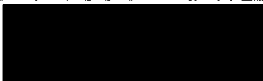


MECKLENBURG COUNTY
FILED #119
JAN 15 2008
AT _____ O'CLOCK _____
CLERK OF SUPERIOR COURT

STATE OF NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
COUNTY OF MECKLENBURG) SUPERIOR COURT DIVISION



STATE OF NORTH CAROLINA)
)
)
vs.)
)
)
)
)
Defendant.)

ORDER

This matter came on to be heard on the 10th day of January, 2008 during the regularly scheduled session of the Superior Court for the 26th Judicial District of North Carolina in Mecklenburg County and was heard before the Honorable [REDACTED] Superior Court Judge presiding. The Defendant was represented by Attorney Bill Powers. The State of North Carolina was represented by Assistant District Attorney [REDACTED]

After hearing the arguments of counsel and reviewing of the documents in the court file, the Court makes the following findings:

1. That on January 2, 2007 the Defendant was charged with the implied consent offense of driving while subject to an impairing substance in violation of N.C.G.S. §20-138.1;
2. That the Defendant made a pre-trial motion to dismiss in which he contested his arrest based on the lack of probable cause in the District Court Division of the General Court of Justice;
3. That the Honorable [REDACTED] presiding in the District Court, made a preliminary determination that the Defendant's pre-trial motion to dismiss based on a lack of probable cause should be granted;
4. That the Judge [REDACTED] entered an Order making Findings of Fact and Conclusions of Law pursuant to North Carolina General Statute §20-38.6;
5. That based upon this Court's review of Judge [REDACTED] Order, it appears the District Court's Conclusions of Law granting the motion to dismiss are based upon the Findings of Fact that are cited in his Order;



6. That this Court takes judicial notice that there is not a certified court reporter in the District Court to produce a transcript from which this Court can determine whether the District Court's Findings of Fact are supported by the evidence;
 7. That pursuant to North Carolina General Statute §20-38.7 & §15A-1432, the State entered Notice of Appeal on August 17, 2007 of the District Court's ruling and alleged certain ultimate facts within the motion to dismiss challenging Judge [REDACTED] ruling;
 8. That the matter is before this Court on the State's appeal;
 9. That prior to hearing evidence in this Court, defendant, through counsel, has moved to dismiss on various constitutional grounds including violations of equal protection, due process, separation of powers, and the protection against former jeopardy;
 10. That after hearing the arguments of counsel and reviewing the applicable legal authorities, this Court adjudges that the statutes allowing the State to appeal the District Court determination on Defendant's motion to dismiss based on a lack of probable cause, including but not limited to N.C.G.S. §20-38.6 and § 20-38.7, are in fact unconstitutional;
 11. That this Court makes the following conclusions of law:
 - a. First, the statutes violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution in that they create a class of defendants separate from any other type of defendant and violate the defendant's fundamental rights; and,
 - b. Second, the statutes violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution in that they give one party, the State of North Carolina, an advantage of immediate appeal over another party, in this instance, the Defendant, before a final judgment is entered; and,
 - c. Third, pursuant to State of North Carolina v. Michael Lee Tutt, 171 N.C. App. 518, 615 S.E.2d 688 (2005), and Article I, § 3 and Article IV, § 1 of the North Carolina Constitution, the North Carolina Supreme Court maintains exclusive authority to make rules of practice and procedure for the General Court of Justice; and,
 - d. Fourth, that Article I, § 3 and Article IV, § 1 of the Constitution of North Carolina prohibits the North Carolina General Assembly from changing the jurisdiction of the District Court; and,
-

- f. Fifth, that pursuant to Article I, § 3 and Article IV, § 1 of North Carolina Constitution, the District Court maintains exclusive original jurisdiction of this matter absent specific amendments to the North Carolina Constitution or provisions adopted by the Supreme Court of North Carolina; and,
- g. Sixth, that the statutes violate the Former Jeopardy Clause of the Constitution.

BASED ON THE FOREGOING DETERMINATIONS, AND GOOD CAUSE HAVING BEEN SHOWN, this Court orders that this matter be remanded to District Court for findings consistent with this ruling.

IT IS THEREFORE, ORDERED, ADJUDGED & DECREED, this matter be remanded to the District Court, which has exclusive original jurisdiction, for the entry of an order consistent with this Court's findings.

Entered this the 15 day of January, 2008.


The Honorable 
Superior Court Judge Prestoing

DCW

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

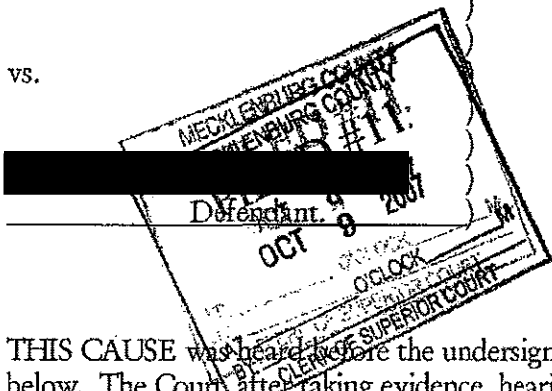
[REDACTED]

FILE

STATE OF NORTH CAROLINA)

vs.

PRELIMINARY FINDING GRANTING
PRETRIAL MOTION TO DISMISS



THIS CAUSE was heard before the undersigned District Court Judge on the date indicated below. The Court, after taking evidence, hearing arguments of the parties and reviewing relevant caselaw makes the following findings:

FINDINGS OF FACT

1. That the Court has jurisdiction over the Defendant and the subject matter of this action.
2. That the Defendant was arrested by Charlotte-Mecklenburg Police Officer [REDACTED] on the 2nd day of January, 2007.
3. That [REDACTED] did not see the Defendant driving or otherwise operate a motor vehicle.
4. That [REDACTED] responded to a call-for-service regarding an automobile "fender bender" that resulted in very minor damages.
5. That O [REDACTED] began an accident investigation and later questioned Defendant about the cause of the accident.
6. That pursuant to said investigation, said officer requested Defendant to submit to a series of Standardized Field Sobriety Tests (SFST's).
7. That O [REDACTED] training on such testing was minimal at best, in that said Officer could not testify to the test criterion regarding the proper administration and performance of SFST's.
8. That specifically Officer [REDACTED] had very limited knowledge of field sobriety testing and could not testify to "clues" or "cues" for any of the respective tests.

9. That Officer [REDACTED] testimony was not credible in that it lacked sufficient reliability based on lack of experience, training and knowledge of the factors considered in determining whether the accused performed satisfactorily on said SFST's. Furthermore, Officer [REDACTED] was unable to cite how the Defendant failed, what was expected in performing said tests or why she believed the Defendant was appreciably impaired.
 10. That Officer [REDACTED] confused the respective tests and could not recount Defendant's performance to the Court's satisfaction in that she could not recall how Defendant performed, positively or negatively, on virtually all the psychophysical and mental dexterity tests.
 11. That Officer [REDACTED] did not have training on the AlcoSensor device.
 12. That AlcoSensor results were not admitted into evidence.
 13. That the State of North Carolina did not seek a continuance to obtain other evidence and/or attempt to introduce AlcoSensor test results when questioned on the issue.
 14. That Defendants performance on other dexterity tests was good.
 15. That Defendant said his ABC's without issue.
 16. That Defendant was not unsteady on his feet.
 17. That Defendant did not have red or glassy eyes.
 18. That Defendant did not have slurred speech.
 19. That Defendant was polite, cooperative and attentive to the charging officer.
 20. That Defendant provided his drivers license and registration without difficulty.
 21. That Defendant performed the "Finger to Nose" test.
 22. That Officer [REDACTED] testified regarding the "Finger to Nose" test that she could not recall how many times, in what order and specifically how Defendant performed said test.
 23. That upon further questioning on the subject, the Court finds the Defendant performed the "Finger to Nose" test satisfactorily.
 24. That Officer [REDACTED] testified that Defendant had bad knees, yet performed generally well on dexterity tests despite said medical condition.
-
25. That Defendant was oriented as to time, location, date and specifics of the fender bender.

26. That on the "Finger Count" test, the Court finds the Defendant performed satisfactorily.
27. That Officer [REDACTED] testimony was confused on the "Finger Count" test, in that she could not testify as to what hand was used, whether Defendant was left or right handed and further recalled that Defendant did at some point perform said test satisfactorily.
28. That Defendant had admitted consuming alcohol at some time prior to the collision, yet the charging officer could not immediately identify a time frame regarding consumption.
29. That upon additional questioning on the issue of consumption, the Court determined a substantial period of time had expired between imbibing and the accident.
30. The Court also determined the amount of alcohol consumed was minimal and therefore relevant to the determination of Probable Cause or lack thereof.

CONCLUSIONS OF LAW

1. The facts as set forth above are true and entitle Defendant relief granted below.
2. That Officer [REDACTED] did not possess probable cause to arrest and charge Defendant with Driving While Impaired.
3. That the State of North Carolina failed to meet its burden of proof consistent with State v. Zuniga regarding establishing sufficient probable cause to arrest.
4. That a reasonable person, in same or similar circumstances could not believe the Defendant guilty of Driving While Impaired.
5. That the State's argument regarding State v. Brooks and State v. Hewitt is inapplicable and/or misapplied.

DECREE

ORDERED, ADJUDGED & DECREED, this matter coming on to be heard and having been heard before the undersigned Court, and after listening to arguments of counsel and reviewing submitted caselaw from the parties on the issue of law, the Court makes the following preliminary finding:

1. That considering the totality of circumstances, Probable Cause did not exist to arrest the above-referenced Defendant; and,
2. That pursuant to the changes set forth under NCGS §20-130.1 et al this Court states that it would dismiss the charges for lack of Probable Cause for the reasons set forth supra.

This the 9th day of October, 2007.

[REDACTED]

[REDACTED]
District Court Judge Presiding
