IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-375

No. COA20-611

Filed 20 July 2021

Rowan County, No. 18 CRS 52368-9

STATE OF NORTH CAROLINA

v.

FERNANDO ALVAREZ, Defendant.

Appeal by the State from order entered 2 December 2019 by Judge Anna Mills Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary K. Dunn, for the State-Appellant.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for the Defendant-Appellee.

GORE, Judge.

¶ 1 Fernando Alonzo Alvarez ("Defendant") was indicted for possession of cocaine, drug paraphernalia, buprenorphine, marijuana paraphernalia, and up to one half ounce of marijuana. Defendant filed a pre-trial motion to suppress on grounds that

the evidence against him was collected at an unconstitutional checkpoint. The trial court granted Defendant's motion to suppress concluding that the State failed to provide a valid primary programmatic purpose for the roadblock. The State appeals, arguing that the trial court erred in granting Defendant's motion to suppress where it made findings of fact unsupported by competent evidence, failed to consider whether officers possessed independent reasonable suspicion to stop Defendant, and erroneously concluded that the checkpoint violated the United States and North Carolina Constitutions. We affirm the trial court's order granting Defendant's motion to suppress on grounds that the State failed to demonstrate a valid primary programmatic purpose for the implementation of the checkpoint.

I. Factual and Procedural Background

¶ 2 On the morning of 6 June 2018, officers with the Rowan County Sheriff's Office set up a checkpoint at the intersection of Stone and Rainey Roads in Salisbury, North Carolina. Deputy Nolan Shue ("Deputy Shue") proposed the checkpoint in response to a fatal accident on 4 June 2018 in which a teenage male traveling over 100 mph lost control of his vehicle and crashed into a tree. Deputy Shue requested and received permission from his superior, Sergeant Meyers, to place the checkpoint roughly 100 yards from the location of the accident, from midnight to 2:00 a.m.

¶ 3 Deputy Shue testified that the purpose of the checkpoint was to check driver's licenses and look for "Chapter 20" traffic violations. However, Shue acknowledged

that the officers present were not using radar to check the speed of approaching vehicles. While no one was stopped for speeding that night, officers issued two citations for driving while license revoked, and one citation for no insurance.

¶ 4 Deputy Shue supervised the checkpoint, and Officers Hill and Mahaley worked alongside him. Officers conducted the checkpoint in accordance with policy, having at least two uniformed deputies present, and at least one marked patrol vehicle with blue lights activated. While not officially part of the planned checkpoint, Officer Richard Tester ("Officer Tester") of the Granite Quarry Police Department arrived towards the end of the checkpoint period. Officer Tester said on direct examination that he showed up because "it was a slow night" and he "just wanted to hang out with a couple of my friends and kill time."

¶ 5 At approximately 1:45 a.m., Deputy Shue, Officer Hill, and Officer Tester observed Defendant approach the checkpoint in his vehicle. At trial, Deputy Shue testified:

> [Deputy Shue]: . . . While standing at the checkpoint intersection I observed a vehicle coming towards the checkpoint. It went off the side of the road to the right of the direction the vehicle was traveling. The tires on the passenger's side crossed the line on the right side of the road and then went completely off the road into the grass.
>
> [The State]: And can you describe the road for the Court, is it just a two lane road, one in each direction?
>
> [Deputy Shue]: Yes, it is, mm-hmm.

> [The State]: When you observed the vehicle go off the right side of the road and the passenger's side tires go off the road into the grass did that cause you any concern based upon your training and experience?
>
> [Deputy Shue]: It did.
>
> [The State]: And why did it cause you concern?
>
> [Deputy Shue]: It made me believe that there might be possibly some impaired driving.

¶ 6 There was no testimony as to precisely how far away the car was from the checkpoint when it went off the road or how long the car stayed on the shoulder. When Defendant arrived at the checkpoint location, Officer Tester and Deputy Shue approached his vehicle and observed Defendant in the driver's seat and two other individuals in the car. Officers testified that Defendant appeared "very nervous and overly talkative," "had some glassy eyes," and "couldn't stop smiling."

¶ 7 One of the officers asked Defendant to exit the vehicle. There was no further testimony as to how the encounter progressed to a search, and there was no body camera video. As a result of the stop, officers recovered cocaine, buprenorphine, marijuana, and related drug paraphernalia in Defendant's vehicle. Defendant moved to suppress the evidence on grounds that it was obtained at an unconstitutional checkpoint.

II. Discussion

¶ 8 On appeal, the State argues that: (1) findings of fact 10, 11, and 12 in the trial

court's order are unsupported by competent evidence; (2) the officers who stopped and searched Defendant's vehicle had independent reasonable suspicion of criminal activity, regardless of the constitutionality of the checkpoint; and (3) the trial court's findings of fact do not support its conclusion of law that the checkpoint violated the Fourth Amendment.

¶ 9 "When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court determines whether the challenged findings of fact are supported by (1) competent evidence and (2) whether those findings support the trial court's conclusions of law." *State v. Johnson*, 204 N.C. App. 259, 262, 693 S.E.2d 711, 714 (2010). "Upon a finding of such competent evidence, this Court is bound by the trial court's findings of fact even if there is also other evidence in the record that would sustain findings to the contrary." *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Id.* at 369, 614 S.E.2d at 558 (citation and quotation marks omitted). Findings of fact not challenged "are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

¶ 10 "[T]he trial court's conclusions of law are reviewed *de novo* and must be legally correct." *Johnson*, 204 N.C. App. at 262, 693 S.E.2d at 714 (citations omitted).

"Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at 262, 693 S.E.2d at 714 (*purgandum*).

A. Challenged Findings of Fact

¶ 11 The State challenges the trial court's findings of fact 10, 11, and 12 as unsupported by competent evidence.

¶ 12 The State challenges a portion of finding 10:

> 10. . . . In this particular roadblock, no evidence was offered as to whether the safety of the motoring public was a factor in the selection of the location.

The State argues that testimony presented at trial supports a logical conclusion that the "safety of the motoring public" was a consideration in choosing the location of the checkpoint. In the alternative, this portion of finding 10 should be characterized as a conclusion of law and is not binding on appeal because a determination as to whether the primary purpose of the checkpoint was for the safety of the public is one factor in ascertaining the reasonableness of the checkpoint.

> As a general rule . . . any determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law. Any determination reached through "logical reasoning from the evidentiary facts" is more properly classified a finding of fact.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted).

¶ 13 This finding is appropriately reviewed as a finding of fact. The stated justification for the checkpoint was "a fatal wreck at that location," which occurred less than 48 hours prior. However, the State also presented evidence at trial that officers wanted to check motorists for driver's licenses and other Chapter 20 motor vehicle infractions. The State asserts that "the only fair deduction from this unrebutted testimony was that the checkpoint was for the safety of the motoring public." However, we disagree that this is the only fair deduction to be made from the evidence presented and uphold the trial court's finding to the contrary.

¶ 14 The State challenges finding 11 in its entirety:

> 11. The location of the checkpoint played a role in the vehicle's alleged "failure to maintain lane control" that led to the investigation and subsequent arrest of the Defendant for the charges in this matter [ ].

Here, the State argues that there was no testimony presented which supports this finding of fact. However, Deputy Shue testified that the checkpoint was not visible until drivers first come around the corner and "there is still that brief moment before they actually realize what's going on that they slow down." All three officers observed that Defendant's vehicle briefly slowed and departed the road before proceeding to the checkpoint. In contrast to this testimony, defense counsel stated in closing arguments that:

> [DEFENSE COUNSEL]: We have no testimony as to whether or not the checking station might have caused

> [Defendant] to look down or something as he was approaching and run off the road.

However, based on the evidence presented, the trial court could reasonably find that a driver coming around a corner, late at night, and confronted with flashing blue lights might pull over to the side of the road to assess the situation. Accordingly, we find the trial court's finding of fact 11 to be based on competent evidence.

¶ 15 The State challenges a portion of finding 12:

> 12. . . . Officer Tester initially made contact with the Defendant and immediately asked the Defendant to get out of the vehicle. There was no evidence that the Defendant was asked for a driver's license or the registration to the vehicle during this encounter which was the alleged purpose of the roadblock.

Here, the trial court found that there was "no evidence" that Defendant was asked for a driver's license. However, there is evidence to the contrary. Deputy Shue testified that he was able to identify Defendant from his drivers' license and did not recall any issue with Defendant providing a drivers' license. Later, Deputy Hill testified that he did not recall whether Defendant provided a drivers' license. Despite some conflicting testimony, the trial court unequivocally stated that there was "no evidence" that Defendant was asked for his driver's license. This was not the case. Accordingly, finding of fact 12 is not binding on review.

B. Independent Reasonable Suspicion

¶ 16 As a preliminary matter, the State argues this Court should first address the

issue of whether officers possessed reasonable suspicion to stop Defendant's vehicle. Specifically, the State contends that if this Court finds reasonable suspicion, it is unnecessary to determine the constitutionality of the checkpoint. In support of this proposition, the State cites *State v. Griffin*, 366 N.C. 473, 749 S.E.2d 444 (2013), and *State v. Foreman*, 351 N.C. 627, 527 S.E.2d 921 (2000). However, we note that the facts in these decisions are distinguishable from those in the instant matter.

¶ 17 In *State v. Griffin*, law enforcement officers conducted a license checkpoint near two intersections. 366 N.C. at 474, 749 S.E.2d at 445. One Trooper observed the defendant approach the checkpoint in his vehicle, stop in the middle of the road, and initiate a three-point turn onto the shoulder. "[The] Trooper . . . testified that these actions caused him to suspect that the driver was attempting *to avoid* the checkpoint." *Id.* (emphasis added). The Trooper stopped the defendant before he could complete the turn. He detected alcohol on the defendant's breath and subsequently charged him with driving while impaired. *Id.*

¶ 18 The Court held that

> even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion. Given the place and manner of defendant's turn in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the trooper had sufficient grounds to stop defendant's vehicle based on reasonable suspicion, it is unnecessary for this Court to address the

> constitutionality of the driver's license checkpoint.

Id. at 477, 749 S.E.2d at 447.

¶ 19 In *State v. Foreman*, officers conducted a DWI checkpoint in the early morning hours and posted signs providing notice about one-tenth of a mile before the roadblock. 351 N.C. at 629, 527 S.E.2d at 922. An officer was tasked with patrolling the checkpoint perimeter and instructed to "pursue any and all vehicles which appeared to attempt to avoid the checkpoint by turning around or away from it and to determine the basis for such avoidance." *Id.* That officer observed the defendant make "a quick left turn" prior to arriving at the checkpoint. *Id.* He followed the defendant's vehicle and found it parked in a residential driveway. The officer testified that he saw "several open containers of alcohol in the vehicle and that the vehicle emitted a 'strong odor of alcohol.' . . . [D]efendant had a strong to moderate odor of alcohol about her person once she exited the vehicle and . . . was unsteady on her feet." *Id.* at 629, 527 S.E.2d at 923.

¶ 20 The Court reasoned that "[a]lthough a legal turn, by itself, is *not* sufficient to establish a reasonable, articulable suspicion, a legal turn in conjunction with other circumstances, such as the time, place and manner in which it is made, *may* constitute a reasonable, articulable suspicion which could justify an investigatory stop." *Id.* at 631, 527 S.E.2d at 923. "'[F]light—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is

certainly suggestive of such.'" *Id.* at 631, 527 S.E.2d at 924 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576-77 (2000)). Thus, the Court held that:

> it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers *may be attempting to avoid the checkpoint*, and it necessarily follows that an officer, in conjunction with the totality of the circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away.

Id. at 632-33, 527 S.E.2d at 924 (emphasis added).

¶ 21 The Court in *Griffin* and *Foreman* addressed the question of whether officers possessed reasonable articulable suspicion to justify a traffic stop, independent of the constitutionality of the checkpoint, as a threshold issue. However, there is a critical distinction given the facts presented in this case. In *Griffin* and *Foreman*, officers stopped the defendants after evading, or attempting to evade, a lawful checkpoint. Here, Defendant slowed and departed the lane onto the shoulder of the road after he drove around a curve and was confronted with a roadblock. Defendant did not attempt to avoid the checkpoint. Instead, he maintained course and purposefully availed himself of the checkpoint and all constitutional protections afforded by it. Accordingly, we first examine the constitutional validity of the checkpoint.

C. Constitutionality of the Checkpoint

¶ 22 "When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint." *State v. Veazey*, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42, 148 L. Ed. 2d 333, 343 (2000)). "Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, '[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.'" *Id.* at 185-86, 662 S.E.2d at 686-87 (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 157 L. Ed. 2d 843, 852 (2004)).

¶ 23 "[I]n considering the constitutionality of a checkpoint, a trial court must first 'examine the available evidence to determine the primary purpose of the checkpoint program.'" *State v. Rose*, 170 N.C. App. 284, 289, 612 S.E.2d 336, 339 (2005) (quoting *Edmond*, 531 U.S. at 46, 148 L. Ed. 2d at 347). While it is the State's burden to demonstrate the constitutionality of a checkpoint, "a trial court may not 'simply accept the State's invocation' of a proper purpose, but instead must 'carry out a close review of the scheme at issue.'" *Id.* at 289, 612 S.E.2d at 339 (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 70, 149 L. Ed. 2d. 205, 208 (2001)).

Our Court has previously held that where there is no

> evidence in the record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose.

Veazey, 191 N.C. App. at 187, 662 S.E.2d at 687 (internal citations omitted).

¶ 24 "[T]he purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Edmond*, 531 U.S. at 48, 148 L. Ed. 2d at 347 (citing *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996)). Further, "a trial court cannot avoid making a determination of the primary programmatic purpose simply by finding that a checkpoint had at least one lawful purpose, such as 'keeping impaired motorists off the road and verifying licenses and registrations.'" *Rose*, 170 N.C. App. at 290, 612 S.E.2d at 340 (quoting *Edmond*, 531 U.S. at 46, 148 L. Ed. 2d at 346-47). "An illegal multi-purpose checkpoint cannot be made legal by the simple device of assigning 'the primary purpose' to one objective instead of the other, especially since that change is unlikely to be reflected in any significant change in the magnitude of the intrusion suffered by the checkpoint detainee." *Id.* at 290, 612 S.E.2d at 340 (*purgandum*).

¶ 25 In conclusion of law 3, the trial court found that "no 'admissible evidence, testimonial or written, of the supervisor's purpose' at a supervisory level was provided

as required by *State vs. Rose*, 170 N.C. App. 284 and therefore, the State has failed to provide the primary programmatic purpose of the roadblock." Sergeant Myers did not testify at trial, but the checkpoint form he signed states, "Location Justification for Checkpoint: On 6/4/18 a male was traveling over 100 mph and was involved in a fatal wreck at that location." While the form does not clearly define a primary programmatic purpose, it sheds light on the basis for the checkpoint's placement, which was a fatal car accident. The stated justification for the checkpoint as authorized by supervisor Sergeant Myers differs from the stated purpose given by Deputy Shue at trial. He testified:

> [THE STATE]: And other than checking for driver's licenses, did you have any other purpose for conducting the checkpoint?
>
> [DEPUTY SHUE]: Yes, for traffic violations.
>
> [THE STATE]: When you say traffic violations, is that for speeding or just all Chapter 20 violations in general?
>
> [DEPUTY SHUE]: All Chapter 20 in general.
>
> [THE STATE]: Were you working on the night of June the 4th?
>
> [DEPUTY SHUE]: I was.
>
> [THE STATE]: At some point after you learned that that traffic accident that occurred on the 4th was a fatality, did you speak to a supervisor about setting up this checkpoint that was on the 6th?
>
> [DEPUTY SHUE]: I did. After the start of our next shift

> which started on the 5th.
>
> [THE STATE]: What supervisor did you speak with?
>
> [DEPUTY SHUE]: He is Lieutenant Meyers now but at the time he was Sergeant Meyers.
>
> [THE STATE]: And did you provide then Sergeant Meyers with your reasoning for wanting to set up the checkpoint?
>
> [DEPUTY SHUE]: I did.
>
> [THE STATE]: And is it the same reason you've testified to today?
>
> [DEPUTY SHUE]: It is.
>
> [THE STATE]: And did Sergeant Meyers approve then the checkpoint?
>
> [DEPUTY SHUE]: Yes, he did.

¶ 26 Given the absence of a supervisor's testimony or other evidence indicating the purpose in approving the checkpoint, it is difficult to reconcile the stated justification of the checkpoint form with the individual officer's stated purpose at trial. While the fatal car accident was the justification for setting up the checkpoint, Deputy Shue testified that no one was monitoring speed of approaching vehicles.

¶ 27 "[I]t is well established that checkpoints may lawfully be conducted for the purpose of verifying drivers' licenses and vehicle registrations", *State v. McDonald*, 239 N.C. App. 559, 567, 768 S.E.2d 913, 919 (2015) (*purgandum*), however, "it is unclear whether a primary purpose of finding any and all *motor vehicle* violations is a lawful primary purpose." *Veazey*, 191 N.C. App. at 189, 662 S.E.2d at 689.

Assuming, *arguendo*, checking for all Chapter 20 motor vehicle violations was a valid primary purpose for the checkpoint, the State has not carried its burden of justifying a general checkpoint based on a single car accident near that intersection. As the United States Supreme Court held in *City of Indianapolis v. Edmond*, "[w]hile we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control." 531 U.S. at 44, 148 L. Ed. 2d at 345. "We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *Id.* Accordingly, we hold that the State did not meet its burden in demonstrating a valid primary purpose for the checkpoint.

¶ 28 Having found no valid primary programmatic purpose in the first prong of our inquiry, we need not examine the second prong of reasonableness. Further, in finding that the checkpoint was unconstitutional, it is unnecessary to address whether officers possessed independent reasonable articulable suspicion when Defendant purposefully availed himself of the seizure.

AFFIRMED.

Judge DIETZ concurs in result by separate opinion.

Judge MURPHY concurs in result only and joins in the concurrence of Judge Dietz.

Report per Rule 30(e).

DIETZ, Judge, concurring.

¶ 29 I believe this Court is required to address whether there was independent reasonable suspicion to stop Alvarez, notwithstanding the constitutionality of the checkpoint, based on the officers' observation of Alvarez failing to maintain lane control before reaching the checkpoint. But the trial court's finding that the failure to maintain lane control resulted from the presence of the checkpoint is supported by competent evidence in the record and that finding supports the trial court's conclusion that the stop violated the Fourth Amendment. I therefore concur in the Court's judgment.