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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-584

No. COA21-728

Filed 16 August 2022

Granville County, No. 18 CRS 50800

STATE OF NORTH CAROLINA

v.

LINDA KEARNEY PARHAM, Defendant.

Appeal by Defendant from judgment entered 1 June 2021 by Judge Cynthia King Sturges in Granville County Superior Court. Heard in the Court of Appeals 25 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Law Office of Matthew Charles Suczynski, PLLC, by Matthew C. Suczynski, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Linda Parham ("Defendant") appeals from a judgment pursuant to a plea agreement convicting her of impaired driving. Under the terms of her plea agreement, Defendant preserved her right to appeal the trial court's denial of her motion to suppress. On appeal, she argues the trial court erred by denying 1) her motion to suppress evidence obtained during an unconstitutional checkpoint, and 2)

her motion to suppress evidence obtained during an unconstitutional arrest. After a careful review of the record an applicable law, we hold the trial court did not err in denying Defendant's motion to suppress and affirm the judgment of the trial court.

I. Factual and Procedural Background

¶ 2 Troopers from the North Carolina State Highway Patrol were operating a check point station on SR 1606 on the morning of May 13, 2018. SR 1606 is a two-lane road in Granville County, North Carolina. Approaching vehicles would be able to observe the checking station approximately one or two tenths of a mile from the location and there was a "sufficient line of sight" so that a motorist could adequately see the checking station. The area selected as the location for the May 2018 checkpoint, SR 1606, was chosen because there were "a lot of complaints as far as reckless driving, a lot of wrecks."

¶ 3 Sergeant D.S. Smith ("Sergeant Smith") was the supervising officer of this checkpoint and outlined his plan regarding the operation of this checkpoint on an HP-14 form. Therein, Sergeant Smith laid out his plan for the troopers to ask each driver who approached the check point for their license and registration and to check for impairment between 12:00 a.m. and 1:30 a.m. The HP-14 form also shows Sergeant Smith intended for the checkpoint to have a minimum of two troopers, with at least one of the trooper's vehicles to have its blue lights activated, and all troopers to wear their reflective vests.

¶ 4 Trooper Dedrick Anders Jr. ("Trooper Anders"), along with three other members of the North Carolina Highway Patrol, conducted the checkpoint on the morning of May 13. Trooper Anders testified he, along with his fellow officers, followed the directive outlined by Sergeant Smith and did not deviate therefrom. He further testified that a checkpoint such as this was governed by the State Highway Patrol's written policy governing checkpoint stations.

¶ 5 Around 12:47 a.m., Defendant's vehicle approached the checkpoint location. Trooper Anders did not note anything unusual about Defendant's driving as her vehicle approached the checkpoint. Upon her arrival to the checkpoint, Trooper Anders asked Defendant for her license and registration. According to Trooper Anders, while Defendant was responding he "smelled a moderate odor of alcohol on her breath." Trooper Anders asked Defendant when the last time she drank alcohol that night was, and Defendant answered she had one drink at Big Daddy's Country Club. Trooper Anders then asked Defendant to put her car into park and step out of her vehicle.

¶ 6 Once Defendant was outside of her vehicle, Trooper Anders performed a Horizontal Gaze Nystagmus ("HGN") test on Defendant.[1] During a HGN test,

[1] Nystagmus is a psychological condition which causes "an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as

Trooper Anders looks for six different signs of impairment while administering the HGN to draw a conclusion that the suspect is impaired. A minimum of four clues is necessary to conclude the suspect is under the influence of alcohol and too impaired to drive. Defendant exhibited four out of the six clues of impairment on the HGN test. From this HGN test, Troopers Anders concluded Defendant had consumed a sufficient quantity of alcohol such that her BAC reading would exceed the legal limit of 0.08. Trooper Anders then attempted to conduct further sobriety tests on Defendant but was unable to do so due to her recent knee replacement. Defendant remained polite and cooperative with Trooper Anders throughout the entirety of the stop, and Trooper Anders did not note slurred speech or red or glassy eyes.

¶ 7 Defendant was subsequently arrested for driving while impaired. On August 24, 2020, Defendant pled guilty to impaired driving under N.C. Gen. Stat. § 138.1 in

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horizontal gaze nystagmus, or HGN." *State v. Helms*, 348 N.C. 578, 579, 504 S.E.2d 293, 294 (1998) (quotation omitted). When this test is administered, "the subject is asked to cover one eye and then use the remaining eye to track the lateral progress of an object (usually a pen) as the officer moves the object at eye-level across the subject's field of vision. As the moving object travels toward the outside of the subject's vision, the officer watches the subject's eye for 'nystagmus' – an involuntary jerking movement of the eyeball. If the person's eyeball exhibits nystagmus, and especially if the nystagmus occurs before the moving object has traveled 45 degrees from the center of the person's vision, this is taken as an indication that the person is intoxicated." *Id.* at 579-80, 504 S.E.2d at 294 (quotation omitted).

the Granville County District Court. The trial court found her as a Level Five DWI and sentenced her to 14 days in custody, suspended the sentence, and placed her on 12 months of unsupervised probation. Defendant entered a written notice of appeal the same day to the Granville County Superior Court, requesting a "trial *de novo*."

¶ 8 On February 11, 2021, Defendant filed a motion to suppress the checkpoint, evidence derived therefrom, and her subsequent arrest. The Superior Court held a hearing regarding Defendant's motion to suppress on February 16, 2021. By order entered March 19, 2021, the Superior Court denied Defendant's motion to suppress. Defendant then pled guilty a second time to impaired driving under N.C. Gen. Stat. § 138.1 in Superior Court on June 1, 2021. Defendant gave oral notice of appeal in open court.

II. Standard of Review

¶ 9 At the outset, we note that pursuant to N.C. Gen. Stat. § 15A-979 "a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2021); *see State v. Hernandez*, 170 N.C. App. 299, 303, 612 S.E.2d 420, 423 (2005). When reviewing a motion to suppress, this court looks to see "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-168, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585

(1994)); *see State v. Macke*, 276 N.C. App. 242, 2021-NCCOA-70, ¶ 13. A trial court is accorded great deference "because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Velazquez-Perez*, 233 N.C. App. 585, 596, 756 S.E.2d 869, 877 (2014) (quoting *State v. Hernandez*, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005)); s*ee State v. Parker*, 277 N.C. App. 531, 2021-NCCOA-217, ¶24 (quotation omitted), *disc. review denied,* 378 N.C. 366 (2021).

¶ 10 Our Supreme Court has clearly established:

> [W]hen[] . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (citation omitted). Conclusions of law are reviewed de novo and are subject to full review. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895 (1994); *see also State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal.' *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Biber, 365 N.C. at 168, 712 S.E.2d at 878.

III. Discussion

¶ 11 Defendant raises multiple issues on appeal. Each will be addressed in turn.

A. The Checkpoint

¶ 12 Defendant first argues since Sergeant Smith signed the HP-14 form after the checkpoint was completed and the form was incomplete until signed, the checkpoint was therefore unconstitutional. We disagree.

¶ 13 As an initial matter, we note the record on appeal is unclear as to when the HP-14 form was signed. The order denying Defendant's motion to suppress found that the "HP-14 form was not provided to Trooper Anders prior to beginning the checkpoint," and "Trooper Anders testified that it was routine practice for him to receive a copy of the signed HP-14 form within a few days 'in his box.' " This finding does not address when Sergeant Smith signed the HP-14 form. Rather it is limited to the usual method and practice by which Trooper Anders routinely received his copy of the HP-14 authorization form for the checkpoint in question. The HP-14 form itself indicates Sergeant Smith signed it the same day the checkpoint was conducted.

¶ 14 Even if the HP-14 form was, as Defendant contends, signed the day after the checkpoint was conducted, we remain unpersuaded by Defendant's argument that an unsigned HP-14 form renders a checkpoint unconstitutional. Our General Assembly sanctions checkpoints like the one at issue under N.C. Gen. Stat. § 20-16.3A: An agency must "[o]perate under a written policy that provides guidelines for the pattern, which *need not be in writing*." N.C. Gen. Stat. § 20-16.3A(a)(2a) (2021) (emphasis added); *see also State v. Mitchell*, 358 N.C. 63, 67, 592 S.E.2d 543, 546 (2004) ("[W]e decline to conclude that checkpoints conducted without written

guidelines are per se unconstitutional."). When determining whether a stop point is constitutional, "a trial court must examine the checkpoint as a whole and 'judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances' present with that checkpoint." *State v. Rose*, 170 N.C. App. 284, 298, 612 S.E.2d 336, 345 (2005) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 124 S. Ct. 885, 890, 157 L. Ed. 2d 843, 852 (2004)); *see also Mitchell*, 358 N.C. at 66, 592 S.E.2d at 545.

¶ 15 In *State v. Mitchell*, a defendant contended the checkpoint was unconstitutional because the officer who conducted the checkpoint "failed to obtain supervisory permission before creating it." *Mitchell*, 358 N.C. at 67, 592 S.E.2d at 546. Justice Orr, writing for the majority, disagreed, concluding:

> [The officer's] standing permission to set up checkpoints pursuant to Captain Jonas' oral guidelines and Officer Falls' call to his supervisor before creating the checkpoint at issue are constitutionally sufficient restraints to keep Falls from abusing his discretion. Because police officers are not constitutionally mandated to conduct driver's license checkpoints pursuant to written guidelines; because Officer Falls received sufficient supervisory authority to conduct the checkpoint; and because the officers stopped all oncoming traffic at the checkpoint, we conclude that the checkpoint was constitutional.

Id. at 68, 592 S.E.2d at 546.

¶ 16 We find our Supreme Court's opinion in *State v. Mitchell* to be directly applicable to this present case. Like the officer in *Mitchell*, Trooper Anders received

directives regarding the checkpoint from his supervising officer, Sergeant Smith. These directives were reflected on the HP-14 form. Sergeant Smith's guidelines included: stopping every vehicle, asking each driving for their license and registration, requiring at least one officer to activate the blue lights on his vehicle, and requiring all officers to wear their reflective vests. Furthermore, the evidence shows the operation of this checkpoint was governed by the State Highway Patrol's written policy governing checkpoint stations.

¶ 17 Because "police officers are not constitutionally mandated to conduct driver's license checkpoints pursuant to written guidelines," the timing of when the HP-14 form was signed is irrelevant to the determination of the constitutionality of this checkpoint. *Id.* at 68, 592 S.E.2d at 546. Therefore, we overrule Defendant's argument and hold this checkpoint was constitutional.

B. The Arrest

¶ 18 Next, Defendant contends the trial court erred by denying her motion to suppress the evidence obtained during an unconstitutional arrest. Specifically, Defendant argues a totality of the circumstances could not lead a reasonable officer to form the opinion she was impaired by an intoxicant, and thus the trial court erred by concluding Trooper Anders had probable cause to arrest her. We disagree.

¶ 19 We note Defendant does not challenge on appeal any of the trial court's findings of fact. Thus, these findings are binding on appeal. *State v. Townsend*, 236

N.C. App. 456, 464, 762 S.E.2d 898, 904 (2014). Although Defendant provides alternative pieces of evidence to support her argument as to why the trooper did not have probable cause to arrest her, "the findings of fact made below are binding on this Court if supported by the evidence, even when there may be evidence to the contrary." *Humphries v. Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (citing *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 249 S.E.2d 698 (1978)). Therefore, we limit our review to whether the trial court erred by concluding Defendant's arrest was supported by probable cause. *See Townsend*, 236 N.C. App. at 464, 762 S.E.2d at 904.

¶ 20 For an arrest to survive constitutional muster, police officers must have probable cause to make an arrest. *State v. Lindsey*, 249 N.C. App. 516, 519, 791 S.E.2d 496, 499 (2016); *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505. Probable cause for an arrest is defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *Streeter*, 283 N.C. at 207, 195 S.E.2d at 505 (quotation omitted); *see also State v. Overocker*, 236 N.C. App. 423, 433, 762 S.E.2d 921, 927 (2014); *Townsend*, 236 N.C. App. 464, 762 S.E.2d at 905.

¶ 21 Our appellate courts have firmly established that "[w]hether probable cause exists depends upon 'whether at that moment the facts and circumstances within their 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.' " *Streeter*, 283 N.C. at 207, 195 S.E.2d at 505 (quoting *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)); s*ee State v. Eubanks*, 283 N.C. 556, 559, 196 S.E.2d 706, 708 (1973); *Lindsey*, 249 N.C. App. at 519, 791 S.E.2d at 499; *Moore v. Hodges*, 116 N.C. App. 727, 730, 449 S.E.2d 218, 220 (1994). Moreover, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (cleaned up) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n. 13, 103 S. Ct. 2317, 2335 n. 13, 76 L. Ed. 2d 527, 552 n.13 (1983)).

¶ 22 The State contends this case is analogous to *State v. Townsend* where the defendant was arrested at a checkpoint for driving while impaired because he had bloodshot eyes, he had an odor of alcohol on his breath, he admitted to "drinking a couple of beers[,]" and the results of two alco-sensor tests and three field sobriety tests indicated he was impaired. *Townsend*, 236 N.C. App. at 456, 465, 762 S.E.2d at 901, 905. On appeal, the defendant argued there was insufficient probable cause to support his arrest for driving while impaired because "he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability." *Id.* at 465, 762 S.E.2d at 905. We disagreed, reiterating "this Court has held, the odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired." *Id.* Based upon the

evidence presented, we held sufficient probable cause existed to justify defendant's arrest. *Id.*

¶ 23 Likewise, in *State v. Parisi* our Supreme Court addressed whether probable cause existed to place defendant under arrest for driving while impaired. *State v. Parisi*, 372 N.C. 639, 639, 831 S.E.2d 236, 237 (2019). There, the officer "did not observe any unlawful or bad driving" but noticed defendant's eyes were glassy and an open container of alcohol in the passenger's side of the vehicle. *Id.* at 651, 831 S.E.2d at 245. The officer asked defendant to exit the vehicle and asked whether he had been drinking, to which defendant answered he had drank "three beers." *Id.* at 651-52, 831 S.E.2d at 245. Additionally, defendant had "a moderate odor of alcohol" emanating from his person. *Id.* at 653, 831 S.E.2d at 245. The officer then administered field sobriety tests. *Id.* at 652, 831 S.E.2d at 245. Defendant missed two steps during the field sobriety test and "swayed and used his arms for balance" during the one-leg field sobriety test and the officer "found clues indicating impairment while administering the horizontal gaze nystagmus test." Based upon these facts, our Supreme Court held the trial court erred by concluding the officer lacked probable cause to arrest defendant. *Id.* at 652, 831 S.E.2d at 245.

¶ 24 We find *Townsend* and *Parisi* to be directly applicable to this present case. Like the defendants in *Townsend* and *Parisi*, Defendant had a moderate odor of alcohol on her breath and admitted to having consumed alcohol prior to driving; and

like the defendant in *Parisi,* Defendant exhibited four of six clues on the HGN test administered by the trooper. Together, these findings of fact support the trial court's conclusion of law that Trooper Anders had "a reasonable ground of suspicion, supported by circumstances strong in themselves to warrant a cautious person in believing the accused to be guilty of driving while impaired." Therefore, we hold the trial court did not err by denying Defendant's motion to suppress.

IV. Conclusion

¶ 25 Because we conclude the evidence supports the trial courts findings and conclusions the check point was constitutional and that Trooper Anders had probable cause to arrest Defendant, we affirm the trial court's denial of Defendant's motion to suppress.

AFFIRMED.

Judges DIETZ and GORE concur.

Report per Rule 30(e).