



Police Law Bulletin



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NORTH CAROLINA COURT OF APPEALS



Defendant's Arrest for Driving While Impaired and Unsafe Movement Were Not Supported by Probable Cause

State Overocker, No. COA14-270 (16 September 2014.)

On October 11, 2012, defendant arrived at about 4:00 p.m. at Time Out Bar & Grill in Durham, North Carolina. Defendant parked his Porsche Cayenne SUV directly in front of the bar and met up with several friends, including Claude Teeter. Over the course of the evening, Mr. Teeter consumed four beers, and defendant consumed four bourbons on the rocks. While defendant was inside the bar, a group of motorcyclists pulled into the parking lot, and one of them parked her motorcycle three to four feet behind defendant's SUV on the passenger side. The trial court later determined that the motorcycle was illegally parked. Around 8:15, after it was dark outside, defendant and Teeter left the bar. Defendant got into his vehicle with the radio playing and the air conditioning on. When defendant began to back up, a motorcyclist ran toward the illegally parked motorcycle, and, together with other motorcyclists, started yelling at defendant's SUV. One motorcyclist got onto the motorcycle, but was unable to move it in time. He jumped off, and defendant's SUV "backed over it, or struck it." The motorcycle fell over and it was dragged along the pavement for a short distance. When defendant "heard something," he stopped and got out of his vehicle. One person was slapping his vehicle, while two others were holding the motorcycle he had struck. The trial court later found that because the motorcycle stood lower than the rear window of the Defendant's vehicle and there were other motorcycles parked in the parking space next to the passenger side of the Defendant's vehicle, there was no evidence the Defendant saw, or could even see the motorcycle parked behind his vehicle which was in a parking space, or was otherwise aware of its presence.

An off-duty police officer with the Durham Police Department had ridden his motorcycle to Time Out and noticed defendant and Teeter when they first arrived because "they were talking loudly." The officer later testified that he believed the Defendant was impaired," but his testimony also indicated that apart from talking loudly, "there was nothing unusual about the Defendant's behavior or conversation in the bar." The officer was outside in the parking lot when defendant was leaving, and noticed that defendant and Teeter were still talking loudly. According to later testimony though, he did not observe anything

unusual about the Defendant's appearance, smell, walking, balance, eyes, or speech, other than he was talking loudly, upon which he based his opinion that the Defendant was impaired and should not be driving. The off-duty officer witnessed the collision.

After the accident, an on-duty officer with the Durham Police Department was dispatched to the scene. The responding officer described defendant as having a "not real strong, light" odor of alcohol. After talking with defendant and the off-duty officer, the responding on-duty officer had defendant perform standardized field sobriety tests ("FSTs"). Defendant was asked to perform the "Walk and Turn Test." After receiving instructions, defendant took nine steps heel-to-toe down one of the lines for a parking space while counting aloud without a problem. Defendant asked the officer what he should do next, and the officer reminded him to follow the instructions. Defendant then walked back nine steps heel-to-toe down on the line while counting aloud without a problem. Defendant was then asked to perform the "One-Legged Stand Test." After receiving instructions, defendant raised his foot more than six inches above the pavement, stopped after fifteen seconds, and put his foot down. Defendant asked the officer what he needed to do next and the officer reminded him to follow the instructions. Defendant then picked up his foot and continued for at least fifteen more seconds until he was stopped by the officer. Another Durham Police Department officer arrived and performed two portable breath tests ("PBTs") on defendant, both of which indicated the presence of alcohol. The officer testified that defendant had "a faint odor of alcohol on his person and red, glassy eyes." Defendant was then arrested for impaired driving and unsafe movement.

On April 11, 2013, a district court judge found defendant guilty of both charges, and defendant appealed to superior court. Defendant filed a motion to suppress, asking the superior court to suppress all evidence based on a lack of probable cause to arrest defendant. The superior court entered an order granting defendant's motion to suppress. Additionally, in the same order, the court dismissed the charges against defendant. The State appealed challenging that the officer lacked probable cause to arrest defendant for impaired driving (the State did not challenge the lack of probable cause for defendant's unsafe movement violation).

Probable cause is a reasonable ground for belief of guilt. When the responding officer arrested defendant, he knew the defendant had been inside Time Out drinking up to three drinks over the course of approximately four hours (although in actuality defendant had had four drinks). Defendant came out of the restaurant and backed up striking the motorcycle, which was illegally parked behind defendant's SUV. There was no evidence that defendant saw the motorcycle or should have seen it before he backed up.

The State argued that other findings of fact related to the collision with the motorcycle support a conclusion that defendant was impaired. The State pointed out that defendant dragged the motorcycle for a short distance before stopping, that there were gouge marks in the pavement as a result, and that defendant did not react to the individuals yelling at him to stop. The State argued that this constitutes evidence of the defendant's failure to recognize his surroundings and that defendant had a delayed reaction time after he hit the motorcycle. However, the court found there was no evidence regarding whether defendant's reaction time was delayed in light of the "short distance" he traveled after hitting the motorcycle. Moreover, the court found that defendant's SUV suffered only a small scratch and the motorcycle's only reported damage was that it had scratches on it. Further, the fact that the defendant had his radio and air conditioning on would explain why defendant did not hear individuals yelling. Thus, the court upheld the trial court's conclusion that there was insufficient evidence of unsafe movement.

Having discounted the traffic accident, the court agreed that there was no other reasonable basis for concluding defendant was impaired. Apart from the traffic accident, in order to establish probable cause,

the officer relied on the fact that defendant had been at a bar, his performance tests, and the odor of alcohol on defendant. Yet, the court found that the officer testified that 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.

In sum, the court found that while defendant had had four drinks in a bar over a four-hour time frame, the traffic accident in which he was involved was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired. A car accident alone does not support a finding of probable cause. Further, an accident combined with evidence of alcohol consumption and a light odor of alcohol is insufficient to give rise to probable cause with no evidence of actual impairment. Finally, the court noted that while the PBTs returned positive results for alcohol in defendant's bloodstream, N.C.G.S. §20-16.3 prohibits the actual alcohol concentration result of an alcohol screening test from being used by a law-enforcement officer in determining if there are reasonable grounds for believing that the driver has committed an implied consent offense, such as driving while impaired.

Officers Had Probable Cause to Arrest Defendant For Impaired Driving

State v Williams, No. COA12-947 (19 February 2013).

Police responded to a one-car accident at approximately 4:00 a.m. on January 20, 2011 in Morrisville. When police arrived, Dante Daon Williams (defendant) was lying on the ground behind the car and appeared very intoxicated. No other person was present when police arrived. Police arrested defendant for driving while impaired. Defendant was uncooperative and resisted arrest. As the officers walked defendant to the police car, defendant spit on an officer's face.

On March 22, 2011, defendant was indicted for the felony of malicious conduct by a prisoner and being a habitual felon. Defendant made a motion to suppress the arrest for lack of probable cause and all evidence resulting from the arrest. The trial court denied defendant's motion concluding that based on defendant's proximity to the vehicle, the absence of any other person in the area, and defendant's strong odor of alcohol, bloodshot eyes, slurred speech, and extreme unsteadiness on his feet, the officer had probable cause to arrest defendant for driving while impaired. A jury found defendant guilty of malicious conduct by a prisoner. He subsequently pled guilty to being a habitual felon. Defendant then appealed arguing, in part, that the officers did not have probable cause to arrest him.

Our Supreme Court has defined probable cause for an arrest 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.

. . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." In the instant case, the trial court made the following findings of fact: 1. Officer Miller observed the Defendant lying behind the car on the ground near the trunk; 2. the Defendant's shirt was pulled over his head and his head was in the sleeve hole of the shirt; 3. the Defendant appeared unconscious; 4. Officer Miller and his sergeant tried to arouse the Defendant who then woke up and started chanting; 5. his speech was

slurred; 6. he had a strong odor of alcohol; 7. he stood up and fell back; 8. he was extremely unsteady on his feet; 9. he had bloodshot eyes; 10. the keys were in the ignition; 11. the car was not running; and 12. police searched the area and found no one in the woods, no other signs of people and no tracks in the woods.

The Court of Appeals found these facts sufficient to establish probable cause to arrest the defendant for Driving While Impaired.

Exigent Circumstances Justified Warrantless Blood Draw Based Upon Facts of Case

***State v. Granger* , No. COA13-1382 (15 July 2014).**

On May 1, 2012, Defendant was involved in a motor vehicle accident in Wilmington. As a result of the accident, he was charged with driving while impaired (“DWI”) and failure to reduce speed. Defendant filed a motion to dismiss arguing that his Fourth Amendment rights had been violated because his blood was drawn shortly after the accident without a warrant. The superior court ruled that Defendant’s Fourth Amendment rights had not been violated because there was sufficient exigent circumstances present to justify the warrantless seizure. Defendant appealed.

The North Carolina Supreme Court has stated that the withdrawal of a blood sample from a person is a search subject to Fourth Amendment protection. Therefore, a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search. In the case at hand, Defendant raised no argument regarding probable cause for the warrantless blood draw. Therefore, the court limited its review to whether there were sufficient exigent circumstances.

The United States Supreme Court recently held, in *Missouri v. McNeely*, that the natural dissipation of alcohol in the bloodstream, standing alone, cannot create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant. The inquiry into an exigency is fact-specific and demands that the court evaluate each case of alleged exigency based on its own facts and circumstances. In the present case, the court concluded that the *totality of the circumstances* showed that exigent circumstances justified the warrantless blood draw. Specifically, Officer Lippert had concerns regarding the dissipation of alcohol from Defendant’s blood, as it had been over an hour since the accident until Officer Lippert established sufficient probable cause to make his request for Defendant’s blood. Officer Lippert did not have the opportunity to investigate the matter adequately until he arrived at the hospital because of Defendant’s injuries and need for medical care. In addition, Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant. Officer Lippert had knowledge of the approximate probable wait time, and that over 40 minutes would be needed to travel round trip to the magistrate from the hospital. Additionally, Officer Lippert had the added concern of the administration of pain medication to Defendant. Defendant had been in an accident severe enough that he was placed on a backboard for transportation to the hospital and complained of pain in several parts of his body. There was a reasonable chance if Officer Lippert left him unattended to get a search warrant or waited any longer for the blood draw, Defendant would have been administered pain medication by hospital staff as part of his treatment, contaminating his blood sample. Based on the foregoing, the Court of Appeals affirmed the trial court’s denial of Defendant’s motion.