

No. 1-11-3762

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. YT 130520
)	YT 130521
)	YT 130524
)	
JOSEPH ZUNIGA,)	Honorable
)	Jill C. Marisie and
Defendant-Appellant.)	James N. Karahalios,
)	Judges Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court correctly denied defendant’s motion to quash, as police officer’s traffic stop of defendant was properly based on witnessing a lane-usage violation. Defendant’s arrest for driving under the influence of alcohol was properly based on his admission to drinking alcohol, the smell of alcohol on his breath, and his failure of two field sobriety tests.

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¶ 2 Following a bench trial, defendant Joseph Zuniga was convicted of driving under the influence of alcohol (DUI) and sentenced to 210 days in jail, and ordered to pay fines and fees. On appeal, defendant contends that the trial court erred in denying his motion to quash arrest and suppress evidence.

¶ 3 On December 16, 2010, defendant was cited by Arlington Heights police for two counts of DUI (driving under the influence of alcohol and driving with a blood alcohol concentration (BAC) of 0.08 or greater), improper lane usage, and improper turn-signal usage, all allegedly committed at about 4:08 a.m. on northwest-bound Rand Road at Hintz Road in that village. A breath test administered at about 4:49 a.m. at the police station found the defendant had a 0.147 BAC, almost twice the legal limit.

¶ 4 Defendant filed a motion to quash alleging that Officer Finnerty of the Arlington Heights police conducted a traffic stop of the car he was driving at about 3:55 a.m. on the day in question without having seen him commit a traffic violation and without a reasonable or articulable suspicion that he had committed or was about to commit a crime. Defendant sought to suppress all evidence arising from the allegedly improper traffic stop and resulting arrest.

¶ 5 At the motion hearing, Officer Ray Finnerty testified that he first saw defendant when they were both driving on Rand Road near Wilke Road, with Officer Finnerty eastbound and defendant westbound. He saw defendant “make a lane violation,” in that he drifted from the center lane into the right lane “enough that it was obvious that he made the lane violation [with] his tires go[ing] over the dashed lane lines.” Specifically, he saw two tires fully cross the line for “a few seconds.” Officer Finnerty’s report stated that he saw defendant’s lane-usage violation while they were both westbound, but he attributed this discrepancy to a typographical error. Defendant’s left turn

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signal was lit as he approached, then passed, Officer Finnerty. Officer Finnerty made a U-turn and followed, then stopped, defendant without seeing him commit any further violation. While he could not recall if there were any other vehicles nearby at the time, no other vehicle had to move to evade defendant's lane violation. When asked if the left-turn signal was illegal, he answered that "if he's not turning left, it was strange that he had it on." Only after Officer Finnerty was following defendant did he "finally" enter a left-turn lane. Officer Finnerty maintained that he decided to stop defendant because of the lane violation, not "because [he] saw [defendant's] face."

¶ 6 After Officer Finnerty approached defendant and asked to see his license and proof of insurance, he showed identification but not a driver's license. Officer Finnerty told defendant that he was not stopped for speeding, but could not recall telling defendant that "he was all over the place" or that defendant denied this. As he spoke with defendant, he noticed a strong odor of alcohol. According to Finnerty, defendant admitted that he was coming from "Crave," a bar on Rand Road, and admitted when asked that he had "a couple" of drinks, including one about a half-hour before the stop. Defendant stated that he had a glass right¹ eye, and removed it. Officer Finnerty administered the horizontal gaze nystagmus (HGN) test, and noticed nystagmus in defendant's good eye. Defendant tried to follow Officer Finnerty's pen with his head despite reminders that he should follow it with his eyes alone. When asked to perform a one-legged stand, defendant stated that he had a "bad" right leg and a healthy left leg. Defendant offered to show scars on his right leg, which Officer Finnerty declined, but stated that his left leg was healthy enough to kick Officer Finnerty in the head from where he stood. Defendant also complained of his weight; Officer Finnerty recorded defendant's height as 6'7" and weight as 307 pounds.

¹ Officer Finnerty testified thus, but the video corroborates defendant's testimony that he has a glass *left* eye.

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Defendant swayed while standing on his left foot and put his foot down after 14 seconds, which Officer Finnerty described as failing the test. Defendant refused the heel-to-toe or walk-and-turn test, though Officer Finnerty could not recall the reason he gave. Defendant agreed to recite the alphabet and professed to know it, but stopped at “G” and claimed to not know the rest. Defendant initially refused to take a portable or preliminary breath test. Based on his experience and defendant’s driving, admission to drinking alcohol, and failure of two field sobriety tests, Officer Finnerty formed the opinion that defendant was under the influence of alcohol and arrested him for DUI. After his arrest but while still at the scene, defendant agreed to a breath test. The portable breath-testing machine showed a 0.16 BAC. He was then brought to the police station.

¶ 7 Defendant testified that he has a glass left eye, but the vision in his right eye is unimpaired, and that he is 6’7” tall and weighs 307 pounds. He stated he has a bad Achilles tendon in his right leg so that he cannot stand for long periods. Thus, when Officer Finnerty asked him to stand on one leg, he objected that he could not do so. He nonetheless tried to do so, unsuccessfully. He initially claimed he did not agree to, nor did he take, a portable breath test either before or after his arrest.

¶ 8 The parties stipulated to, and the court viewed, a video recording from Officer Finnerty’s police car from the night in question. Only about ten seconds elapse between the start of the video and Officer Finnerty’s U-turn (from the center lane, rather than the left-turn lane as he testified) to follow defendant. During that time, defendant passed through one intersection without making a left turn, but a “do not enter” sign precluded a left turn from defendant’s direction at that location. Due to the glare of the headlights and the quality of the grainy video, defendant’s turn signal cannot be discerned on the video while he is approaching Officer Finnerty. For the same reasons,

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it is unclear whether a brief movement of defendant's headlights towards those of another car to his right resulted from a rightward movement of defendant's car or was an artifact of defendant passing the other car and the glare of the two cars' headlights. Defendant's left turn signal flashed as Officer Finnerty followed him, but defendant took the first left turn possible after Officer Finnerty's U-turn. From when defendant stopped until he was arrested, the video evidence is consistent with Officer Finnerty's testimony. After stopping defendant, Officer Finnerty accused him of driving with a "non-stop" turn signal "all over the road," which defendant denied. Defendant is not visible on the video after his arrest, so the video neither corroborates nor refutes whether he took a portable breath test.

¶ 9 Following arguments, the court denied the motion to quash. The court found that "whether I can see it on the video or not," Officer Finnerty testified to seeing two tires of defendant's car fully cross the lane dividers, rather than a slight intrusion, at a time that the video showed other vehicles around defendant's car. The court also found that the video showed defendant's left turn signal flashing as he passed several locations where he could have, but did not, make a left turn and that this suggested impairment whether or not it was a violation. The court rejected the argument that Officer Finnerty stopped defendant due to seeing his face, finding that it was unlikely he could have seen defendant's face due to the relative speed of Officer Finnerty and defendant. As to probable cause for the arrest, the court noted defendant's admission to drinking, the odor of alcohol on his breath, and his inability to follow instructions during the HGN test. The court found the testimony of Officer Finnerty credible and that of defendant not credible, particularly on whether a portable breath test was administered.

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¶ 10 Defendant filed a motion to reconsider. He argued regarding the stop that he could not have made a left turn at the intersection that he can be seen passing through so that his turn signal was not activated an unusually long time, that the statutes do not establish an offense from having a turn signal lit unnecessarily, and that it was impossible for Officer Finnerty to see the lane-usage violation he described. Regarding his arrest, he argued that his disabilities explained his reluctance to take field sobriety tests and his performance on those tests, and that his testimony that he refused a portable breath test impeached Officer Finnerty's testimony that he took one.

¶ 11 The court denied the motion to reconsider. The court found that the video showed defendant's lane violation though also noting that "there were things that Officer Finnerty testified to that clearly neither of us saw on the video because the video was not turned on at that point." The court noted that the other vehicles around defendant were not evading a pothole or other hazard in the road, so that it was unlikely that defendant was doing so. The court found that the continuing left turn signal was unusual or suspicious even if not illegal. The court expressly found that the smell of alcohol on defendant's breath, his admitted drinking, and his observed driving were sufficient grounds for his arrest even if he had refused all field sobriety tests. The court also found that defendant's inability to follow instructions on the HGN test – moving his head rather than his eyes alone – was unrelated to having only one eye and was further evidence of his impairment.

¶ 12 At trial, the court viewed the video and Officer Finnerty testified generally consistently with his hearing testimony. While he emphasized the turn-signal violation over the lane-usage violation regarding his grounds for stopping defendant, he saw defendant's tires cross the lane stripe for three or four seconds. While Officer Finnerty did not administer the breath test at the

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police station, he observed defendant for at least 20 minutes before his breath test and did not see him belch, regurgitate, or put anything in his mouth. The officer who administered the breath test testified at length regarding the test.

¶ 13 The court granted a directed finding on the turn-signal charge, noting that a signal is required before a left turn but no statute prohibits having a flashing turn signal while not turning.

¶ 14 Defendant testified generally consistently with his hearing testimony. His ideal weight for his height is 245 to 250 pounds, and his education was only through the eighth grade as he did not do well academically. While at Crave, a restaurant, for about three hours on the night in question, he had three or four drinks, specifically cranberry vodka. He ate lightly -- only six chicken wings -- because his “gastric”² would not allow him to eat more; it also resulted in “gas reflux [and] burping.” He testified that these drinks did not impair his ability to drive. He did not recall drifting out of his lane, and when Officer Finnerty accused him of being “all over the road,” he denied it. When Officer Finnerty asked how many drinks he had consumed, he replied “a couple.” He explained that he is frequently stopped by the police and always responds that he has had a couple of drinks because “a couple is a few.”

¶ 15 Following argument, the court found defendant guilty of both counts of DUI as well as the lane-usage charge. The court expressly based the latter finding on Officer Finnerty’s testimony that he saw the lane-usage violation. After arguments in aggravation and mitigation, in which it was revealed that defendant had a prior conviction for DUI, the court sentenced him to 270 days in jail with fines and fees for the DUI offenses, and supervision without any fine for the lane-usage offense.

² Presumably referring to gastric-bypass surgery.

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¶ 16 Defendant filed a motion for a new trial, arguing insufficiency of the evidence and erroneous denial of his motion to quash. Regarding the latter, defendant argued that Officer Finnerty lacked reasonable suspicion to stop him and that the court had not afforded him a fair opportunity to argue his motion to reconsider. Regarding the former, defendant argued that Officer Finnerty had testified to smelling alcohol on his breath but could not tell from that smell when or what he had drank, that Officer Finnerty “could not establish a nexus between glassy eyes/slurred speech and consumption of alcohol,” that he failed field sobriety tests due to being over 50 pounds overweight with a “bad” leg and vision in only one eye, and that his BAC when he was driving could not be determined from his BAC about an hour later (the “reverse-extrapolation” theory). Following arguments, the court granted a new trial as to DUI by BAC and entered a not-guilty finding on under-the-influence DUI. As to under-the-influence DUI, the court found that there was substantial evidence of defendant’s intoxication but also evidence regarding how his physical condition affected his performance on the field sobriety tests so that not all reasonable hypotheses of innocence were excluded. As to DUI by BAC, the court found that defendant should be allowed to present the reverse-extrapolation theory at trial.

¶ 17 Following a plea conference, a stipulated bench trial was held. The parties stipulated that defendant was driving a vehicle at the time alleged, he later took a breathalyzer test with a BAC of 0.147, the DVD in evidence accurately depicted the occurrences before his arrest, and the witnesses would testify as they had in the first trial. The court found defendant guilty of DUI by BAC and sentenced him to 210 days in jail with fines and fees. This appeal timely followed.

¶ 18 On appeal, defendant contends that his motion to quash was erroneously denied.

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¶ 19 Police-citizen encounters are divided into three tiers: arrests, which must be supported by probable cause; investigatory or *Terry* stops, which must be supported by reasonable, articulable, suspicion of criminal activity; and encounters that involve no coercion or detention and thus do not implicate constitutional rights. *People v. Grant*, 2013 IL 112734, ¶ 11; *People v. Hackett*, 2012 IL 111781, ¶ 20; *People v. Hopkins*, 235 Ill. 2d 453, 471 (2009).

¶ 20 A police officer may conduct a brief investigatory stop of a person where the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop. *Hackett*, ¶ 20. We judge the stopping officer's conduct by an objective standard, considering whether the facts available to the officer at the moment of the stop justify the action taken. *Id.*, ¶ 29. Vehicle or traffic stops are treated as *Terry* stops, so that they are proper when the stopping officer has a reasonable and articulable suspicion that a traffic violation or crime has occurred. *Id.*, ¶ 20. The officer's belief may, but is not required to, rise to the level of probable cause, so that an officer can conduct a lawful stop "without first 'considering whether the circumstances he or she observed would satisfy each element of a particular offense.'" *Id.*, quoting *People v. Close*, 238 Ill. 2d 497, 510 (2010).

¶ 21 While probable cause or conviction for a lane-usage violation (625 ILCS 5/11-709(a) (West 2010)) requires testimony or positive evidence that the defendant deviated from his lane of travel and that no road conditions necessitated the movement, it is sufficient for an investigatory traffic stop that the officer observes lane deviations with no obvious basis or reason, because the stop allows the officer to further investigate whether there was a reason for the lane deviation by questioning the driver or examining the condition of the roadway. *Id.*, ¶ 28. The distance a driver travels across lane-lines is not dispositive, and our supreme court has rejected the

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proposition that a lane-usage violation exists only where one drives in more than one lane for a reasonably appreciable distance. *Id.*, ¶ 26. See also *People v. Flint*, 2012 IL App (3d) 110165, ¶¶ 8-9 (following *Hackett* in a case with one lane deviation for a few seconds, followed by “donut” maneuvers in a private parking lot).

¶ 22 Probable cause for an arrest exists if the facts and surrounding circumstances, considered as a whole, are sufficient to justify a belief by a reasonably cautious person that the defendant is or has been involved in a crime. *Grant*, ¶ 11. The State is not required to show that it was more likely true than false that defendant was involved in criminal activity. *Hopkins*, 235 Ill. 2d at 472. Our probable cause analysis is based on common sense and concerns the probability of criminal activity rather than proof beyond a reasonable doubt. *Grant*, ¶ 11. The arresting officer’s factual knowledge, including law enforcement experience, is relevant to our analysis. *Id.*

¶ 23 When a trial court ruling on a motion to suppress involves factual determinations or credibility assessments, the court’s findings will not be disturbed on review unless they are against the manifest weight of the evidence. *Id.*, ¶ 12. However, we review *de novo* the court’s ultimate legal ruling to grant or deny the motion. *Id.* In reviewing the denial of a motion to quash, we may consider the trial evidence as well as the evidence from the motion hearing. *Hopkins*, 235 Ill. 2d at 473.

¶ 24 Here, Officer Finnerty testified clearly to seeing two tires of defendant’s car cross the lane line for a few seconds, which he explained at trial to be three or four seconds. The video -- grainy and with some key aspects obscured by headlight glare -- does not substantially contradict or corroborate this testimony. While the video does not clearly depict a continuous turn signal without a left turn, and establishes that defendant could not make a left turn at the intersection he is

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seen passing through, it does not preclude that Officer Finnerty could have seen defendant driving towards him with his turn signal lit for some time before that. With due deference to the trial court's credibility determination, made after seeing Officer Finnerty and defendant's testimony as well as the video, we do not find that Officer Finnerty's testimony was impeached by defendant's.

¶ 25 Accepting Officer Finnerty's testimony to the lane-usage violation, this case falls squarely under *Hackett* and *Flint*. Also, Officer Finnerty's perception that defendant was driving towards him for some time with his left turn signal lit tends to corroborate the appearance of inattentiveness from the lane-usage violation so that it reasonably reinforced his decision to stop defendant for the lane-usage violation even though it was not itself a violation. We therefore find no error in the court's conclusion that Officer Finnerty had reasonable suspicion of a traffic offense so that his stop of defendant was proper.

¶ 26 As to whether there was probable cause to arrest defendant, Officer Finnerty testified clearly to forming the opinion that he was under the influence of alcohol based not only on his performance on the field sobriety tests but on his admitted consumption of alcohol that night, the odor of alcohol on his breath, and the aforementioned driving irregularities. The court expressly found these sufficient to constitute probable cause even if defendant had not taken, and thus not failed, any field sobriety tests. We agree. Regarding the field sobriety tests, the court found there was substantial evidence of defendant's intoxication but his physical disabilities meant that not all reasonable hypotheses of innocence could be eliminated as to under-the-influence DUI. In other words, the court's ruling was based squarely on the difference between probable cause and proof beyond a reasonable doubt and does not cast doubt upon the former as defendant contends. For example, while defendant attributed his inability to recite the alphabet past "G" to his lack of

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education, he did not profess to being illiterate, so that it was reasonable for both Officer Finnerty and the court to attribute that inability to the influence of alcohol. Lastly, the additional evidence at trial -- defendant's own testimony that he had three or four vodka-based drinks (rather than the intentionally ambiguous "couple" he told police) and little food before his stop -- supports the finding of probable cause to arrest.

¶ 27 Accordingly, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.