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2017 IL App (3d) 160441-U

Order filed July 18, 2017

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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. 3-16-0441
GREGORY SWITZER,	)	Circuit No. 15-DT-502
Defendant-Appellee.	)	Honorable Lisa Y. Wilson, Judge, Presiding.

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PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justice Carter concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

¶ 1 *Held:* The circuit court did not err in granting the defendant's motion to quash arrest and suppress evidence.

¶ 2 The defendant, Gregory Switzer, filed a motion to quash arrest and suppress evidence, which was granted. The State appeals, arguing that the court erred by granting the motion and denying the admission of a postarrest breath test.

¶ 3 **FACTS**

¶ 4 The defendant was charged with two counts of driving under the influence of alcohol (DUI). 625 ILCS 5/11-501(a)(1), (a)(2) (West 2014). The defendant filed a motion to quash arrest and suppress evidence. Jeff Ganieany testified that he was renovating the house next to the defendant's house, but did not live there. On September 30, 2015, Ganieany barely knew the defendant as the defendant had moved to the area less than a month earlier. The defendant entered the house Ganieany was remodeling and asked him if he wanted "to go uptown for a chili dog." The defendant drove them to a bar around 7:30 p.m. They each had four beers. The defendant also had two shots. Since the defendant consumed more drinks, Ganieany drove the defendant home in the defendant's truck around 10:30 p.m. It only took a couple of minutes to drive to the defendant's house. Once they arrived at the defendant's house, Ganieany parked the defendant's truck in the back of the defendant's house, and the defendant invited Ganieany in for "a shot or two." They both had a shot, and Ganieany declined a second shot. He then left between 10:35 and 10:40 p.m. to go home. When he left the defendant's house, he did not notice any kind of gas leak at the house he was renovating. He did not notice any gas hissing or any damage. He later learned the gas meter there had been hit. He was never contacted by a police officer concerning the gas leak. Ganieany never saw the defendant operate his truck after driving it to the bar.

¶ 5 Ganieany said that a couple of days prior to the incident he had helped the defendant move a freezer into his house as the defendant was still in the process of moving in. The defendant had backed up a truck and trailer a little between the two houses in order to unload it in the garage. Between the two houses there was, at most, seven to eight feet of space, but Ganieany stated that there was not enough room between the houses to drive through. The main gas line was in that area. The defendant's truck was around 10 feet away from the gas meter at

that point, but did not hit it. Around the time of the incident, Ganieany had people moving rock between the houses.

¶ 6 Sergeant Andrew Burgess testified that he had been a police officer at the Glasford police department for 14 years. Prior to that he had worked for the Bradley University police department, but he was terminated based on his failure to report an incident. On September 30, 2015, at 11:06 p.m., he was dispatched to a call of a gas meter that was ruptured at the house that Ganieany was renovating. When he arrived, Burgess said he could hear a very loud hissing noise. Burgess observed the defendant standing in the front yard of the house.

¶ 7 Burgess believed the defendant was intoxicated, as indicated by swaying, slurred speech, and the smell of alcoholic beverages emanating from him. Burgess noticed two trucks at the defendant's house: one in front of the house and one behind the house. When Burgess arrived, the lights to truck behind the house were still on, though he never saw the vehicle running or the defendant in the vehicle. The defendant had the truck keys in his pocket. The defendant told Burgess there was a gas line that had broken. Burgess believed that the defendant had hit the gas line with his truck.

¶ 8 Burgess said the defendant told him that he drove the truck that was parked behind the house, stating, "What [the defendant] told me was when he—that he had been drinking at the bar and that he came home and that he drove to the back side of the house to get home, not the front." The defendant told Burgess that he had returned home from work at 3:30 p.m. and later went to the bar with Ganieany. Burgess further stated that "[l]ater on in questioning [the defendant] told me that another person was driving." Burgess admitted that it could be possible that when the defendant said that he drove he could have meant that he was the passenger and someone else was driving. Burgess never spoke to Ganieany.

¶ 9 The gas meter was located between the house Ganieany was renovating and the defendant's house. The fire department and gas company inspected the meter and stated that it looked like it had been hit by something. One of the firemen mentioned it might have been hit by a lawnmower. Burgess said between the houses there was a space of about three to five feet. Burgess stated that a vehicle would not fit between the two houses, though he stated that it would be physically possible for the truck to hit the meter. Burgess investigated the gas meter with the firemen and noted that there were tire marks somewhere near the meter. Burgess stated that the tire treads were similar to the defendant's truck. When asked about the tire marks, the defendant said he and Ganieany had backed up there a couple of days previously to unload a freezer. Burgess took some photographs of marks on the defendant's truck that could have been from hitting the meter, but noted that the defendant's truck was old and had marks all over.

¶ 10 The camera inside Burgess's squad car recorded the incident. The videotape was played in court. On the videotape, Burgess was asked by someone off camera whether he was going to arrest the defendant for DUI, and Burgess said, "Probably. I'm still looking at it." Then Burgess stated, "I'm trying to make it go that way." At another point in the videotape, sheriff's deputies arrived, and Burgess told them, "I'm to do field sobriety test[s] on him, and if nothing else, get him for DUI if he won't admit to [hitting the gas line]." Burgess arrested the defendant for DUI, and stated, "[W]ith his intoxication, his swaying, his slurred speech, him telling me that he was driving, I believed, yes, that he had hit the gas main." After arresting the defendant, Burgess transported him to the jail where he performed a breath test on the defendant.

¶ 11 The State attempted to admit into evidence the results of defendant's breath test taken after he was arrested. The defendant objected to the evidence, and the court sustained the

objection, stating: “[A]t this point, the Court is looking at what were the determining factors for this officer at the time that he placed [the defendant] under arrest.”

¶ 12 In granting the motion to suppress, the court stated:

“The issue that’s—there’s some issues that are concerning for the Court as I try to work through the evidence. The first is that nobody saw the defendant drive. We know that based upon Ganieany’s testimony that he was the one that drove them to the bar and drove them back. The Court assumes that the defendant had driven home from work, but other than that, there’s nothing to put him driving unless the Court would surmise that he got into his vehicle after he returned back home from the bar and then his vehicle damaged the gas meter.

I mean, that’s what I’m asked to surmise, because there was absolutely no evidence presented where anybody saw him driving.

The sergeant testified that the defendant admitted to driving. But I guess there’s a question as to, well, when was it that he drove? Was it when he was driving home from work and then that was it? Or was there an admission that he drove sometime between 3:30 and when Ganieany took him to the bar with him or sometime after the bar? So that’s the question.

And I know that the sergeant testified that the defendant did have keys on him, but nobody saw the defendant in either vehicle behind the wheel or driving.

And I don’t think there’s any question that the defendant had had something to drink. The sergeant testified that the indicators for him was that the defendant smelled strongly of alcohol, he was swaying or staggering, there was

slurring of speech, he was agitated, and then he had indicated that the defendant told him that he had been driving. So that's the evidence that we have.

We then sort of have this strange investigation or trying to figure out how did the gas meter get damaged, so we have firemen looking at it, we have Ameren looking at it.

And they're looking at the defendant's tires on one of his vehicles. I'm not sure that there was really an investigation of the tires on the vehicle that was in front of the house, but there was an investigation to some extent of the tires of the vehicle in the back of the property. We have some statements on the video that when people are saying the tire tracks look like they're similar to the defendant's tire tracks, there's an assumption that the defendant drove.

But then we have this whole issue of, can the vehicle fit between the houses? You know, can it actually get in between the houses, given the distance? And the Court looked at the photographs, also considered again the testimony provided. And the fact that where the damage is, the mirrors weren't torn off, there wasn't damage to the siding. Those are all factors that the Court has considered in making its ruling as well.

At 1:02.33 on the video, someone posed a question, 'Is this guy going to get a DUI?' And the sergeant responds, 'Well, it will probably go this way.' Also, at 1:19 on the video, 'If he's not going to admit to the main break, then we'll get him for a DUI.'

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It's a troubling case. I understand that, you know, this officer and those that were involved in the investigation of the main break were trying to get to the bottom of it. But when I look at the totality of the circumstances, when I look at the evidence that was presented, I'm not confident that the sergeant had probable cause to arrest the defendant for a DUI.

Maybe there was some other issue that the defendant could have been arrested for. I mean, if there was more investigation into this gas main leak, if there was damage to property, something of that nature. But even then, we don't know that the defendant is linked to that based upon the evidence presented.

So based upon the standard that the Court has to look at, which is the totality of the facts and circumstances known to the officer at the time, would that warrant a reasonable and prudent person to believe a crime had been committed, particularly driving while under the influence? The Court is not going to find that the officer had probable cause.”

¶ 13 The State filed a motion to reconsider. In denying the motion, the court stated:

“There's been no evidence to support Sergeant Burgess's allegation that the defendant was operating any motor vehicle prior to his arrest.

I would take note that Jeff Ganieany's testimony was unrefuted that he drove the defendant home from [the bar] on September 30, 2015, at approximately 10:40 p.m. Upon review of the transcript, there was no other witness that testified that they saw the defendant driving a motor vehicle, and that's a critical component of this particular case.”

¶ 14

## ANALYSIS

¶ 15 On appeal, the State argues that the circuit court erred in granting the defendant’s motion to suppress. We review a 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 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 court’s ultimate legal rulings *de novo. Id.* at 268.

¶ 16 “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. To commit the offense of DUI, the defendant would have had to (1) driven or been in actual physical control of a vehicle; and (2) either been under the influence of alcohol or had an alcohol concentration of 0.08 or more. See 625 ILCS 5/11-501(a)(1), (a)(2) (West 2014). Stated another way, in order to have probable cause to arrest, the circumstances at the time had to be sufficient for a reasonable person to believe *both* that the defendant had been under the influence and been driving a vehicle.

¶ 17 Here, the court observed and listened to the testimony of Burgess and Ganieany. The court also watched the videotape. Based on all the evidence, the court held that Burgess lacked probable cause to arrest the defendant. Specifically, the court believed Ganieany’s testimony that he was the one that drove the defendant home from the bar, noting in its denial of the motion to reconsider that “Ganieany’s testimony was unrefuted.” We defer to this factual finding as it was not against the manifest weight of the evidence. See *Jones*, 215 Ill. 2d at 267-68. The court stated that no one saw the defendant drive and said, “there’s nothing to put him driving unless the Court

would surmise that he got into his vehicle after he returned back home from the bar and then his vehicle damaged the gas meter.” The court noted the question of whether a vehicle could fit between the houses and observed that there was no damage to the siding or the mirrors of the defendant’s vehicle. Further, the court did not believe that the defendant’s admission of driving was clear, stating: “Was it when he was driving home from work and then that was it? Or was there an admission that he drove sometime between 3:30 and when Ganieany took him to the bar with him or sometime after the bar.”

¶ 18           Upon our *de novo* review, we agree that Burgess did not have probable cause to arrest the defendant. It is undisputed that the defendant was under the influence of alcohol. However, the circumstances were not sufficient for Burgess to believe the defendant had operated a vehicle while intoxicated. No one testified that they saw the defendant drive. Though Burgess testified that the defendant admitted to driving, such admission was unclear. Burgess further stated that the taillights on the back of the truck were on when Burgess pulled up and the defendant had his keys in his pocket. Neither of these facts are inconsistent with Ganieany’s testimony that he had driven the defendant’s truck home from the bar. Because we find that the evidence did not establish that the defendant had driven a vehicle, we find the officer did not have probable cause to arrest the defendant.

¶ 19           In coming to this conclusion, we offer no opinion on the State’s argument that the court’s ruling on the motion to suppress was based in part on its error “in refusing to admit into evidence the result of defendant’s post-arrest breath test, based on the judge’s misinterpretation of 625 ILCS 5/11-501.2(a).” This argument is irrelevant. The breath test solely corroborated the State’s evidence that the defendant was intoxicated, and its admittance would have had no bearing on the determination of whether or not the defendant had operated a vehicle. As stated above, both

intoxication and physical control of a vehicle are necessary for a DUI. See 625 ILCS 5/11-501 (West 2014).

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Peoria County is affirmed.

¶ 22 Affirmed.

¶ 23 JUSTICE SCHMIDT, dissenting.

¶ 24 As the majority correctly observes, we review the trial court's decision to suppress the evidence *de novo*. *Supra* ¶ 15. Admittedly, defendant's neighbor testified that after he and defendant went to a local bar, he drove defendant's truck home. However, the neighbor also testified that when he left defendant's house, he could not hear gas hissing and noticed nothing unusual. This was at least one-half hour before the 911 call.

¶ 25 When speaking with the police officer, defendant stated that when he got home, he heard the gas spewing and called 911. That is, he stated gas was spewing when he arrived at home. The officer then questioned him about whether he was coming home from work at the time. Defendant stated no, he and his neighbor, Ganieany, went to a local bar. It was when he arrived home from the bar that he noticed the gas spewing. The officer then asked him whether Ganieany was in the truck with him when he came home. The defendant stated no. He asked if Ganieany remained at the bar when defendant left the bar to come home and defendant stated yes.

¶ 26 The above, along with all of the other circumstantial evidence, clearly gave the police officer probable cause to believe that defendant had been in actual physical control of a vehicle while intoxicated. I further note that this evidence to which I refer is contained in the

defendant's exhibit No. 3, which is the police audio and video recording from the officer's squad car.

¶ 27 The majority notes that Ganieany's testimony was unrefuted. *Supra* ¶ 17. I find the trial court's statement that Ganieany's testimony was unrefuted to be against the manifest weight of the evidence for the reasons stated above. Defendant himself refuted Ganieany's testimony.

¶ 28 To obtain probable cause, a police officer does not have to be right, only reasonable. *Maryland v. Pringle*, 540 U.S. 366, 372 (2003). Possible innocent explanations do not obviate probable cause. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983).

¶ 29 For the reasons set forth above, I would reverse and remand for further proceedings.