2015 IL App (2d) 140503-U
No. 2-14-0503
Order filed April 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. VICTOR M. ALVAREZ, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Kane County. No. 13-CF-261 Honorable John A. Barsanti, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in ruling that the police lacked probable cause to arrest defendant for DUI, as defendant emitted the odor of alcohol, drove erratically, mumbled, refused to take a breath test, was (briefly) belligerent, and was in a traffic accident consistent with DUI.

¶ 2 The State appeals from an order of the circuit court of Kane County granting defendant Victor M. Alvarez's motion to quash arrest and suppress evidence, based on a lack of probable cause that he was driving under the influence (DUI). Because there was probable cause, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of aggravated DUI based on a blood alcohol concentration of .08 or greater (625 ILCS 5/11-501(a)(1),(d)(3) (West 2012)), one count of aggravated DUI based on being under the influence of alcohol (625 ILCS 5/11-501(a)(2),(d)(3) (West 2012)), one count of aggravated reckless driving (625 ILCS 5/11-503(a)(2) (West 2012)), one count of DUI based on a blood alcohol concentration of .08 or greater (625 ILCS 5/11-501(a)(1) (West 2012)), and one count of DUI based on being under the influence of alcohol (625 ILCS 5/501(a)(2) (West 2012)). Defendant filed a petition to rescind his statutory summary suspension, contending, in part, that there was no probable cause to arrest him for DUI.

¶ 5 The following evidence was established at the hearing on defendant's petition to rescind. Officer John Kerlin of the North Aurora police department testified in defendant's case. According to Officer Kerlin, on February 10, 2013, at about 2:11 p.m., he arrived at the scene of a one-car accident on Route 25. The car had left the roadway and struck a telephone pole. There was heavy damage to the passenger side, the pole was snapped in half, and there was extensive debris. Defendant was in the driver's seat and Juan Garcia was in the front passenger seat. Because of Garcia's injuries, Officer Kerlin requested medical assistance. The medical responders indicated to Officer Kerlin that defendant was not injured.

¶ 6 It had been raining intermittently, and the road was wet. There was a puddle of water that spanned the northbound lane of Route 25. The puddle was seven feet long and was three to four inches deep. There was ice around the edge of the puddle.

¶ 7 Kim White, who had been driving south on Route 25 at the time of the accident, reported to Officer Kerlin that she observed defendant's vehicle, which was traveling north on Route 25, cross into her lane, leave the roadway, and strike the telephone pole.

¶ 8 Ernst Lang, who had been driving north on Route 25, reported to Officer Kerlin that he saw defendant's vehicle "come up behind him very quickly." The vehicle "tailgate[ed]" him for awhile before passing him. As it passed, the vehicle "accelerated to a high rate of speed." As it returned to the northbound lane, it hit a large puddle of water. The driver lost control of the vehicle, which ran off the road and struck a telephone pole. Lang estimated that he was driving approximately the speed limit when the vehicle passed him. The speed limit for that section of Route 25 increased from 40 to 50 miles per hour.

¶ 9 Neither White nor Lang reported seeing defendant's vehicle weaving in its lane or touching an "edge line." Neither reported seeing defendant lose control of the vehicle until it hit the puddle.

¶ 10 When Officer Kerlin first spoke to defendant, he did not smell the odor of alcohol. A few minutes later, Sergeant Flowers of the Kane County Forest Preserve police told Officer Kerlin that he could smell an odor of an alcoholic beverage on defendant. Officer Kerlin testified that, when he spoke to defendant a second time, he smelled a strong odor of an alcoholic beverage. He explained that he could not smell an alcoholic beverage initially, because it was windy and he was upwind of defendant. When Officer Kerlin wrote in his report that he smelled an odor of an alcoholic beverage, he did not describe the odor as strong.

¶ 11 Defendant's eyes were not bloodshot or glassy. Nor did he fumble when retrieving his driver's license from his wallet. Defendant did not have slurred or thick-tongued speech, although he mumbled.

¶ 12 Defendant denied drinking any alcohol on the day of the accident. He admitted to drinking heavily the day before, but told Officer Kerlin that he had quit drinking around noon on that day.

¶ 13 Officer Kerlin attempted to administer a horizontal gaze nystagmus (HGN) test to defendant. In administering the test, Officer Kerlin had defendant stand with his feet together and his hands at his sides. He also had defendant face away from the flashing lights of the emergency vehicles to avoid any possible effect on the test. Defendant had no balance issues while performing the test. Officer Kerlin completed the first portion of the test, the results of which indicated that he was impaired. However, Officer Kerlin was not able to complete the remaining two assessments because, although he attempted to do so several times, defendant was unable to follow his instructions. Officer Kerlin interpreted defendant's inability to complete the test as evidence that he was either impaired or dizzy. Defendant scored only two because of his inability to complete the test. According to Officer Kerlin, an HGN test requires a score of four to be considered a failure.

¶ 14 Officer Kerlin did not perform any other field sobriety tests, such as the heel-to-toe walk or the one-leg stand, as he believed that defendant might have difficulty completing them due to his having been involved in a serious traffic accident.

¶ 15 Officer Kerlin asked defendant if he would take a preliminary breath test (PBT), to which defendant said yes. After an officer arrived with the PBT equipment, however, defendant refused to take the test and "became rather belligerent" for about 20 seconds. However, Officer Kerlin wrote in his report that defendant was polite, cooperative, and calm during the incident. Officer Kerlin did not consider defendant's refusal to take the PBT as evidence that he was under the influence.

¶ 16 The trial court found that there was no probable cause to arrest defendant for DUI, and thus, granted the petition to rescind.[1] In doing so, the court noted, among other things, that

[1] The State does not appeal that ruling.

Officer Kerlin did not initially smell alcohol on defendant, though he did so after being advised by a fellow officer that defendant had an odor of alcohol. The court, in pointing to the inconsistency between Officer Kerlin's testimony that he smelled a strong odor of alcohol and his written report, in which he stated that he smelled merely an odor of alcohol, commented that "[h]ow much that means, [it guessed], is arguable, but it is a difference." The court found that the evidence of the odor of alcohol "bounced around a little bit, not completely making it something not to take into consideration, but that does affect the credibility of that."

¶ 17 Defendant subsequently moved to quash his arrest and suppress evidence because there was no probable cause. The parties stipulated to the transcript of the rescission hearing as the factual basis for the motion to quash and suppress. After hearing arguments, the court granted the motion to quash and suppress. In granting the motion, the court found, among other things, that the testimony regarding the odor of alcohol was "inconsistent." The State filed a certificate of impairment (see Ill. S. Ct. R. 604(a)(1) (eff. Feb. 6, 2013)) and a timely notice of appeal.

¶ 18 II. ANALYSIS

¶ 19 On appeal, the State contends that the evidence was sufficient to establish that Officer Kerlin had probable cause to arrest defendant for DUI. Defendant responds that the trial court's factual findings are supported by the record and that its ruling that there was no probable cause for the arrest was correct.

¶ 20 On a motion to quash an arrest and suppress evidence, it is the defendant's burden to present a *prima facie* case that the police lacked probable cause for an arrest. *People v. Lurz*, 379 Ill. App. 3d 958, 965 (2008). Once the defendant has done so, the State has the burden of going forward with evidence that counters the *prima facie* case. *Lurz*, 379 Ill. App. 3d at 965. When reviewing the trial court's decision, we greatly defer to the court's factual findings and

credibility assessments and will reverse those findings only if they are against the manifest weight of the evidence. *Lurz*, 379 Ill. App. 3d at 965. However, we review *de novo* the ultimate question of whether the motion should have been granted. *Lurz*, 379 Ill. App. 3d at 965.

¶ 21 Probable cause to arrest exists when the totality of the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime. *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008). Probable cause concerns probabilities and not technicalities. *Wear*, 229 Ill. 2d at 564. That is, probable cause is based on the factual and practical considerations of everyday life upon which reasonable, prudent people, not legal technicians, act. *Wear*, 229 Ill. 2d at 564. Probable cause is more than a mere suspicion (*People v. Wingren*, 167 Ill. App. 3d 313, 320 (1988)) but less than proof beyond a reasonable doubt (*Wear*, 229 Ill. 2d at 564).

¶ 22 The elements of DUI under section 11-501(a)(2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(2) (West 2012)) are: (1) the defendant was driving or in actual physical control of the vehicle; and (2) the defendant was under the influence of alcohol. *Lurz*, 379 Ill. App. 3d at 967. Here, only the second element is at issue.

¶ 23 In this case, the evidence was sufficient for a reasonable person to conclude that defendant was driving under the influence. In that regard, Officer Kerlin smelled the odor of an alcoholic beverage on defendant. That was certainly an indication that defendant was under the influence. Additionally, Sergeant Flowers told Officer Kerlin that he smelled the odor of alcohol on defendant. That further evinced that defendant was under the influence. See *People v. Walter*, 374 Ill. App. 3d 763, 775 (2007) (probable cause may be established by the collective knowledge of the police even if it is not within the personal knowledge of the arresting officer).

¶ 24 Defendant contends, however, that the trial court found that Officer Kerlin was impeached on the issue of whether he smelled the odor of alcohol. However, the court never expressly rejected the evidence that Officer Kerlin smelled the odor of alcohol. Instead, the court questioned whether Officer Kerlin was credible in testifying that the odor was strong. Any odor of alcohol, however, is relevant to show that a person is under the influence. See *Wingren*, 167 Ill. App. 3d at 321.

¶ 25 Additionally, there was evidence of erratic and unsafe driving before the accident. Lang, who was driving about the speed limit, reported to Officer Kerlin that he saw defendant's vehicle "come up behind him very quickly." Additionally, defendant's vehicle struck the telephone pole with enough force to snap it in half and cause significant damage to the vehicle. Those facts imply that defendant was driving in excess of the speed limit. Lang also told Officer Kerlin that defendant was "tailgating" him for a period of time. Considering the rainy conditions and the wet road, tailgating and speeding constituted careless driving by defendant. Finally, Lang told Officer Kerlin that defendant passed him just before the accident. Although it was a legal passing zone, the act of passing required defendant to exceed the speed limit and in any event was less than prudent in light of the wet roadway and the intermittent rain. In totality, defendant's erratic and careless driving was another fact that would have led a reasonable person to conclude that defendant was under the influence.

¶ 26 According to Officer Kerlin, defendant's speech was "mumbled." Difficulties speaking, such as mumbling, indicate being under the influence. See *People v. Diaz*, 377 Ill. App. 3d 339, 345 (2007). Therefore, the fact that defendant mumbled when speaking to Officer Kerlin further evinced his being under the influence.

¶ 27 Defendant also refused to take the PBT. Such refusal was circumstantial evidence of defendant's consciousness of guilt (see *People v. Weathersby*, 383 Ill. App. 3d 226, 230 (2008)) and further supported probable cause to arrest defendant for DUI.

¶ 28 Defendant also became belligerent, albeit for a relatively brief time. His belligerence was evidence of his being under the influence. See *People v. Long*, 316 Ill. App. 3d 919, 926 (2000); see also *People v. Rathnau*, 140 Ill. App. 3d 88, 91 (1986) (combativeness is evidence of being under the influence). Although Officer Kerlin's report described defendant as generally polite, cooperative, and calm, defendant's brief belligerence supported the arrest.

¶ 29 Finally, defendant was in a traffic accident. A traffic accident that an officer can reasonably conclude was caused, at least in part, by the driver's intoxication is relevant in deciding whether there was probable cause to arrest the driver for DUI. *People v. Brodeur*, 189 Ill. App. 3d 936, 941 (1989); see also *Wingren*, 169 Ill. App. 3d at 320-21 (an accident, even though explainable by adverse weather conditions, does not preclude an officer from inferring that the accident was the result of the driver's intoxication). Here, given the evidence that defendant had been drinking, and given the nature of the accident, Officer Kerlin could conclude that a contributing cause of the accident was defendant's being under the influence.

¶ 30 Defendant relies on *People v. Boomer*, 325 Ill. App. 3d 206 (2001), in arguing that the traffic accident was not a proper consideration in assessing whether he was under the influence. *Boomer*, however, is readily distinguishable from this case.

¶ 31 In *Boomer*, the only evidence of intoxication was that the defendant, who was operating a motorcycle, had apparently skidded off the road, had a strong odor of alcohol on his breath, and acknowledged to the arresting officer that he had been drinking. *Boomer*, 325 Ill. App. 3d at 209. In holding that there was no probable cause to arrest the defendant for DUI, we emphasized

that the only evidence of intoxication was the unexplained accident and defendant's drinking. *Boomer*, 325 Ill. App. 3d at 210-11. We explained that in other DUI cases involving vehicle accidents there had been more evidence of intoxication, as well as more known about how the accidents occurred. *Boomer*, 325 Ill. App. 3d at 210; see also *Lurz*, 379 Ill. App. 3d at 966 (recognizing that in *Boomer* we distinguished its facts from other DUI cases involving accidents). Further, we emphasized the unique nature of motorcycles in that they are vulnerable to any number of road hazards that a four-wheeled vehicle might safely navigate. *Boomer*, 325 Ill. App. 3d at 210. Similar to those other cases, and unlike in *Boomer*, in the present case there is additional evidence regarding defendant's intoxication and more is known about the cause of the accident. Thus, *Boomer* is distinguishable from this case.

¶ 32 When we view the totality of the circumstances, we hold that there was probable cause to arrest defendant for DUI.[2] In doing so, we are mindful that the trial court was deliberate in its factual findings underlying its conclusion that there was no probable cause. Nonetheless, under *de novo* review, we conclude otherwise.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the order of the circuit court of Kane County granting defendant's motion to quash arrest and suppress evidence and remand this cause.

¶ 34 Reversed and remanded.

[2] In so holding, we need not take into account the results of the incomplete HGN test. Likewise, we need not decide to what extent the results of an incomplete HGN test are admissible to establish probable cause.