

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 6, 2014 Session

STATE OF TENNESSEE v. MARVIN ROSCOE

**Appeal from the Criminal Court for Shelby County
No. 12-01122 Paula Skahan, Judge**

No. W2013-01714-CCA-R9-CD - Filed July 11, 2014

This is a Rule 9, Tennessee Rules of Appellate Procedure, interlocutory appeal by the State of Tennessee of the trial court's granting in part the defendant's motion to suppress. On March 1, 2012, the Shelby County Grand Jury returned a two-count indictment charging the defendant, Marvin Roscoe, with DUI and DUI over .08%. The defendant filed a motion to suppress any evidence seized or statements made as a result of his stop and arrest. The trial court entered an order denying in part the defendant's motion to suppress any evidence pertaining to the initial traffic stop and granting in part the defendant's motion to suppress any evidence pertaining to the defendant's subsequent arrest. The State now appeals, arguing that the trial court erred in granting in part the defendant's motion to suppress the evidence regarding his subsequent arrest. Based upon our review, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court Reversed
and Remanded**

ALAN E. GLENN, J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. MCMULLEN, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Senior Counsel; Amy P. Weirich, District Attorney General; and Stephanie Johnson, Assistant District Attorney General, for the appellant, State of Tennessee.

John Scott, Memphis, Tennessee, and Randall B. Tolley, Gulf Shores, Alabama, for the appellee, Marvin Roscoe.

OPINION

FACTS

On July 15, 2011, Officer Michael Thomas of the Memphis Police Department was on routine patrol when he observed the defendant run a stop sign at the intersection of Person and Castalia. Officer Thomas activated his blue lights and initiated a traffic stop. He approached the driver's side of the defendant's vehicle and informed the defendant of his reason for the stop once the defendant rolled down his window. At the open driver's side window, Officer Thomas noticed a strong odor of alcohol coming from inside the defendant's vehicle and then asked for his driver's license. After speaking with the defendant, Officer Thomas realized that the defendant had slurred speech such that he "stuttered over his words" and that he had bloodshot eyes. When Officer Thomas asked the defendant if he had been drinking, the defendant admitted he had consumed "a couple of beers." Officer Thomas then asked the defendant to exit his vehicle, and the defendant complied.

After the defendant got out of his vehicle, Officer Thomas performed a preliminary field sobriety test, specifically a horizontal gaze nystagmus ("HGN") test, on the defendant. Based on the defendant's performance and Officer Thomas' previous observations, he detained the defendant in his patrol vehicle. Officer Thomas noticed that the defendant "swayed from side to side" as he walked to Officer Thomas' vehicle. After placing the defendant in his squad car, Officer Thomas returned to the defendant's vehicle and observed a "glass of brandy or alcohol" in the passenger side of the vehicle. Officer Thomas then called for a DUI unit because he knew the defendant had been drinking, and he needed the DUI unit to conduct additional testing.

Officer Veronica Crutchfield testified that on the evening of July 15, 2011, she received a "whiskey van call" from Officer Thomas, meaning that he needed assistance with a possible DUI. When Officer Crutchfield spoke with the defendant, she noticed a strong odor of alcohol, slurred speech, and bloodshot, watery eyes. She then set up her video equipment to conduct field sobriety tests. She administered the "walk and turn" test, which the defendant failed because he started too soon, did not touch heel to toe, was swaying, and could not keep his hands to his side. Further, before the defendant attempted to perform the "walk and turn" test, he was argumentative and complained about taking the test. Officer Crutchfield also administered the "one leg" test, which the defendant failed because he used his arms to maintain his balance, swayed, and put his foot down. Officer Crutchfield concluded that the defendant was too impaired to operate a motor vehicle. The defendant was then arrested, detained in Officer Crutchfield's vehicle, and asked if he would take a breath test, to which he consented.

The defendant testified that he did not run the stop sign at the intersection of Person and Castalia but admitted that “[he] may have not sat there long enough for [Officer Thomas].” He admitted that he told Officer Thomas that he had consumed three or four beers and that there was an empty wine bottle in his car, but he claimed it belonged to someone else.

On May 30, 2013, the trial court entered an order denying in part and granting in part the defendant’s motion to suppress. In denying the motion, the trial court concluded that the traffic stop and detention of the defendant and his vehicle were lawful. The trial court reasoned that Officer Thomas had reasonable suspicion to initiate the traffic stop and detain the defendant for further investigation as to whether he was driving under the influence. In granting the defendant’s motion, the trial court concluded that Officer Thomas lacked probable cause to arrest the defendant following the preliminary HGN test. Therefore, the trial court suppressed any evidence or statements pertaining to or obtained after the defendant’s arrest.

ANALYSIS

The State argues that Officer Thomas had sufficient probable cause for the detention and warrantless arrest of the defendant for driving under the influence based on the following observations: he ran a stop sign; a strong odor of alcohol emanated from the defendant and his vehicle; he admitted having consumed “a couple of beers”; his speech was slurred and he was stuttering; his eyes were bloodshot; he swayed when he walked; and, he failed the field sobriety tests. The defendant responds that the trial court did not err in granting his motion to suppress because the odor of alcohol and the HGN test are insufficient grounds to establish probable cause for arrest.

We review the trial court’s denial of the defendant’s motion to suppress by the following well-established standard:

Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court’s findings, those findings shall be upheld. In other words, a trial court’s findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, the trial court’s application of law to the facts, as a matter of law, is reviewed de novo, with no presumption of correctness. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000). This court may consider the proof at trial, as well as at the suppression hearing, when considering the appropriateness of the trial court’s ruling on a pretrial motion to suppress. See State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998) (holding that because the rules of appellate procedure “contemplate that allegations of error should be evaluated in light of the entire record[,]” an appellate court “may consider the proof adduced both at the suppression hearing and at trial”).

The issue to be resolved at the suppression hearing was whether Officer Thomas had probable cause to arrest the defendant for DUI without a warrant.

The warrantless arrest of the defendant implicates the protections of the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution. These constitutional provisions protect individuals against unreasonable searches and seizures. State v. Day, 263 S.W.3d 891, 900-01 (Tenn. 2008). They are designed “to prevent arbitrary and oppressive interference . . . with the privacy and personal security of individuals.” Id. at 901 (quoting I.N.S. v. Delgado, 466 U.S. 210, 215 (1984)). “The provisions are the wellspring of the basic constitutional rule that a warrantless search or seizure is presumed unreasonable and any evidence discovered thereby is subject to suppression.” State v. Bell, ___ S.W.3d ___, 2014 WL 644502, at *4 (Tenn. 2014)¹ (citing Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849, 1856 (2011)).

However, there are exceptions to this basic rule, such as an arrest supported by probable cause. State v. Echols, 382 S.W.3d 266, 277 (Tenn. 2012) (citing State v. Hanning, 296 S.W.3d 44, 48 (Tenn. 2009)). Tennessee law provides that an officer may make a warrantless arrest for DUI – as “a public offense committed or a breach of the peace threatened in the officer’s presence” – as long as probable cause exists. Tenn. Code Ann. § 40-7-103(a)(1) (2012). “When determining whether probable cause existed for a warrantless arrest, courts should consider the collective knowledge that law enforcement possessed at the time of the arrest, provided that a sufficient nexus of communication existed between the arresting officer and any other officer or officers who possessed relevant information. Such a nexus exists when the officers are relaying information or when one officer directs another officer to act.” Bell, ___ S.W.3d at ___, 2014 WL 644502, at *5 (citing Echols, 382 S.W.3d at 278).

¹We note that the trial court did not have the benefit of this decision, which was released after the hearing.

We first note that several facts appear not to be in dispute. The defendant ran a stop sign; and, after being stopped by Officer Thomas, the defendant and his vehicle emitted a strong odor of alcohol. The defendant admitted to Officer Thomas that he had consumed “a couple of beers” that evening. His speech was slurred, he was stuttering and swaying when he walked, and his eyes were bloodshot.

The pivotal question in this case is whether, at the time of the arrest, the facts and circumstances within Officer Thomas’ knowledge were sufficient to enable a prudent person to believe that the defendant had committed or was committing the offense of DUI. See Echols, 382 S.W.3d at 277-78.

In concluding that Officer Thomas did not have probable cause to arrest the defendant, the trial court relied on various decisions concluding that the odor of alcohol alone, while sufficient to justify a brief detention, was insufficient to establish probable cause for arrest. See State v. Donald Smith, No. W2010-01850-CCA-R3-CD, 2011 WL 6234943, at *5 (Tenn. Crim. App. Dec. 12, 2011) (while insufficient to establish probable cause to arrest for DUI, the smell of alcohol on a driver, even if not strong, constitutes reasonable suspicion to justify a brief detention to ascertain a driver’s level of sobriety); State v. Harry Richard, No. W2008-02458-CCA-R3-CD, 2010 WL 1462547, at *7 (Tenn. Crim. App. Apr. 13, 2010) (the defendant’s odor of alcohol gave the officer only a reasonable suspicion to briefly detain the defendant in order to determine his state of sobriety); State v. Jashua Shannon Sides, No. E2000-01422-CCA-R3-CD, 2001 WL 523375, at *3 (Tenn. Crim. App. May 16, 2001) (trial court properly suppressed the defendant’s motion to suppress any evidence obtained after the defendant’s arrest because the odor of alcohol did not establish sufficient probable cause to justify DUI arrest).

Although the trial court was correct in concluding that the odor of alcohol alone was insufficient to establish probable cause, the combination of the odor of alcohol with other signs of intoxication supports a finding of probable cause for the DUI arrest. In Bell, ___ S.W.3d at ___, 2014 WL 644502, at *1, our supreme court analyzed a similar DUI arrest in which a law enforcement officer stopped a motorist who was driving in the wrong direction on a divided highway. Another officer administered several field sobriety tests and arrested Bell for DUI because he had been driving in the wrong direction on a divided highway, smelled of alcohol, and admitted that he had been drinking. Id. When the grand jury returned a presentment charging Bell with DUI and DUI per se, he filed a motion to suppress the evidence and to dismiss the charges, which the trial court granted on the ground that the officer lacked probable cause to arrest Bell in light of his performance on the field sobriety tests. Id. The supreme court held that the officer had probable cause to arrest Bell for DUI without a warrant. Id. at *9. The court instructed that performance on field sobriety tests is but one of the many factors officers should consider when deciding whether to arrest a

motorist for DUI or similar offenses without a warrant.

Therefore, as established by our supreme court in Bell, we must conduct a common-sense analysis of the facts and circumstances known to the officers at the time of arrest to determine whether these facts and circumstances are sufficient to permit a reasonable person to believe that the defendant had committed or was committing an offense. Id. at *8. Accordingly, we must now examine the facts surrounding the defendant's arrest to determine whether they provided Officer Thomas probable cause to arrest him for DUI, notwithstanding his odor of alcohol. Id. at *9.

The defendant committed a traffic violation when he ran a stop sign at the intersection of Person and Castalia on the evening of July 15, 2011. At the suppression hearing, the defendant denied that he ran the stop sign and only conceded that “[he] may have not sat there long enough for [Officer Thomas],” the implication being that, at most, it was an innocent mistake. However, like our supreme court, we recognize that “[i]n dealing with probable cause, . . . we deal with probabilities.” Id. (quoting State v. Grier, 791 P.2d 627, 631 (Alaska Ct. App. 1990)). Thus, “[the defendant’s] innocent explanation does not prevent us from finding probable cause for DUI in this case in light of the other circumstances surrounding the arrest.” Id.

Specifically, the defendant and his vehicle emitted a strong odor of alcohol, and he admitted to Officer Thomas that he had consumed “a couple of beers” that evening. Furthermore, the defendant had slurred speech and was stuttering in addition to having bloodshot, watery eyes.

Thus, as the trial court correctly determined, Officer Thomas had reasonable suspicion to lawfully and briefly detain the defendant for further investigation based on the following observations: an odor of intoxicant emanated from the defendant’s vehicle; the defendant’s slurred speech, bloodshot eyes, and swaying posture; and the defendant’s admission to consuming alcohol. The trial court also correctly concluded that Officer Thomas had reasonable suspicion to conduct the lawful and brief detention of the defendant, which did not transform into an arrest simply because the defendant was handcuffed and placed in the police squad car. However, the trial court incorrectly concluded that Officer Thomas’ observations were insufficient to establish probable cause to justify the warrantless arrest of the defendant. The record establishes that the defendant committed a traffic violation by running a stop sign, that he and his vehicle emitted a strong odor of alcohol, and that he admitted having consumed three or four beers. These facts alone clearly support a finding of probable cause for DUI. Id.; see State v. Evetts, 670 S.W.2d 640, 642 (Tenn. Crim. App. 1984) (finding probable cause where defendant was at fault in a traffic accident and smelled of alcohol, even though he did not exhibit other outward signs of intoxication). Even with

the high standard set by our supreme court concerning the admissibility of the results of an HGN test at trial, nothing precludes an officer from taking into his probable cause determination his observations when the test was administered. Even if Officer Thomas was not sure whether the “mere” odor was that of alcohol, “we decline to conclude that [this fact] sufficiently undermines the aforementioned circumstances so as to defeat a finding of probable cause for DUI.” Bell, __ S.W.3d at __, 2014 WL 644502, at *9 (footnote omitted). “[I]t matters not whether the arresting officers themselves believed that probable cause existed” as long as probable cause actually existed. Id. at *5 (citing State v. Huddleston, 924 S.W.2d 666, 676 (Tenn. 1996) (“[An officer’s] subjective belief that he did not have enough evidence to obtain a warrant is irrelevant to whether or not probable cause actually existed. . . .”)).

We have considered the totality of the circumstances from the evidence provided by the record and conclude that Officer Thomas had probable cause to arrest the defendant without a warrant for operating a motor vehicle while under the influence of an intoxicant.

CONCLUSION

As the evidence preponderates against the trial court’s finding, we reverse the judgment of the trial court suppressing the evidence and statements pertaining to the matter subsequent to the defendant’s arrest following the preliminary HGN test. We remand this case to the trial court with directions to admit any evidence collected after the defendant’s arrest and for further proceedings consistent with this opinion.

ALAN E. GLENN, JUDGE