2015 IL App (2d) 141056-U
No. 2-14-1056
Order filed November 17, 2015



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>KRISTA KUNKEL,<br><br>Defendant-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kendall County.<br><br><br><br>No. 14-DT-93<br><br>Honorable Bradley J. Waller, Judge, Presiding. |

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

**ORDER**

¶ 1 *Held*: The State showed prima facie reversible error in the trial court's grant of defendant's petition to rescind her summary suspension: per existing authority, the arresting officer needed reasonable grounds to arrest defendant only for driving under the influence of alcohol, even though defendant was ultimately charged with driving under the influence of alcohol and drugs.

¶ 2 Defendant, Krista Kunkel, was ticketed for driving while under the influence of drugs and alcohol (625 ILCS 5/11-501(a)(5) (West 2014)). Her driving privileges were summarily suspended (625 ILCS 5/11-501.1(e) (West 2014)), and she petitioned to rescind that suspension (625 ILCS 5/2-118.1(b) (West 2014)), arguing that the arresting officer lacked reasonable

grounds to believe that she was driving while under the influence of drugs. The trial court granted the petition, and the State filed a certificate of impairment and timely appealed (see Ill. S. Ct. R. 604(a)(1) (eff. Feb. 6, 2013)). For the reasons that follow, we reverse.

¶ 3 Officer Derek Stoch was the only witness to testify at the hearing on defendant's petition to rescind. He stated that, on June 6, 2014, at around 12:30 a.m., he was on patrol when he saw a car driven by defendant speeding in a construction zone. More specifically, Stoch asserted that defendant was driving 62 miles per hour, and the posted speed limit was 35.

¶ 4 After ascertaining the speed defendant was driving, Stoch activated the emergency lights on his patrol car, and defendant pulled her car over to the side of the road. Stoch then approached defendant in her car. He noticed a strong smell of alcohol on defendant's breath and observed that defendant's eyes were glossy and blurry. Stoch asked defendant for her driver's license and insurance, and defendant tendered both of these things to Stoch without difficulty.

¶ 5 After checking defendant's driver's license, Stoch asked defendant to exit the car to perform some field sobriety tests (FSTs). Defendant exited her car without difficulty. Stoch then asked defendant if she had been drinking, and she said that she had consumed two Red Bull vodkas. At the back of her car, Stoch asked defendant to perform three FSTs: the Horizontal Gaze Nystagmus test, the walk-and-turn test, and the one-leg-stand test. Stoch testified that defendant failed all three tests. Thus, Stoch believed that defendant was not fit to drive, and he arrested her for driving while under the influence of alcohol. Although later, as the traffic citation issued to defendant indicates, defendant was charged with driving while under the influence of alcohol and drugs, Stoch asserted that, when he initially placed defendant under arrest, he neither smelled drugs on defendant nor saw any drugs.

¶ 6 The trial court granted the petition to rescind. In doing so, the court found lacking any evidence that Stoch believed that defendant was driving while under the influence of drugs. Because defendant was charged with driving while under the influence of drugs and alcohol, the court determined that, in order for the officer to have had reasonable grounds to arrest defendant, evidence that defendant was under the influence of both substances needed to be presented.

¶ 7 Relying on *People v. Arrendondo*, 2012 IL App (3d) 110223, the State moved to reconsider. The State argued that the statutory-summary-suspension law requires proof of only two things. First, that the defendant was charged with and arrested for an offense delineated in section 11-501 of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501 (West 2014)), and, second, that there were reasonable grounds to believe that the defendant was driving while under the influence of alcohol, drugs, or both. See 625 ILCS 5/2-118.1(b) (West 2014). The State argued that proof of facts necessary to support the specific offense with which the defendant was charged is relevant only at the defendant's criminal trial, not the civil summary-suspension hearing. Because defendant was charged with an offense under section 11-501 of the Code, specifically section 11-501(a)(5) of the Code (625 ILCS 5/11-501(a)(5) (West 2014)), and the officer had reasonable grounds to believe that defendant was driving while under the influence of alcohol, the State claimed that the court should reconsider its prior ruling and deny defendant's petition to rescind.

¶ 8 The court denied the State's motion to reconsider. Relying on the dissent in *Arrendondo*, the court found that reasonable grounds under the summary-suspension law must be based on the specific offense with which the defendant is charged, not just any offense under section 11-501 of the Code. Accordingly, because no evidence was presented suggesting that defendant was

under the influence of drugs, the court determined that it properly granted defendant's petition to rescind.

¶ 9 Before addressing the issue raised in this appeal, we note that defendant has not filed a brief with this court. While we may not reverse summarily on that basis alone, we need not serve as defendant's advocate or search the record for a basis upon which to affirm. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976); *Orava v. Plunkett Furniture Co.*, 297 Ill. App. 3d 635, 636 (1998). Unless the record is simple and the issues can be easily decided without the aid of an appellee's brief, we may reverse "if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record." *Talandis*, 63 Ill. 2d at 133; see *Orava*, 297 Ill. App. 3d at 636. " '*Prima facie* means, "at first sight, on the first appearance, on the face of it, so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary." [Citation.]' " *Talandis*, 63 Ill. 2d at 132 (quoting *Harrington v. Hartman*, 233 N.E.2d 189, 191 (Ind. App. 1968)). We do not believe that the issue in this case can be easily decided. See *Arrendondo*, 2012 IL App (3d) 110223, ¶ 16. Therefore, the question is whether the State's brief establishes *prima facie* reversible error. We hold that it does.

¶ 10 In presenting its case, the State relies on *Arrendondo*. There, the defendant was charged under section 11-501(a)(4) of the Code (625 ILCS 5/11-501(a)(4) (West 2010)), which prohibits a person from driving while under the influence of intoxicating compounds to such a degree that the person is incapable of driving safely. *Arrendondo*, 2012 IL App (3d) 110223, ¶ 3. As a result of this charge, the defendant's driving privileges were summarily suspended, and he petitioned to rescind that suspension. *Id*.

¶ 11 Evidence presented at the hearing on the petition revealed that the defendant was stopped after the arresting officer observed that the car the defendant was driving did not have a rear registration-plate light and that objects hanging from the car's rearview mirror obstructed the defendant's view. *Id.* ¶ 5. When the officer approached the defendant's car, the defendant rolled down the car window, and the officer smelled a strong odor of unburnt cannabis. *Id.* ¶ 7. As the officer continued to talk with the defendant, noticing that the defendant's eyes were glossy and bloodshot, the officer smelled burnt cannabis on the defendant's breath, and the defendant, after admitting that he had drugs on him and had consumed drugs earlier, gave the officer the cannabis that he had. *Id.* ¶¶ 8-11. The officer made clear at the hearing that he did not observe the defendant driving erratically and that the defendant's "mental facilities appeared intact." *Id.* ¶¶ 6, 11. The trial court granted the defendant's petition to rescind, noting that, although the defendant might have ingested marijuana, the evidence did not indicate that the defendant was driving improperly. *Id*. ¶¶ 13-14.

¶ 12 The appellate court, without the aid of a brief from the defendant, found *prima facie* reversible error. *Id*. ¶ 16. In doing so, after observing that summary-suspension hearings are civil proceedings divorced from any criminal proceedings that may arise from the same incident, the court noted that compliance with the relevant factors of the summary-suspension law had been had. *Id.* ¶¶ 18, 20. That is, the defendant was charged with and placed under arrest for an offense defined in section 11-501 of the Code (625 ILCS 5/11-501 (West 2010)); the officer had reasonable grounds to believe that the defendant was under the influence of cannabis, as evinced by the smell of cannabis detected on the defendant as well as the defendant's glossy and bloodshot eyes; and the defendant refused to submit to chemical testing after being advised of the consequence of submitting to or refusing such tests. *Arrendondo,* 2012 IL App (3d) 110223,

¶¶ 20-22; see 625 ILCS 5/2-118.1(b) (West 2010). Importantly, the court also found immaterial the fact that no evidence of any unsafe driving on the defendant's part was presented at the hearing. *Arrendondo,* 2012 IL App (3d) 110223, ¶ 25. Specifically, the court asserted:

> "[S]ubsection (b) of section 2-118.1 merely provides that [a] defendant be placed under arrest for *an offense* as defined in section 11-501 of the Code. [Citation.] It does not provide that the actual offense for which [the] defendant was arrested be proven at the summary suspension hearing. In other words, the matter before the trial court was not [the] defendant's actual criminal trial where the State needed to establish the elements of subsection (a)(4) of section 11-501 beyond a reasonable doubt. Instead, it was merely a summary suspension hearing, governed by section 2-118.1, at which [the] defendant was required to prove a *prima facie* case for rescission." (Emphasis in original.) *Id.*

¶ 13 Here, in light of *Arrendondo,* the State has made a *prima facie* case for reversal. First, the ticket issued to defendant reveals that defendant was charged with and arrested for an offense under section 11-501 of the Code (625 ILCS 5/11-501 (West 2014)). Specifically, defendant was charged with and arrested for driving while under the influence of alcohol and drugs. See 625 ILCS 5/11-501(a)(5) (West 2014).

¶ 14 Second, Stoch had reasonable grounds to believe that defendant was driving while under the influence of alcohol. That is, when Stoch approached defendant, he noticed a strong smell of alcohol on defendant's breath, and he saw that defendant's eyes were bloodshot and glossy. Defendant admitted to drinking alcohol, and she failed all three FSTs Stoch administered. Such facts provide an officer with reasonable grounds to believe that a defendant was driving while under the influence. See, *e.g.*, *People v. Rush*, 319 Ill. App. 3d 34, 41 (2001).

¶ 15 Third, according to Stoch's sworn report, defendant was advised about chemical testing to determine the amount of intoxicating compound in her system. Stoch's report reflects that defendant refused to submit to such testing.

¶ 16 In reaching the conclusion that the State established *prima facie* error, we note that, as in *Arrendondo*, it is irrelevant that the State presented no evidence of defendant's alleged drug consumption. Although the ticket, which reflects that defendant was charged with driving while under the influence of alcohol and drugs, constitutes the criminal complaint filed against defendant, the ticket does not necessarily provide the basis for defendant's *initial* arrest. See *People v. Mourecek*, 208 Ill. App. 3d 87, 89, 94 (1991) (citation for failure to have a firearm owner's identification (FOID) card provided valid basis for subsequent charges of unlawful possession of cocaine and armed violence, even though, as officer stated, failure to have a FOID card was not actual basis for arrest). Moreover, even if the ticket evinces Stoch's subjective basis for the arrest, whether there were reasonable grounds to believe that defendant was driving while under the influence of alcohol must be viewed under an objective test. See *id.* at 94 ("[I]f the arrest is properly supported by probable cause to arrest for a certain offense, neither the officer's subjective reliance on an offense for which there is no probable cause nor his verbal announcement of the wrong offense vitiates the arrest [citation], and it does not foreclose the State from later justifying the arrest by proving probable cause on another basis [citation]."). Here, the facts, as laid out above, support the conclusion that Stoch had reasonable grounds to believe that defendant was driving while under the influence of alcohol. Under the summary-suspension law and *Arrendondo*, he did not need reasonable grounds as to defendant's consumption of drugs.

¶ 17 For these reasons, the judgment of the circuit court of Kendall County is reversed.

¶ 18 Reversed.