2016 IL App (3d) 150741-U

Order filed September 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois,
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-15-0741 Circuit No. 15-DT-173
CHRISTOPHER G. KIERNAN,	)	Honorable Lance R. Peterson,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice O'Brien and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the defendant's petition for rescission of statutory summary suspension and motion to quash arrest and suppress evidence.

¶ 2 The defendant, Christopher G. Kiernan, was charged with driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2014)), and a statutory summary suspension of his driver's license was imposed. After a hearing, the defendant's petition to rescind the statutory summary suspension and motion to quash arrest and suppress evidence were

granted. The State filed an interlocutory appeal and certificate of impairment (Ill. S. Ct. R. 604(a) (eff. Dec. 11, 2014)) from the circuit court's order granting the defendant's motion.

¶ 3 FACTS

¶ 4 At the hearing, Deputy Greg Butterfield (the officer) testified that he had been employed by the Grundy County sheriff's department for five years and had been trained on the administration of field sobriety testing at the Illinois State police academy in 2010. He had a refresher course on such testing in 2015. On August 13, 2015, at about 11:45 p.m., he clocked a vehicle traveling at 79 miles per hour in a 55 mile-per-hour zone. The officer activated his emergency lights as he was approaching a covered bridge. He activated his siren before entering the covered bridge. The defendant hit his brakes a couple times. Inside the covered bridge, the officer noticed the defendant drove over the center line. The defendant pulled over as soon as he exited the covered bridge.

¶ 5 Upon pulling the defendant over, the officer said, "His speech was slightly slurred and I believe he was fumbling through his wallet and looking for his insurance card. I smelled the odor of alcoholic beverage emitting from the vehicle." When asked if there were different degrees of slurred speech, the officer answered, "If it was excessive, I wouldn't be able to understand. I have had that before. Slightly is just if I have to ask myself what did he just say or just an observation." The officer also noticed that the defendant's eyes were red, bloodshot, and watery, though he agreed that there were "about 50 other things that cause red and bloodshot eyes." The officer asked the defendant to step out of the vehicle and noticed the smell of alcohol was coming from the defendant's breath.

¶ 6 The officer had the defendant perform three field sobriety tests. The first was the horizontal gaze nystagmus (HGN) test. The officer did not remember if he noticed the defendant

swaying while he performed the test, but the officer did have to remind the defendant to keep his head still. The officer observed all six of the possible clues of impairment in both of the defendant's eyes. When asked whether the results indicated that the defendant had consumed alcohol, the officer stated, "There are other reasons that someone could have nystagmus, but I had asked him if he had taken prescription medications, which is one reason that he would be showing nystagmus, and he said no. So yes, alcohol is a factor in nystagmus."

¶ 7 The defendant next performed the walk and turn test. The officer said that the defendant showed signs of impairment stating, "[h]e couldn't hold his balance while I was giving instructions. He stopped walking on the first 9 steps and stepped off the line, and as he turned, he turned correctly; however, he gained his balance and stopped on the second step to gain his balance again." The officer noticed three clues of impairment out of a possible eight on that test. Two clues qualify for impairment. The defendant never used his arms for balance or lost balance while turning, counted his steps out loud, did nine steps down and back, and did not miss heel to toe. The officer said that he remembered traffic passing as the defendant was starting his second step. The officer had made a comment that people were "driving like idiots," but he did not agree that the cars were distracting as the defendant was safe between his car and the squad car and the officer was the one standing in the road. The last test the defendant performed was the one leg stand test. There are four possible impairment clues on that test, and the officer did not observe any clues. The defendant passed the test.

¶ 8 The officer stated

> "I asked [the defendant] three or four times if he had been drinking. I could smell him. I told him I knew he had been drinking, and there was one point I said I know you have been drinking; you know you have been drinking; how many did

you have to drink; I wanted to know. As I was saying that *** he said I know a lot of Grundy County Sheriffs and one of them is Jason Cory and then stopped."

The officer then arrested the defendant.

¶ 9 A video recording of the incident was then played in the court room. The defendant agreed that the video recording was an accurate portrayal of what happened.

¶ 10 The defendant testified that at 11:45 p.m. on the night in question, he was coming from a friend's motorcycle shop in Morris. It was a Thursday, and he had worked until 5:30 p.m. Over the few hours that he was at the motorcycle shop he had consumed two cans of beer. He said that he denied having consumed alcohol when the officer asked, stating, "I have some friends in law enforcement that in the past have told me that [sic] don't admit to having any drinks if you're questioned."

¶ 11 When the defendant was stopped, he was on his way home and was in a hurry to get to bed as he had to work the next day. He gave the officer his driver's license without any difficulty. The vehicle belonged to the defendant's father so he was not familiar with where the insurance card was kept but found an expired card. The officer asked him to get out of the car, which he had no difficulty doing.

¶ 12 The defendant agreed to perform some field sobriety tests. When performing the HGN test, he remembered moving his head. When asked why he did so, the defendant stated, "he asked me to watch the tip of his finger. As it went too far I couldn't see it anymore. It was beyond my peripheral vision so I had to turn my head a little to see it more." Other than that, he did not have any problems with the officer's directions, his speech and gait were normal, and he was not swaying.

¶ 13 The defendant next performed the walk and turn test. He stated that the officer put him "in a ready position" with one foot in front of the other, and he agreed that at one point he broke the position. Defendant said, "I don't think I fully understood that I was supposed to stand there like that and the whole time he was giving me instructions. *** When he was explaining, I stepped off to see him better, watch his feet better." He had no difficulty taking nine steps down while counting out loud and keeping his hands by his side, though he took his foot off the line at one point. He then pivoted and took another nine steps back. One time he was hesitant when he was stepping because of an oncoming vehicle, but did not have any other issues. The defendant then completed the one leg stand test without issue.

¶ 14 The defendant admitted that, when the officer told him that he knew the defendant had been drinking, he made a comment about knowing police officers and named a Grundy County officer. He said that he was not saying who told him never to admit to drinking, but stated the name of the officer because, "He was supposed to go on the motorcycle ride with us that night, I think that's what I was going to say, but [the officer] cut me off."

¶ 15 The defendant stated that he was not under the influence of alcohol when he was stopped, was able to act in a rational manner, and the two beers he had did not affect his ability to drive safely. The only time he had difficulty staying in his lane was when he heard the siren. He did not believe it would have been safe to stop inside the covered bridge, so he waited until he exited it.

¶ 16 The defendant further stated that he was asked if he wanted to take a portable breathalyzer test (PBT). He initially did not know what it was, as the officer only called it by its initials: PBT. After the officer explained it, the defendant declined. He refused to take the PBT because he "didn't feel [he] was impaired and [he had] been told also not to do that."

¶ 17 The court granted the petition to rescind and the motion to quash arrest and suppress evidence, stating:

> "In almost 21 years of doing this, in all of the videos that I've watched, which probably number in the hundreds, this is the most coherent, clear speaking defendant I've ever seen, and he did the best on the field sobriety tests that the Court can observe objectively of every video I have ever seen. And if you listen to the conversation, what happened here is the officer believed he was drinking, believed he was lied to, got angry about it and decided to make it because of the anger, not because of observations of impairment. Everyone acknowledges, because there's just no way around it, that he passed the one leg stand completely. I think he almost passed the walk and turn. The officer said there were three points. One of them I agree is explained when a car went by 6 feet away, 55 miles an hour plus, so now you're down to two. We all know the HGN does not indicate impairment. It indicates consumption of alcohol. So when the officer made the decision, we know there was no impairment in the driving and I am going to say that the moment when I believe that the defendant did drift slightly to his left when he was driving was when he had the holy cow moment and was hitting the brakes hard; you could almost hear and just feel the car pulling because he realized it was an officer coming up on him with the sirens and the lights going. So he didn't observe an impaired driver. It wasn't one of your typical crossing the center. It was a speed limit ticket. No impaired driving to speak of. He unequivocally passed one field sobriety test. I think he arguably passed the other. If you acknowledge that at least one of the points the officer is relying on,

you have to take into account that a car went by at 60 miles an hour, 6 feet away and you could see the officer's frustration with the defendant's denial of drinking. He can be frustrated, but he doesn't get to just arrest somebody because he's angry. 20 years of doing, 21 years of looking at these videos, this is the most coherent, clear speaking person I've ever seen and did as good on the field sobriety test as I've ever seen, so if I [don't] grant this, I guess I will never grant any."

¶ 18 ANALYSIS

¶ 19 On appeal, the State argues that the trial court erred in granting the defendant's petition to rescind statutory summary suspension, stating that the officer had probable cause to arrest the defendant.

¶ 20 At the outset, we note that the defendant has not filed a brief in this case. "Our supreme court has held that the failure of an appellee to file a brief does not mandate *pro forma* reversal, as '[a] considered judgment of the trial court should not be set aside without some consideration of the merits of the appeal.' " *U.S. Bank Trust, N.A. v. Atchley*, 2015 IL App (3d) 150144, ¶ 9 (quoting *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976)). The appellate court should decide the merits of the appeal, so long as the record is simple and the claimed errors can be easily decided without the appellee's brief. *Id.* (citing *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133); see also *People v. Sarver*, 262 Ill. App. 3d 513 (1994). We find this scenario present in the instant case and, therefore, we will consider the merits of this appeal, notwithstanding the lack of appellee's brief.

¶ 21 We review a trial court's ruling on a motion to suppress pursuant to a two-part test. *People v. Jones*, 215 Ill. 2d 261, 267-68 (2005). First, we will uphold the court's factual findings

unless they are against the manifest weight of the evidence. *Id.* Second, we assess the established facts in relation to the issues presented and review the trial court's ultimate legal rulings *de novo*. *Id.* at 268.

¶ 22 In challenging the above standard, the State argues that we should review both the factual findings and the probable cause determination *de novo* as "the videotape depicted in People's Exhibit #1 resolves all issues of fact," citing *People v. Oaks*, 169 Ill. 2d 409, 447 (1996) (abrogated on other grounds by *In re G.O.*, 191 Ill. 2d 37 (2000)). We disagree. See *People v. Valle*, 405 Ill. App. 3d 46, 56 (2010).

¶ 23 *Valle*, specifically states, "cases such as *People v. Oaks*, 169 Ill. 2d 409 (1996) (which endorses *de novo* review when videos in the appellate record resolve all issues of fact) are inapplicable in a case such as this one, where videos in the record do not resolve all issues of fact." *Valle*, 405 Ill. App. 3d at 56. The trial court in the present case made findings of fact based both on the videotape and the testimony of the parties. Based on the separate accounts of the videotape made by the court and the State, there appear to be different interpretations of the scene the videotape depicts. Because all issues of fact are not resolved by the videotape, the *de novo* exception endorsed in *Oaks* does not apply here. We now turn to the merits of the State's appeal.

¶ 24 "Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Wear*, 229 Ill. 2d 545, 563 (2008). The existence of probable cause is based on the totality of the circumstances at the time of the arrest. *Id.* at 564.

¶ 25 Here, the trial court observed and listened to the testimony of the officer and the defendant. The court also watched the videotape. Based on everything that it heard and saw, the

court held the officer lacked probable cause to arrest defendant for DUI. Specifically, the court found that the officer got frustrated because he believed he was being lied to, which impaired his judgment with regard to the defendant's sobriety. The court further found that the defendant's swerving over the center line was based on his sudden realization that an officer was behind him with his lights and sirens on and not, therefore, an indication of the defendant's impairment. The court further held that the defendant unequivocally passed one of the impairment tests, arguably passed another, and failed the HGN test, though he stated that the test indicated consumption and not impairment. In 20 years of watching hundreds of these DUI videotapes, the court stated that it had never seen such a clear speaking, coherent defendant who performed so well on the field sobriety tests. Upon review of the record, we defer to these factual findings as they are not against the manifest weight of the evidence. See *Jones*, 215 Ill. 2d at 267-68; *People v. Sorenson*, 196 Ill.2d 425, 430-31 (2001).

¶ 26 Accepting the above factual findings, the only remaining evidence we have indicating that defendant *may* have been impaired is: the odor of alcohol the officer detected upon pulling defendant over, defendant's bloodshot eyes, and the failed HGN test. Each of these facts is evidence of alcohol consumption and a relevant factor, though not dispositive, on the question of impairment. See *People v. McKown*, 236 Ill. 2d 278, 303 (2010). When weighed against the findings of the trial court, we uphold the court's finding of no probable cause and find that the court did not err in granting the petition to rescind and motion to quash arrest and suppress evidence.

¶ 27 In coming to this conclusion, we reject the State's argument that we should consider the defendant's refusal to take a PBT as admissible for consciousness of guilt. The State admits that courts have held that there is no penalty for a defendant refusing to take the test, and we will

continue to follow the established law on this issue. See *People v. Gutierrez*, 2015 IL App (3d) 140194, ¶ 20.

¶ 28 We further reject the series of highly technical arguments the State makes, parceling the video into a matter of seconds. The court correctly viewed the videotape in its entirety in making its factual findings. We must view the evidence in light of the totality of the circumstances, not focus on isolated fragments.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court of Grundy County is affirmed.

¶ 31 Affirmed.