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2017 IL App (3d) 160214-U

Order filed June 30, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellant,)	
v.)	Appeal No. 3-16-0214
)	Circuit No. 15-DT-560
WILLIAM ATCHISON,)	
Defendant-Appellee)	Honorable Lisa Wilson Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge and Justice Carter concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not err in granting defendant's motion to suppress evidence and quash arrest and petition to rescind statutory summary suspension. Trial court's findings that police officer lacked credibility, failed to properly administer field sobriety tests, and did not have probable cause to arrest defendant were supported by the evidence.
- ¶ 2 Defendant William Atchison was charged with driving under the influence of alcohol (DUI). He filed a motion to suppress evidence and quash arrest and a petition to rescind his

statutory summary suspension, arguing that the police officer lacked probable cause to arrest him. Following hearings, the trial court granted both motions. The State appealed. We affirm.

¶ 3

FACTS

¶ 4

On October 25, 2015, defendant William Atchison was charged by citation with DUI and failure to reduce speed. 625 ILCS 5/11-501(a)(2); 11-601(a) (West 2014). The charges arose from a rollover accident to which Peoria police officer Thomas Bieneman responded. Bieneman's police report stated that he came upon an overturned vehicle and that Atchison had dilated eyes, smelled of alcohol, and failed the field sobriety tests. Bieneman arrested Atchison, who refused to submit to a breath test. Atchison's license was suspended due to his refusal. Atchison filed a motion to rescind his statutory summary suspension and a motion to suppress the evidence and quash his arrest. Hearings took place on both motions.

¶ 5

At the motion to suppress hearing in December 2015, Bieneman testified as follows. He graduated from the police academy around October 1, 2014, and participated in a training program where he worked under an experienced Peoria police officer until April or May 2015. At the police academy, he was trained in DUI detection and enforcement, and the administration of field sobriety tests according to National Highway Transportation Safety Administration (NHTSA) standards. He received minimal training in vehicle accident investigation.

¶ 6

While on patrol on October 25, 2015, Bieneman encountered a single-vehicle rollover accident around 1 a.m. He stopped and helped the four occupants exit the vehicle. They were examined by emergency medical technicians (EMTs) at the scene and refused further treatment. Bieneman then spoke to Atchison. He originally thought Jody Atchison, the defendant's wife, had been driving but Atchison admitted he was the driver. Atchison also admitted he had three or four Miller Lite beers during the evening. Atchison said he had been driving too fast when he

approached the curve and hit the curb. Atchison could not remember any other details of the accident.

¶ 7 Bieneman could smell alcoholic beverages on Atchison's breath but admitted smell does not indicate how much alcohol a person has consumed. Atchison did not slur his speech or have trouble standing but he did notice Atchison sway at times. Atchison's eyes were red, bloodshot and "abnormally dilated." He assumed that Atchison's eyes were bloodshot because he had been drinking. He did not ask Atchison whether he had allergies or whether there was any other reason that his eyes would be red. Bieneman did not consider whether Atchison's dilated pupils or inability to recall details of the crash could be a sign of head trauma caused by the accident. Atchison did not say he suffered head trauma or that his head hurt.

¶ 8 Atchison agreed to perform field sobriety tests. Prior to beginning the tests, Atchison informed Bieneman that he wore glasses but they had broken in the crash. Bieneman inquired as to whether there were other concerns or issues that would affect Atchison's performance on the tests, to which Atchison said no. Bieneman first administered the horizontal gaze nystagmus (HGN) test. He could not recall the name of the test, referring to it as "the eye test," but he remembered the name in later testimony. He described the test and stated its purpose was to check for "jerky" eyes or nystagmus. He knew drinking alcohol caused nystagmus although he did not know any other causes for it. He stated the test was designed to indicate impairment and concluded from the test that Atchison was "showing impairment."

¶ 9 Bieneman said the one-leg-stand test also tests for impairment. He described the test and its clues indicating impairment for the court. He said he demonstrated the test and asked Atchison if he understood the instructions. Before conducting the test, Atchison told Bieneman he did not have any balance or walking problems. Bieneman explained Atchison exhibited four

of the clues of the test: he put his foot down, swayed slightly, did not keep his hands to his sides, and ended the test before time was up. The last clue was not an official one. Bieneman “scored” Atchison for impairment.

¶ 10 Bieneman described the walk-and-turn test for the court. There are eight clues that indicate impairment but he could only remember seven of them. The trial court noted it took Bieneman at least a couple of minutes to list the clues. Bieneman told the court that it did not take him as long at the scene as it did in court, despite that it was his first DUI arrest. Bieneman said he demonstrated the test, told Atchison to “assume the position,” and to hold it until he told Atchison to start the test. Atchison performed the test and showed three clues: he stepped out of position before beginning the test, he did not consistently touch his heel to his toe on three steps on the return walk, and he performed the test with his arms extended. Bieneman had a manual with verbatim instructions but it was not with him at the accident or in court. He had not memorized the instructions.

¶ 11 After Atchison performed the field sobriety tests, Bieneman arrested him for DUI. The reasons for the arrest were Atchison’s performance on the tests, his bloodshot eyes and the odor of alcoholic beverages on his breath. He did not see Atchison driving badly but Atchison did wreck his car. Bieneman did not do any accident investigation at the scene, such as taking pictures or measurements. When asked about the cause of the accident, he stated, “probably excessive speed.” Bieneman surmised that Atchison’s car hopped the curb, knocked over a light pole, and flipped over.

¶ 12 The DVD was played and Bieneman was questioned about it. The beginning of the encounter was not recorded, and after the recording began, the audio portion of the video was not working for a period. Bieneman said the audio and video recording equipment in the squad car

were in working order when he began his shift and should have started when he activated the overhead lights. At some point before conducting the field sobriety tests, Bieneman turned on his microphone, which had failed to start when Bieneman activated the squad car lights. The DVD showed Bieneman conducting the HGN test in a manner that appeared inconsistent with NHTSA standards. On the one-leg-stand test, he told Atchison to raise his foot, keep his hands at his side and count until told to stop. He demonstrated the test with his toe pointed down but told Atchison to point his heel out. When Atchison put his foot down prematurely, Bieneman told him to raise it again. When demonstrating the test, he kept his arms at his side. He did not tell Atchison he could hold his arms out, which Atchison did throughout the test. Atchison counted aloud as instructed. Bieneman stopped the test when Atchison reached the count of 19. Although he testified that he asked Atchison whether he understood the instructions, the DVD did not show the conversation. Bieneman admitted his failure to ask violated NHTSA protocols.

¶ 13 The DVD next shows the walk-and-turn test and Bieneman demonstrating it. Bieneman admitted he did not ask Atchison whether he understood the instructions for the test before beginning it, contrary to his prior testimony. Bieneman told Atchison to “assume the position and don’t start until I tell you to start” but did not tell Atchison to stay in the position while Bieneman explained the test. Atchison did not start early and “assumed the position” as instructed. His instructions differed from the NHSTA training but he instructed Atchison to the best of his ability. He described the three clues Atchison missed: premature start, missing heel-to-toe steps, and arms not to his side. The three clues indicated impairment. He also marked Atchison off one point for not remaining in the proper position to start the test. His instructions differed from NHSTA standards but he instructed Atchison to the best of his ability.

¶ 14 Bieneman acknowledged all three field sobriety tests must be considered together in determining whether a driver is impaired and said he observed clues of impairment in all three tests. He also admitted that if the tests were not conducted properly, false positives could result and would affect a DUI determination based on all three tests. On cross-examination, Bieneman watched the DVD again. The walk-and-turn test showed Atchison stepped off the line, which Bieneman did not notice at the scene because at one point during the test his view was blocked. He testified this clue could substitute for an unsupported clue regarding a premature start.

¶ 15 Jody Atchison testified. She was married to Atchison. On the night at issue, they went to dinner and a concert with another couple. They ate dinner in Washington at 5:30 p.m. and attended an 8:30 p.m. concert in Peoria. The concert ended around midnight but they stayed for a short time for a meet-and-greet with the band members. She had three drinks during the evening and estimated Atchison had three or four beers. She did not believe he was intoxicated when they left the concert venue. If he had been, she would not have allowed him to drive. Jody did not remember any details of the accident except that they hit a curb. Bieneman arrived soon after it occurred and helped them out of the vehicle. On cross-examination, she said the paramedics inspected the vehicle's occupants at the scene and recommended they all go to the hospital. No one in her party felt further medical care was necessary.

¶ 16 At the close of Atchison's case, the State moved for a directed verdict, which was heard and denied. The State presented its case and Bieneman testified again. In addition to reiterating some of the testimony from his direct examination by Atchison, he stated he arrested Atchison based on the crash, Atchison's physical condition, admission to drinking, and the clues from the field sobriety tests. Bieneman said that after he arrested Atchison, he asked him to provide a breath sample. Defenses counsel objected, challenging any questions about Atchison's post-

arrest refusal to submit to the breath test. The State argued evidence of Atchison's refusal demonstrated consciousness of guilt and was admissible under section 11-501.2(c) of the Illinois Vehicle Code (625 ILCS 5/11-501(c) (West 2014)). The trial court disagreed and sustained Atchison's objection.

¶ 17 On cross-examination by Atchison, Bieneman said he assumed Atchison's eyes were bloodshot due to drinking, and considered them another sign of impairment. The crash was also a factor he considered in arresting Atchison. Bieneman acknowledged Atchison's speech was not slurred and he did not stumble. He admitted to errors he made in the administering the tests, that it took him some time while testifying to try to remember the clues on the walk-and-turn test, and that he was unable to remember all eight clues. On re-direct examination, the State showed Bieneman the DUI training manual listing stopping problems as a DUI indicator, which Bieneman said applied to Atchison's supposed failure to negotiate the curve.

¶ 18 The trial court issued an oral ruling on the motion to suppress on January 7, 2016. The court found it significant that Bieneman had one and a half years' experience in law enforcement and this arrest was his first DUI arrest. The trial court noted Bieneman testified Atchison smelled of alcohol, had bloodshot eyes and abnormally dilated pupils, and had admitted to drinking three to four Miller Lite beers. The trial court further noted Jody testified Atchison drank three or four beers between 5:30 p.m. and 12:30 or 1 a.m.; one beer at dinner and two to three at the concert. The trial court further noted that Bieneman did not see Atchison driving and that Bieneman conceded that he did not do a thorough accident investigation.

¶ 19 The trial court did not consider the HGN test because it found Bieneman did not comply with NHTSA standards in administering the test as set forth in *People v. McKown*. See *McKown*, 236 Ill. 2d 278, 306 (2010) (nystagmus indicates consumption of alcohol and possibility of

impairment, not level of alcohol or fact of impairment). The trial court faulted Bieneman's testimony that the test could be used to prove impairment. The trial court found Bieneman did not properly instruct Atchison on the one-leg-stand test and that his demonstration was contrary to proper implementation of the test. The trial court stated "it was painful to wait for the officer to actually outline what the clues are for the *** test. We waited an inordinate amount of time for him to even answer the question."

¶ 20 The court questioned Bieneman's credibility, finding his attitude to be "the poorest attitude I've seen in law enforcement since I've been on the bench." The trial court also considered Jody's testimony about the time period in which Atchison drank and that she did not think he was intoxicated, finding Jody's testimony to be credible. The trial court concluded Bieneman lacked probable cause to arrest Atchison for DUI and granted Atchison's motion to suppress.

¶ 21 At the hearing on Atchison's petition to rescind the statutory summary suspension, the parties stipulated to the testimony from the motion to suppress hearing. The trial court granted the petition based on its rulings on the motion to suppress. The court again questioned Bieneman's credibility regarding the accident investigation and his administration of the field sobriety tests. The State filed motions to reconsider both rulings, which the trial court heard and denied. The trial court cited Bieneman's inexperience and lack of credibility in its denial. The State timely appealed and filed a certificate of substantial impairment.

¶ 22

ANALYSIS

¶ 23 There are three issues on appeal: whether the trial court erred in granting Atchison's motion to suppress and his petition to rescind, and in denying the State's motion to reconsider those rulings.

¶ 24 We first consider the trial court's grant of Atchison's motion to suppress. The State argues the trial court erred in granting the motion to suppress. It maintains the trial court should not have sustained Atchison's objection to the admission of evidence of his refusal to submit to post-arrest breath testing, that the exclusionary rule did not apply to Bieneman's conduct, and that the court's findings that Bieneman did not properly conduct the field sobriety tests were contrary to the evidence.

¶ 25 Driving under the influence of alcohol is unlawful. 625 ILCS 5/11-501(a)(2) (West 2014). The implied consent provision states that a driver is deemed to have given consent to chemical, blood, breath or urine testing to determine alcohol content if the person has been arrested for DUI. 625 ILCS 5/11-501.1(a) (West 2014). Under the implied consent statute, a person arrested for DUI must either submit to a breathalyzer or have his license subject to a statutory summary suspension. *People v. Garriott*, 253 Ill. App. 3d 1048, 1051 (1993). If a person under arrest refuses to submit to testing, evidence of the refusal is admissible in any action arising out of the acts allegedly committed while the person was DUI. 625 ILCS 5/11-501.2(c)(1) (West 2014). If a person arrested for DUI refuses testing, under section 11-501.2(c)(1), evidence of the refusal is admissible in the DUI case. *People v. Jones*, 214 Ill. 2d 187, 201 (2005).

¶ 26 A law enforcement officer may request that a person submit to a breath test when the officer has probable cause to believe the driver was driving under the influence. 625 ILCS 5/11-501.2(c)2 (West 2014). Probable cause to arrest exists when the facts that are known to the police officer at the time of the arrest are sufficient to lead a reasonable person to believe the person arrested has committed a crime. *People v. Wear*, 229 Ill. 2d 545, 563 (2008). Probable cause depends on the totality of circumstances. *People v. Sims*, 192 Ill. 2d 592, 615 (2000).

Where an officer lacks probable cause to arrest, the defendant is entitled to have his arrest quashed and resulting evidence suppressed. *People v. O'Brien*, 227 Ill. App. 3d 302, 307 (1992). The exclusionary rule was designed to deter police misconduct. *People v. McDonough*, 395 Ill. App. 3d 194, 198 (2009) (citing *United States v. Herring*, 555 U.S. 135, 142 (2009)). While negligence is insufficient to trigger the rule's deterrent purpose, "systemic error or reckless disregard of constitutional requirements" is conduct properly subject to the rule's deterrent effect. *Id.* at 199 (citing *Herring*, 555 U.S. at 147-48). In reviewing a trial court's ruling on a motion to suppress, this court will uphold the factual findings unless they are against the manifest weight of the evidence but reviews *de novo* the ultimate question of whether to suppress the evidence. *People v. Absher*, 242 Ill. 2d 77, 82 (2011).

¶ 27 The State first argues that the trial court erred when it sustained Atchison's objection to its question to Bieneman about Atchison's post-arrest refusal to submit to breath testing. It maintains that the refusal was admissible evidence of Atchison's consciousness of guilt of driving while intoxicated. The statutory support on which the State relies applies to post-arrest procedures. The statute directs that evidence of refusal is admissible in the DUI case and other proceedings arising out of the alleged DUI. Here, the issue in the motion to suppress hearing and on review was whether Bieneman had probable cause to arrest Atchison. As determined by the trial court, Atchison's post-arrest refusal could not serve as a basis of probable cause to arrest him. See *People v. Motzko*, 2017 IL App (3d) 160154, ¶31 (post-arrest actions cannot be used for probable cause to arrest).

¶ 28 Next, contrary to the State's argument, we consider that Bieneman's conduct does trigger the exclusionary rule. He conducted field sobriety tests that did not comply with NHTSA standards and arrested Atchison as a result of the improper tests. As demonstrated by his

testimony at the motion to suppress hearing, Bieneman still had not mastered the procedures and necessary information to conduct field sobriety tests. By all accounts, Bieneman did not properly administer the field sobriety tests. He did not follow the required procedures or consult his manual. Despite his failure to follow NHSTA standards, he arrested Atchison anyway. In addition, he failed to conduct an accident scene investigation and instead surmised at the scene and on the witness stand that the crash resulted from Atchison's supposed impairment. Such conduct is the type that could be deterred through use of the exclusionary rule.

¶ 29 The State next contends the trial court's ruling that Bieneman did not properly conduct the field sobriety tests was not supported by the evidence. The record does not support the State's contention. The officer's testimony revealed numerous and substantial omissions and lack of understanding of the field sobriety tests and how to conduct them. Bieneman was unable to name the HGN test, calling it the "eye test." His understanding of the test was at odds with the standards set forth for administering the test and supports the court's questioning of his credibility. He testified that he found nystagmus in Atchison's eyes that indicated impairment. This statement demonstrates Bieneman's misunderstanding regarding the HGN test and is contrary to the law. The DVD established that Bieneman did not follow the proper procedures as he testified. We find the trial court did not err in excluding evidence of the HGN test.

¶ 30 Bieneman's recitation of the steps he took in administering the one-leg-stand and the walk-and-turn tests also contradicts the DVD evidence, which showed that Bieneman did not conduct either test according to NHTSA standards. He did not properly instruct Atchison on the tests nor ask if Atchison understood the instructions before requiring him to perform the tests. Bieneman's demonstration of the one-leg-stand test did not correspond with the NHTSA procedures and contradicted the verbal instructions he gave Atchison. He similarly gave

inadequate instructions regarding the walk-and-turn test. During his testimony, Bieneman was unable to timely outline what clues he was to look for in a walk-and-turn test. The trial court described the wait for Bieneman's explanation as "painful." His inability at trial to articulate the clues he looked for when assessing Atchison's performance on the test lends further support to the trial court's finding that his administration of the test was flawed.

¶ 31 Bieneman's improper administration of the field sobriety tests negated their effectiveness to establish probable cause to arrest Atchison. We next examine the other indicators of impairment, such as Atchison's red, bloodshot eyes, dilated pupils, odor of alcoholic beverages, and the accident itself in light of the trial court's credibility findings. The trial court found Bieneman's credibility suspect and pointed to his lack of experience and poor attitude as contributing factors in his unprofessional conduct. The court described Bieneman's attitude as the "poorest" it had seen from the bench. From our reading of the record, Bieneman seemed unconcerned with his lack of knowledge regarding administration of the field sobriety tests, stating he conducted them to the best of his ability while knowing they did not comply with NHSTA standards. He also acknowledged that he had a manual with the standards but he did not use it at the accident scene or in court. Use of the exclusionary rule under these circumstances would serve as a deterrent to curb conduct that exhibits a "reckless disregard of constitutional requirements." *McDonough*, 395 Ill. App. 3d at 198. See *People v. Stehman*, 203 Ill. 2d 26, 33 (2002) (where State's primary witness at suppression hearing is found by trial court to lack credibility, trial court did not err in granting motion to suppress). We find the trial court did not err in granting Atchison's motion to suppress.

¶ 32 We next consider the trial court's ruling on Atchison's petition to rescind. The State argues Atchison failed to establish a *prima facie* case for rescission and that Bieneman had probable cause to arrest him.

¶ 33 A hearing on a petition to rescind is a civil proceeding where the burden of proof is placed on the driver. *Wear*, 229 Ill. 2d at 559-60. If he establishes a *prima facie* case, the burden shifts to the State to present evidence that justifies the summary suspension. *Id.* The issues that may be raised at summary suspension hearing are limited to: (1) whether the person was arrested for DUI under section 11-501 of the Vehicle Code (625 ILCS 5/11-501 (West 2014)), and issued a uniform traffic ticket; (2) whether the officer had reasonable grounds to believe the person was driving while under the influence of alcohol; (3) whether the person refused to submit or complete a test to determine his blood alcohol level after being informed that refusal would result in a summary suspension or revocation; (4) whether the test results showed an alcohol concentration of .08 or more. *Wear*, 229 Ill. 2d at 560; 625 ILCS 5/2-118.1(b)(1)-(4) (West 2014).

¶ 34 Facts sufficient to establish probable cause for DUI include slurred speech, a strong odor of alcoholic beverage, defendant's admission of drinking, and failed field sobriety tests. *People v. Rush*, 319 Ill. App. 3d 34, 40-41 (2001). Dilated eyes may also indicate impairment. *People v. Robinson*, 368 Ill. App. 3d 963, 973 (2006). Other observations, such as the occurrence of an accident, may support probable cause that a driver is DUI. *People v. Wingren*, 167 Ill. App. 3d 313, 321 (1988). The two-part standard used to review a trial court's decision on a motion to suppress applies to its determination on a petition to rescind. *Wear*, 229 Ill. 2d at 561. The trial court's factual findings are reviewed under the manifest weight standard and the decision whether to grant or deny the motion to suppress is reviewed *de novo*. *Id.* at 561-62.

¶ 35 The State refutes the trial court's finding that Bieneman lacked reasonable grounds or probable cause to arrest Atchison for DUI. It points to his testimony that Atchison had an odor of alcoholic beverages on his breath and red, bloodshot eyes with dilated pupils. Bieneman also used as support for reasonable grounds the fact an accident occurred and Atchison's performance on the field sobriety tests. We acknowledge these accepted indicators of impairment, but as above, we must consider them in light of Bieneman's lack of credibility as the trial court expressly determined. It questioned Bieneman's conduct in investigating the accident and conducting the field sobriety tests. Importantly, the trial court had the benefit of seeing and hearing the witnesses and it found Jody credible and Bieneman's testimony suspect. We find the trial court's factual findings were consistent with the evidence and its determination to grant Atchison's petition to rescind not in error.

¶ 36 The third issue is whether the trial court erred in denying the State's motion to reconsider its rulings on the motions to suppress and rescind. The State submits the evidence did not support the trial court's denial and argues the court should not have allowed Jody to testify at the hearings.

¶ 37 A motion to reconsider is designed to bring to the attention of the court newly discovered evidence not available at the first hearing, changes in the law, or errors in the court's application of the existing law. *People v. Teran*, 376 Ill. App. 3d 1, 4-5 (2007). We review *de novo* a motion for reconsideration based on the court's application of the law. *People v. Politt*, 2011 IL App (2d) 091247, ¶ 18. When the motion to reconsider is based on new facts or legal theories, we employ an abuse of discretion standard. *Id.*

¶ 38 The State argues the trial court improperly considered the testimony of Jody Atchison regarding her husband's drinking and level of intoxication, contrary to the probable cause

standard which focuses on “facts and circumstances within the arresting officer’s knowledge.” *People v. Robinson*, 62 Ill. 2d 273, 276 (1976). The trial court was free to consider the testimony of other witnesses to determine whether the officer’s knowledge of the facts and circumstances was reasonable and fact-based. See *People v. O’Brien*, 227 Ill. App. 302, 304 (1992) (defendant’s friend testified at motion to suppress hearing). The trial court did not err in its application of the law to allow Jody to testify.

¶ 39 The State questions the court’s finding that Bieneman was not credible, focusing on the trial court’s determination that Bieneman was inexperienced as an improper reason to negate the results of the field sobriety tests. It is undisputed Bieneman was inexperienced, having only been on patrol by himself for approximately six months. Atchison was his first DUI arrest. This inexperience contributed to his errors during the encounter as well as during his testimony. The court also emphasized Bieneman’s poor attitude and lack of credibility as reasons for its determination. The trial court viewed the DVD of the encounter and observed the differences between the recording and Bieneman’s testimony. The recording established that Bieneman did not properly administer the field sobriety tests, contrary to the State’s claims. The trial court assessed the witnesses, discredited Bieneman, and found Jody credible. We find nothing in the record to reject the trial court’s ruling. The State did not present any newly discovered evidence that was previously unavailable, changes in the law, or errors in the trial court’s application of the law. We find its decisions to deny the State’s motions to reconsider was not in error.

¶ 40 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 41 Affirmed.