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2013 IL App (3d) 110945-U

Order filed March 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10 th Judicial Circuit,
Plaintiff-Appellee)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-11-0945
)	Circuit No. 11-DT-464
ROBERT T. BROWN,)	
)	Honorable
Defendant-Appellant.)	Kim L. Kelly,
)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

- ¶ 1 Held: The trial court's denial of the defendant's petition to rescind statutory summary suspension was not against the manifest weight of the evidence where (1) the deputy had sufficient basis to stop defendant, who was driving in the lane for oncoming traffic and (2) the defendant's failure of field sobriety tests and refusal to take a preliminary breath test provided sufficient basis for his DUI arrest.
- ¶ 2 Defendant, Robert T. Brown, appeals the trial court's denial of his petition to rescind his statutory summary suspension. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 26, 2011, around 4:30 a.m., defendant was driving north on Elmore Road in rural Peoria County. The road is a narrow two-way road (north and south) but it does not have a marked center dividing line. The road is in poor condition and warped in several areas. Defendant's residence is located adjacent to the road.

¶ 5 Peoria County Sheriff's Deputy Jason Patterson observed defendant's vehicle traveling northbound on the road. Patterson was driving in a marked squad car a considerable distance behind defendant's vehicle. He accelerated his vehicle and approached defendant's vehicle from the rear at 80 m.p.h. His emergency lights were not activated at this time as he did not observe anything unusual. There was no other traffic on the road.

¶ 6 As Patterson was approaching, he observed defendant's vehicle move into the left (southbound) lane of the road. After driving on that side of the road for approximately ten seconds, defendant turned left into the driveway of his home. Patterson activated his emergency lights and followed the defendant into the driveway.

¶ 7 Defendant exited his vehicle but was instructed by Patterson to get back inside. Patterson approached defendant's vehicle and informed defendant that he stopped him for driving left of center on the road. Defendant responded that he was driving in the wrong lane because the road was "warped." Defendant also stated he had been living in the area for three years and had driven left of center several times before. Patterson detected the "scent of an intoxicating beverage on [defendant's] breath." Upon being asked by Patterson, defendant admitted to consuming alcohol, saying his last drink was around midnight. Defendant declined a preliminary breath test (PBT). After administering several field sobriety tests, which defendant failed, Patterson arrested defendant for driving under the influence (DUI).

¶ 9 Defendant filed a motion to quash arrest and suppress evidence, arguing that Patterson did not have a sufficient justification to stop defendant's vehicle. At the suppression hearing, defendant testified that his car had no equipment problems and that he believed he was driving legally. Defendant admitted to moving into the southbound lane and driving there before turning because he saw a vehicle approaching quickly from behind. Defendant stated that he believed the approaching vehicle was going to strike his vehicle from behind, so he moved to the left side of the road to allow the approaching vehicle to pass on the right; defendant's attorney referred to this maneuver as a "farmer's turn." However, defendant also testified that he usually moved into the left portion of the road when preparing to enter his driveway. Defendant admitted he never informed Patterson that he believed he was going to be hit by his squad car and moved to the left side of the road to avoid a collision. He also testified that Patterson never told him why the emergency lights had been activated.

¶ 10 Deputy Patterson testified next. He stated that he observed defendant's car and rapidly accelerated to catch up to the car without activating his emergency lights. He did this to check the car's license plates because there had been a recent spate of burglaries in the area. When the car crossed over into the southbound lane and turned into the driveway, Patterson activated his emergency lights and followed. Defendant exited his car, but Patterson "tersely" told him to return to his vehicle. At no point during the stop did defendant tell Patterson that he moved into the left hand lane to avoid being hit.

¶ 11 By agreement of the parties, Patterson's dashboard video showing the stop and subsequent arrest was admitted into evidence. The video revealed the following evidence:

Patterson was traveling over 80 miles per hour, without his emergency lights activated, as he approached defendant's vehicle. Defendant's vehicle was driving in the wrong lane for approximately ten seconds. Defendant parked his vehicle in his driveway and exited but Patterson repeatedly told him to return to his vehicle. Patterson informed defendant that he was driving in the wrong lane. Defendant responded that the road was "warped." Defendant also stated he had been living in the area for three years and had previously driven in the middle of the road.

¶ 12 The trial court issued a memorandum decision considering whether defendant's driving in the wrong lane was in response to the action of the deputy. The court noted that defendant stated he usually drove down the left hand side of the road to mitigate the effects of the poor road conditions. Therefore, the court found that defendant's actions were part of his usual and customary driving, and were not an evasive action brought on by Patterson's rapid approach. Accordingly, Patterson's observation of defendant driving in the wrong lane was a sufficient reason for the stop, and defendant's motion was denied. He has not appealed from this denial.

¶ 13 Petition to Rescind Statutory Summary Suspension

¶ 14 Defendant next filed a petition to rescind his statutory summary suspension, arguing Patterson (1) did not have a sufficient reason to stop his vehicle; and (2) did not have reasonable grounds to arrest him for DUI. As to the first issue, the trial court adopted its ruling from the suppression hearing that the stop of the vehicle was justified. The court then held a hearing on whether Patterson had reasonable grounds to arrest defendant for DUI.

¶ 15 Defendant testified that on the night he was stopped, he drank three light beers while playing golf. He also stated he stopped drinking before 9:00p.m. After that, he ate pasta and

went to sleep at his friend's house. He did not believe he was under the influence of alcohol while driving home. The only erratic driving was moving to the left side of the roadway before he turned, which Patterson admitted was the sole reason he stopped defendant.

¶ 16 After following defendant into his driveway, Patterson observed defendant safely park his car and exit it. He ordered defendant to get back into his vehicle and admitted that defendant had no difficulty getting in or out of his car. After approaching the car, Patterson smelled the aroma of alcohol on defendant's breath, which he described as being of "medium" strength. Patterson asked defendant how much alcohol he had that night. Defendant responded: "Had one, I mean at midnight." Patterson asked defendant again and defendant responded: "Not much."

¶ 17 Patterson then asked defendant to recite the alphabet from the letter M to the letter Z, a pre-exit procedure used to determine if standardized field sobriety tests should be administered. Patterson acknowledged that asking defendant to stop at Z violated National Highway Traffic Safety Administration (NHTSA) protocol but stated defendant twice failed, omitting various letters before ever getting to Z. Patterson then asked if defendant would exit the car to perform field sobriety tests, and defendant agreed.

¶ 18 Patterson first administered the Horizontal Gaze Nystagmus (HGN) examination. In this test, the officer moves a stimulus in the subject's field of vision and looks for "clues" indicating the presence of HGN, which can be a sign the defendant is intoxicated. Defendant had six such clues, indicating that he failed the examination. Patterson stated that there can be causes of nystagmus other than intoxication, and that other forms of nystagmus can be brought on through optical stimuli. Defendant was facing the flashing lights of his squad car while performing the examination, which is against NHTSA protocol.

¶ 19 At this point, Patterson asked if defendant would take a PBT. Defendant refused.

Defendant testified that he refused the PBT because the deputy had an abrupt attitude toward him.

¶ 20 Finally, Patterson administered the walk-and-turn test and the one-leg stand test, prior to which defendant removed his flip flops for greater stability. When directed to walk heel-to-toe on an unmarked line towards Patterson's car, defendant failed to keep his balance and missed several steps, demonstrating three clues and failing this test. Defendant was next instructed to stand on one leg and count. Because defendant used his arms for balance and swayed, he failed this test as well.

¶ 21 At the hearing, defendant blamed several environmental factors, such as the slope of the driveway and loose gravel, and a history of back and foot problems for his poor performance. He never mentioned any of these factors to Patterson during the stop, however.

¶ 22 When the field tests were completed, Patterson again asked if defendant would take a PBT. Defendant refused and Patterson arrested him for DUI.

¶ 23 The trial judge ruled that Patterson had probable cause to arrest defendant for DUI. The court found that the defendant's driving and behavior after exiting the car seemed to be normal. Regarding the tests Patterson administered, the court accepted the alphabet test, although it was not properly conducted, because defendant failed twice before getting to Z. Because the HGN test was administered with defendant facing the flashing lights of the squad car, the court rejected the result. The court found defendant failed both the heel-to-toe and one-leg stand tests and also noted that defendant had trouble following simple instructions from Patterson during the stop. Based on inconsistencies between his testimony and what he told Patterson during the stop, the

court found defendant was not credible and that he had failed to meet his burden of proving the arrest was not supported by probable cause. The petition was denied.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant challenges: 1) Patterson did not have a "sufficient justification" to stop defendant's vehicle; and 2) Patterson did not have probable cause to arrest defendant for DUI.

¶ 26 Standard of Review

¶ 27 Under the Illinois Vehicle Code, a defendant's driving privileges are summarily suspended if he is arrested for DUI and he refuses to submit to drug testing. 625 ILCS 5/11-501.1(d) (West 2010). This suspension may be rescinded if the driver demonstrates that the police officer had no reasonable grounds to believe the person was driving under the influence of drugs or alcohol. 625 ILCS 5/2-118.1(b)(2) (West 2010). Illinois courts utilize probable cause analysis under the Fourth Amendment to determine if an officer had reasonable grounds to arrest for DUI. *People v. Wear*, 229 Ill. 2d 545, 560 (2008). In a civil proceeding to rescind the statutory summary suspension, the driver bears the burden of proof. *Wear*, 229 Ill. 2d at 560. If the driver makes a prima facie case to rescind, the burden shifts to the State to justify the suspension. *Wear*, 229 Ill. 2d at 560.

¶ 28 Under Illinois law, an appellate court must give great deference to the trial judge's findings of fact and may only reverse them if they are against the manifest weight of the evidence. *Wear*, 229 Ill. 2d at 561. The appellate court then reviews de novo the actual legal ruling on whether the petition to rescind should be granted. *Wear*, 229 Ill. 2d at 561. Defendant, however, challenges the application of that standard in this case, arguing that because the arrest

was recorded by the video equipment in Patterson's squad car, we should review the facts of this case de novo. Although we agree the video is a useful part of the record because it provides an accurate and objective view of the facts, we see no reason to depart from the established standard of review where both the video and the live testimony contributed to resolving the dispute. See *People v. Valle*, 405 Ill. App. 3d 46, 58 (2010) (rejecting defendant's argument that appellate court should use video to conduct de novo review of voluntariness of confession because the live testimony had a role in resolving a disputed issue of fact). The video is an element in determining whether the trial judge's findings of fact were against the manifest weight of the evidence; its existence neither justified nor requires de novo review of the court's factual findings.¹

¶ 29 We now turn to the merits of defendant's appeal.

¶ 30 Grounds for Vehicle Stop

¶ 31 First, the defendant argues that Patterson did not have a "sufficient justification" to stop his vehicle. Under the Fourth Amendment, an officer may stop a defendant if she has probable cause to believe that the defendant has committed a traffic violation. *People v. Hackett*, 2012 IL 111781 ¶ 20. "[T]he existence of probable cause depends upon the totality of the circumstances at the time of the arrest." *Wear*, 229 Ill. 2d at 564. Probable cause exists when there is the objective probability of criminal activity, and it does not require proof beyond a reasonable doubt. *People v. Lee*, 214 Ill. 2d 476, 485 (2005). A traffic stop can also be valid even if

¹ We also note that nothing in the video contradicts that the trial judge's factual findings were erroneous.

justified by less than probable cause. Hackett, 2012 IL 111781 ¶ 20. If an officer has a reasonable, articulable suspicion that a traffic violation has occurred, the officer can conduct a valid investigatory stop. Hackett, 2012 IL 111781 ¶ 20.

¶ 32 Here, defendant committed a traffic violation by driving in the wrong lane of the two lane road. See 625 ILCS 5/11-701 (West 2010). It is undisputed that Patterson observed the violation and stopped defendant for that reason. These facts support the conclusion that Patterson's stop was justified by either probable cause or a reasonable, articulable suspicion that a traffic violation occurred.

¶ 33 We reject defendant's argument that *People v. Phillips*, 328 Ill. App. 3d 999 (2002), controls the outcome of this case. In *Phillips*, the defendant was driving eastbound on a multilane Interstate. *Phillips*, 328 Ill. App. 3d at 1001. The defendant was driving in the left hand lane, but moved into the right lane after he observed a police officer rapidly approaching from behind in the left hand lane. *Phillips*, 328 Ill. App. 3d at 1001. The officer slowed after he reached defendant's car, effectively trapping the defendant in the right lane behind a truck. *Phillips*, 328 Ill. App. 3d at 1004. The officer then determined that the defendant was following this truck too closely and stopped defendant's car. *Phillips*, 328 Ill. App. 3d at 1004. The trial court ruled that the officer was not justified in stopping the defendant for a traffic violation. *Phillips*, 328 Ill. App. 3d at 1004. We affirmed because the evidence showed that any traffic violation by the defendant was specifically caused by the police officer's actions. *Phillips*, 328 Ill. App. 3d at 1005. Thus the officer could not point to specific, articulable facts that indicated a reasonable belief that the defendant committed a crime. *Phillips*, 328 Ill. App. 3d at 1005.

¶ 34 In this case, the trial court acknowledged the holding of Phillips but found that it was inapplicable because Patterson's driving did not cause the defendant to commit a traffic violation. This finding was not against the manifest weight of the evidence. When informed by Patterson that he was stopped for driving on the left hand side of the road, defendant stated he drove there because the road was warped and that he usually drove in this manner because of the poor condition of the roadway. Defendant never told Patterson that he moved to the left hand side of the road because he feared Patterson's car would run into the rear of his vehicle. Therefore, we agree that Phillips does not apply to the facts of this case, and hold that Patterson had probable cause to stop defendant's vehicle.

¶ 35 Grounds for DUI Arrest

¶ 36 Defendant also argues that Patterson lacked reasonable grounds to arrest him for DUI. Based on the totality of the circumstances, we conclude Patterson had probable cause to believe defendant was operating his vehicle under the influence of alcohol. Patterson detected the aroma of alcohol on the defendant's breath. Defendant (1) admitted to drinking before he was stopped, (2) had trouble following the officer's instructions, (3) refused a PBT, (4) twice failed to recite the alphabet correctly, (5) failed two field sobriety tests: the one-leg stand and walk-and-turn tests, NS (6) while defendant offered a plausible excuse for why he failed those tests, saying that the slope and gravel impaired his performance, he did not offer that explanation to Patterson during the stop. The court noted other inconsistencies between defendant's statements on the video and his testimony in court and found him not to be credible. Based on this evidence, it is

clear that Patterson had probable cause to believe defendant was impaired and to arrest him for DUI.

¶ 37 Defendant contends that the field sobriety tests administered by Patterson should not have been considered in the probable cause determination because the tests were not administered according to NHTSA protocol. We reject defendant's arguments that the admitted irregularities in the tests require a reversal in this case. First, while the alphabet test deviated from NHTSA guidelines, the officer testified that this was a non-standardized test which he only uses to help determine if he should conduct standardized field sobriety tests. Second, we note that the trial court excluded the results of the HGN test because it was not administered according to NHTSA protocol and the nature of the deviation rendered those results suspect. Third, there was no evidence proving that the one-leg stand test and walk-and-turn tests were administered incorrectly. We also note the presence of other facts, discussed above, that could give rise to a reasonable belief that defendant was intoxicated. Therefore, we hold that defendant's arrest for DUI was based on probable cause.

¶ 38 Affirmed.