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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-388

No. COA 20-401

Filed 20 July 2021

Alamance County, No. 15CRS002738

STATE OF NORTH CAROLINA

v.

DEMARIO LAWRENCE MORROW, Defendant.

Appeal by Defendant from judgment entered 8 May 2019 by Judge Rebecca W. Holt in Alamance County Superior Court. Heard in the Court of Appeals 10 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for the Defendant.

DILLON, Judge.

I. Background

¶ 1 During the early morning of 13 September 2015, a police officer found Defendant Demario L. Marrow asleep at a traffic light, behind the wheel of his running vehicle. Remarkably, Defendant's foot stayed on the brake while the car idled through multiple light cycles. Equally remarkable, the officer was able put the

vehicle in park, as Defendant failed to respond to being woken up initially. The officer detected the odor of alcohol on Defendant, though no alcohol containers were present in the vehicle. Defendant eventually woke up and “appeared hazy.” The officer called for backup, and another officer, along with his officer in training, responded.

¶ 2 The officers put Defendant through a series of tests including: Horizontal Gaze Nystagmus test (“HGN Test”), walk and turn test, one-leg stand test, and portable breath test. Defendant made errors in all four tests, though evidence was presented that the physical balancing tests were performed on a slight incline. Throughout the interaction, however, the officers noticed Defendant’s body swaying. After the tests, the officers had a meeting amongst themselves, and based on their shared information, Defendant was arrested for driving while impaired. Defendant was transported to the police department for a breath test on an Initializer ECIR-II and his alcohol concentration was detected at .12.

¶ 3 Defendant was indicted for driving while impaired and carrying a concealed gun when alcohol remaining in body.¹ Pretrial, Defendant’s motion to suppress evidence based on a lack of probable cause was denied. Defendant was then tried before a jury. The jury found him guilty of driving while impaired, but it found him not guilty of the weapons charge. Defendant timely appealed in open court.

¹ The officers found a handgun while searching the vehicle.

II. Analysis

¶ 4 When reviewing a ruling on a motion to suppress, we analyze whether the underlying findings of fact are supported by competent evidence. *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (citation omitted).

¶ 5 We next look to whether the findings of fact support the sole conclusion of law that there was probable cause to arrest Defendant for driving while impaired. *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017). Conclusions of law are reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

A. Findings of Fact

¶ 6 Defendant argues that many of the court’s findings of fact are unsupported by the evidence. We disagree.

¶ 7 We find that the findings of fact challenged by Defendant are supported by competent evidence, and address each assertion below:

(1) Defendant contests the finding that the “traffic was light,” but that finding is supported by the presence of two cars at the scene.

(2) Defendant contests the finding that he was “passed out,” but that is supported by Defendant being found asleep—“passed out” being a common synonym.

(3) Defendant contests the finding that Sergeant Brown said he suspected Defendant was appreciably impaired. Still, evidence exists that Brown testified to

the essence of that statement, just in other terms, such as he “felt” or “believed” Defendant was impaired.

(4) Defendant contests that one finding failed to note that the field sobriety test occurred on a slight incline, but that argument does not directly challenge the test. Similarly, Defendant attacks a finding that the sobriety tests were moved to more level ground, yet testimony and exhibits showed that the ground was flat.

(5) Defendant argues that Officer Meisenbach did not state that his observation of the HGN test was an indication of appreciable impairment, but the officer directly testified to that very point.

¶ 8 The challenged findings of fact are supported by competent evidence. Thus, we hold that the trial court did not commit error.

B. Conclusion of Law

¶ 9 Defendant was charged with driving while impaired. “The essential elements of DWI are: (1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance.” *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002) (citing N.C. Gen. Stat. § 20-138.1 (2015)).

¶ 10 Defendant argues that there was not probable cause to trigger his arrest. “Probable cause to arrest exists when the officer has reasonable grounds to believe that a crime has been committed and that the suspect committed it.” *Richardson v.*

Hiatt, 95 N.C. App. 196, 200, 381 S.E.2d 866, 868 (1989) (citing *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973)). The totality of the circumstances dictates whether probable cause exists. *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014).

¶ 11 Defendant argues there were not sufficient indicia of impairment for a cautious and prudent officer to suspect that Defendant was appreciably impaired. We disagree and find there to be adequate indicia of impairment under the totality of the circumstances.

¶ 12 Defendant was asleep at a traffic light while in a running motor vehicle at 4 A.M. It took the officer multiple attempts to wake him. When he finally came to, Defendant appeared groggy, emitted a moderate to strong smell of alcohol, and eventually admitted to drinking. He failed the walk and turn test under police standards, exhibited two issues with the one-leg stand test, represented 6/6 factors on the HGN test of impairment, and had a positive result for alcohol on two consecutive portable breath tests. The officers observed Defendant swaying and suspected impairment. *See State v. Rich*, 351 N.C. 386, 397-98, 527 S.E.2d 299, 305 (2000) (“The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol.”).

¶ 13 Admittedly, Defendant passed an alphabet and numbers test, did not have bloodshot eyes, had no alcohol containers in the car, spoke without slurring, and was overall polite and cooperative. However, even though there were some indications that Defendant might not have been impaired, when looking at the totality of the circumstances, the many factors indicating impairment gave the officers probable cause to arrest Defendant.

III. Conclusion

¶ 14 We conclude that probable cause was present to arrest Defendant, as the findings of fact were supported by competent evidence and the sole conclusion of law was supported by the findings of fact.

NO ERROR.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).