



Case Summaries -- N.C. Court of Appeals (11/19/2019)

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This post summarizes opinions issued by the Court of Appeals of North Carolina on November 19, 2019.

Trial court did not err in denying defendant's motion to suppress evidence obtained from a search of the defendant's purse when officer testified that the defendant voluntarily consented to the search, notwithstanding contradictory testimony from the defendant.

[State v. Hall](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 19, 2019).

An officer patrolling the parking area of a park just before closing discovered the defendant asleep in her car. Based on the defendant's positioning, he was concerned there might be a medical emergency, so he knocked on the window of her car. After he knocked several times, the defendant sat up, looked at him, and opened the driver's side door. She said she was camping in the park with her son and decided to take a nap in her car. Her speech was slurred, her eyes were bloodshot, and she was unsteady on her feet when she got out of her car. The officer also saw track marks on her arms that were consistent with heroin use. The officer asked for the defendant's license, and, while holding it, asked for consent to search the defendant's car and her purse, which was sitting in the front seat of the car.

The State and defendant presented conflicting evidence about what happened next. The officer said that defendant responded, "Sure." The defendant said the officer asked three times for permission to search her car and each time she said, "I would really rather you not." She said she only consented to the search after the officer threatened to arrest her.

The officer searched the defendant's purse and found several syringes in its top section. He then asked the defendant whether she was carrying anything illegal. The defendant asked whether she was going to jail. The officer told her that he would not take her to jail if she cooperated. The defendant told him she had a syringe containing heroin in the side compartment of her purse. The officer found the syringe there, along with a burnt spoon and two grams of heroin.

The defendant was not arrested that evening, but subsequently was indicted for possession of heroin and possession of drug paraphernalia. She filed a motion to suppress the evidence obtained from the search, which the trial court denied. She pled guilty, preserving her right to appeal. On appeal, she argued that she did not voluntarily consent to the search of her purse, and that the trial court's findings on that issue were insufficient. The court of appeals disagreed. Rejecting the defendant's argument to the contrary, the court explained that the question of whether consent to search was voluntary is one of fact, not law.

The trial court determined that the defendant freely gave consent to the officer to search her vehicle and her purse. This finding was supported by the officer's testimony at the suppression hearing that he asked defendant for consent to search her car and purse, and she said, "Sure." The court of appeals concluded, therefore, that the trial court's finding that the defendant's consent was "freely given" was supported by competent evidence and was binding on appeal. Though the trial court failed to make a specific finding that the search did not violate the defendant's Fourth Amendment rights, the appellate court reached that conclusion based on the finding of fact that the defendant voluntarily consented to the search. Thus, the court of appeals concluded that the trial court did not err in denying the

defendant's motion to suppress.

(1) Trial court erred in imposing 36 months of probation in misdemeanor case without special findings. (2) Jury instructions on possession of drug paraphernalia departed from indictment but did not constitute plain error

[State v. Lu](#), ___ N.C. App. ___, ___ S.E.2d ____ (Nov. 19, 2019).

The defendant was a passenger in a car stopped at a traffic checkpoint. An officer smelled marijuana emanating from the vehicle. The defendant told the officer that the marijuana was located in a bag behind the driver's seat. The officer found a drawstring bag there, which the defendant said was his. Inside the bag, the officer found two plastic bags containing marijuana, a hookah, a snort straw, and a beer can. The beer can was altered to be a container that could be unscrewed. Inside the beer can the officer found two white crystallized substances later identified as Methylone and a Lorazepam tablet.

The defendant was charged with felony possession of a Schedule I controlled substance (Methylone), misdemeanor possession of marijuana, and misdemeanor possession of drug paraphernalia based on his possession of the altered beer can. He was convicted and sentenced to 6 to 17 months for the felony and 120 days (to run consecutively) for each misdemeanor offense. Each sentence was suspended, and the defendant was placed on probation for 36 months. He also was ordered to serve 12 days of special probation for the felony.

(1) The defendant argued on appeal that the sentences for the misdemeanor offenses were unlawful because the trial court did not make finding that a longer period of probation was necessary. The court of appeals agreed.

G.S. 15A-1343.2(d)(2) provides that "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary," the probationary period for a misdemeanant sentenced to intermediate punishment (which includes any suspended sentence that requires supervised probation) must be not less than 12 nor more than 24 months. The record supported the defendant's argument that the trial court made no specific findings; therefore, the court of appeals vacated the misdemeanor judgments and remanded for resentencing.

(2) The defendant also argued that the trial court erred by giving jury instructions that did not identify the item that served as the basis for the defendant's drug paraphernalia charge (the altered beer can) and that referred to marijuana in addition to Methylone. The defendant was charged with possession of drug paraphernalia under G.S. 90-113.22, not possession of marijuana paraphernalia, a separate crime under G.S. 90-113.22A. The defendant argued that the reference to marijuana may have caused the jury to consider the items associated with the marijuana, including the drawstring bag and the plastic bags containing the marijuana. Because the defendant did not object to the jury instructions at trial, the court of appeals reviewed for plain error.

The court of appeals determined that naming marijuana in the instructions varied from the indictment and was error. However, the appellate court found that the facts presented during trial undercut any perceived probable impact on the jury. The officer gave substantially more testimony about the altered beer can and its contents than the other containers. The other bags were not discussed in detail, while the beer can was the subject of focused and specific questions, and the jury was given a demonstration of how it unscrewed. The marijuana was entered into evidence inside the plastic bags, "indicating that the bag was part and parcel of the marijuana possession." Slip op. at 11. The beer can, in contrast, was its own exhibit, and the drawstring bag was not entered into evidence at all. In addition, the jury convicted the defendant of possessing Methylone, a drug contained exclusively in the beer can, suggesting that the jury also believed the defendant possessed the can itself, which, unlike the other items, was designed for the specific purpose of containing and concealing drugs. Thus, the court concluded that the defendant failed to show that the trial court's error had a probable impact on the jury's finding of guilt and, as such, was not plain error.

(1) State's appeal of trial court's order suppressing blood test result on the basis that the evidence was

essential to its case did not preclude it from proceeding to trial without the suppressed evidence; thus, trial court did not err in denying defendant's motion to dismiss on the basis that the State was estopped from adjudicating its case against the defendant because the trial court suppressed the blood test result. (2) Trial court did not err in admitting defendant's medical records, including results of the blood alcohol test performed by the hospital, and the admission of those records did not prejudice defendant's case.

[State v. Romano](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 19, 2019).

The defendant was arrested for impaired driving. Because of his extreme intoxication, he was taken to a hospital for medical treatment. The defendant was belligerent and combative at the hospital, and was medicated in an effort to calm his behavior. After the defendant was medically subdued, a nurse withdrew his blood. She withdrew some blood for medical purposes and additional blood for law enforcement use. No warrant had been issued authorizing the blood draw. The defendant moved to suppress evidence resulting from the warrantless blood draw on constitutional grounds. The trial court granted the motion, suppressing evidence of the blood provided to law enforcement and the subsequent analysis of that blood. The State appealed from that interlocutory order, certifying that the evidence was essential to the prosecution of its case. The North Carolina Supreme Court, in *State v. Romano*, 369 N.C. 678 (2017), affirmed the trial court's ruling suppressing the State's blood analysis, and remanded the case for additional proceedings.

While the case was pending before the state supreme court, the State filed a motion for disclosure of the defendant's medical records on the date of his arrest, which included records of the hospital's analysis of his blood. The motion was granted, and the medical records were disclosed.

After the case was remanded, the State proceeded to try the defendant on charges of habitual impaired driving and driving while license revoked for impaired driving. The defendant moved to dismiss the charges and to suppress the evidence of his medical records. The trial court denied the motions, and the defendant was convicted.

(1) The defendant argued on appeal that the trial court erred by denying his motion to dismiss. Noting that the State appealed the order suppressing evidence from the warrantless blood draw on the basis that the State's analysis of his blood was essential to its case, the defendant argued that the State should not have been permitted to try the case against him on remand because that evidence was ordered suppressed. The court rejected the defendant's argument, stating that the supreme court's decision simply upheld the suppression of the evidence. It did not preclude the State from proceeding to trial without the suppressed evidence on remand. Thus, the court of appeals concluded that the trial court did not err in denying defendant's motion to dismiss.

(2) The defendant also argued on appeal that the trial court erred when it denied his motion to suppress and admitted his medical records, which contained the results of a blood alcohol test performed by the hospital. A manager from the hospital's records department testified regarding the management of hospital records, and a medical technologist testified about the hospital's methods and procedures for conducting laboratory tests. In addition, an expert witness in blood testing testified for the State that he relied upon the medical records in forming a conclusion about the defendant's blood alcohol level. The court determined that the records were properly admitted because (1) they were created for medical treatment purposes and kept in the ordinary course of business and thus were nontestimonial for purposes of the Confrontation Clause; (2) even if the records were testimonial, they were admissible as the basis of a testifying expert's independent opinion; and (3) the admission of the records was not prejudicial in light of the substantial additional evidence that the defendant was driving while impaired.

Trial court erred by dismissing DWI charges for the destruction of dash cam video that was only potentially useful to the defendant without assessing whether the footage was destroyed in bad faith.

[State v. Taylor](#), ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 19, 2019).

The defendant was cited for misdemeanor driving while impaired on November 27, 2016. His attorney requested

discovery in July 2017, specifically asking for dash cam and body camera footage. The defendant was subsequently indicted for habitual impaired driving and other traffic offenses based on the November 27, 2016 incident. In January 2018, the defendant's attorney again requested dash cam footage. The defendant's attorney was informed in February 2018 that the dash cam video had been deleted from the local server, and the Highway Patrol was attempting to locate it from other sources. In March 2018, defense counsel was informed that the video had been purged and was not available for release.

The defendant moved to dismiss the charges based on the destruction of the dash cam video. The trial court granted the motion, concluding that the destruction of the dash cam video footage violated the defendant's right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and required dismissal of the charges. The State appealed.

The court of appeals noted that suppression of evidence favorable to an accused violates due process when the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. But when the evidence is only potentially useful, the State's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the State.

Though the trial court concluded that the destruction of the dash cam video footage was a *Brady* violation, it made no findings on what the dash cam video footage would have shown. Indeed, it could not have made such findings because there was no record of what the footage may have shown. The dash cam footage was not material exculpatory evidence; instead, it was only potentially useful. To establish a constitutional violation based on the destruction of potentially useful evidence, the defendant must show bad faith. The trial court erred by concluding that destruction of the footage warranted dismissal, regardless of bad faith on the part of the State. The court of appeals remanded the case to the trial court for a determination of whether the footage was destroyed in bad faith. A dissenting judge would have reversed the trial court on the basis that the evidence presented could not support a finding of bad faith.