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No. 117,508

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

JOSEPH SHEPACK,
Plaintiff-Appellee,

v.

KANSAS DEPARTMENT OF REVENUE,
Defendant-Appellant.

BRIEF OF APPELLANT KANSAS DEPARTMENT OF REVENUE

Appeal from the District Court of Shawnee County
Honorable Teresa Watson, District Court Judge
District Court Case No. 15 C 121

Respectfully submitted:
_/s/ J. Brian Cox_____
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Oral argument: 20 minutes

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I. NATURE OF THE CASE

This is a driver's license suspension case under the Implied Consent law, K.S.A. 8-1001 *et seq.*, K.S.A. 8-259, and the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.* Plaintiff (hereinafter "Shepack") was arrested for DUI on September 20, 2014, by Kansas Highway Patrol Trooper S.M. Taylor. Shepack refused to submit to a requested breath test, and KDR ordered the suspension/restriction of his driver's license following administrative hearing, pursuant to law.

Following the trial of the matter on January 27, 2017, the Court determined that the Trooper arrested Shepack without reasonable grounds, by its Memorandum Decision and Order of February 1, 2017 (copy attached hereto as Exhibit A). Other issues raised by Shepack below were not resolved by the district court and are not in issue in this appeal. KDR's motion to alter or amend the court's decision was denied. KDR timely appealed; there has been no cross appeal by Shepack.

II. STATEMENT OF THE ISSUES

KDR raises the following issues in this appeal:

I. the district court erred in determining that the Trooper needed to have reasonable grounds to believe that Shepack was operating a vehicle while under the influence of alcohol or drugs *at the point at which he was cuffed*;

II. the district court erred in determining that the Trooper arrested Shepack *for DUI* at the point that he was cuffed;

III. the district court erred in determining that the Trooper lacked reasonable grounds to arrest Shepack for DUI and/or to request that he submit to testing *at the point at which he was cuffed*

IV. the district court erred in failing to determine that the Trooper had reasonable grounds to arrest Shepack and/or to request that he submit to testing after Shepack refused the PBT and the field sobriety tests

III. STATEMENT OF THE FACTS

The facts are these (including those found by the district court in its Memorandum Decision and Order, and other facts shown by the record with respect to the issue of the Trooper's reasonable grounds (facts relevant to other issues not part of this appeal are not included)):

The arresting officer in this case, Master Trooper Shawn Taylor, has been with the Kansas Highway Patrol for thirteen (13) years, ten (10) years of which were involved with traffic enforcement; he is familiar with the Kansas Turnpike's layout, its mileposts, and its exits; his duty is to patrol the Turnpike; and he has been involved with 50-60 DUI investigations. R 2 at 31, 34, 173-74.

Trooper Taylor was on duty on September 20, 2014. At 8:18 p.m. Trooper Taylor received information from dispatch that a white 2012 Toyota Tacoma with Kansas tag 920 DOK was driving erratically on Interstate 335 near milepost 173 southbound. Dispatch later indicated that the vehicle had exited at milepost 147. Trooper Taylor did not see the described vehicle in the area. R 1 at 181, ¶ 1.

That dispatch – from a private citizen – reported more fully that the vehicle (Shepack's) almost struck the reporting party's vehicle, almost struck a guardrail, was all over the road, was varying its speed from 45 to 80 mph, and included the reporting party's opinion that he was witnessing a possible drunk driver (*i.e.* Shepack). R 2 at 28,

34, 36-37, 40; R 3 at 6, page 1 (KDR trial Exhibit B, admitted R 2 at 95-97) (Trooper's arrest report).

KDR trial exhibit A is the Voluntary Witness Statement by Austin Kennedy – the private citizen report from KHP dispatch – which states as follows:

> At approximately 20:15 I was traveling south on the turnpike when a white Toyota pickup cut me off. Nearly striking my vehicle. After following for a few miles I decided he was possibly drunk, called KTA and advised my location. I continued following, his driving continued to be erratic. Cross the center line, cross over to the shoulder, and varying speed from 45-80 approximately. I followed until the vehicle exited at Counsil [sic] Grove. I continued onto my destination and advised dispatch that he had exited.

R 2 at 44-45; R 3 at 6 (KDR trial Exhibit A)

At 9:17 p.m. Trooper Taylor stopped an unrelated car for speeding at milepost 168 northbound. His emergency lights were activated. While speaking to the driver of the unrelated vehicle on the shoulder of the highway, Trooper Taylor saw a white 2012 Toyota Tacoma pickup drive by. The truck did not move away into the far lane, but rather moved over to straddle the dotted line between the two northbound lanes as he passed the Trooper. Trooper Taylor returned to his vehicle to catch up to the white truck. R 1 at 181-82, ¶ 2.

Kansas law, the "Move Over" law, requires drivers, if able, to move completely into the left hand lane. R 2 at 55. Shepack did not do so as he did not completely change lanes, rather, straddled it as he went by. R 2 at 56-57.

The Trooper opined that, based on his experience and training, there are higher numbers of impaired drivers out at night as opposed to day. R 2 at 48; *see also* R 2 at 135. Shepack, an experienced prosecutor, agreed. R 2 at 121:10-13, 135.

Trooper Taylor spotted the white truck at milepost 173 northbound. He followed the truck for three to four miles. He confirmed that the truck bore Kansas tag 920 DOK. He used radar to confirm that the truck was traveling below the 75 mile per hour speed limit. Trooper Taylor testified that he did not remember the exact speed. R 1 at 182, ¶ 3.

Shepack's speed while the Trooper was behind him was slower than the posted limit; driving considerably faster or slower than the posted limit can be a potential indicator of DUI. R 2 at 58-59.

Trooper Taylor activated a camera inside his patrol car. A DVD recording of the encounter was shown at trial and admitted into evidence. R 1 at 182, ¶ 4; R 3.

While following the truck, Trooper Taylor observed the vehicle drift left over the dotted line between the two northbound lanes. On two of these occasions the truck remained on the dotted line for 30 seconds or more. Shepack admitted at trial that the DVD showed he was drifting. R 1 at 182, ¶ 5. The Trooper testified that Shepack straddled the center line six (6) times. R 2 at 60-61. Shepack testified at trial that he was weaving and that the stop was legitimate. R 1 at 108.

Trooper Taylor activated his emergency lights one-half mile south of milepost 177, the South Topeka exit. The white truck did not stop until it was in front of the South Topeka exit ramp. Trooper Taylor testified, and the DVD shows, that the white truck did not stop immediately when his emergency lights were activated. The DVD shows that the

truck continued driving for approximately thirty (30) seconds after the Trooper's lights were activated before stopping. R 1 at 182, ¶ 6. Slowness in pulling over in reaction to emergency lights is a potential indicator of DUI. R 2 at 65.

Trooper Taylor testified that there was nothing improper about the way Shepack was parked on the shoulder after the stop. R 1 at 183, ¶ 11. However, the location where Shepack eventually stopped was close to the turnpike exit, an unsafe location, according to the Trooper, as other vehicles might also be attempting to exit there. R 2 at 65-66.

As he approached the truck, Trooper Taylor observed a box in the bed of the truck with six closed wine bottles, and an empty box in the cab of the truck. R 1 at 182, ¶ 7. The latter box was a "wine box." R 2 at 77:2-4.

Trooper Taylor detected the odor of alcohol coming from the truck. Trooper Taylor observed that Shepack's eyes were bloodshot, watery, and glazed. R 1 at 182-83, ¶ 8. Shepack could not dispute the observations as to his eyes. R 2 at 142. In fact, the Trooper detected the odor of alcohol on Shepack, not just in his truck. R 2 at 75-76. Shepack did not dispute that he had such an odor. R 2 at 133.

Trooper Taylor asked Shepack if he had been drinking. Shepack said no – a misrepresentation of fact. R 1 at 183, ¶ 9; at 184, ¶ 17; R 3 at 5 (Shepack trial Exhibit 4 (DVD at 5:33)). Shepack agreed that he did not give a truthful response. R 2 at 112-13. Shepack also denied being on prescription medication. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 6:05)).

Trooper Taylor asked Shepack where he was going. He said he was going to his daughter's home in Lawrence. Trooper Taylor asked Shepack where he was coming from.

Shepack said Wichita. Shepack admitted at trial that these were not accurate statements. Rather, Shepack testified that he drove from his home in Ellsworth that morning to Lawrence, and left Lawrence around 8 p.m. to drive to Wichita. Somewhere around milepost 147 southbound he noticed his tire pressure light was on. He exited to check it, then headed back north to Topeka to address the problem with his tire. R 1 at 183, ¶ 10. Shepack admitted at trial that he misstated where he was coming from. R 2 at 113.

The Trooper asked Shepack to step out, R 2 at 67:15, and Shepack dropped his toll ticket on the ground when he got out of the truck. Trooper Taylor told Shepack to pick it up and then asked to see it. Shepack said no and put it in his pocket. R 1 at 183, ¶ 11. The toll ticket which Shepack dropped as he stepped out and refused to permit the Trooper to look at was some potential evidence of Shepack's confusion about where he was going, as such would have shown the time and location of his entry onto the Turnpike, R 2 at 71-72; or the refusal could have been Shepack's consciousness that that ticket might aid the Trooper's DUI investigation, R 2 at 104:14-19.

Here, the Trooper told Shepack that he had received reports of Shepack's whereabouts and asked him where he was going, and Shepack stated that he was coming *from Wichita*. The Trooper added that he had reports of Shepack earlier *going southbound*, and therefore questioned that he was coming from Wichita. The Trooper also said he had received a report that Shepack had gotten off on exit 147. Shepack said he didn't think so. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 5:35-5:53)).

The Trooper testified that Shepack exited the vehicle when asked to do so. He testified that Shepack did not have any problems with walking or standing and did not

lean on the vehicle. Trooper Taylor testified that Shepack did not have slurred speech or difficulty communicating. R 1 at 183, ¶ 11. However, the DVD shows that, at one point, Shepack stumbled and almost fell over backwards after he had been directed to the rear of his truck. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 6:50)), as also noted below.

The district court stated that Trooper Taylor testified that Shepack did not fumble with his license when producing it. R 1 at 183, ¶ 21. The trial testimony was that the Trooper did not recall that Shepack had "trouble fumbling his driver's – getting or retrieving his driver's license," not that there had been made any actual request with which Shepack had no difficulty. R 2 at 14:10-12. Shepack said he did not "believe" he had any difficulty retrieving his license. R 2 at 110:21-23. The video tape shows that, as of the point that the Trooper announced that Shepack was under arrest, while in the police vehicle, no such request had been made.

After the stop and after Shepack stepped out, the Trooper thought that he and Shepack were in a somewhat vulnerable, unsafe position, and given that he had effected the stop, he believed that he was responsible for Shepack's safety. R 2 at 66-67; *see also* R 2 at 147 (Shepack agreed). Trooper Taylor asked Shepack to move to the back of the truck. Shepack put his hands in his pockets. Trooper Taylor told Shepack to take his hands out of his pockets, which he did, and move to the back of the truck. Trooper Taylor testified that Shepack just stared at him. The DVD indicates that Shepack said "what do you want me to do?" Trooper Taylor took Shepack's upper arm and led him to the back of the truck while saying "come back here." Trooper Taylor said this was for safety reasons because the two were too close to cars speeding by on the highway. R 1 at 183, ¶ 13.

More precisely, the DVD reflects that the Trooper had to ask Shepack twice to step out of his truck, had to tell him three times to step to the rear of his truck, and had to grab Shepack by his arm to escort him to the rear of his truck. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 6:10 to 6:47)). As noted, after the Trooper brought Shepack over to the back of his truck, there is a point at which Shepack stumbles and appears to almost fall over backwards. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 6:50)).

Trooper Taylor told Shepack he could either follow directions or go straight to jail. Shepack responded that he would go to jail. R 1 at 184, ¶ 14; R 3 at 5 (Shepack trial Exhibit 4 (DVD at 6:52)). Trooper Taylor put Shepack's hands behind his back and placed him in handcuffs. Shepack allowed his right hand to be cuffed but grasped the tailgate with his left hand, requiring Trooper Taylor to pull his left hand away to be cuffed. Trooper Taylor testified that Shepack did not resist arrest. Trooper Taylor placed Shepack in the back of his patrol car. R 1 at 183, ¶ 15. Although testifying that Shepack was not resisting arrest, the Trooper also testified that Shepack did not comply with a lawful police order to come to the rear of his truck, and that Shepack was resistive and combative. R 2 at 66, 68, 101.

Trooper Taylor *testified* that at that point he placed Shepack under arrest on suspicion of driving under the influence. R 1 at 183, ¶ 16. Trooper Taylor went back to search the cab of the truck. He found packaged meat from a Lawrence grocery store that was cold to the touch. R 1 at 183, ¶ 18. The Trooper thought it odd that Shepack would have fish, still cold, if he was coming from Wichita as he claimed. R 2 at 73, 77.

Trooper Taylor came back to the patrol car. He told Shepack he was going to ask him to submit to a preliminary breath test ("PBT") and some field sobriety tests ("FSTs"). Shepack said he was not going to do anything. R 1 at 184, ¶ 19; R 3 at 5 (Shepack trial Exhibit 4 (DVD at 11:24)). (Shepack agrees that he refused. R 2 at 151-52.) Shepack understood exactly what the Trooper was asking him for when he asked for field sobriety tests and a preliminary breath test. R 2 at 116, 150-51, 152.

The DVD reflects that, *after* Shepack told the Trooper that he would not take field sobriety tests or a preliminary breath test, the Trooper told him he was under arrest for DUI. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 11:44)); *see also* R 2 at 148 (Shepack agrees).

IV. ARGUMENTS AND AUTHORITIES

A. the district court erred in determining that the Trooper needed to have reasonable grounds to believe that Shepack was operating a vehicle while under the influence of alcohol or drugs *at the point at which he was cuffed*

The district court erred in determining that the Trooper needed to have reasonable grounds to believe that Shepack was operating a vehicle while under the influence of alcohol or drugs at the point *at which he was cuffed.*

i. standard of review

The level of "reasonable grounds" required to request a test under the Kansas Implied Consent law, is a question of law. "An appellate court's review of a question of law is unlimited." *Foulk v. Colonial Terrace,* 20 Kan. App. 2d 277, Syl. ¶ 1, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

ii. KDR raised this issue below

KDR raised the issue at all times that the officer needed to have reasonable grounds to request Shepack to submit to testing. *E.g.,* R 1 at 85-92 (KDR's Trial Brief at 9-16) (including argument that Shepack refused to submit to field sobriety testing and to a PBT, *both of which occurred after he was cuffed*); R 2 at 194-96 (KDR argued that Shepack was arrested for DUI after request was made for PBT and field sobriety tests, and that arrest prior to that was for failing to obey lawful police order).

That said, it was not clear that the district court was going to misapply the law by holding that reasonable grounds was cut off at the point that Shepack was cuffed, *see Nutt v. Knutson*, 245 Kan. 162, 164, 776 P.2d 475 (1989) ("[a] party is not required … to raise arguments at trial in anticipation of a court's misinterpretation of the law"), but KDR made clear to the district court that reasonable grounds is not cut off at that point, but rather at the point at which the test is requested. R 1 at 211-12 (KDR's Motion to Alter or Amend at 18-19).

iii. Arguments

Kansas law requires that an officer have reasonable grounds to believe that the person to be tested was or had been operating a vehicle while under the influence *at the point at which the test is requested*, not at any other time, including at the point of arrest. K.S.A. 8-1001(b). The district court erred in so holding. R 1 at 11 (last paragraph) (Mem. Dec.) ("Under the totality of the circumstances present at the time of Shepack's arrest, the Court concludes that there was not probable cause to arrest him for driving under the influence.").

KDR understands that the Court in *Sloop v. Kansas Dep't of Revenue*, 296 Kan. 13, 290 P.3d 555 (2012), held to the contrary in 2013 following then K.S.A. 8-1001(b). In *Sloop*, the Court noted that this provision read as follows:

> (b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a): (1) if [First] *the officer has reasonable grounds to believe* the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both ... and [Second] one of the following conditions exists: (A) *The person has been arrested* or otherwise taken into custody for any offense involving operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both, ... in violation of a state statute or a city ordinance.

Sloop, 296 Kan. at 17 (emphasis in original). That provision was changed in 2013, however, after *Sloop* and now reads:

> A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a): (1) *If, at the time of the request*, the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system; and one of the following conditions exists: (A) The person has been arrested or otherwise taken into custody for any violation of any state statute, county resolution or city ordinance; or (B) the person has been involved in a vehicle accident or collision resulting in property damage or personal injury other than serious injury ….

K.S.A. 8-1001(b) (in pertinent part) (emphasis added).

This Court in *State v. Wagner*, No. 112,730, 2015 WL 6620621, at *6 (Kan. Ct. App. Oct. 30, 2015) (copy attached hereto as Exhibit B), agreed: "In response to *Sloop*,

the legislature amended K.S.A. 8–1001(b)(1)(A) to provide in pertinent part …," and this Court then cited the language from the amended version set out above.

As such, the district court here erred in holding that the Trooper's reasonable grounds were cut off at the point at which he cuffed Shepack. This was error prejudicial to KDR. Because the district court so ruled, it erroneously failed to consider the additional evidence that Shepack refused to submit to a PBT and to field sobriety tests, facts the existence of which the Court expressly found. R 1 at 184 (Memorandum Decision and Order at 4, ¶ 19) ("Trooper Taylor came back to the patrol car. He told Shepack he was going to ask him to submit to a preliminary breath test ("PBT") and some field sobriety tests ("FSTs"). Shepack said he was not going to do anything."). It bears noting that long-time prosecutor Shepack knew exactly what he was being asked to do. R 2 at 116, 150-51, 152.

This evidence was relevant. Circumstantial evidence of the commission of a crime, such as DUI, is admissible and as probative as direct evidence. *See, e.g., State v. Humbolt*, 1 Kan. App. 2d 137, 140, 562 P.2d 123 (1977) (flight from scene of crime, "[a]s evidencing defendant's consciousness of guilt these were proper matters for the jury's consideration ….").

Refusal to submit to field sobriety tests is relevant and admissible to show consciousness of guilt, *State v. Rubick*, 16 Kan. App. 2d 585, 827 P.2d 771 (1992); as is a refusal to submit to a preliminary breath test, *Sjoberg v. Kansas Dep't of Revenue*, No. 103,937, 2012 WL 3966511, at *5 (Kan. Ct. App. Sept. 25, 2012), *rev. denied* (2013)

(copy attached hereto as Exhibit C) (PBT refusal admissible on question of officer's reasonable grounds).

In fact, this Court recently held that a PBT refusal is circumstantial evidence that the driver knows he will fail the test:

> This court has previously held that a law enforcement officer may draw a negative inference from a driver's refusal to take a preliminary breath test. That is, *the refusal amounts to circumstantial evidence the driver knows he or she* has been drinking and likely *is sufficiently intoxicated that he or she will fail the test*. The refusal, therefore, properly may be considered in a driver's license revocation [sic] proceeding as bearing on reasonable grounds.

Forrest v. Kansas Dept. of Revenue, No. 115,532, 2017 WL 2399475 at * 2 (Kan. Ct. of App. June 2, 2017) (copy attached hereto as Exhibit D). A failed PBT gives the officer authority to arrest for DUI. K.S.A. 8-1012(d) ("A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test."); *see also Sterling v. Kansas Dept. of Revenue*, No. 103,780, 2011 WL 1377010 (Kan. Ct. App. April 8, 2011) ("the failure of the PBT alone is sufficient reasonable suspicion to request additional testing.") (copy attached hereto as Exhibit D1).

It bears noting that appellee Shepack took no cross appeal from these findings. As such, they are not subject to further contest. *Northern Natural Gas Co. v. Williams*, 208 Kan. 407, 424, 493 P.2d 568 (1972) ("K.S.A. 60-2103(h) provides in effect that where notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which he complains, he shall do so by cross-appeal.").

Clearly, these refusals are highly relevant evidence, and should have been taken account of by the district court; and that failure prejudiced KDR, and such requires that

this Court determine as a matter of law that, with such evidence the, Trooper did have the required reasonable grounds (issue no. IV), or at least, order a remand of the case for consideration of such facts. (KDR discusses under issue no. IV whether, in view of uncontroverted facts, a remand by this Court on the issue of reasonable grounds is necessary.)

B. the district court erred in determining that the Trooper arrested Shepack *for DUI* at the point that he was cuffed

The district court erred in determining that the Trooper arrested Shepack *for DUI* at the point that he was cuffed.

i. standard of review

The evidence concerning what the Trooper *actually* arrested Shepack for is shown by uncontroverted evidence, the DVD, offered by Shepack and received into evidence, R 2 at 28 (Shepack trial Exhibit 4), and trial testimony. Where "[t]he issues presented are questions of law to be decided upon uncontroverted facts … [the court's] standard of review is plenary and unlimited." *Petty v. City of El Dorado*, 270 Kan. 847, 850, 19 P.3d 167 (2001) (citing *Matney v. Matney Chiropractic Clinic,* 268 Kan. 336, 338-39, 995 P.2d 871 (2000); *see also Foulk v. Colonial Terrace,* 20 Kan. App. 2d 277, Syl. ¶ 1, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) ("An appellate court's review of a question of law is unlimited.").

ii. KDR raised this issue below

KDR raised the issue at the trial of the matter. *E.g.,* R I at 88-89 (KDR's Trial Brief at 12-14); R 2 at 194-96 (KDR argues that Shepack was arrested for DUI after

request was made for PBT and field sobriety tests, and that arrest prior to that was for failing to obey lawful police order; KDR also pointed inter alia to facts that Shepack refused to permit examination of toll ticket and misrepresented his drinking); R 2 at 195:12-13 (KDR argues that "[t]he better evidence of what [Shepack] was arrested for is the videotape.").

That said, KDR could not know that the district court would misinterpret Kansas law by holding that the Trooper's subjective belief (including what he testified to), as opposed to an objective view of what he did or could have arrested Shepack for (based on all the facts known to him), as is Kansas law, was determinative. *See Nutt v. Knutson*, 245 Kan. 162, 164, 776 P.2d 475 (1989) (a party "is not required . . . to raise arguments at trial in anticipation of a court's misinterpretation of the law.").

To the extent it is claimed that KDR did not raise the issue below concerning what Shepack was or could have been arrested for prior to being placed in the Trooper's vehicle, it is Kansas law that a new issue can be raised for the first time on appeal if "the newly asserted theory involves only a question of law arising on proved or admitted facts and which is finally determinative of the case." *Johnson v. Kansas Neurological Institute,* 240 Kan. 123, 126, 727 P.2d 123 (1986).

iii. arguments

a. generally

KDR's argument here is in two related parts. First, the DVD and the trial testimony show plainly what Shepack was or could have been arrested for, at the time he was cuffed, that is obstruction or failure to obey a police order, and not for DUI, the latter

happening later. Because this arrest was lawful, there can be no further issue as to the lawfulness of the subsequent request for Shepack to submit to a breath test after he was transported to the law enforcement center.

The DVD and the trial testimony reflect that, at the point at which the Trooper stopped him, at the very least, he had grounds to suspect that Shepack had violated traffic laws, or to believe that there was some community caretaking reason to investigate him, or indeed, to believe that Shepack was potentially driving while under the influence, and therefore to investigate the matter.

Those facts further show that, after making contact with him, the Trooper had knowledge of facts indicating that Shepack had been drinking or taking drugs, and he asked Shepack if he had been. Shepack's response to that question would have been useful to the Trooper in assessing Shepack's state of sobriety or intoxication. Shepack said no, a misrepresentation of fact, certainly as to alcohol..

Those facts further show that Shepack might have been confused as to where he had been that evening or was attempting to conceal those facts from the Trooper. Shepack's turnpike toll ticket was some evidence of these facts. That ticket was also some evidence of how long Shepack had been in his truck. When Shepack stepped out of his truck after the stop, he dropped that ticket. The Trooper asked to see it but Shepack refused to permit him to do so.

Those facts further show that, after the stop, the Trooper wanted to get Shepack out of his truck, and thereafter to get Shepack into a position of safety, away from the side of the road, and he attempted to direct Shepack in this regard, which Shepack

actively frustrated. As noted, the Trooper had to ask Shepack twice to step out of his truck, had to tell him three times to step to the rear of his truck, and had to grab Shepack by his arm to escort him to the rear of his truck. Ultimately, Shepack told the Trooper to take his hands off him, Trooper Taylor told Shepack he could either follow directions or go straight to jail, and Shepack responded that he would go to jail.

Thereafter, *after* the Trooper cuffed Shepack and placed him in his police vehicle, and *after* requesting field sobriety tests and a PBT, which Shepack refused, the Trooper announced that he was arresting Shepack *for DUI*. R 3 at 5 (Shepack trial Exhibit 4 (DVD at 11:44); *see also* R 2 at 148:13-17 (Shepack agrees that Trooper said he was under arrest for DUI "[a]fter he put me in the car ….").

The second part of KDR's argument here is that the Trooper's trial testimony – that is, his *subjective* belief that at the point of cuffing Shepack, he only had cause to arrest him for DUI, does not override the *objective* facts which established that he had cause at that point to arrest Shepack for obstruction or failure to obey a police order.

b. grounds for an arrest is an objective, not subjective standard

generally

The Trooper testified at the trial of the matter to what he believed he arrested Shepack for at the time that he was cuffed. However, the Trooper's subjective belief, articulated after Shepack's arrest, does not override what the objective facts known to him at the time permitted him to arrest Shepack for. Given that the facts known to the Trooper at the time of cuffing Shepack gave him probable cause for the arrest of Shepack

for disobeying a lawful police order or obstruction – on multiple bases – it was not necessary that the Trooper have been able to pinpoint the precise basis for the arrest. Indeed, it matters not that he may have done so (*i.e.* testified) incorrectly or incompletely, nor does it matter that, as here, the district court second-guessed his stated reason and found it insufficient.

case law

The United States Supreme Court addressed the precise issue in *Devenpeck v. Alford*, 543 U.S. 146 (2004), an action for damages for illegal arrest, including pursuant to 42 U.S.C. § 1983. Alford stopped to assist other motorists on a highway. The equipment on his vehicle ("wig-wag" headlights) made the motorists believe he was a law enforcement officer. When a Washington State Patrol officer stopped, Alford hurried back to his car and drove away. Believing that Alford was impersonating an officer, the Patrol officer radioed another officer, who stopped Alford.

After Alford was stopped, it was discovered he was recording his conversation with the officer, an apparent violation of the Washington Privacy Act. The officer arrested Alford for *that* violation. The officers and a prosecutor discussed the fact that there was probable cause to believe Alford had committed several offenses, but because the State Patrol, as a matter of policy, did not "stack charges," the only stated ground for arrest was the privacy act violation.

The Ninth Circuit held that Alford had not violated the Privacy Act and the officers therefore did not have probable cause to arrest. The Court of Appeals further held that the other offenses were not "closely related" to the offense stated as the ground for

arrest and therefore could not support the arrest under a standard which had been applied by the Ninth Circuit in other cases.

The Supreme Court reversed, stating that, "[s]ubjective intent of the arresting officer, *however* it is determined … is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest." 543 U.S. at 154-55 (emphasis in original). The Court further clarified:

> Our cases make clear that an arresting officer's state of mind (*except for the facts that he knows*) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken *as long as the circumstances, viewed objectively, justify that action*.'"

543 U.S. at 153 (emphasis added) (citations omitted).

In *McNeely v. United States*, 353 F.2d 913 (8th Cir. 1965), the Eighth Circuit similarly explained:

> *The law cannot expect a patrolman, unschooled in the technicalities of criminal and constitutional law, following the heat of a chase, to always be able to immediately state with particularity the exact grounds on which he is exercising his authority.* We believe that if the officer had probable cause to arrest and otherwise validly performed the arrest, he is not under the circumstances of this case required to immediately recognize and accurately broadcast the exact grounds for this action or suffer the arrest to come under constitutional criticism. Therefore, since Patrolman Walton had probable cause to believe the occupants of the car were engaged in felonious activity, the arrest of McNeely was valid regardless of the initially stated grounds for arrest.

353 F.2d at 918 (emphasis added).

The rule has been applied in Kansas in *State v. Beltran*, 48 Kan. App. 2d 857, 300 P.3d 92, *rev. denied* (2013). There, this Court affirmed the defendant's cocaine possession conviction based on a police officer's discovery of cocaine in the defendant's pocket while at the premises which were the subject of a search warrant after the defendant failed to obey the officer's command that he take his hand out of his pocket. The officer "expressly disclaimed any intent to arrest Beltran before the search." This Court held after extended analysis that, "an objectively reasonable officer would have had probable cause to arrest [the defendant] for obstruction, and the search would have been constitutionally acceptable as an incident of that justifiable, if theoretical, arrest." 48 Kan. App. 2d at 859.

This Court explained:

> Applying the objective test here, [officer] McClay had probable cause to arrest Beltran for obstruction when Beltran refused the orders to stop and to take his hand out of his pocket—even though McClay didn't recognize the legal import of the situation. The facts measured objectively then supported McClay's action in reaching into Beltran's pocket as a constitutionally acceptable search incident to an arrest based on probable cause. In turn, the search did not violate the Fourth Amendment, and the cocaine and money should be admissible.
>
> The issue in the suppression hearing was whether Beltran's Fourth Amendment right to be free of an unreasonable search had been violated. Using an objective standard, there was no violation. To suppress the evidence in this case would neither recognize nor remedy a Fourth Amendment violation so much as punish the State for a law enforcement officer's shortsighted legal assessment of the circumstances leading up to the search. The Supreme Court has refused to endorse Fourth Amendment analyses that would apply those constitutional protections in irregular, if not capricious, ways dependent upon how the officers involved subjectively viewed the relevant events. See *Devenpeck,* 543 U.S. at 156, 125 S.Ct. 588 (protections of the Fourth Amendment would be intolerably "haphazard" if the result turned on which of two officers effected an arrest where they had

> differing suspicions about the proper charges); *Whren,* 517 U.S. at 814–15, 116 S.Ct. 1769 ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent[,]" and to do otherwise would render the protections against unreasonable searches and seizures unacceptably "variable."). Had the Reno County Sheriff sent the "objectively reasonable deputy" along to help execute the search warrant, Beltran would be in exactly the same predicament he now finds himself. That deputy would have discerned probable cause to arrest Beltran for obstruction. He would have done so and then dutifully undertaken a full search of Beltran yielding the cocaine and money, all within the strictures of the Fourth Amendment. The outcome cannot and should not be any different because McClay was there without that assistance.

48 Kan. App. 2d at 884–85.

In short, Kansas law (and constitutional law generally) is that it matters not whether the Trooper did or did not correctly or completely recognize at the time, or at trial did or did not correctly or completely articulate the grounds for which he did or could have arrested Shepack at the time that he cuffed him, or that he may have erroneously identified such basis at the time or at trial. Rather, what matters is what cause the facts, *viewed objectively*, gave him to arrest Shepack. In the next section, KDR shows that the Trooper's arrest at the time that he cuffed Shepack was based on probable cause to believe that Shepack was disobeying a lawful police order or was obstructing official duty.

c. Trooper had probable cause to arrest Shepack for disobeying a lawful police order or obstructing official duty

generally

The Trooper had lawful grounds to arrest Shepack for disobeying a lawful police order, K.S.A. 8-1503 or interference with official duty, K.S.A. 21-5904.

K.S.A. 21-5904 provides that:

> (a) Interference with law enforcement is … (1) Falsely reporting to a law enforcement officer, law enforcement agency or state investigative agency: … (C) any information, knowing that such information is false and intending to influence, impede or obstruct such officer's or agency's duty; or … (3) knowingly obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty."

K.S.A. 8-1503 provides that: "No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer or fireman invested by law with authority to direct, control or regulate traffic."

Importantly, the issue of relevance here is not whether Shepack was guilty of either one of these offenses but rather whether the Trooper had probable cause to so believe, a standard substantially short of guilt beyond a reasonable doubt.

refusal to turn over toll ticket on Trooper's request

Shepack's refusal to turn over evidence to the Trooper – evidence the Trooper knew that Shepack had in his possession and which was in plain view because Shepack dropped it to the ground right in front of the Trooper, and the import of which was evident to the Trooper – constituted interference by Shepack with the Trooper's investigation pursuant to K.S.A. 21-5904(a)(3). The Trooper reasonably believed that the toll ticket was *some evidence of or relating to* Shepack's commission of the crime of DUI, and knew that Shepack had it because he dropped it to the ground in the Trooper's presence; the Trooper asked to see it, but Shepack refused. These facts are uncontroverted.

Shepack's refusal constituted "knowingly … opposing any person … in the discharge of any official duty." K.S.A. 21-5904(a)(3). This court in *State v. Harris*, No.116,129, 2017 WL 2899730 at *5 (Kan. Ct. App. July 7, 2017) (*pet. rev. pending* (July 24, 2017)) (copy attached hereto as Exhibit E), upheld the defendant's conviction under sub-(3) by his act of hiding from officers who had a warrant. This Court in *Beltran*, 48 Kan. App. 2d at 876-78, held that an officer executing a search warrant had probable cause to arrest for obstruction when a person at the scene (defendant) refused to stop and stay put (under the prior version, K.S.A. 21-3808). If it is obstruction of a law enforcement officer to hide one's person or to fail to remain where told, then it necessarily is so to hide evidence lawfully requested by a law enforcement officer, as Shepack did here.

misrepresenting alcohol consumption

In addition, Shepack misrepresented fact to the Trooper about his alcohol consumption. This fact is uncontroverted. The giving of false information to a police officer with intent to influence, impede, or obstruct the officer's duty is all that is required to constitute interference with law enforcement pursuant to K.S.A. 21-5904(a)(1). *Harris*, 2017 WL 2899730 at *3. There is no requirement that the officer have relied on this information or that he was hindered by it. *Id.* And so, in that case, the defendant's falsely telling the officer that he was not Bryan Harris was sufficient to support a conviction. *Id.* at *3-4.

Here, Shepack gave false information to the Trooper when asked whether he had been drinking. Even though the Trooper likely knew this statement was false, an

admission of alcohol consumption is relevant evidence for probable cause/reasonable grounds purposes, and therefore Shepack's statement hindered the Trooper's investigation. This constitutes interference with law enforcement and Shepack could have then been arrested for that as well.

obstructing Trooper's attempt to get Shepack to move to rear of his truck

In *State v. Latimer*, 9 Kan. App. 2d 728, 687 P.2d 648 (1984), the Court dealt with the predecessor of K.S.A. 21-5904(a)(3), above, and explained the nature of the offense:

> Kansas cases have upheld convictions of obstructing official duty for the following acts of defendant: breaking away and/or running from a law enforcement officer before or after arrest prior to the filing of a formal written charge; becoming uncooperative and belligerent toward an officer, requiring physical restraint; and responding to an officer's request that the defendant accompany him by going into a house and closing the door. In *State v. Merrifield,* the Kansas Supreme Court examined the obstruction statute, G.S. 1949, 21–718, whose wording is echoed in the current obstruction statute, by stating:
>
> > "The statute does not limit the offense to resistance alone. It includes also willful acts of obstruction or opposition, and to obstruct is to interpose obstacles or impediments, to hinder, impede, or in any manner interrupt or prevent, and this term does not necessarily imply the employment of direct force, or the exercise of direct means. It includes any passive, indirect or circuitous impediments to the service or execution of process; such as hindering or preventing an officer by not opening a door. It may be stated as a general rule that under statutes containing the words 'obstruct, resist, or oppose,' or the single word 'resist,' the offense of resisting an officer can be committed without the employment of actual violence or direct force." *Merrifield,* 180 Kan. at 270–71, 303 P.2d 155.

9 Kan. App. 2d at 732 (most citations omitted).

Shepack's active attempt to obstruct the Trooper's reasonable attempts to get Shepack out of his truck, to establish officer safety, and to move him to the rear of his truck for the safety of both, was "knowingly obstructing, resisting or opposing any person … in the discharge of any official duty."

Shepack's conduct also constituted failure to obey lawful police order

Shepack's refusal to cooperate with the Trooper by refusing to permit him to examine the toll ticket, by misrepresenting fact concerning his alcohol consumption, and by refusal to follow the direction to move to the rear of his truck also constituted the failure to obey a lawful police order pursuant to K.S.A. 8-1503. The first two, while couched in terms of questions were plainly directions, the first to permit examination of evidence which the Trooper had the right to, and the second to tell the truth concerning his alcohol consumption.

KDR recognizes that in *State v. Greene*, 5 Kan. App. 2d 698, 623 P.2d 933 (1981), this Court held in a criminal case that one does not violate K.S.A. 8-1503 merely by disobeying a lawful police order unless "one is violating some traffic law on a public street or highway, or where circumstances necessitate that an official so authorized regulate and direct traffic." 5 Kan. App. 2d at 704. But there, the Court indulged a strict construction of this statute as it was a criminal prosecution, *id.* at 705; the case at bar is completely different, however, because it is a civil case with the burden on Shepack, not the state. And moreover, strict construction notwithstanding, that is not what this statute

plainly provides which is that it is *any lawful or direction*, so long as it is by "a police officer or fireman invested by law with authority to direct, control or regulate traffic."

That said, Shepack *was* "violating some traffic law on a public street or highway," that is, potential DUI, which the Trooper was then investigating. The Trooper's sequential directions that Shepack permit examination of the toll ticket, truthfully answer the question how much he had to drink, and move to the rear of his truck were all parts of the Trooper's investigation of Shepack for DUI.

Further, while Shepack was standing on the side of the turnpike only because the Trooper had stopped his vehicle and had him get out, it is nevertheless a traffic violation for a person to stop or stand on a public highway, K.S.A. 8-1571(a)(1)(i) ("no person shall: (1) … stand … : (i) On the roadway side of any vehicle stopped or parked at the edge or curb of a street …. (ix) on any controlled-access highway …."). It is important that this statute is part of Kansas' Uniform Act Regulating Traffic. Doing so potentially puts that person, and the accompanying police officer, in danger due to passing traffic. When the Trooper asked him to move from the roadway, Shepack willfully failed to comply with a lawful order. In that sense, Shepack was indeed "violating some traffic law on a public street or highway" within the meaning of this Court's decision in *Green*, above.

Further, the Trooper was effectively "regulat[ing] and direct[ing] traffic" given that he had stopped Shepack's vehicle for investigation of a criminal offense, and getting Shepack to the rear of his truck for safety's sake in pursuit of that investigation was part and parcel of that investigation.

All of this means that the Trooper's arrest of Shepack at the time that he cuffed him was lawful for these offenses, if not for DUI (KDR discusses that point below). Although KDR raised the issue, the district court determined instead to go with the Trooper's testimony at the trial of the matter which, concededly, was that, at the time that he cuffed Shepack, the arrest was for DUI, and determined that such arrest was unlawful as not based on reasonable grounds/probable cause. But KDR has shown that that arrest *was* lawful based on facts known to the Trooper which established that Shepack obstructed legal process and/or failed to obey a lawful police order. As KDR will show in the next section, the Trooper thereafter developed additional grounds supporting reasonable grounds/probable cause to arrest Shepack for DUI, and he then effected an arrest for such offense (as he stated on the DVD).

C. the district court erred in determining that the Trooper lacked reasonable grounds to arrest Shepack for DUI and/or to request that he submit to testing *at the point at which he was cuffed*

i. standard of review

"Whether an officer had reasonable grounds for a challenged action involves a mixed question of law and fact. Thus, we must review the ultimate legal conclusion – whether reasonable grounds existed – independently, even though we must defer to the district court's factual findings." *Hebberd v. Kansas Dept. of Revenue*, No. 115689, 2017 WL 543545, at *4 (Kan. Ct. App. Feb. 10, 2017) (Exhibit I hereto) (citing *Poteet v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 412, 414, 233 P.3d 286 (2010) (internal cites

and quote omitted). As a fact question, the issue requires this Court to review the issue in light of the record as a whole. K.S.A. 77-621(c)(7), (d).

Although "the court shall not reweigh the evidence or engage in de novo review," K.S.A. 77-621(d), here, the evidence relevant to the Trooper's reasonable grounds was almost entirely uncontroverted, therefore, the question for this Court is a question of law. And, indeed, evidence which is uncontradicted, is ordinarily regarded as conclusive. *Sullivan v. Kansas Dep't of Revenue*, 15 Kan. App. 2d 705, 708, 815 P.2d 566, 568 (1991).

ii. KDR raised this issue below

KDR raised the issue at all times that the officer had reasonable grounds to request Shepack to submit to testing. *E.g.,* R 1 at 85-92 (KDR's Trial Brief at 9-16)

iii. Arguments

a. generally

The district court erred in holding that the Trooper did not have reasonable grounds to arrest Shepack and/or to request that he submit to testing at the point at which he was cuffed. In making its determination that the Trooper lacked grounds to arrest Shepack for DUI, the district court failed to take account of all the uncontroverted evidence it heard, did not correctly interpret the evidence which it recited in its decision, and did not correctly analyze the cases which it cited in that decision.

b. district court failed to take account of all the uncontroverted evidence it heard

The district court failed to take into account all of the uncontroverted evidence it heard. For example, the district court only summarily mentioned the Kansas Turnpike Authority ("KTA") dispatch from a private citizen of a vehicle (Shepack's) being driven erratically. R 1 at 181 (Mem. Dec. at 1, ¶ 1). The district court's statement that Shepack's driving behavior consisted merely of his "fail[ing] to move over for his emergency vehicle, and then later drift[ing] over the dotted line between the northbound lanes," R 1 at 189 (Mem. Dec. at 9), substantially understates the evidence. And this important evidence dropped out completely when the district court summarized the reasons for its decision finding no reasonable grounds. R 1 at 191 (Mem. Dec. at 11).

In fact, the uncontradicted evidence was that Shepack's driving was far more egregious than noted by the district court. The KTA dispatch more fully informed the Trooper that Shepack almost struck the reporting party's vehicle, almost struck a guardrail, was all over the road, was varying his speed from 45 to 80 mph, and included the reporting party's opinion that he was witnessing a possible drunk driver (*i.e.* Shepack).

KDR trial exhibit no. B (R 3 at 6) contains the Voluntary Witness Statement by Austin Kennedy (on which the KTA dispatch was based) which states more fully as follows:

> At approximately 20:15 I was traveling south on the turnpike when a white Toyota pickup cut me off. Nearly striking my vehicle. After following for a few miles I decided he was possibly drunk, called KTA and advised my location. I continued following, his driving continued to be erratic. Cross the center line, cross over to the shoulder, and varying speed from 45-80 approximately. I followed until the vehicle exited at Counsil [sic] Grove. I continued onto my destination and advised dispatch that he had exited.

This uncontradicted testimony and evidence was admitted at the trial of the matter over objections by Shepack (including his hearsay objection), R 2 at 38:16; 42-44; 45, however, in the absence of any cross appeal of the rulings admitting this evidence, the same are no longer subject to contest here. Ultimately, the facts concerning his driving were not controverted by Shepack, indeed were uncontradicted, and therefore pursuant to Kansas law cited above (*Sullivan*), the district court was required to accept them as fact. "[U]ncontradicted … [evidence] is ordinarily regarded as conclusive." *Sullivan*, above.

This most egregious driving behavior, perhaps above all else, evidences that Shepack was driving under the influence of alcohol to the extent that he was incapable of safely driving. *See, e.g., City of Wichita v. Molitor*, 301 Kan. 251, 268, 341 P.3d 1275 (2015) ("[o]bviously, evidence of unsafe driving can suggest intoxication."); *State v. Hamman*, 273 Kan. 89, 93–94, 41 P.3d 809, 812 (2002) (probable cause to arrest for DUI based solely on driving behaviour), *Poteet v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 412, 416, 233 P.3d 286 (2010) ("In addition to the odor of alcohol, Poteet drove through a field and a barbed-wire fence; she so lost control of the car that it rolled onto its side. These facts certainly suggest an impaired driver.").[1]

The district court also failed to take into account the fact that when Shepack eventually stopped, *i.e.* close to the turnpike exit, it was at a location which the Trooper

[1] While Shepack indicated that he did not "believe [his] driving was erratic," R 2 at 140:18, the district court did not credit that testimony. R 1 at 181 (Mem. Dec. at 1, ¶ 1 ("Trooper Taylor received information from dispatch that a white 2012 Toyota Tacoma with Kansas tag 920 DOK was driving erratically on Interstate 335 near milepost 173 southbound.")).

described as unsafe (due to the prospect that other drivers would be exiting there). The district court's finding that "Trooper Taylor testified that there was nothing improper about the way Shepack was parked on the shoulder after the stop," R 1 at 183 (Mem. Dec. at 3, ¶ 11), ignored this uncontradicted testimony.

In this regard, the Trooper was an experienced law enforcement officer assigned to the turnpike, a highway designed for the smooth, safe flow of high speed traffic, with appropriate exits for such traffic. Kansas law is that the Court needs to "make [its] determination with deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances …." *State v. DeMarco*, 263 Kan. 727, 735, 952 P.2d 1276 (1998) (quoting *United States v. Mendez,* 118 F.3d 1426, 1429 (10th Cir. 1997)); *see also State v. Butts*, 46 Kan. App. 2d 1074, Syl. ¶ 4, 269 P.3d 862, 865 (2012) ("Trained law enforcement officers are permitted to make inferences and deductions that might well elude an untrained person."). The Trooper's assessment was that Shepack stopped at an unsafe location and that was or could properly have been taken into account in assessing his reasonable grounds to arrest Shepack for DUI. The district court erred in failing to so recognize.

The district court also failed to take into account in its summary of the facts that Shepack misrepresented his obvious alcohol consumption. While the district court noted that the Trooper smelled the odor of alcohol on Shepack (and noted his failing to completely pull over, drifting, and bloodshot, watery, glazed eyes) and that Shepack denied drinking, that was as far as its analysis went before the Court stated that the Trooper had no reasonable grounds. R 1 at 191 (Mem. Dec. at 11).

Here, the Trooper not only observed obvious signs of alcohol consumption (report of a drunk driver; erratic driving; odor of alcohol; bloodshot, watery eyes; alcoholic beverage containers found in the bed of the truck, *etc.*), but Shepack also misrepresented his drinking. Indeed, the Court found facts indicating that it was more than a fudging of the fact, because "[Shepack] had 4 to 7 glasses of wine that day." R 1 at 184 (Mem. Dec. at 4, ¶ 17). Shepack's denial demonstrated his consciousness of guilt of DUI. *Landram v. Kansas Dept. of Revenue*, No. 104790, 2012 WL 924803, at *3 (Kan. Ct. App. March 9, 2012), *rev. denied* (2013) (copy attached hereto as Exhibit F) (false statements about drinking properly taken into account); *State v. Swingle*, No. 107,856, 2013 WL 4729565, at *4 (Kan. App. Aug. 30, 2013), *rev. denied* (2014) (copy attached hereto as Exhibit G) (same).

The district court also failed to take note of the late hour in its summary of facts relevant to its decision. R 1 at 191 (Mem. Dec. at 11). This Court's decision in *Campbell v. Kansas Dept. of Revenue,* 25 Kan. App. 2d 430, 431, 962 P.2d 1150, *rev. denied* (1998), holds that late hour is a factor supporting reasonable grounds. *Accord Hebberd*, 2017 WL 543545, at *4 (citing inter alia *Campbell*) (copy attached hereto as Exhibit H); *see also Kohn v. Kansas Dept. of Revenue,* No. 103,703, 2011 WL 768000, at *2 (Kan. Ct. App. Feb. 25, 2011) (finding that the time of the stop—after 1 a.m.—was one factor that supported reasonable grounds to request testing) (Exhibit H hereto); *Horton v. Kansas Dept of Revenue,* No. 101, 047, 2009 WL 3270833, at *2 (Kan. Ct. App. Oct. 9, 2009) (same) (copy attached hereto as Exhibit J).

Further, while initially noting that "Shepack admitted at trial that these [statements to the Trooper about where he had been and was going] were not accurate statements," R 1 at 183 (Mem. Dec. at 3), these facts are not included in the district court's summary of the evidence. Confusion about or misrepresentation to an officer of relevant facts are certainly relevant considerations in judging an officer's reasonable grounds to believe a person is under the influence. *See, e.g., Wagner*, 2015 WL 6620621, at *8 (driver appearing to be "[a] little bit confused" was factor supporting reasonable grounds) (copy attached hereto as Exhibit B); *Phillips v. Kansas Dep't of Revenue*, No. 111,378, 2014 WL 5801283, at *1 (Kan. Ct. App. Oct. 31, 2014) (same) (Exhibit J1 hereto).

c. Court misconstrued the evidence

The district court also failed to correctly analyze some of the evidence that it did hear. For example, the district court stated that Shepack "dropped his toll ticket when getting out of the truck, but he had no difficulty picking it up. The fact that he put it in his pocket and would not show it to Trooper Taylor is no indication of being under the influence." R 1 at 191 (Mem. Dec. at 11). That Shepack dropped the ticket in the first place should have been taken into account as evidence of lack of precision in Shepack's gross motor skills or manual dexterity. *See, e.g., State v. Behnken*, No. 113,340, 2016 WL 1296085, at *4 (Kan. Ct. App. April 1, 2016) (defendant dropping driver's license relevant to probable cause) (copy attached hereto as Exhibit K).

Further, the refusal to allow the Trooper to examine the ticket on his request is also some evidence bearing on whether Shepack was conscious of his guilt. That is, the ticket would show where Shepack had gotten onto the turnpike and thereby evidence

whether he was confused as to where he was or where he was going. Further, that ticket would also be relevant to Shepack's *time* of consumption of alcohol, a relevant factor (*see, e.g., State v. Zacharias*, No. 114,334, 2016 WL 2811024, at *4 (Kan. Ct. App. May 13, 2016) (copy attached hereto as Exhibit K1)), on the theory that, barring consumption while driving, as to which there was no evidence, the longer Shepack was on the turnpike, the greater the time from last consumption.

The district court also stated that, "Shepack's demeanor was calm and appeared, according to the DVD, to be cooperative." R 1 at 191 (Mem. Dec. at 11). This is an incorrect statement of Shepack's actual uncooperative demeanor which began with his slowness in pulling over, his misrepresentation as to his alcohol consumption, his refusal to permit the Trooper to examine the toll ticket, and his refusal to comply with the Trooper's instructions (including the orders twice to step out, three times to step to the rear of his truck). Some of these matters were found as fact by the district court. R 1 at 183 (Mem. Dec. at 3). *See, e.g., State v. Harbacek*, No. 110664, 2014 WL 3843506, 13 *3 (Kan. Ct. App. Aug. 1, 2014), *rev. denied* (2015) (belligerent, combative, irrational behavior) (copy attached hereto as Exhibit L). However, none of them was factored in the court's decision, and indeed, the court held that Shepack was calm and cooperative.

The district court also stated of Shepack, "[h]e did not have balance problems, he did not have difficulty walking, and he did not lean on the truck for support." R 1 at 191 (Mem. Dec. at 11). This is not accurate. First, Shepack did drop his KTA receipt which evidences some problems with his manual dexterity or gross motor skills and attention to what he was doing, all of which can be affected by alcohol consumption. Second, as of

the time that Shepack was placed in cuffs, there is a total of only thirty-six (36) seconds – as shown by the DVD – in which to observe if he had any balance problems; as such, the lack of observation of any balance problems may be due to the short time in which to make such observation. Finally, after the Trooper brought Shepack over to the back of his truck, there is a point at which Shepack stumbled and appeared to almost fall over backwards. R 3 at 5 (Shepack's trial Exhibit 4 (DVD at 6:50)). As such, Shepack did have balance and walking problems.

d. district court did not correctly read case law

The district court also did not correctly read the cases which it cited. One of the cases which KDR cited in support and which the Court discounted was *Campbell v. Kansas Dept. of Revenue,* 25 Kan. App. 2d 430, 962 P.2d 1150, *rev. denied* (1998). Of *Campbell*, the district court stated that, "in *Sloop,* the Kansas Supreme Court found that the "more important" reason that *Campbell* was distinguishable was that the Court of Appeals in *Campbell* applied the wrong test for probable cause. For this reason, *Campbell* is of little help here." R 1 at 190 (Mem. Dec. at 10).

There is room to argue that *Campbell* applied settled law. *See, e.g., State v. Morgan*, 222 Kan. 149, 152, 563 P.2d 1056, 1059 (1977) ("It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information led a reasonable officer to believe that *guilt is more than a possibility* ….") (emphasis added).

That said, however, it is fact that the ultimate holding of *Campbell* is still good law. As such, *Campbell* is of great help to the Court because the same facts present there are also present here – traffic violation, late hour, bloodshot eyes, and (the equivalent of an) admission of drinking (that is, Shepack's denial of drinking in the face of clear evidence to the contrary). *See State v. Johnson*, 297 Kan. 210, 222, 301 P.3d 287, 297 (2013) (citing *Campbell* with approval); *Hicks v. Kansas Dep't of Revenue*, No. 114643, 2016 WL 3960893, at *5 (Kan. Ct. App. July 22, 2016) (copy attached hereto as Exhibit M) ("Kansas courts have found that a traffic infraction plus the smell of alcohol, bloodshot eyes, and an admission of drinking is sufficient to establish probable cause. See *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 431–32, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998)."); *Hoeffner v. Kansas Dep't of Revenue*, No. 109606, 2014 WL 2589806, at *3 (Kan. Ct. App. 2014) (copy attached hereto as Exhibit N).

Penultimately, the district court held that the absence of slurred speech and balance problems was dispositive. R 1 at 189 (Mem. Dec. at 9) ("The bottom line is that in *Sloop, Wonderly,* and *Molitor,* the Court found it persuasive that the drivers did not have slurred speech and did not have problems walking or balancing. This is also true of Shepack."). The district court misread these cases to the extent that it read them as holding that the absence of slurred speech and balance problems prevails over other indicia of impairment.

The *Sloop* Court merely mentioned these as factors. 296 Kan. at 23. That Court also noted, however, that, "[t]he primary factual difference between *Campbell* and the instant case is that Campbell was speeding, *i.e.,* committing a moving violation, while

Sloop was driving legally before being stopped for an improper tag light." 296 Kan. at 22. Here, Shepack was not driving legally before being stopped, in fact, he was driving erratically and dangerously.

The *Molitor* decision also noted these same things, but merely as factors: "After stopping the vehicle, Molitor spoke without slurring his words, produced his identifying documents without difficulty, exited and proceeded from his vehicle without losing his balance, and, most importantly, passed the two admissible SFSTs." 301 Kan. at 268. The *Molitor* Court also noted of significance here, however, that, "evidence of unsafe driving can suggest intoxication," "and, most importantly, [Molitor] passed the two admissible SFSTs." *Id.* As KDR has noted, Shepack's driving was erratic and dangerous and there were no *passed* field sobriety tests here.

Similarly, in *City of Norton v. Wonderly*, 38 Kan. App. 2d 797, 172 P.3d 1205 (2007), the facts were that:

> "[officer] Morel did not see Wonderly commit any traffic infractions while he followed Wonderly for 3 minutes. Wonderly pulled his truck over in a normal manner when Morel turned on the emergency lights, he did not fumble for his driver's license, and he had no problems getting out of his truck and walking to Morel's patrol car. Wonderly's speech was "fair" and "not particularly slurred."

38 Kan. App. 2d at 808. By contrast here, after the Trooper got behind Shepack, his driving continued to be erratic, he was slow to pull over, he was confused or misrepresented where he had been, he fumbled with his turnpike ticket including dropping it, and he stumbled and almost fell over after he got out of his vehicle.

And poor balance and slurred speech are not necessary components of reasonable grounds. *See Hebberd*, 2017 WL 543545 at *5 (rejecting claim that Hebberd "was not impaired [because] he never lost his balance, he showed manual dexterity, he spoke clearly, he was not emotional.") (copy attached hereto as Exhibit H); *State v. Scott*, No. 99,561, 2009 WL 929102 (Kan. Ct. App. April 3, 2009) (copy attached hereto as Exhibit O) (court sustained finding of probable cause to arrest with one failed field sobriety but with no balance indicators, and one passed test, and no indication otherwise of poor balance; noting inter alia "Scott not exhibiting some signs of impairment of his physical and mental faculties does not imply that he did not exhibit other known psychomotor signs of impairment.").

e. district court came to the wrong conclusion generally

Here, at the time that Shepack was cuffed, the Trooper was aware of the following facts (*much of which were agreed to by Shepack*):

> erratic, unsafe driving behavior (presumably at times at high speed as such was on the Kansas Turnpike), including the opinion of a witness that the driver was intoxicated,
>
> late hour;
>
> slowness in pulling over;
>
> ultimate stop at an unsafe location;
>
> odor of alcohol on his person;
>
> box of wine in the bed of the truck and an empty wine box in the cab;
>
> bloodshot, watery, glazed eyes;

misrepresentation of alcohol consumption;

misrepresentation or confusion about where he had been;

poor gross motor skills (based on the dropped KTA ticket);

poor balance (based on stumbling and almost falling over after he was brought over to the back of his vehicle);

resistive, combative demeanor

Based on all these facts, and conceding for the moment that the relevant time was at the point at which Shepack was cuffed, the Trooper had reasonable grounds to believe that Shepack was under the influence, and as such, the district court erred in determining that the Trooper lacked reasonable grounds to arrest Shepack and/or to request that he submit to testing.

Penultimately, as this Court recently reiterated, "it is not necessary that the driver exhibit every sign of possible intoxication. It is sufficient that the police officer observe enough signs of intoxication to make a reasonable police officer believe the driver was operating a vehicle while under the influence of alcohol." *Peace v. Kansas Dep't of Revenue*, No. 112113, 2015 WL 4487055, at *6 (Kan. Ct. App. July 17, 2015) (internal modification omitted) (copy attached hereto as Exhibit P). That was the case here and the district court erred in determining to the contrary.

Analysis under *Hamman* decision

Alternatively, an arrest for DUI here was entirely lawful based solely on Shepack's driving behavior. In *State v. Hamman*, 273 Kan. 89, 93–94, 41 P.3d 809

(2002), the Kansas Supreme Court held an arrest for DUI was lawfully based on probable cause arising from driving behavior described as follows:

> While in Lyon County, Smith noticed a Plymouth Neon ahead of him that was going approximately 40 miles per hour. Deputy Smith was traveling approximately 55 miles per hour, and he slowed to keep from getting too close to the Neon. The road was generally straight and had lane markings. Smith observed the Neon going to the right side of the road and then veering back toward the center line.
>
> Due to oncoming traffic, Smith was not able to pass the Neon right away. As oncoming traffic approached the Neon, it moved to the right side of the lane. As oncoming traffic cleared, the Neon veered back toward the center line. He observed the Neon going from side to side in its lane two or three times. From his training and experience, Smith recognized that driving pattern as an indication that the driver might be under the influence of alcohol. Due to his safety concerns, Smith decided to follow the vehicle.
>
> Within a short time, the driver of the Neon turned on the right turn signal and turned off the pavement onto a gravel road. Smith observed the Neon go off to the left side of the gravel road and the driver "struggle slightly" with the steering wheel to get the car back on the right side of the gravel road. Back on the right side of the road, the Neon slowed almost to a stop before proceeding. Then Smith observed the Neon being driven very slowly and on the far right side, not in the ditch, but right alongside it.

273 Kan. at 90. The Court stated:

> "Writing about warrantless arrests, *this court has defined probable cause as "the reasonable belief* that a specific crime has been committed and that the defendant committed the crime. It does not require evidence of each element of the crime or evidence to the degree necessary to prove guilt beyond a reasonable doubt." *Key v. Hein, Ebert & Weir, Chtd.*, 265 Kan. 124, Syl. ¶ 2, 960 P.2d 746 (1998). *In the present case, Smith had a reasonable belief that Hamman was driving under the influence at the time he turned on his emergency lights to stop her.* Once he stopped her and observed her and smelled alcoholic beverage, he had a reasonable belief that she should be detained until a Lyon County deputy arrived."

273 Kan. at 95 (emphasis added). As described above, Shepack's driving behavior was at least as egregious if not more so, than that described in *Hamman.*

D. the district court erred in failing to determine that the Trooper had reasonable grounds to arrest Shepack and/or to request that he submit to testing at the point after Shepack refused the PBT and the field sobriety tests

i. standard of review

Because the facts relevant to the Trooper's reasonable grounds were uncontroverted, the issue raised becomes one of law, and the Court's standard of review is unlimited. *Petty v. City of El Dorado*, 270 Kan. 847, 850, 19 P.3d 167 (2001) (citing *Matney v. Matney Chiropractic Clinic,* 268 Kan. 336, 338–39, 995 P.2d 871 (2000)).

ii. KDR raised this issue below

KDR raised the issue at all times that the officer had reasonable grounds to request Shepack to submit to testing. *E.g.,* R I 83 (KDR's Trial Brief at 7).

iii. Arguments

KDR has shown, above (issue no. 1), that the district court erred in determining that the Trooper's reasonable grounds were cut off at the point of his cuffing Shepack. If this Court determines that the Trooper lacked reasonable grounds at the point that Shepack was cuffed (discussed immediately above under issue no. 3), a point with which KDR does not agree, nonetheless, it should determine as a matter of law that – *with the additional evidence of Shepack's refusals of the PBT and the field sobriety tests* (both findings of fact by the district court, R 1 at 184, ¶ 19, not cross appealed by Shepack) – the Trooper did have reasonable grounds to arrest Shepack and request him to submit to testing, and no remand is necessary on this issue. KDR has noted above the relevance of refusals of field sobriety tests and a PBT.

KDR recognizes, of course, that a remand would be necessary to determine whether Shepack was requested to submit to testing and whether he refused which are additional issues raised by Shepack in this case but which the district court did not resolve and as to which the facts are arguably in dispute. That this issue pends has no legal effect on the reasonable grounds issues which KDR raises in this Brief.

Conclusion

It is for all of these reasons, which are substantial, that KDR requests and prays that the Court reverse the district court's determination that the Trooper lacked reasonable grounds to request Shepack to submit to a breath test both at the time that Shepack was cuffed and after the time he refused to submit to field sobriety tests and a PBT, and remand the case for further proceedings.

Respectfully submitted:
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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that a copy of the above and foregoing Brief was filed via the appellate court's electronic filing system, on the 3rd day of September, 2017, which will generate a notice of the filing to:

Douglas A. Wells
5891 SW 29th Street
Topeka, KS 66614

_/s/ J. Brian Cox_____
J. Brian Cox, Attorney

Attachments

Exhibit A	Memorandum Decision and Order of February 1, 2017
Exhibit B	*State v. Wagner*, No. 112,730, 2015 WL 6620621 (Kan. Ct. App. Oct. 30, 2015)
Exhibit C	*Sjoberg v. Kansas Dep't of Revenue*, No. 103,937, 2012 WL 3966511 (Kan. Ct. App. Sept. 25, 2012), *rev. denied* (2013)
Exhibit D	*Forrest v. Kansas Dept. of Revenue*, No. 115,532, __ WL __ (Kan. Ct. of App. June 2, 2017)
Exhibit D1	*Sterling v. Kansas Dept. of Revenue*, No. 103,780, 2011 WL 1377010 (Kan. Ct. App. April 8, 2011)
Exhibit E	*State v. Harris*, No.116,129, 2017 WL 2899730 (Kan. Ct. App. July 7, 2017) (*pet. rev. pending* (July 24, 2017))
Exhibit F	*Landram v. Kansas Dept. of Revenue*, No. 104,790, 2012 WL 924803 (Kan. Ct. App. March 9, 2012), *rev. denied* (2013)
Exhibit G	*State v. Swingle*, No. 107,856, 2013 WL 4729565 (Kan. App. Aug. 30, 2013), *rev. denied* (2014)
Exhibit H	*Hebberd v. Kansas Dept. of Revenue*, No. 115,689, 2017 WL 543545 (Kan. Ct. App. Feb. 10, 2017)
Exhibit I	*Kohn v. Kansas Dept. of Revenue,* No. 103,703, 2011 WL 768000 (Kan. Ct. App. Feb. 25, 2011)
Exhibit J	*Horton v. Kansas Dept of Revenue,* No. 101,047, 2009 WL 3270833 (Kan. Ct. App. Oct. 9, 2009)
Exhibit J1	*Phillips v. Kansas Dep't of Revenue*, No. 111,378, 2014 WL 5801283 (Kan. Ct. App. Oct. 31, 2014)
Exhibit K	*State v. Behnken*, No. 113,340, 2016 WL 1296085 (Kan. Ct. App. April 1, 2016)
Exhibit K1	*State v. Zacharias*, No. 114,334, 2016 WL 2811024 (Kan. Ct. App. May 13, 2016)

Exhibit L *State v. Harbacek*, No. 110664, 2014 WL 3843506 (Kan. Ct. App. Aug. 1, 2014), *rev. denied* (2015)

Exhibit M *Hicks v. Kansas Dep't of Revenue*, No. 114,643, 2016 WL 3960893 (Kan. Ct. App. July 22, 2016)

Exhibit N *Hoeffner v. Kansas Dep't of Revenue*, No. 109,606, 2014 WL 2589806 (Kan. Ct. App. 2014)

Exhibit O *State v. Scott*, No. 99,561, 2009 WL 929102 (Kan. Ct. App. April 3, 2009)

Exhibit P *Peace v. Kansas Dep't of Revenue*, No. 112,113, 2015 WL 4487055 (Kan. Ct. App. July 17, 2015)

Exhibit A

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

JOSEPH R. SHEPACK,

Petitioner

Case No. 2015CV121

KANSAS DEPARTMENT OF REVENUE,

Respondent

MEMORANDUM DECISION AND ORDER

This is a driver's license suspension case under Kansas' implied consent law. This matter is before the Court for trial *de novo* on the petition for review of agency action filed by Joseph R. Shepack. Respondent is the Kansas Department of Revenue ("KDOR"). The Court has considered all trial briefs filed by the parties and has heard the evidence presented at trial. The matter is submitted to the Court for decision.

FINDINGS OF FACT

1. Master Trooper Shawn Taylor of the Kansas Highway Patrol was on duty on September 20, 2014. At 8:18 p.m. Trooper Taylor received information from dispatch that a white 2012 Toyota Tacoma with Kansas tag 920 DOK was driving erratically on Interstate 335 near milepost 173 southbound. Dispatch later indicated that the vehicle had exited at milepost 147. Trooper Taylor did not see the described vehicle in the area.

2. At 9:17 p.m. Trooper Taylor stopped an unrelated car for speeding at milepost 168 northbound. His emergency lights were activated. While speaking to the driver of the unrelated vehicle on the shoulder of the highway, Trooper Taylor saw a white 2012 Toyota

Tacoma pickup drive by. The truck did not move away into the far lane, but rather moved over to straddle the dotted line between the two northbound lanes as he passed the Trooper. Trooper Taylor returned to his vehicle to catch up to the white truck.

3. Trooper Taylor spotted the white truck at milepost 173 northbound. He followed the truck for three to four miles. He confirmed that the truck bore Kansas tag 920 DOK. He used radar to confirm that the truck was traveling below the 75 mile per hour speed limit. Trooper Taylor testified that he did not remember the exact speed.

4. Trooper Taylor activated a camera inside his patrol car. A DVD recording of the encounter was shown at trial and admitted into evidence.

5. While following the truck, Trooper Taylor observed the vehicle drift left over the dotted line between the two northbound lanes. On two of these occasions the truck remained on the dotted line for 30 seconds or more. Shepack admitted at trial that the DVD showed he was drifting. Shepack testified at trial that he believed Trooper Taylor had reason to stop him based on his driving as portrayed on the DVD.

6. Trooper Taylor activated his emergency lights one half mile south of milepost 177, the South Topeka exit. The white truck did not stop until it was in front of the South Topeka exit ramp. Trooper Taylor testified, and the DVD shows, that the white truck did not stop immediately when the emergency lights were activated. The DVD shows that the truck continued driving for approximately 30 seconds after the Trooper's lights were activated before stopping.

7. As he approached the truck, Trooper Taylor observed a box in the bed of the truck with six closed wine bottles, and an empty box in the cab of the truck.

8. Trooper Taylor detected the odor of alcohol coming from the truck. This was not noted on the DC-27 form, which was admitted at trial. Trooper Taylor said he made an error in

failing to note it on the form. Trooper Taylor observed that Shepack's eyes were bloodshot, watery, and glazed.

9. Trooper Taylor asked Shepack if he had been drinking. Shepack said no.

10. Trooper Taylor asked Shepack where he was going. He said he was going to his daughter's home in Lawrence. Trooper Taylor asked Shepack where he was coming from. Shepack said Wichita. Shepack admitted at trial that these were not accurate statements. Rather, Shepack testified that he drove from his home in Ellsworth that morning to Lawrence, and left Lawrence around 8 p.m. to drive to Wichita. Somewhere around milepost 147 southbound he noticed his tire pressure light was on. He exited to check it, then headed back north to Topeka to address the problem with his tire.

11. Trooper Taylor testified that there was nothing improper about the way Shepack was parked on the shoulder after the stop. He testified that Shepack exited the vehicle when asked to do so. He testified that Shepack did not have any problems with walking or standing and did not lean on the vehicle. Trooper Taylor testified that Shepack did not have slurred speech or difficulty communicating.

12. Shepack dropped his toll ticket on the ground when he got out of the truck. Trooper Taylor told Shepack to pick it up and then asked to see it. Shepack said no and put it in his pocket.

13. Trooper Taylor asked Shepack to move to the back of the truck. Shepack put his hands in his pockets. Trooper Taylor told Shepack to take his hands out of his pockets, which he did, and move to the back of the truck. Trooper Taylor testified that Shepack just stared at him. The DVD indicates that Shepack said "what do you want me to do?" Trooper Taylor took Shepack's upper arm and led him to the back of the truck while saying "come back here."

Trooper Taylor said this was for safety reasons because the two were too close to cars speeding by on the highway.

14. Shepack told Trooper Taylor to take his hands off him. Trooper Taylor told Shepack he could either follow directions or go to straight to jail. Shepack responded that he would go to jail.

15. Trooper Taylor put Shepack's hands behind his back and placed him in handcuffs. Shepack allowed his right hand to be cuffed but grasped the tailgate with his left hand, requiring Trooper Taylor to pull his left hand away to be cuffed. Trooper Taylor testified that Shepack did not resist arrest. Trooper Taylor placed Shepack in the back of his patrol car.

16. Trooper Taylor testified that at that point he placed Shepack under arrest on suspicion of driving under the influence.

17. Trooper Taylor asked Shepack how much of that wine he had to drink. Shepack said he didn't know what Trooper Taylor was talking about. However, Shepack testified at trial that he had 4 to 7 glasses of wine that day.

18. Trooper Taylor went back to search the cab of the truck. He found packaged meat from a Lawrence grocery store that was cold to the touch.

19. Trooper Taylor came back to the patrol car. He told Shepack he was going to ask him to submit to a preliminary breath test ("PBT") and some field sobriety tests ("FSTs"). Shepack said he was not going to do anything.

20. Trooper Taylor took Shepack to the nearby Highway Patrol station.

21. Trooper Taylor testified that Shepack did not fumble with his license when producing it.

22. Trooper Taylor read Shepack the implied consent advisory, form DC-70. He handed Shepack a written copy of the DC-70 to allow him to follow along. After Trooper Taylor had read the entire first page of the advisory, Shepack, an attorney, said he would refuse to take the test under the authority of *State v. DeClerk.*

23. Trooper Taylor said, "so the answer to the question is no?" Shepack said "no."

24. Trooper Taylor testified he did not say the words "will you take a breath test" as written on the DC-70 form.

25. Shepack testified that Trooper Taylor did not ask him whether he would take a breath test.

26. Trooper Taylor asked Shepack to initial the DC-70 form where it indicates that Shepack refused to take the test. Shepack said no. Shepack would not initial the form.

27. Shepack was charged with driving under the influence and improper driving on a laned roadway. He entered into a diversion agreement. The diversion agreement was completed and the charges were dismissed. The Court, without objection from the parties, takes judicial notice of Shawnee County case number 2015TR2149, *State v. Shepack.*

CONCLUSIONS OF LAW

The suspension of Shepack's driver's license is subject to review under the Kansas Judicial Review Act ("KJRA"). K.S.A. 2015 Supp. 8-259; K.S.A. 2015 Supp. 8-1020. A person who demonstrates standing, exhaustion of remedies, and a timely filed petition is entitled to judicial review of the agency action. K.S.A. 77-607(a). There is no dispute that Shepack meets these requirements. On review, this Court conducts a *de novo* trial. K.S.A. 2015 Supp. 8-1020(p). Shepack has the burden to demonstrate that the agency decision should be set aside. K.S.A. 2015 Supp. 8-1020(q).

Anyone attempting to operate or operating a vehicle in Kansas is deemed to have given consent to testing to determine the presence of alcohol or drugs. K.S.A. 2015 Supp. 8–1001(a). A law enforcement officer shall request the person submit to testing if the officer has reasonable grounds to believe the person was under the influence of alcohol or drugs while operating or attempting to operate a vehicle and the person has been arrested or otherwise taken into custody for any violation of a statute or ordinance. K.S.A. 2015 Supp. 8–1001(b)(1)(A). The reasonable grounds test of K.S.A. 2015 Supp. 8–1001(b) is strongly related to the standard for determining probable cause to arrest. See *Gross v. Kansas Dept. of Revenue,* 26 Kan.App.2d 847, 848–49, 994 P.2d 666, *rev. denied* 269 Kan. 932 (2000).

Here, Shepack was arrested and subsequently refused to submit to a chemical test. The agency moved to suspend his license. Shepack requested a hearing. K.S.A. 2015 Supp. 8-1020(h)(1) describes the scope of the hearing:

> "(h)(1) If the officer certifies that the person refused the test, the scope of the hearing shall be limited to whether:
>
> (A) A law enforcement officer had reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system;
>
> (B) the person was in custody or arrested or was involved in a vehicle accident or collision resulting in property damage, personal injury or death;
>
> (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and
>
> (D) the person refused to submit to and complete a test as requested by a law enforcement officer."

In his petition, Shepack argues that: 1) Trooper Taylor did not have reasonable grounds to believe Shepack was operating or attempting to operate a vehicle while under the influence of alcohol or drugs; 2) Trooper Taylor had no probable cause to arrest him; 3) Trooper Taylor did

not present him with oral notice as required by K.S.A. 2015 Supp. 8-1001; and 4) Shepack did not refuse to submit to and complete a chemical test.

Shepack also asserted various statutory grounds for reversal of the agency decision under K.S.A. 77-621(c):

> "(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
> . . .
> (3) the agency has not decided an issue requiring resolution;
> (4) the agency has erroneously interpreted or applied the law;
> . . .
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
> (8) the agency action is otherwise unreasonable, arbitrary or capricious."

Shepack's arguments are numerous. Only one will be discussed here because it is dispositive of the appeal. K.S.A. 2015 Supp. 8–1001(b), the implied consent law, requires that the underlying arrest be lawful. In order to be lawful, the arrest must be supported by probable cause. *Sloop v. Kansas Dept. of Revenue,* 296 Kan. 13, 20, 290 P.3d 555 (2012). Probable cause is defined as follows:

> "Probable cause is the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime. Existence of probable cause must be determined by consideration of the information and fair inferences therefrom, known to the officer at the time of the arrest. Probable cause is determined by evaluating the totality of the circumstances. As in other totality of the circumstances tests, there is no rigid application of factors and courts should not merely count the facts or factors that support one side of the determination or the other." [Internal citations and quotations omitted.] *Id.*

In *Sloop,* the officer observed Sloop execute a left turn with hesitation, sitting up close to his steering wheel. The officer followed Sloop for several blocks without further incident. It was around midnight. The officer decided to stop Sloop because his tag light was out. The officer

said Sloop's speech was impaired but not slurred, he and his passenger smelled of alcohol, his eyes were watery and bloodshot, and when asked if he had been drinking, Sloop denied it but then said he had one beer. Sloop did not fumble with his driver's license, he did not stumble when exiting his vehicle, and he walked steadily to the rear of his car. *Id.* at 14-16. The Kansas Supreme Court held that there was not probable cause to arrest Sloop for driving under the influence, thus no authority to suspend Sloop's license for refusing to take a breath test. *Id.* at 24.

In *City of Norton v. Wonderly,* 38 Kan.App.2d 797, 172 P.3d 1205, *rev. denied* 286 Kan. 1176 (2008), a criminal case, the Kansas Court of Appeals found no probable cause for Wonderly's arrest for driving under the influence. There, the officer did not observe any traffic violations, but he stopped Wonderly's truck based upon a phone call from a motorist who indicated Wonderly had exhibited erratic driving. Wonderly stopped his truck in a normal manner, but when he exited the vehicle the officer had to tell him twice to get back inside. The officer detected the odor of alcohol, but he could not tell whether the odor came from Wonderly, his passengers, or the truck itself. Wonderly had bloodshot eyes, but he produced his driver's license without incident. The officer asked Wonderly to step out of his truck. Wonderly, who exhibited no problems walking, proceeded to the patrol car and sat down inside as instructed. The officer asked Wonderly if he had consumed alcohol, and Wonderly said he had some drinks at a local bar earlier that evening and one or two drinks at another bar. Wonderly's speech was not slurred. *Id.* at 800.

Because the weather was bad and the officer wanted to continue his investigation, he took Wonderly to the sheriff's office to perform field sobriety tests. The Kansas Court of Appeals held that this was the point of arrest, even though the officer formally arrested Wonderly later. The

Court also held that the limited evidence the officer had gathered at the scene was insufficient to support a finding of probable cause for the arrest. *Id.* at 801, 804–09.

In *City of Wichita v. Molitor,* 301 Kan. 251, 341 P.3d 1275 (2015), a criminal case, the Kansas Supreme Court considered whether the officer had reasonable suspicion to believe Molitor was operating or attempting to operate a vehicle while under the influence of alcohol or drugs sufficient to support a request for a preliminary breath test under K.S.A. 2015 Supp. 8-1012. There, the officer saw Molitor turn without using a turn signal, and Molitor hit the curb or drove on the curb when stopping his car. *Id.* at 252-53. The Court said, though, that any "alleged lapse of coordination must be viewed in conjunction with what followed." Molitor had watery and bloodshot eyes, the officer detected the strong smell of alcohol, and Molitor admitted that he had two or three beers. But Molitor's speech was not slurred, he did not fumble his license or other documents, he did not lose his balance, and he passed two of three FSTs. *Id.* at 268.

KDOR attempts to distinguish *Sloop* and *Wonderly* because in those cases, the officer did not observe the driver commit a moving violation. Here, Trooper Taylor observed Shepack fail to move over for his emergency vehicle, and then later drift over the dotted line between the northbound lanes. But in *Molitor,* the officer saw the driver turn left without a signal, then hit the curb when pulled over. Then the officer observed watery and bloodshot eyes and smelled alcohol. Molitor admitted to drinking. The Court, though, gave greater weight under the circumstances to the fact that Molitor's speech was not slurred, he did not fumble his license, his balance was not impaired, and he passed two FSTs. KDOR points out that Shepack did not take any FSTs. In fact, he was arrested before being asked to do so. The bottom line is that in *Sloop, Wonderly,* and *Molitor,* the Court found it persuasive that the drivers did not have slurred speech and did not have problems walking or balancing. This is also true of Shepack.

KDOR points to *Campbell v. Kanas Dept. of Revenue,* 25 Kan.App.2d 430, 962 P.2d 1150 (1998). *Sloop* summarizes *Campbell* as follows:

> "In *Campbell,* which, as here, involved an administrative appeal of a driver's license suspension, this court held that probable cause to arrest the driver existed when an officer observed the driver speeding [72 mph in a 55 mph zone] at 1:10 a.m., the officer smelled alcohol on the driver, the driver admitted to having a few drinks, and the driver's eyes were glazed and bloodshot.
>
> But we find it sufficiently distinguishable. The primary factual difference between *Campbell* and the instant case is that Campbell was speeding, i.e., committing a moving violation, while Sloop was driving legally before being stopped for an improper tag light.
>
> More important, the *Campbell* court's articulated test for probable cause to arrest was overly generous to the KDOR, i.e., requiring only 'that quantum of evidence that would lead a reasonably prudent police officer to believe that guilt is more than a *mere* possibility.' (Emphasis added.) Furthermore, the *Campbell* panel was not making a *de novo* determination of probable cause. Rather, it was reviewing the district court's holding of probable cause for the DUI arrest, a holding the panel declared it was reviewing only for substantial competent evidence to support. So there is a serious question whether the *Campbell* court felt restricted by either, or both, of these standards in arriving at its holding of probable cause." [Internal quotations and citations omitted.] *Sloop,* 296 Kan. at 22-23.

KDOR argues that here, as in *Campbell,* Shepack committed a moving violation. But in *Sloop,* the Kansas Supreme Court found that the "more important" reason that *Campbell* was distinguishable was that the Court of Appeals in *Campbell* applied the wrong test for probable cause. For this reason, *Campbell* is of little help here.

It is true that in *Sloop, Wonderly,* and *Molitor,* one cannot find an exact match to the facts of this case, but each case is similar in a convincing way. First, it is important to note when the arrest in this case occurred. Trooper Taylor testified that when Shepack was placed in handcuffs at the back of the truck, he was under arrest for driving under the influence. Indeed, an arrest occurs when a person is physically restrained. *State v. Hill,* 281 Kan. 136, 143, 130 P.3d 1 (2006). Probable cause is necessary to make an arrest. *Id.* at 141. When determining whether

Trooper Taylor had probable cause to arrest Shepack for driving under the influence, the Court looks only to that information Trooper Taylor had at the time of the arrest. See *Sloop,* 296 Kan. at 23 ("we do not consider . . . postarrest conduct in our probable cause to arrest calculus").

Here, Trooper Taylor witnessed Shepack fail to move entirely to the left lane when passing his lighted patrol vehicle on the shoulder. Trooper Taylor, when following Shepack, saw him drifting over the dotted line from the right to the left northbound lane several times. Trooper Taylor testified that he smelled the odor of alcohol on Shepack (though this box was not checked on the DC-27) and observed his bloodshot, watery, and glazed eyes. However, Shepack denied drinking. Trooper Taylor saw a box of wine bottles, but they were closed and in the back of the truck.

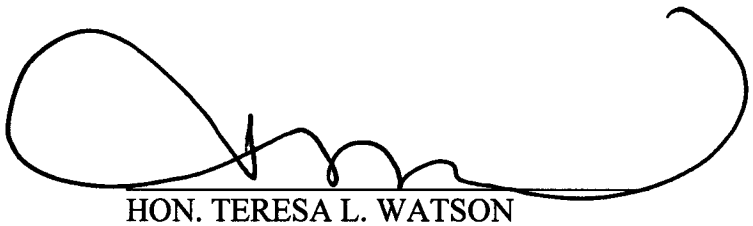
Shepack parked his truck properly on the side of the road. He did not have slurred speech. He did not have balance problems, he did not have difficulty walking, and he did not lean on the truck for support. He dropped his toll ticket when getting out of the truck, but he had no difficulty picking it up. The fact that he put it in his pocket and would not show it to Trooper Taylor is no indication of being under the influence. Shepack's demeanor was calm and appeared, according to the DVD, to be cooperative.

Under the totality of the circumstances present at the time of Shepack's arrest, the Court concludes that there was not probable cause to arrest him for driving under the influence. KDOR points to Shepack's refusal to take a PBT and field sobriety tests, but this occurred after the arrest. KDOR points to several other factors which became known to the officer only after the arrest, but these are likewise not part of the probable cause equation.

CONCLUSION

Without probable cause to support it, Shepack's arrest was unlawful. A lawful arrest is required before the officer is authorized to request the driver to take a breath test. K.S.A. 2015 Supp. 8–1001(b). Thus, there was no statutory authority to request Shepack to take this test at the station. Shepack's driving privileges were administratively suspended by KDOR because he refused to take the breath test. Shepack's suspension, because it was based upon his refusal to take an unauthorized test, is invalid. The decision of the agency is reversed and the matter is dismissed.

IT IS SO ORDERED.



HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, Angela Cox, hereby certify that the above document was delivered or deposited in the U.S. Mail, postage prepaid on the 1st day of February, 2017.

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Exhibit B

358 P.3d 878 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Amanda E. WAGNER, Appellant.

No. 112,730.
|
Oct. 30, 2015.

Appeal from Riley District Court; John F. Bosch, Judge.

Attorneys and Law Firms

John W. Thurston, of Addair Thurston, Chtd., of Manhattan, for appellant.

James W. Garrison, assistant county attorney, Barry R. Wilkerson, county attorney, and Derek Schmidt, attorney general, for appellee.

Before HILL, P.J., PIERRON and ARNOLD BURGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Amanda E. Wagner led police on a high speed chase through Manhattan before she abandoned her car and texted a coworker to pick her up. The coworker picked Wagner up, and she concealed herself in the front passenger seat. While leaving the area, the coworker encountered the police who were looking for Wagner and told an officer he was lost and needed directions. The officer saw Wagner attempting to hide in the front seat and asked her, by name, if she was alright. She was then asked to step from the car, where it became apparent she was intoxicated. She was arrested and taken to the police station for an intoxilyzer test. In the meantime, her car was located and searched based on the officer's observation of open containers of alcohol in the vehicle and a purse that would provide them with identification. On appeal, she challenges the stop of her coworker's car by police, her arrest for driving under the influence (DUI) which led to her submitting to an intoxilyzer test, and the search of her car. Because the police encounter with the coworker was both based upon reasonable suspicion and voluntary, there was probable cause to believe she was operating under the influence of alcohol, and the search of her vehicle was supported by probable cause and exigent circumstances, we affirm the district court's denial of her motions to suppress.

FACTUAL AND PROCEDURAL HISTORY

One winter evening, the Riley County Police Department received a call reporting a vehicle driving erratically, including swerving and crossing the center line. Police officers located the vehicle and attempted to pull it over. Rather than pulling over, the car fled, leading police on a chase through Manhattan.

During the chase, the driver committed numerous traffic violations including speeding at speeds in excess of 90 miles per hour, driving the wrong way through a roundabout, driving over curbs, driving after dark with the vehicle's lights off, failing to stop at a stop sign, and failing to use a turn signal. At one point during the chase, the vehicle made a U-turn which gave the officers involved an opportunity to clearly see the driver so that they were later able to identify her.

After some time, the chase was terminated because officers were concerned for public safety. Police lost sight of the vehicle, but it was located again within 30 minutes. When the car was located, it was parked in the parking lot of an apartment complex and was unoccupied. The vehicle was registered to Wagner.

Shortly after the vehicle was located, police began a search of the surrounding area in an attempt to locate the driver. While the search was underway a car drove slowly down a dead end road near where the vehicle involved in the

chase was parked. Lieutenant Erin Freidline approached the vehicle on foot as it completed a U-turn at the end of the road. The driver of the vehicle, Nicholas Hagnauer, rolled down the window as Freidline approached and told the officer he was lost and wanted to know how to get out of the area. As Freidline got closer to the vehicle she saw a woman curled up on the passenger seat. Suspecting it might be the woman they were looking for and to whom the vehicle was registered, she said, "Amanda, are you ok?" The passenger raised her head and made eye contact with Freidline. At that point, Freidline asked the driver to shut off the car.

***2** After she made contact with Hagnauer, additional officers came to assist Freidline. One of the officers was Officer Adam Peterson. Peterson had been involved in the car chase and had seen the driver of the car. As a result, he was able to identify the woman in the passenger seat as the driver of the car involved in the chase, Wagner.

As Hagnauer would testify at the suppression hearing, he was a coworker of Wagner's who had known her for about 2 1/2 years. She sent a text message to him asking him to give her a ride home because "[s]he couldn't drive" because she was "too drunk." She also mentioned that she was running from the police. He confirmed that when he picked her up she was drunk. He stated he had seen her sober in the past. He estimated that she was "fairly" drunk, a 7 or 8 on a scale of 1 to 10. The police asked him that evening if Wagner appeared drunk to him, and Hagnauer told them that she did.

Peterson asked Wagner to get out of the car. As she got out, Peterson noticed that she was unsteady, used the vehicle for assistance, smelled strongly of alcohol, and had red bloodshot eyes. When Peterson began speaking to Wagner, he also noticed her speech was slurred. Peterson arrested Wagner without performing any field sobriety tests and took her to jail.

After Wagner was arrested, police conducted a full search of her car. The search turned up open containers of alcohol, Wagner's driver's license, and a small amount of marijuana.

Prior to trial, Wagner filed three motions to suppress. The first motion sought suppression of all evidence gathered out of the stop of Hagnauer's vehicle. The second was a motion to suppress for lack of probable cause to arrest her. The third was a motion to suppress evidence gathered during the search of her vehicle. The district court denied all three motions.

Wagner proceeded to a bench trial at which she stipulated to the facts and was found guilty of fleeing and eluding, DUI, circumvention of an ignition interlock device, possession of marijuana, and transportation of liquor in an open container.

On appeal, Wagner challenges the denial of each of her motions to suppress. After setting forth our standard of review, we will examine each in turn.

When reviewing a district court's denial of a motion to suppress, appellate courts utilize a bifurcated standard. Appellate courts review district courts' factual findings to determine whether they are supported by substantial competent evidence. In making this determination, appellate courts do not reweigh evidence or asses the credibility of witnesses. *State v. Reiss*, 299 Kan. 291, 296, 326 P.3d 367 (2014). Substantial competent evidence "is that which possesses both relevance and substance and which furnishes a substantial basis in fact from which the issues can be reasonably resolved." *State v. Sharp*, 289 Kan. 72, 88, 210 P.3d 590 (2009). The ultimate legal conclusions drawn from the application of the law to the facts are reviewed de novo. *Reiss*, 299 Kan. at 296, 326 P.3d 367.

THE POLICE ENCOUNTER WITH HAGNAUER'S VEHICLE

***3** Wagner moved to suppress all evidence obtained as a result of the stop of Hagnauer's car because she believed the police lacked reasonable suspicion to conduct the stop. She renews this argument on appeal. The State responds with two arguments. First, the State contends that, if the officer's conduct resulted in a stop, then the police had reasonable suspicion so that the stop was legal. Second, the State argues the issue of suspicion is irrelevant because the encounter between Freidline and Hagnauer was voluntary.

Both the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights protect citizens from unreasonable searches and seizures. Courts have interpreted this protection as requiring police to have some minimum level of reasonableness or articulable suspicion before they engage citizens in involuntary encounters, because such interactions amount to seizures. *State v. Parker*, 282 Kan. 584, 588, 147 P.3d 115 (2006). The exact level of suspicion required to initiate an encounter varies based upon the type of interaction taking place.

Courts have distinguished between four different types of law enforcement-citizen encounters: voluntary encounters, investigatory detentions or *Terry* stops, public safety stops, and arrests. 282 Kan. at 588, 147 P.3d 115. Voluntary encounters are unique from the other three because police can engage a citizen in a voluntary encounter without first having any suspicion that the citizen has committed, is, or is planning on committing a crime (or in the case of public safety stops, without suspicion that the person or vehicle poses a public safety risk) because the citizen freely consents to the interaction. 282 Kan. at 588, 147 P.3d 115. An officer may engage a citizen in a short, investigatory detention or stop if the officer has " 'prior knowledge of facts or observe[s] conduct of a person which causes the officer to reasonably suspect that such person is committing, has committed, or is about to commit a crime.' " *State v. Epperson*, 237 Kan. 707, 711, 703 P.2d 761 (1985). When an officer stops a moving vehicle, the resulting traffic stop is viewed as an investigatory detention. *State v. Thompson*, 284 Kan. 763, 773, 166 P.3d 1015 (2007).

The encounter between police and Hagnauer was based upon reasonable suspicion.

After hearing arguments on Wagner's motion to suppress, the district court determined that a stop had occurred and that the motion to suppress evidence gathered out of that stop should be denied because the police had reasonable suspicion for the stop. As discussed above, police must have some minimum level of reasonableness or articulable suspicion before they engage a citizen in an involuntary encounter, because such interactions amount to seizures. *Thompson*, 284 Kan. at 772–73, 166 P.3d 1015. The exact level of suspicion required to initiate an encounter varies based upon the type of interaction taking place. 284 Kan. at 772, 166 P.3d 1015. Traffic stops are generally viewed as investigatory detentions and require officers to have reasonable suspicion that a crime has been, is being, or will be committed at the time the stop is initiated. 284 Kan. at 773, 166 P.3d 1015.

***4** Although reasonable suspicion is not a high bar, it does require an officer to articulate "[s]omething more than an unparticularized suspicion or hunch." *State v. DeMarco*, 263 Kan. 727, 735, 952 P.2d 1276 (1998). To determine whether reasonable suspicion existed, a court looks at the totality of the circumstances, considering both the quantity and quality of the information an officer possessed, at the time he or she initiated contact, to see whether the officer had " ' "a particularized and objective basis" for suspecting the person stopped of criminal activity.' " 263 Kan. at 735, 952 P.2d 1276. However, we do view the evidence in light of a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances. 263 Kan. at 735, 952 P.2d 1276. Reasonable suspicion represents a " 'minimal level of objective justification' " which is "considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Whether reasonable suspicion exists is a question of law. *State v. Moore*, 283 Kan. 344, 350, 154 P.3d 1 (2007).

Here, at the hearing on the motion to suppress, Freidline testified that she was suspicious of the vehicle because "it just it was traveling slowly. Due to the construction area it just didn't seem to fit. It was the one and only vehicle in the amount of time that I had been there that had traveled down that street, and it just raised my suspicion about it." The officer also testified that she had been involved in fleeing and eluding cases before where the driver had abandoned the vehicle and had someone pick him or her up. Because it was a cold evening, she was concerned that that driver was doing just that. Wagner's car was located in the parking lot of an existing apartment building approximately 100 yards from where Hagnauer was stopped. So it would not be unusual for her to call someone to pick her up in the vicinity. This was the only car in the vicinity where officers believed Wagner was hiding and were in fact actively searching for her,

it was driving slowly, and it drove into an area that dead ended into a dirt road. We agree with the district court that Freidline had a reasonable basis to believe that Wagner may be concealed in the car. Accordingly, the district court's decision denying the motion to suppress is affirmed.

Even if there were not reasonable grounds to stop the vehicle, the encounter between police and Hagnauer was voluntary.

Here, the district court arrived at the conclusion that a stop had occurred, citing evidence that Hagnauer was "[f]lagged down by an officer. The individual testified he wasn't going to leave, and there was an officer in front of him that he would have had to drive over if he had tried to leave, and he wasn't going to do that." Although the State did not cross-appeal on this issue, it did argue the voluntariness of the stop as an alternative basis to support the district court's ruling.

***5** Freidline testified that she was on foot in the area near where Wagner's car had been found when a dark-colored vehicle drove slowly past her, hit the point where the road dead ended into the construction site, then made a U-turn to come back toward her. Freidline approached the vehicle after it completed its turn. As Freidline approached, the driver of the vehicle, Hagnauer, rolled down his window, told her he was lost, and asked for directions.

Hagnauer's testimony was substantially the same as Freidline's testimony. He testified that he was completing a U-turn when an officer approached his vehicle on foot. As the officer approached the car, Hagnauer rolled down his window and told her he was lost and needed directions.

Neither party to the alleged stop testified that Hagnauer was, as the district court said, "flagged down." One officer testified that he wrote in his report that Freidline "waved the car down," but then indicated that was a figure of speech and he did not actually see Freidline do anything other than approach the car. Accordingly, this factual finding by the district court was not justified by the evidence.

The Kansas Supreme Court has recognized a number of factors to look at when determining whether an interaction is a voluntary encounter or an investigatory detention.

> "This nonexhaustive and nonexclusive list includes: the presence of more than one officer, the display of a weapon, physical contact by the officer, use of a commanding tone of voice, activation of sirens or flashers, a command to halt or to approach, and an attempt to control the ability to flee." *State v. McGinnis*, 290 Kan. 547, 553, 233 P.3d 246 (2010).

When evaluating the presence or absence of these factors in a given case, the court has instructed that the analysis should not be rigid. Instead, courts should look at the totality of the circumstances, recognizing that no one factor alone is determinative, although some factors may be more indicative of an involuntary encounter than others. 290 Kan. at 553, 233 P.3d 246. The key question is whether a reasonable person, under the circumstances, would feel free to refuse the officer's request or end the encounter. Where an encounter is initiated through the use of physical force or an overt show of authority it is appropriate to conclude that a stop has occurred. 290 Kan. at 552, 233 P.3d 246.

Here, Freidline made no show of authority; she did not utilize lights or sirens to effectuate the stop; Freidline did not yell at or even orally ask Hagnauer to stop; she did not wave the car down or otherwise signal the driver to stop; Freidline approached the vehicle alone while no other officers were in the immediate vicinity; and Freidline did not utilize her weapon to force the car to stop. In short, none of the factors the Kansas Supreme Court has provided for guidance in determining that a stop occurred were present in this case. The only evidence contained in the record that a stop occurred is Hagnauer's testimony that Freidline was standing in the road in front of him. See *McGinnis*, 290 Kan. at 560, 233 P.3d 246 (fact that officer's car appeared to be blocking defendant, not determinative, when defendant could have maneuvered around it). Here, the only thing standing between Hagnauer and the open road was one female officer on foot. If the court in *McGinnis* found that an officer and his car were an insufficient barrier to give rise to the finding of a stop, it would be hard to convincingly argue a stop occurred based on the facts here. Evidence that this was a stop is further diminished

by Hagnauer's testimony that, contemporaneously with Freidline approaching the car, Hagnauer rolled down his window to ask her for directions. This fact points to the stop actually being a mutual, voluntary encounter.

***6** Even if Hagnauer truly believed that he had no choice but to stop when Freidline approached him, his subjective belief is somewhat irrelevant. The crucial question in evaluating whether a stop has occurred and a person has been seized is not whether he or she subjectively felt free to leave, but whether a reasonable person in his or her situation would have felt free not to engage with the officer. Courts have consistently held that "a seizure does not occur simply because a police officer approaches an individual.... 'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' " *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Accordingly, we agree with the State that even if there were not reasonable grounds to stop the vehicle, the encounter between police and Hagnauer was nevertheless voluntary.

PROBABLE CAUSE FOR WAGNER'S ARREST

Wagner next contends that the police lacked probable cause to arrest her for driving under the influence of alcohol. Consequently, she contends, there was no basis to request a breath test and the evidence of the results should be suppressed.

Prior to July 1, 2013, the law was clear. A person was required to be lawfully under arrest for an alcohol or drug related offense before an arresting officer is authorized to request a test of breath, blood, or urine to determine the presence of alcohol or drugs. See *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 18-19, 290 P.3d 555 (2012). This was based on the clear language of K.S.A.2008 Supp. 8 1001(b)(1)(A) at the time *Sloop* was decided, which required that the driver be under arrest for DUI at the time the request was made. In response to *Sloop*, the legislature amended K.S.A. 8 1001(b)(1)(A) to provide in pertinent part:

> "(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a): (1) If, *at the time of the request,* the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, ... and one of the following conditions exists: (A) The person has been arrested or otherwise taken into custody for any *violation of any state statute, county resolution or city ordinance* ...." L.2013, ch. 122, sec. 2.

To be lawful, a warrantless arrest must be supported by probable cause. 296 Kan. at 20, 290 P.3d 555. Probable cause is a higher burden of proof than reasonable suspicion, but it is less exacting than the standard of proof required for a criminal conviction. 296 Kan. at 20, 290 P.3d 555. Probable cause exists when " ' "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " 296 Kan. at 21, 290 P.3d 555.

***7** Immediately after Wagner stepped from Hagnauer's car, she was handcuffed and placed in his patrol vehicle and transported to jail. The arresting officer testified that because Wagner had already fled earlier both in her vehicle and on foot, he did not want to have to chase her down again. The officer clearly had probable cause to believe Wagner had violated the state's fleeing and eluding statute. The car involved in the police chase was found abandoned and registered to her. The same officer who had been involved in the car chase and had seen the driver of the car identified Wagner at the scene. It did not take long to also develop reasonable grounds to believe she was under the influence of alcohol or drugs. He did not have Wagner perform any field sobriety tests. Wagner contends because of the lack of such testing, that police lacked probable cause to arrest her for DUI and request a breath test.

While field sobriety testing is useful for establishing probable cause that a driver is under the influence of alcohol, it is just one tool that officers use to determine whether a driver is capable of driving safely. See *State v. Huff*, 33 Kan.App.2d 942, 945, 111 P.3d 659 (2005). Field sobriety testing, however, is not necessary to establish probable cause. 33 Kan.App.2d at 945, 111 P.3d 659. A probable cause determination is made based on the

totality of the circumstances. *Sloop,* 296 Kan. at 20, 290 P.3d 555. For instance, in *Huff,* this court found probable cause existed based upon Huff's "speeding and driving off the roadway, his slurred speech, bloodshot eyes, fumbling to find his drivers license, and odor of alcohol." 33 Kan.App.2d at 945–46, 111 P.3d 659.

We have no hesitation finding that Wagner was lawfully arrested and was subsequently lawfully requested to take a breath test. Well before the time she was requested to take a breath test, officers had established reasonable grounds to believe she was operating or attempting to operate a vehicle while under the influence of alcohol. Police observed a long list of factors that gave rise to probable cause that Wagner was DUI. At the hearing on the motion to suppress, police testified that they were alerted to her driving due to independent reports that the vehicle was driving erratically, swerving and crossing the center line. The officers then witnessed erratic driving that included failing to stop for emergency vehicles displaying flashing lights and sirens, speeding in excess of 90 miles per hour, driving at night without headlights, driving the wrong way through a roundabout, failure to stop at a stop sign, and failure to use a turn signal. Her driving caused such a danger to the public that police elected to call off the pursuit in hopes she would at least slow down and turn her lights on if the police were no longer following her. When police finally made contact with Wagner, they noticed she had trouble getting out of the car—using the vehicle to steady herself, smelled strongly of intoxicants, had red bloodshot eyes, and her speech was slurred. Once in the officer's vehicle, she fell asleep. Hagnauer, who had known her for over 2 years and picked her up following her text that evening, told officers at the scene that she appeared drunk. He corroborated the officers' testimony that Wagner's speech was slurred, she was "wobbly," "[a] little bit confused," and she appeared drunk.

***8** The totality of the circumstances provide substantial competent evidence that the police had probable cause to arrest Wagner and request that she take a breath test. Accordingly, the district court's decision is affirmed.

THE SEARCH OF WAGNER'S VEHICLE

Wagner contends that the district court erred when it denied her motion to suppress all evidence obtained from the warrantless search of her vehicle, because the search was invalid as a search incident to arrest.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures by police. Whether a search is unreasonable depends entirely on the circumstances surrounding the search—a search that would generally be impermissible without a warrant may be allowed based on an exception to the Fourth Amendment. *State v. Sanchez-Loredo,* 294 Kan. 50, 55, 272 P.3d 34 (2012). The exceptions recognized in Kansas include: " 'consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses.' " 294 Kan. at 55, 272 P.3d 34.

Wagner challenges the validity of the search the police conducted of her vehicle on the theory that it was not a lawful search incident to arrest. But the State has never argued this was a search incident to arrest. The district court did not find it was a search incident to an arrest, but instead focused on its constitutionality based upon the plain view exception. So there is no need to address whether this was a valid search incident to an arrest, and our analysis could end there. However, on appeal, the parties do address the applicability of the plain view doctrine, so we will briefly discuss the applicability of this exception to the warrant requirement.

The State has argued that the search was justified under two separate exceptions: plain view and the automobile exception. Under the plain view exception, " 'if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.' " *State v. Wonders,* 263 Kan. 582, 590, 952 P.2d 1351 (1998). The automobile exception has developed as a specific instance in which a warrantless search will be allowed under the probable cause plus exigent circumstances exception. *Sanchez-Loredo,* 294 Kan. at 56, 272 P.3d 34. Under this exception, police are justified in searching a vehicle when they have probable cause to believe the vehicle contains

contraband or evidence of a crime. 294 Kan. at 56–57, 272 P.3d 34. This is regardless of whether the vehicle or its occupants are already in police custody. 294 Kan. at 56–57, 272 P.3d 34. The automobile exception is the broader of the two exceptions, requiring only probable cause, and fully supports the search that took place here, so we will discuss and apply it to the search of Wagner's vehicle.

***9** The first step in the analysis of whether a search is valid under the automobile exception is to determine whether there was probable cause that evidence of a crime or contraband would be found in the vehicle searched. Probable cause exists "when the facts and circumstances within a law enforcement officer's knowledge ... are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *State v. Fitzgerald*, 286 Kan. 1124, 1128, 192 P.3d 171 (2008). Here, at the time of the search, police knew Wagner's vehicle was the vehicle that had been involved in police chase. Police officers approached the vehicle, looked through the windows, and observed open containers of alcohol. With the driver's erratic and reckless driving, the bottles of alcohol—whether empty or full—could be evidence in a DUI investigation or evidence of the separate crime of transporting an open container. Although Wagner argues that the open containers could not be the basis for probable cause because the officers did not know if there was liquid in them, whether the officers saw liquid in the bottles before entering the vehicle simply goes to the quality of the evidence for a subsequent conviction for transporting an open container. It does not detract from a determination that there was probable cause to believe that the bottles were evidence of a DUI or a transporting an open container charge. They also observed a purse, which could reveal evidence of the identity and location of the person driving the abandoned car that had fled from police.

Looking at the totality of the circumstances, the record clearly supports the district court's finding that the police had probable cause to believe they would find evidence of a crime in Wagner's car at the time they initiated the search.

The second issue to address is the scope of the search. Once police have probable cause to search a vehicle, the search is limited only by the nature of the evidence police hope to find. *State v. Jaso*, 231 Kan. 614, 621, 648 P.2d 1 (1982). Police are justified in searching all parts of the car and containers found therein, in which there is probable cause to believe evidence may be found. So, for instance, " 'probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.' " 231 Kan. at 621, 648 P.2d 1. Here, police testified that they were looking for evidence related to the DUI charge as well as evidence related to the flee and elude charge, such as a driver's license or other evidence that Wagner was the driver of the vehicle. The search for evidence related to driver identification opened essentially the entire vehicle and all containers therein to search.

Substantial competent evidence supported the district court's determination that police had probable cause to conduct a search of Wagner's vehicle under the automobile exception. The district court's denial of the motion to suppress is, therefore, affirmed.

***10** Affirmed.

All Citations

358 P.3d 878 (Table), 2015 WL 6620621

End of Document

Exhibit C

284 P.3d 375 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Scott D. SJOBERG, Appellee,
v.
KANSAS DEPARTMENT OF REVENUE, Appellant.

No. 103,937.
|
Sept. 7, 2012.
|
Review Denied Sept. 25, 2013.

Appeal from Douglas District Court; Paula B. Martin, Judge.

Attorneys and Law Firms

J. Brian Cox, of Legal Services Bureau, Kansas Department of Revenue, of Topeka, for appellant.

Douglas E. Wells, of Topeka, for appellee.

Before LEBEN, P.J., GREEN and MARQUARDT, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** We review this case anew on remand from the Kansas Supreme Court, which concluded that we had not applied the correct standard in deciding the case. So we begin with a review of the three different rules that may apply in determining whether a law enforcement officer has acted within the law in investigating a potential DUI case.

Let's assume first that the officer has stopped a driver for a traffic violation, as occurred in Sjoberg's case. If so, here's how the three rules might play out after that stop:

- To measurably extend the traffic stop beyond what's required to handle the traffic infraction itself (*i.e.*, checking license and registration and then writing a ticket for the infraction), the officer must have reasonable suspicion, which is a particularized and objective basis for suspecting the person stopped is involved in criminal activity. *State v. Pollman*, 286 Kan. 881, Syl. ¶¶ 3, 4, 190 P.3d 234 (2008).

- To arrest the driver on a DUI charge, the officer must have probable cause to arrest. Probable cause exists when the officer's knowledge of the events creates a reasonable belief that a defendant has committed, is committing, or is about to commit a specific crime. *Allen v. Kansas Dept. of Revenue*, 292 Kan. 653, Syl. ¶ 2, 256 P.3d 845 (2011). Probable cause does not require that an officer have evidence of every element of a crime. *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, Syl. ¶ 1, 242 P.3d 1179 (2010).

- To request that the driver take a preliminary breath test or an evidentiary breath test to determine the level of alcohol in the driver's system, the officer must have reasonable grounds. Kansas courts evaluate 'reasonable grounds' by looking to probable cause standards. *Swank v. Kansas Dept. of Revenue*, 294 Kan. 871, 281 P.3d 135, 142(2012).

In Sjoberg's case, we are called upon to determine whether the officer had reasonable grounds to conclude that Sjoberg was operating a vehicle while under the influence of alcohol, see K.S.A.2007 Supp. 8–1001(b), not whether the officer had reasonable suspicion to extend a traffic stop for further investigation. Our Supreme Court's remand order recognizes the importance of this distinction:

> Although the Court of Appeals opinion stated that the issue in the case was whether the arresting officer had reasonable grounds to request a breath test, the opinion relied in part on its review of *State v. Pollman*, 286 Kan. 881, 190 P.3d 234 (2008), where this court found sufficient grounds to establish reasonable suspicion of DUI in order to permit the officer's further detention of the driver for DUI investigation. Appellee petitions for our review of the Court of Appeals opinion, arguing in part that the Court of Appeals confused the

applicable standards, *i.e.,* reasonable suspicion for an investigatory detention, probable cause for an arrest, or reasonable grounds to request an evidentiary breath test. We agree.

Appellee's petition for review in the above-captioned case is granted and the case is summarily remanded to the Court of Appeals for a reconsideration of its decision based upon the reasonable ground standard. See *Allen v. Kansas Dept. of Revenue,* 292 Kan. 653[, 256 P.3d 845] (2011); *Smith v. Kansas Dept. of Revenue,* 291 Kan. 510[, 242 P.3d 1179] (2010).

***2** The point is, of course, well taken: our Supreme Court has also explained that [r]easonable suspicion is a less demanding standard than probable cause. *Pollman,* 286 Kan. 881, Syl. ¶ 6. Thus, by considering cases applying the reasonable-suspicion standard, we could inadvertently tip the scale in favor of the Kansas Department of Revenue.

We therefore reconsider the case under the reasonable-grounds standard. Since Kansas courts generally consider that standard equivalent to the probable-cause standard, see *Swank,* 281 P.3d at 142, we may consider precedents applying either of those standards. To the extent that there is any difference between the reasonable-grounds and probable-cause standards, our Supreme Court has noted that an officer may have reasonable grounds ... but not have the probable cause required to make an arrest. *Smith,* 291 Kan. at 514 (citing *Bruch v. Kansas Dept. of Revenue,* 282 Kan. 764, 776, 148 P.3d 538 [2006]). Thus, to the extent there is any difference in these standards, relying upon cases decided under the probable-cause standard could favor Sjoberg, but we know of no case that has found a difference between those two standards decisive.

Sjoberg's license was suspended for 1 year by the Department of Revenue based on a failed breath test, which was taken shortly after he was arrested for a DUI based on the officer's conclusion that there was probable cause to arrest Sjoberg for a DUI offense. An officer must ask a person to submit to a breath, blood, or urine test to determine the presence of alcohol or drugs if the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence. K.S.A.2007 Supp. 8–1001(b)(1). Sjoberg's contention in his appeal of his license suspension has been that the officer didn't have reasonable grounds to believe Sjoberg had been operating his vehicle while under the influence of alcohol.

We cite in this opinion to the statutes in place on the date of Sjoberg's encounter with law enforcement.

FACTUAL BACKGROUND

We reviewed the facts of the case in detail in our earlier opinion. See *Sjoberg v. Kansas Dept. of Revenue,* No. 103, 937, 2011 WL 4906843 (Kan.App.2011) (unpublished opinion), *rev. granted* June 25, 2012. In our prior decision, however, we did not consider some arguments made on appeal by the Department of Revenue about rulings the district court made that narrowed the facts that could be considered in determining whether the officer had reasonable grounds. We will provide a bit more discussion of those issues in this opinion.

Our story begins at 12:43 a.m. on March 2, 2008; Kansas Highway Patrol Trooper Josh Kellerman pulled Scott Sjoberg over for having a nonworking headlight. When Kellerman approached the car, the driver's and passenger's windows were down and the moon roof was open. Kellerman smelled pizza in the car. After Sjoberg produced his driver's license and registration, Kellerman asked Sjoberg to sit in the patrol car with Kellerman. Kellerman then noticed a little alcohol odor; he testified that the more Sjoberg spoke, the stronger the alcohol smell got. Kelierman also saw that Sjoberg's eyes were bloodshot. Sjoberg admitted to having a few drinks before the KU basketball game and one drink after the game when he and his companion stopped at a bar and had pizza and a beer.

***3** Kelierman then administered a preliminary breath test, which showed that Sjoberg's alcohol level was almost twice the legal limit. Kelierman admitted that he did not comply with his training and the test device's manual by waiting 15 to 20 minutes before administering the test; the test was conducted about 5 minutes after the stop. The district court admitted evidence of the preliminary breath test results at trial over Sjoberg's objection that testing protocols weren't followed.

Kelierman then called for another officer so that they'd have more light to conduct field-sobriety tests. Kelierman asked Sjoberg to complete the horizontal gaze nystagmus, walk-and-turn, and one-leg-stand sobriety tests. On the walk-and-turn test, Kelierman observed two clues of intoxication: Sjoberg lost his balance during the instructions and made an improper turn. Before the one-leg-stand test, a few cars drove by in the lane of traffic closest to where Kelierman and Sjoberg were. Kelierman moved his car to shield the area, and Sjoberg thanked him. When Sjoberg performed the test, Kelierman again observed two clues: Sjoberg used his arms for balance and put his foot down.

Kelierman and Sjoberg got back into the patrol car, and Kelierman asked Sjoberg to take another preliminary breath test. Sjoberg refused; Kelierman arrested him for driving under the influence. Later, at a police station, Sjoberg took and failed an Intoxylizer breath test, which resulted in the suspension of his driver's license. After an administrative hearing, the Department of Revenue affirmed the suspension.

Sjoberg petitioned the Douglas County District Court to review the Department's action, which resulted in a trial in which the evidence we've noted was presented to the district court. The district court found that the preliminary breath test results should not have been considered in the reasonable-grounds determination because Kellerman had failed to wait the required 15 to 20 minutes before administering the test. The district court concluded that Kellerman didn't have reasonable grounds to believe that Sjoberg was driving under the influence, and it overturned the suspension. The district court also held that the results of the horizontal gaze nystagmus test should not have been considered in assessing reasonable grounds.

ANALYSIS

Before we assess whether the officer had reasonable grounds to believe that Sjoberg was driving while intoxicated, we must first consider whether certain facts that were excluded from consideration by the district court should have been considered. Our Supreme Court has held that all of the circumstances related to the driver's situation should be considered when assessing reasonable grounds. See *Smith*, 291 Kan. at 515. Specifically, the district court determined that it would not consider, for purposes of determining reasonable grounds, the result of the initial preliminary breath test, the refusal to take a second preliminary breath test, or the officer's interpretation of the results of the horizontal gaze nystagmus test.

First Preliminary Breath Test Result

***4** The Department insists that compliance with the 15 minute deprivation period is not required before the officer can use a preliminary breath test result in his or her reasonable-grounds determination. Sjoberg insists that the opposite is true.

K.S.A.2007 Supp. 65 1, 107(d) authorized the Kansas Department of Health and Environment (KDHE) to create rules and regulations that establish the criteria for preliminary breath test screening devices before they can be used for law-enforcement purposes, including an officer's reasonable-grounds determination. See *Leffel v. Kansas Dept. of Revenue*, 36 Kan.App.2d 244, Syl. ¶¶ 4, 5, 138 P.3d 784 (2006).

The regulations pertaining to preliminary breath test devices in effect when Sjoberg was stopped listed the requirements that the device must meet before being approved by the KDHE. K.A.R. 28 32 6 (2006). Additionally, the regulations required that the device be operated according to the manufacturer's written directions. K.A.R. 28 32 7(a) (2006). A few weeks after Sjoberg was stopped, the KDHE revoked these regulations and promulgated new ones. But the requirement that the device be operated according to the manufacturer's instructions remained unchanged. K.A.R. 28 32 14(c).

Here, the operator's manual for the preliminary breath test device that Kellerman used suggests a 15 to 20 minute deprivation period before testing. Kellerman testified at trial that he was trained to observe the deprivation period, and he admitted that he did not do so in this case. The police video reflects that Kellerman told Sjoberg that a recent drink would cause the results to skyrocket.

But Kellerman testified that unless a suspect indicated that his or her last drink was fairly recent, he didn't worry about the deprivation period. Nevertheless, the deprivation period's purpose is to make sure that mouth alcohol not only from a recent drink but also from stomach regurgitation doesn't falsely elevate the test. Complying with the deprivation period regardless of when the suspect said he or she last took a drink ensures that regurgitation doesn't skew the test result.

Kellerman's use of the testing device 5 minutes after the stop was a substantial departure from the instruction manual's 15 minute deprivation period. The district court properly ruled that the preliminary breath test result could not be used for the law-enforcement purpose of determining whether there were reasonable grounds to believe that Sjoberg was driving under the influence of alcohol. Moreover, such a ruling makes sense in light of the influence preliminary breath tests have: An officer can arrest a person for driving under the influence based solely on the preliminary breath test's results. K.S.A.2007 Supp. 8 1012(d).

Preliminary Breath Test Refusal

The Department contends that Sjoberg's refusal of the second preliminary breath test can be included in Kellerman's reasonable-grounds determination. Sjoberg counters that the preliminary breath test refusal can only be considered in a preliminary breath test refusal prosecution, not for determining whether a person is driving under the influence.

***5** Refusing to submit to a preliminary breath test is a traffic infraction. K.S.A.2007 Supp. 8 1012(d). Kansas courts have found that a preliminary breath test refusal is admissible to prove that the defendant was guilty of refusing the test, but not to prove that the defendant was guilty of driving under the influence. *State v. Wahweotten*, 36 Kan.App.2d 568, 573 76, 143 P.3d 58 (2006), *rev. denied* 283 Kan. 933 (2007). But this case doesn't present a situation where the refusal is being introduced as evidence to show that Sjoberg's guilty of a crime; rather, Sjoberg is questioning Kellerman's ability to use the refusal when determining reasonable grounds for an officer to conclude that Sjoberg was driving under the influence. K.S.A.2007 Supp. 8 1012(d) explicitly states that the preliminary breath test *results* can be used to assist an officer in determining whether to request tests under K.S.A.2007 Supp. 8 1001. *Wahweotten* suggests that the preliminary breath test *refusal* can be used for the same statutorily indicated purpose as well. 36 Kan.App.2d at 576 ([T]he legislature's intent under K.S.A.2005 Supp. 8 1012 was to limit the use of evidence of a preliminary breath test ... to the circumstances that are specifically set forth in the statute.). We conclude that the officer could take into account Sjoberg's refusal to take a second preliminary breath test, though the significance of that fact in determining reasonable grounds is obviously lessened when the person had already voluntarily taken the test once before.

Horizontal Gaze Nystagmus Test Results

The Department also argues that the district court improperly excluded the results from the horizontal gaze nystagmus (HGN) test from the reasonable-grounds determination. The HGN field-sobriety test asks the suspect to follow an object in the police officer's hand with his or her eyes as the officer moves the object back and forth horizontally; it's considered a sign that the suspect's blood-alcohol level is above .10 if the suspect exhibits four or more out of the six possible points. *State v. Witte*, 251 Kan. 313, 315 17, 836 P.2d 1110 (1992); see Black's Law Dictionary 805 (9th ed.2009). Had the district court let Kellerman testify on this point, he would have explained that he observed Sjoberg exhibit all six clues during the test.

In 1982, the Kansas Supreme Court concluded that for HGN results to be admissible, the proponent must establish the result's admissibility pursuant to the standard articulated in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923). *Witte*, 251 Kan. 313, Syl. ¶ 2. But as the Department points out, Sjoberg's HGN results were not being admitted at trial to prove guilt. Kellerman was testifying about how the field-sobriety-test results including the HGN test supported his belief that Sjoberg was driving under the influence.

Some opinions from our court have declined to decide the issue about whether HGN results may be considered in determining whether an officer had reasonable grounds to believe a driver was intoxicated. *E.g., Martin v.*

Kansas Dept. of Revenue, 38 Kan.App.2d 1, 7 8, 163 P.3d 313 (2006); *Spencer v. Kansas Dept. of Revenue*, No. 93,765, 2006 WL 2043016, at *3 (Kan.App.2006) (unpublished opinion). In the context of a criminal case, however, in which the question was whether an officer had reasonable suspicion to request a preliminary breath test, our court has concluded that an officer's testimony about HGN results could be considered in determining the reasonable-suspicion question. *City of Wichita v. Molitor*, 46 Kan.App.2d 958, Syl. ¶ 6, 268 P.3d 498 (2012), *petition for review filed* February 13, 2012.

***6** In our prior ruling in Sjoberg's case, we concluded that we need not answer this question because it wasn't necessary to consider the HGN testing to conclude that the officer here had reasonable grounds to believe Sjoberg was driving while intoxicated. After reconsideration, that is still our conclusion. We therefore need not determine whether the district court erred by excluding the HGN testimony.

Other Factual Disputes

In addition to its challenge to the district court's exclusion of some evidence from reasonable-grounds consideration, the Department of Revenue also challenges some factual findings the district court made.

According to the Department, the district court erroneously found that: (1) Sjoberg was mimicking Kellerman's actions on the walk-and-turn test; (2) the wind and passing traffic adversely impacted Sjoberg's ability to perform the field-sobriety tests; (3) Kellerman said he only smelled a faint scent of alcohol; (4) Kellerman observed Sjoberg's eyes as only bloodshot, not extremely bloodshot; and (5) Sjoberg's statements about when he last drank were consistent.

First, although the district court initially found that Sjoberg was mimicking Kellerman, it amended its conclusion and stated that it couldn't determine whether Sjoberg was mimicking or not. Whether Sjoberg was mimicking Kellerman was therefore not a factual finding that the district court made.

Second, Kellerman testified that, based on his experience, the wind wasn't at a level that would make the field-sobriety tests unfair. But the sound of blowing wind is heard in the police video and Sjoberg's clothing is seen to be blowing a good amount as well. Moreover, Sjoberg remarked at trial how the wind was blowing so strongly that it pushed him while he was standing and made it difficult to do the field-sobriety tests.

Additionally, before the one-leg-stand test, Sjoberg commented to Kellerman that it had to be scary for the officers too with all the cars coming towards them. Kellerman remarked that he didn't know why people weren't getting over in the far lane of traffic. At trial, Sjoberg testified that he was scared for his safety because the cars driving on the highway weren't getting over into the far lane and were passing just a few feet from him. He said that he couldn't concentrate on anything but whether he was safe. Although Kellerman said that he felt things were safe and it was his job to make sure that they were, Kellerman did say that the cars were fairly close and he recalled that Sjoberg's attention had been diverted at some point. Kellerman also said that it wouldn't be proper to conduct field-sobriety tests when the suspect is concerned for his safety. The speed limit on that part of the highway was 70 miles-per-hour.

Third, Kellerman did testify that the alcohol odor got stronger as Sjoberg spoke to him. In the police video, however, Kellerman said that he could smell just a little bit of an alcohol odor; one that he described a bit later as not real strong.

***7** Fourth, Kellerman testified that Sjoberg's eyes appeared extremely bloodshot. But he also noted that his incident report described Sjoberg's eyes as merely bloodshot.

Fifth, Sjoberg first told Kellerman that he drank earlier before the game; it wasn't until a little later that he told Kellerman about the postgame beer. Sjoberg said that he'd had four beers before the game and another after at about 10:30 or 11 p.m. On cross-examination, he clarified that he got the beer at 11:30 p.m. and probably finished it by midnight or 12:30 a.m. Kellerman admitted that Sjoberg didn't say his last drink was between 11:30 p.m. and 12:30 a.m., but Kellerman himself testified that he didn't see any inconsistencies in Sjoberg's testimony about when Sjoberg's last drink was.

The Department has not shown that the district court's factual findings weren't supported by substantial evidence a reasonable person would accept the evidence we've just noted as sufficient to support the district court's findings. Moreover, as Sjoberg points out, the Department is in essence asking this court to do what it cannot reweigh the evidence and reassess the witnesses' credibility. See *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009); *Snyder v. Kansas Dept. of Revenue*, No. 103,767, 2011 WL 1196917, at *2 (Kan.App.2011) (unpublished opinion), *rev. denied* 293 Kan. (October 7, 2011).

Consideration of Reasonable Grounds

We turn now to consideration of whether the officer had reasonable grounds to conclude that Sjoberg was driving while intoxicated. In doing so, we rely upon the facts found by the district court and any other facts that aren't in dispute.

Before stopping Sjoberg, Kellerman didn't see any typical clues of intoxication: Kellerman observed Sjoberg having no troubles staying in his lane, maintaining his speed, braking, accelerating or decelerating, pulling the car off the road, or stopping the car; Sjoberg didn't weave, straddle or cross the lane lines, turn with a wide radius, swerve, drift, drive more than 10 miles under the speed limit, act inconsistently with his turn signal, make an unsafe lane change, throw objects from the car, follow another vehicle too closely, or almost hit another vehicle or person.

Although the Department insists that Sjoberg's nonworking headlight indicates intoxication, this wasn't described as a typical intoxication clue at trial, and we find no basis to give it any weight in the reasonable-grounds determination. The lateness of the hour when the suspect is stopped, on the other hand, does support an inference that there's a greater likelihood of encountering an intoxicated driver. See *Kohn v. Kansas Dept. of Revenue*, No. 103,703, 2011 WL 768000, at *2 (Kan.App.2011) (unpublished opinion) (finding that the time of the stop after 1 a.m. was one factor that supported reasonable grounds to request testing); *Horton v. Kansas Dept of Revenue*, No. 101, 047, 2009 WL 3270833, at *2 (Kan.App.2009) (unpublished opinion) (same). As the district court noted, however, the time of day could also be explained in this case based on the nighttime basketball game and Sjoberg's explanation that he'd eaten after the game.

***8** Kellerman said that his suspicions about intoxication arose when he approached Sjoberg's vehicle and noticed that the windows were down and the moon roof was open. Based on his experience and training, opening the car in such a manner can be a sign that a suspect is trying to air the car out and get rid of an incriminating smell. But Kellerman admitted at trial that several innocent explanations exist for having the windows and moon roof open, and Sjoberg had testified that the temperature was warm that night.

Sjoberg didn't exhibit several other common clues of alcohol impairment: Sjoberg didn't attempt to flee, didn't act in a disorderly or threatening manner, didn't have difficulty communicating or slurred speech, didn't fumble when he got his license, had no trouble exiting his car, didn't stumble, wasn't slow in responding to Kellerman's questions or instructions, and didn't have alcohol or drugs in the car. The police video confirms these observations.

Sjoberg's eyes were bloodshot, but they weren't watery, glazed, or droopy. And Kellerman acknowledged that a person's eyes can be bloodshot for reasons other than intoxication, including the time being as late as it was in this case. Kellerman only noticed the alcohol smell after he had Sjoberg in his patrol car; again, Kellerman recognized that a person can smell like alcohol yet not be intoxicated.

Kellerman did observe Sjoberg exhibit some clues of intoxication on the field-sobriety tests. Kellerman admitted that the walk-and-turn and one-leg-stand tests are not normal activities, and Sjoberg didn't exhibit the six other clues on the walk-and-turn test or the two other clues on the one-leg-stand test.

Based upon the district court's findings, the officer had detected bloodshot eyes and a mild odor of alcohol. In addition, Sjoberg had admitted that he'd drunk one beer quite recently and that he'd drunk four to five beers over the course of the day, and there were some clues of impairment in field-sobriety tests (the district court found

that Sjoberg exhibited at least two clues of impairment on the walk-and-turn test and had a balance problem at one point in the one-leg-stand test), though there also was a possible innocent explanation for that based on wind and traffic. In addition, it was nearly 1 a.m.

The closest published Kansas appellate case to these facts is *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 431 32, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998). In *Campbell,* the driver was stopped for driving 72 miles per hour in a 55 mile-per-hour zone at about 1:10 a.m. The officer immediately noted an odor of alcohol on the driver's breath. The driver had glazed and bloodshot eyes, and he admitted having had a few drinks. Our court found that these facts were *more* than sufficient to satisfy a reasonably prudent officer that [the suspect] had been driving under the influence. (Emphasis added.) Thus, the court found that there was probable cause to arrest Campbell. 25 Kan.App.2d at 432.

***9** The facts of *Campbell* are very similar to Sjoberg's case. Sjoberg was stopped just before 1 a.m., had bloodshot eyes, and admitted to drinking right before he was pulled over. As in *Campbell,* the lateness of the hour provides some support for an inference of drunk driving. Here, unlike *Campbell,* Sjoberg had some difficulty in field-sobriety tests; no field-sobriety tests were considered in the probable-cause determination in *Campbell.*

We recognize, as we did in our earlier *Sjoberg* opinion, that this case presents a judgment call. The district court provided a carefully reasoned written opinion coming out the other way. But once we have the facts in hand, either undisputed ones or those as found by the district court, we must independently review the ultimate legal questionhere, whether the officer had reasonable grounds to believe Sjoberg had been driving under the influence of alcohol. See *Poteet v. Kansas Dept. of Revenue,* 43 Kan.App.2d 412, 415 16, 233 P.3d 286 (2010).

We also recognize that the district court noted potential innocent explanations for some of the facts, including the lateness of the hour (not unusual based on attendance at a KU men's basketball game) and some difficulties in field-sobriety tests (potentially explainable based on wind and traffic conditions). We note, however, that in the context of determining whether the reasonable suspicion to extend a traffic stop exists, our Supreme Court has said that courts should analyze all circumstances and not eliminate from consideration factors that might have an innocent explanation. *State v. Coleman,* 292 Kan. 813, 817 18, 257 P.3d 320 (2011). The same concept applies when determining reasonable grounds for concluding whether a person was driving under the influence of alcohol. *State v. Ramirez,* 278 Kan. 402, 406 09, 100 P.3d 94 (2004) (applying this rule to officer's determination of probable cause to arrest); *Fleming v. Kansas Dept. of Revenue,* No. 97, 182, 2007 WL 2178261, at *2 (Kan.App.2007) (unpublished opinion) (applying this rule to officer's determination of reasonable grounds in license-suspension case). We must consider reasonable grounds based on all the circumstances. While the district court correctly notes that the weight to be given to some of them may be less than suggested by the officer or by the Department of Revenue, they cannot be altogether excluded from consideration.

In our view, Trooper Kellerman had reasonable grounds to believe that Sjoberg had been driving while intoxicated. A person commits a DUI offense in Kansas when he or she either is unable to drive safely, K.S.A.2007 Supp. 8 1567(a)(3), or has a blood-alcohol level of .08 or above, K.S.A.2007 Supp. 8 1567(a)(1), and the latter, strict-liability option does not require any bad driving to constitute a crime. Our court recently made this point in *Cline v.. Kansas Dept. of Revenue,* No. 103,123, 2011 WL 148897, at *2 3 (Kan.App.2011), *rev. denied* 291 Kan. 910 (2011), where we found that the driver's admission that he had recently consumed two mixed drinks supplied reasonable grounds to believe there was a violation of the Kansas blood-alcohol-level statute:

> ***10** Cline ... told Trooper Walker that he had two mixed drinks earlier in the evening. That alone furnished a reasonable ground to request a chemical or blood test. In K.S.A. 8 1567, Kansas has criminalized the status offense of driving with a blood-alcohol level of .08 or more. The offense requires only that the person drive or attempt to drive a vehicle (which Cline clearly did) and that the person

> exceed the requisite blood-alcohol level. Neither the person nor his or her driving need be impaired by the alcohol to violate the statute. Cline's statement to Trooper Walker that he had recently consumed more than a negligible amount of alcohol provided probable cause or a reasonable ground to believe a violation had occurred and, in turn, to arrest and to require a test.2011 WL 148897, at *2.

In Sjoberg's case, as in *Campbell,* there are factors beyond the mere admission of recent drinking to support the officer's reasonable-grounds conclusion an odor of alcohol, bloodshot eyes, the early-morning hour, and some clues of impairment in field-sobriety tests. See also *Allen v. Kansas Dept of Revenue,* 292 Kan. 653, 659 60, 256 P.3d 845 (2011) (finding reasonable grounds from odor of alcohol, bloodshot eyes, admission of drinking, three impairment clues on walk-and-turn test, one clue of impairment on one-leg-stand test, brief driving irregularities, and status of driver as a minor); *Smith v. Kansas Dept. of Revenue,* 291 Kan. 510, 518 19, 242 P.3d 1179 (2010) (finding reasonable grounds from odor of alcohol, bloodshot and watery eyes, admission to having had a few drinks with one only 30 minutes before stop, open container, two impairment clues on walk-and-turn test, and one impairment clue on one-leg-stand test).

As the court concluded in *Allen,* [u]nder these factual circumstances, [the trooper] had good reason to 'believe that guilt [was] more than a possibility.' 292 Kan. at 660 (quoting *Bruch v. Kansas Dept. of Revenue,* 282 Kan. 764, 775 76, 148 P.3d 538 [2006]). Trooper Kellerman had reasonable grounds to believe that Sjoberg had been driving while intoxicated.

The district court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

All Citations

284 P.3d 375 (Table), 2012 WL 3966511

End of Document

Exhibit D

395 P.3d 840 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

James FORREST, Appellee,

v.

KANSAS DEPARTMENT OF REVENUE, Appellant.

No. 115,532

Opinion filed June 2, 2017

Appeal from Russell District Court; MIKE KEELEY, judge.

Attorneys and Law Firms

John Shultz, of Kansas Legal Services Bureau, Kansas Department of Revenue, for appellant.

No appearance by appellee.

Before Atcheson, P.J., Malone and Powell, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** The Kansas Department of Revenue appeals the Russell County District Court's decision to set aside the administrative suspension of James Forrest's driver's license. The Department took the action against Forrest based upon results of a breath test confirming his intoxication while operating a motor vehicle. The district court incorrectly placed the burden of proof on the Department rather than Forrest and improperly disregarded entirely Forrest's refusal to take a preliminary breath test. Those errors require that we reverse the district court's ruling and remand for further proceedings.

Given the issues on appeal, we need not burden our review with an extended factual or procedural history.

In October 2014, Russell Police Officer Travis Peck stopped Forrest after observing several driving errors. Peck noticed Forrest smelled of alcohol and slurred his words as he spoke. Forrest admitted to have been drinking. According to Peck, Forrest performed two field sobriety tests in a manner consistent with his being impaired. Peck asked Forrest to take a preliminary breath test; Forrest refused.

Peck then arrested Forrest and transported him to the police station. At the station, Peck duly informed Forrest about his rights and obligations with respect to the testing of the alcohol level in his blood. As part of that process, Peck read the DC 70 advisory to Forrest. Forrest consented to and took a breath test to measure his blood-alcohol level. The test result of .118 placed Forrest over the legal limit. See K.S.A. 2016 Supp. 8-1567(a)(2) (driver guilty of driving under the influence if his or her blood-alcohol level is .08 or more).

Based on the blood-alcohol test result, the Department suspended Forrest's driver's license. Forrest requested and received an administrative hearing in which the hearing officer upheld the suspension. As provided in K.S.A. 2016 Supp. 8-1020(o), Forrest sought judicial review of the suspension order. A district court conducts a trial de novo in evaluating the propriety of an administrative suspension of a person's license. K.S.A. 2016 Supp. 8-1020(p). And the suspended driver bears the burden of proving the Department's order should be set aside. K.S.A. 2016 Supp. 8-1020(q).

Forrest challenged the suspension on the basis Peck lacked "reasonable grounds" to believe he was under the influence of alcohol and, therefore, had no legal basis to arrest him and then to request a blood-alcohol test. See K.S.A. 2016 Supp. 8-1001(b)(1)(A). The reasonable grounds standard under K.S.A. 2016 Supp. 8-1001(b)(1)(A) essentially replicates the evidentiary threshold required for probable cause to arrest. *State v. Declerck*, 49 Kan. App. 2d 908, 917, 317 P.3d 794, *rev. denied* 299 Kan. 1271 (2014). Sitting without a jury, the district court heard testimony and received other evidence on November 18, 2015. Peck was the only witness to testify. He did not recall some aspects of his encounter with Forrest, including the results of the field sobriety tests. Peck's contemporaneous

report regarding Forrest's arrest was admitted as a past recollection recorded as to those particulars.

***2** The district court reversed the administrative suspension of Forrest's driver's license in a memorandum decision issued February 18, 2016, because Peck did not have reasonable grounds to believe Forrest had been operating his vehicle under the influence. In its written ruling, the district court stated: "The burden is on the officer to show there was reasonable grounds to request the breath test, and ... that burden was not met." The district court also expressly declined to consider Forrest's refusal to take the preliminary breath test in assessing whether Peck had reasonable grounds to proceed with the arrest and the later blood-alcohol test. The Department has appealed the district court's decision.

The two points we take up are questions of law, so we owe no deference to the district court's handling of them.

First, as we have indicated, the district court improperly placed the burden of proof on the Department to establish reasonable grounds for the arrest and testing. But K.S.A. 2016 Supp. 8-1020(q) places the burden on Forrest to prove the absence of reasonable grounds. See *Mitchell v. Kansas Dept. of Revenue*, 41 Kan. App. 2d 114, 122, 200 P.3d 496, *rev. denied* 289 Kan. 1279 (2009). That error in misplacing the burden of proof alone requires reversal.

Second, the district court declined to consider Forrest's refusal to take the preliminary breath test in determining whether Peck had reasonable grounds. The district court based the declination on a legal conclusion rather than an assessment of disputed facts. The district court reasoned that there was no showing the device Peck would have used to administer the preliminary breath test had been properly calibrated or that Forrest had been informed that he had no right to consult with a lawyer about the testing, that refusing would amount to a traffic infraction, and that he might be required to submit to further testing. See K.S.A. 2016 Supp. 8-1012(c) (outlining required notice for preliminary breath test).

Neither rationale holds up. Since Forrest didn't take the preliminary breath test, the calibration of the testing instrument, which was never used, is irrelevant. The operative evidentiary fact was Forrest's refusal itself. As to the other, K.S.A. 2016 Supp. 8-1012(c) provides that a law enforcement officer's failure to give the statutorily required information about the preliminary breath test to a driver "shall not be an issue or a defense in any action." So the district court could not have disregarded Forrest's refusal for that reason.

In short, the district court had no sound legal basis to ignore Forrest's refusal to take the preliminary breath test in assessing the evidence bearing on whether Peck had reasonable grounds to make the arrest and then to request a blood-alcohol test. This court has previously held that a law enforcement officer may draw a negative inference from a driver's refusal to take a preliminary breath test. That is, the refusal amounts to circumstantial evidence the driver knows he or she has been drinking and likely is sufficiently intoxicated that he or she will fail the test. The refusal, therefore, properly may be considered in a driver's license revocation proceeding as bearing on reasonable grounds. See *Chambers v. Kansas Dept. of Revenue*, No. 115,141, 2017 WL 1035442, at *5 (Kan. App. 2017) (unpublished opinion); *Wilkerson v. Kansas Dept. of Revenue*, No. 113,058, 2015 WL 6457801, at *3 (Kan. App. 2015) (unpublished opinion); *cf. Landram v. Kansas Dept. of Revenue*, No. 104,790, 2012 WL 924803, at *8 (Kan. App. 2012) (unpublished opinion) (Atcheson, J., dissenting) (refusal to perform field sobriety tests may be considered as evidence driver knew he or she was sufficiently impaired that he or she would fail the tests), *rev. denied* 296 Kan. 1130 (2013). We express no opinion on other circumstances in which the refusal to take a preliminary breath test might be considered as evidence. Here, however, the district court erred in declining to consider Forrest's refusal at all.

***3** Given those errors, the district court's conclusion is legally infirm and cannot be upheld. We, therefore, reverse the order finding the Department lacked legally sufficient grounds to suspend Forrest's driver's license and remand to the district court for further proceedings. On remand, the district court should reevaluate the trial evidence correctly placing the burden of proof on Forrest and according Forrest's refusal of the preliminary breath test such weight as may be appropriate in conjunction with the other evidence in determining whether Peck had reasonable grounds to believe Forrest was under the

influence and thus subject to arrest and blood-alcohol testing.

Reversed and remanded with directions.

All Citations

395 P.3d 840 (Table), 2017 WL 2399475

Exhibit D1

249 P.3d 468 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Sydney S. STERLING, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 103,780.
|
April 8, 2011.

West KeySummary

1 Automobiles
Refusal of test

Substantial evidence in license suspension case, arising from refusal of evidentiary breath test, supported district court's finding that there were reasonable grounds for an officer to request that a driver submit to alcohol testing despite the absence of a traffic infraction. Driver drove 20 miles per hour under the speed limit, was weaving in her lane, and failed to maintain a smooth line around a curve. Driver admitted to drinking alcohol, had watery and bloodshot eyes, and "slightly mumbled" speech. Driver failed two sobriety tests and a preliminary breath test. K.S.A. 8–1001.

Cases that cite this headnote

Appeal from Barber District Court; Robert J. Schmisseur, Judge.

Attorneys and Law Firms

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

James G. Keller, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before GREENE, C.J., PIERRON and ARNOLD–BURGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Sydney S. Sterling appeals her driver's license suspension. Because the officer had reasonable grounds to ask her to submit to a breath test under K.S.A. 8–1001, we affirm.

FACTS

While on patrol at about 2:25 a.m., Kansas Highway Patrol Trooper Brian Quick observed a vehicle approaching him at 43 miles per hour in a 65–mile per hour zone. As the vehicle neared his, it slowed down to 38 miles per hour. Quick turned around to follow the vehicle. As he followed the vehicle, Quick noticed it weave within its lane and fail to maintain a smooth line around a curve in the road. He followed for about a mile and a half before pulling the vehicle over. Quick did not observe any traffic infractions prior to pulling the vehicle over.

The driver of the vehicle was Sterling. Quick told her that he pulled her over because she was driving extremely slow and had been weaving in her lane. Sterling told Quick that she was tired and asked him if he had seen her son or knew of any parties in the area. As he talked with Sterling, Quick noticed that she smelled of alcohol, had bloodshot and watery eyes, and had "slightly mumbled" speech. Sterling admitted to Quick that she had consumed alcohol that night. Based upon these factors and Sterling's driving, Quick believed that she was intoxicated and asked her to step out of the vehicle for sobriety testing.

Quick first asked Sterling to recite the alphabet. In her recitation, Sterling placed the letter F in between R and S. Quick then asked Sterling to perform a "finger count" test, which she was unable to complete correctly. Based on the results of the tests given, Quick asked Sterling to complete a preliminary breath test (PBT). She agreed. The

result of this test was over .08. Sterling refused to submit to an evidentiary breath test.

Following an administrative hearing, Sterling's driving privileges were suspended. On review, the district court found that based upon Sterling's slow and unsteady driving, the smell of alcohol, bloodshot eyes, mumbled speech, and the results of the PBT, Quick had reasonable grounds to ask her to submit to a breath test and affirmed the administrative sanction.

STANDARD OF REVIEW

Generally, an appellate court reviews a district court's determination of whether there are reasonable grounds to request alcohol testing for substantial competent evidence. *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629, 176 P.3d 938 (2008). A law enforcement officer has "reasonable grounds to believe" that a person is operating or attempting to operate a vehicle while under the influence of alcohol or drugs if, under the totality of the circumstances, a reasonably prudent police officer would believe that the person's guilt is more than a mere possibility. *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, 775–76, 148 P.3d 538 (2006). The reasonableness of an officer's suspicion is based on the totality of the circumstances and is viewed from the perspective of those versed in law enforcement. *Martin*, 285 Kan. at 637, 176 P.3d 938.

There was substantial competent evidence to support the district court's finding.

***2** There was no traffic infraction in this case. But a traffic infraction is not the only basis to support Quick's request in this case. Quick observed Sterling drive 20 miles per hour under the speed limit, weave within her lane, and fail to maintain a smooth line around a curve. While none of this behavior amounted to a traffic infraction, it was sufficient to catch the officer's attention and be considered out of the ordinary. Weaving within one's lane can provide the basis for a trained law enforcement officer to believe the occupant may be impaired. *State v. Field*, 252 Kan. 657, 664, 847 P.2d 1280 (1993).

Once Quick made personal contact with Sterling, Sterling admitted to drinking alcohol, smelled of alcohol, had watery and bloodshot eyes, and "slightly mumbled" speech. Sterling failed the two sobriety tests and a PBT. K.S.A.2010 Supp. 8–1012(d) provides that "[a] law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test." It also provides that the results are admissible "to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8–1001 and amendments thereto." K.S.A.2010 Supp. 8–1012(d). Therefore, the failure of the PBT alone is sufficient reasonable suspicion to request additional testing.

The results of the PBT, the other physical indicia of intoxication, and Sterling's abnormal and unsteady driving, constituted substantial evidence to support the district court's finding that there was reasonable grounds for Quick to request alcohol testing.

Affirmed.

All Citations

249 P.3d 468 (Table), 2011 WL 1377010

Exhibit E

2017 WL 2899730
Unpublished Disposition
Only the Westlaw citation is currently available.
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Bryan Richard HARRIS, Appellant.

No. 116,129

Opinion filed July 7, 2017

Appeal from Atchison District Court; ROBERT J. BEDNAR, judge.

Attorneys and Law Firms

Michael G. Highland, of Bonner Springs, for appellant.

Gerald R. Kuckelman, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Green, P.J., Powell and Gardner, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** In 2015, Bryan Richard Harris had a warrant out for his arrest for failure to appear. Harris was arrested by law enforcement officers from the Atchison, Kansas, Police Department. During his arrest, Harris asserted that he was not Bryan Harris. He also physically resisted arrest. Harris was charged with two counts of interference with a law enforcement officer under K.S.A. 2015 Supp. 21 5904 one count of interference with law enforcement under K.S.A. 2015 Supp. 21 5904(a)(1)(C) and one count under K.S.A. 2015 Supp. 21 5904(a)(3). Harris was found guilty of both counts at a bench trial. Harris now appeals, arguing that insufficient evidence existed to support his convictions. For reasons stated below, we reject these arguments. Accordingly, we affirm.

In the late afternoon of November 7, 2015, Atchison Police Department Sergeant Kory Webb and Officer Kyle Mason responded to an anonymous tip that Harris, who had a warrant out for his arrest, was located in the backyard of an Atchison residence. After confirming that Harris had an arrest warrant for failure to appear, Sergeant Webb and Officer Mason went to the residence. Sergeant Webb went to the backyard while Officer Mason knocked on the front door of the house.

While Sergeant Webb was in the backyard, he saw Harris open the backdoor. Sergeant Webb told Harris to "stop." When Harris saw Sergeant Webb, he ran back into the house. Sergeant Webb recognized Harris because he was familiar with him from past dealings. Sergeant Webb followed Harris into the house and then into the basement. Sergeant Webb told Harris that he was under arrest. Harris circled the stairwell in the basement, avoiding Sergeant Webb. Sergeant Webb finally drew his taser and ordered Harris to get on the ground. Harris complied. Sergeant Webb told Harris that there was a warrant out for his arrest. When Sergeant Webb then attempted to put handcuffs on Harris, Harris resisted by pulling away. Sergeant Webb was unable to put handcuffs on Harris until Officer Mason came to the basement to assist him. When Officer Mason saw that Harris was physically resisting, he assisted Sergeant Webb in securing Harris.

While Sergeant Webb was attempting to handcuff Harris, Harris stated that he was "not ... Bryan Harris." Harris did not give any fictitious name or assert that he was anyone else, he only denied being Bryan Harris. Sergeant Webb and Officer Mason were able to confirm Harris' identity when they found a driver's license in his pocket.

Once Harris was handcuffed, he continued to resist. Despite being asked to stand up multiple times, Harris refused. The law enforcement officers had to pick Harris up off of the ground. Sergeant Webb and Officer Mason had to carry Harris out of the house because he did not want to be arrested. Then, Harris had to be physically lifted and placed into the police car to take him to jail. Officer Mason noted that Harris was not kicking or swinging at the officers, but he was aggressively moving

in a way that made it clear that he did not want to be arrested. When the officers arrived at the jail, Harris had to be forcibly removed from the patrol car.

***2** On November 9, 2015, Harris was charged with two counts of interference with a law enforcement officer under K.S.A. 2015 Supp. 21 5904. Both counts were charged as class A nonperson misdemeanors.

On December 9, 2015, the district court received a collection of handwritten material from Harris. In an "Affidavit of Truth," Harris asserted that he was "dwelling above and beyond the STATES [*sic*] territorial jurisdiction and upon terra firma within the Temple of the Living God." Harris went on to claim that he was a "Private Diplomat appointed to act as a Gratuitous Agent" and "the Flesh and Blood Living Divine Being." The district court ordered Harris to undergo a mental and competency assessment to determine whether he suffered from mental illness or defect that prevented him from understanding the nature of the charges against him. There is no finding as to Harris' competency in the record on appeal.

On February 3, 2016, a bench trial was held. Harris represented himself pro se. Harris was found guilty on both counts of interference with a law enforcement officer. Harris objected to the findings of guilt, asserting that he was under the impression that he was at a preliminary hearing on the matter. The district court judge told Harris that misdemeanors did not require a preliminary hearing. On March 28, 2016, Harris was sentenced to 1 year of imprisonment. Harris filed a timely notice of appeal.

Did Sufficient Evidence Exist to Support Harris' Convictions for Interference with Law Enforcement?

Harris was convicted of one count of interference with law enforcement under K.S.A. 2015 Supp. 21 5904(a)(1)(C) and one count of interference with law enforcement under K.S.A. 2015 Supp. 21 5904(a)(3). On appeal, Harris challenges his convictions by arguing that they were not supported by sufficient evidence.

When an appellant in a criminal case challenges the sufficiency of the evidence supporting his or her conviction, the appellate court reviews the evidence in the light most favorable to the State. The court will uphold a conviction when it finds that based on the evidence presented at trial, a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Laborde*, 303 Kan. 1, 6, 360 P.3d 1080 (2015). In determining whether sufficient evidence existed to support a conviction, the appellate court should not reweigh evidence or reassess the credibility of witnesses. *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016). A guilty verdict will only be reversed in the rare case that the testimony presented is so incredible that no reasonable factfinder relying on it could have found the defendant guilty beyond a reasonable doubt. *State v. Matlock*, 233 Kan. 1, 5 6, 660 P.2d 945 (1983). To the extent that we are required to interpret Harris' statute of conviction, we exercise unlimited review. *State v. Collins*, 303 Kan. 472, 473 74, 362 P.3d 1098 (2015).

Harris challenges his convictions based on sufficiency of the evidence. He was convicted under K.S.A. 2015 Supp. 21 5904(a)(1)(C) and K.S.A. 2015 Supp. 21 5904(a)(3). Under K.S.A. 2015 Supp. 21 5904(a)(1)(C), interference with law enforcement is "[f]alsely reporting to a law enforcement officer, law enforcement agency or state investigative agency ... any information, knowing that such information is false and intending to influence, impede or obstruct such officer's or agency's duty." Under K.S.A. 2015 Supp. 21 5904(a)(3), interference with law enforcement is "knowingly obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty."

***3** We are guided in this inquiry by the recent decision in *State v. Miller*, No. 113,595, 2016 WL 1079467 (Kan. App. 2016) (unpublished opinion). This court discussed the differences between reporting false information to the police under K.S.A. 2014 Supp. 21 5904(a)(1)(C) and obstructing, resisting, or opposing the police under K.S.A. 2014 Supp. 21 5904(a)(3). Notably, those same two subsections are at issue in our current appeal.

In *Miller*, the court held "that the plain language of K.S.A. 2014 Supp. 21 5904(a)(1)(C) does not include a substantial hindrance requirement." 2016 WL 1079467, at *5. The court explained its holding:

> "It is important to recognize that the state of mind required to violate K.S.A. 2014 Supp. 21 5904(a)(1)(C) is significantly different than the state of mind required to violate K.S.A. 2014 Supp. 21 5904(a)(3) or the former K.S.A. 21 3808(a). On the one hand, it is a violation of K.S.A. 2014 Supp. 21 5904(a)(1)(C) to knowingly report false information 'intending to influence, impede or obstruct' the duties [of] a law enforcement officer. So, there is no requirement that an actual obstruction be proven simply the intent to obstruct. On the other hand, one can be convicted for violating K.S.A. 2014 Supp. 21 5904(a)(3) only if he or she knowingly obstructed, resisted, or opposed a person authorized to serve legal process. Hence, an actual obstruction, resistance, or opposition must be proven. Moreover, we note that unlike 'Interference with law Enforcement False Reporting,' the pattern instruction for 'Interference with Law Enforcement Obstructing Legal Process' includes 'substantial hindrance or increased burden' as one of the required elements." 2016 WL 1079467, at *5.

In arguing that his convictions were not supported by sufficient evidence, Harris challenges each conviction separately. Accordingly, we will address Harris' convictions in turn below.

K.S.A. 2015 Supp. 21 5904(a)(1)(C)

K.S.A. 2015 Supp. 21 5904(a)(1)(C) defines interference with law enforcement as "[f]alsely reporting to a law enforcement officer, law enforcement agency or state investigative agency ... any information, knowing that such information is false and intending to influence, impede or obstruct such officer's or agency's duty." The basis for Harris' conviction was the fact that he told the arresting officers that he was "not the person of Bryan Harris." Harris argues that "[b]ecause Webb already knew who Harris was, indeed was actively serving a warrant on Harris, it cannot be said that Harris intended to influence, impede or obstruct Officer Webb."

The State, relying on *Miller*, argues that "[a]ll that is required to prove a violation of K.S.A. 21 5904(a)(1) is that the person gave false information and that they did so with the intent to obstruct or impede law enforcement. There is no requirement that the police relied upon the information or were otherwise hindered."

The State is correct that what Sergeant Webb did or did not know has no bearing on what Harris' *intent* was in telling the officers that he was "not ... Bryan Harris." Thus, we cannot agree with Harris' assertion that because Sergeant Webb knew Harris' identity, Harris could not have *intended* to influence, impede, or obstruct his official duty. Moreover, because actual obstruction is not contained in K.S.A. 2015 Supp. 21 5904(a)(1)(C), Harris' argument is fatally flawed based on the plain wording of the statute. Thus, sufficient evidence existed to support his conviction under K.S.A. 2015 Supp. 21 5904(a)(1)(C).

***4** Harris also argues that his speech was protected under the First Amendment to the United States Constitution. A brief discussion will show that his speech was not protected. Harris bases his argument on two cases, *City of Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L.Ed. 2d 398 (1987), and *City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 99 P.3d 1125 (2004).

In *Hill*, the United States Supreme Court acknowledged that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." 482 U.S. at 461. The Court held that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." 482 U.S. at 462 63.

In *Grabauskas*, the defendant was convicted of interference with a law enforcement officer. The conviction resulted from an encounter with police in which the officers asked the defendant for her name. Instead of providing her name, the defendant asked the officers why they needed to know her name. The officers told the defendant that they needed to know for an investigation. The defendant replied, " 'We don't have to tell you shit. Stop harassing us.... We don't We don't have to tell you shit. Leave us fucking alone.' " 33 Kan. App. 2d at 212. The defendant was arrested and convicted of interference with a law enforcement officer. On appeal, this court held that the defendant was expressing her disapproval with

the police when she asked them why they wanted to know her name. Accordingly, the court held that the defendant's speech was protected under the First Amendment. 33 Kan. App. 2d at 223.

Harris asserts that his speech was akin to the defendant's speech in *Grabauskas*. But Harris' comparison is not persuasive. In *Grabauskas*, the defendant questioned the officers' authority to request her name. Here, Harris was affirmatively asserting that he was not the individual named in the officers' arrest warrant. There is a marked difference between questioning the police and affirmatively asserting information known to be false. Moreover, it cannot be said that Harris' declarations that he was "not ... Bryan Harris" were meant to be criticisms of the police as protected by *Hill*. Accordingly, Harris' speech was not protected by the First Amendment to the United States Constitution.

K.S.A. 2015 Supp. 21 5904(a)(3)

Next, we consider whether Harris' conviction for interference with law enforcement under K.S.A. 2015 Supp. 21 5904(a)(3) was supported by sufficient evidence. Harris argues that because the State did not present evidence that Harris attempted to strike or kick the officers, the evidence was not sufficient to support his conviction. He asserts that the officers "were able to make the arrest in a relatively easy manner although, to be sure, Harris was continually attempting to question the officer's authority to make that arrest."

Again, K.S.A. 2015 Supp. 21 5904(a)(3) defines interference with law enforcement as "knowingly obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty."

***5** We begin our discussion by recalling that whether an individual has interfered with law enforcement depends on the particular facts of the case. See *State v. Parker*, 236 Kan. 353, 364, 690 P.2d 1353 (1984). Despite Harris' assertion that the State's evidence was too meager to support his conviction, a review of the evidence presented leads us to conclude otherwise.

In *State v. Brown*, 305 Kan. 674, 387 P.3d 835 (2017), our Supreme Court considered whether sufficient evidence existed to support a conviction under K.S.A. 2015 Supp. 21 5904(a)(3). In *Brown* the police got information that the defendant was hiding in a basement. Three officers went to the top of the basement stairs, announced their presence, and ordered the defendant to come out. The court found that when he hid from officers after they identified themselves and ordered him to come out, the defendant created a safety issue for the officers and himself. 305 Kan. at 691. Accordingly, the court found that sufficient evidence existed to support the conviction. 305 Kan. at 691 92.

Here, when Harris saw Sergeant Webb in the backyard, he fled back into the house. Sergeant Webb pursued Harris into the house's basement. In the basement, Harris continued to avoid Sergeant Webb by running around the staircase. Harris only complied with Sergeant Webb's commands to get on the ground after Sergeant Webb drew his taser. Even then, Harris continued to struggle with Sergeant Webb, pulling his hands away and moving around. Sergeant Webb could not put handcuffs on Harris until Officer Mason arrived to help. Once Harris was in handcuffs, he refused to stand up. Sergeant Webb and Officer Mason had to carry Harris out of the house and physically lift him into the patrol car. When they arrived at the jail, Harris had to be pulled out of the backseat of the patrol car.

Because our Supreme Court has held that the act of hiding can be sufficient to uphold a conviction under K.S.A. 2015 Supp. 21 5904(a)(3), we must hold that Harris' actions here were also sufficient. Thus, we hold that sufficient evidence existed such that a reasonable factfinder could have found Harris guilty beyond a reasonable doubt of interference with law enforcement for obstructing, resisting, or opposing law enforcement under K.S.A. 2015 Supp. 21 5904(a)(3).

Affirmed.

2017 WL 2899730

All Citations

Slip Copy, 2017 WL 2899730 (Table)

End of Document

Exhibit F

272 P.3d 624 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

John T. LANDRAM, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 104,790.
|
March 9, 2012.
|
Review Denied Mar. 25, 2013.

Appeal from Ellis District Court; Thomas L. Toepfer, Judge.

Attorneys and Law Firms

MichaelS. Holland II, of Holland and Holland, of Russell, for appellant.

James G. Keller, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before LEBEN, P.J., PIERRON and ATCHESON, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** John Landram appeals the suspension of his driver's license, claiming that the officer who arrested him didn't have reasonable grounds to believe that Landram had been operating his pickup truck under the influence of alcohol. Without such grounds, the officer would not have been authorized to request a breath test for alcohol a test that Landram refused, leading to the suspension of his license.

But the district court made several factual findings in upholding the license suspension. Although Landram wasn't seen driving the pickup he was asleep in it on the side of I 70 when the officer knocked on the window to check on Landram's welfare Landram had an open bottle of vodka leaning against his seat, had trouble figuring out how to roll down the window and ended up opening the door to talk to the officer, admitted that he'd been driving the car (which still had the key in the ignition), had slurred speech, and gave off an odor of alcohol. These facts provided reasonable grounds, and the district court properly sustained the suspension of Landram's license.

We'll begin with a brief factual summary. At about 8:30 p.m. on May 3, 2009, Kansas Highway Patrol Trooper Merl Ney noticed a pickup parked on the side of I 70 and stopped to check on the driver. As he approached the pickup, Ney saw Landram apparently asleep in the driver's seat with an open bottle of vodka resting against the seat next to him. Ney knocked on the window to determine whether Landram needed assistance. Landram awoke and looked at Ney, who motioned for Landram to lower the driver's side window. Landram fumbled momentarily with the window switches before opening the door to talk to Ney. When Ney later checked the window switches, they were working properly; the key had been left in the ignition, turned to allow the car's electrical systems to operate.

Ney smelled a strong odor of alcohol as soon as Landram opened the door. Ney asked whether Landram had been drinking, which Landram denied, but Landram said that he had been driving from Houston, had become sleepy, and had stopped to rest. Landram was alone, and his speech was soft and slurred.

Ney asked Landram to get out of the car to perform some field-sobriety tests. Landram initially agreed, but as Ney began to demonstrate the tests, Landram changed his mind and told Ney he did not wish to do the tests. Ney then arrested Landram, took him to the nearby Russell police station, and, after giving Landram the required notices, asked Landram to take a breath test. Landram refused. Ney then gave Landram the appropriate notice that his driver's license would be suspended for the refusal.

Landram asked for an administrative hearing before the Kansas Department of Revenue, but an administrative hearing officer ruled against him. Landram then sought review in the district court, which hears such matters independently on evidence presented to the court. See K.S.A.2008 Supp. 8 1020(p). On appeal, we determine whether substantial evidence supports the district court's factual findings; if so, we must accept them. Once the facts are clarified, we must independently determine whether those facts provided reasonable grounds for the officer to believe that Landram had been operating a vehicle under the influence of alcohol. See *Allen v. Kansas Dept. of Revenue,* 292 Kan. 653, 656 58, 256 P.3d 845 (2011); *Poteet v. Kansas Dept. of Revenue,* 43 Kan.App.2d 412, 414 15, 233 P.3d 286 (2010).

***2** This is not a case in which the facts are in dispute; Ney was the only witness, and the district court did not indicate that it had rejected any of his testimony. The question before us is simply whether the facts known to the officer gave him reasonable grounds to believe that Landram had been driving under the influence of alcohol which required that the officer have had reasonable grounds to believe that Landram had been driving the vehicle and that, while doing so, he was either so intoxicated that he was incapable of driving safely or that his blood-alcohol concentration would have exceeded .08. See K.S.A.2008 Supp. 8 1001(b); K.S.A.2008 Supp. 8 1567(a)(1) and (a)(3).

The Kansas Supreme Court has generally considered "reasonable grounds" for requesting DUI breath tests to be substantially similar to the "probable cause" standard used to determine whether an arrest was proper. *Allen,* 292 Kan. at 656. But the court has also recognized that the reasonable-grounds test is somewhat easier to meet: an officer could have reasonable grounds to request a breath test while still not yet having the probable cause required to make an arrest. 292 Kan. at 656 (citing *Smith v. Kansas Dept. of Revenue,* 291 Kan. 510, 514 15, 242 P.3d 1179 [2010]); see *State v. Pollman* 286 Kan. 881, 896 97, 190 P.3d 234 (2008).

Regarding arrests made in the context of investigatory actions, the Kansas Supreme Court has noted that the probable-cause standard is met if the information would lead a prudent officer to believe that guilt is more than a mere possibility. See *Bruch v. Kansas Dept. of Revenue,* 282 Kan. 764, 775 76, 148 P.3d 538 (2006); *State v. Smith & Miller,* 224 Kan. 662, 666, 585 P.2d 1006 (1978), *modified* 225 Kan. 199, 588 P.2d 953, *cert. denied* 441 U.S. 964 (1979). And on the specific question before us in Landram's case, *i.e.,* whether the officer had reasonable grounds to request a breath test under K.S.A.2008 Supp. 8 1001(b), our court has said that the gauge is whether, under all the circumstances, a reasonably prudent officer would have believed that the driver's guilt was more than a mere possibility. *E.g., Shrader v. Kansas Dept. of Revenue,* 45 Kan.App.2d 216, 220, 247 P.3d 681 (2011), *rev. granted on other grounds* 292 Kan. 965 (2011) (pending); *Poteet,* 43 Kan.App.2d at 416. The Kansas Supreme Court applied this same test in *Allen,* in which the court concluded that the officer had good reason to believe that guilt was more than a mere possibility and "[c]onsequently ... possessed reasonable grounds to request a breath test." 292 Kan. at 660.

Here, Landram admitted that he'd driven to the spot where his car was parked, so the officer needed only reasonable suspicion that Landram had been intoxicated while doing so. There was ample indication that Landram had been drinking his slurred speech, the strong odor of alcohol, his inability to open the car window, and the open bottle of vodka next to him. The remaining question is whether there was sufficient indication that Landram had been drinking enough before he drove, while he was driving, or both to have violated the DUI statute.

***3** Landram denied he'd been drinking, which was contrary to the evidence Ney could observe. False statements about matters within a person's knowledge that are material to whether he or she has committed a crime may be considered as one factor giving reasonable grounds to believe the person has done something criminal. See *People v. Williams,* 79 Cal.App. 4th 1157, 1167 68, 94 Cal.Rptr. 727 (2000) ("Deliberately false statements to the police about matters that are within an arrestee's knowledge and materially relate to his or her guilt or innocence have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances."); *Thompson v. State,* 138 Idaho 512, 515 16, 65 P.3d 534 (2003) (finding that apparent lie regarding denial of alcohol consumption may be

considered in officer's probable-cause determination). In addition, Landram declined even to attempt any field-sobriety tests. That too may be considered an indicator that Landram had been driving while intoxicated because, among other reasons, it may indicate consciousness of guilt. See *State v. Huff*, 33 Kan.App.2d 942, 945 46, 111 P.3d 659 (2005) (finding that court may consider refusal to take field-sobriety tests as supporting conclusion that driver was too intoxicated to drive safely); *State v. Rubick*, 16 Kan.App.2d 585, 587 88, 827 P.2d 771 (1992) (noting that driver's refusal to take field-sobriety tests is admissible in part because it may indicate consciousness of guilt); see also *Jones v. Commonwealth*, 279 Va. 52, 59 60, 688 S.E.2d 269 (2010) (finding that refusal to take field-sobriety tests may be considered in probable-cause determination when there is evidence of alcohol consumption and a discernable effect of the alcohol on the driver); *People v. Roberts*, 115 Ill.App.3d 384, 387 88, 450 N.E.2d 451 (1983) (permitting evidence of refusal to take field-sobriety tests as relevant to knowledge of intoxication).

We recognize that it is at least possible that Landram hadn't taken a drink until he stopped his car and that he only drank after he had finished driving for the night. But an officer does not have to negate every potential innocent explanation before the officer can have reasonable grounds to believe that a person has committed a crime. See *State v. Coleman*, 292 Kan. 813, 817 18, 257 P.3d 320 (2011) (stating that court must consider all facts, not eliminating ones that could have an innocent explanation, when determining whether officer had reasonable suspicion of criminal activity); *Burroughs v. Kansas Dept. of Revenue*, No. 96,549, 2007 WL 3085363, at *2 (Kan.App.2007) (unpublished opinion) ("When the issue is probable cause, [one] may not explain away all inferences of guilt by concluding that each of them could have an innocent explanation."); *United States v. Malin*, 908 F.2d 163, 166 (7th Cir.), *cert. denied* 498 U.S. 991 (1990) (finding that officer need not negate every potential innocent explanation of facts to have probable cause needed for search warrant). Here, Ney had sufficient indicators that Landram had been drinking and driving and also that he had been unable to drive safely in his condition to make the likelihood of guilt more than a mere possibility. That gave Ney authority under K.S.A.2008 Supp. 8 1001(b) to request a breath test from Landram.

***4** The judgment of the district court is therefore affirmed.

ATCHESON, J., dissenting:

***4** I respectfully dissent. In this case, there was plenty of circumstantial evidence John T. Landram drove his pickup truck. He also admitted it. And there was a whole lot of direct and circumstantial evidence he was drunk. But there was no evidence direct or circumstantial he did both at the same time. On that point, the Department of Revenue had only guess and by gosh. Even under the relaxed standards for driver's license revocation proceedings, a law enforcement officer cannot entertain the legally required reasonable grounds to conclude someone was driving drunk based on mere speculation or possibilities. The record in this case contains nothing more on the crucial issue. I would reverse the decision of the district court upholding the suspension of Landram's driving privileges because he refused to take a breath test after he was arrested for driving under the influence in violation of K.S.A.2008 Supp. 8 1567.

Before turning to the evidence, I acknowledge the burdens of proof and standards of review that govern administrative and judicial determinations in suspension proceedings. Under K.S.A.2008 Supp. 8 1001(b), a law enforcement officer "shall request a person to submit to a test" if the officer "has reasonable grounds to believe the person was operating or attempting to operate a vehicle under the influence of alcohol" and the person has been arrested for that offense. The appellate courts have equated the reasonable grounds required under K.S.A.2008 Supp. 8 1001 to probable cause to believe a person has committed a criminal offense. The Kansas Supreme Court recently reiterated that view and noted: "Probable cause exists where the officer's knowledge of the surrounding facts and circumstances creates a reasonable belief that the defendant committed a specific offense." *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 515, 242 P.3d 1179 (2010). In its brief, the Department of Revenue cites the standard as set out in *Sullivan v. Kansas Dept. of Revenue*, 15 Kan.App.2d 705, 707, 815 P.2d 566 (1991):

"It is sufficient [to establish reasonable grounds] if the information leads a reasonable officer to believe that guilt is more than a possibility." The Kansas Supreme Court has recognized that to be a synonymous description of the quantum of evidence. *Bruch v. Kansas Dept. of Revenue,* 282 Kan. 764, 775–76, 148 P.3d 538 (2006).

While there has been some banter in the caselaw about the congruence of reasonable grounds and probable cause, the two remain functionally the same in driver's license proceedings. See *Smith,* 291 Kan. at 515; *Bruch,* 282 Kan. at 776. In the legal scheme of levels of proof, probable cause imposes a comparatively low threshold falling below, for example, the typical civil burden of more probably true than not true. But it is more than the "reasonable suspicion" necessary to initiate a traffic stop. *State v. Pollman,* 286 Kan. 881, Syl. ¶ 6, 190 P.3d 234 (2008).

***5** When a driver challenges the administrative suspension of his or her driving privileges for a test refusal, the district court conducts a de novo trial. K.S.A.2008 Supp. 8–1020(p). The driver bears the burden of proving the agency action should be set aside. K.S.A.2008 Supp. 8–1020(q). On appeal in suspension cases, we review factual findings of the district court to determine if they are supported by substantial competent evidence. *Smith,* 291 Kan. at 514; *Schoen v. Kansas Dept. of Revenue,* 31 Kan.App.2d 820, 822, 74 P.3d 588 (2003); *Lincoln v. Kansas Dept. of Revenue,* 18 Kan.App.2d 635, 637, 856 P.2d 1357, *rev. denied* 253 Kan. 859 (1993). Substantial competent evidence refers to testimony, documents, stipulations, or other information received during a proceeding that a reasonable person would accept as furnishing an adequate basis for a particular conclusion. *Hodges v. Johnson,* 288 Kan. 56, Syl. ¶ 7, 199 P.3d 1251 (2009); *Schoen,* 31 Kan.App.2d at 822. On appeal under that standard, we neither make credibility findings nor credit evidence conflicting with the trial court's fact determinations. *Hodges,* 288 Kan. 56, Syl. ¶ 7. If a point on appeal in a suspension case turns on a question of law, we apply a de novo standard of review to that issue. *Gudenkauf v. Kansas Dept. of Revenue,* 35 Kan.App.2d 682, 683, 133 P.3d 838 (2006).

As the majority notes, Highway Patrol Trooper Meryl Ney was the only witness to testify at the trial, and the district court accepted his testimony as credible. Both the majority and I do, as well. Accordingly, the issue before us is one of law: whether the evidence presented, all of which was credited, establishes probable cause to conclude Landram was driving under the influence.

The majority opinion sets forth what it describes as a "brief factual summary." Slip op. at 2. That actually reflects an accurate statement of *all* of the salient facts presented at the district court trial. There really is nothing to add. And, as I discuss, it is the absence of material evidence in the district court trial on the controlling issue that mandates a decision for Landram.

Before turning to that lack of evidence, I note a peculiar characteristic of the offense of driving under the influence of alcohol. It combines two activities neither of which, if done alone, is unlawful. It is not a crime to drive, at least if one has a license. Nor is it a crime to consume alcohol—even to the point of intoxication—so long as one is not on a public street or highway. See K.S.A. 2008 Supp. 41–719 (misdemeanor to consume "alcoholic liquor" on "the public streets ... or highways or inside vehicles while on the public streets ... or highways"). Only when the driving and the intoxication coincide does the proscribed offense of operating a vehicle under the influence of alcohol occur. The issue here is whether there was *evidence* supporting probable cause that those two circumstances actually coincided.

***6** The circumstantial evidence that Landram drove the pickup was compelling. When Trooper Ney arrived, the truck was parked on the shoulder of a limited-access highway. Landram was in the driver's seat, although the engine was not running. Nothing suggested someone else might have been driving and walked away while Landram slept—say, a woman's purse in the front seat or two cups in the drink holders. When Trooper Ney questioned Landram he admitted he drove from Houston, got tired, and parked on the shoulder to rest. All of that is pretty strong evidence of driving.

When Trooper Ney got Landram to open the window of the truck, the evidence of intoxication started flowing. Landram displayed telltale signs of having drunk too much. He smelled of alcohol. His speech was soft and slurred. Landram's inability to get the window

open in the first place suggested a distinct lack of physical coordination and mental acuity consistent with drunkenness. Based on those observations and his experience as a law enforcement officer, Trooper Ney testified that he concluded Landram was intoxicated. As I discuss in more detail, Landram's denial that he had been drinking and his refusal to perform the field sobriety tests support the conclusion he was intoxicated.

Then there's the bottle of vodka. The bottle was unsealed, less than full, and resting in plain view on the console of the pickup. We don't know anything more about it. That lends substantial backing to the circumstantial evidence Landram had been drinking, notwithstanding his denial. But it also confounds an otherwise strong circumstantial case that Landram drove drunk. If there were no liquor bottle, the evidence would have shown Landram to be quite intoxicated and parked on a limited-access highway far removed from any bar, club, or other source of alcohol. That scenario supports a reasonable conclusion probable cause Landram drove there while under the influence. But the liquor bottle scrambles the picture. Landram may have gotten tired, as he said, pulled over, and then consumed several nightcaps from the bottle. He may have fallen asleep or passed out, only to stir when Trooper Ney began banging on the pickup window. That's certainly possible, as the majority agrees, and, as I suggest, fully consistent with the evidence presented to the district court. Based on that evidence, it is no more or less possible than the notion Landram had been drinking the vodka to help pass the time during his drive from Houston.

So maybe Landram drove drunk. That's possible. But maybe Landram sequentially engaged in the activities of driving and then drinking, rather than operating the pickup while he was under the influence. That's possible and, on the evidence, equally possible. The KDR presented no evidence at trial suggesting one to be more likely or probable than the other. That represents a failure to establish probable cause. The test is whether the evidence demonstrates guilt to be more than a possibility. Here, it does not. Guilt (driving drunk, thus supporting the request Landram take a breath test) is one possibility that stacks up with another, essentially equally plausible possibility. Without something more, probable cause cannot be drawn from the facts. See *Sherouse v. Ratchner*, 573 F.3d 1055, 1062 (10th Cir.2009) ("Where an officer observes inherently innocuous behavior that has plausible innocent explanations, it takes more than speculation or mere possibility to give rise to probable cause to arrest."); *United States v. Welker*, 689 F.2d 167, 169 (10th Cir.1982) ("Probable cause requires more than a mere suspicion of criminal activity."). The issue here is not whether evidence making guilt more than just a possibility might be weak or strong, undisputed or controverted, or even barely credible. The case rests on the absence of that evidence altogether.

***7** Probable cause to arrest consists of two components: evidence a crime has been committed and evidence a particular person, *i.e.,* the defendant, committed it. This case turns on showing that a crime has been committed in the first instance. That's unusual. Seldom is the existence of a crime at issue in a probable cause determination. Here, however, it is. So the KDR must point to evidence demonstrating more than a possibility that the crime occurred. *Cortez v. McCauley*, 478 F.3d 1108, 1116 17 (10th Cir.2007) (Law enforcement officers lacked probable cause for an arrest when they relied on an uncorroborated, secondhand statement from a 2 year old child indicating defendant had molested her because "what ... [they] had fell short of reasonably trustworthy information indicating that a crime had been committed" without additional investigation.); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir.1986). In evaluating probable cause determinations, the Seventh Circuit Court of Appeals has stated: "A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest." *BeVier*, 806 F.2d at 128. So "[r]easonable avenues of investigation must be pursued especially when, as here, it is unclear whether a crime had even taken place." 806 F.2d at 128. In this case, there was nothing of evidentiary value permitting Trooper Ney to opt for one of the possibilities over the other. He, then, necessarily relied on suspicion or hunch to select the one consistent with an offense having been committed and, thus, with guilt. Neither an arresting officer nor a court may resort to guesswork to fashion probable cause to arrest from facts depicting equally plausible though conflicting conclusions that a crime has even taken place. See *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir.2004) (While a court may not ignore facts to undermine a probable cause determination, "neither may a court arrive at probable cause simply by piling hunch upon hunch.").

The district court dealt with the evidentiary deficiency by concluding that "[Trooper] Ney relied on his training and experience in DUI detection to conclude that [Landram] had been operating his vehicle under the influence." The district court turned Trooper Ney into an expert witness able to pick between those possibilities. But the record contains no basis for that expertise and no such opinion from Trooper Ney. (He did properly conclude, based on his training and his observations at the scene, that Landram was drunk.) It is difficult to figure out just what training might have permitted the sort of opinion the district court describes unless the Highway Patrol teaches troopers how to read minds.

The majority trowels over the evidentiary defect principally by drawing too much from Landram's denial he had been drinking and his refusal to perform the field sobriety tests. Both his denial and his refusal are of a kind from an evidentiary standpoint. An admission from Landram that he had been drinking would have been just that. But it would not contribute to the evidence showing he had been driving or drinking *and* driving at the same time. The denial ought not be taken to support any broader inference or conclusion. Likewise, had Landram performed poorly on the field sobriety tests, as he almost certainly would have, that performance would furnish evidence he was drunk, not that he had been driving or driving drunk. In turn, his refusal cannot be used to bolster an inference he had been driving drunk.

***8** The DUI caselaw the majority cites either supports how I would treat the evidence or doesn't directly address the point. In *Jones v. Commonwealth*, 279 Va. 52, 59-60, 688 S.E.2d 269 (2010), the Virginia Supreme Court held that a person's refusal to perform field sobriety tests could be considered circumstantial evidence of his or her "awareness that his [or her] consumption of alcohol would affect his [or her] ability to perform such tests." That is, the refusal could be taken as the subject's recognition that he or she had consumed enough alcohol that he or she would do poorly and, thus, might be considered intoxicated. The Illinois Court of Appeals reached the same conclusion in *People v. Roberts*, 115 Ill.App.3d 384, 387-88, 450 N.E.2d 451 (1983), recognizing the refusal to perform field sobriety tests permits "the drawing of inferences ... relative to [the subject's] ability to perform the tests" and, thus, amounts to evidence "probative of the issue of his intoxication."

The other cases simply acknowledge that a driver's refusal to perform field sobriety tests may be considered circumstantial evidence in proving a DUI case without explaining the particular evidentiary value of the refusal. *State v. Huff*, 33 Kan.App.2d 942, 946, 111 P.3d 659 (2005) (citing *State v. Rubick*, 16 Kan.App.2d 585, 587-88, 827 P.2d 771 [1992]); *State v. Rubick*, 16 Kan.App.2d 585, 588, 827 P.2d 771 (1992); *Thompson v. State*, 138 Idaho 512, 516, 65 P.3d 534 (2003). Each of those cases conformed to the typical DUI scenario in which a law enforcement officer stopped a moving vehicle for a traffic violation, approached the driver, and found evidence of his or her intoxication. In those opinions, the courts mentioned the drivers' refusals to perform field sobriety tests as part of the evidentiary mix. The evidence of driving was largely undisputed. The crux of the defenses lay in contesting impairment, not driving. The defendants apparently did not request limiting instructions on the refusal evidence. The courts, therefore, had little reason to discuss the precise evidentiary purpose or use of a refusal. And they did not. But none of the cases declared that the refusal should be considered circumstantial evidence of driving rather than of alcohol consumption.

The majority's second suggestion that a law enforcement officer need not negate innocent explanations in arriving at a probable cause determination fails to support the outcome here. As I have said, looking at the totality of the circumstances and without disregarding any of the evidence, the facts present essentially equally plausible possibilities. The majority agrees there are two reasonable conclusions to be drawn from the facts. When that happens, a law enforcement officer must have evidence not a hunch, not a surmise, and not speculation that would support the one consistent with a crime having been committed or, here, that Landram drove while drunk. See *Sherouse*, 573 F.3d at 1062; *Welker*, 689 F.2d at 169. As I have said, the evidence could be disputed or of limited probative value and yet would still allow an officer to cross the probable cause threshold. An officer need not resolve conflicts about what the facts are or disregard weak evidence in making a call on probable cause to arrest. Here, however, crediting all of the facts and evidence favorably to the KDR, nothing in that

body of tangible information elevates the possibility that Landram drove drunk over the possibility that he parked the pickup and then got drunk. Only speculation and conjecture differentiate them.

***9** Courts have, from time to time, described probable cause as evidence establishing "a fair probability" the defendant committed a crime. *State v. Gardner*, 10 Kan.App.2d 408, 410, 701 P.2d 703, *rev. denied* 237 Kan. 888 (1985); *see Holder v. Town of Sundown*, 585 F.3d 500, 504 (1st Cir.2009); *United States v. Hartz*, 458 F.3d 1011, 1018 (9th Cir.2006). Was there such evidence to be had? Maybe. Had the pickup been parked askew, say at an odd angle or partly off the shoulder, that would have suggested Landram was intoxicated at the time. It would have been some evidence Landram was impaired when he parked the pickup, just as his inability to open the window suggested he was impaired then. In his testimony, Trooper Ney agreed the pickup was "fully on the shoulder" and did not otherwise describe how it was parked.

Evidence that Landram had been parked only a short time would have favored the drunk driving possibility. If Trooper Ney patrolled the area a half hour earlier and didn't see the pickup, that would indicate Landram had only recently arrived. During the stop, Trooper Ney could have checked whether the engine was still warm, another indicator Landram hadn't been there very long. Trooper Ney could have asked Landram how long he had been parked. He also could have asked Landram when and where he had purchased the bottle of vodka. Assuming there were evidence Landram had been parked only briefly and the vodka bottle were near empty, that would tilt toward Landram having been drinking at least some before he stopped, particularly had the liquor been purchased that day. (I have assumed the bottle was a standard 750 ml one, although the record is silent on that too. And I put to one side the issue of when Trooper Ney might have had to read Landram his *Miranda* warnings during the questioning. See *Smith*, 291 Kan. at 516–18.) Absent that sort of evidence, however, guilt was not a "fair probability."

Although not directly germane to the probable cause issue, I would note, for what it is worth, that my conclusion does not denigrate the public safety. Even if there were insufficient evidence to support probable cause to conclude Landram had been driving under the influence, Trooper Ney would not have had to leave him on the side of the highway in his obviously impaired and potentially dangerous condition. Trooper Ney had ample grounds to arrest Landram and to take him into custody for drinking in public under K.S.A.2008 Supp. 41–719.

I would reverse the decision of the district court and remand with directions that judgment be entered for Landram and his driving privileges restored.

All Citations

272 P.3d 624 (Table), 2012 WL 924803

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Exhibit G

308 P.3d 30 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Emily S. SWINGLE, Appellant.

No. 107,856.
|
Aug. 30, 2013.
|
Review Denied June 17, 2014.

Appeal from Sedgwick District Court; Warren M. Wilbert and David J. Kaufman, judges.

Attorneys and Law Firms

John E. Stang and John E. Rapp, of Hulnick, Stang & Rapp, P.A., of Wichita, for appellant.

Matt J. Moloney, assistant district attorney, Nola Tedesco Foulston, district attorney, and Derek Schmidt, attorney general, for appellee.

Before BUSER, P.J., ATCHESON, J., and BUKATY, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Defendant Emily S. Swingle appeals her convictions for felony driving under the influence, a violation of K.S.A.2009 Supp. § 1567, and for refusing a preliminary breath test, an infraction violating K.S.A.2009 Supp. § 1012, arguing the Sedgwick County District Court erred in denying her motion to suppress evidence because a sheriff's deputy arrested her without probable cause. The officer had sufficient facts to arrest Swingle, so he did not violate her rights. The district court correctly denied her motion and permitted the evidence to be used against her. Swingle also argues that the district court should have considered sentencing her to house arrest, as permitted by recent amendments to K.S.A. § 1567. Given longstanding Kansas law recognizing that a defendant should be punished under the statutes in effect at the time of the offense, the district court properly rejected that option in sentencing Swingle. We, therefore, affirm in all respects.

On April 21, 2010, at about 7:30 p.m., Sedgwick County Sheriff's Deputy Andrew Dodge was dispatched to a one-car mishap in rural Sedgwick County. At the scene, he found a four-door sedan in a field on the north side of an east-west dirt road. The car left the roadway, crossed a ditch, and hit a fence before stopping. The car had damage to the front end and a large hole toward the passenger side of the windshield where a fencepost had entered. The post then apparently went through the rear passenger door and came to rest just outside the sedan.

Swingle was kneeling behind the car when Dodge arrived. She identified herself as the driver. A man at the scene said he was Swingle's boyfriend. The record at the suppression hearing was unclear on whether he was a passenger in the car or had arrived at the scene in his own vehicle. According to Dodge, Swingle was emotionally upset but did not appear to be physically injured. Swingle explained to Dodge that she had been following another vehicle eastbound on the road. As the dust kicked up by that vehicle increasingly impaired her view of the road, she applied her brakes and lost control of her car.

Dodge asked Swingle for her driver's license. She had difficulty getting the license out of her wallet. As Dodge approached Swingle, he noticed a strong odor of alcohol about her. He asked whether she had been drinking, and she denied having consumed any alcohol. Swingle's eyes were bloodshot. According to Dodge, Swingle asked him to repeat himself, was slow to respond to some of his questions, and gave responses he characterized as scattered. At the hearing on Swingle's motion to suppress, Dodge agreed her demeanor and behavior with the exception of the odor of alcohol would have been consistent with her having been in a significant motor vehicle mishap. But her appearance and actions also

were consistent with intoxication, according to Dodge, and ultimately formed part of the basis for his decision to arrest Swingle for DUL He also considered the circumstances of the mishap and the evidence Swingle had been drinking.

*2 Based on his observations, Dodge asked Swingle if she would take some field sobriety tests. Those tests are intended to reveal the subject's ability to understand the instructions and to measure the subject's physical coordination in performing the required tasks. A poor performance on the tests would be consistent with a degree of intoxication impairing mental and physical abilities. Swingle agreed to take the tests. But Dodge testified that the dirt road had some sizeable stones and the grassy field was uneven, so neither provided the sort of clear, flat surface conducive to fairly administering the tests. Dodge, therefore, asked Swingle if she would go with him to a nearby QuikTrip to perform the tests in the store's paved parking lot. She agreed to that as well.

Swingle sat in the backseat of Dodge's patrol car for the mile-and-a-half drive to the QuikTrip. Dodge neither informed her she was under arrest nor placed her in handcuffs. At the suppression hearing, Dodge testified that had Swingle declined to go to the QuikTrip or some other suitable location to perform the tests, he would have arrested her for DUI based on the circumstances of the motor vehicle mishap and her appearance and actions at the scene.

At the QuikTrip, Dodge explained both the walk-and-turn test and the one-leg-stand test to Swingle. He testified that she seemed to have some difficulty understanding the directions, so he repeated them. But he testified she performed both field sobriety tests without displaying any indicators of impairment. Dodge then asked Swingle if she would take a preliminary breath test and read the related advisory to her. Swingle declined to take the preliminary breath test. At that point, Dodge told Swingle she was under arrest. Dodge then drove her to the Sedgwick County jail. At the jail, Swingle agreed to take a breath test. That test, administered with an Intoxilyzer 8000, indicated her alcohol level to be .111, in excess of the .08 legal limit.

The Sedgwick County District Attorney charged Swingle with felony DUI, no proof of insurance, and refusing a preliminary breath test. The State later dismissed the no-insurance charge, and it doesn't otherwise figure in this case.

As we have indicated, Swingle filed a motion to suppress on the grounds Dodge functionally arrested her without probable cause when he took her to the QuikTrip and then formally arrested her there also without probable cause. As a result, Swingle argued the results of the breath test should have been excluded as evidence. Dodge was the only witness to testify at the suppression hearing. The district court ruled that Swingle was effectively under arrest when Dodge drove her to the QuikTrip. But the district court found that Dodge had probable cause to arrest Swingle for DUI at that point based on her having driven off the road and her appearance and comportment at the scene. The district court also ruled that Swingle's performance on the field sobriety tests did not negate or overcome the evidence supporting probable cause.

*3 Swingle later went to trial on stipulated facts, and the district court found her guilty of DUI and refusing a preliminary breath test. At her sentencing on February 14, 2012, Swingle requested that she be allowed to serve part of her incarceration on house arrest, as provided in the amended version of K.S.A. 8 1567 that became effective July 1, 2011. The district court found the amendment was not retroactive and denied that request. On the DUI charge, Swingle received a sentence of 180 days in jail, with work release; postrelease supervision of 12 months; and a fine of $2,500. She received a $90 fine on the infraction for refusing the preliminary breath test.

Swingle has timely appealed.

Swingle reprises the issues she asserted in the district court, challenging her arrest and the admissibility of the breath test results as evidence and arguing she should have been considered a candidate for house arrest. Swingle launches her attack on the breath test on three fronts: (1) Dodge functionally arrested her at the scene without probable cause; (2) Dodge lacked probable cause to arrest her at the QuikTrip; and (3) Dodge had no reasonable basis to request that she submit to the Intoxilyzer 8000 breath test.

For purposes of the appeal, we essentially combine them into the single issue of probable cause to arrest.

In reviewing a district judge's ruling on a motion to suppress, an appellate court applies a bifurcated standard. The appellate court accepts the factual findings of the district court if they are supported by competent evidence having some substance. The appellate court exercises plenary review over legal conclusions based upon those findings, including the ultimate ruling on the motion. *State v. Woolverton*, 284 Kan. 59, 70, 159 P.3d 985 (2007); see *State v. Thompson*, 284 Kan. 763, 772, 166 P.3d 1015 (2007). The prosecution bears the burden of proving a search or seizure to be constitutional by a preponderance of the evidence. *State v. Pollman*, 286 Kan. 881, 886, 190 P.3d 234 (2008) (allocation of burden; quantum of evidence); *Thompson*, 284 Kan. at 772 (allocation of burden).

An arrest is a seizure within the meaning of the Fourth Amendment to the United States Constitution and must be based on probable cause. Kansas has codified the probable cause standard for arrests in K.S.A. 22-2401(c). Probable cause to arrest requires that an officer have knowledge of facts that would lead a reasonably cautious person to believe a crime had been committed and the suspect committed it. *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) ("This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."); *Dunaway v. New York*, 442 U.S. 200, 208 n. 9, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); see *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 20-21, 290 P.3d 555 (2012). Probable cause to arrest for DUI furnishes a sufficient legal basis for a law enforcement officer to request a breath test. K.S.A. 8-1001(b) (grounds for requesting chemical test of alcohol level); *Sloop*, 296 Kan. at 19 (K.S.A. 8-1001 authorizes chemical test of alcohol level upon lawful arrest, *i.e.*, one based on probable cause).

***4** For purposes of this appeal, we assume but do not decide that Dodge arrested Swingle when he asked her to go to the QuikTrip to take the field sobriety tests and she agreed. The district court came to that legal conclusion, although it might be fairly debated. Given our resolution that Dodge had probable cause to arrest Swingle the debate amounts to an academic exercise.[*]

[*] An individual legally may be considered under arrest if the circumstances are such that a reasonable person in that position would not feel free to leave. *United States v. Guzman-Padilla*, 573 F.3d 865, 885 (9th Cir.2009); *United States v. Brown*, 441 F.3d 1330, 1347 (11th Cir.2006) (individual in custody requiring *Miranda* warnings if reasonable person would not feel free to leave). The person need not be told he or she is under arrest. The subjective intent or belief of the law enforcement officer is irrelevant. *Brown*, 441 F.3d at 1347. Here, Dodge asked rather than ordered Swingle to go to the QuikTrip, and she agreed. She was not handcuffed or otherwise restrained. Dodge did not inform Swingle she would be arrested if she refused to go. In arguably similar circumstances, this court held that transporting a person a short distance to facilitate the safe performance of field sobriety tests did not amount to an arrest. *State v. Barriger*, 44 Kan.App.2d 648, 652-53, 239 P.3d 1290 (2010), *rev. denied* 292 Kan. 966 (2011).

We turn to the evidence. At the scene, Dodge saw a car driven a fair distance off the road. In his testimony, Dodge alluded to the absence of readily apparent reasons for the mishap. The road appeared to be in good condition and without observable defects or obstructions, according to Dodge. The mishap occurred during daylight hours, and nobody suggested the weather was inclement or in any way contributed to the situation. Swingle told Dodge her line of sight was obscured by dust from another vehicle. But by the time Dodge arrived, that was an unverifiable explanation.

As we have already recounted, Dodge found Swingle to be unsteady in her physical actions and in her responses to his inquiries. Her eyes were bloodshot. And Swingle smelled strongly of alcohol. But she denied having drunk any alcoholic beverages. The mishap itself is consistent with and would be indicative of an impaired driver, although there could be other explanations, including the one Swingle offered. Similarly, Swingle's discombobulation could have been the product of intoxication or the emotional trauma of the mishap or a combination of the two. But the odor of alcohol and Swingle's dissembling

about it don't fall in that category. Particularly in combination, they present significant evidence supporting Swingle's intoxication. That is, she lied about drinking because she knew she had been driving when she really shouldn't have been. *Thompson v. State*, 138 Idaho 512, 516, 65 P.3d 534 (Ct.App.2003) (defendant's denial of alcohol consumption despite odor of alcohol on breath evidence of consciousness of guilt supporting probable cause to arrest); see *State v. Appleby*, 289 Kan. 1017, 1061, 221 P.3d 525 (2009) (giving false information to law enforcement officer investigating crime admissible as evidence of consciousness of guilt).

***5** Looking at all of those circumstances, we agree with the district court that Dodge had probable cause to arrest Swingle for DUI at the scene of the mishap before taking her to the QuikTrip for the field sobriety tests. Dodge had no basis for evaluating the truth of Swingle's explanation for driving off the road. And especially in light of her apparent lie about not drinking, he had reason to question it. Likewise, Dodge had no obligation to discount Swingle's appearance and reactions as solely the product of the mishap rather than intoxication in making a probable cause determination. Swingle's alternative spin on the circumstances could be a defense to the DUI charge at trial, but it doesn't negate the probable cause to arrest at the scene.

Swingle's good performance on the field sobriety tests at the QuikTrip does not cancel out or materially diminish the probable cause evidence. That is particularly true given the ways a DUI offense may be proven. Her success on the tests indicates that she was not obviously impaired physically by the alcohol she had consumed. But physical impairment is not an element necessary to establish a DUI under K.S.A. 8 1567. A person is guilty of DUI if he or she operates a motor vehicle with an alcohol level of .08 or higher without regard to impairment. K.S.A. 8 1567(a)(1). The person may be wholly unimpaired. The status of having an alcohol level exceeding the statutorily prohibited level is sufficient to convict.

Here, Dodge had ample reason probable cause to draw that conclusion. Swingle, of course, admitted driving. She smelled strongly of alcohol, yet denied any consumption. That is sufficient to establish probable cause to arrest for a violation of K.S.A. 8 1567(a)(1). Swingle's performance on the field sobriety tests had only limited relevance to a charge based on that means of violating K.S.A. 8 1567.

In sum, Dodge had probable cause to arrest Swingle and to have her submit to the Intoxilyzer 8000 breath test. The district court correctly denied the motion to suppress. We, therefore, affirm Swingle's conviction.

In her remaining point on appeal, Swingle asserts that she ought to be eligible for house arrest, as provided in amendments made to K.S.A. 8 1567 in 2011 and 2012 after the incident resulting in her conviction. The version of K.S.A. 8 1567 in effect when Swingle committed the offense did not allow house arrest for anyone with four or more convictions. This was Swingle's fourth DUI. The district court rejected the request as a matter of law. That is, Swingle had no legal basis to request house arrest as a possible form of punishment. The district court, therefore, did not address whether Swingle was deserving of house arrest as an alternative to imprisonment.

Swingle argues that the amendments operate as procedural or remedial measures and, therefore, ought to be applied retroactively, making her eligible for house arrest.

As a general rule, "a statute applies prospectively unless there is clear language in the statute that the legislature intended that it applies retroactively." *Welty v. U.S.D. No. 259*, 48 Kan.App.2d 797, Syl. ¶ 1, 302 P.3d 1080 (2013); *State v. Williams*, 291 Kan. 554, 557, 244 P.3d 667 (2010). In addition, the Kansas Supreme Court has long held that criminal defendants will be sentenced based on the statutory punishment in effect at the time they committed the offense. 291 Kan. at 559; *State v. Walker*, 277 Kan. 849, 850, 89 P.3d 920 (2004). As the court has stated: "It is a fundamental rule that a person convicted of a crime is given the sentence in effect when the crime is committed." *State v. Jones*, 272 Kan. 674, 677, 35 P.3d 887 (2001).

***6** Given that well established history, we must assume that had the Kansas Legislature intended retroactive application of the amendments to K.S.A. 8 1567 extending house arrest to four-time DUI offenders, it would have included clear language accomplishing that purpose. The amendments are conspicuously

lacking anything resembling a directive for retroactive application.

Swingle contends we should apply the canon of statutory construction allowing procedural or remedial amendments to operate retroactively when a statute is silent. See *Williams*, 291 Kan. at 557 (noting the canon). Under Kansas Supreme Court precedent, it seems unlikely the house-arrest amendment is procedural. *State v. Sylva*, 248 Kan. 118, 120-21, 804 P.2d 967 (1991) (amendment to criminal sentencing statutes making certain offenses punishable with presumptive probation is substantive rather than procedural); see *State v. Martin*, 270 Kan. 603, 608, 17 P.3d 344 (2001) (citing *State v. Hutchison*, 228 Kan. 279, 287, 615 P.2d 138 [1980], court states "[t]he prescription of a punishment for a criminal act is substantive, not procedural, law"); *State v. Sutherland*, 248 Kan. 96, 106, 804 P.2d 970 (1991) (a "substantive" criminal statute "involves the length or type of punishment"). Nor is the amendment obviously remedial in the sense of reforming or extending an existing right to enhance the public welfare or of correcting a defect in the earlier statutory language. See *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 461, 264 P.3d 102 (2011) (remedial statutes " ' "reform or extend existing rights" ' "); *In re Care & Treatment of Hunt*, 32 Kan.App.2d 344, 360, 82 P.3d 861, *rev. denied* 278 Kan. 845 (2004). Here, Swingle had no right to house arrest before the amendments, so her existing rights were not altered, as by allowing house arrest to substitute for more of the required period of incarceration. Nor was there a statutory defect in the preamendment version of K.S.A. § 1567, where the legislature had attempted to allow house arrest for four-time DUI offenders but the effort failed because the language was ineffective.

Given the settled law on retroactivity generally and criminal statutes particularly, we cannot infer some legislative intent that the house-arrest provisions in the recent amendments to K.S.A. § 1567 should be applied to DUI prosecutions based on incidents occurring before they became effective. The district court, therefore, correctly found that Swingle was not eligible for house arrest.

Affirmed.

All Citations

308 P.3d 30 (Table), 2013 WL 4729565

End of Document

Exhibit H

388 P.3d 949 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Casey HEBBERD, Appellee,

v.

KANSAS DEPARTMENT OF REVENUE, Appellant.

No. 115,689

Opinion filed February 10, 2017

Appeal from Johnson District Court; GERALD T. ELLIOTT, Judge.

Attorneys and Law Firms

Donald J. Cooper, of Kansas Department of Revenue, for appellant.

N. Trey Pettlon, of Pettlon & Ginie, of Olathe, for appellee.

Before Hill, P.J., Green, J., and Burgess, S.J.

MEMORANDUM OPINION

Per Curiam:

**1 Following Casey M. Hebberd's arrest for driving under the influence of alcohol, the Kansas Department of Revenue (KDOR) suspended Hebberd's driving privileges. Hebberd later challenged the suspension of his driver's license in the trial court. The trial court reversed the suspension of Hebberd's license, finding that the police lacked reasonable grounds to believe Hebberd was driving under the influence of alcohol. KDOR now appeals from the trial court's decision to reinstate Hebberd's driving privileges. KDOR argues that the trial court erred in finding that the police lacked reasonable grounds to believe Hebberd had been driving under the influence of alcohol. Finding merit in KDOR's argument, we reverse the trial court's order and reinstate the administrative decision revoking Hebberd's driving privileges.

On March 23, 2015, at 3:07 a.m., a sergeant with the Mission Police Department in Johnson County, Kansas, saw a car traveling 80 miles per hour on Interstate 35 where the posted speed limit was 60 miles per hour. The police sergeant turned on his emergency lights and stopped the speeding car

When the sergeant first spoke to Hebberd he could smell alcohol. The sergeant asked Hebberd if he had consumed any alcohol that night. Hebberd stated that he had not consumed any alcohol that night. The sergeant also saw that Hebberd's eyes were bloodshot, but he noted that they were not watery or glazed. Hebberd told the sergeant that he was coming from a bar, where he had been playing music with his band. When the sergeant asked Hebberd for his driver's license, it took Hebberd several attempts to get it out of his wallet. Hebberd did not have any trouble producing his insurance card. Other than struggling to remove his license from his wallet, Hebberd did not show any signs of difficulty with his manual dexterity.

After a brief exchange at the window of Hebberd's car, the sergeant asked him to get out of his car. Hebberd got out of his car without any difficulty. He was not unsteady nor did he lean on his car or use it for balance. At no time did Hebberd exhibit any difficulty in keeping his balance. After Hebberd got out of his car, the sergeant administered the Horizontal Gaze Nystagmus (HGN) test. Hebberd was able to follow the sergeant's instructions during the HGN test. He was also able to follow the sergeant's stimulus with his eyes without moving his head. Hebberd was able to articulate and communicate with the sergeant clearly.

After the HGN test, the sergeant asked Hebberd to perform the walk-and-turn test. Hebberd then told the sergeant that he was not going to participate in any further testing. Hebberd remarked that he did not trust the tests and that his wife, an attorney, told him not to take the tests. Hebberd declined to participate in the walk-and-turn test, the one-leg stand test, a test that required him to recite the alphabet from C to N, and a test that required him to count from 7 to 23. Hebberd also refused to take a preliminary breath test (PBT). At trial, the sergeant

acknowledged that Hebberd was polite when declining to perform the field sobriety tests. The sergeant testified that refusing to perform tests is a possible indicator of impairment.

**2 When Hebberd refused to perform the final field sobriety test requested, the sergeant placed him under arrest. The arrest occurred about 9 minutes after Hebberd was stopped. Hebberd was compliant and followed the sergeant's instructions. Hebberd did not become emotional, which the sergeant testified can be an indication of impairment. The sergeant's DC 27 report listed the reasonable grounds for arrest were that Hebberd smelled of alcohol and had bloodshot eyes. The sergeant marked that the odor of alcohol was strong.

KDOR revoked Hebberd's driving privileges at an administrative hearing. Hebberd filed a petition for review of the administrative decision in the Johnson County District Court. Hebberd's review was conducted by a bench trial. At the conclusion of the bench trial, the court held that the sergeant lacked reasonable grounds to believe Hebberd was driving under the influence. As a result, the trial court reversed the administrative decision to revoke Hebberd's driving privileges. KDOR filed a timely notice of appeal.

Did the Police Sergeant Have Reasonable Grounds to Believe Hebberd was Driving Under the Influence of Alcohol?

Generally, the trial court's decision in a driver's license suspension case is reviewed by the appellate court to determine whether it is supported by substantial competent evidence. *Swank v. Kansas Dept. of Revenue*, 294 Kan. 871, 881, 281 P.3d 135 (2012). If the trial court's decision is supported by substantial competent evidence, an appellate court will affirm. *Poteet v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 412, 414, 233 P.3d 286 (2010) (citing *Martin v. Kansas Dept. of Revenue*, 38 Kan. App. 2d 1, 5, 163 P.3d 313 [2006]). "[W]e do not consider other evidence that might support a different result as long as sufficient evidence supports the district court's decision." *Poteet*, 43 Kan. App. 2d at 414 (citing *In re Estate of Antonopoulos*, 268 Kan. 178, 193, 993 P.2d 637 [1999]).

An appellate court, however, is not required to ignore undisputed facts in making its determination. See *Poteet*, 43 Kan. App. 2d at 415. Whether an officer had reasonable grounds for a challenged action involves a mixed question of law and fact. 43 Kan. App. 2d at 415. Thus, "we must review the ultimate legal conclusion whether reasonable grounds existed independently, even though we must defer to the district court's factual findings." 43 Kan. App. 2d at 415. "The independent review of the ultimate legal conclusion of whether reasonable suspicion, probable cause, or the like exists is 'necessary if appellate courts are to maintain control of, and to clarify, the legal principles' at stake." 43 Kan. App. 2d at 415 (quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L.Ed. 2d 911 [1996]).

Here, we are presented a case with mostly undisputed facts. The sergeant is the only witness who testified at trial. The only disputed evidence involves Hebberd's denial of having consumed any alcohol before he was stopped. The sergeant was adamant that he smelled alcohol on Hebberd's breath. Where most of the facts are not in dispute, the true question before us is whether the sergeant had reasonable grounds to believe Hebberd had been driving under the influence of alcohol. See *Landram v. Kansas Dept. of Revenue*, No. 104,790, 2012 WL 924803, (Kan. App. 2012) (unpublished opinion), *rev. denied* 296 Kan. 1130 (2013).

K.S.A. 2015 Supp. 8 1001(b) mandates that a law enforcement officer shall request a person to submit to a one or more chemical tests to determine the level of alcohol in a person's system "[i]f, at the time of the request, the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both...."

**3 Kansas courts will evaluate whether an officer had reasonable grounds by utilizing probable cause standards. *Swank*, 294 Kan. at 881. This court has defined probable cause "as a quantum of evidence which leads a prudent person to believe an offense had been or was being committed. [Citation omitted.]" *State v. Keenan*, 50 Kan. App. 2d 358, 364, 325 P.3d 1192 (2014), *aff'd* 304 Kan. 986, 377 P.3d 439 (2016). Probable cause is determined by considering the totality of the circumstances known to the law enforcement officer, including the fair inferences

that could be reasonably drawn from those circumstances. *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 20, 290 P.3d 555 (2012) (citing *Allen v. Kansas Dept. of Revenue*, 292 Kan. 653, 656–57, 256 P.3d 845 [2011]).

In considering the totality of the circumstances, we must remember that "an officer does not have to negate every potential innocent explanation before the officer can have reasonable grounds to believe that a person has committed a crime. [Citations omitted.]" *Landrum*, 2012 WL 924803 at *3. Put another way, "[w]hen the issue is probable cause, a district court may not explain away all inferences of guilt by concluding that each of them could have an innocent explanation." *Burroughs v. Kansas Dept. of Revenue*, No. 96,549, 2007 WL 3085363 (Kan. App. 2007) (unpublished opinion). Furthermore, a finding of reasonable grounds does not mean that a driver has exhibited every possible sign of intoxication. *McClure v. Kansas Dept. of Revenue*, No. 109,025, 2013 WL 5870119 (Kan. App. 2013) (unpublished opinion).

On appeal, KDOR argues that the trial court improperly "focused only on the two factors marked on the DC27 ... as the only factors to consider in determining [the sergeant's] reasonable grounds belief." The sergeant indicated on the DC 27 form that the reasonable grounds for believing Hebberd had been driving under the influence were his bloodshot eyes and the strong odor of alcohol. KDOR goes on to argue that "there is insufficient evidence to support the trial court's conclusion," and "[t]he narrow review by the Judge did not take into consideration the other evidence presented at trial. ..."

After hearing arguments on what facts he should be taking into consideration in determining whether reasonable grounds existed, the trial judge stated that he was going to "put this issue to bed ...." Without mention of the specific facts he was relying on, the trial judge held that the sergeant did not have reasonable grounds to believe Hebberd had been driving under the influence. The trial judge then told the parties that it would not "bother [him] in the slightest" if they asked an appellate court to review his judgment and findings, admitting that maybe he was "picking at it the wrong way."

Turning to the standards that must be applied, we reiterate that the test for reasonable grounds demands consideration of the totality of the circumstances. *Sloop*, 296 Kan. at 20. Moreover, this court has expressly held that the facts found in a DC 27 form "may be supplemented by testimony and that all of the factual information available to officers when the test was requested may be considered ...." *Poteet*, 43 Kan. App. 2d at 416. After reviewing the totality of the circumstances it becomes clear that the trial judge may have considered only the facts found on the DC 27 form. Thus, he was indeed "picking at it the wrong way." We will examine the uncontroverted evidence presented at trial to determine the question before us. In doing so, we give no deference to the trial court's legal conclusion.

**4 DUI cases often involve unique sets of facts. As a result, in determining whether a law enforcement officer had reasonable grounds to believe an individual had been driving under the influence of alcohol, it can be a difficult task. To illustrate, DUI cases require consideration of the totality of the circumstances, which necessarily requires us to look across multiple cases to determine the weight of the individual circumstances. We must consider the facts known to the sergeant when he stopped Hebberd's car.

Hebberd was stopped at 3:07 a.m. for speeding. He was driving 80 miles per hour where the posted speed limit was 60 miles per hour. Both the time of night and the traffic violation of speeding may properly be considered indicators of impairment. See *Kohn v. Kansas Dept. of Revenue*, No. 103,703, 2011 WL 768000, at *2 (Kan. App. 2011) (unpublished opinion) (fact that stop occurred after 1 a.m. was a factor supporting reasonable grounds); *Nunemaker v. Kansas Dept. of Revenue*, No. 105,528, 2011 WL 5143136, at *3 (Kan. App. 2011) (unpublished opinion) (defendant driving 40 miles per hour in a 30 miles per hour zone was a factor supporting reasonable grounds); *Campbell v. Kansas Dept. of Revenue*, 25 Kan. App. 2d 430, 431, 962 P.2d 1150 (1998) (defendant's driving 72 miles per hour in a 55 miles per hour zone at 1:10 a.m. was a factor supporting probable cause to arrest for driving under the influence). Thus, the time of night and the fact that Hebberd was driving 20 miles per hour over the posted speed limit weigh in favor of finding that he had been driving under the influence of alcohol.

The sergeant also saw that Hebberd's eyes were bloodshot, which has been accepted as an indication of impairment

in determining whether reasonable grounds exist. See *Campbell*, 25 Kan. App. 2d at 431 (defendant's bloodshot eyes were a factor supporting probable cause to arrest for driving under the influence); *Nunemaker*, 2011 WL 5143136, at *2 (defendant's bloodshot eyes were a factor supporting reasonable grounds). Thus, the fact that Hebberd's eyes were bloodshot is a factor that weighs in favor of finding that he had been driving under the influence of alcohol.

Next, the sergeant noticed that Hebberd struggled to retrieve his license from his wallet when the sergeant requested it. Struggling to produce requested documentation has been considered in the totality of the circumstances to indicate impairment. See *State v. Huff*, 33 Kan. App. 2d 942, 946, 111 P.3d 659 (2005) (defendant fumbling with his wallet considered in upholding conviction for driving under the influence). Thus, Hebberd's struggle with his wallet weighs in favor of finding that he had been driving under the influence of alcohol.

The sergeant also testified that Hebberd smelled of alcohol. When the sergeant asked Hebberd if he had been drinking, Hebberd stated that he had not consumed any alcohol that night. Hebberd did admit that he was coming from a bar, though he told the sergeant that he was only at the bar because he had been playing in a band. The odor of alcohol is an accepted indicator of impairment. See *Campbell*, 25 Kan. App. 2d at 431 (odor of alcohol on defendant was a factor supporting probable cause to arrest for driving under the influence); *Sjoberg v. Kansas Dept. of Revenue*, No. 103,937, 2012 WL 3966511, at *8 (Kan. App. 2012) (unpublished opinion) (odor of alcohol on defendant was a factor supporting reasonable grounds). Thus, the odor of alcohol on Hebberd weighs in favor of finding that he had been driving under the influence of alcohol.

**5 Moreover, as KDOR points out, an individual's false statements may also be taken into account in determining whether an officer had reasonable grounds. See *Landram*, 2012 WL 924803, at *3 ("[f]alse statements about matters within a person's knowledge that are material to whether he or she has committed a crime may be considered as one factor giving reasonable grounds to believe the person has done something criminal"). In *Landram*, the court considered the defendant's statements false because they were contrary to the evidence known to the officer. Here, Hebberd admitted that he had been at a bar, and the sergeant could smell the odor of alcohol coming directly from Hebberd for the entirety of the stop. Thus, the evidence tends to show that Hebberd was not telling the truth when he denied having consumed any alcohol. For this reason, where evidence to the contrary exists, Hebberd's denial of having drank alcohol weighs in favor of finding that he had been driving under the influence of alcohol.

Finally, after the sergeant administered the HGN test, Hebberd told the sergeant that he would not participate in any more field sobriety tests. Hebberd specifically refused to perform the walk-and-turn test and the one-leg stand test. He also specifically refused to recite the alphabet from C to N and count from 7 to 23. Finally, he refused to take a PBT. Refusal to perform field sobriety tests may be considered as an indicator of impairment. See *State v. Rubick*, 16 Kan. App. 2d 585, 588, 827 P.2d 771 (1992) (defendant's refusal to perform field sobriety tests admissible at trial for driving under the influence); *Huff*, 33 Kan. App. 2d at 946. Hebberd refused to submit to the tests first because he was on the shoulder of a highway. Then, Hebberd told the sergeant that he did not trust the tests. Finally, he told the sergeant that his wife is an attorney, and she told him not to take any tests. Thus, Hebberd's refusal to perform the field sobriety tests weighs in favor of finding that he had been driving under the influence.

We, however, acknowledge that there were facts presented at trial offered to explain the circumstances previously cited. For instance, the sergeant acknowledged that Hebberd's bloodshot eyes could have been because of the early morning hour. Moreover, Hebberd stated that he was out only because he had been playing music with his band at a bar. Again, though, we must note that "an officer does not have to negate every potential innocent explanation before the officer can have reasonable grounds to believe that a person has committed a crime. [Citations omitted.]" *Landram*, 2012 WL 924803, at *3.

In addition to the innocent explanations offered at trial, testimony was produced that would tend to show that

Hebberd was not impaired he never lost his balance, he showed manual dexterity, he spoke clearly, he was not emotional. In response to those facts we recall that when determining whether an officer had reasonable grounds to believe an individual had been driving under the influence of alcohol, "it is not necessary that the driver exhibit every sign of possible intoxication. It is sufficient that the police officer observe enough signs of intoxication to make a reasonable police officer believe the driver was operating a vehicle while under the influence of alcohol." *McClure*, 2013 WL 5870119, at *4.

Here, we conclude that the sergeant observed enough signs of intoxication to have reasonable grounds to believe Hebberd had been driving under the influence of alcohol. Thus, even with the innocent explanations and other evidence that may have indicated Hebberd was not impaired, the totality of the circumstances show that the sergeant had reasonable grounds to believe Hebberd had been driving under the influence of alcohol.

Reversed.

All Citations

388 P.3d 949 (Table), 2017 WL 543545

End of Document

Exhibit I

247 P.3d 234 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Kyle A. KOHN, Appellant,

v.

KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 103,703.

Feb. 25, 2011.

Appeal from Ford District Court; Van Z. Hampton, Judge.

Attorneys and Law Firms

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

James G. Keller, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before GREENE, C.J., BUSER and ATCHESON, JJ.

MEMORANDUM OPINION

GREENE, C.J.

***1** Kyle A. Kohn appeals the district court's decision to affirm the administrative action suspending his driver's license, arguing that the police officer who stopped him lacked objective facts sufficient to establish reasonable grounds to request Kohn submit to a breath test. We disagree with Kohn and affirm the district court.

A Dodge City police officer stopped Kohn at 1:50 a.m. after he failed to use a turn signal and came close to hitting a curb. Upon reaching Kohn's vehicle, the officer saw an open alcoholic beverage container in the center console, could smell alcohol coming from Kohn's person, and observed that Kohn's eyes were bloodshot or watery. When the officer asked Kohn if he had been drinking, Kohn admitted that he "had a few."

The officer asked Kohn to exit the vehicle and perform field sobriety tests. Kohn exhibited four clues of impairment during the walk-and-turn test and two clues of impairment during the one-leg-stand test. Kohn was then arrested and transported to the law enforcement center. Upon arrival, the officer provided Kohn with the implied consent advisories and asked him to submit to a breath test. The results showed a blood alcohol content of .175.

At the subsequent administrative hearing, Kohn failed to appear and the administrative law judge suspended his driving privileges. Kohn appealed the decision to the district court, where the suspension was affirmed after a de novo trial. Kohn now timely appeals.

Kohn's sole issue on appeal is whether the officer had reasonable grounds to request a breath test. This court reviews the district court's ruling to see whether it is supported by substantial competent evidence. *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 514, 242 P.3d 1179 (2010); *Schoen v. Kansas Dept. of Revenue*, 31 Kan.App.2d 820, Syl. ¶ 1, 74 P.3d 588 (2003). Our Supreme Court has recently noted:

> "In this context, the issue as to whether an officer has reasonable grounds to believe someone is operating or attempting to operate a vehicle while DUI is strongly related to whether that officer had probable cause to arrest. *Bruch v. Kansas Dept. of Revenue*, 282 Kan. 764, 775, 148 P.3d 538 (2006). This court has found the term 'reasonable grounds' synonymous in meaning with 'probable cause,' but in doing so has noted an officer may have reasonable grounds to believe a person is operating a vehicle under the influence sufficient to request a test under the statute but not have the probable cause required to make an arrest under K.S.A. 8-1001. 282 Kan. at 776." *Smith*, 291 Kan. at 513-14.

"Probable cause is determined by evaluating the totality of the circumstances." *Smith*, 291 Kan. at 515. We do not ask law enforcement officers to act as judge and jury; the probable-cause requirement is simply designed to avoid arbitrary conduct against citizens based purely

on speculation. *Burroughs v. Kansas Dept. of Revenue,* No. 96,549, unpublished opinion filed Oct. 19, 2007. Stated another way, "[p]robable cause to arrest is that quantum of evidence that would lead a reasonably prudent police officer to believe that guilt is more than a mere possibility." *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 431, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998).

***2** Having reviewed the record and applied the applicable legal standard, we conclude the officer here had probable cause to believe that Kohn was driving while under the influence of alcohol. The evidence against Kohn is at least as strong as that found in *Campbell,* where this court affirmed the district court's conclusion that reasonable grounds had been shown. There, probable cause was based on the time of day (1:10 a.m.), a traffic infraction (speeding), the odor of alcohol, admitted alcohol consumption, and bloodshot, glazed eyes. Here, those same factors were present, but the officer additionally observed the open container in the center console of the vehicle.

Although Kohn argues on appeal that the field sobriety testing was unreliable due to weather and ground conditions, we conclude this is irrelevant because there was already adequate cause to request breath testing prior to the field sobriety testing. When the field sobriety test results are considered along with the other factors, there is more than "reasonable grounds" to request breath testing. We decline to consider that Kohn failed to exhibit other signs of impairment. See *Grabner v. Kansas Dept. of Revenue,* No. 100,390, unpublished opinion filed July 10, 2009.

We conclude there was substantial competent evidence to support the district court's finding that there were reasonable grounds to request that Kohn submit to breath testing.

Affirmed.

All Citations

247 P.3d 234 (Table), 2011 WL 768000

End of Document

Exhibit J

217 P.3d 66 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Ashley HORTON, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 101,047.
|
Oct. 9, 2009.

Appeal from Ellis District Court; Edward E. Bouker, Judge.

Attorneys and Law Firms

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

James G. Keller, of Kansas Department of Revenue, for appellee.

Before GREENE, P.J, GREEN and STANDRIDGE, JJ.

MEMORANDUM OPINION

GREENE, J.

***1** Ashley Horton appeals the district court's affirmance of an administrative action suspending her driver's license, arguing the arresting officer lacked reasonable grounds to arrest her and request breath testing. We disagree and affirm.

Factual and Procedural Background

At 1:13 a.m. on June 17, 2007, an officer stopped Horton's vehicle after observing three separate but minor traffic infractions. When the officer initially contacted Horton in her vehicle, he noticed an odor of alcohol coming from the vehicle and observed that Horton's eyes were bloodshot. Upon removing Horton from the vehicle, the officer confirmed that the odor was indeed coming from Horton. When Horton was asked if she had consumed any alcohol that evening, Horton admitted that she had two drinks about 1 hour earlier.

The officer then asked Horton to perform field sobriety testing, and she agreed to do so. On the walk-and-turn test, Horton exhibited only one clue of eight possible. On the one-leg stand test, Horton exhibited three out of four clues of possible impairment. No other tests were administered, but the officer then arrested Horton. She ultimately submitted to a breath alcohol test on the Intoxilyzer 5000, which she failed with an alcohol concentration of .142.

After an administrative hearing officer affirmed the suspension of Horton's driving privileges, Horton appealed to the district court. The court concluded there were reasonable grounds to request the breath test, citing the three observed traffic infractions, the time of day, the observed odor of alcohol, the bloodshot eyes, and the failure of at least one field sobriety test. Horton appeals.

Did the District Court Err in Concluding There Were Reasonable Grounds to Support the Arrest?

Horton's exclusive argument on appeal is that the officer "lacked objective facts sufficient to establish reasonable ground to request testing under the Kansas Implied Consent Law." The determination whether an officer had reasonable grounds to make a warrantless arrest in a DUI case is a mixed question of law and fact. *City of Dodge City v. Norton*, 262 Kan. 199, 203, 936 P.2d 1356 (1997). Where the facts are not in dispute, however, we have unlimited review of the district court's determination. See *State v. Vandiver*, 257 Kan. 53, 56, 891 P.2d 350 (1995).

One who challenges an administrative action suspending his or her driving privileges based on an invalid arrest prior to testing has the burden to show that the arresting officer lacked reasonable grounds to request the test. *Huelsman v. Kansas Dept. of Revenue*, 267 Kan. 456, 462 63, 980 P.2d 1022 (1999). Our courts have often equated this reasonable grounds requirement with probable cause to arrest. See, *e.g.*, *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 176 P.3d 938 (2008). The issue before us is whether the undisputed facts were sufficient to lead a

reasonably prudent police officer to believe that guilt was more than a mere possibility. *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 431, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998).

***2** Horton claims that the undisputed facts are parallel if not identical to those in *City of Norton v. Wonderly,* 38 Kan.App.2d 797, 172 P.3d 1205 (2007), *rev. denied* 286 Kan. 1176 (2008) where a panel of our court concluded that reasonable grounds did not support the arrest and testing. We disagree. In *Wonderly,* there was no observed traffic infraction and there was no field sobriety testing until after the arrest. Here, there were three observed traffic infractions, although very minor, and there was an indication of three clues of impairment in at least one field sobriety test. These factors, coupled with the time of day, the odor of alcohol, the admission of consuming alcohol, and the bloodshot eyes were sufficient to support reasonable grounds to request the testing. See *Campbell,* 25 Kan.App.2d at 431–32, 962 P.2d 1150 (speeding at 1:10 a.m., odor of alcohol, and bloodshot eyes "were more than sufficient"). For these reasons, we agree with the district court in concluding there were reasonable grounds to request Horton's breath test.

Affirmed.

All Citations

217 P.3d 66 (Table), 2009 WL 3270833

Exhibit J1

337 P.3d 73 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Toby F. PHILLIPS, Appellant,

v.

KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 111,378.

|

Oct. 31, 2014.

Appeal from Saline District Court; Robert G. German, Judge.

Attorneys and Law Firms

Roger D. Struble, of Blackwell & Struble, LLC, of Salina, for appellant.

Donald J. Cooper, of Kansas Department of Revenue, for appellee.

Before McANANY, P.J., ARNOLD-BURGER, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Toby J.F. Phillips appeals from the district court's order affirming the Kansas Department of Revenue's (KDR) decision to suspend his driver's license. He contends that the arresting officer lacked reasonable grounds to request an evidentiary breath test under the Kansas implied consent law. For the reasons stated below, we affirm the district court's order affirming the KDR's suspension of Phillips' driver's license.

The parties are well acquainted with the facts, and we need not recount all of them here. It suffices to say that Phillips was stopped at 11:30 p.m. for failing to signal before making a turn. Phillips' actions appeared to be clumsy and slow as he attempted to retrieve his driver's license. There was a strong odor of alcohol coming directly from him. Phillips had bloodshot eyes, slurred speech, and he appeared to be confused as the officer gave him instructions. Phillips was uncooperative and argumentative. He was unsuccessful in the walk-and-turn field sobriety test. All this occurred before the officer arrested Phillips for DUI and requested an evidentiary breath test, which Phillips refused.

All of this provides substantial evidence to support the district court's finding that the officer had reasonable suspicion to ask Phillips to submit to the breath test. We do not reweigh the evidence in reaching this conclusion. See *Hodges v. Johnson*, 288 Kan. 56, Syl. ¶ 7, 199 P.3d 1251 (2009).

Phillips relies on *City of Hutchinson v. Davenport*, 30 Kan.App.2d 1097, 54 P.3d 532 (2002), in arguing that the odor of alcohol, without more, does not establish a reasonable suspicion that a person is intoxicated or too impaired to drive. *Davenport* does not apply. As noted above, there was much more evidence present in our case than the mere odor of alcohol.

Phillips also relies on *State v. Blair*, 26 Kan.App.2d 7, 974 P.2d 121 (1991), in which the driver admitted she had been drinking, arguing that there was no such admission here. No such admission was needed to establish reasonable suspicion based on the observations of Phillips at the scene.

Here, the officer made a legitimate traffic stop and had probable cause to arrest Phillips for DUI and reasonable grounds to request that he take a breath test. The district court did not err in upholding the suspension of Phillips' driver's license.

Affirmed.

All Citations

337 P.3d 73 (Table), 2014 WL 5801283

Exhibit K

367 P.3d 1284 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
John Jacob BEHNKEN, Appellant.

No. 113,340.
|
April 1, 2016.

Appeal from Cowley District Court; Nicholas M. St. Peter, Judge.

Attorneys and Law Firms

Jennifer Anne Passiglia, of Law Office of Jennifer Passiglia, of Winfield, for appellant.

Christopher E. Smith, county attorney, and Derek Schmidt, attorney general, for appellee.

Before GREEN, P.J., BUSER, J., and HEBERT, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** John Jacob Behnken appeals from his conviction of driving under the influence (DUI) after a bench trial on stipulated facts. He argues that the district court erred by denying his motion to suppress evidence, particularly the results of an Intoxilyzer breath test.

We find no reversible error and affirm the judgment of the district court.

Factual and Procedural Background

At about 2 a.m. on February 25, 2014, Officer Phillip Lynch of the Winfield Police Department stopped a vehicle traveling without using its headlights. Officer Lynch approached the vehicle and spoke with the driver, subsequently identified as Behnken, who was the only person in the vehicle. When he told Behnken that he pulled him over because his headlights were not on, Behnken turned on the windshield wipers in an apparent attempt to turn on the headlights. Behnken tried to explain his mistake by telling Officer Lynch that he just got his pickup back.

Officer Lynch smelled alcohol on Behnken's breath and asked Behnken for his driver's license and insurance information. When Behnken tried to hand his driver's license to Officer Lynch, he fumbled and dropped it between the seats. After using Officer Lynch's flashlight to retrieve the driver's license, Officer Lynch returned to his vehicle, wrote down Behnken's personal information, checked his license, and returned to Behnken's vehicle. Officer Lynch testified that he suspected Behnken had been drinking because Behnken slurred his speech, fumbled and dropped his driver's license, turned on the windshield wipers instead of the headlights, and because he could smell alcohol on Behnken's breath. Officer Lynch then asked Behnken to perform some standard field sobriety tests.

After Officer Lynch explained and demonstrated the walk-and-turn test, Behnken attempted the test. Officer Lynch noted that Behnken was unable to keep his balance before beginning the test, he missed heel-to-toe on three steps, stepped off the line while walking, and used his arms for balance. All-in-all, Behnken exhibited four clues of impairment. Next, Behnken performed the one-leg-stand test, during which he put his foot back on the ground twice in a 30 second period and used his arms for balance.

After completing the field sobriety tests, Officer Lynch "explained to [Behnken] that [he] was going to take him to the Police Department" to have him tested on an Intoxilyzer 8000. At this point, Officer Lynch did not tell Behnken that he was under arrest. Behnken rode to the police department in the front seat of Officer Lynch's patrol car, without his hands cuffed. Once at the station, Behnken submitted a breath sample, which indicated his blood-alcohol content was .192. After Officer Lynch received the test results, he told Behnken he was under arrest.

On March 11, 2014, the State charged Behnken with one count each of driving with a suspended license, driving without headlamps when required, and driving under the influence of alcohol or drugs. On July 11, 2014, Behnken filed a motion to suppress all evidence obtained from the traffic stop, including the results of the evidentiary breath test. In his motion to dismiss, Behnken argued that Officer Lynch's interaction with him was more akin to a *Terry* stop than an arrest. To that end, he argued he was not "under arrest or otherwise taken into custody," which he contended was a prerequisite to a request for a breath test under K.S.A.2013 Supp. § 1001. He also argued that even if the court found that he was under arrest, Officer Lynch lacked probable cause to make such an arrest. The State filed a response in which it asserted Behnken was under arrest at the time he was placed into Officer Lynch's patrol vehicle and that probable cause existed to justify the arrest.

***2** On July 22, 2014, the district court held an evidentiary hearing on the motion to suppress, during which only Officer Lynch testified. After direct and cross-examination, the district court judge examined Officer Lynch. Officer Lynch told the district court judge that when he transported Behnken to the police department, he was not free to leave at that point.

Officer Lynch also told the district court judge that not long before this incident, he had investigated a vehicle accident Behnken had in a Wal Mart parking lot. Officer Lynch testified that Behnken's speech during that prior investigation was "clear and easy to understand"; but on the night of the traffic stop, Behnken spoke slower than normal and his words "smeared together."

After hearing closing arguments, the district court denied Behnken's motion to suppress. It found that a person in Behnken's situation would not believe that he or she was free to leave. The district court stated that Behnken submitted to Officer Lynch's show of authority and was under arrest when he was directed to the patrol car. It further found that Officer Lynch possessed reasonable suspicion to request Behnken take field sobriety tests and, eventually, probable cause to place him under arrest.

On July 23, 2014, the district court filed a journal entry of its order denying Behnken's motion to suppress. On December 17, 2014, the parties stipulated to the facts presented in the suppression hearing for the purposes of a bench trial on the DUI charge. They also stipulated that (1) on February 25, 2014, Behnken was operating a motor vehicle at 2:10 a.m. without headlamps; (2) the breath sample submitted indicated a blood-alcohol content of .192; and (3) Behnken had entered into a previous DUI diversion in 2012. In exchange, the State agreed to dismiss the remaining counts.

The district court ultimately found Behnken guilty of his second DUI offense and on February 4, 2015, it imposed an underlying 1 year prison sentence and fine of $1,250. However, the district court ordered Behnken to serve 5 days in jail and then be released on probation for 1 year. Behnken thereafter filed a timely notice of appeal.

The District Court Properly Denied Behnken's Motion to Suppress

Behnken's argument on appeal is two-fold. He first argues the evidentiary breath test should have been suppressed because he was not under arrest at the time he was taken to the police department and submitted to the test. He further argues that, even if he was under arrest at that time, the officer lacked probable cause to arrest him.

In reviewing a district court's decision on a motion to suppress, we apply a bifurcated standard. We review the district court's factual findings to determine whether they are supported by substantial competent evidence. Then we review the ultimate legal conclusion de novo. See *State v. Reiss*, 299 Kan. 291, 296, 298, 326 P.3d 367 (2014). Substantial evidence is legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion. *State v. May*, 293 Kan. 858, 862, 269 P.3d 1260 (2012).

Behnken Was Under Arrest

***3** Behnken's first argument is that he was not "under arrest" when he was placed in a patrol car to be transported to the police station for the Intoxilyzer test. He would, rather, characterize his situation as simply a continuation of the investigatory detention and,

thus, insufficient to support the administration of an evidentiary breath test. In *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 20, 290 P.3d 555 (2012), our Supreme Court determined that a request for evidentiary testing under K.S.A.2008 Supp. 8 1001(b)(1)(A) must be predicated upon a valid arrest.

An arrest is the taking of a person into custody to answer for a crime. See K.S.A. 22 2202(4). A seizure generally occurs when, pursuant to a show of police authority, a reasonable person would not feel free to leave or to terminate the encounter and submits to the show of authority. See *State v. Morales*, 297 Kan. 397, Syl. ¶¶ 3 4, 300 P.3d 1090 (2013). That determination is to be made by reviewing the totality of the circumstances in each case. See *State v. Thompson*, 284 Kan. 763, Syl. ¶¶ 19 20, 166 P.3d 1015 (2007).

> "Pursuant to K.S.A. 22 2202(4) and K.S.A. 22 2405(1), a person is considered under arrest by a law enforcement officer when the person is physically restrained or otherwise deprived of his freedom of action in any significant way or when he or she submits to the officer's custody for the purpose of answering for the commission of a crime. See *State v. Hill*, 281 Kan. 136, 143, 130 P.3d 1 (2006). The test for determining whether a person was placed under arrest ... 'is based on what a reasonable person would believe under the totality of the circumstances surrounding the incident. [Citation omitted.]' *Hill*, 281 Kan. at 145." *City of Norton v. Wonderly*, 38 Kan.App.2d 797, 804 05, 172 P.3d 1205 (2007), *rev. denied* 286 Kan. 1176 (2008).

In the instant case, it is clear Officer Lynch had initiated the encounter/seizure by a show of police authority. He displayed emergency lights to stop Behnken's vehicle and subsequently directed Behnken to exit his vehicle in order to perform field sobriety tests. The record indicates the tests were not merely suggested or optional. Upon completion of the field sobriety tests, Officer Lynch "explained" to Behnken he was going to take him to the police department for further tests. Again, there is nothing in the record which would suggest Behnken was free to refuse the change of location; all indications suggest compliance was mandatory. These circumstances establish several of the factors indicative of a coercive environment as set forth in *Thompson*, 284 Kan. at 811. Behnken submitted to Officer Lynch's show of authority by riding in the patrol car albeit in the front seat and without handcuffs to the police station where he submitted to the Intoxilyzer test. Although Officer Lynch did not explicitly tell Behnken that he was "under arrest," a reasonable person in Behnken's situation would not have felt free to refuse Officer Lynch's directive or to otherwise terminate the custodial encounter. *Cf. Wonderly*, 38 Kan.App.2d at 805 (defendant effectively under arrest when transported for further field sobriety tests; however he was in handcuffs). In his brief, Behnken claims he was under the belief that if he passed the breath test he would be returned to his vehicle and allowed to go home, but the record does not support this point. In response to questioning by Behnken's attorney during the suppression hearing, Officer Lynch testified that it was not possible he would have told Behnken he could go home if he passed the evidentiary test.

***4** We find that the totality of the circumstances, based on the substantially uncontroverted findings of fact made by the district court, leads to the conclusion Behnken was under arrest at the time he was transported to the police department and submitted to the evidentiary breath test.

Probable Cause Existed for Behnken's Arrest

We turn to Behnken's next argument that, should we agree with the district court he was under arrest when taken to the police department, the arrest was not valid because there was no probable cause at that point upon which to premise an arrest.

We first note that Behnken does not challenge the district court's finding Officer Lynch had a reasonable suspicion to support the initial stop. Behnken stipulated he was driving his vehicle at 2:30 a.m. without headlights in violation of K.S.A.2013 Supp. 8 1702(a)(1). See *State v. Delgado*, 36 Kan.App.2d 653, 655 56, 143 P.3d 681 (2006), *rev. denied* 283 Kan. 932 (2007).

While speaking with Behnken about the traffic violation, Officer Lynch noticed Behnken's breath smelled of alcohol and observed that Behnken had turned on his windshield wipers instead of his lights and fumbled and dropped his driver's license and insurance information. Officer

Lynch further noted Behnken's speech was slurred and slower than normal, in contrast to a recent interaction between Officer Lynch and Behnken. These observations supported a reasonable and articulable suspicion Behnken was driving under the influence, thereby permitting Officer Lynch to expand the scope of his investigation.

Officer Lynch then directed Behnken to exit his vehicle for field sobriety tests. He observed that Behnken was unable to maintain his balance prior to the walk-and-turn test. During the test, Behnken missed heel-to-toe on three steps, stepped off the designated line, and used his arms for balance, thereby exhibiting at least four clues of impairment. While attempting the one-leg-stand test, Behnken put his foot back to the ground twice and used his arms for balance. It was at this point that Officer Lynch told Behnken that he was taking him to the police station.

Probable cause for arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to assure a person of reasonable caution an offense has been committed or is being committed and the person being arrested is or was involved in a crime. *State v. Hill*, 281 Kan. 136, 146, 130 P.3d 1 (2006); see *Sloop*, 296 Kan. at 21. Each case must be evaluated on the basis of the totality of the circumstances presented. *State v. Ramirez*, 278 Kan. 402, 406, 100 P.3d 94 (2004).

Here, we agree with the district court that Officer Lynch made sufficient observations and conducted sufficient field sobriety testing to support probable cause to arrest Behnken at the scene for driving under the influence. The arrest was valid, and the district court properly denied the motion to suppress.

***5** Affirmed.

All Citations

367 P.3d 1284 (Table), 2016 WL 1296085

Exhibit K1

376 P.3d 93 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Matthew Ryan ZACHARIAS, Appellant.

No. 114,334.
|
May 13, 2016.

Appeal from Atchison District Court; Martin J. Asher, Judge.

Attorneys and Law Firms

John R. Kurth, of Kurth Law Office Incorporated, P.A., of Atchison, for appellant.

Gerald R. Kuckelman, county attorney, and Derek Schmidt, attorney general, for appellee.

Before POWELL, P.J., ARNOLD-BURGER, J., and BURGESS, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Matthew Ryan Zacharias appeals his conviction of driving under the influence (DUI) in violation of K.S.A.2015 Supp. 8-1567(a)(3). On appeal, Zacharias argues that the trial court erred when it considered his blood alcohol content (BAC) test results. Zacharias also argues that there was insufficient evidence to support his convictions. Nevertheless, as detailed below, both of Zacharias' arguments fail. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 8, 2015, at approximately 1:30 a.m., Deputy Kelly Johansen received a call that a person had driven his truck off the side of the road. Deputy Johansen arrived on scene shortly thereafter, finding a pickup truck with its driver's side wheels in a ditch. Two men were attempting to get the truck out of the ditch. When Deputy Johansen asked the men what happened, a man, later identified as Zacharias, told Deputy Johansen that he had driven the truck off the side of the road while he was texting and driving. The road Zacharias had driven off was a gravel road. Due to recent snow, the road was wet and muddy in certain parts.

Deputy Johansen became suspicious that Zacharias had been driving under the influence after noticing the following: (1) Zacharias had an odor of alcohol emanating from his breath; (2) Zacharias had slurred speech; (3) Zacharias had poor balance, falling on the ground when he jumped off the bed of his truck; and (4) Zacharias had bloodshot and watery eyes. When Deputy Johansen asked Zacharias how many beers he had consumed, Zacharias responded a couple. Zacharias also told Deputy Johansen that he had just left a local bar.

Zacharias agreed to complete standardized field sobriety tests (SFSTs). Deputy Johansen reported that Zacharias did poorly on both the one-leg-stand test and the walk-and-turn test, losing his balance and swaying during both tests. After failing these tests, Deputy Johansen asked Zacharias if he would consent to a preliminary breath test (PBT). Zacharias agreed, and his PBT results indicated that he was under the influence.

Accordingly, Deputy Johansen arrested Zacharias for DUI. Deputy Johansen took Zacharias to the hospital, asked Zacharias if he would agree to a blood draw, and read Zacharias the implied consent notices. Zacharias agreed to the blood draw. Zacharias' blood was drawn at approximately 3 a.m. At some point after his arrest, Zacharias admitted to Deputy Johansen that he had consumed about 12 beers in the previous 12 hours. Ultimately, Zacharias' blood test results showed that his BAC was 0.17.

The State charged Zacharias with DUI in violation of K.S.A.2015 Supp. 8-1567, a class A nonperson misdemeanor. The complaint specifically alleged that Zacharias

> "unlawfully operate[d] or attempt[ed] to operate a vehicle within this state while the alcohol concentration in [his] blood or breath [was] over .08 or more; or

> the alcohol concentration in [his] blood or breath as measured within two hours of the time of operating or attempting to operate a vehicle [was] .08 or more; or, while under the influence to a degree that render[ed [him] incapable of safely driving a vehicle."

***2** At Zacharias' bench trial, Deputy Johansen testified about his encounter with Zacharias. Deputy Johansen explained that he believed Zacharias was under the influence based on his breath smelling like alcohol, his slurred speech, his poor balance, his bloodshot and watery eyes, and his failed SFSTs. Deputy Johansen testified that Zacharias told him the last drink he had was at the bar. Deputy Johansen admitted that he was unsure exactly when Zacharias drove his truck into the ditch, but he knew that he arrived on scene about 1:30 a.m. and that Zacharias' blood was drawn at about 3 a.m. The State also admitted Zacharias' blood test results into evidence.

Zacharias' father, Claude Zacharias, testified on behalf of the defense. Claude explained that Deputy Johansen called him to the scene of Zacharias' accident so he could tow the truck out of the ditch. Claude explained that he knew Deputy Johansen personally because he is also a police officer for the city of Atchison. Accordingly, Claude was able to observe his son at the scene of the accident before Deputy Johansen took him to the hospital for the blood draw. When asked by the State if he could tell whether his son had been drinking, Claude responded, "Oh, I think he had been drinking, yes."

The defense also admitted Deputy Johansen's bodycam video of the SFSTs, arrest, and blood draw into evidence. After its admission, it seems the trial court watched the video in its entirety. The defense challenged the validity of the blood test given that Deputy Johansen was unable to establish if Zacharias' blood was drawn within 2 hours of driving.

After viewing the video, the trial court found Zacharias' guilty of DUI. In reaching this ruling, the trial judge stated:

> "There is not sufficient evidence to establish the time line as far as whether the blood was drawn within two hours of driving.
>
> "So I don't believe that evidence can be used for those subsections of d.u.i.
>
> ....
>
> > "So the evidence of the blood draw, which the Court has admitted, would be admissible and relevant with regards to the general catchall in the d.u.i. statute as to whether the defendant was under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle."
>
> "Really, for no other purpose.
>
> "With regards to that the, the evidence established that the officer testified that he smelled the odor of alcohol.
>
> "He testified that there was slurred speech and bloodshot eyes.
>
> "There was testimony with regards to that he had gone back to the truck to remove a pack of cigarettes.
>
> "The truck is at kind of an angle into the ditch, which has been testified and also can be viewed on the video, when the defendant apparently jumped off of the truck from getting the cigarettes.
>
> "He apparently fell.
>
> "Frankly, I think that's of limited evidentiary value, given that he's jumping from an off-centered off-angled vehicle onto a muddy road.
>
> ***3** "So I think it's a very limited evidentiary value as far as showing impairment.
>
> "You know, the accident itself, again, is somewhat of a limited value as far as evidence of impairment since the cause of the accident was his distracted driving while texting with the combination of muddy conditions of the road.
>
> ....
>
> "With regards then to the two field sobriety tests that the defendant conducted, he performed the one-leg stand.

"From the Court's observation, he essentially performed that rather well.

"I think there was a slip towards the end .... until the end, he had performed it reasonably well.

"With regards to the walk-and-turn, the deputy testified that he had counted a flaw in the initial step that is visible on the video that you can see.

"Really the first step is off the imaginary line.

"The deputy testified that there was also a swaying and using of arms in coming back.

"Frankly, the Court did not see that.

"I mean, if that occurred, it had to be very subtle.

....

"The test results from the blood test have been admitted.

"They show that at the time he was tested, he was at [0.17], which, of course, is twice the limit, of the .08.

"I think, given the combination of the evidence ... it's not what the Court would consider overwhelming, but I do think it's sufficient—so the Court is going to find you guilty of the charge.

"Again, given the evidentiary value of the test, even though it's not the presumed impairment within the two hours, it still is admissible and relevant with regards to whether the defendant could safely operate the vehicle, given the combination of other factors.

"Even the field sobriety—obviously, we've seen worse—there were some flaws.

"So the Court finds there is sufficient evidence and finds him guilty."

The trial court sentenced Zacharias to 1 year in county jail but suspended all but 5 days of his sentence. The trial court also fined Zacharias in the amount of $1,250. Zacharias timely appealed.

ANAYLSIS

Did the trial court err in considering the blood test?

An appellate court has unlimited review over the interpretation of a statute. *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12, *cert. denied* 135 S.Ct. 91 (2014).

Both parties agree that the trial court found Zacharias guilty of DUI to a degree that made him incapable of safely driving in violation of K.S.A.2015 Supp. 8–1567(a)(3). Nevertheless, Zacharias takes issue with the fact that the trial court considered his blood test results. Zacharias argues that because Deputy Johansen was unable to establish when he drove his truck into a ditch, and therefore stopped driving, his blood test results were inadmissible for purposes of determining whether he was DUI. Citing *State v. Armstrong*, 236 Kan. 290, 689 P.2d 897 (1984), Zacharias contends that if the lapse of time between the moment a defendant stopped driving and the moment a defendant's blood was drawn is of an unknown proportion, then the defendant's blood test should not be considered for any purpose because the probative value of the test is entirely negated. The *Armstrong* court made no such holding.

***4** Under K.S.A.2015 Supp. 8–1567(a)(3), a person may be convicted of DUI when that person is "under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle ." Under K.S.A.2015 Supp. 8–1567(a)(2), a person may be convicted of DUI when "the alcohol concentration in the person's blood or breath, as *measured within three hours of the time of operating or attempting to operate a vehicle,* is .08 or more." (Emphasis added.) Thus, K.S.A.2015 Supp. 8–1567(a)(2) requires that a test be taken within a specific time of a person operating a vehicle, while K.S.A.2015 Supp. 8–1567(a)(3) does not. See also *State v. Pendleton*, 18 Kan.App.2d 179, 185, 849 P.2d 143 (1993) (explaining the statutory differences regarding the admissibility of blood and breath tests under K.S.A. 8–1567[a][1], [2], and [3]).

In the complaint, the State charged Zacharias under an alternative that stated that he "unlawfully operate[d] or attempt[ed] to operate a vehicle within this state while ... the alcohol concentration in [his] blood or breath as measured within *two hours* of the time of operating or attempting to operate a vehicle [was] .08 or more." (Emphasis added.) The older version of K.S.A. 8–1567(a)(2) had a 2–hour window which was amended to

3 hours in 2011. This discrepancy has no effect on the outcome of this issue.

In *Armstrong,* our Supreme Court held that even though Armstrong's blood was drawn over the statutory time limit, his blood test results were admissible. 236 Kan. at 295. The *Armstrong* court held:

> "While we believe that blood tests should be administered as near in time to the arrest as practicable, a delay should not make the test results inadmissible since it is possible to estimate the alcohol content 'at the time' the defendant was driving. The amount of elapsed time is something the jury should take into account in weighing the probative value of the evidence." 236 Kan. at 295.

Thus, the *Armstrong* court never banned the trial court from considering blood test results because the time between the moment the defendant stopped driving and the moment the defendant's blood was drawn was unknown. Instead, the *Armstrong* court simply directed the trial court to consider the length of the delay, whatever that may be, in determining the weight of the evidence. As a result, Zacharias' assertion that the trial court erred by considering his blood test results because the State was unable to establish exactly when he stopped driving is incorrect.

Moreover, although we do not know the exact moment Zacharias stopped driving, the State presented a timeline of Zacharias' alcohol consumption. In turn, this timeline provided the trial court with highly relevant evidence regarding whether Zacharias was capable of safely driving.

As previously detailed, the State presented evidence: (1) that Zacharias ultimately admitted that he had consumed 12 beers over the 12 hours before the accident; (2) that Zacharias consumed beer at the bar immediately before driving his truck into a ditch; and (3) that Zacharias consumed his last drink at the bar. All of this evidence strongly supports that Zacharias had been drinking heavily immediately before driving. Consequently, even though the trial court did not know the exact moment Zacharias stopped driving, the trial court had a timeline of Zacharias' alcohol consumption. From this timeline, the trial court had substantial competent evidence to reasonably conclude that when Zacharias drove his truck into the ditch, he was under the influence to a degree that made him so impaired he could not safely drive. Clearly, the fact that Zacharias stopped drinking at the bar and his BAC was more than twice the legal limit when he was eventually tested at 3 a.m. indicates that he was very impaired when he drove earlier that evening.

***5** The *Armstrong* court further noted:

> "Although it is theoretically possible that the defendant's blood alcohol level had increased since the time he last operated his car, it has been observed in other jurisdictions that the lapse of time usually favors a defendant who takes a blood alcohol test some time after termination of his driving because of the body's ability to 'burn off' alcohol." 236 Kan. at 295.

Given Zacharias' admission that his last drink was at the bar before driving, this court can safely assume that any time delay between the moment Zacharias stopped driving and the moment Zacharias had his blood drawn favored Zacharias because his body had the opportunity to burn off more alcohol.

In summary, even though the State could not establish the exact moment Zacharias stopped driving, the trial court could consider this evidence in determining whether Zacharias drove his truck while under the influence of alcohol to a degree that rendered him incapable of safely driving. Any delay in giving the blood test impacted the weight of the evidence not its admissibility. Additionally, given the facts of this case, it is readily apparent that the blood test result was highly relevant in showing that Zacharias was too impaired to operate his truck safely.

Was there sufficient evidence to support Zacharias' conviction?

An appellate court reviews a defendant's challenge on the sufficiency of the evidence in the light most favorable to the prosecution. *State v. Williams,* 299 Kan. 509, 525, 324 P.3d 1078 (2014). In conducting this review, this court will not reweigh the evidence or reassess the credibility of witnesses. 299 Kan. at 525. Reversal of the factfinder's decision will occur in only the rarest cases where the evidence is so incredible that no reasonable factfinder could find the defendant guilty beyond a reasonable doubt. *State v. Matlock,* 233 Kan. 1, 5-6, 660 P.2d 945 (1983).

In his brief, Zacharias argues that without the blood test results, there was insufficient evidence to convict him of DUI. Nevertheless, as previously detailed, Zacharias' argument that the trial court could not consider his blood test results because the State failed to establish when he stopped driving was incorrect. Accordingly, his argument that there was insufficient evidence without the blood test to convict him necessarily fails. Because Zacharias has included no other argument regarding the sufficiency of the evidence in his brief, he has abandoned any argument he may have had. See *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013) (holding that an issue not briefed is abandoned).

It is important to point out that even without the blood test there was sufficient evidence to support Zacharias' conviction. The State presented the following evidence supporting that Zacharias was DUI to a degree he could not safely drive: (1) he smelled like alcohol; (2) he had poor balance, falling when jumping off of his truck bed; (3) he had slurred speech; (4) he failed the one-leg-stand test; (5) he failed the walk-and-turn test; (6) he drove his truck into a ditch; (7) he admitted he had been drinking, eventually admitting he had consumed 12 beers over 12 hours; (8) he had just left a bar; and (9) he had been out in the early morning hours.

***6** When the trial court ultimately found Zacharias guilty of DUI to a degree that he was incapable of driving safely, it discounted some of the State's evidence. The trial court found that the fact Zacharias fell when he jumped out of his truck bed and the fact that he drove his car into a ditch was of "limited evidentiary value" because of the wet and muddy conditions of the road. The trial court also found that Zacharias performed the SFSTs "reasonably well." Yet, the trial judge did not totally discount this evidence because although he had "seen worse," he recognized that Deputy Johansen accurately reported that there "were some flaws." Based on this statement, it is clear that the trial court ultimately considered the SFSTs.

Citing *City of Wichita v. Molitor*, 301 Kan. 251, 341 P.3d 1275 (2015), Zacharias asks this court to disregard Deputy Johansen's subjective observations. In *Molitor*, our Supreme Court held that an "officer's sensory perceptions, such as the strength of the alcohol odor or the condition of the driver's eyes, are subject to an imprecise personal opinion." 301 Kan. at 267. *Molitor*, however, is distinguishable in two ways. First, *Molitor* is distinguishable because it involved whether an officer had reasonable suspicion to request that Molitor submit to a breath test, not whether there was sufficient evidence to support his DUI conviction. Second, *Molitor* is distinguishable because unlike Zacharias, Molitor passed his SFSTs and told police he had consumed maybe two or three beers.

Accordingly, omitting the blood test results and the evidence the trial court discounted, the evidence supported that Zacharias was DUI to a degree that rendered him incapable of driving. Zacharias' failure of both SFSTs is a particularly damning fact. As the *Molitor* court noted, SFSTs are objective-scientific tests developed to identify whether a person is illegally impaired. See 301 Kan. at 267. Thus, failure of these tests should weigh heavily against Zacharias. Moreover, regardless of the timeframe of consumption, it is readily apparent that the trial court's finding that Zacharias was too intoxicated to safely drive was reasonable given Zacharias' admission to drinking 12 beers before driving.

Accordingly, for the preceding reasons, a rational factfinder could have concluded that Zacharias drove his truck while under the influence to a degree that rendered him incapable of safely driving.

Affirmed.

All Citations

376 P.3d 93 (Table), 2016 WL 2811024

Exhibit L

329 P.3d 1254 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Eric HARBACEK, Appellant.

No. 110,664.
|
Aug. 1, 2014.
|
Review Denied July 27, 2015.

Appeal from Reno District Court; Trish Rose, Judge.

Attorneys and Law Firms

Sam S. Kepfleld, of Hutchinson, for appellant.

Daniel D. Gilligan, assistant district attorney, Keith E. Schroeder, district attorney, and Derek Schmidt, attorney general, for appellee.

Before STANDRIDGE, P.J., PIERRON, J., and JOHNSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Eric Harbacek appeals his conviction of felony driving under the influence of alcohol (DUI). He argues that the district court erred when, over his objection to relevance, it allowed the jury to hear testimony about his unruly behavior at a party. He contends that since that behavior occurred before he was even operating his motorcycle, the evidence was irrelevant to the issue at trial, *i.e .*, whether alcohol rendered him incapable of safely driving that vehicle. We disagree with Harbacek's contentions. We find that the challenged testimony was properly admitted and, therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The trial record discloses the following evidence and argument. On September 19, 2009, Terry Bell was hosting a birthday party for himself at his home in Hutchinson. He and around 15 guests were sitting outside. A man he had never met before, subsequently identified as Harbacek, came into his yard and created a substantial disturbance. As Bell began to specifically describe the disturbing behavior, defense counsel objected. Defense counsel stated: "Judge, I'm going to object as to relevance. This doesn't have anything to do with observations of intoxication. Anything to do with DUI." The State argued that a defendant's behavior before, during, and after a stop are all relevant to a charge of DUI and that Harbacek's behavior at the party was an indicator of his intoxication. After the State established that the traffic stop occurred within 15 to 25 minutes after Harbacek's conduct at Bell's party, the district court overruled Harbacek's relevance objections.

The district court permitted Bell to describe Harbacek's behavior. According to Bell, the man "approached everybody and kind of got fairly close to everybody, but he was cussing at everybody and pointing fingers and just randomly cussing at people." The man spit toward Bell's son. When one of the guests announced that she had called the police, Harbacek immediately left the party. Bell watched him walk across the street.

Approximately 10 to 20 minutes after the police were called, Officer Charles Malvo arrived at Bell's residence. As Malvo was interviewing Bell, Bell noticed Harbacek riding a motorcycle away from a house across the street. Bell alerted Malvo. Bell said he did not observe anything unusual about Harbacek's operation of the vehicle in the 15 seconds he could see him. Malvo left Bell's property in order to stop and interview Harbacek about his conduct at the party. Malvo activated his lights and followed Harbacek. After traveling about 2 blocks, Harbacek pulled over. Malvo did not see anything about Harbacek's driving that indicated he was impaired.

Malvo attempted to obtain Harbacek's version of events at the party, asking if Harbacek had spit on anyone. Harbacek replied that he did not spit on his mom. Malvo told Harbacek that it was not his mother who was accusing him, but Harbacek could not seem to grasp that Malvo was not talking about his mother. Malvo asked Harbacek for his driver's license. Malvo watched as Harbacek passed over his license several times. Malvo finally intervened and pointed out the license for Harbacek. Malvo could smell the odor of an alcoholic beverage on Harbacek's breath, and the more Harbacek talked the stronger the odor grew. Harbacek had slurred speech, bloodshot eyes, and moved slower than a normal person would.

***2** Malvo asked Harbacek to get off his motorcycle. As Harbacek complied, he stumbled a little bit. Malvo administered the "walk-and-turn" field sobriety test to Harbacek. Malvo testified that Harbacek exhibited six clues for intoxication during that test. Malvo then asked Harbacek to perform a one-leg stand. Harbacek, while performing the test, swayed and did not raise his foot as instructed. Then Harbacek began to describe, for reasons not explained, the loss of his father. Harbacek said he could not complete the test. Malvo concluded that Harbacek was incapable of safely operating a motor vehicle. He arrested Harbacek for DUI and placed him in his patrol vehicle.

On the way to the station, Harbacek cursed obscenities. Once there, Harbacek refused to get out of the patrol vehicle. Malvo eventually got him out with the help of another officer. In the station Malvo read Harbacek the implied consent form and gave him a copy. Malvo monitored Harbacek for the 20 minute deprivation period. Ultimately, though, Harbacek refused to undergo a breath test on the Intoxilyzer 8000.

The jury viewed a video, with sound, from Officer Malvo's police dash camera. Some parts of the video were redacted by court order. Although that video is not in the record on appeal, the trial transcript confirms that the video depicted at least the field tests Harbacek attempted to perform.

Harbacek did not testify at the trial. The jury found Harbacek guilty of felony driving under the influence of alcohol pursuant to K.S.A.2009 Supp. 8 1567(a)(3). Harbacek appeals.

ANALYSIS

We note that Harbacek previously challenged the propriety of the traffic stop here, but that issue was then resolved by a panel of this court. On Harbacek's motion to suppress, the district court ruled that Officer Malvo stopped Harbacek without reasonable suspicion. It granted Harbacek's motion and suppressed all the State's evidence from that stop. The State took an interlocutory appeal. A panel of this court reversed and remanded for trial. The panel held that the stop was justified by Malvo's reasonable suspicion that Harbacek had committed an assault or disorderly conduct at the party. *State v. Harbacek*, No. 105,391, 2011 WL 5390237, at *3 (Kan.App.2011) (unpublished opinion), *rev. denied* 294 Kan. 945 (2012).

Harbacek's sole argument on this appeal, then, is that the district court erred when it permitted witnesses to testify concerning his actions at Bell's birthday party. He claims that the testimony was irrelevant to the charged crime of DUI. In his brief, he appears to add an argument, not made to the district court, that the district court should have excluded the evidence as it was unduly prejudicial.

K.S.A. 60 407(f) provides that all relevant evidence is admissible unless it is prohibited by statute. Harbacek does not assert that some other statute prohibited the admission of the subject evidence. In order to determine if evidence is relevant, the trial judge should evaluate whether there is a logical connection between the challenged fact asserted and the inference the fact is intended to support. See *State v. Ultreras*, 296 Kan. 828, 857, 295 P.3d 1020 (2013). The statute defining relevant evidence provides a guide to that evaluation: relevant evidence is "evidence having any tendency in reason to *prove* any *material* fact." (Emphasis added.) K.S.A. 60 401(b). There are, then, two elements to examine when assessing relevance: a materiality element and a probative element. Evidence is material when the fact it supports is in dispute. Evidence is probative when it has a logical tendency to prove a material fact. We conduct a de

novo review of materiality. We review the district court's assessment of the probative value of evidence under an abuse of discretion standard. See *State v. Lowrance*, 298 Kan. 274, 289, 312 P.3d 328 (2013).

***3** Here the disputed issue was whether Harbacek operated his motorcycle "while ... under the influence of alcohol to such a degree that renders the person incapable of safely driving a vehicle ." K.S.A.2009 Supp. 8 1567(a)(3). The State argued that Harbacek's behavior at the party was relevant to the DUI charge: it concerned his demeanor, which the State contended was an indicator of intoxication. The district court was initially concerned about the time frame between the challenged party-behavior evidence and the later arrest. This was a legitimate consideration when determining whether the evidence was probative. The court impliedly indicated that if there was too great a time gap between the behavior at the party and the later arrest, the party-behavior evidence would not be probative, *i.e.,* it would not have a logical tendency to prove the material fact of Harbacek's intoxication at the time he drove his vehicle. Once the State showed that the time gap between the belligerent party behavior and the traffic stop was 15 to 25 minutes, the district court overruled Harbacek's relevance objection. The district court did not abuse its discretion when it implicitly determined that the evidence was probative.

In our de novo review of materiality, we agree with the State's contention: belligerent, aggressive, and irrational conduct can be evidence of intoxication when combined with other evidence. See, *e.g., Train v. Kansas Dept. of Revenue*, No. 105,806, 2012 WL 603295, at *4 (Kan.App.2012) (unpublished opinion) (citing Train's belligerent behavior as a factor toward establishing the officer's reasonable grounds to arrest Train for DUI); *Steele v. Kansas Dept. of Revenue*, No. 101,295, 2009 WL 4035282, at *2 (Kan.App.2009) (unpublished opinion) (citing belligerent and argumentative behavior as evidence of intoxication); *Lee v. State*, 280 Ga.App. 706, 707, 634 S.E.2d 837 (2006) (evidence supporting DUI conviction included odd behavior in addition to other factors); *People v. Green*, No. 1 12 1060, 2013 WL 6576042, at *4 (Ill.App.2013) (unpublished opinion) (noting evidence of irrational behavior bolsters other evidence of DUI); *Commonwealth v. Derouin*, 31 Mass.App. 968, 970, 583 N.E.2d 1293 (1992) (offensive behavior extreme profanity toward officer considered a factor toward a finding of intoxication).

Harbacek's apparently unprovoked conduct in visiting a birthday party uninvited, cussing at people, closely approaching them, pointing at them, and spitting toward Bell's son all constitute irrational and belligerent conduct. This prior conduct was consistent with the somewhat bizarre and, then, belligerent behavior Harbacek exhibited in his interactions with Malvo. We conclude, upon our de novo review, that this evidence was material to the ultimate issue of Harbacek's intoxication while subsequently operating his motorcycle.

The evidence concerning Harbacek's behavior at Bell's party was both probative and material. The district court did not err when it overruled Harbacek's objection to the relevance of that evidence.

***4** Finally, Harbacek suggests in his brief that an analysis under K.S.A. 60 445 "may be required, depending on the issue and the parties' arguments." K.S.A. 60 445 provides that the district court can exclude even otherwise relevant evidence if the potential risk of unfair prejudice from its admission substantially outweighs the probative value of the evidence. See *State v. Reed*, 282 Kan. 272, 280, 144 P.3d 677 (2006). Harbacek contends that, since he refused the Intoxilyzer test, the State could only rely on evidence of his behavior. He acknowledges that his behavior during and after the traffic stop was relevant, but he claims that the pre-stop behavior evidence was unduly prejudicial.

We note that Harbacek did not ask the district court to exclude this evidence under the discretionary power granted in K.S.A. 60 445. As noted above, he only objected to its relevance. Moreover, it is not sufficient that Harbacek claims, or even demonstrates, that the admitted evidence was prejudicial. After all, most evidence presented by the State in a criminal trial is prejudicial to a defendant if it supports the conviction of a crime. A party alleging that the prejudicial effect of admitted evidence outweighs its probative value must demonstrate unfair or undue prejudice arising from that admission of evidence. *State v. Vasquez*, 287 Kan. 40, 53, 194 P.3d 563 (2008).

As discussed, Harbacek's conduct at the party was relevant toward proving the DUI charge. The very fact that his conduct was offensive, crude, and belligerent is what makes the evidence both material and probative. While there is some prejudice inherent in the challenged evidence, that prejudice did not substantially outweigh its probative value. As we noted above in our lengthy recitation of the facts, this evidence was simply consistent with the State's other, extensive evidence supporting this DUI conviction. Harbacek has failed to demonstrate that the admission of the challenged evidence was unfairly or unduly prejudical. Thus, we cannot find that the district court abused its discretion in admitting the evidence.

Affirmed.

All Citations

329 P.3d 1254 (Table), 2014 WL 3843506

Exhibit M

376 P.3d 98 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Kathryn HICKS, Appellant,

v.

KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 114,643.

July 22, 2016.

Appeal from Saline District Court; Jerome P. Hellmer, Judge pro tem.

Attorneys and Law Firms

Julie McKenna, of McKenna Law Office, P.A., of Salina, for appellant.

Donald J. Cooper, of Kansas Department of Revenue Legal Services Bureau, for appellee.

Before LEBEN, P.J., STANDRIDGE and ARNOLD BURGER, JJ.

MEMORANDUM OPINION

LEBEN, J.

***1** Kathryn Hicks appeals the suspension of her driver's license, claiming that the officer who arrested her didn't have reasonable grounds to believe that she had been driving under the influence of alcohol. Without reasonable grounds, the officer wouldn't have been authorized to request a breath test for alcohol a test that Hicks failed, since she was under 21 and the test showed she had some alcohol in her system.

But the district court's factual findings supported its conclusion that the officer had reasonable grounds to believe she had been driving under the influence of alcohol: When the officer spoke to Hicks through the driver's window, he smelled alcohol and noticed that Hicks' eyes were watery, glazed, and bloodshot. The officer wrote Hicks a warning for speeding, and when he returned to Hicks' car to deliver the warning, he smelled alcohol again and saw alcohol containers in the car when he asked the backseat passengers to lift up the blanket on their laps. Hicks then failed a preliminary breath test, failed one of two standard field sobriety tests, and admitted to drinking. These facts gave the officer reasonable grounds, thus allowing him to request a breath test, so we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Most of the facts in this case aren't in dispute because they are based on the video of the traffic stop. Around 9:30 p.m. on November 15, 2014, Trooper J.L. Riedel of the Kansas Highway Patrol clocked a car traveling south on I 135 at 87 miles per hour in a 75 mile per hour zone. Riedel had been traveling north, so he turned around to follow the car. He used his radar to recheck the speed 85 miles per hour and pulled the car over for speeding.

Hicks, who was 19 at the time, was driving, and there were four passengers in the car. Hicks and her friends were returning to Salina from Topeka, where they had been watching men's college soccer. She told Riedel that she was driving because her friends, who were all 21 or older, had planned to drink.

When Riedel first approached Hicks, he noticed a slight odor of alcohol and that Hicks' eyes were bloodshot, watery, and glazed. He also thought that Hicks might be under 21 years old and noticed that the backseat passengers' legs and the floorboards were completely covered up by a blanket. Riedel took Hicks' driver's license and proof of insurance, returned to his patrol car, and prepared a written warning for speeding.

When Riedel returned to Hicks' car, he noticed the smell of alcohol again. He also smelled breath spray that he hadn't noticed before, and he saw breath spray in the car's center console. But Hicks denied using breath spray and said she didn't have any in the car.

Riedel then asked the backseat passengers to remove the blanket covering their legs and the floorboards; he said he did this both for officer-safety reasons and because he suspected alcohol violations. When the blanket was moved, Riedel saw alcohol containers on the backseat floorboards. At that point, Riedel gave the written speeding warning to Hicks and asked her to step out of the car.

***2** Although he had smelled alcohol on his first contact with Hicks, Riedel said that he had waited until his second contact to begin the alcohol investigation because he had wanted to "formulate a plan" for the investigation, particularly with regard to the blanket covering up much of the backseat. Riedel asked Hicks if she had been drinking, and she said no; Riedel suspected she was lying because of the smell of alcohol and her bloodshot eyes.

Once Hicks was out of the car, Riedel asked her to take a deep breath and exhale, from which he verified the smell of alcohol and breath spray. Riedel then asked Hicks if there was any alcohol in her car, and she said there wasn't. Riedel viewed this answer as deceptive because he'd already seen alcohol containers in the car. According to Hicks, she told Riedel that she didn't *know* if there was any alcohol in her car, not that there definitely wasn't any; she said she had a lot of various containers and cups in her car and just didn't know if any of them contained alcohol. But the video shows Hicks saying, "I promise there's nothing in the car," referring to alcohol.

Riedel then asked the other passengers to get out of the car. He asked the front-seat passenger if Hicks had been drinking, and the passenger said he didn't think so but that he hadn't been with Hicks the whole time. Riedel then removed the alcohol containers from the front and back floorboards of Hicks' car and placed them on top of the car; some of them were open and some weren't.

Riedel next asked Hicks to take a preliminary breath test, and Hicks agreed. That test showed a result of .094, indicating that Hicks had been drinking and was over the legal limit (.02 for those under age 21 and .08 for those 21 and older). K.S.A.2015 Supp. § 1567; K.S.A.2015 Supp. § 1567a. Riedel then asked Hicks to perform two standard field-sobriety tests, the one-leg-stand test and the walk-and-turn test. Hicks passed the one-leg-stand test without any clues of impairment, but Riedel noticed three clues of impairment on the walk-and-turn test.

Riedel arrested Hicks and gave her citations for driving under the influence, being a minor in possession of alcohol, and transporting an open container. The video also shows Riedel discovering Hicks' fake ID, which said she was over 21, but Hicks wasn't charged for that. On the way to the Saline County jail, Hicks said that she had had four beers.

The evidentiary breath test showed a result of .074, which is under the legal limit for those age 21 and older (.08) but over the legal limit for drivers under the age of 21(.02). As a result, the Kansas Department of Revenue suspended Hicks' driver's license. Hicks requested an administrative hearing, and the hearing officer affirmed the decision to suspend Hicks' license. Hicks then filed a petition for review in the Saline County District Court.

The trial took place in June 2015, and Riedel and Hicks testified as outlined above. The only issue was reasonable grounds: the burden was on Hicks to show that Riedel didn't have reasonable grounds to believe she had been driving under the influence. K.S.A.2015 Supp. § 1020(q). The video of the traffic stop was admitted into evidence, and the district court took the case under advisement until it could review the video. The district court later described the video on the record, and it was consistent with Riedel's testimony.

***3** Based on the evidence, the district court found that Riedel had reasonable grounds to believe that Hicks had been driving under the influence and affirmed the suspension of Hicks' driver's license. Hicks has appealed to this court.

ANALYSIS

Hicks argues that the district court wrongly concluded that the officer had reasonable grounds to believe she had been driving under the influence. We review the district court's ruling in a driver's-license-suspension case to determine whether it was supported by substantial evidence. *Swank v. Kansas Dept. of Revenue*, 294 Kan.

871, 881, 281 P.3d 135 (2012). Evidence is substantial when a reasonable person would accept it as adequate to support a conclusion. *State v. Jolly*, 301 Kan. 313, 325, 342 P.3d 935 (2015). When reviewing the district court's factual findings, we do not reweigh evidence, resolve evidentiary conflicts, or make determinations about witness credibility. *State v. Hall*, 292 Kan. 841, 859, 257 P.3d 272 (2011). However, after determining whether the district court's factual findings are supported by substantial evidence, we must independently consider the ultimate legal question of whether the officer had reasonable grounds. *Poteet v. Kansas Dept. of Revenue*, 43 Kan.App.2d 412, Syl. ¶ 1, 233 P.3d 286 (2010).

Anyone who drives a car in Kansas agrees, by implication, to submit to a breath test to determine the presence of alcohol. K.S.A.2015 Supp. 8–1001(a) (implied-consent statute). But before a police officer can ask a person to take a breath test, the officer must have arrested or taken the person into custody for violating a state statute and must have "reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs ... or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system." K.S.A.2015 Supp. 8–1001(b)(1)(A).

"The reasonable grounds test ... is strongly related to the standard for determining probable cause to arrest. [Citation omitted.] Probable cause to arrest is the reasonable belief, drawn from the totality of information and reasonable inferences available to the arresting officer, that the defendant has committed or is committing a specific crime." *State v. Johnson*, 297 Kan. 210, 222, 301 P.3d 287 (2013). Probable cause is "a higher standard than reasonable suspicion but a lower standard than necessary to establish guilt beyond a reasonable doubt." *Bixenman v. Kansas Dept. of Revenue*, 49 Kan.App.2d 1, 6, 307 P.3d 217 (2013).

Here, the district court specifically noted several facts to support its decsion that Riedel had reasonable grounds to believe that Hicks had been driving under the influence: (1) a smell of alcohol was coming from the car; (2) there were alcohol containers in the car; (3) Hicks had been speeding; and (4) Hicks wasn't truthful about whether she'd been drinking or about whether there were alcohol containers in the car. Additionally, the record shows that Hicks' eyes were bloodshot, watery, and glazed, she admitted to drinking, she failed the walk-and-turn test, and she failed the preliminary breath test. See *State v. Dern*, 303 Kan. 384, 394, 362 P.3d 566 (2015) ("When no objection is made to the adequacy of the district court's findings, we can presume the district court found all facts necessary to support its judgment."). Generally, when a person admits to drinking, has bloodshot eyes, has committed traffic infractions, and makes a few errors on field sobriety tests, Kansas courts have concluded that the officer had reasonable grounds to request a breath test. *Allen v. Kansas Dept. of Revenue*, 292 Kan. 653, 659, 256 P.3d 845 (2011), *disapproved of on other grounds by Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 290 P.3d 555 (2012). And here, Hicks admitted drinking, had bloodshot eyes, was speeding, and failed the walk-and-turn test. Under these circumstances, Riedel had reasonable grounds to believe that Hicks had been driving under the influence. See *Johnson*, 297 Kan. at 222; *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 515, 242 P.3d 1179 (2010).

***4** In her brief, Hicks argues that she passed the one-leg-stand test, that she didn't know there were alcohol containers in her car, and that she wasn't legally impaired since the result of the evidentiary breath test showed that her blood-alcohol level was just under the legal limit. But this competing evidence of sobriety, while part of what the court must consider to determine the reasonable-grounds issue, doesn't substantially undermine the other evidence that Hicks was under the influence. See *State v. Edgar*, 296 Kan. 513, 525, 294 P.3d 251 (2013); *Taylor v. Kansas Dept. of Revenue*, No. 112,042, 2015 WL 4460548, at *5 (Kan.App.2015) (unpublished opinion) (reasonable grounds existed even where driver passed the one-leg-stand and alphabet tests, didn't slur his speech or fumble when retrieving his license, and was cooperative, because he also swerved over the fog line, it was early in the morning, he was coming from an area with many bars, his eyes were bloodshot, his car smelled like alcohol, and he admitted to drinking). Furthermore, it's not relevant to the reasonable-grounds question in this case that Hicks' test result was under .08 for two reasons. First, while it's always illegal to drive with a blood-alcohol level over .08, it's still possible to be an impaired driver with a test result below that number. See K.S.A.2015 Supp. 8–1567 (defining "driving under the influence" to include both

when "[t]he alcohol concentration in the person's blood or breath ... is .08 or more" and when the driver is "under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle"). So Riedel could still reasonably believe that Hicks was an impaired driver that she was "under the influence" even though her ultimate test result was under .08. Second, Riedel rightly suspected that Hicks was under 21, meaning that her legal limit was .02, not .08. That meant that breath testing was authorized by statute so long as the officer had reasonable grounds to believe she was driving with *any* alcohol in her system. See K.S.A.2015 Supp. 8 1001(b)(1)(A); *State v. Schuster*, 273 Kan. 989, 991 92, 46 P.3d 1140 (2002).

Hicks next argues that Riedel unlawfully extended the traffic stop to investigate the alcohol offenses. To extend a traffic stop beyond the time needed to handle the traffic infraction itself, an officer must have reasonable suspicion, or a particularized and objective basis for suspecting that the person stopped has committed or is committing a crime. *State v. Pollman*, 286 Kan. 881, 889 890, 190 P.3d 234 (2008). Like reasonable grounds and probable cause, reasonable suspicion depends on all the circumstances. 286 Kan. at 890 (quoting *State v. Toothman*, 267 Kan. 412, Syl. ¶ 5, 985 P.2d 701 [1999]). But reasonable suspicion is a lower standard than reasonable grounds or probable cause; while it must be more than an unparticularized hunch, it can come from information that is less reliable than what's required to show reasonable grounds or probable cause. 286 Kan. at 890.

***5** Hicks makes much of the fact that Riedel didn't immediately investigate the smell of alcohol when he first approached her car; according to Hicks, the lawful traffic stop ended when Riedel delivered the written warning for speeding, and he lacked reasonable suspicion at that point to continue the investigation. Assuming for the purpose of argument that that this factual distinction is meaningful, Riedel did have reasonable suspicion to continue investigating at the point he gave Riedel her ticket. On his first approach, he smelled alcohol and noticed that Hicks' eyes were bloodshot, watery, and glazed. On his second approach, before he delivered the written warning, he asked the backseat passengers to remove the blanket covering their laps, and he saw alcohol containers on the floorboards. So at the moment he delivered the written warning for speeding, which Riedel argues ended the traffic stop, Riedel had seen alcohol containers in the car and had noticed the smell of alcohol and Hicks' bloodshot eyes. Kansas courts have found that a traffic infraction plus the smell of alcohol, bloodshot eyes, and an admission of drinking is sufficient to establish probable cause. See *Campbell v. Kansas Dept. of Revenue*, 25 Kan.App.2d 430, 431 32, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998). We have no difficulty agreeing with the district court's conclusion that the circumstances in this case, similar to those in *Campbell,* constituted reasonable suspicion, a lower standard than probable cause or reasonable grounds, that Hicks had committed the crime of driving under the influence.

Hicks also argues that Riedel lacked reasonable suspicion to request a preliminary breath test. An officer can request a preliminary breath test if he or she has reasonable suspicion that the person has been driving under the influence of alcohol. K.S.A.2015 Supp. 8 1012(b); see *Pollman,* 286 Kan. at 889 90 (describing reasonable-suspicion standard). At the time Riedel requested the preliminary breath test, he had confirmed that Hicks' breath smelled of alcohol, had seen that her eyes were bloodshot, watery, and glazed, and had seen and removed multiple alcohol containers from her car. Additionally, he suspected Hicks of deception, which can also be an indicator of driving under the influence, because she had told him there weren't any alcohol containers in the car. These facts were sufficient to establish reasonable suspicion that Hicks had been driving under the influence, permitting Riedel to request a preliminary breath test.

Because Riedel had reasonable grounds to believe that Hicks had been driving under the influence, we affirm the district court's judgment.

All Citations

376 P.3d 98 (Table), 2016 WL 3960893

End of Document

Exhibit N

326 P.3d 1089 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Timothy HOEFFNER, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 109,606.
|
May 30, 2014.

Appeal from Saline District Court; Robert German, Judge pro tem.

Attorneys and Law Firms

Julie McKenna, of McKenna Law Office, P.A., of Salina, for appellant.

Donald J. Cooper, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before LEBEN, P. J., ATCHESON and SCHROEDER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Timothy Hoeffner appeals the district court order affirming the administrative suspension of his driver's license by the Kansas Department of Revenue (KDOR). Hoeffner was stopped for failing to use a turn signal, resulting in the officer's observation of several alcohol-related indicators of driving under the influence of alcohol (DUI). Hoeffner was asked to perform field sobriety tests and refused. At the police station, Hoeffner was asked to take a breathalyzer test and refused. Finding no error by the district court, we affirm the suspension of Hoeffner's driver's license.

FACTS

In the early morning hours of April 8, 2012, Officer Jeffrey Montre of the Saline County Sheriff's Office initially observed Hoeffner fail to use a turn signal to get on the Interstate, in violation of K.S.A. § 8-1548(a). Montre began following Hoeffner and followed him to a truck stop. When Hoeffner left the truck stop, he again failed to use a turn signal. Montre activated his emergency lights and siren, and Hoeffner pulled over to the shoulder of the Interstate after approximately 10 seconds. The audio/video system from Montre's truck recorded the initial contact and stop of Hoeffner's vehicle.

Montre approached the vehicle and spoke with Hoeffner, who was driving the car. Montre noticed Hoeffner had "[v]ery slurred speech, bloodshot watery eyes, [and a] strong odor of alcohol." Although there was a passenger in the vehicle, Montre stated the odor of alcohol was strong enough to be noticed before he approached the vehicle and made contact with the occupants. Nevertheless, Montre admitted the odor of alcohol could have been coming from the passenger. Montre disagreed with Hoeffner's assessment that the video showed he said, "I smell a little bit of alcohol," because Montre did not recall saying "a little."

Montre asked Hoeffner if he had been drinking; Montre did not recall Hoeffner's answer, but Montre stated that in the video Hoeffner said he had not been drinking. Montre also asked Hoeffner for his insurance, but Hoeffner provided his registration. Montre interpreted this error as difficulty in communicating because he failed to produce the correct documents.

Montre asked Hoeffner to step out of the vehicle. As Hoeffner did so, Montre noticed an odor of alcohol coming from Hoeffner himself. The odor was not as strong as it was in the vehicle, but it was a "[m]ore than moderate" odor. Montre testified that he asked Hoeffner to take field sobriety tests, which Hoeffner refused. After Hoeffner refused the test, Montre placed Hoeffner under arrest. As Montre walked Hoeffner to the police vehicle, Montre testified Hoeffner had some balance problems.

Once Hoeffner was in the police vehicle, Montre testified the odor of alcohol was stronger because it was in a confined area.

Montre took Hoeffner to the Saline County Sheriff's Department, where he provided and read to Hoeffner the DC 70 implied consent advisories to a breathalyzer test. Montre then asked Hoeffner if he would submit to a breath test. Montre did not offer to allow Hoeffner to perform any field sobriety tests because that test had been refused on the scene. Hoeffner refused the breath test. After refusing, Montre told him that refusal would result in his license being suspended for 1 year. As Montre began to walk out of the breath testing room, Hoeffner began asking questions about the breath test. Montre did not stop to explain that Hoeffner could take the breath test at this point because Hoeffner had already refused the breath test.

***2** The KDOR affirmed the suspension of Hoeffner's driving privileges. Hoeffner petitioned the district court to review the KDOR's decision.

At the hearing before the district court, Hoeffner raised two issues: whether the officer had reasonable grounds to stop Hoeffner based on the belief he was DUI and whether Hoeffner refused a breath test. Here, Hoeffner was initially stopped for failure to use a turn signal, which developed into a DUI arrest. The district court determined that after making the stop Montre had reasonable grounds to believe Hoeffner was operating his vehicle while under the influence of alcohol. To support this decision, the district court noted Montre testified that Hoeffner exhibited a strong odor of alcohol, his speech was slurred, he had bloodshot eyes, he had difficulty in communicating, he had poor balance, and he refused to take field sobriety tests.

The court further determined the testimony and video evidence demonstrated Hoeffner was asked if he would take a breath test and he refused. Because this refusal was never rescinded, the district court concluded there was substantial evidence to support the conclusion Hoeffner refused the breath test requested by the sheriff's deputy. The district court therefore affirmed the administrative order of suspension.

Hoeffner timely appeals.

ANALYSIS

Did the District Court Err in Determining There Was Substantial Competent Evidence to Support the Finding Montre Had Reasonable Grounds to Believe Hoeffner Was Driving Under the Influence?

Standard of Review

In driver's license suspension cases, appellate courts review a district court's decision to determine whether its decision is supported by substantial competent evidence. *Swank v. Kansas Dept. of Revenue*, 294 Kan. 871, 881, 281 P.3d 135 (2012). Panels of this court have noted that appellate courts do not consider other evidence that could support a different result as long as sufficient competent evidence supports the district court's decision; however, the ultimate legal conclusion of whether reasonable grounds existed is reviewed de novo. *Poteet v. Kansas Dept. of Revenue*, 43 Kan.App.2d 412, 414, 233 P.3d 286 (2010) (citing *In re Estate of Antonopoulos*, 268 Kan. 178, 193, 993 P.2d 637 [1999]).

K.S.A.2013 Supp. 77–621(d) defines substantial evidence "in light of the record as a whole" to include the evidence both supporting and detracting from an agency's finding. Courts must determine whether the evidence supporting the agency's factual findings is substantial when considered in light of all the evidence. See *Redd v. Kansas Truck Center*, 291 Kan. 176, 183, 239 P.3d 66 (2010).

Did Montre Have Reasonable Grounds to Believe Hoeffner Was Driving Under the Influence?

"The reasonable grounds test of K.S.A.2007 Supp. 8–1001(b) is strongly related to the standard for determining probable cause to arrest." *State v. Johnson*, 297 Kan. 210, 222, 301 P.3d 287 (2013) (citing *Allen v. Kansas Dept. of Revenue*, 292 Kan. 653, Syl. ¶ 1, 256 P.3d 845 [2011]). The Kansas Supreme Court recently defined probable cause as

> ***3** " 'the reasonable belief that a specific crime has been or is being committed and that the

> defendant committed the crime. *State v. Abbott,* 277 Kan. 161, 164, 83 P.3d 794 (2004). Existence of probable cause must be determined by consideration of the information and fair inferences therefrom, known to the officer at the time of the arrest. *Bruch [v. Kansas Dept. of Revenue],* 282 Kan. [764,] 775 76[, 148 P.3d 538 (2006)]. Probable cause is determined by evaluating the totality of the circumstances. *State v. Hill,* 281 Kan. 136, 146, 130 P.3d 1 (2006). As in other totality of the circumstances tests, there is no rigid application of factors and courts should not merely count the facts or factors that support one side of the determination or the other. *State v. McGinnis,* 290 Kan. 547, 552 53, 233 P.3d 246 (2010); see *Smith [v. Kansas Dept. of Revenue],* 291 Kan. [510,] at 515[, 242 P.3d 1179 [(2010)] (holding that the defendant's list of facts did not negate the other factors presented).' " *Sloop v. Kansas Dept. of Revenue,* 296 Kan. 13, 20, 290 P.3d 555 (2012) (quoting *Allen,* 292 Kan. at 656 57).

Hoeffner argues the district court's decision was based, in part, upon the fact Hoeffner had difficulty producing his license. However, Montre testified the difficulty in producing his license was not an indicator of a driver being under the influence. Thus, had the district court ignored the fact Hoeffner had difficulty producing his license, Hoeffner claims the remaining factors of his slurred speech, his bloodshot eyes, his difficulty in walking to and from Montre's car, and the odor of alcohol were insufficient to support its decision. During the hearing, Hoeffner points out Montre stated the odor of alcohol was so strong that he smelled it before reaching Hoeffner's car; however, on the video, Hoeffner claims Montre stated he could only smell "a little bit of alcohol."

Based on these revised facts, Hoeffner argues the facts of this case are very similar to *Sloop.* In *Sloop,* an officer followed a driver for 8 to 10 blocks, witnessing no traffic infractions. The officer stopped the driver anyway because his tag light was out. The driver handed over his license without fumbling it, but the driver and the passenger smelled of alcohol, and the driver's eyes were bloodshot. When asked if he had been drinking, the driver said he had, "Nothing really," then said he had, "[L]ike one beer at a friend's house." 296 Kan. at 14. The driver's speech was impaired but not slurred. The officer had the driver get out of the car. The driver did not stumble upon exiting the car and was steady when walking back to the car. The officer then gave Sloop a breath test, which was later determined to be invalid, and arrested Sloop. 296 Kan. at 14 15. The Kansas Supreme Court determined these facts did not create probable cause for the driver to be arrested. 296 Kan. at 23.

In comparing the Hoeffner case with *Sloop,* we see:

***4** • Both drivers smelled of alcohol;

• Both had a passenger who smelled of alcohol;

• Both drivers had bloodshot and watery eyes;

• Sloop did not fumble his license when presenting it to the officer;

• Hoeffner fumbled his license, but Montre did not construe it as fumbling;

• The officer in *Sloop* did not witness a traffic infraction;

• Montre observed Hoeffner failed to use a turn signal;

• Hoeffner denied drinking;

• Sloop admitted to having one beer;

• Sloop had impaired speech not rising to the level of slurred speech;

• Hoeffner was characterized as having slurred speech; and

• The district court made no finding regarding his refusal to perform field sobriety tests as an inference of impairment.

Based on this comparison, Hoeffner argues the panel should follow the ruling of *Sloop* and determine there was no substantial competent evidence to support the district court's findings that Montre had reasonable grounds to arrest Hoeffner.

The KDOR argues *Sloop* is not applicable in this case. In *Sloop,* the arresting officer did not witness a traffic infraction. Here, Montre saw Hoeffner fail to use his turn signal twice. The KDOR notes the court in *Sloop* distinguished, but did not overturn, a Kansas Court of Appeals case, *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998). The court in *Sloop* noted: "The primary factual difference between *Campbell* and the instant case is that Campbell was speeding, *i.e.,* committing a moving violation, while Sloop was driving legally before being stopped for an improper tag light." 296 Kan. at 22. *Campbell* has continued to be favorably cited by both our court and the Kansas Supreme Court. See *Johnson,* 297 Kan. at 222; *McClure v. Kansas Dept. of Revenue,* No. 109,025, 2013 WL 5870119 (Kan.App.2013) (unpublished opinion).

In *Campbell,* the driver was initially pulled over for speeding. The officer smelled alcohol on the driver's breath, noticed his eyes were glazed and bloodshot, and the driver admitted consuming alcohol. The panel determined these facts were "more than sufficient" to give the arresting officer probable cause to arrest the driver. 25 Kan.App.2d at 431 32. Hoeffner likewise was pulled over for a traffic infraction, smelled of alcohol, and had bloodshot eyes. Although Hoeffner denied having consumed alcohol, he demonstrated slurred speech, bloodshot eyes, produced the wrong documents when asked, and refused to take field sobriety tests prior to being arrested.

Montre testified Hoeffner had trouble maintaining his balance as he walked to the police car after he was placed under arrest. Because the information was gathered after Hoeffner was placed under arrest, the information should not be considered in determining whether Montre had probable cause to arrest Hoeffner for driving under the influence. See *Sloop,* 296 Kan. at 23. The KDOR also notes Hoeffner had trouble producing his license and insurance; however, as Hoeffner notes, Montre testified this difficulty was not an indication of intoxication.

***5** The KDOR is correct in asserting that Hoeffner's moving violation makes the facts of this case more akin to *Campbell.* Hoeffner had the same bloodshot eyes and odor of alcohol as the driver in *Sloop,* but his speech was more impaired to the level of being slurred. Hoeffner also refused to submit to field sobriety testing, which panels of this court have determined to be an indicator of guilt. See *State v. Huff,* 33 Kan.App.2d 942, 946, 111 P.3d 659 (2005) (citing *State v. Rubick,* 16 Kan.App.2d 585, 587 88, 827 P.2d 771 [1992]). Despite Hoeffner's argument and Montre's testimony, this court has found fumbling to find a drivers license to be an indicator of intoxication. *State v. Nye,* 46 Kan.App.2d 182, 196, 261 P.3d 923 (2011), *rev. denied* 293 Kan. 1112 (2012); *Huff,* 33 Kan.App.2d at 946; *City of Hutchinson v. Gilmore,* 16 Kan.App.2d 646, 648, 827 P.2d 784 (1992). Additionally, providing the wrong document upon request, as Hoeffner did with his registration instead of insurance, may also be considered evidence that a driver is intoxicated. *Foster v. Kansas Dept. of Revenue,* No. 104,777, 2011 WL 3795515, at *3 (Kan.App.2011) (unpublished opinion); *Burroughs v. Kansas Dept. of Revenue,* No. 96,549, 2007 WL 3085363 (Kan.App.2007) (unpublished opinion).

These facts alone would appear to demonstrate Montre had reasonable grounds to arrest Hoeffner for driving under the influence. However, the court in *Sloop* noted that even more important than the factual differences between *Sloop* and *Campbell* were the different standards of review in each case. *Sloop* was reviewed de novo due to undisputed facts. In *Campbell,* as here, the material facts were not disputed, and the case was reviewed for substantial competent evidence to support the district court's conclusion. See *Sloop,* 296 Kan. at 22 23; *Campbell,* 25 Kan.App.2d at 431 32.

CONCLUSION

Substantial evidence supports the district court's conclusion that the officer had reasonable grounds to request a breath test from Hoeffner and he refused. Thus,

we affirm the district court and the resulting suspension of Hoeffner's privileges to drive.

Affirmed.

All Citations

326 P.3d 1089 (Table), 2014 WL 2589806

Exhibit O

203 P.3d 1281 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Thaddeus Matthew SCOTT, Appellant.

No. 99,561.
|
April 3, 2009.

Appeal from Ellis District Court; Thomas L. Toepfer, Judge.

Attorneys and Law Firms

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

Glenn R. Braun and Carol M. Park, special prosecutors, and Stephen N. Six, attorney general, for appellee.

Before BUSER, P.J., ELLIOTT and GREEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Thaddeus Matthew Scott appeals the trial court's judgment denying his motion to suppress evidence, which led to his conviction of driving under the influence (DUI) after a bench trial on stipulated facts. The sole issue presented by this appeal is whether the trial court improperly denied Scott's motion to suppress evidence based on the arresting officer's lack of probable cause. Because the facts do not show that the officer lacked probable cause, we affirm.

On January 11, 2007, at 2:01 a.m., Officer Harold Anderson of the Hays Police Department was on routine patrol when he saw Scott driving a sport utility vehicle (SUV) the wrong way down a one-way street. Anderson turned on his overhead lights and made a traffic stop. When Anderson approached the SUV, he noticed that Scott's eyes were bloodshot, and he detected a strong odor of alcoholic beverage coming from either Scott or his two passengers. Scott did not have his driver's license with him. Once Scott got out of the SUV, Anderson could still smell a strong odor of an alcoholic beverage coming from Scott. Anderson also noticed that Scott was wearing an orange arm band. Based on Anderson's experience, the band indicated that Scott had been at one of the local bars that night. Scott admitted to Anderson that he had consumed alcohol, but Anderson did not ask how much.

Scott was very cooperative with Anderson and agreed to perform field sobriety tests. During the walk-and-turn test, Anderson saw four clues or indicators of Scott's impairment: (1) Scott attempted to start the test before Anderson told him to; (2) during both the first and second nine-step sets of the test, he twice failed to touch heel to toe as instructed; (3) he incorrectly turned by pivoting on both feet; and (4) he took only eight steps on the second nine-step set. Scott did not, however, exhibit any clues of impairment on the one-leg-stand test.

After administering the field sobriety tests, Anderson arrested Scott for DUI and took him to the Law Enforcement Center. Scott then submitted to evidentiary breath-alcohol testing, which showed that Scott had a breath-alcohol concentration of .149 within 2 hours of driving. Consequently, the State charged Scott with one count each of DUI, refusal of a preliminary breath test, and driving the wrong way on a one-way street.

Scott moved to suppress the evidence, arguing in pertinent part that Anderson lacked probable cause to arrest him for DUI.

The trial court held a hearing on the motion, and Anderson testified to the facts surrounding Scott's arrest as detailed earlier. In denying the motion, the trial judge stated:

> "I don't know if there is a breath test in this case and what it might be. Let's assume there isn't and this case went to a jury. This would be a tough case for the jury

to find the defendant guilty absent some sort of a breath test.

"But that's not the test here. The test here this morning is whether or not there is probable cause to believe that this young man was driving under the influence to the point that he was impaired and could not drive safely.

***2** "And what we have here is we have a violation of the law, driving the wrong way on a one-way street for two blocks, which shows a lack of judgment which can be attributed to alcohol or confusion, one or the other. But it can be contributed to alcohol.

"It's 2:00 in the morning. He's admitted to drinking. He has a strong odor of alcohol on his breath. His eyes are bloodshot. He exhibits four clues on one test. Those are all factors that I believe takes this case beyond the minimum requirements of probable cause.

"I will grant that there are a lot of other factors that mitigate in the other direction, but all I'm required to find is is there probable cause and I believe there is."

The parties later submitted the case for a bench trial on stipulated facts, and the trial court found Scott guilty as charged.

> DID THE TRIAL COURT ERR IN DENYING SCOTT'S MOTION TO SUPPRESS BASED ON A FINDING THAT THE OFFICER HAD PROBABLE CAUSE TO ARREST SCOTT?

Scott's sole argument on appeal is that the trial court erred in denying his motion to suppress the evidence because Anderson lacked probable cause to arrest him for DUI.

Appellate review of a decision on a motion to suppress is well known. Upon the filing of Scott's motion to suppress evidence, the State bore the burden of proving to the trial court the lawfulness of the seizure (arrest) by a preponderance of the evidence. See *State v. Pollman,* 286 Kan. 881, 886, 190 P.3d 234 (2008). When reviewing a trial court's decision on a motion to suppress, an appellate court reviews the factual underpinnings by substantial competent evidence without reweighing evidence, determining witnesses' credibility, or resolving conflicts in evidence. Review of the ultimate legal conclusion on the suppression issue is unlimited. 286 Kan. at 886, 190 P.3d 234.

"In a DUI case, the answer to the probable cause to arrest question will depend on the officer's factual basis for concluding that the defendant was intoxicated at the time of arrest." *City of Dodge City v. Norton,* 262 Kan. 199, 203, 936 P.2d 1356 (1997). "Probable cause to arrest is that quantum of evidence that would lead a reasonably prudent police officer to believe that guilt is more than a mere possibility. [Citation omitted.]" *City of Norton v. Wonderly,* 38 Kan.App.2d 797, 808, 172 P.3d 1205 (2007), *rev. denied* 286 Kan. 1176 (2008). Stated another way, probable cause to arrest is "a preponderance of the evidence given the totality of the circumstances." *Pollman,* 286 Kan. at 896, 190 P.3d 234.

In arguing that Anderson could not have reasonably believed beyond a mere possibility that Scott was DUI, Scott does not claim there was insufficient evidence to support the facts underlying the trial court's ultimate legal conclusion. Rather, Scott focuses on the various factual circumstances (or lack thereof) that tended to mitigate against a conclusion that Scott was legally impaired to drive, arguing that they support a conclusion that there was nothing more than a possibility that he was DUI, so probable cause was lacking. For example, Scott notes that before pulling Scott over for driving the wrong way on a one-way street, Anderson admittedly did not observe other indications of possible impairment in Scott's driving, such as weaving, swerving, erratic driving, or failing to properly react to the emergency equipment and come to a stop. Scott maintains that he did not have any difficulties in searching for his driver's license or in exiting the SUV. In addition, he contends that his speech was not slurred, Scott further points out that Anderson admitted during cross-examination that while administering the walk-and-turn test, he did not notice Scott exhibit any outward signs of problems with balance or coordination, that is, Scott did not raise his arms for balance, he never stepped off the line, and he never stopped while walking.

***3** Scott insists his case is indistinguishable from *Wonderly,* in which this court concluded that the officer lacked probable cause to arrest the defendant for DUI.

The facts underlying the trial court's probable cause determination in that case showed: after his truck was pulled over by the police, the defendant initially disobeyed an order to get back into his truck; he had bloodshot eyes; the smell of alcohol was on his breath; and he admitted to drinking earlier that evening. The officer also knew that a motorist had called law enforcement earlier that night and accused the defendant of recklessly driving his truck. However, the officer did not see the defendant commit any traffic infractions. The defendant pulled his truck over in a normal manner when the officer turned on the emergency lights; the defendant did not fumble for his driver's license; and the defendant had no problems getting out of his truck and walking to the officer's patrol car. Also, the defendant's speech was "fair" and "not particularly slurred." 38 Kan.App.2d at 808, 172 P.3d 1205. Based on the totality of those circumstances, this court held that the officer lacked probable cause to arrest the defendant for DUI. 38 Kan.App.2d at 808 09, 172 P.3d 1205.

Scott argues that there were even fewer circumstances to establish probable cause for arrest in his case because, unlike in *Wonderly,* there was no evidence of possible reckless or impaired driving. Thus, Scott asserts that "[t]he only evidence offered by the state to establish probable cause where none exists is the field testing." Scott then insists his performance on the field sobriety tests did not establish any objective indications of possible impairment. Rather, Scott maintains that Anderson observed only a few " 'technical' irregularities" in Scott's performance of the tests. Scott repeatedly suggests that this court should apply a "common sense objective standard" or conduct a "common sense review" of his performance on the tests and conclude that he performed as well or better than an average person would have under similar circumstances. Thus, he maintains that his performance on those tests offers nothing to support the probable cause analysis.

"Common sense" is not the standard for determining probable cause to arrest for DUI. Rather, as noted above, whether a person's guilt of DUI is more than a mere possibility is made from the viewpoint of a reasonably prudent police officer. *Wonderly,* 38 Kan.App.2d at 808, 172 P.3d 1205.

The State counters that the facts in Scott's case are similar to the facts in *State v. Shaw,* 37 Kan.App.2d 485, 154 P.3d 524, *rev. denied* 784 Kan. 950 (2007). In *Shaw,* a highway patrol trooper stopped a defendant after the trooper noticed the defendant's right front headlight was not operating. As the trooper was attempting to stop the defendant, the defendant drove over a curb onto a sidewalk and nearly hit a sign post. After the stop, the trooper noticed that the defendant's eyes were watery and bloodshot. While the trooper and the defendant were in the patrol car, the trooper smelled the odor of alcohol coming from the defendant. The defendant admitted he had consumed about four beers and consented to undergo field sobriety testing. During the walk-and-turn test, the defendant exhibited four out of the eight clues of intoxication. Nevertheless, during the one-leg-stand test, the defendant showed no clues of intoxication. On appeal, this court found that there was probable cause to arrest the defendant for DUI based on the defendant's erratic driving; the odor of alcohol coming from the defendant; the defendant's watery and bloodshot eyes; the defendant's admission to drinking four beers; and the defendant's performance on the walk-and-turn test. 37 Kan.App.2d at 495 96, 154 P.3d 524.

***4** This court also found that the officer had probable cause to arrest a defendant on similar facts in *State v. Rupp,* No. 93,425, unpublished opinion filed December 2, 2005. The facts underlying the probable cause determination in *Rupp* involved the following: a 2 a.m. traffic stop in Hays; a smell of alcohol on defendant and defendant's bloodshot and watery eyes, although defendant denied that he had been drinking; the defendant's speech was not slurred or garbled, but he was not cooperative; the defendant eventually produced restricted driving papers from a previous DUI after fumbling through his wallet; the defendant exhibited four of eight possible clues of impairment on the walk-and-turn test, but he performed the one-leg stand test without any clues of impairment; and a PBT registered an alcohol concentration of .131. This court determined that the trial court did not err in concluding-without consideration of the PBT results-that the officer had sufficient probable cause to place the defendant under arrest. Slip op. at 5 6.

Probable cause is a fact-intensive determination made on a case-by-case basis. Nevertheless, the facts of Scott's

case are more similar to the facts of *Shaw* and *Rupp* than the facts of *Wonderly*. To review the circumstances supporting the probable cause underlying Scott's arrest for DUI, Anderson saw Scott driving the wrong way on a one-way street. After the stop, Anderson detected the odor of alcohol coming from Scott and observed that Scott had bloodshot eyes, Scott admitted he had been drinking and was unable to produce a driver's license. More important, unlike in *Wonderly*-where there was no admissible evidence of field sobriety testing-Scott submitted to field sobriety testing and displayed four clues of impairment on the walk-and-turn test.

Scott wants this court to focus on the signs of impairment he did not exhibit while glossing over or trying to discount those signs of impairment he did exhibit. Scott's argument is an example of what logicians call the fallacy of negative proof. This occurs when someone attempts to sustain a factual proposition merely by negative evidence.

> "This type of reasoning is unacceptable because of the difficulty in sustaining a factual proposition merely by negative evidence. When an advocate determines that "there is no evidence that B is the case"; he or she is attempting to affirm or assume that non-B is the case. But all that is affirmed or assumed is that the advocate has found no *evidence* of non-B. The correct method of proceeding is to find affirmative evidence of non-B." Aldisert, Logic for Lawyers, p. 156 (3d ed.1997).

Similarly, Scott not exhibiting some signs of impairment of his physical and mental faculties does not imply that he did not exhibit other known psychomotor signs of impairment. See *Sprenkel v. Kansas Dept. of Revenue,* no. 93,722, unpublished opinion filed December 9, 2005, slip op. at 8, 11 (Evidence that the driver exhibited two or more distinct clues on the walk-and-turn test is sufficient to present a strong likelihood of impairment. With those results, added to the evidence of alcohol consumption in that case [odor of alcohol, bloodshot eyes, and an admission of drinking], a reasonable police officer would believe that DUI was more than a mere possibility.). Accordingly, we conclude that the facts-taken in their totality and viewed from the perspective of a reasonably prudent police officer-showed more than a mere possibility that Scott was DUI. Thus, the trial court properly denied Scott's motion to suppress.

***5** Affirmed.

All Citations

203 P.3d 1281 (Table), 2009 WL 929102

Exhibit P

353 P.3d 470 (Table)
Unpublished Disposition
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Court of Appeals of Kansas.

Garrison PEACE, Appellant,
v.
KANSAS DEPARTMENT OF REVENUE, Appellee.

No. 112,113.
|
July 17, 2015.

Appeal from Rooks District Court; Edward E. Bouker, Judge.

Attorneys and Law Firms

Michael S. Holland, II, of Holland and Holland, of Russell, for appellant.

John D. Shultz, of Legal Services Bureau, Kansas Department of Revenue, for appellee.

Before LEBEN, P.J., SCHROEDER and GARDNER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Garrison Peace appeals the district court's decision affirming the Kansas Department of Revenue's (KDOR) suspension of his driver's license for refusing a breathalyzer test. Peace claims Sergeant James Phlieger lacked reasonable grounds to request testing. Based on the facts of this case, Sergeant Phlieger had reasonable grounds to request Peace submit to the breathalyzer test. We affirm.

FACTS

On April 13, 2013, Sergeant Phlieger of the Plainville Police Department observed a vehicle stop near an intersection. As he pulled up behind the vehicle, the driver activated his emergency hazard lights. Accordingly, Sergeant Phlieger pulled up alongside the vehicle and asked the driver, who he later identified as Garrison Peace, if he needed any assistance. Sergeant Phlieger's brief conversation with Peace through the passenger side window of his patrol car led him to suspect Peace was "possibly under the influence." Consequently, Sergeant Phlieger effectuated a traffic stop of Peace's vehicle.

Upon making direct contact with Peace, Sergeant Phlieger detected an odor of alcohol. Peace admitted he had consumed alcohol that evening. Sergeant Phlieger also noted that Peace's speech was "very slurred" and his eyes were "very bloodshot"; in fact, according to Sergeant Phlieger, "[Peace's eyes] were almost nothing but red. They were very droopy, watery." When Sergeant Phlieger asked Peace for his driver's license, Peace had some difficulty providing it. Sergeant Phlieger explained, "I asked him three times for his driver's license. He handed me a military identification and then after telling me that he didn't have his license, his license was at home, he did ultimately find his license in his wallet."

Sergeant Phlieger requested that Peace step out of his vehicle, and after Peace complied with his request, Sergeant Phlieger noticed that Peace was having "balance problems." Sergeant Phlieger asked Peace if he would perform some field sobriety tests, but Peace claimed he had "a medical problem that affected his balance." Sergeant Phlieger subsequently inquired as to the nature of Peace's problem, and Peace "told [him] it was a mental problem." When Sergeant Phlieger then indicated that he did not understand how such a condition would affect his balance, Peace amended his story slightly: "He ... told me that he had a high frequency hearing loss and that that would and that was the cause of his equilibrium, his balance problems."

Sergeant Phlieger offered no other tests for Peace to perform after he refused field sobriety testing. Sergeant

Phlieger's preliminary breath test (PBT) device was not working. Sergeant Phlieger testified that based on his observation, training, and experience, he believed Peace was under the influence of alcohol to such a degree that he was rendered incapable of safely driving a vehicle. Consequently, Sergeant Phlieger placed Peace under arrest for driving under the influence (DUI).

***2** Peace refused to take the breathalyzer test at the Plainville Police Station. The KDOR administratively suspended Peace's driving privileges due to his refusal to submit to evidentiary chemical testing following his arrest. Peace requested judicial review of the suspension, and the sole issue before the district court was whether Sergeant Phlieger had reasonable grounds to believe Peace had been operating a vehicle while under the influence of alcohol, drugs, or both. After reviewing the evidence Sergeant Phlieger's testimony and the parties' arguments the district court affirmed the order of suspension, finding Peace failed to "meet his burden to prove that [Sergeant Phlieger] lacked reasonable grounds to request testing." The district judge explained:

> "Well, the court finds that [Peace] was stopped near South Section Line and South Third Street. And I'm not exactly sure of the sequence, but the officer pulled up to check on him because this was an unusual thing apparently, and Mr. Peace activated his emergency lights. The thing I'm not sure is whether he activated his emergency lights and then the officer pulled up, I think that's how it happened, but at any rate, somewhat simultaneously those things happened.
>
> "The officer began to speak with Mr. Peace. He smelled the odor of alcohol. Mr. Peace's speech was very slurred. That was emphasized by the officer in his tone of voice. He described Mr. Peace's eyes as, 'they were red. Actually, they were nothing, almost nothing but red. They were droopy.'
>
> "The officer asked Mr. Peace to get out his DL, he got out a military ID and claimed he did not have his DL, said it was at home. Later he found his DL in his wallet or in his car.
>
> "And as far as the balance thing is concerned, I don't know enough about how high frequency hearing loss could affect balance. I tend to think it probably wouldn't, but that is speculation at best, so I am not even considering that.
>
> "But I think with what I have just reiterated on the officer's testimony, that the officer had reasonable grounds and I so find."

ANALYSIS

Did Sergeant Phlieger have reasonable grounds?

Peace contends that the district court erred in upholding the KDOR's suspension of his driving privileges because Sergeant Phlieger lacked reasonable grounds to believe he was operating a vehicle while under the influence of alcohol and, thus, Sergeant Phlieger had no statutory authority to request he submit to evidentiary blood alcohol testing. The KDOR argues the "totality of the circumstances in this case would lead any reasonable and prudent officer to believe that [Peace] was operating his vehicle while under the influence of alcohol."

Any person who operates or attempts to operate a vehicle in Kansas is "deemed to have given consent ... to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs." K.S.A.2014 Supp. 8 1001(a). A law enforcement officer shall request evidentiary blood alcohol testing if the officer has reasonable grounds to believe the person was operating a vehicle while under the influence and the officer had arrested or otherwise taken the person into custody for any offense involving DUI. K.S.A.2014 Supp. 8 1001(b)(1)(A). The reasonable grounds test is strongly related to the standard for determining whether an officer had probable cause to arrest. See *State v. Johnson*, 297 Kan. 210, 222, 301 P.3d 287 (2013). Accordingly, an officer's statutory authority to request chemical testing depends upon the legality of the individual's warrantless arrest. *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, Syl. ¶ 3, 17 20, 290 P.3d 555 (2012).

***3** "Probable cause to arrest is the reasonable belief, drawn from the totality of information and reasonable inferences available to the arresting officer, that the defendant has committed or is committing a specific crime. [Citation omitted.]" *Johnson*, 297 Kan. at 222, 301 P.3d 287; see *Sloop*, 296 Kan. at 20 21, 290 P.3d 555. In

other words, " '[p]robable cause exists where "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." [Citation omitted.]" *Sloop,* 296 Kan. at 21, 290 P.3d 555. " 'As in other totality of the circumstances tests, there is no rigid application of factors and courts should not merely count the facts or factors that support one side of the determination or the other.' [Citations omitted.]" 296 Kan. at 20, 290 P.3d 555.

This court reviews the district court's decision by determining whether its underlying factual findings are supported by substantial competent evidence, which is sufficient to support its legal conclusions; only when there is no factual dispute does this court exercise de novo review. See *Swank v. Kansas Dept. of Revenue,* 294 Kan. 871, 881, 281 P.3d 135 (2012). Substantial competent evidence possesses both relevance and substance that a reasonable person could accept as being adequate to support a conclusion. *State v. Jolly,* 301 Kan. 313, 325, 342 P.3d 935 (2015). When reviewing factual findings, appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make determinations regarding witness credibility. *State v. Hall,* 292 Kan. 841, 859, 257 P.3d 272 (2011).

Peace argues that despite the district court's finding to the contrary, reasonable grounds did not exist in this case because Sergeant Phlieger did not conduct a DUI investigation. Specifically, Peace maintains that while he indicated that he was physically unable to perform the field sobriety testing, Sergeant Phlieger could have "conducted non-standardized field sobriety tests such as an alphabet test, finger to thumb test, accounting test, and numerous other tests which [would] not require physical balance or coordination." According to Peace, without such testing, Sergeant Phlieger's observations during the traffic stop were insufficient to establish probable cause or reasonable grounds. While Peace does not cite any caselaw supporting this assertion, he references *City of Norton v. Wonderly,* 38 Kan.App.2d 797, 172 P.3d 1205, *rev. denied* 286 Kan. 1176 (2008), and provides a lengthy quotation from our Supreme Court's decision in *Sloop,* which arguably suggests his intention to rely upon the probable cause determinations in these two cases.

As the State asserts, and we agree, *Wonderly* is clearly distinguishable. Although Officer Pat Morel did not observe any traffic infractions, he effectuated a traffic stop of Wonderly's truck based upon a phone call from a motorist who indicated Wonderly had exhibited erratic driving. After stopping his truck in a normal manner, Wonderly exited the vehicle and Officer Morel had to instruct him twice to get back inside. Officer Morel detected the odor of alcohol when he approached the driver's side window, but he could not tell whether the odor came from Wonderly, his passengers, or the truck itself. Wonderly had bloodshot eyes, but he produced his driver's license without incident. Officer Morel asked Wonderly to step outside his truck, and Wonderly, who exhibited no problems walking, proceeded to Morel's patrol car and sat down inside as instructed. At this point, Officer Morel discerned the smell of alcohol on Wonderly's breath, and when he questioned Wonderly as to whether he had consumed alcohol, Wonderly said that he had "some drinks at a local bar earlier that evening and one or two drinks at a bar in Lenora, Kansas." 38 Kan.App.2d at 800, 172 P.3d 1205. Officer Morel observed Wonderly's speech was not particularly slurred.

***4** Due to the unfavorable weather that evening and the fact that Officer Morel wanted to continue his investigation, Officer Morel decided to transport Wonderly to the sheriff's office to perform field sobriety tests. Wonderly was ultimately convicted for DUI, and, on appeal, a panel of this court determined that Officer Morel effectively placed Wonderly under arrest when he transported him to the sheriff's office, and while Officer Morel had reasonable suspicion for the traffic stop, the limited evidence he had gathered at the scene was insufficient to support a finding of probable cause for an arrest. 38 Kan.App.2d at 801, 804-09, 172 P.3d 1205. In reaching this conclusion, the panel noted: "The fact that [Officer] Morel felt it was necessary to continue his investigation at the sheriff's office before formally arresting Wonderly for DUI supports this conclusion." 38 Kan.App.2d at 809, 172 P.3d 1205.

Peace's argument that *Wonderly* supports his claim Sergeant Phlieger lacked reasonable grounds to believe he was operating a vehicle while under the influence of alcohol lacks merit. Here, Peace was arrested for DUI

based on his contact with Sergeant Phlieger and then refused to take the breath test when offered. In *Wonderly,* Officer Morel had not placed Wonderly under arrest and decided to transport him to the sheriff's office to continue his DUI investigation.

In *Sloop,* a law enforcement officer pulled Sloop over for a defective tag light after he had followed Sloop for approximately 8 to 10 blocks. Although Sloop committed no traffic violations, the officer noticed that while executing a left hand turn, Sloop was " 'sitting unusually close to his steering wheel' " and he was somewhat hesitant going into his turn. 296 Kan. at 14, 290 P.3d 555. Sloop provided the officer his driver's license without incident, and the officer noted that Sloop's speech was " 'not as clear as it could be but [ ] not inherently slurred either.' " 296 Kan. at 14 15, 290 P.3d 555. The officer detected an odor of alcohol emanating from Sloop, and his passenger and Sloop's eyes were "watery and bloodshot." 296 Kan. at 14, 290 P.3d 555. When the officer asked Sloop if he had been drinking, Sloop initially replied, " 'Nothing really,' " but then stated he had consumed " 'like one beer at a friend's house.' " 296 Kan. at 14 15, 290 P.3d 555. Sloop did not stumble upon exiting his vehicle and was steady on his feet. Our Supreme Court determined that under the totality of the circumstances, the officer did not have probable cause to believe Sloop was DUI. 296 Kan. at 23, 290 P.3d 555.

However, in *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998), this court determined that a law enforcement officer had reasonable grounds to request evidentiary chemical testing on facts similar to those present in this case. Campbell was stopped by a law enforcement officer for speeding 72 miles per hour in a 55 mile per hour zone. Upon making contact with Campbell, the officer smelled alcohol on his breath and noticed his eyes appeared "glazed and blood shot," and Campbell subsequently admitted that he "had a few drinks." 25 Kan.App.2d at 431, 962 P.2d 1150. A panel of this court determined that these facts were "more than sufficient to satisfy a reasonably prudent police officer that Campbell had been [DUI]." 25 Kan.App.2d at 431 32, 962 P.2d 1150; see *Hansen v. Kansas Dept. of Revenue,* No. 106,752, 2012 WL 3136517 (Kan.App.2012) (unpublished opinion) (law enforcement officer had probable cause to believe Hansen was DUI because a person fell out of the back of his moving pickup truck [there were no reports of reckless driving], Hansen's eyes were bloodshot, the officer detected a strong odor of alcohol emanating from Hansen's person, and Hansen admitted to drinking earlier that evening).

***5** In *Sloop,* however, our Supreme Court found the *Campbell* court's definition of the probable cause standard "overly generous." 296 Kan. at 22, 290 P.3d 555. However, the Supreme Court did not overturn *Campbell* 's ultimate probable cause determination. See *Sloop,* 296 Kan. at 21 23, 290 P.3d 555. In fact, a panel of this court recently explained:

> "The KDOR notes the court in *Sloop* distinguished, but did not overturn, a Kansas Court of Appeals case, *Campbell v. Kansas Dept. of Revenue,* 25 Kan.App.2d 430, 962 P.2d 1150, *rev. denied* 266 Kan. 1107 (1998). The court in *Sloop* noted: 'The primary factual difference between *Campbell* and the instant case is that Campbell was speeding, *i.e.,* committing a moving violation, while Sloop was driving legally before being stopped for an improper tag light.' 296 Kan. at 22, 290 P.3d 555. *Campbell* has continued to be favorably cited by both our court and the Kansas Supreme Court. [Citations omitted.]" *Hoeffner v. Kansas Dept. of Revenue,* No. 109,606, 2014 WL 2589806, at *4 (Kan.App.2014) (unpublished opinion).

See also *Johnson,* 297 Kan. at 222, 301 P.3d 287 (citing *Campbell*); *State v. Stejskal,* No. 109,298, 2014 WL 702524, at *2 3 (2014 Kan.App.) (unpublished opinion) (deeming *Campbell* instructive despite *Sloop*); *McClure v. Kansas Dept. of Revenue,* No. 109,025, 2013 WL 5870119, at *4 (Kan.App.2013) (unpublished opinion) (same).

Similar to *Campbell* and unlike *Sloop,* the totality of the circumstances in this case supports the district court's decision to uphold the suspension of Peace's driving privileges for the following reasons:

- Sergeant Phlieger testified Peace activated his emergency hazard lights, and although it is unclear why Peace undertook this action, Sergeant Phlieger's testimony suggests Peace did so without cause.
- Sergeant Phlieger detected the odor of alcohol when he first made contact with Peace.

- Sergeant Phlieger detected the odor of alcohol coming from Peace when he made closer contact.

- Peace admitted to consuming alcohol.

- Sergeant Phlieger observed that Peace's speech was "very slurred" and his eyes were "very bloodshot." In fact, according to Sergeant Phlieger, "[Peace's eyes] were almost nothing but red. They were very droopy, watery."

- Peace had a great deal of difficulty providing Sergeant Phlieger with his driver's license, and this court has found that fumbling with a driver's license and providing the wrong document upon request to be indicators of impairment. See *State v. Huff,* 33 Kan.App.2d 942, 945 46, 111 P.3d 659 (2005); *Foster v. Kansas Dept. of Revenue,* No. 104,777, 2011 WL 3795515, at *3 (Kan.App.2011) (unpublished opinion); *Burroughs v. Kansas Dept. of Revenue,* No. 96,549, 2007 WL 3085363 (Kan.App.2007) (unpublished opinion).

- Peace refused to submit to field sobriety testing, which is another fact that this court has determined to be an indicator of DUI. See *Huff,* 33 Kan.App.2d at 946, 111 P.3d 659 (finding that court may consider refusal to take field-sobriety tests); *State v. Rubick,* 16 Kan.App.2d 585, 587 88, 827 P.2d 771 (1992) (noting that driver's refusal to take field-sobriety tests is admissible).

***6** As noted by a panel of this court in *McClure,* "[I]t is not necessary that the driver exhibit every sign of possible intoxication. It is sufficient that the police officer observe enough signs of intoxication to make a reasonable police officer believe the driver was operating a vehicle while under the influence of alcohol." 2013 WL 5870119, at *4.

CONCLUSION

In conclusion, based upon the totality of the circumstances and the multiple indicators of alcohol impairment Sergeant Phlieger observed, the district court did not err in finding reasonable grounds existed for Sergeant Phlieger to request Peace take the breathalyzer test after he had been placed under arrest for DUI. We affirm.

Affirmed.

All Citations

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