2015 IL App (2d) 140745-U
No. 2-14-0745
Order filed June 29, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. MATTHEW ALFREDSON, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of De Kalb County. Nos. 13-DT-509 13-TR-14900 Honorable Thomas L. Doherty, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's motion to quash his arrest and petition to rescind his summary suspension: the arresting officer had probable cause to arrest defendant for DUI, as defendant's portable breath test showed a result nearly twice the legal limit and he showed several other indicia of intoxication.

¶ 2 Defendant, Matthew Alfredson, was arrested for driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(1), (a)(2) (West 2012)), and his driving privileges were summarily suspended. He moved to quash his arrest and petitioned to rescind his suspension, arguing, among other things, that the officer lacked probable cause to arrest him for DUI.

Following a hearing, the trial court granted the motion and the petition. After the State's motion to reconsider was denied, the State filed a certificate of impairment and timely appeals, claiming that the officer had probable cause to arrest defendant for DUI. We agree. Thus, we reverse and remand.

¶ 3 The facts relevant to resolving the issue raised are as follows. On the evening of November 21, 2013, defendant, who was a division sales manager for a draft beer company, was at Fatty's Bar and Grill in De Kalb, running a promotion. While at Fatty's for approximately three hours, defendant consumed six beers. Defendant left Fatty's at around 1:30 a.m. on November 22, 2013, and went to the drive-through of a nearby Taco Bell, where he ordered some food.[1] According to Officer Craig Diefenderfer, who was sitting in his squad car near this location, defendant pulled out in front of another car when he exited the Taco Bell. Defendant denied that this happened. Based on what Diefenderfer saw, the officer turned on his headlights and followed defendant.

¶ 4 Defendant stated that, after he pulled out of Taco Bell, he proceeded to drive home, turning right at the intersection of Lincoln Highway and Annie Glidden Road. According to Diefenderfer, defendant did not signal his turn at this intersection, so the officer activated his emergency lights. Defendant pulled over immediately.

¶ 5 Diefenderfer then approached defendant while defendant was still in his car. Diefenderfer noticed that defendant's breath smelled strongly of alcohol and that his eyes were glassy. Diefenderfer asked defendant if he had consumed any alcohol, and defendant, who did not slur his words, told the officer that he had consumed six beers over a three-hour period. Diefenderfer asked defendant to complete two pre-exit tests. Specifically, he asked defendant to

[1] Evidence was not presented concerning whether defendant ate the food he ordered.

recite the alphabet from F to S and to count backward from 65 to 48. Defendant believed that he completed these tests sufficiently. According to Diefenderfer, defendant recited the alphabet from F to V, and he hesitated while counting and repeated 50 twice.

¶ 6 After completing these tests, Diefenderfer asked defendant to exit his vehicle. Defendant did as asked, and Diefenderfer then asked defendant to perform a few field sobriety tests (FSTs). Specifically, he had defendant complete the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg-stand test. Defendant testified that he completed these tests sufficiently as well. However, Diefenderfer stated that defendant failed all six points of the HGN test and failed the walk-and-turn test when he lost his balance while Diefenderfer was explaining the test and held his arms more than six inches away from his body on the first part of that test. With regard to the one-leg-stand test, Diefenderfer testified that, although he had to repeatedly remind defendant to watch his foot, defendant passed this test.[2]

¶ 7 Diefenderfer then had defendant complete a portable breath test (PBT).[3] The PBT revealed that defendant had a blood-alcohol concentration of 0.114.[4] Based on the result of the

[2] The video admitted at trial shows defendant completing these tests. Because Diefenderfer is standing in front of defendant, one cannot see how defendant does on the HGN test. On the walk-and-turn test, defendant does step off the line a bit while Diefenderfer is explaining the test, and defendant does hold his arms out slightly as he begins the test. On the one-leg-stand test, defendant holds his foot steady while balancing on one leg, and Diefenderfer asks defendant once to look at his foot.

[3] Before administering the test, Diefenderfer asked defendant when he consumed his last drink, but he never asked defendant when he last ate something.

[4] Defendant objected to the admission of the PBT result, arguing, among other things,

PBT and all of the observations Diefenderfer made, Diefenderfer believed that defendant was intoxicated, and, thus, he arrested defendant for DUI.

¶ 8 The trial court granted the motion to quash and the petition to rescind. In doing so, the court noted that defendant admitted drinking six beers in three hours. Moreover, the court, after finding both defendant and Diefenderfer credible, observed:

> "I heard [strong] odor [of alcohol] and thanks to your helping me out here we've got [glassy] eyes.
>
> Then we get to the field sobriety tests. I could not do those field sobriety tests as well as the defendant did, perhaps because of my advanced age, but those are pretty good field sobriety test results.
>
> I also notice that while standing outside the car during the HGN he was as steady as one could be, so I think the officer made his decisions based on traffic violations.
>
> The HGN we all know means someone has had alcohol, in this case alcohol which is pretty obvious, and the officer made his decision also based on the preliminary breath test which was three points over the .08 roughly.
>
> On the defendant's side as I already mentioned and I thought he did pretty well on the FSTs, his driving that I saw on the video was fine. He pulled over right away. He turned his signal on. He stopped. He was cooperative. There's no slurred speech. I think he used good judgment at the time in the way he behaved. He was candid with his answers.

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that the result was tainted because Diefenderfer never asked defendant if he had eaten anything prior to taking the test. The trial court overruled the objection.

> So on one hand it might be a close call. When someone blows .114 I don't blame an officer for thinking the person is impaired. However, I think in looking at everything here I don't think he was impaired."

¶ 9 At issue in this appeal is whether the evidence established that there was probable cause to arrest defendant for DUI.

¶ 10 Probable cause depends upon the totality of the circumstances and "exists when 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). "Whether probable cause is present is governed by common-sense considerations [citations], and the calculation concerns '[t]he probability of criminal activity, rather than proof beyond a reasonable doubt.' [Citation.]" *People v. Montgomery*, 112 Ill. 2d 517, 525 (1986). "Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false." *Wear*, 229 Ill. 2d at 564.

¶ 11 In determining whether the trial court was correct in finding no probable cause,[5] we employ a two-part standard of review. *City of Highland Park v. Kane*, 2013 IL App (2d) 120788, ¶ 11. First, we review the trial court's factual findings and credibility determinations. *Id.* We give great deference to the trial court's factual findings and credibility assessments, and we will reverse them only if they are against the manifest weight of the evidence. *Id.* A factual

[5] Arguably, despite granting defendant's motion and petition, the trial court found that the officer *did* have probable cause. Indeed, based on the PBT, the court did not "blame" the officer for believing that defendant was impaired. Instead, contrary to the probable-cause standard, the court ruled that defendant was not *actually* impaired. For purposes of our analysis, we disregard this discrepancy.

finding or credibility determination is against the manifest weight of the evidence only when the opposite conclusion is clearly evident. *Id.* Second, we review the trial court's ultimate legal ruling. *Id.* In doing so, we may make our own assessment of the facts in relation to the issues, and we may draw our own conclusions when deciding what relief should be granted. *Id.* Accordingly, the trial court's ultimate determination is reviewed *de novo*. *Id.*

¶ 12 Here, we agree with the State that Diefenderfer had probable cause to arrest defendant for DUI. DUI requires two elements: (1) "driv[ing] or be[ing] in actual physical control of any vehicle" and (2) being "under the influence of alcohol." 625 ILCS 5/11-501(a)(2) (West 2012).[6] Under the totality of the circumstances, we find it reasonable for Diefenderfer to have concluded that defendant committed the offense of DUI.

¶ 13 Specifically, the trial court found that defendant consumed six beers in three hours, had glassy eyes, smelled of alcohol, failed the HGN test, and had a blood-alcohol concentration of 0.114. These findings are not against the manifest weight of the evidence. Moreover, we determine that these facts gave Diefenderfer probable cause to arrest defendant for DUI.

¶ 14 First, courts have found that the results of a PBT are admissible at a hearing on whether the arresting officer had probable cause to arrest a defendant for DUI. See, *e.g.*, *People v. Davis*, 296 Ill. App. 3d 923, 928-29 (1998) ("[W]hen the issue is the correctness of the officer's probable cause determination, he must be allowed to demonstrate the bases for his belief, including the PBT results."). Pursuant to section 11-501(a)(1) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(1) (West 2012)), a defendant commits DUI if his blood-alcohol concentration is 0.08 or higher. Here, according to the PBT, defendant's blood-alcohol concentration was over the legal limit.

[6] The parties do not dispute that defendant was driving the vehicle.

¶ 15 Second, added to the results of the PBT were several other factors giving Diefenderfer probable cause to arrest defendant for DUI. Specifically, defendant smelled strongly of alcohol, his eyes were glassy, he admitted drinking six beers in three hours, and he failed the HGN test. We have found that similar facts "leave no doubt that [the arresting officer] had probable cause to arrest [the] defendant for DUI." *People v. Rush*, 319 Ill. App. 3d 34, 41 (2001) (this court found that officer had probable cause to arrest the defendant for DUI when the defendant's speech, though understandable, was slurred; the defendant smelled strongly of alcohol; the defendant admitted to drinking several beers the night before; the defendant had open alcohol in his car; the defendant failed one of the FSTs; and a PBT revealed an alcohol concentration of 0.07, which was under the legal limit). Although the court here observed that defendant did well on the FSTs other than the HGN, that fact alone did not defeat probable cause. As noted, courts must consider the totality of the circumstances, and not facts in isolation, in assessing whether an officer had probable cause to arrest a defendant for DUI. See *Wear*, 229 Ill. 2d at 563-64 (whether probable cause exists depends upon the totality of the circumstances). When we consider all of these facts, including the fact that the PBT revealed that defendant's blood-alcohol concentration was 0.114, we must conclude that there was probable cause to arrest defendant for DUI. See *Rush*, 319 Ill. App. 3d at 40-41; see also *People v. Rozela*, 345 Ill. App. 3d 217, 226 (2003) (in considering whether the arresting officer had reasonable suspicion to conduct a PBT, this court noted that the successful completion of all the FSTs administered does not mandate a conclusion that there was no reasonable suspicion to believe that the defendant committed DUI, when the arresting officer can "point[] to specific and articulable facts which, when taken together with the rational inferences therefrom, suggest[] that [the] defendant had committed DUI").

¶ 16 Citing *Rozela*, defendant argues that admission of the PBT results was improper. Specifically, defendant notes that the evidence indicated that he exited a Taco Bell right before he was pulled over. Defendant claims that, from this, an inference can be drawn that defendant ingested something before he was asked to take the PBT. Defendant argues that, because ingesting food or drink before taking a PBT impacts the reliability of the results, the PBT results here cannot be considered in assessing whether Diefenderfer had probable cause to believe that defendant committed DUI. We disagree with defendant's position. As the State observes in its reply, although the evidence established that defendant was stopped after he ordered food from the drive-through lane of the Taco Bell, no evidence was presented concerning whether defendant actually ingested any food that he ordered. Without such evidence, there is no " 'circumstance which tends to cast doubt on the test's accuracy.' " *Rozela*, 345 Ill. App. 3d at 228 (quoting *People v. Orth*, 124 Ill. 2d 326, 341 (1988)). Accordingly, the results of the PBT are properly considered.

¶ 17 For these reasons, the judgment of the circuit court of De Kalb County is reversed, and this cause is remanded for further proceedings.

¶ 18 Reversed and remanded.