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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-989

Filed: 5 May 2020

Wake County, No. 17 CRS 212577

STATE OF NORTH CAROLINA

v.

JOHN SCOTT HIGGINBOTHAM

Appeal by defendant from judgment entered 3 June 2019 by Judge Stephan R. Futrell in Wake County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant.

ARROWOOD, Judge.

John Scott Higginbotham (“defendant”) appeals from judgment entered on his conviction for driving while impaired. Defendant contends the trial court erred in denying his motion to suppress because the evidence did not support the trial court’s

findings of fact and the findings of fact did not support its conclusion there was probable cause to arrest defendant. For the following reasons, we affirm.

I. Background

At approximately 4:00 p.m. on 3 July 2017, North Carolina State Highway Patrol Trooper Brian Thompson responded to a call about a possible impaired driver. Trooper Thompson was given a description of the vehicle and its last known location. Based on this information, Trooper Thompson was able to locate the vehicle as it was being driven into the parking lot of a shopping center. As he approached the vehicle, he observed defendant back into a parking space and exit the vehicle from the driver's seat without any noticeable issues. Trooper Thompson then parked his patrol vehicle next to defendant's and asked defendant to speak with him. He informed defendant that his truck matched the description of a vehicle in the area about which he had received a call. Defendant said he did not mind speaking with Trooper Thompson.

Upon observing an open 40-ounce bottle of Bud Ice beer on the floorboard of defendant's car, Trooper Thompson asked defendant when was the last time he had something to drink. Defendant informed him that he drank about forty minutes ago. Trooper Thompson then asked defendant if he could check his eyes and perform the horizontal gaze nystagmus test (hereinafter "HGN test") on him, and defendant agreed. Before performing this test, he checked defendant's eyes to see if he was a viable candidate for that type of test. Following an examination of defendant's eyes,

Trooper Thompson determined defendant was capable of undergoing the test. During the HGN test, Trooper Thompson observed there was a lack of smooth pursuit in both of defendant's eyes. He also observed a distinct and sustained nystagmus at maximum deviation in both eyes. Trooper Thompson did not observe vertical nystagmus and onset of nystagmus prior to 45-degrees in either eye. In total, Trooper Thompson saw "[f]our out of six validated clues" of impairment on the HGN test. He also noted defendant's eyes were red.

Trooper Thompson next requested that defendant submit to a portable breath test, and defendant complied. The test sample was positive for alcohol. Trooper Thompson then asked defendant to move towards the back of the parking lot, where there was less traffic, to conduct further testing. Defendant again complied with Trooper Thompson's request. Once in the back parking lot, Trooper Thompson attempted to administer the "walk and turn" and "one leg stand" standardized field sobriety tests, which are also divided attention tests. Defendant initially complied and attempted to perform the tests. In preparation for the "walk and turn" test, Trooper Thompson instructed defendant to wait and stand with his left foot on the line and his right foot directly in front of it and his arms by his side while Trooper Thompson gave him the instructions for the test. Contrary to Trooper Thompson's instructions, defendant began to walk and start the test during the instructional stage. Trooper Thompson noticed defendant was unable to maintain his balance and

broke his stance. Defendant did not complete the test because he did not feel comfortable performing the test due to a hip injury. Defendant also initially agreed to perform the “one leg stand” test, but upon starting he again informed Trooper Thompson that he did not feel like he could perform the test due to his hip injury.

Because defendant could not perform the “walk and turn” and “one leg stand” tests, Trooper Thompson instead requested that defendant perform some non-standardized field sobriety tests. He asked defendant to recite the alphabet without singing, and defendant was able to do so without issue. However, Trooper Thompson noticed a mild odor of alcohol on defendant’s breath as he would talk. Defendant was also asked to perform a “finger dexterity test,” which required him to touch every fingertip while counting out loud. While completing the test, defendant touched the meaty part of his fingers rather than his fingertips. Trooper Thompson then requested defendant to provide a second breath sample, which again yielded a positive result for alcohol. Trooper Thompson lastly requested that defendant perform the “Romberg Balance Test,” which he did not typically use when testing for alcohol impairment. For this test, Trooper Thompson instructed defendant to stand with his feet together, hands by his side, tilt his head back, close his eyes, and estimate the passage of thirty seconds. After thirty seconds, defendant was to tilt his head back down, open his eyes, and say “stop.” Trooper Thompson noticed defendant took thirty-five seconds to estimate thirty seconds, and had a “slight sway.”

Following defendant's completion of the field sobriety tests, Trooper Thompson arrested defendant for driving while impaired. Defendant was also charged with transporting an open container. On 9 January 2019, defendant pled guilty in Wake County District Court to driving while impaired and was sentenced to a term of sixty days imprisonment. The sentence was suspended and defendant was placed on twelve months of unsupervised probation. Defendant gave oral notice of appeal to the Wake County Superior Court.

On 25 February 2019, defendant filed a motion to suppress in Wake County Superior Court and the matter was heard the same day. In his motion, defendant argued Trooper Thompson lacked probable cause to arrest him and thus violated his Fourth Amendment rights. On 27 February 2019, the trial court entered a written order denying defendant's motion. On 3 June 2019, defendant pled guilty to driving while impaired and reserved the right to appeal the denial of his motion to suppress. The trial court again sentenced defendant to a term of sixty days imprisonment, suspended for twelve months of unsupervised probation. Defendant gave oral notice of appeal.

II. Discussion

Defendant's sole contention on appeal is that the trial court erred in denying his motion to suppress because the evidence did not support the trial court's findings

of fact and the findings of fact did not support its conclusion there was probable cause to arrest defendant. We disagree.

“The standard of review for a motion to suppress ‘is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.’” *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (quoting *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003)). “[T]he trial court’s findings of fact ‘are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.’” *State v. Phillips*, 151 N.C. App. 185, 188, 565 S.E.2d 697, 700 (2002) (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). We review conclusions of law *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Under *de novo* review, this Court considers the matter anew and substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

1. Findings of Fact

Defendant first contends the trial court’s findings of fact 8, 9, 10, and 12 are unsupported by the evidence because the trial court included certain findings that Trooper Thompson did not expressly testify to. Specifically, in its order denying defendant’s motion to suppress, the trial court found, in pertinent part, as follows:

8. In between the first and second PBTs, Thompson moved the Defendant to a nearby location where he could have the Defendant perform two other standard field sobriety tests – the “walk and turn” and the “one leg stand.”

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After beginning each of those tests, however, Defendant said that because of a hip injury, he could not complete either test. As a result, Thompson did not complete those tests. However, in that both are “divided attention” tests, Thompson noted that Defendant began each of those tests before Thompson completed his instructions. He considered those early starts as indications of impairment.

9. Because the Defendant’s physical limitations prevented use of those two standard tests, Thompson attempted some non-standard field sobriety tests. First, the Defendant adequately performed the “alphabet test,” in which Defendant recited the alphabet backwards in a non-“sing song” fashion. Next, Thompson showed Defendant how to perform the “finger dexterity” test, in which an individual counts forward and backward as he touches the tips of his fingers, while Defendant counted forward and backward, he touched the meaty part of his finger instead of the tips as he had been instructed. Thompson considered the variance as a somewhat positive indication of impairment.

10. Finally, Thompson had Defendant perform the “Romberg Balance Test,” in which Defendant was instructed to stand with his feet together (touched each other) and close his eyes. Thompson noted that Defendant began to sway a little during this test; this provided another positive indication of impairment.

....

12. Based upon the Defendant’s admission to consumption of alcohol within 40 minutes before his encounter with Thompson, the Defendant’s red eyes, the mild odor of alcohol coming from his breath, the positive results of the PBTs, Defendant’s positive findings on 4 of 6 clues during the HGN test, and the positive findings from Defendant’s performance of the Romberg Balance [T]est and the finger dexterity test, Thompson formed an opinion that Defendant’s mental and physical faculties were

sufficiently impaired by alcohol as to provide probable cause to arrest Defendant for driving while impaired; and Thompson placed Defendant under arrest.

Defendant contends that the trial court erred in finding that Trooper Thompson considered defendant's performance on the "walk and turn" test, "one leg stand" test, "finger dexterity" test, and "Romberg Balance Test" to be indications of his impairment, where Trooper Thompson did not expressly say so. However, "[i]t is well-settled that the trial court determines the credibility of the witnesses, the weight to be given to the testimony, and 'the reasonable inferences to be drawn therefrom.' " *State v. Fields*, __ N.C. App. __, __, 836 S.E.2d 886, 891 (2019) (quoting *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 828 (2009)).

Here, Trooper Thompson testified that he arrested defendant for driving while impaired after having defendant undergo several field sobriety tests. Throughout his testimony, he described in detail to the trial court defendant's performance of those tests, including any errors he made and other factors Trooper Thompson found important to take note of, such as the red tint of defendant's eyes and odor of alcohol on his breath. Based on Trooper Thompson's own testimony that, at the conclusion of the sobriety tests, he arrested defendant for driving while impaired, the trial court reasonably inferred that the results of the tests Trooper Thompson performed indicated defendant was impaired. Though Trooper Thomas never expressly said "these were indications of impairment," the fact that he arrested defendant following

his administration of the sobriety tests is clear indication that he believed defendant's results indicated his impairment.

Furthermore, though defendant contends there was evidence he was not impaired, it is the role of the trial court, as factfinder, to weigh evidence. Thus, "even though there is evidence in the record to support a contrary finding," *Phillips*, 151 N.C. App. at 190, 565 S.E.2d at 701, the trial court's findings are binding on appeal if supported by any competent evidence. *Cockerham*, 155 N.C. App. at 736, 574 S.E.2d at 699. As the trial court noted in its finding of fact 12, based on Trooper Thompson's testimony there were a number of indicators that defendant was impaired, including his own admission he recently consumed alcohol, two breath samples testing positive for alcohol, defendant's red eyes, the mild odor of alcohol on defendant's breath, positive findings of four of six clues on the HGN test, and errors or variances defendant made when performing other sobriety tests administered by Trooper Thompson. Thus, the findings challenged by defendant are supported by the evidence, and his argument is without merit.

2. Probable Cause

Defendant further argues the trial court's findings do not support its conclusions that defendant was sufficiently impaired by alcohol and Trooper Thompson had probable cause to arrest defendant. We disagree.

N.C. Gen. Stat. § 20-138.1 governs impaired driving and provides, in pertinent part, that “[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance.” N.C. Gen. Stat. § 20-138.1(a)(1) (2019). “ ‘[A] person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of those faculties.’ ” *State v. Parisi*, 372 N.C. 639, 649-50, 831 S.E.2d 236, 243-44 (2019) (quoting *State v. Carroll*, 226 N.C. 237, 240-41, 37 S.E.2d 688, 691 (1946)). “The fact that a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [N.C. Gen. Stat.] § 20-138.” *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965) (citing *State v. Gurley*, 257 N.C. 270, 125 S.E.2d 445 (1962)).

Probable cause for an arrest is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed. The existence of such grounds is determined by the practical and factual considerations of

everyday life on which reasonable and prudent people act. If there is no probable cause to arrest, evidence obtained as a result of that arrest and any evidence resulting from the defendant's having been placed in custody, should be suppressed.

State v. Tappe, 139 N.C. App. 33, 36-37, 533 S.E.2d 262, 264 (2000) (citations and quotation marks omitted). “Whether probable cause exists to justify an arrest depends on the ‘totality of the circumstances’ present in each case.” *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) (citations omitted). In *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014), we upheld the trial court’s finding there was probable cause to arrest a defendant for driving while impaired. There, the arresting officer observed the defendant had bloodshot eyes, emitted a moderate odor of alcohol, admitted to drinking only an hour prior to being stopped, exhibited clues indicating intoxication on three field sobriety tests, and produced positive results on two alco-sensor tests. *Id.* at 465, 762 S.E.2d at 905. We held these facts sufficient to support the trial court’s determination that the arresting officer had probable cause to arrest the defendant. *Id.* In doing so, we rejected the defendant’s argument that “because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause for [the officer] to arrest [the] defendant for driving while impaired.” *Id.*

Our Supreme Court addressed a similar issue in *Parisi*. There, the defendant was arrested for driving while impaired after being stopped at a checkpoint. 372 N.C.

at 651, 831 S.E.2d at 245. Though the arresting officer did not observe the defendant driving badly or unlawfully, he asked the defendant to perform field sobriety tests after observing the defendant's eyes were red and glassy, there was an open box of alcoholic beverages in the vehicle, and the defendant admitted to drinking earlier in the evening. *Id.* at 651-52, 831 S.E.2d at 245. The defendant missed two steps while performing the "walk and turn" test and swayed and used his arms for balance during the "one leg stand" test. In addition, the officer found clues indicating impairment while administering the HGN test. *Id.* at 652, 831 S.E.2d at 245. Based on these facts, the officer formed the opinion the defendant had consumed a sufficient amount of alcohol so as to appreciably impair his physical and mental faculties. *Id.* Our Supreme Court held the trial court erred in concluding the officer lacked probable cause to arrest the defendant given the defendant's own admission of drinking, the odor of alcohol, defendant's red and glassy eyes, and the multiple indicia of impairment revealed by the sobriety tests. *Id.* at 653, 831 S.E.2d at 245.

Similarly, in the present case, there was evidence defendant was appreciably impaired such that Trooper Thompson reasonably believed there was probable cause to arrest defendant for driving while impaired. Like the defendants in *Townsend* and *Parisi*, defendant here admitted to consuming alcohol within the past hour, had red eyes, emitted an odor of alcohol, tested positive for alcohol on two separate breath samples, and exhibited clues of intoxication on several field sobriety tests, including

four of six clues on the HGN test. In addition, there was a 40-ounce open container of beer in defendant's truck, and Trooper Thompson had received a call about a possible impaired driver in a vehicle matching the same description as defendant's truck. Thus, the facts support a finding of probable cause for both driving while impaired and the separate offense of transporting an open container, which defendant was also charged with. *See State v. Simmons*, 205 N.C. App. 509, 526, 698 S.E.2d. 95, 107 (2010) (finding probable cause existed to arrest a defendant where there was an open container in his vehicle); N.C. Gen. Stat. § 20-138.7 (2019).

Defendant argues this Court's decision in *State v. Overocker*, 236 N.C. App. 423, 762 S.E.2d. 921 (2014) requires us to reverse the trial court's order. In that case, the defendant had consumed several drinks at a bar over the course of four hours, and then backed into a motorcycle as he was leaving the parking lot. *Id.* at 426, 762 S.E.2d. at 923. The arresting officer observed the defendant emanated a light odor of alcohol, admitted to consuming alcohol prior to the accident, and had some minor trouble remembering the instructions for the "walk and turn" and "one leg stand" tests. In addition, the defendant had red, glassy eyes, and twice tested positive on tests indicating the presence of alcohol. *Id.* at 426-27, 762 S.E.2d. at 923-24. The arresting officer thus determined the defendant was impaired and placed the defendant under arrest. *Id.* at 427, 762 S.E.2d. at 924. However, the trial court concluded the officer lacked probable cause to arrest because it found the car accident

was not the fault of the defendant, who did not see the motorcycle that was illegally parked behind his SUV, and not due to any impairment by alcohol. *Id.* at 433-34, 762 S.E.2d. at 927-28. Furthermore, in regards to other indications of impairment cited by the officer,

the strength of the alcohol odor was “‘not real strong, light.’” In addition, none of the three officers on the scene observed defendant staggering or stumbling when he walked, and his speech was not slurred. Further, the only error defendant committed when performing the two field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, defendant did so.

Overocker, 236 N.C. App. at 434, 762 S.E.2d. at 928.

Noting that the trial court determined that the car accident was not the fault of the defendant, the accident was minor, and “defendant’s performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment,” we upheld the trial court’s order granting the defendant’s motion to suppress due to lack of probable cause. *Id.* at 435, 762 S.E.2d. at 928. Recognizing the trial court’s role as factfinder, this Court in *Overocker* essentially refused to reweigh the evidence and instead correctly focused on whether the trial court’s findings supported its conclusions. Because the trial court’s findings established there was no reasonable basis for concluding the defendant was impaired, we affirmed the trial court’s order.

The present case is notably distinguishable from *Overocker* because, as discussed elsewhere in this opinion, the trial court here found there were several

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indications that defendant was impaired by alcohol. Instead, we believe this case is more closely akin to *Parisi* and *Thompson*. As in all the cases cited, we decline defendant's invitation to reweigh the evidence and substitute our judgment for that of the trial court. Defendant's reliance on our decision in *Overocker* is thus misplaced, and we reject his argument.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).