STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LEONARD BATTLE,

Defendant-Appellant.

UNPUBLISHED
June 25, 2020

No. 350837
Grand Traverse Circuit Court
LC No. 19-034888-AR

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted[1] the opinion and order of the Grand Traverse Circuit Court, which reversed the district court's order granting defendant's motion to suppress evidence. Specifically, defendant contends that the arresting officer did not properly administer a preliminary breath test (PBT) or other field sobriety tests, so the officer lacked probable cause to effectuate defendant's arrest, and therefore the results of a subsequent blood alcohol test using a DataMaster instrument[2] should be suppressed as the product of an unlawful arrest. Defendant is facing trial on a charge of operating a motor vehicle while intoxicated, MCL 257.625(1). We affirm.

[1] *People v Battle*, unpublished order of the Court of Appeals, entered January 21, 2020 (Docket No. 350837).

[2] We recognize that defendant also contends the DataMaster instrument was itself unreliable. However, that issue is not before us, so strictly for the purposes of resolving this appeal, we will presume, but we expressly do not decide, that the DataMaster tests in this matter were reliable. We express no opinion, and none should be implied, as to the actual reliability of the DataMaster tests.

I. BACKGROUND

On the night of October 21, 2018, Grand Traverse County Deputy Sheriff Brian Potter initiated a traffic stop on the basis that defendant's vehicle had an expired license place. He confirmed this by means of a LEIN check and also discovered that defendant did not have automobile insurance for the vehicle. Upon making contact with defendant, Potter immediately noticed the odor of intoxicants coming from defendant's breath and that defendant's eyes were watery and bloodshot. Defendant acknowledged that he had consumed one IPA[3] at the Detroit airport from which he was driving. Thereafter, after his mediocre performance on a series of field sobriety tests, defendant was given a PBT. The results indicated a blood alcohol content (BAC) of .084 percent.[4] Defendant was taken into custody, and two additional breath alcohol tests were performed using a DataMaster instrument. Both of those tests indicated a BAC of .09 percent.

Defendant moved, in relevant part, to suppress the DataMaster test results as the product of his unlawful arrest. The district court held a hearing, during which Potter testified regarding the details of the traffic stop, the particular field sobriety tests he performed, and the PBT. More specifically, Potter testified that he asked defendant to recite the alphabet from the letter "A" to the letter "T," but defendant continued past "T" to the end of the alphabet. Potter also indicated that he asked defendant to pick a number between 12 and 14, and defendant chose the number 11. Potter also had defendant perform "the one-leg stand" (OLS) test, "the walk and turn" (WAT) test, and the horizontal gaze nystagmus (HGN) test. Regarding the OLS test, Potter noted that defendant used his arms to balance even though he had been instructed to leave his arms at his side. Defendant also swayed, hopped, and dropped his foot at least three times during the test.

Potter explained that during the WAT test, he instructed defendant to take 10 heel-to-toe steps, pivot, and walk 10 heel-to-toe steps back but defendant stopped after pivoting and asked how many steps he was supposed to take back. He also noted that defendant failed at least twice "to touch his toe to his heel." Further, defendant raised his arms to steady his "balance" during this activity; and defendant swayed, hopped, and dropped his raised foot during the test. Potter admitted that he did not know how high a person was allowed raise his arms before it would be considered a sign of intoxication by the National Highway Traffic Safety Administration (NHTSA).

Regarding the HGN test, Potter testified that he held his left index finger between 12 and 18 inches in front of defendant's face, and he proceeded to move his finger to one side of defendant's face, return to center, and then to the other side of defendant's face. He held his finger at 45 degrees from the center for two to four seconds and noted that defendant's eyes were involuntarily jerking when he held his finger at this angle. Potter further noted that defendant kept

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[3] "IPA" stands for "India Pale Ale." It is a kind of beer that typically, although not necessarily, has a significantly higher alcohol content, of up to 17.2%, than the 5% alcohol content generally found in most "regular" beers. See < https://en.wikipedia.org/wiki/India_pale_ale >, and see also < https://www.niaaa.nih.gov/what-standard-drink >.

[4] In relevant part, MCL 257.625(1)(a) and (b) define "operating while intoxicated" as "under the influence of" alcohol, or having a BAC in excess of 0.08 percent.

moving his head as he was following Potter's finger and had to be reminded not to do so at least twice. Nonetheless, Potter testified that defendant's pupils were equal in size and that the tracking of his eyes was equal. Potter further noted that defendant's face was flushed and that he "staggered" when trying to stand still.

Potter also indicated that before he administered a PBT, he would have asked defendant whether there was anything in his mouth or if had smoked, had gum, had a mint, or done anything else. Potter also testified that there was "[n]othing to suggest" that defendant had recently drank, eaten, smoked, or vomited. Potter did not see defendant put anything in his mouth during that time, and although defendant would have been out of Potter's sight while he returned to his patrol vehicle to get the PBT device, Potter had "a backup deputy" on scene who observed defendant during that time. However, the evidence proved unclear whether defendant was monitored for the full 15 minutes required[5] before administering the PBT. Potter initially testified that he did observe defendant for the full 15 minutes, but he acknowledged that the computer-aided dispatch (CAD) report's date-stamps reflected a period of 14 minutes between defendant's contact with defendant and the PBT. Nevertheless, he explained that he would have performed the LEIN check before the time listed on the CAD report, and he would have been observing defendant—albeit from the vantage point of the police vehicle and while defendant was in his own vehicle—during that time. Potter opined that "[i]t was really close to 15 minutes."

Dr. Ronald Henson, an independent drug and alcohol consultant, testified on behalf of defendant as an expert in sobriety field testing, OWI investigation, and DataMaster testing. Henson testified that watery eyes, a flushed face, and the odor of alcohol were not considered to be indicators of intoxication. Additionally, Henson testified that the two nonstandard field sobriety tests performed by Potter involving reciting of parts of the alphabet and picking a number in a cited range had never been validated as reliable indicators of intoxication. Henson opined that the results of the sobriety tests suggested that defendant was not intoxicated and insufficient to justify either the PBT or arrest. Henson also opined that Potter's violation of the rule requiring 15 minutes of observation before administering the PBT was both technical and substantive, "[b]ecause the PBT does not have mouth alcohol detection capability."

The district court recognized that the question was close, but it granted the motion to suppress on the basis that the sobriety tests were not administered according to applicable or recognized standards, and the results were insufficient to warrant a conclusion that defendant was intoxicated. The prosecution appealed to the circuit court, which reversed, finding that under the totality of the circumstances, "Potter had probable cause to lawfully place Defendant under arrest for committing misdemeanor operating while intoxicated and the District Court clearly erred by granting the Motion to Suppress." The circuit court recounted defendant's numerous failures to fully perform the various field sobriety tests, standard and nonstandard. It concluded that even if none of those failures individually indicated intoxication, they nevertheless provided practical indicators that defendant was impaired in some manner and "provided sufficient cumulative

[5] Pursuant to MI Admin Code, R 325.2655(b), a PBT may be performed "only after the operator determines that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes."

evidence that Defendant was intoxicated" to establish probable cause to arrest defendant. It also observed that violation of an administrative rule only warranted suppression of evidence if the violation called the reliability of the test into question. It concluded that under the circumstances, it was not clear that Potter actually did violate the 15-minute requirement before administering the PBT, and even if he did, a violation of at most 60 seconds did not undermine the PBT's reliability enough to warrant suppression of the test results. This appeal followed.

II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

"This Court reviews for clear error findings of fact regarding a motion to suppress evidence. However, we review de novo the trial court's ultimate decision on a motion to suppress." *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Further, whether a search violated the Fourth Amendment, whether an exclusionary rule applies, and whether an officer's suspicion is reasonable under the Fourth Amendment are questions of constitutional law that this Court reviews de novo. *People v Hyde*, 285 Mich App 428, 436-438; 775 NW2d 833 (2009).

The Fourth Amendment to the United States Constitution guarantees the right against unreasonable searches and seizures, US Const, Am IV; see also Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "Generally, seizures are reasonable for purposes of the Fourth Amendment only if based on probable cause." *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002). In *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court carved out an exception to the probable cause requirement that permits the police to stop and briefly detain a person for investigation based on reasonable and articulable suspicion that criminal activity may be afoot. *Id*. at 21, 30-31. This exception has been extended to traffic stops. *People v Nelson*, 443 Mich 626, 631-632; 505 NW2d 266 (1993). These stops should last long enough only to confirm or dispel the officer's initial suspicion, but may also produce evidence to establish probable cause for arrest or a more thorough search. *People v Barbarich*, 291 Mich App 468, 473; 807 NW2d 56 (2011). Further, both the United States Supreme Court and this Court have held that chemical breath tests for alcohol constitute "searches" within the meaning of the Fourth Amendment, *Skinner v R Labor Executives' Ass'n*, 489 US 602, 616-617; 109 S Ct 1402; 103 L Ed 2d 639 (1989); *People v Chowdhury*, 285 Mich App 509, 523-524; 775 NW2d 845 (2009). Generally, the introduction into evidence of materials seized and observations made during an unreasonable search are barred by the exclusionary rule. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

III. ANALYSIS

Defendant argues that the circuit court erred by reversing the district's court order because Potter's testimony makes it clear that he did not observe defendant for the required 15-minute observation period before administering a PBT, and he failed to adhere to the proper testing protocol resulting in inaccuracy. Further, defendant argues that even during his 14 minutes of interaction with defendant, Potter turned his back to defendant on at least one occasion, and therefore, Potter could not definitively say that defendant did not eat, drink, chew gum, or otherwise perform an act that would affect the test results. We disagree.

We note three initial concerns. First, defendant does not challenge the propriety of Potter's initial traffic stop of defendant's vehicle based on his expired license plate. Defendant also does not contend that Potter lacked a reasonable and articulable suspicion justifying a brief detention in order to make reasonable inquiries aimed at confirming or dispelling suspicions arising from the smell of intoxicants inside the vehicle. Secondly, we decline to consider the results of the DataMaster test as any kind of after-the-fact justification for defendant's arrest. This is partly because we recognize that defendant has raised an outstanding challenge to the DataMaster results themselves.[6] Primarily, however, the propriety of a search or seizure must stand or fail on the facts known to the effectuating officer at the time of the search or arrest, not on any facts learned afterwards. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *Terry*, 392 US at 21-22. Finally, we also decline to shift the burden of proof onto defendant to affirmatively prove that he did place something in his mouth or otherwise affirmatively caused the PBT test to be unreliable. Accordingly, the questions before us are whether Potter's alleged failure to comply with the PBT standards invalidated the results and whether Potter had sufficient evidence to support probable cause for defendant's arrest at the time the arrest was made.

Pursuant to MCL 257.625a(2),

> [a] peace officer who has reasonable cause to believe that a person was operating a vehicle upon a public highway or other place open to the public . . . and that the person by the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of them *may have affected* his or her ability to operate a vehicle . . . may require the person to submit to a preliminary chemical breath analysis. [Emphasis added.]

" 'Reasonable cause' means having enough information to lead an ordinarily careful person to believe that the defendant committed a crime." *People v Freeman*, 240 Mich App 235, 236; 612 NW2d 824, 825 (2000) (citation omitted).

As noted, R 325.2655(2)(b) provides that the operator administering a PBT may do so "only after the operator *determines* that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes." (Emphasis added.) We find it significant that the rule does not specify how the operator must make that determination. Furthermore, a deviation from the administrative rule warrants suppression of the test results only where the deviation undermines the accuracy of the test. *Fosnaugh*, 248 Mich App at 450.

It appears that there is no dispute that Potter observed defendant for at least 14 minutes, other than while Potter walked to the police vehicle. Potter believed that his "backup deputy" watched defendant during that brief interruption. We find nothing in the rule to suggest that a "determination" that the testee had "not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes" must be based exclusively on the operator's own personal

[6] See footnote 2.

uninterrupted monitoring.[7] Thus, Potter's delegation of observation duties to a trusted fellow officer is perfectly permissible and in no way undermines the "determination."

Irrespective of whether a 60-second discrepancy in observation is otherwise meaningful, the evidence strongly suggests that Potter had an adequate basis to *determine* that defendant had "not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes" before the administration of the PBT. Potter recalled seeing cigarettes in defendant's car but not smelling any smoke or seeing any lit cigarettes. Potter explained that he needed to be within four car-lengths of defendant's car to see his license plate tag, and he followed defendant for several minutes, during which, even though it was nighttime and "not the best vantage point," he did not observe anything to suggest defendant was smoking. Potter testified that it was his standard practice to ask testees if they had eaten or drank anything, which defendant denied other than the IPA. Potter also checked defendant's mouth before administering the PBT, and he did not otherwise observe anything else to suggest that defendant had recently eaten, drank, smoked, or regurgitated. We do not believe R 325.2655(2)(b) precludes PBT operators from making reasonable inferences about the recent past.

Furthermore, the evidence indicates that the CAD report documented when defendant's case was assigned to Potter, not when Potter first started watching defendant. Potter explained that he initially contacted dispatch while he was getting out of the police vehicle, so the CAD date-stamp must have been entered at some point thereafter. Potter further explained that he was able to see defendant "the whole time" after pulling him over. Therefore, Potter would have begun directly observing defendant at some point before the CAD date-stamp. To reiterate, the rule mandates a determination about the preceding 15 minutes, not personal and direct observation for the preceding 15 minutes. On this record, Potter certainly had the ability to make that determination, and we cannot find any clear error in the circuit court's conclusion that Potter's determination was proper. Consequently, the PBT test was properly administered.

We therefore need not consider whether Potter would have had probable cause to effectuate defendant's arrest even without the PBT results. However, we nevertheless consider defendant's challenge to the field sobriety tests and other observations of defendant because of their possible relevance to whether Potter had an adequate basis for performing the PBT.

Defendant's argument against the other sobriety tests Potter administered is essentially that defendant did not perform badly enough on the tests for any individual test, standing alone, to establish that he was intoxicated. Even presuming we were to accept that premise, defendant's

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[7] This Court has held that even where an administrative rule *did* require actual observation by the test operator prior to performing a breath test, a brief interruption in that observation during which another officer watched the defendant did not require suppression of the test's results. *People v Wujkowski*, 230 Mich App 181, 184-188; 583 NW2d 257 (1998). Defendant accurately points out that the interruption in *Wujkowski* was for only a few seconds, but defendant only speculates that the interruption here was longer. Furthermore, as noted, the rule here does not specify observation for 15 minutes, but rather only a determination. In any event, *Wujkowski* merely supports our conclusion, which we would have reached in any event.

argument is fundamentally misguided. Probable cause is based on the totality of the circumstances. *People v Nguyen*, 305 Mich App 740, 752; 854 NW2d 223 (2014). Defendant's difficulties performing the tests provide evidence that he was impaired for some reason, and an administering officer should consider all of that evidence in combination. Furthermore, Potter agreed with Henson that defendant's odor of alcohol was not proof of intoxication. However, even Henson agreed that the odor of alcohol "indicat[ed] that somebody had something to drink."

"Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). Under the totality of the facts and circumstances, a reasonable person could conclude that defendant was impaired and that he was impaired because he was under the influence of alcohol. See *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). We conclude that defendant essentially "misses the forest for the trees," and that even without the PBT test, Potter would have had probable cause to arrest defendant, and the arrest was not based on a mere "hunch."

IV. CONCLUSION

Given the totality of these circumstances, an officer could reasonably believe that defendant was operating his vehicle while intoxicated in violation of Michigan law. Accordingly, we conclude that the information before Potter provided sufficient reasonable cause to conduct a search in the form of the PBT, but also provided sufficient probable cause to support Potter's decision to place defendant under arrest, which led to the DataMaster test. In sum, the circuit court did not err by concluding that defendant's motion to suppress should be denied.

Affirmed.

/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause
/s/ Michael J. Riordan