NO. COA13-873 **THIRTIETH A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	**From Swain County**
v.	)	**10 CRS 277**
	)	
STEVEN CLARK KOSTICK	)	

****

BRIEF FOR THE STATE

****

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

NO. COA13-873 **THIRTIETH A DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	**From Swain County**
v.	)	**10 CRS 277**
	)	
STEVEN CLARK KOSTICK	)	

****

BRIEF FOR THE STATE

****

ISSUES PRESENTED

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR DENYING THE DEFENDANT'S MOTION TO DISMISS BASED UPON LACK OF JURISDICTION TO THE CRIME HE COMMITTED ON A INDIAN RESERVATION?

II. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE CHECKPOINT WAS UNCONSTITUTIONAL?

III. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE HIGHWAY PATROL OFFICER HAD JURISDICTION TO MAKE THE DWI ARREST OF A NON-INDIAN ON TRIBAL LAND?

IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO DISMISS THE CASE DUE TO LACK OF DUE PROCESS AFFORDED TO DEFENDANT AS ARTICULATED IN STATE V. KNOLL?

STATEMENT OF THE CASE

The Defendant was charged with DWI on 24 April 2010 in Swain County. (R p 2). He was adjudicated guilty on 4 April 2011 in the District Court. See, Judgement filed with Motion to Amend Record, 26 August 2013 and Order of this Court filed 28 August 2013.

On appeal to Superior Court before the Honorable James U. Downs presiding, 22 February 2013, Defendant was convicted by jury trial of Impaired Driving Level 5, and given a suspended sentence. (R pp 34, 35). He gave notice of appeal to the Court of Appeals the same day. (R pp 35-37).

On 20 and 21 February 2013, there was a pre-trial hearing on a Motion to Dismiss for lack of jurisdiction and some other motions. All of the Defendant's motions were denied. (T pp 73-75, pp 147-149, and pp 217-218). It is the denial of these motions that is the subject of the appeal.

The Record on Appeal was filed on 2 August 2013 and docketed on 6 August 2013. (R p 1). As noted above, the Record on Appeal was amended on 28 August 2013. The Defendant's brief was served on the undersigned 22 September 2013.

On 1 October 2013, the State moved to dismiss the appeal due to inadequacies in the Record on Appeal. The Defendant responded to the motion to dismiss on 10 October 2013.

STATEMENT OF THE FACTS

These facts were gleaned from the pre-trial motions hearings before the Honorable James U. Downs on 20 and 21 February, 2013.

In April of 2010, the Cherokee Indian Police Department [CIPD] requested assistance from the North Carolina Highway Patrol and local law enforcement agencies to police an annual motorcycle rally held on tribal land. The request for assistance was via a written "mutual aid request" which was done each year for the rally. Part of the assistance requested by the CIPD was to man check points when the event ended. (T pp 30, 31, 45; R p 23).

To prepare for the rally, the CIPD invited the other agencies to a briefing prior to their deployment. At the briefing, the written plan for the checkpoints was discussed. (T pp 104-105, R p 23).

On 24 April 2010, CIPD Officer Dustin Wright was working one of the check points at the motorcycle rally. The checkpoint was set up on Drama Road, also know as State Highway 1361. This portion of Drama road is a State maintained road leading to the amphitheater where the event was held. Both Drama Road and the amphitheater are located on tribal land. (T p 33).

The Defendant's vehicle was the first one to come to the check point. When the Defendant came to the check point driving his pick up truck, he passed Officer Wright by approximately two car lengths before stopping, "a delayed response." Officer Wright approached the vehicle and saw two open beer cans in the console and smelled alcohol. He noticed the Defendant had red and glassy eyes. He

then asked the Defendant to back into a staging area where some vehicles stopped by the check point could be more closely scrutinized. (T pp 23-29).

Officer Wright then notified the Highway Patrol that he was requesting assistance for a vehicle that had been stopped by the checkpoint. At the same time, Trooper Jim Hipp of the Highway Patrol was working at the rally at the request of CIPD and happened to be going by the checkpoint and stopped to assist. (T pp 24, 44, 51).

Officer Wright told Officer Hipp why he asked the Defendant to pull over. Officer Hipp then approached the Defendant's pick-up truck. Officer Hipp noticed the Defendant's red glassy eyes and an odor of alcohol on his breath. Trooper Hipp asked the Defendant to step out of the vehicle; When the Defendant complied, Trooper Hipp noticed the Defendant was unsteady on his feet and had slurred speech. (T pp 167-8).

Trooper Hipp asked the Defendant to perform four field sobriety tests. The Defendant performed the "ABCs" and counting backwards in an "okay" fashion. The horizontal gaze nystagumus test showed "appreciable impairment" from alcohol. The alco-sensor indicated the presence of alcohol. Upon questioning, the Defendant admitted to having consumed four to five servings of beer, one just prior to being stopped. (T pp 169-171).

After the tests were completed Trooper Hipp formed the opinion that the Defendant had consumed enough alcohol to appreciably impair his physical and/or mental faculties and he placed the

Defendant under arrest for DWI. (T p 172).

At the police station, a breathalyzer test showed the Defendant's impairment to be .15. (T p 177, R p 28).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S PRE -TRIAL MOTION TO DISMISS BASED UPON LACK OF JURISDICTION OF DRIVING WHILE IMPAIRED WHICH OCCURRED ON AN INDIAN RESERVATION. (Defendant's Brief Sections I & II)

At the outset, the State reaffirm's its motion to dismiss the entire appeal of the Defendant for all of the reasons set out in the Motion to Dismiss filed by the State. Primarily, the Defendant did not file a trial transcript in this case or otherwise show that he renewed his Pre-Trial motions at the trial. In addition, there is no evidence that the issues raised in Section I of the Defendant's Brief were raised and objected to at trial or in the Pre-Trial Motions. The State is entitled to a dismissal of Sections I and II of the Defendant's Brief for the reasons cited in its Motion to Dismiss.

The Defendant contends in Section II of his brief that the trial court erred in failing to dismiss the driving while impaired charge since the incident occurred on an Indian reservation where the State court had no jurisdiction. This assignment of error is without merit since the trial court did have jurisdiction over the Defendant for the charge of driving while impaired committed by the Defendant, a non-Indian, who was attending a motorcycle rally on

the reservation.

As the Defendant concedes in his brief, two United States Supreme Court cases established the right of states to try non-Indians in State Court for crimes committed on reservations absent federal law or treaties with the Indians to the contrary. In United States v. McBratney, 104 U.S. 621, 26 L. Ed. 869 (1882), the United States Supreme Court held that where a State was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on a Indian reservation by others than Indians or against Indians, the state courts (Colorado), were vested with jurisdiction to try and punish crimes. McBratney, 104 U.S. at 624. The Supreme Court went on to say, that contrary to the Defendant's contentions, the federal court had no jurisdiction to try such criminal matters. Id. Then in Draper v. United States, 164 U.S. 240, 41 L. Ed. 419 (1896) the U.S. Supreme Court made the same ruling citing McBratney. Draper, 164 U.S. at 242-243.

Contrary to the Defendant's Brief, Williams ET UX v. Lee, 358 U.S. 217, 3 L. Ed. 2d 251 (1959), did not over rule Draper and McBratney.[1] In Lee, the Supreme Court (citing Worcester v.

[1] The Defendant's Brief states at Page 12, "The Court in Lee also pointed out that Congress, by the adoption of Public Law 280 (18 U.S.C. § 1162) had provided the sole means for a State to acquire civil and criminal jurisdiction in Indian Country. Id. at 223." The Defendant was apparently referring to Footnote 5, Lee p. 220, which states, "For example, Congress has granted to the federal courts exclusive jurisdiction upon Indian reservations over 11 major crimes. And non-Indians committing crimes against Indians are now generally tried in federal courts . . . ."

Georgia, 31 U.S. 515, 8 L. Ed. 483 (1832))stated:

> Over the years, this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained.
>
> * * *
>
> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Williams, 358 U.S. at 220.

This rule of law in Williams was reaffirmed by the U.S. Supreme Court in Organized Village of Kake et al. v. Egan, Governor of Alaska, 369 U.S. 60, 67, 7 L. Ed. 2d 573 (1962). Applying the facts of this case to the principles articulated in Williams, it is clear that the Highway Patrol was at the motorcycle rally at the written and verbal request of the Cherokee Indian Police Department and that the police agencies had coordinated their effort at this event for years. (T pp 48, 87). The CIPD chose the sites of the checkpoints and helped to man them. (T p 91). Then after the Defendant was stopped by the check point, the CIPD called the Highway Patrol to assist with the Defendant. (T p 24). It is clear that the CIPD intended the Highway Patrol, if warranted, to arrest the Defendant and that he be processed in State Court.

It is also clear that the CIPD was in charge of the event and that the Highway Patrol assisted them in the manner requested. Under these facts, the rights of Indians were not jeopardized, and

the state action did not infringe on the right of reservation Indians to make their own laws and to be ruled by them. Williams, 358 U.S. at 220.

The Defendant also asserts that the case at bar should have been tried in federal court because the crime of DWI is not a victimless crime. (Defendant's Brief p 14). For this proposition, the Defendant cites Solem v. Bartlett, 465 U.S. 463, 79 L. Ed. 2d 443 (1984), Footnote 2, which states in pertinent part:

> "Within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians, see New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), and victimless crimes by non-Indians. Tribes exercise concurrent jurisdiction over certain minor crimes by Indians, 18 U. S. C. § 1152, 1153, unless a State has assumed jurisdiction under § 1162."

The Defendant then asserts that DWI is not a "victimless crime" and therefore it must be tried in federal court, citing United States v. Thunder Hawk, 127 F. 3d 705(8th Cir. S.D. 1997).

This is a tortured and incorrect reading of the ruling and meaning of Hawk. In Hawk, the Court ruled, "We hold that the "Indian v. Indian" exception to the ICCA does not apply here because Hawk's offense, driving under the influence of alcohol, was not against the person or property of another Indian. Therefore, we affirm the judgment of the district court." Hawk, 127 F.3d. at 709. The Court went on to say that the crime of DWI, is not a crime against an Indian, or anyone in particular, and therefore, it could be tried in federal court (rather than tribal court) since the Indian vs. Indian exception did not apply. Id. In the case at

bar, the crime of DWI was also not against or involving an Indian, and since the offense was by a non-Indian, the Indian v. Indian exemption again does not apply.

The North Carolina Appellate Courts have ruled on a case that is analogous to the case at bar in State v. Dugan, 52 N.C. App. 136, 277 S.E.2d 842, disc. rev. denied, 303 N.C. 711, 283 S.E.2d 137 (1981). Dugan is a treatise on the jurisdiction of Courts relating to Indian reservations. The case involved the charge of speeding on a reservation by an Indian. The Court of Appeals ruled that since the charge of speeding was not covered by the General Crimes Act, 18 U.S.C. § 1152, and since it was not a crime against an Indian, the Indian vs. Indian exception did not apply so the State courts had jurisdiction. Dugan, 52 N.C. App. at 138, 139. The law of Dugan applies even more clearly to the case at bar since the Defendant is not Indian so the State court had jurisdiction. Id.

Under the facts articulated above, the Superior Court properly denied the Motion to Dismiss.

In Section I of the Defendant's Brief, the Defendant argues that the Trial Court erred in determining that the road upon which the Defendant was stopped was a North Carolina State Road within the boundaries of a Federally recognized Indian Reservation.

It is true that in ruling on the motion challenging the jurisdiction of the State Court, the trial court referred to Drama Road as State Road 1361 [sic]. (T p 74). In doing so, he was only repeating one of the names by which defense counsel referred to the

very same road. (T p 11).

However, a plain reading of the trial court's order relative to the Motion to Dismiss reveals that whether Drama Road was a State road, or a tribal road maintained by the State was not an issue considered by the Court and did not play a part in the denial of the motion. (T pp 73-75). In reading all of Section I of the Defendant's Brief, it is difficult to understand what the Defendant is asking the Court to do based upon the Trial Court repeating the defense Counsel's reference to State Road 1361. (T pp 11, 74). Further, the Defendant's Brief does not mention the reference to State Road 1361 in Section II pertaining to the Motion to Dismiss. To further confuse this issue, the Defendant concludes Section I. by asserting "The State of North Carolina had no right to claim any use of that road as a *county* road as found by the Trial Court." The record including the trial court's order, is devoid of any reference to the State claiming "use of that road" or anyone referring to it as a "county" road, or how it matters in solving the issues at hand.

For the reasons above, the State asserts that the assignments of error set forth in Sections I and II of the Defendant's Brief should not be allowed.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN CONCLUDING THAT THE CHECKPOINT AT ISSUE DID NOT VIOLATE N.C.G.S. § 20-16.3(A) AND WAS CONSTITUTIONAL.
(Defendant's Brief Section III.)

Again, as an initial matter, the State reaffirm's its motion to dismiss the entire appeal of the Defendant for all of the reasons set out in the Motion to Dismiss this appeal filed by the State. Primarily, the Defendant did not file a trial transcript in this case or otherwise show that it renewed its Pre-Trial Motions at the trial. It is noteworthy that the Defendant's reason for failing to file the trial transcript is that "since the Defendant is only appealing the court's subject matter jurisdiction over the Defendant . . . ." (R p 45). This reason for not filing the transcript does not even apply to the issues raised in this assignment of error. Id. It is impossible to see what evidence was introduced at trial, and whether it would have been subject to a motion to suppress had such a motion to suppress been filed and or granted.[2] It is also noteworthy that the Defendant does not even assert in his brief that he renewed his Pre-Trial Motions at trial. The State is entitled to a dismissal of the issues raised in Section III of the Defendant's Brief, for the reasons cited in its Motion to dismiss dated 2 October 2013.

This assignment of error asserts that the trial court erred

---

[2] In response to the Motion to Dismiss filed by the State, the Defendant attempted to "Supplement" the record with two paper-writings that appear to have been filed in Swain County District Court on 24 November 2010. It appears therefore that no such motions were ever filed in Superior Court.

when it concluded that the roadblock in question did not violate N.C.G.S. § 20-16.3(a) and was therefore constitutional.

Actually, the order of the superior court does not mention N.C.G.S. § 20-16.3(a), but it does state that the "facts support the propriety of the stop. (T pp 147-149).

N.C.G.S. § 20-16.3(a)(2) states:

> (2) An articulable and reasonable suspicion that the driver has committed an implied-consent offense under G.S. 20-16.2 and the driver has been lawfully stopped for a driver's license check or otherwise lawfully stopped or lawfully encountered by the officer in the course of the performance of the officer's duties.

N.C.G.S. § 20-16(3)(a)(2).

To determine whether a check point was constitutional, our courts must determine whether the checkpoint had a valid primary programmatic purpose and whether under the circumstances it was reasonable. State v. Veazey, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686, 687 (2008), rev. denied, 363 N.C. 811, 692 S.E.2d 876 (2010).

In making this determination when a checkpoint is challenged, the trial court should hold an evidentiary hearing and make findings of fact and conclusions of law. If the findings of fact are supported by competent evidence, they are binding on any reviewing appellate court. Veazey, 191 N.C. App. at 186 (2008).

The purpose of the checking stations was highway safety and to enforce traffic laws at end of the motorcycle rally, as was found

by the trial judge in his order. (T pp 89, 92, 148, 149).[3] A check point such as the one in the case at bar that is aimed at addressing immediate highway safety threats can justify the intrusion of a checkpoint. Veazey, 191 N.C. App. at 185, 662 S.E.2d at 686.

Once the trial court determines that the primary purpose of the checkpoint is lawful, it must then determine is the checkpoint was reasonable. Id.

Courts have identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including; the checkpoint's interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint, whether the location of the checkpoint was selected by a supervising official rather than by officers in the field, whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to supervision, and whether the officers received permission from their supervising officer to conduct the checkpoint. These factors are not individual lynchpins, but are factors to be considered in as part of the totality of the circumstances. Veazey, 191 N.C. App. at

---

[3] The trial judge's order stated, "the primary purpose of the check point was to see if the license was current, the registration of the vehicle, and any other violations of the law that was then eminently detectable by the officer." (T p 149).

193, 662 S.E.2d at 691. Evidence supporting these factor is as follows:

For the checkpoint in question, police took steps to put drivers on notice of an approaching checkpoint with flashing lights of their patrol cars. To enhance the effect, a truck with "big lights" was put at one checkpoint and a fire truck with a "big extended light was put at the other. These lights not only provided visibility of the checkpoint but also gave drivers visible signs of the officers' authority. (T pp 99, 108, 109).

The location of the checkpoints were selected by official of the Cherokee Indian Police Department. (T pp 91, 92).

Every vehicle that went through the check point was stopped. (T p 108) (and many other pages).

The police operated the checkpoint pursuant to a written plan. In addition, all of the officers from various agencies participating in security at the rally were briefed at a meeting on issues relating to the rally including the operation of the checkpoints. By written policy the officers were supervised at the checkpoints. (T pp 83, 92, 93).

Although the trial judge did not make explicit findings on each of the above factors, he did find that there was a written policy in place regarding the checkpoints and that each vehicle going through the checkpoint at issue was stopped. The trial judge found that the Cherokee Indian Police Department decided to establish the checkpoints, not the officers in the field. The trial judge noted in his order the involvement of a line sergeant.

Based upon these factors, the trial judge upheld the propriety of the stop. (T pp 148, 149). Based upon the evidence at the hearing and the trial court's order, the State asserts that the checkpoint was constitutional.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO CONCLUDE THAT THE NORTH CAROLINA HIGHWAY PATROL OFFICER HAD AUTHORITY TO ARREST THE DEFENDANT FOR AN IMPAIRED DRIVING OFFENSE ON TRIBAL LAND.
(Defendant's Brief Section IV.)

Again, as an initial matter, the State reaffirm it's motion to dismiss the entire appeal of the Defendant for all of the reasons set out in the Motion to Dismiss dated 2 October 2013. The Defendant did not file a trial transcript in this case or otherwise show that he renewed his Pre-Trial Motions at the trial. It is impossible to see what evidence was introduced at trial, and whether it would have been subject to a motion to suppress had such a motion to suppress been filed and or granted. It is noteworthy that the Defendant does not assert in his brief that he renewed his Pre-Trial Motions at trial even in the fact of the State's Motion to Dismiss. The State is entitled to a dismissal of the issues raised in Section IV of the Defendant's Brief, for the reasons cited in its Motion to dismiss dated 2 October 2013.

Section IV of the Defendant's Brief asserts that the North Carolina Highway Patrol has only the authority of a private citizen while on tribal land, and therefore no jurisdiction to arrest the Defendant. This assignment of error is without merit. The

Defendant does not dispute that the Highway Patrol is comprised of sworn police officers who normally have authority over roads in North Carolina, see, N.C.G.S. § 20-49. Rather the Defendant makes the argument similar to the argument in Section II of his brief wherein he alleged that North Carolina courts had no jurisdiction over this crime, he alleges in effect that North Carolina police also had no jurisdiction over this crime.

For the reasons stated in Section I supra, the Highway Patrol in the case at bar had jurisdiction because its actions did not compromise the sovereignty of the Eastern Band of the Cherokee Indians. See, Williams v. Lee, 358 U.S. 217, 3 L. Ed. 2d 251 (1959).

> Over the years, this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained.
>
> * * *
>
> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Williams, 358 U.S. at 220.

Applying the facts of this case to the principles articulated in Williams, it is clear that the Highway Patrol was at the motorcycle rally at the written and verbal request of the Cherokee Indian Police Department and that the police agencies had coordinated their effort at this event for years. (T pp 45, 87).

The CIPD chose the sites of the checkpoints and helped to man them. (T p 91). After the Defendant was stopped by the check point, the CIPD called the Highway Patrol to assist with the Defendant. The CIPD intended the Highway Patrol to, if warranted, to arrest the Defendant. The CIPD was in charge of the event and that the Highway Patrol assisted them in the manner requested. Under these facts, the rights of Indians were not jeopardized, and the state action did not infringe on the right of reservation Indians to make their own laws and to be ruled by them. Williams, 358 U.S. at 220.

This assignment of error should be overruled because the Highway Patrol had jurisdiction under the facts of this case.

IV. THE SUPERIOR COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANTS MOTION MADE PURSUANT TO STATE v. KNOLL.

Again, as an initial matter, the State reaffirm it's motion to dismiss the entire appeal of the Defendant for all of the reasons set out in the Motion to Dismiss dated 2 October 2013. The Defendant has not shown show that he renewed his Pre-Trial motions at the trial and in fact does not even assert in his Response to the Motion to Dismiss that he did so.

The Defendant's last assignment of error is that he was not promptly allowed out of confinement after his arrest pursuant to the law articulated in State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988). This argument is without merit since the Defendant was given due process mandated by State v. Knoll, that his bond was for

not only his Driving While Impaired and Open Container charges but for Carrying Concealed Weapon, and that any delay in posting his bond (three hours and 50 minutes), was due to the fact that the Defendant had to await a bail bondsman. This assignment of error is further without merit because the Defendant told the magistrate both verbally and in writing that he did not want to contact anyone.

State v. Knoll requires that those arrested for DWI be afforded due process that allows them to contact witnesses in a timely manner so those witnesses might be able to help them to prepare their defense. For the same reason, Knoll requires that in most cases absent special circumstances the accused be given bail promptly. State v. Knoll, 322 N.C. at 536, 537, 546, 369 S.E.2d 558, 559 (1988). Specifically, it states:

> Upon a defendant's arrest for DWI, the magistrate is obligated to inform him of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release.
>
> N.C.G.S. § 15A-511(b) (1983). A defendant may be confined or otherwise secured if he is so unruly as to disrupt and impede the proceedings, becomes unconscious, is grossly intoxicated, or is otherwise unable to understand the procedural rights afforded by the initial appearance before the magistrate. N.C.G.S. § 15A-511(a)(3) (1983).
>
> * * * *
>
> The magistrate must also determine conditions for pretrial release of the defendant, N.C.G.S. § 15A-533(b) (1983), by adhering to one of the following courses: (1) release the defendant on his written promise to appear;

> (2) release the defendant upon his execution of an unsecured appearance bond; (3) place the defendant in the custody of a designated person or organization; or (4) require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage, or by at least one solvent surety, N.C.G.S. § 15A-534(a) (1983). In determining the particular pretrial condition to impose, the magistrate must take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision, and any other evidence relevant to the issue of pretrial release. N.C.G.S. § 15A-534(c) (1983).

State v. Knoll, 322 N.C. at 536, 537, 369 S.E.2d at 559, 560 (1988).

The entire underpinning of the Defendant's argument for this assignment of error is based upon the mis-perception that the Defendant was charged only with DWI. In fact the Defendant was initially also charged with Carrying Concealed Weapon by his own admission. The record of his bond dated 25 April 2010 shows a "bond amount" of $2000, for charges of "DWI, Open cont., CCW". (see, R p 8). The Defendant admitted at his motion hearing that"at that time" he was also charged with carrying concealed weapon. (T p 202). Carrying a concealed weapon, in this case, a handgun, is a Class 2 misdemeanor. N.C.G.S. § 14-269(c). It is unreasonable to expect the magistrate to ignore the CCW charge in setting the bond. The magistrate indicated that he set bond based upon the DWI charge, the CCW charge, and the fact that the Defendant was from out of State (South Carolina). (T pp 180, 181).

At the motions hearing, the magistrate testified that he did inform the Defendant of the charges against him as well as his right to communicate with friends and counsel, as well as the general conditions of his release and the fact that he was allowed to arrange an alternate blood test. (T pp 178, 179). The Defendant specifically informed the magistrate that he did not wish to speak to anyone. (T p 190). The Defendant made this declaration in writing by checking the box "I do not wish to contact anyone," and signing his name. (R p 30). At his motions hearing the Defendant admitted that he had been informed of his right to call an attorney or to have someone "be with me" but he further testified that he was from South Carolina and he had no one to call. (T p 199). The Defendant first appeared before the magistrate at 1:05 a.m. and he was released on bond the same day at 4:50 a.m.. (T pp 175, 192).

Contrary to the facts in Knoll, the trial judge made no findings of fact indicating that the actions of the magistrate were unreasonable. In the different Knoll cases, in fact the trial judge found the magistrates involved were unreasonable in selecting arbitrary periods of time for the Defendants to be held prior to their release. Knoll, 322 N.C. at 542, 369 S.E.2d at 562. This did not happen in the case at bar.

Under the facts and circumstances in this case, the State asserts the trial court did not commit reversible error in not finding any Knolls violations.

CONCLUSION

This Court should affirm the judgment entered by the trial court and find no reversible error.

Electronically submitted this the 23rd day of October 2013.

Roy Cooper
ATTORNEY GENERAL

/s/Neil Dalton
Neil Dalton
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6650
Facsimile: (919) 716-6708
E-mail: ndalton@ncdoj.gov
N.C. Bar No.: 13357

CERTIFICATE OF SERVICE

I, Neil Dalton, Special Deputy Attorney General, hereby certify that I have this day served the foregoing **BRIEF FOR THE STATE** upon the Defendant through electronic mail and by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

VIA E-MAIL Rlmclean3@aol.com
Russell L. McLean, III
McLean Law Firm, P.A.
Post Office Box 4
Waynesville, North Carolina 28786

This the 23rd day of October 2013.

/s/Neil Dalton
Neil Dalton
Special Deputy Attorney General