcement did not have probable cause to arrest him. When examining whether probable cause exists to make an arrest, courts examine the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). The existence of probable cause depends upon whether, at the moment of arrest, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The trial court made the following unchallenged findings of fact in its order denying the motion to suppress: First, the court found that when Trooper Weaver initially encountered Case, he noticed Case smelled strongly of alcohol, had red eyes, and spoke with slurred speech. Next, the court found that, when Trooper Weaver later approached Case's car, he saw "containers on the floorboard through the tinted windows." The court also found that during this second encounter with Case, Trooper Weaver "saw the same glassy eyes, smelled the strong odor of alcohol, and slurred

speech." Finally, the court found that Case admitted to Trooper Weaver that he had been drinking but not "enough to worry about."

These findings are sufficient to support the trial court's conclusion that Trooper Weaver had probable cause to arrest Case. A law enforcement officer observed Case driving a vehicle while smelling strongly of alcohol, slurring his speech, and having red, glassy eyes. Case admitted that he had been drinking. The officer also saw containers on the floorboards inside the vehicle. This evidence is sufficient for a reasonably prudent officer to believe that Case was driving while impaired. *State v. Biber*, 365 N.C. 162, 169, 712 S.E.2d 874, 879 (2011).

Case also challenges the trial court's use of the "collective knowledge" doctrine to consider facts known by Officer Wilde but not conveyed to Trooper Weaver before Trooper Weaver arrested Case. We need not address this issue because the trial court's findings concerning the facts known to Trooper Weaver, standing alone, are sufficient to support the court's conclusion that probable cause existed. Accordingly, the trial court did not err—and certainly did not plainly err—by denying Case's motion to suppress.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Chief Judge McGEE and Judge COLLINS concur.

Report per Rule 30(e).