

2016 IL App (2d) 150393-U
No. 2-15-0393
Order filed May 16, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of De Kalb County.
)	
Plaintiff-Appellant,)	
)	
v.)	Nos. 14-DT-521
)	14-TR-15890
)	
JACOB R. WILLRETT,)	Honorable
)	Robert P. Pilmer,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in granting defendant's motion to suppress evidence and petition to rescind his summary suspension: the arresting officer had probable cause to arrest defendant for DUI, as defendant smelled of alcohol, admitted having consumed alcohol, had bloodshot glossy eyes, failed the HGN test, and failed to follow instructions on other tests, and, despite conflicts in the evidence, defendant's driving and his performance on other tests were sufficiently poor to support the officer's probable cause, rather than refute it.
- ¶ 2 The State appeals from the judgment of the circuit court of De Kalb County granting defendant Jacob R. Willrett's motion to suppress evidence and petition to rescind his statutory

summary suspension. Because there was probable cause to arrest defendant for driving under the influence (DUI), we reverse and remand.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged by traffic citation and complaint with two counts of DUI (625 ILCS 5/11-501(a)(1), (a)(2) (West 2014)) and one count of improper lane usage (625 ILCS 5/11-709 (West 2014)). Defendant filed a motion to suppress evidence (motion) and a petition to rescind his statutory summary suspension (petition).

¶ 5 The following facts are taken from the combined hearing on the motion and petition. On December 5, 2014, defendant ate dinner and then attended a birthday party for a friend. Defendant arrived at the party at around 9 p.m. While there, he drank a “few beers” but had nothing to eat. He had his last beer at about 1 a.m. and left the party at approximately 2 a.m.

¶ 6 Defendant, who was accompanied by a passenger, left in his 2001 Dodge pickup truck. According to defendant, the truck would “begin to wander” when driven at higher speeds.

¶ 7 Defendant drove north on Annie Glidden Road. He described the driving conditions as “[r]elatively good,” although it was a “little windy.” He had no issues “navigating the roadway” and did not recall crossing the center line, leaving his lane, or leaving the roadway. Defendant then turned onto Twombly Road.

¶ 8 According to defendant, he had no issues turning onto Twombly Road. Nor did he have any problems navigating the roadway or staying in his lane. Although he never crossed the center or fog lines, he possibly could have because of his “wandering truck.”

¶ 9 As he drove on Twombly, defendant saw flashing lights behind him. He activated his right turn signal, pulled onto the gravel shoulder, and stopped.

¶ 10 Officer Jason Goodwin of the De Kalb police department was patrolling with a field training officer. Although Officer Goodwin had been a De Kalb police officer for about five months, he had been a police officer since 2005. During that time, he had made about 100 DUI arrests.

¶ 11 At about 2:10 a.m., Officer Goodwin observed defendant driving north on Annie Glidden Road. The camera on Officer Goodwin's squad car, which recorded both video and audio, was activated as he followed defendant on Annie Glidden Road. He acknowledged that the recording accurately depicted defendant's driving and the events related to his arrest. According to Officer Goodwin, who was two to three blocks behind defendant, he noticed defendant's truck because it had crossed the center line on Annie Glidden Road. The video recording does not show whether defendant's vehicle crossed the center line while on Annie Glidden Road.

¶ 12 After following defendant onto Twombly Road, Officer Goodwin saw defendant's vehicle cross the center line twice and the fog line once. Although, because of the distance between the squad car and defendant's truck, the video does not show whether defendant's truck crossed the center line, it clearly shows that the truck's passenger-side tires crossed the fog line. Officer Goodwin then stopped defendant.

¶ 13 Officer Goodwin approached and spoke to defendant while defendant was sitting in his truck. Officer Goodwin smelled "an odor of an alcoholic beverage," and defendant's eyes were "bloodshot and glossy." Although Officer Goodwin testified that defendant's speech was slurred, he admitted that his sworn report, wherein he described defendant's speech as "good," was accurate.

¶ 14 As defendant sat in his truck, Officer Goodwin had him perform three preexit tests. He had defendant do a finger-dexterity test, which required defendant to touch the tip of his thumb

to the tip of each of his fingers in one direction and then the other. According to Officer Goodwin, although he instructed defendant to start by touching his index finger, defendant began by touching his little finger. Defendant also missed touching his “finger to thumb” several times.

¶ 15 Officer Goodwin had defendant count backward from 79 to 60. Although defendant did so correctly, he did not stop at 60. Instead, he kept counting until Officer Goodwin stopped him.

¶ 16 Officer Goodwin asked him if he could recite the alphabet. Defendant answered that he could not do so backward. When Officer Goodwin told him that he did not have to recite it backward, defendant responded, “Good because [I] couldn’t do that sober.” Officer Goodwin asked him to recite the alphabet from C to T, but defendant began with A and recited the entire alphabet. According to defendant, he felt like he “did pretty good” on all three tests and was able to do what Officer Goodwin asked. The recording does not show how defendant performed on the preexit tests.

¶ 17 After defendant completed the tests, Officer Goodwin had him exit the truck. Defendant did so without stumbling or falling down.

¶ 18 Officer Goodwin directed defendant to the gravel shoulder between the truck and the squad car. He then administered a horizontal gaze nystagmus (HGN) test. According to Officer Goodwin, defendant scored the maximum of six on the HGN. He also testified that defendant swayed during the test, although the video does not show defendant swaying.

¶ 19 After the HGN test, Officer Goodwin had defendant perform two more field sobriety tests. As to the first, the one-legged stand, Officer Goodwin instructed defendant on, and demonstrated how, to complete the test. Defendant was directed to stand on the edge of the roadway with his hands by his sides. He then was told to lift one leg. According to Officer

Goodwin, defendant put his foot down twice, lost his balance, and lifted his arms more than six inches from his body. The video is consistent with Officer Goodwin's description.

¶ 20 Officer Goodwin also directed defendant to complete a walk-and-turn test. Officer Goodwin explained to, and demonstrated for, defendant how to perform the test. According to Officer Goodwin, defendant was unable to complete the test as instructed, in that he stepped off of the line twice, turned by spinning rather than taking small steps, and did not connect heel-to-toe several times. The video shows that defendant spun when turning and did step off of the line, but it does not show that he failed to touch heel-to-toe. Although Officer Goodwin testified that he had defendant walk on an imaginary line, the video shows that defendant walked on the fog line.

¶ 21 Based on his experience as a police officer, defendant's driving, the HGN test, and the various field sobriety tests, Officer Goodwin believed that defendant was under the influence.

¶ 22 In ruling on the motion and petition, the trial court found that the video showed that defendant's truck crossed the fog line "at least once." As to the instances of crossing the center line, the court found that they were not "really displayed on the video but that [did not] necessarily mean that they did or did not occur."

¶ 23 The trial court noted that, although Officer Goodwin testified that defendant had slurred speech, he acknowledged that he indicated in his sworn report that defendant's speech was good. The court added that "from what [it could] hear on the video that it did not appear that [defendant's] speech was slurred."

¶ 24 As for the pre-exit tests, the trial court found that Officer Goodwin's testimony showed not that defendant could not perform the tests but that he "just [did not] do them as he was

instructed.” The court noted that defendant did not appear to stumble or have difficulty exiting his truck.

¶25 In discussing the HGN results, the trial court, noting that the HGN test is an indicator of possible impairment as opposed to definitively showing impairment, found that the HGN test supported defendant's admission that he had drunk "a few beers."

¶26 Although the trial court recognized that defendant put his foot down twice during the one-legged-stand test, it found that it was “very windy” and that the wind was a “factor that [it] would look at and consider.” The court found, based on the video, that defendant performed the walk-and-turn test “substantially fine.”

¶27 The trial court found that there was reasonable suspicion to stop defendant. However, it ruled that there were not reasonable grounds to believe that defendant was under the influence. Therefore, the court granted both the motion and the petition.

¶28 The State filed a certificate of impairment pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. Feb. 6, 2013) and a timely notice of appeal.

¶ 29 II. ANALYSIS

¶30 On appeal, the State contends that there was probable cause to arrest defendant for DUI. Defendant responds that Officer Goodwin was impeached in critical respects by both his sworn report and the video and that the trial court's factual findings were not against the manifest weight of the evidence.

¶31 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 a 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.¹ *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. The standard of review is the same for an appeal from a ruling on a petition to rescind. *People v. Wear*, 229 Ill. 2d 545, 561 (2008).

¶ 32 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).

¶ 33 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.

¹ Because the trial court considered live testimony as well as video evidence, we apply a deferential standard of review. See *People v. Span*, 2011 IL App (1st) 083037, ¶ 27 (although decisions based on solely documentary evidence, such as a video, are reviewed *de novo*, the manifest-weight-of-the-evidence standard applies when live testimony is in part considered); *People v. Valle*, 405 Ill. App. 3d 46, 57-58 (2010) (same).

¶ 34 In this case, there was substantial evidence that defendant was under the influence. Officer Goodwin smelled an alcoholic beverage when he spoke to defendant while standing outside of defendant's truck window. Any odor of alcohol is relevant to show that a person is under the influence. *Wingren*, 167 Ill. App. 3d at 320-21. Although defendant suggests that the passenger might have been the source of the alcohol odor, defendant admitted to Officer Goodwin that he had consumed a few beers between 9 p.m. and 1 a.m. That indicated that the odor, at least in part, came from defendant. Moreover, after defendant exited the truck, Officer Goodwin, while standing at arm's length, could still smell alcohol coming from defendant. The persistent odor of alcohol coming from defendant evinced that defendant was under the influence.

¶ 35 Defendant's eyes were bloodshot and glossy. That further demonstrated that defendant was under the influence. See *People v. Brodeur*, 189 Ill. App. 3d 936, 941 (1989).

¶ 36 Defendant also failed the HGN test. According to Officer Goodwin, he scored a score of six, a strong indication of being under the influence. See *People v. Gordon*, 378 Ill. App. 3d 626, 630 (2007) (a score of four or more decision points is considered failing). A failed HGN test is relevant to impairment in the same manner as the smell of alcohol on a person's breath. *People v. McKown*, 236 Ill. 2d 278, 302 (2010).

¶ 37 As noted above, defendant admitted to Officer Goodwin that he consumed a "few" beers between 9 p.m. and 1 a.m. Consumption of alcohol bears on the question of impairment. *McKown*, 236 Ill. 2d at 302.

¶ 38 Defendant also failed to follow instructions on the preexit tests and one of the other field sobriety tests. He failed to perform the finger-dexterity test as instructed, as he began with his little finger instead of his index finger. When counting backward, although he was instructed to

stop at 60, he continued counting past 60 until Officer Goodwin stopped him. When asked to recite the alphabet beginning with the letter C and ending with T, he began with A and continued through Z. Finally, on the walk-and-turn test, defendant pivoted instead of turning with small steps as instructed. Defendant's consistent failure to properly follow the instructions on the pre-exit tests and the walk-and-turn test constituted additional evidence that he was under the influence. See *People v. King*, 2014 IL App (2d) 130461, ¶ 12 (a motorist's failure to follow an officer's instructions during a traffic stop is relevant to the question of whether the motorist was impaired).

¶ 39 All of the foregoing evidence—the odor of alcohol, the admission to having recently consumed alcohol, the bloodshot, glossy eyes, the failed HGN test, and the failure to follow instructions—provided ample probable cause to believe that defendant was under the influence, irrespective of defendant's driving or performance on the various field sobriety tests. See *Wingren*, 167 Ill. App. 3d at 320-21.

¶ 40 Relevant to defendant's driving, Officer Goodwin testified that defendant's truck crossed the center line several times and the fog line once. Defendant testified that he had no problems staying in his lane, although he hedged by stating that his truck would wander at high speed. However, defendant never testified that he drove at high speed or that his truck actually wandered as he drove on Annie Glidden or Twombly Roads. Even if defendant's truck did wander due to a mechanical problem, absent knowledge of that problem Officer Goodwin could have reasonably relied on the vehicle's movements as an indication of impaired driving. Moreover, the video, although not showing whether defendant's truck crossed the center line, clearly showed that it crossed the fog line just before Officer Goodwin stopped defendant. Thus,

defendant's driving was sufficiently erratic to support a finding of probable cause. See *Wingren*, 167 Ill. App. 3d at 321.

¶ 41 As for the preexit tests, according to Officer Goodwin, defendant failed to touch his thumb to his fingers several times. That was further evidence of being under the influence. To the extent that the trial court found that Officer Goodwin's testimony did not show that defendant could not perform the preexit tests, that finding was against the manifest weight of the evidence as to the finger-dexterity test. On the other hand, aside from not following the instructions, defendant was able to recite the alphabet and count backward with no apparent problems.

¶ 42 However, defendant also had performance problems on the other field sobriety tests. On the one-legged-stand test he put his foot down twice, lost his balance slightly, and moved his arms more than six inches from his body. Although the trial court found that it was very windy, it does not appear from the video that the wind was a significant factor in how defendant performed the test. He also stepped off of the line during the walk-and-turn test. Even though the court found that defendant performed that test "substantially fine," there was some indication in his performance that he was under the influence. More importantly, it cannot be said that his performance on the preexit and field sobriety tests was so satisfactory as to negate the many other indicators of being under the influence.

¶ 43 Lastly, we note that defendant's speech was not slurred² and that he had no apparent problems exiting his vehicle. Although those two indicators did not show that defendant was

² Defendant contends that Officer Goodwin was "critically impeached" by his sworn report and the video, both of which showed that defendant's speech, which was a "critical factor" in determining whether he was under the influence, was not slurred. Although defendant's

under the influence, the test for probable cause is based on the totality of the circumstances known to the arresting officer when he arrested defendant. See *Wear*, 229 Ill. 2d 563-64. Here, when viewed collectively, the circumstances would have led a reasonable officer to believe that defendant was under the influence. Thus, the trial court erred in ruling otherwise.

¶ 44

III. CONCLUSION

¶ 45 For the reasons stated, we reverse the judgment of the circuit court of De Kalb County and remand for further proceedings.

¶ 46 Reversed and remanded.

speech bears on the issue of whether there was probable cause to arrest him for DUI (see *Brodeur*, 189 Ill. App. 3d at 941), it was only one of many such factors.