2012 IL App (3d) 110419-U

Order filed May 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0419
v.	)	Circuit No. 11-DT-434
	)	
JOSEPH F. HOGAN,	)	Honorable Joseph C. Polito,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held:* (1) The officer had reasonable grounds to believe that defendant was driving under the influence. (2) The record demonstrates that defendant was given the proper warnings. (3) The trial court did not abuse its discretion in allowing the State to recall the arresting officer and present evidence on the warnings issue.

¶ 2 Defendant, Joseph F. Hogan, appeals from an order of the circuit court denying his petition to rescind the summary suspension of his driving privileges. We affirm.

¶ 3 On March 13, 2010, defendant was arrested for driving under the influence (DUI) (625 ILCS 5/11-501(a)(5) (West 2010). He refused chemical testing. The arresting officer, Lawrence McKenna, served defendant with written notice of the statutory summary suspension of his driver's license. Defendant subsequently petitioned to rescind the summary suspension, alleging that McKenna (1) lacked reasonable grounds to believe he was driving under the influence of alcohol and/or drugs and (2) failed to give the proper warnings prescribed by section 11-501.1(c) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501.1(c) (West 2010)).

¶ 4 At the petition to rescind hearing, defendant testified that he was driving his car near his home at approximately 5:00 p.m. He was about three miles from home when he first remembered feeling "edgy." Since he was diabetic, he wondered if his blood sugar was low. After turning westbound onto Route 30 and traveling a short distance, he was stopped by officer McKenna. Defendant could not remember the details of his conversation with the officer, but he remembered McKenna asking if he was on any medication and whether he had been drinking. Defendant denied both. Defendant then performed several field sobriety tests, which he thought he passed.

¶ 5 At some point during the tests, defendant informed the officer that he was diabetic and asked to retrieve his glucometer, an instrument that tests blood sugar levels. Defendant knew that the lowest his blood sugar level should be was 70. Defendant tested his blood, and the glucometer read a result of 25. He then told Officer McKenna that his test result was low and he needed something to eat.

¶ 6 Defendant refused a breath test at the scene. He did not remember Officer McKenna

reading anything to him about the consequences of taking a breath test.

¶ 7 Officer McKenna testified that he had been a police officer for 11 years. On the evening of March 13, 2011, a dispatcher notified him of a possible DUI. McKenna observed defendant's vehicle, which matched the dispatcher's description, and pulled in behind it. As he followed the car, McKenna witnessed the driver fail to stop at a red light. One half block after the red light, the vehicle crossed the yellow line by two or three feet. Shortly thereafter, it crossed the yellow line again by four or five feet. McKenna then activated his lights and his siren. Defendant continued driving for two miles before he finally stopped behind other vehicles that were waiting for a red light.

¶ 8 McKenna walked up to the driver's side window and asked defendant to hand over his keys. Defendant complied. McKenna then asked defendant why he did not stop earlier. Defendant gave him a blank stare and did not answer. During further questioning, defendant was slow to respond and appeared confused. He could not locate his driver's license or his insurance card. McKenna asked if defendant had been drinking or was on any kind of medication. Defendant denied drinking or taking drugs or any prescription medication. Defendant responded to McKenna's questions slowly and used his cell phone several times while McKenna was talking to him. McKenna noticed a slight odor of alcohol when he was speaking to defendant.

¶ 9 McKenna performed several field sobriety tests. First, he conducted the horizontal gaze nystagmus (HGN) test. McKenna tested both eyes. Defendant exhibited all six markers that indicated that he had consumed alcohol. Next, defendant failed the one-legged stand test. He also failed the walk-and-turn test. McKenna instructed defendant to take nine steps,

turn and take nine steps back. Defendant walked 12 steps, then turned and walked into his vehicle after taking 19 steps. McKenna asked defendant again if he had been drinking or was on any medication. At that point, defendant said he was diabetic and had taken insulin earlier in the day. He told McKenna that he needed to test his blood sugar level. He then tested his blood sugar. The meter read "25," which defendant said was low. McKenna testified that he was not familiar with diabetes and was not aware of how insulin interacts with alcohol. He asked defendant if he needed medical treatment. Defendant said that he was fine and that he did not want medical assistance.

¶ 10 McKenna offered a portable breath test numerous times at the scene, and defendant refused to take it. After defendant told McKenna he was diabetic, he was again offered a portable breath test, and again he refused. McKenna testified that based on the totality of the circumstances, he believed defendant was under the combined influence of alcohol and insulin and was unfit to drive. McKenna arrested defendant for DUI and transported him to the police station.

¶ 11 Eric Moeller, a paramedic with the Mokena fire department, testified that he was called to the station to treat defendant. He tested defendant's blood sugar level, and it tested at a level of 28. Moeller testified that a normal blood sugar level is between 80 and 120. In his 15 years of experience, Moeller found that most patients with blood sugar levels that low are unconscious, combative or unaware of their surroundings. Defendant was asymptomatic. Moeller further testified that a person with low blood sugar may emit a "fruity odor" similar to when someone has had too much to drink. He did not smell that odor on defendant.

¶ 12 Defendant rested, and the State moved for a directed finding on the issues of

reasonable grounds and warnings. Before ruling on the motion, the trial court noted that defendant's testimony did not address the warnings argument. The court questioned when the Warnings to Motorist form was read to defendant. Defense counsel stipulated that if McKenna was recalled, he would testify that he read defendant the statutory warnings. But counsel noted that timing was still an issue. After further discussion, defense counsel stated:

"MR. VILLASENOR [defense attorney]: Actually, your Honor, if counsel wishes to recall as to that issue, because if there is some–I don't want to misspeak [sic] for Mr. Hogan, there is some issues there as far as what the officer–how the officer offered him a breath test so if your Honor wants–"

THE COURT: Why don't we call McKenna. Let's get McKenna on the stand, okay?

MS. DUNN [Assistant State's Attorney]: Sure."

¶ 13 Officer McKenna then testified that he read defendant the warnings after he transported him back to the station. After he read the Warning to Motorist form, he asked defendant if he would perform a breathalyzer test, and defendant refused. Upon questioning from the court, McKenna testified that he believed defendant's impairment was the result of alcohol and insulin. The court granted the State's motion for a directed finding on the warnings issue.

¶ 14 The hearing proceeded on the issue of reasonable grounds, and defendant called Officer Wojowski. Wojowski stated that he responded to the scene as a secondary officer. He noted that defendant's eyes "didn't look right." He asked if defendant was on any legal or illegal medication, which defendant denied. He noticed that defendant was unable to

maintain his balance during testing at the scene, but was not close enough to assess defendant further.

¶ 15 The stipulated affidavit of defendant's physician, Dr. John Panozzo, was also admitted into evidence. Dr. Panozzo stated defendant had been his patient for two years and had been diabetic for eighteen years. In his opinion, defendant experienced a condition known as hypoglycemia on March 13, 2011, resulting from low blood sugar. Dr. Panozzo believed it was likely that defendant's blood glucose level was somewhat higher than the 25 or 28 level that the glucometer read. He noted that symptoms may very from patient to patient but that, at low levels of insulin, patients usually experience physical and mental impairment. He stated that defendant's hypoglycemic condition provided a pathological basis for his inability to pass the HGN test McKenna administered.

¶ 16 At the close of evidence, the trial court granted the State's motion for a directed verdict.

¶ 17 I

¶ 18 In a hearing on a petition to rescind a summary suspension, the defendant has the burden of proof to demonstrate by a preponderance of the evidence a *prima facie* case for rescission. *People v. Ehley*, 381 Ill. App. 3d 937 (2008). If the defendant establishes a *prima facie* case, the burden then shifts to the State to present evidence justifying the suspension. *Ehley*, 381 Ill. App. 3d at 943. Generally, this court will not reverse a trial court's judgment on a petition to rescind a statutory summary suspension unless it is against the manifest weight of the evidence. *People v. Ewing*, 377 Ill. App. 3d 585 (2007). The denial of a rescission petition is against the manifest weight of the evidence "only if the opposite

conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *People v. Fonner*, 385 Ill. App. 3d 531, 539 (2008).

¶ 19 Under section 2–118.1(b) of the Code, there are four grounds on which a petition to rescind a statutory summary suspension may be based: (1) whether the person was placed under arrest for an offense under section 11-501 of the Code; (2) whether the officer had reasonable grounds to believe that the person was driving while under the influence of alcohol; (3) whether the person received the statutory motorist's warnings and refused to complete the test; and (4) whether, after being so advised, the person submitted to the test and the test disclosed an alcohol concentration of 0.08 or more, or any amount of a prohibited substance. 625 ILCS 5/2-118.1(b)(1) through (b)(4) (West 2010); *Ehley*, 381 Ill. App. 3d at 942. Here, defendant argues the trial court erred by denying his petition to rescind because two of the four grounds exist in his case.

¶ 20 *A. Reasonable Grounds for Arrest*

¶ 21 Defendant first alleges that the arresting officer lacked reasonable grounds to believe he was driving under the influence of alcohol and/or drugs.

¶ 22 In a summary suspension case, "reasonable grounds" is synonymous with "probable cause." *Fonner*, 385 Ill. App. 3d at 540. To determine whether reasonable grounds and/or probable cause existed for a defendant's arrest, a court "must determine whether a reasonable and prudent person, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant committed the offense." *People v. Fortney*, 297 Ill. App. 3d. 79, 87 (1998). That standard requires the officer to have "more than a mere suspicion, but does not require the officer to have evidence sufficient to convict." *People v. Long*, 351 Ill.

App. 3d 821, 825 (2004). A probable cause determination is a practical, common sense decision that requires consideration of the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213 (1983).

¶ 23 Here, Officer McKenna observed defendant fail to stop at a red light. He also observed defendant cross the center line twice. When McKenna turned on his lights, defendant failed to stop his vehicle. Defendant pulled his car onto the shoulder of the road only after McKenna followed defendant with his lights and siren activated for two miles. When McKenna approached the car and began to question defendant, defendant looked at him with a blank stare. As McKenna talked to defendant, he smelled the slight odor of alcohol. Defendant appeared confused and responded slowly. His eyes reacted poorly to stimuli; he failed the HGN test. He could not maintain his balance when asked to stand on one foot, and he failed the walk-and-turn test. He then refused to submit to a field breath test. After defendant informed McKenna that he was diabetic and had taken insulin earlier that day, defendant again refused to take a breath test. Having observed defendant's impairment, it was reasonable for McKenna to believe that defendant was under the influence of alcohol or a combination of alcohol and another drug. Thus, the trial court's denial of defendant's petition on the basis of reasonable grounds was not against the manifest weight of the evidence.

¶ 24 Defendant maintains that his statutory summary suspension should be rescinded because the testimony at the hearing demonstrated that he was not under the influence of alcohol or the combined influence of alcohol and any drug at the time of his arrest. While such evidence may be relevant to prove defendant's criminal violation of the DUI statute (625

ILCS 5/11-501(a)(5) (West 2010)), it does not negate the officer's observations in the field for summary suspension purposes. See 625 ILCS 5/11-501(a)(5) (West 2010). The summary suspension statute does not require the State to prove the elements of the DUI violation beyond a reasonable doubt. See 625 ILCS 5/2-118.1(b) (West 2010). Section 2-118.1(b)(2) merely requires that the officer have reasonable grounds to believe that the person was driving while under the influence of alcohol, other drugs, or a combination thereof. 625 ILCS 5/2-118.1(b)(2) (West 2010). At the summary suspension hearing, defendant was required to prove a *prima facie* case for rescission. In other words, defendant needed to establish that Officer McKenna lacked reasonable grounds to believe that defendant was under the influence of alcohol or other drugs at the time of his arrest. Defendant failed to meet that burden.

¶ 25 *B. Warning to Motorist Form*

¶ 26 Defendant next argues that the summary suspension of his driving privileges must be rescinded because the record does not contain the Warning to Motorist form that McKenna read to him. He also argues that his suspension should be rescinded because he was not warned that his driving privileges would be suspended if he submitted to blood or urine testing which revealed the presence of insulin.

¶ 27 The warnings required under the implied consent law are not designed to permit the motorist to make an informed decision about whether to submit to blood or urine testing. Instead, the warnings are primarily designed to assist police officers by encouraging cooperation with their efforts to collect evidence of potential intoxication. *People v. Johnson*, 197 Ill. 2d 478 (2001). Section 11-501.1(c) sets forth the warnings that must be

given. Essentially, first time offenders must be informed that if they refuse or fail to complete the chemical test, their driving privileges will be suspended for a minimum of 12 months. 625 ILCS 5/11-501.1(c) (West 2010). First offender motorists must also be warned that their driving privileges will be suspended for a minimum of 16 months if they submit to a chemical test disclosing an alcohol concentration of 0.08 or more or any amount of a drug, substance or intoxicating compound resulting from the unlawful use or consumption of cannabis, a controlled substance, an intoxicating compound, or methamphetamine. 625 ILCS 5/11-501.1(c) (West 2010).

¶ 28 As a matter of fairness, a law enforcement officer may not misinform a motorist, who might rely on the misinformation contained in the warnings. *Johnson*, 187 Ill. 2d at 488. If a motorist is misinformed as to the potential suspension for an individual in his situation, he has not been properly warned and his suspension may be rescinded. *Id*. at 489. A claim that the warnings were inadequate is reviewed *de novo*. *People v. Tomczak*, 395 Ill. App. 3d 877 (2009).

¶ 29 Here, the record contains the "Warning to Motorist" form McKenna read to defendant. The form has a line at the bottom that states "Warning Issued to," and defendant's name appears on the line. Next to his printed name are the handwritten initials "JH." The record also shows that the trial court considered the form. The court noted that it had been initialed by defendant, which indicated that the warnings had been read to him. Further, McKenna testified that the warnings in the record were given before defendant's final refusal to take the breath test, and the trial court found that the warnings were properly given. Thus, the record is not insufficient; it shows that the warnings were complete and that

the Warning to Motorist form was actually read to defendant.

¶ 30 Defendant also argues that the Warning to Motorist form, as read to him, was inadequate because he was not informed that his license would be summarily suspended if he tested positive for insulin. However, the warnings did not inform defendant that insulin use would result in a statutory summary suspension because the presence of insulin in his blood or urine would not result in his license being suspended. See 625 ILCS 5/11-501.1(c) (West 2010). The warnings given followed the precise wording contained in the statute, and they accurately stated the consequences of refusing or submitting to testing for an individual in defendant's situation. Since Officer McKenna did not misinform defendant as to the potential suspension he was facing, the warnings were not inadequate. Thus, the trial court properly denied defendant's petition to rescind.

¶ 31 II

¶ 32 Last, defendant claims that the trial court erred in allowing the State to recall Officer McKenna on the issue of warnings.

¶ 33 A hearing on a petition to rescind is a civil proceeding in which the motorist bears the burden of proving his case for rescission. *People v. Smith*, 172 Ill. 2d 289 (1996). If the motorist establishes a *prima facie* case, the burden shifts to the State to present evidence justifying the suspension. *Smith*, 172 Ill. 2d at 295. The admissibility of evidence at trial is a matter within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. See *People v. Illge*n, 145 Ill. 2d 353 (1991). A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person could take the view it adopted. *Illgen*, 145 Ill. App. 3d at 364.

¶ 34 In this case, the trial court did not act arbitrarily or unreasonably in allowing the State to recall Officer McKenna. When McKenna was recalled, the burden of proof had shifted to the State to rebut defendant's argument that the warnings were inadequate, and the State had previously asked to call McKenna on the warnings issue. The State had not rested, and McKenna's testimony was necessary to justify the suspension. Further, defendant did not object to McKenna taking the stand again. Defendant's attorney suggested that the officer be called to testify regarding the Warning to Motorist form to clarify defendant's position. Defendant cannot invite the trial court to adopt a procedure and then argue on appeal that the trial court's actions were error. See *People v. Woods*, 373 Ill. App. 3d 171, 175-176 (2007). Accordingly, the trial court did not abuse it discretion in allowing the State to call McKenna to testify on the limited issue of warnings.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Will County is affirmed.

¶ 37 Affirmed.

¶ 38 JUSTICE HOLDRIDGE, specially concurring:

¶ 39 I concur. I write separately, however, to point out what I believe is an evidentiary problem regarding Officer McKenna's testimony that he detected a slight odor of alcohol on the defendant's breath. McKenna's testimony was too vague to be probative, as alcohol is generally odorless and can be contained in any number of beverages. The more accurate and precise testimony would be that the officer detected the odor of *an alcoholic beverage* on the defendant's breath. See *Village of Lincolnshire v. Kelly*, 389 Ill. App. 3d 881, 883 (2009); *People v. Robinson*, 369 Ill. App. 3d 963, 984 (2006). When McKenna's testimony regarding

the smell of alcohol is discounted, the remaining evidence is, nonetheless, sufficient to support the trial court's ruling upholding the statutory summary suspension of the defendant's driving privileges. I, therefore, concur in the judgment of the court.