

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA24-137

Filed 5 November 2024

Buncombe County, No. 19 CRS 84967

STATE OF NORTH CAROLINA

v.

COLLIN PAUL MAY, Defendant.

Appeal by defendant from judgment entered 4 August 2023 by Judge David Hugh Strickland in Buncombe County Superior Court. Heard in the Court of Appeals 12 June 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Liliana R. Lopez, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

THOMPSON, Judge.

Collin May (defendant), charged with driving while impaired (DWI), filed a motion to suppress. The district court issued a preliminary determination granting defendant's motion pursuant to N.C. Gen. Stat. § 20-38.6(f), the State appealed, and the superior court denied defendant's motion. The superior court's order failed to expressly remand the motion to suppress to the district court for entry of a final order.

However, the parties proceeded as if the superior court's order complied with N.C. Gen. Stat. § 20-38.6(f). Ultimately, defendant was tried by a jury and found guilty of DWI. Defendant appealed. We affirm the trial court's judgment against defendant.

I. Factual Background and Procedural History

a. Part I – Unlawful seizure

On 13 May 2019, at approximately 1:20 am, Officer Oldenbergh, Officer Felix, and Sergeant Flanders, law enforcement officers with the City of Asheville, responded to a call for service to assist the fire department. Upon his arrival, Officer Oldenbergh spoke with one of the firefighters, who informed him that when they arrived on the scene, defendant was passed out and slumped over the steering wheel. The firefighters suspected defendant was intoxicated; however, the vehicle was not running, and the keys were not in the ignition.

Officer Oldenbergh then approached defendant's red Ford Explorer and observed defendant in the driver's seat, with the driver's door open, and the vehicle parked illegally in the parking lot of the First Bank. Officer Oldenbergh also noticed vomit on the ground just below the driver's-side door of the vehicle.

Upon speaking to defendant, Officer Oldenbergh observed that defendant had glassy eyes and noticed a strong odor of alcohol on his breath. Defendant admitted to Officer Oldenbergh during their conversation that defendant had been to some bars, had been drinking, and defendant did not know where he was because he thought he

was still in the parking lot of a bar. As Officer Oldenbergh was talking with defendant, Officer Felix noticed open containers in defendant's vehicle.¹ Following the conversation, Officer Oldenbergh requested defendant's driver's license to run a warrant check. While Officer Oldenbergh determined whether defendant could be cited for anything, the warrant check returned no results for defendant.

Officer Oldenbergh investigated whether there was enough evidence to charge defendant with DWI, but ultimately determined that a DWI charge would not be viable because there was not enough direct evidence that defendant had driven while intoxicated.² However, Officer Oldenbergh and his partners believed that defendant had already driven while intoxicated based on their observations of the situation and defendant's admissions that he had been at bars that night and thought he was still in the parking lot of a bar, even though there were no bars near the bank's parking lot in which defendant was found. Officer Oldenbergh told defendant to call someone to pick up defendant. Defendant informed Officer Oldenbergh that he had two friends coming, one to pick him up and the other to drive defendant's vehicle.

Toward the end of the interaction, Officer Oldenbergh advised defendant that he was not being charged with DWI or open container, and spoke to defendant about

¹ There were beer cans in plain view in defendant's vehicle; however, upon further inspection, it became clear that the containers were empty and dry, and therefore, would not constitute an open container pursuant to North Carolina law.

² Despite Officer Oldenbergh's observations leading him to believe defendant was intoxicated, there was no direct evidence to prove that defendant had driven to the bank's parking lot because there was no surveillance footage available to Officer Oldenbergh at that time, the vehicle was off, and the keys were not in the ignition.

the severity of a DWI charge. Defendant asked if he could pull his vehicle into a parking spot; Officer Oldenbergh informed defendant that he could not.

Officer Oldenbergh and Officer Felix left the bank parking lot. They drove approximately 0.3 miles down the road on Patton Avenue, east of the bank parking lot, and parked at a Chipotle restaurant. As Officer Oldenbergh was working on a report, he witnessed defendant driving his red Ford Explorer at a high speed³ down Patton Avenue headed toward the interstate. Based on these circumstances, Officer Oldenbergh decided to initiate a traffic stop.

b. Part II – Lawful traffic stop

Because of the speed at which defendant was traveling, Officer Oldenbergh and Officer Felix could not tell in which direction defendant went when he came to a split in the road that allowed traffic to merge onto I-240 East or I-240 West. The officers split up, and Officer Felix took the I-240 East route and Officer Oldenbergh took the I-240 West route. Officer Oldenbergh spotted defendant, still traveling at a high rate of speed,⁴ and had to reach speeds over 80 mph to catch up to defendant.

As Officer Oldenbergh got closer to defendant's vehicle, defendant began pumping his brakes, despite no other cars in his travel lane causing him to slow down. Defendant also began weaving inside his travel lane and crossed over onto the

³ Officer Oldenbergh testified that he estimated defendant to be going at least 10 mph over the speed limit. It was also Officer Oldenbergh's testimony that he had not been formally trained on speed detection or received radar training, but his estimation was based on life experience.

⁴ The speed limit on I-240, in the section where the interaction took place, was 55 mph.

shoulder of the road. Based on Officer Oldenbergh’s prior interaction with defendant, defendant’s speed and inability to keep his vehicle from swerving while driving in his lane, Officer Oldenbergh initiated a traffic stop. Defendant was arrested and charged with DWI.

On 26 June 2019, defendant filed a motion to suppress the evidence from the traffic stop on I-240 because it was an “illegal and unconstitutional stop and seizure of [d]efendant’s vehicle” and “Oldenbergh lacked sufficient reasonable articulable suspicion that criminality was afoot and thus the stop violated [d]efendant’s rights under the Fourth Amendment of the United States Constitution, the North Carolina Constitution, North Carolina General Statutes, and prevailing case law.”

On 24 May 2021, Judge Edwin D. Clontz issued a preliminary notice of intent to grant defendant’s motion to suppress pursuant to N.C. Gen. Stat. § 20-38.6(f). On 2 June 2021, the State appealed the District Court’s order allowing defendant’s suppression motion to the Superior Court of Buncombe County. On 14 September 2021, Superior Court Judge Karen Eady-Williams denied defendant’s motion to suppress.

On 12 December 2022, defendant pled guilty to DWI and the district court entered a judgment, which defendant appealed from the district court to the superior court.

On 18 January 2023, defendant filed two motions to suppress: one regarding the alleged unlawful seizure and detention, and the second pertaining to the alleged

unlawful vehicle stop. On 2 August 2023, defendant's case came on for trial during the Criminal Session of Buncombe County Superior Court before the Honorable David H. Strickland. The superior court granted defendant's motion to suppress the unlawful seizure but denied defendant's motion to suppress the traffic stop. On 4 August 2023, a unanimous jury found defendant guilty of DWI. The trial court sentenced defendant to serve eighteen months of unsupervised probation, pay a \$200 fine plus court costs, and complete twenty-four hours of community service within thirty days.

On 4 August 2023, defendant entered a timely written notice of appeal.

II. Appellate Jurisdiction

At the outset, we must address the State's motion to dismiss appellant's appeal. In its motion, the State contends that defendant has no right to appeal, and that defendant's appeal must be dismissed "[b]ecause the district court did not enter a final judgment pursuant to N.C. Gen. Stat. § 20-38.6(f)," and therefore, "[d]efendant cannot seek review of his motions to suppress and conviction." However, defendant appealed from the judgment entered 4 August 2023, not from the superior court's ruling on the district court's preliminary indication pertaining to defendant's 26 June 2019 motion to suppress. Thus, the State's motion to dismiss is denied and this Court will reach the merits of defendant's appeal.

III. Discussion

A. N.C. Gen. Stat. § 20-38.6(f)

Defendant argues that because the superior court failed to expressly remand its order denying defendant's 26 June 2019 pretrial motion to suppress with instructions for the district court to enter a final judgment, the judgments that followed are nullities. We disagree.

Under N.C. Gen. Stat. § 20-38.6(f), “[w]hen a defendant makes a pre-trial motion to suppress . . . , the district court may only enter a ‘preliminary determination’ indicating whether the motion should be granted or denied.” *State v. Parisi*, 251 N.C. App. 861, 866, 796 S.E.2d 524, 527 (2017). And “[t]he district court cannot enter a final judgment on the pre-trial motion until after the State has appealed to the superior court, has indicated it does not intend to appeal, or fails to appeal within the time allowed.” *Id.* “On such an appeal, the district court’s findings of fact are binding on the superior court and should be presumed to be supported by competent evidence unless there is a dispute about the findings of fact, in which case the matter must be reviewed by the superior court de novo.” *State v. Fowler*, 197 N.C. App. 1, 11, 676 S.E.2d 523, 535 (2009) (emphasis omitted) (internal quotation marks, italics, and citation omitted). “After considering a matter properly before it according to the appropriate standard of review, the superior court must then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant’s pretrial motion[.]” *Id.*

Despite the superior court’s failure to expressly remand its order with instructions to the district court, defendant’s case made it back to the district court

as if it had been remanded and was before the same judge that entered the preliminary determination. On 12 December 2022, defendant pled guilty to DWI and appealed this judgment from the district court to the superior court.

On 18 January 2023, defendant filed two motions to suppress: one pertaining to the alleged unlawful seizure/detention, and one pertaining to the alleged unlawful vehicle stop. Defendant's case came on for trial on 2 August 2023 before Judge David H. Strickland in the Criminal Session of Buncombe County Superior Court. Following a hearing on the pre-trial motions, the trial court granted defendant's pre-trial motion to suppress evidence gleaned following the unlawful seizure and denied defendant's motion to suppress evidence gleaned from the vehicle stop. On 4 August 2023, a unanimous jury found defendant guilty of DWI.

The record indicates that the superior court erred by failing to enter an order that expressly "remand[ed] the matter to the district court with instructions to finally grant or deny [] defendant's pretrial motion[.]" *Id.* at 11, 676 S.E.2d at 535. Nevertheless, we review the superior court's failure to follow the statutory mandate in this case under the harmless error review because "the trial court's statutory violation is simply an error in the trial process itself that did not affect the framework within which the trial proceeded." *State v. Hamer*, 377 N.C. 502, 508, 858 S.E.2d 777, 782 (2021) (internal quotation marks, brackets, and citation omitted). Under the harmless error review, defendant "bear[s] the burden of showing prejudice[.]" and "[a] defendant is prejudiced by errors relating to rights arising other than under the

Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *Id.* at 508, 858 S.E.2d 782 (citation omitted).

Although defendant correctly points out that the superior court failed to comply with the mandate of N.C. Gen. Stat. § 20-38.6(f), defendant failed to establish how this error prejudiced him in any way. The trial process carried on as if the superior court’s order was properly remanded. Moreover, neither defendant nor the district court raised any issue with the non-compliant superior court order. Thus, the judgment entered by the district court on 12 December 2022 is not a nullity nor is the superior court’s judgment that was entered on 4 August 2023.

B. Defendant’s motions to suppress

Next, defendant contends that “[t]he trial court erred in failing to suppress the entirety of the officers’ interactions with [] defendant because [] defendant was seized immediately upon the officers’ approach.” We disagree.

When this Court reviews an order granting or denying a motion to suppress, “we are strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Carrouthers*, 200 N.C. App. 415, 418, 683 S.E.2d 781, 784 (2009) (internal quotation marks and citation omitted). “Findings of fact which are not challenged are deemed to be supported by competent evidence and are

binding on appeal[.]” *id.* (internal quotation marks and citation omitted), and the “trial court’s conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.” *Id.* (internal quotation marks and citation omitted).

The Fourth Amendment of the United States Constitution protects individuals against unreasonable searches and seizures. *Id.* at 418–19, 683 S.E.2d at 784. “The Fourteenth Amendment makes this provision applicable to the States.” *Id.* at 419, 683 S.E.2d at 784. In general, “a person can be ‘seized’ in two ways for the purposes of a Fourth Amendment analysis: by arrest or by investigatory stop.” *Id.* However, “an officer may detain an individual for an investigatory stop upon a showing that the officer has reasonable, articulable suspicion that a crime may be underway.” *Id.* (internal quotation marks and citation omitted). But “[t]he characteristics of the investigatory stop, including its length, the methods used, and any search performed, should be the least intrusive means reasonably available to effectuate the purpose of the stop.” *Id.* (internal quotation marks and citation omitted). “Whether a particular action on the part of the police exceeds permissible conduct is determined based on the facts and circumstances of each case.” *Id.*

Here, regarding defendant’s 18 January 2023 motion to suppress relating to the unlawful seizure, the trial court’s findings of fact “are supported by competent evidence” and “are conclusively binding on appeal[.]” *Id.* at 418, 683 S.E.2d at 784 (citation omitted). In relevant part, the trial court correctly found that defendant was

not seized until Officer Oldenbergh requested defendant's driver's license, and that defendant was not free to leave for approximately twenty-four minutes because Officer Oldenbergh was investigating whether an "open container" citation could be issued. Based on its findings, the trial court concluded that all evidence obtained against defendant after defendant was unlawfully seized in the bank parking lot must be suppressed because defendant's detention "was not based on an objectively reasonable belief that [] defendant was committing an open container offense at the time that Officer Oldenbergh seized [] defendant." Thus, the "trial court's conclusions of law [are] legally correct, [and] reflect[] a correct application of applicable legal principles to the facts found." *Id.* (citation omitted).

Furthermore, because defendant was not seized until Officer Oldenbergh requested his driver's license, the trial court properly admitted the evidence obtained *before* defendant was unlawfully seized in the bank parking lot and all evidence obtained *during* the lawful traffic stop. For these reasons, we decline to address defendant's final contention on appeal.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's judgment against defendant. The superior court's non-compliance with N.C. Gen. Stat. § 20-38.6(f) amounted to harmless error, and defendant failed to demonstrate how such error prejudiced him. Regarding defendant's motions to suppress, the trial court correctly granted defendant's motion to suppress the evidence obtained against defendant

STATE V. MAY

Opinion of the Court

following the unlawful seizure of defendant's person, and the trial court correctly denied defendant's motion to suppress the evidence obtained during the lawful traffic stop.

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

Report per Rule 30(e).