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2019 IL App (3d) 170392-U

Order filed July 1, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellant,)	
v.)	Appeal No. 3-17-0392
DAVID A. NELSON,)	Circuit No. 16-DT-1027
Defendant-Appellee.)	The Honorable Carmen Julia Lynn Goodman, Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's grant of defendant's motion to quash arrest and suppress evidence was not error.
- ¶ 2 Defendant David Nelson was charged with driving under the influence of alcohol. Nelson filed a petition to rescind statutory summary suspension, which the trial court granted. Nelson subsequently filed a motion to quash arrest and suppress evidence, claiming that the police officer arrested Nelson before he completed his investigation and, therefore, any evidence or

statements made after the arrest should be suppressed. The trial court granted the motion. The State appealed, arguing the trial court's grant of the motion to suppress was error because (1) the trial court's determination of when Nelson was arrested was against the manifest weight of the evidence and (2) Kirsch had probable cause to arrest Nelson. We affirm.

¶ 3

FACTS

¶ 4

In July 2016, defendant David Nelson was charged with driving while under the influence of alcohol. The following narrative is a description of the traffic stop taken from the police video and officer testimony.

¶ 5

On July 30, 2016, Will County Sheriff's Deputy Steven Kirsch was driving westbound on Black Road at 3 a.m. when he observed a vehicle traveling eastbound "at a high rate of speed." Kirsch's radar unit indicated that the vehicle was traveling 63 miles per hour in a 40-mile-per-hour zone. Kirsch made a U-turn and started following the vehicle. Kirsch activated his emergency lights at an intersection at Black Road and the vehicle made a right turn into an entrance of a subdivision, curved around a circular median, and came to a stop. Kirsch stated the vehicle's right rear tire had driven onto the white fog line but he did not include the violation in his police report and he did not inform the driver of it. When he approached the driver of the vehicle, later identified as Nelson, Kirsch smelled "a strong odor of alcoholic beverage on his breath and his eyes were red and his speech appeared slow." Kirsch did not note Nelson's slow speech in his police report. Kirsch also observed passengers in the vehicle.

¶ 6

Upon requests for documents, Nelson handed Kirsch his driver's license, two expired insurance cards, and the car's registration card with no apparent difficulty. Kirsch claims that he asked Nelson for a valid insurance card multiple times but was not given one. Kirsch returned the insurance cards to Nelson but retained his driver's license. Kirsch alleged that the speeding,

breach of the fog line, and the production of expired insurance cards were all signs of impairment. Kirsch asked Nelson to step out of the vehicle multiple times while another officer stood by the rear passenger's side door. Kirsch eventually opened the vehicle's door, grabbed Nelson's left arm, and escorted him out. At that time, a third officer walked over to the vehicle. When Kirsch asked how much he had had to drink, Nelson stated he had two beers at 10 p.m. Nelson also opined that it was 1 a.m. although it was in fact after 3 a.m. Kirsch asked Nelson to recite the letters D through Q in sequential order and Nelson responded "D, E, F, G, H, I, G" which he immediately corrected to "J" and continued flawlessly past Q to the letter Y. Kirsch asked Nelson if he had any medical problems and he responded, "no."

¶ 7 Moving to physical field sobriety tests, Kirsch demonstrated the one-leg-stand test in a standing position with his feet together and instructed Nelson to stand and put his hands together. Nelson stated that he wanted to go home, the passengers in the vehicle lived nearby, he could walk home, and that he did not want to do the test. Nelson also said, however, that he was not too impaired to pass the test and that "he understood where this was going." Nelson later stated that he could stand on one leg. Kirsch instructed Nelson to put his feet together with his hands by his side and hold one foot out while counting. While Kirsch gave instructions, Nelson mimicked Kirsch by holding one leg up and counting. Kirsch informed Nelson that if he dropped his leg, he could raise it back up and continue counting. Kirsch asked Nelson if he understood and Nelson nodded his head in the affirmative. Kirsch then instructed Nelson to begin the test by holding one leg up for 30 seconds while keeping his hands to his side. Nelson stated that he was not doing any more tests. When Kirsch asked Nelson why he would not perform the field sobriety test, Nelson stated that he did not trust Kirsch because "there had been a lot of instances where cops

have been shot by citizens with this state, along with other states, and I don't trust that." Kirsch testified that, at this point, he believed he had enough to arrest Nelson for DUI.

¶ 8 Kirsch then asked if Nelson would complete the field sobriety routine and offered Nelson another test to perform. Nelson turned his back to Kirsch and placed his hands behind his back. Kirsch inquired into Nelson's actions and Nelson replied that he would prefer to walk home and that he had IPA beers that night. Kirsch asked Nelson why he did not want to take the test and Nelson replied that he just wanted to go to his friend's house. Kirsch asked Nelson if he would submit to a breath test and Nelson refused. Nelson also refused to do the walk-and-turn and one-leg stand tests. Nelson again asked if he could drive past the gatehouse to the passenger's home and Kirsch stated that he did not feel safe granting Nelson's request but if he passed the test he would let him drive past the gatehouse. Kirsch considered defendant asking to walk home a sign of impairment.

¶ 9 Kirsch offered Nelson another opportunity to perform the field sobriety test and Nelson refused and stated that he would refuse a breathalyzer. Kirsch and another officer moved toward Nelson, and when Kirsch grabbed Nelson's arm, Nelson stated that he was willing to perform the tests. Kirsch testified that he moved toward Nelson "[t]o make sure that he does not try and run or something" although Nelson was not moving at the time Kirsch began walking toward him. Kirsch testified that, at this point, Kirsch had not completed his investigation.

¶ 10 Kirsch asked Nelson if he remembered how to perform the one-leg stand test and Nelson asked Kirsch to give him a break and that he "understood where this was going." Kirsch asked, "Where is this going?" and Nelson replied, "The test don't matter because ultimately it ends in a breathalyzer and I'm going to refuse." Kirsch asked Nelson to stand on his right leg to perform the one-leg stand test and Nelson responded, "I'm right here" as he pointed to the subdivision.

Kirsch stated, "I'm not going to argue with you, put your hands behind your back" as he grabbed Nelson's hands and secured them behind his back and another officer held on to Nelson's left arm. Nelson asked for another opportunity to perform the field sobriety test. Kirsch asked if Nelson "wanted to try it?" and Nelson asked, "then what will happen?" Kirsch stated that if Nelson "passed the test, he'll drive through that gate." Kirsch then instructed Nelson to put his hands to his side, lift his one foot six inches off the ground, and count out loud by the thousands for 30 seconds. Kirsch stated that Nelson could go through the gate if he passed the test.

¶ 11 While Nelson performed the test, his hands were lifted at his sides and he began to sway back and forth. When he got to "one-thousand twelve," he began to lose his balance and placed his hand on the ground to stop his fall. Nelson then refused to continue the test and told Kirsch to take him to jail. Nelson complied with Kirsch's request to conduct a HGN test. Kirsch claimed that the results of the HGN test confirmed consumption of alcohol. Kirsch asked if Nelson would perform the walk-and-turn test and Nelson stated he wanted to drive past the gate. Kirsch stated, "if you don't want to perform the test then I have to go based on what I've already observed of you. Okay. Which I think you're impaired." Kirsch told Nelson to put his hands behind his back because he was under arrest for DUI. Nelson stated that he would perform the walk-and-turn test, and Kirsch stated that he had placed Nelson under arrest but that he would "unarrest" him to perform the test.

¶ 12 Kirsch demonstrated the test and Nelson performed it. Kirsch claimed that he noticed signs of impairment when Nelson "started before being instructed to begin. He stepped off the line at eight and nine on his first nine steps. He did not turn as instructed. He stopped walking to steady himself. And on return, he stepped off the line at number eight." Kirsch asked Nelson if he would submit to a breath test and Nelson stated he wanted to go home. Kirsch arrested Nelson

again. Kirsch believed he had enough for an arrest for DUI before the field sobriety tests were concluded but was trying to ascertain as much as he could before effectuating an arrest, which is why he continued to ask Nelson to complete more testing. The officer's sworn report stated that Nelson's license was suspended because he did not submit to or failed to complete chemical testing. The report also stated that there were reasonable grounds to believe Nelson was driving under the influence of alcohol because "speeding, strong odor of an alcoholic beverage on breath, red eyes, admitted drinking and failed field sobriety tests."

¶ 13 Nelson filed a petition to rescind statutory summary suspension. In September 2016, a hearing on the petition was held. Kirsch testified as an adverse witness for Nelson. Afterward, the State filed a motion for directed finding, which the trial court denied. The State called Nelson as an adverse witness. Nelson testified to his age, occupation, and that he was the driver of the vehicle in the video but invoked his fifth amendment rights to further questions. The State noted that Nelson's voice was clear in the courtroom and that his speech on the video shows that he was intoxicated and that Kirsch properly considered his speech when determining whether he had probable cause to arrest Nelson. Ultimately, the trial court granted the petition to rescind. In its oral ruling, the court determined that it could not rely on the sobriety field tests because "the fields occurred really after the deputy was placing him under arrest." Because of this, the court held that Kirsch could only consider Nelson's speeding as a basis for probable cause and that, based on case law, speeding was not enough to constitute probable cause. The court also made multiple credibility determinations.

¶ 14 For instance, the court determined that (1) the only place Nelson could have pulled over was in the subdivision and he pulled over appropriately; (2) Nelson did "a really good job" stating the alphabet and was able to "recite it without singing, and it was fast"; (3) the court

never observed slurred speech; (4) Nelson's balance was "excellent" when Kirsch escorted him about the vehicle; (5) Kirsch did not "do too much of a demonstration," did not ask Nelson if he had any disabilities, and gave instructions quickly during the walk-and-turn test; and (6) when Nelson gave Kirsch expired insurance cards, it did not indicate that Nelson was intoxicated. The court also took into consideration (1) Kirsch's testimony that he smelled an odor of alcohol on Nelson's breath; (2) there were times that Nelson was not cooperative; (3) Nelson admitted that he had drunk three beers; and (4) Kirsch's testimony that Nelson had red eyes, not bloodshot eyes.

¶ 15 In November 2016, Nelson filed a motion to suppress statements, arguing that he had not been given *Miranda* warnings when he made incriminating statements during an interrogation. He also filed a motion to quash arrest and suppress evidence, claiming that Kirsch arrested Nelson before Kirsch completed his investigation and that any evidence or statements made after the arrest should be suppressed. In June 2017, a hearing on the motion to quash arrest and suppress statements was held.¹ At the hearing, the parties stipulated to the transcript of the petition to rescind hearing and the traffic stop video.

¶ 16 The trial court determined that Kirsch did not have probable cause to arrest Nelson. Specifically, the court held that probable cause was not supported by Nelson's difficulty locating his documents in his car because it only showed he could not provide proof of insurance, not that he struggled with his dexterity. Furthermore, the court found that probable cause was not supported by Kirsch observing of odor of alcohol or Nelson admitting that he had been drinking because there was no evidence that Nelson's driving was erratic and the court observed from the tape that he had good balance when he got out of the car. The court noted that it is not illegal to

¹ A hearing was never set on the motion to suppress statements.

drink and drive; rather, it is illegal to drink “to the point that it reduces your ability to think” and then drive. Moreover, the court held that probable cause was not supported by Nelson’s slurred speech because Kirsch failed to note this observation in his police report and the court observed on the tape that the conversation between Nelson and Kirsch was comprehensible. The court also found that probable cause was not supported by Nelson’s speeding because, absent any other corroborating factors presented in this case, speeding alone was not enough to establish probable cause to arrest. The court also determined that Nelson’s refusal to take a breath test did not constitute probable cause when viewed in context with the other alleged factors. Based on the court’s findings, it granted Nelson’s motion to suppress evidence. The State appealed.

¶ 17

ANALYSIS

¶ 18

The issue before this court is whether the trial court erred when it granted Nelson’s motion to suppress because (1) Officer Kirsch conducted a formal arrest before Nelson performed any field sobriety test and (2) considering the evidence leading up to the arrest, Officer Kirsch did not have probable cause to arrest Nelson. “When a trial court’s ruling on a motion to suppress involves factual and credibility assessments, the ultimate ruling will not be disturbed on appeal unless it is manifestly erroneous.” *People v. Motzko*, 2017 IL App (3d) 160154, ¶ 18. The court’s ultimate legal ruling of whether reasonable suspicion or probable cause exists and whether suppression is warranted is reviewed *de novo*. *People v. Bonilla*, 2017 IL App (3d) 160457, ¶ 9.

¶ 19

I. Formal Arrest

¶ 20

The State claims that the trial court erred when it determined that Kirsch arrested Nelson when he grabbed for his arms and placed them behind his back toward the beginning of the traffic stop and, therefore, it could not consider the field sobriety tests in determining whether

Kirsch had probable cause to arrest Nelson. The State argues that Nelson was not under arrest because Kirsch had not handcuffed Nelson, Kirsch had not told Nelson he was under arrest, the officers had backed away when Nelson stated he would perform the field sobriety test, and Kirsch had told Nelson he could leave if he passed the tests. The State relies on *People v. Tortorici*, 205 Ill. App. 3d 625 (1990), *People v. Smith*, 2013 IL App (3d) 110477, and *People v. Gilbert*, 347 Ill. App. 3d 1034 (2004), to support its argument that Nelson was not under arrest until Kirsch told Nelson he was under arrest and handcuffed him. The State also asserts that neither Kirsch's intent to arrest Nelson nor Nelson presenting himself for arrest constitutes a formal arrest.

¶ 21 Nelson counters that the trial court's grant of the motion to quash arrest and suppress evidence was proper. Specifically, Nelson claims that the evidence shows that Kirsch arrested him before he performed the field sobriety tests because (1) he was asked to exit the vehicle after being stopped; (2) when Nelson stated that he did not want to exit the vehicle, Kirsch opened the driver's side door, grabbed Nelson's arm, and pulled him out of the vehicle; (3) four officers were present at the scene; (4) when Nelson voluntarily placed his hands behind his back, Kirsch reached for his handcuffs and moved toward Nelson to initiate an arrest; and (5) Kirsch told Nelson he could not leave until he had performed the field sobriety tests.

¶ 22 A traffic stop is only an investigatory seizure. *People v. Gilbert*, 347 Ill. App. 3d 1034 (2004). "An arrest occurs when a person's freedom of movement has been restrained by means of physical force or show of authority." *People v. Reed*, 298 Ill. App. 3d 285, 298 (1998). In determining whether an arrest took place, the question is whether a reasonable, innocent person in the defendant's situation would have considered himself arrested or free to go. *People v. Reynolds*, 94 Ill. 2d 160, 165 (1983). "Such circumstances include the continuing possession of

the individual's driver's license by a police officer, the handcuffing of the individual, the placing of the individual in a squad car, and the duration of the individual's detention." *People v. Goodman*, 173 Ill. App. 3d 559, 561 (1988). The issuance of a written citation, although one way to establish whether an arrest was made, is not a prerequisite for a valid arrest for DUI. *People v. Bahnfleth*, 233 Ill. App. 3d 289, 292 (1992). "No formal declaration of arrest is necessary for an arrest to occur." *Id.* A trial court's finding as to the time of arrest cannot be disturbed unless it is manifestly erroneous. *People v. McClellan*, 232 Ill. App. 3d 990, 999 (1992).

¶ 23 Here, although it is not totally clear when, in the trial court's view, Nelson was actually placed under arrest, it is clear from the record that the court found that it had occurred prior to Nelson's performance of the field sobriety tests.

¶ 24 We believe that conclusion by the trial court is supported from the evidence in the record, including the videotape from the scene. After Kirsch received Nelson's license and expired registration, he told Nelson to step out of the vehicle. When Nelson remained in the car, Kirsch opened the door, grabbed Nelson by the arm, pulled him from the car, and escorted him to the rear of the vehicle. He began to question him about his drinking and Nelson stated that "he understood where this was going." Kirsch told Nelson that if he passed the field tests he would be free to leave and his actions and statements made clear that Nelson was *not* free to leave unless or until he did so. Kirsch continued to grab Nelson's arm when he moved "to make sure he didn't run away" and later told Nelson to put his hand behind his back and held Nelson's arm behind his back while another officer grabbed his left arm. Under these circumstances, no reasonable person, innocent or not, would believe he or she was free to leave. Therefore, we find that the trial court properly concluded that Nelson was under arrest before Kirsch conducted the field sobriety test.

¶ 25 The State cites *Gilbert*, 347 Ill. App. 3d at 1040 for the proposition that a reasonable person, when stopped for a minor traffic violation, would not view himself as being under arrest but merely temporarily stopped. However, this was more than a minor traffic stop. Kirsch testified that when he came to Nelson’s vehicle, he smelled an odor of alcohol and observed Nelson’s red eyes. When Kirsch escorted Nelson out of the vehicle he began to question him about his drinking and Nelson replied that he knew where this was going. Any reasonable person would believe that being suspected of a DUI is more than a minor traffic violation and could lead to a possible arrest. Indeed, Nelson’s statement that he “understood where this was going” confirms that he held that belief. The State also cites *Tortorici*, 205 Ill. App. 3d at 628, and *Smith*, 2013 IL App (3d) 110477, for the proposition that the use of the language “you are under arrest” and the use of handcuffs are signs that an arrest occurred. However, these signals are not the *only* indicators of an arrest—rather any conduct which would lead an innocent person to reasonably conclude that he or she is not free to leave constitutes a sufficient showing. We believe, based on the totality of the circumstances, that Nelson had shown that he was under arrest before Kirsch conducted the tests.

¶ 26 II. Probable Cause

¶ 27 The State claims that Kirsch had probable cause to arrest Nelson because (1) Nelson did not pull over in a timely fashion; (2) he drove onto a fog line before making a stop; (3) he did not safely pull over in the subdivision because his vehicle blocked a lane of travel; (4) his speech was slow; (5) his eyes were red; (6) Kirsch smelled alcohol on Nelson’s breath; (7) Nelson did not recite part of the alphabet correctly; (8) Nelson staggered when Kirsch assisted him out of the vehicle; (9) he failed his one-leg stand test; (10) he failed his walk-and-turn test; (11) his HGN test shows signs of intoxication; (12) he stated he would not take a breathalyzer test; and (13) he

refused to take a preliminary breath test (PBT). The State also argues that any factual findings the trial court made in determining that Kirsch did not have probable cause was against the manifest weight of the evidence.

¶ 28 Nelson asserts that the trial court’s finding that Kirsch did not have probable cause to arrest Nelson was not against the manifest weight of the evidence. Nelson relies heavily on the trial court’s findings that his driving was not bad, he pulled over appropriately, he did not have any speech trouble, he did not have any difficulty with dexterity or coordination when he gave Kirsch expired insurance cards, and he had no balance issues leading up to his arrest. Nelson alleges that his refusal to take a PBT is not evidence of consciousness of guilt because section 11-501.5 of the Vehicle Code (625 ILCS 5/11-501.5 (West 2016)) allows a driver to refuse the test.

¶ 29 “Probable cause for arrest exists when facts and circumstances within the arresting officer’s knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense.” *People v. Lippert*, 89 Ill. 2d 171, 178 (1982). “Although a ‘mere suspicion’ that the person arrested has committed the offense is an insufficient basis for arrests [citations], evidence sufficient to convict is not required.” *Id.* Certain factors such as the odor of alcoholic beverage on the driver’s breath or bloodshot or glassy eyes, even considered together, may arouse suspicion of impairment but will not give rise to probable cause unless they are corroborated with other factors such as poor driving, stumbling, falling, or an inability to communicate clearly. *People v. Day*, 2016 IL App (3d) 150852, ¶¶ 36, 38. The trial court’s ultimate determination with respect to probable cause is reviewed *de novo*. *People v. Motzko*, 2017 IL App (3d) 160154, ¶ 18.

¶ 30 The evidence shows that at the time Kirsch arrested Nelson, he did not have probable cause to do so. Kirsch testified that he observed Nelson had red eyes and a strong odor of alcohol on his breath. As stated above, these factors, even taken together, are not enough to establish probable cause. Even considering other evidence, there were no other corroborating factors that would give rise to probable cause. For instance, although Kirsch testified that Nelson's speech was slow, the trial court found no inability to communicate with the officer. This court gives great deference to the trial court's factual and credibility determinations. *Motzko*, 2017 IL App (3d) 160154, ¶ 18. Moreover, Kirsch testified that Nelson gave Kirsch a driver's license and expired insurance cards with no difficulty. The trial court relied on its own perception and earlier finding that the expired insurance cards were not proffered in such a way as to indicate that Nelson was intoxicated. Furthermore, while Kirsch testified that Nelson improperly drove over a fog line, the trial court found that claim incredible because it was neither shown on the videotape nor included in the police report. In addition, the videotape showed his driving was not erratic and that he was able to complete the turn and make a stop without difficulty. Also, Kirsch testified that Nelson was speeding, but speeding, without any other corroborating evidence, is insufficient to establish probable cause. *Id.* ¶ 20. In assessing whether there was probable cause to arrest, we do not credit the State's argument that Nelson failed the sobriety tests because we have already determined that the tests were conducted after Nelson's arrest.

¶ 31 Nelson did refuse to take a preliminary breath test. The State requests that this court hold that Nelson's refusal can be used as support in the determination of whether Kirsch had probable cause to arrest. Under section 11-501.5 of the Vehicle Code (625 ILCS 5/11-501.5 (West 2016)), if an officer has reasonable suspicion to believe a person is driving under the influence, the officer, *prior to an arrest*, may ask the person to provide a sample of his or her breath for a

preliminary breath screening test using a portable device. The person may refuse the test. *Id.*

“When the issue is the correctness of the officer’s probable cause determination, the officer must be allowed to demonstrate the bases for his belief, including the PBT results.” *People v. Davis*, 296 Ill. App. 3d 923, 928-29 (1998). If PBT results are admissible, like a breathalyzer test, a person’s refusal “is relevant because it implies that he believes he is intoxicated, something he is clearly in a prime position to appraise.” *People v. Garriott*, 253 Ill. App. 3d 1048, 1052 (1993).

The fact that section 11-501.5 allows Nelson to refuse the test “neither affects the relevancy of the driver’s refusal nor diminishes its evidentiary value.” *Id.* Nelson also refused to take a breathalyzer test. It is well-established that a defendant’s refusal to submit to chemical testing is circumstantial evidence of consciousness of guilt. *People v. Morris*, 2014 IL App (1st) 130512, ¶ 20. We agree with the State’s assertion that Nelson’s refusal to submit to chemical testing can be a factor in the assessment of probable cause. In this case, however, considering this factor in the totality of the circumstances as described, we find that the trial court did not err in its determination that Kirsch lacked probable cause for his arrest of Nelson. Accordingly, we hold that the trial court’s grant of the motion to suppress was not error.

¶ 32

CONCLUSION

¶ 33

The judgment of the circuit court of Will County is affirmed.

¶ 34

Affirmed.