2020 IL App (2d) 190469-U
No. 2-19-0469
Order filed March 9, 2020

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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 McHenry County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 19-TR-3474
	)	
MATTHEW E. KONIE,	)	Honorable
	)	Mark R. Gerhardt,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting defendant's petition to rescind his summary suspension, as probable cause was established by testimony that defendant, a police officer, had a strong odor of alcohol, admitted drinking, refused field sobriety tests, and was observed speeding, changing lanes without signaling, and randomly activating the lights and siren of his unmarked SUV.

¶ 2 Defendant, Matthew E. Konie, was arrested for driving under the influence of alcohol (625 ILCS 5/11-501 (West 2018)) (DUI). At the time of his arrest, he was an officer with the Illinois State Police and was driving an unmarked police vehicle. Pursuant to section 11-501.1(d) of the Illinois Vehicle Code (Code) (*id.* § 11-501.1(d)), the arresting officer submitted a sworn report to

the circuit court of McHenry County and the Secretary of State indicating that defendant refused to submit to chemical testing of his blood alcohol level. As a result, the Secretary of State entered the statutory summary suspension of his driver's license. *Id.* § 11-501.1(e). Defendant filed a petition to rescind the statutory summary suspension, and the trial court granted the petition following a hearing. The State appeals, arguing that defendant failed to make a *prima facie* case for rescission. We reverse.

¶ 3 I. BACKGROUND

¶ 4 During defendant's case in chief at the rescission hearing, Crystal Lake police officer Daniel Hulata testified that, on February 1, 2019, at about 7:30 p.m., he observed a silver Ford Explorer SUV driving east on Brink Street. Hulata followed the Explorer as it turned onto Main Street. The vehicle had drawn Hulata's attention because the driver was intermittently activating red and blue lights and a siren. Hulata had seen police vehicles briefly activate their emergency lights to get traffic to move out of its way, but he had not seen a vehicle do so when responding to a call that was not necessarily an emergency. There were no vehicles in the Explorer's way when the driver used the lights and siren. The Explorer had passenger plates that were registered to "MRT Enterprises." Hulata believed that the driver might have been impersonating a police officer. Hulata testified that he had never seen a "covert" vehicle registered to an address other than that of the agency to which the vehicle belonged.

¶ 5 As Hulata followed the Explorer, he observed it accelerate rapidly and change lanes at least once without signaling. However, he saw nothing to indicate that the driver could not keep the Explorer in its lane. Hulata testified that the Explorer was speeding. The posted speed limit was 40 miles per hour. As Hulata followed the Explorer, the speedometer on his vehicle read 54 miles per hour, and the Explorer was pulling away from him. Hulata acknowledged that the speedometer

on his vehicle had not been calibrated since the vehicle was manufactured. He did not "pace" the Explorer by maintaining a constant distance behind it.

¶ 6 Hulata eventually pulled over the Explorer. As the Explorer changed lanes on its way to the curb, its emergency lights flashed briefly. Hulata noticed that there was a cage in the back of the Explorer. He testified that an undercover police vehicle might be equipped with a cage. The Explorer stopped in the center of the lane adjacent to the curb. Defendant was behind the wheel, and there was a passenger in the front seat with him. Defendant shifted into reverse, but several seconds later he pulled forward about 20 feet, bringing the Explorer closer to the curb. Defendant shifted into reverse again and then shifted to park. He also activated the vehicle's siren briefly. It appeared to Hulata that defendant was having trouble shifting into park.

¶ 7 When Hulata approached defendant, defendant displayed a badge identifying him as an Illinois State Police officer. However, he did not say anything to Hulata. Hulata asked defendant why he activated his emergency lights and siren. Defendant did not respond. When defendant did speak with Hulata, Hulata detected a strong odor of an alcoholic beverage on defendant's breath. Hulata testified that defendant's eyes were glassy, and his speech was slurred and very difficult to understand.

¶ 8 By that point, other officers had arrived at the scene. Hulata told one of the officers, Matthew Smith, that defendant had been driving 70 miles per hour, which Hulata acknowledged at trial was not accurate. Smith had defendant step out of the vehicle. Defendant leaned on the door as he did so, but he did not stumble or stagger. Defendant had no problem maintaining his balance while standing outside the Explorer. Smith asked defendant several times to perform field sobriety tests. Defendant refused each request. Hulata's squad car was equipped with a video

camera. A video recording of Hulata's encounter was admitted into evidence and played during the hearing.

¶ 9 Smith testified that he arrived at the scene after Hulata pulled over the Explorer. At one point, Smith observed defendant using a cell phone. Defendant had trouble touching the "end call" button on the phone. He attempted to press the button but missed four times before successfully ending a call. Defendant said that he had been downtown with some friends. Smith asked defendant how much he had to drink. Defendant indicated that he had a couple of drinks. According to Smith, defendant leaned on the driver-side door as he stepped out of the Explorer but did not stumble or stagger. Smith smelled the strong odor of alcohol on defendant's breath. Defendant refused to submit to field sobriety tests. Hulata turned the investigation over to Smith after describing what he observed before Smith arrived. Smith and Hulata jointly decided that there was probable cause to arrest defendant based on both of their observations. Defendant was given another opportunity to submit to field sobriety tests. He again refused, and Smith placed him under arrest.

¶ 10 After defendant rested, the State moved for a directed finding, contending that defendant had failed to make a *prima facie* case that he was arrested without probable cause. The trial court noted that defendant had committed no traffic violations other than changing lanes without signaling. The court remarked that Hulata had "guesstimated" the speed at which the Explorer was traveling. The court stated, "[Hulata] said I was going 54, and the vehicle was going further. I can't tell exactly what's going on other than [defendant's] car got well in front of [Hulata's] car until it slowed down."

¶ 11 The trial court concluded that Hulata was entitled to conduct the traffic stop because defendant changed lanes without signaling and Hulata had a reasonable articulable suspicion that

defendant was impersonating a police officer. The court found that that there was nothing unusual in the way defendant maneuvered the vehicle when Hulata pulled him over or in the way defendant stepped out of the vehicle. The trial court also noted that defendant did not stumble or stagger, that he stood "like a statue," and that he spoke clearly. The trial court found that defendant made a *prima facie* case for rescission and the court therefore denied the State's motion for a directed finding.

¶ 12 During the State's case, the audio portion of a recording from Smith's squad car's video camera was admitted into evidence, as were written reports from three police officers who interacted with defendant after his arrest. For purposes of our analysis, the contents of these materials are unimportant. The State presented no witnesses. The trial court granted defendant's petition, and this appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Pursuant to section 11-501.1(a) of the Code, which is commonly known as the "implied consent law," a motorist operating a vehicle on a public highway in Illinois is deemed to have consented that, if arrested for DUI, he or she will submit to chemical testing to determine his or her blood alcohol level. 625 ILCS 5/11-501.1(a) (West 2018). The motorist's driving privileges will be summarily suspended if he or she refuses to submit to testing, or the testing reveals a blood alcohol concentration of 0.08 or more. *Id.* § 11-501.1(c). However, if the suspension resulted from an unconstitutional seizure, the motorist is entitled to have the suspension rescinded. See *People v. Crocker*, 267 Ill. App. 3d 343, 345 (1994). Rescission is proper when the arresting officer lacked reasonable grounds to believe that the motorist committed DUI. 625 ILCS 5/2-118.1(b) (West 2018). "Reasonable grounds" is synonymous with probable cause, which exists "whether a reasonable person, armed with the objective knowledge possessed by the officer at the

time of the arrest, would believe that the defendant committed the offense." *People v. Acevedo*, 2017 IL App (3d) 150750, ¶ 17. The determination of probable cause is based on the totality of the circumstances. *People v. Nicolosi*, 2019 IL App (3d) 180642, ¶ 19.

¶ 15 A motorist bears the burden of proof with respect to the grounds for rescission. *People v. Patel*, 2019 IL App (2d) 170766, ¶ 12. If the motorist fails to make a *prima facie* case for rescission, the State is entitled to a directed finding. *People v. Relwani*, 2019 IL 123385, ¶ 17. On appeal from the trial court's decision in a rescission proceeding, "[t]he trial court's factual findings are reviewed under the manifest weight of the evidence standard, while the ultimate legal ruling regarding rescission is reviewed *de novo*." *People v. Gocmen*, 2018 IL 122388, ¶ 21.

¶ 16 The State argues that defendant failed to make a *prima facie* case that he was arrested for DUI without probable cause. A person commits DUI when he or she drives or is in actual physical control of a vehicle while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2018). A person is under the influence of alcohol when he or she is " 'less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves operate an automobile with safety to himself and to the public.' " *People v. Bostelman*, 325 Ill. App. 3d 22, 34 (2001) (quoting *People v. Seefeldt*, 112 Ill. App. 3d 106, 108 (1983)).

¶ 17 Common indicia of impairment include the odor of alcohol and red and glassy eyes. *People v. Williams*, 2018 IL App (2d) 160683, ¶ 14. Both were present here. Evidence that a motorist was speeding can also contribute to probable cause when other factors are present. Hulata testified that defendant was speeding, but defendant argues that the testimony was unreliable. As discussed, Hulata testified that his speedometer showed that he was traveling 54 miles per hour in a 40 mile-per-hour zone while the distance between his vehicle and defendant's vehicle was increasing.

Defendant contends, however, that because Hulata's speedometer had not been calibrated it cannot be relied on as evidence that defendant was exceeding the speed limit. We disagree.

¶ 18 In *Village of Schaumburg v. Pedersen*, 60 Ill. App. 3d 630, 632 (1978), the First District noted that courts in other States were divided on the issue of whether a party offering a speedometer reading as proof of a vehicle's rate of travel must introduce evidence of the accuracy of the speedometer. Because the State introduced some evidence that the speedometer was accurate, the *Pedersen* court did not decide the issue, and we have not found a subsequent Illinois case addressing the issue. *Id.* at 632-33. Here, however, it is significant that Hulata's speed was admitted not to prove beyond a reasonable doubt that defendant was speeding, but for purposes of establishing probable cause for DUI. The probable cause inquiry is what a reasonable person would believe based on the facts known to the officer. Reasonable drivers rely on speedometers to provide a reasonably accurate measurement of speed. See *People v. Lowe*, 130 Cal. Rptr. 2d 249, 252 (Cal. Ct. App. 2002) (quoting *State v. Tarquinio*, 221 A.2d 595, 596 (Conn. Cir. Ct. 1966)) ("the general accuracy of speedometers is a matter of general knowledge and although speedometers 'like other machines, may get out of order *** they may be relied upon with reasonable certainty to determine accurately the speed at which a vehicle is driven.' ") Even assuming for the sake of argument a speeding conviction based on pacing the motorist requires proof of speedometer calibration, a speedometer reading without such proof may nonetheless contribute to probable cause. See *Commonwealth v. Johnson*, 202 A.3d 125, 129 (Pa. Super. Ct. 2019).

¶ 19 The State also argues that defendant's use of his vehicle's lights and siren is another factor supporting probable cause because it suggests that defendant's judgment was impaired. In response, defendant notes Hulata's testimony that it is not unusual to see a police vehicle use its

emergency lights to get traffic to move out of its way. However, defendant ignores Hulata's testimony that defendant was not responding to an emergency or attempting to apprehend a lawbreaker. Hulata had not seen police vehicles using their lights in response to nonemergency calls, and such use of the siren is expressly forbidden. 625 ILCS 5/12-601(b) (West 2018). We therefore agree with the State that, under the circumstances, defendant's use of his vehicle's lights and siren was a factor contributing to the existence of probable cause.

We also agree with the State that defendant's refusal to submit to field sobriety tests was evidence of consciousness of guilt contributing to a finding of probable cause. *Williams*, 2018 IL App (2d) 160683, ¶ 17. Although defendant acknowledges that his refusal to submit field sobriety tests "*may* allow the court to make inferences about [defendant] perhaps being intoxicated," he argues that "[that] does not mean that the court *must* or that those inferences should outweigh the rest of the court's findings of fact." (Emphases in original.) The argument is meritless. The issue before the trial court was not whether defendant was under the influence of alcohol, but whether the officers had probable cause to believe that he was. It is undisputed that defendant repeatedly refused to undertake field sobriety tests, so the question was whether those refusals, along with all the other circumstances known to the officers, would lead a reasonable person to believe that defendant committed DUI. Because the test is an objective one and we review the ultimate determination of probable cause *de novo*, we need not defer to the trial court's inferences. *People v. Fonner*, 385 Ill. App. 3d 531, 540 (2008).

¶ 20 The State also argues that defendant acted suspiciously by displaying his badge when Hulata approached his vehicle. The State contends that he did so to avoid an investigation. Defendant responds that he showed his badge to identify himself as a police officer who was therefore authorized to operate a police vehicle. Defendant's explanation is plausible, but "the

existence of possible innocent explanations for the individual circumstances or even for the totality of the circumstances does not necessarily negate probable cause." *People v. Geier*, 407 Ill. App. 3d 553, 557 (2011). Moreover, it is significant that defendant did not verbally identify himself as a police officer. That suggests that defendant might have kept silent in a futile effort to conceal the smell of alcohol on his breath.

¶ 21 Defendant argues that if he "was able to think or act with ordinary care while driving a motor vehicle it would show in his driving." However, "[n]o direct evidence that the defendant actually drove a motor vehicle in an erratic or unlawful manner is required either to sustain a defendant's conviction for DUI or to provide probable cause for his arrest for DUI." *People v. Misch*, 213 Ill. App. 3d 939, 942 (1991). We likewise disagree with defendant's argument that probable cause was lacking because, after stepping out of his vehicle, he could maintain his balance and walk without staggering or stumbling. Proof that a motorist was under the influence of alcohol does not require evidence that he or she was incapacitated. A motorist can maintain his or her balance and walk steadily, and yet be too impaired to safely operate a motor vehicle. *People v. Tatera*, 2018 IL App (2d) 160207, ¶ 29.

¶ 22 The State points to other circumstances indicating that defendant was impaired, including his difficulty when using his phone, his need for support when getting out of his vehicle, and his inability to speak clearly. We agree with the State that defendant's lack of dexterity with his phone is a factor supporting probable cause.[1] We note, however, that, after reviewing a video recording

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[1] The trial court noted that the video did not show defendant having trouble with his phone. However, the court added that was because of the way the camera was positioned. We do not interpret the trial court's remarks to signify that it discounted Smith's testimony on this point.

of defendant's encounter with the police, the trial court found that there was nothing unusual about the way defendant spoke or exited his vehicle. These findings of fact were not against the manifest weight of the evidence. Even so, the circumstances previously discussed were more than enough to supply probable cause that defendant committed DUI. We therefore conclude that defendant failed to establish a *prima facie* case for the rescission of his driving privileges. Accordingly, the trial court erred in granting the petition to rescind.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of McHenry County is reversed.

¶ 25 Reversed.