STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 22, 2009
v	No. 288781 Wayne Circuit Court
JEFFREY SCOTT BLOW, Defendant-Appellee.	LC No. 07-015200-FH

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

In this action, in which defendant faces charges of operating while intoxicated, MCL 257.625(1), third offense, MCL 257.625(9), the prosecution appeals by leave granted an order suppressing the results of Datamaster breathalyzer tests. We reverse.

At approximately 2:00 a.m., in August 2007, defendant was driving home when Officer Curtis Johns observed him speeding 20 miles per hour above the speed limit. Officer Johns followed defendant and pulled him over after seeing him cross the center line.[1] When Officer Johns approached defendant, he smelled intoxicants and asked defendant if he had been drinking. Initially, defendant claimed that he only had a little to drink, but when questioned further, he admitted that he had six drinks. Officer Johns asked defendant to exit his vehicle and instructed him to perform some field sobriety tests: an alphabet recital, backwards counting from 100 to 85 skipping 91, a finger-dexterity count, and a heel-to-toe walk-and-turn. Defendant satisfactorily performed the alphabet recital and the finger-dexterity count. Defendant successfully skipped 91 when counting, but at one point during the test, he stumbled over his words and apologized to Officer Johns. For the heel-to-toe test, Officer Johns instructed defendant to walk out eight steps, turn, and walk back eight steps. According to Officer Johns, defendant "wobbled on the start, wobbled the front eight, and on the back eight he fell off the line a couple times."[2]

[1] After viewing a police, in-dash video of the instant incident, the trial court questioned whether defendant actually crossed the center line and found that defendant only touched it.

[2] An expert testified that defendant would have been able to turn without stumbling with better instructions from Officer Johns.

Following the field sobriety tests, defendant pleaded with Officer Johns to let him go because an arrest would ruin his career and he was only a mile away from home. Not persuaded, Officer Johns administered a Preliminary Breath Test (PBT). Defendant's PBT result was 0.17. Officer Johns arrested defendant for operating a vehicle under the influence of liquor and transported him to the police station. They arrived at approximately 2:17:47 a.m., and the parties agreed that defendant was seated in the booking room by 2:18:24 a.m. Defendant remained in Officer Johns's presence until 2:45:28 a.m.,[3] when Officer Johns administered the first Datamaster test. The first test registered 0.17 Blood Alcohol Content (BAC). Two minutes later, Officer Johns administered the second test, which registered 0.18 BAC. Defendant was thereafter charged with operating while intoxicated, third offense.

After waiving his preliminary examination, defendant moved to suppress both the PBT and the Datamaster results, arguing that Officer Johns lacked authority to administer the PBT because (1) he lacked any reasonable suspicion of intoxification and (2) he did not follow the proper procedure in administering the test. Defendant also argued that without the PBT result Officer Johns lacked probable cause to effectuate an arrest. Lastly, defendant argued that the Datamaster results were inadmissible because they were the consequence of the alleged illegal arrest and, in any case, the administrative procedures for conducting the test were not followed.

The prosecution conceded that the officer technically violated the administrative rule by never ascertaining whether defendant put anything in his mouth 15 minutes before administering the PBT. The prosecution then agreed that the PBT result was thereby inadmissible. The prosecution, however, argued that even without the PBT result, there was probable cause to make the arrest given the speeding, the crossing of the center line, the odor of intoxicants, defendant's admission of having six drinks, and the stumbling on the heel-to-toe test. Regarding the Datamaster test at the police station, the prosecution argued that any technical violations of the administrative rule requiring a 15-minute observation period before using the Datamaster were not substantial enough to warrant suppressing the results. The trial court granted the motion to suppress the results of the Datamaster tests and ruled that Officer Johns lacked probable cause to effectuate the arrest.[4]

The prosecution filed a motion under MCR 6.435(b)[5], which the court treated as a motion for reconsideration. The prosecution argued that it wished to withdraw its stipulation that the PBT result was inadmissible. The prosecution also argued that suppression of the evidence is not the proper remedy for any technical violations that occurred with the administering of the breath tests. The trial court denied the motion, ruling that probable cause was never established.

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[3] Officer Johns left the booking room periodically, and also had his back facing defendant at times. However, Officer Johns indicated that defendant was always in his direct or peripheral vision, and that he never saw defendant eat, drink, smoke, chew, or regurgitate.

[4] Given the prosecution's stipulation that the PBT results were in admissible, the trial court did not address the validity of the PBT results.

[5] MCR 6.435(b): "Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous."

The prosecution raises two issues on appeal. First, the prosecution claims that the trial court erred by ruling that Officer Johns lacked probable cause to arrest defendant. Second, the prosecution claims that the trial court erred by suppressing the results of the Datamaster tests. We agree with both claims.

I. PROBABLE CAUSE

To the extent that a trial court's decision is based on an interpretation of the law, appellate review is de novo. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). The application of constitutional standards to uncontested facts is a question of law subject to de novo review on appeal. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999); *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006). But findings of historical facts are reviewed for clear error, with due weight given to inferences drawn from those facts by the trial court. *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001); *People v Lapworth*, 273 Mich App 424, 259-260; 730 NW2d 258 (2006).

The prosecution first argues that the trial court erred by ruling there was no probable cause to arrest defendant at the traffic stop. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense" occurred and that the defendant committed it. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Probable cause only requires 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).

The trial court ruled that defendant's driving and performance of the field sobriety tests were not objective evidence sufficient to establish probable cause to believe that defendant was operating his vehicle while intoxicated. In support of its ruling, the trial court found that defendant satisfactorily passed three of the four sobriety tests and "substantially pass[ed]" the fourth, and that there were no other obvious indicia of being intoxicated, such as slurred speech or glassy eyes. In the trial court's view, defendant's speeding and crossing or touching the center line did not establish probable cause. Moreover, the trial court considered the facts that defendant smelled of alcohol and admitted to drinking six drinks *only* to determine whether there was reasonable suspicion to administer the sobriety tests, not to evaluate whether probable cause existed.

The trial court's analysis was faulty because *all* facts and circumstances known to the arresting officer need to be evaluated when considering whether probable cause existed at the time of the arrest. See *Champion*, *supra* at 115. Here, viewing all of the evidence available to Officer Johns at the time of the arrest, we find there were enough facts and circumstances present such that a fair-minded person with average intelligence could conclude that there was a

substantial chance that defendant was driving while intoxicated, *id.; Lyon*, *supra* at 611, and therefore, probable cause was established.[6] A single occurrence of any of the facts above, standing alone, might not be enough to support probable cause; but the *totality* of the circumstances demands a different conclusion.[7]

II. SUPPRESSION OF THE DATAMASTER TEST RESULTS

The prosecution next argues that the results from the Datamaster breath tests were improperly suppressed. We agree. To the extent a lower court's decision on a motion to suppress is based on an interpretation of law, appellate review is de novo, but any factual findings are reviewed for clear error. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000).

As a threshold matter, Datamaster test results are admissible for proving a defendant's guilt. MCL 257.625a(6)(b)(ii). However, the test results must be both relevant and reliable. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). Here, although the relevance of the Datamaster test results' is not at issue, the reliability of the results is disputed. A test that complies with applicable administrative procedures is considered reliable. See *People v Tipolt*, 198 Mich App 44, 46; 497 NW2d 198 (1993).

The administrative rule in question, 2007 AACS, R 325.2655(1)(e), requires a 15-minute observation of the test subject before administering the Datamaster test. The observation period is to ensure that the subject does not smoke, regurgitate, or put anything in the subject's mouth leading up to the test, thereby compromising the results. However, the rule explains that

> [t]he operator need not stare continuously at the subject, but must be close enough to be aware of the person's actions and conditions. The operator may complete paperwork, enter data into the breath test instrument, or conduct other reasonable tasks during the observation period provided the subject is within the operator's field of vision. Breaks in the observation lasting only a few seconds do not invalidate the observation if the operator can reasonably determine that the subject did not smoke, regurgitate, or place anything in his or her mouth during the break in the observation.

At the time the motion to suppress was argued, the trial court viewed the DVD made of defendant in the booking room during the observation period and the Datamaster tests. The parties agreed that video showed that defendant was sitting in the booking room by 2:18:24 a.m.

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[6] We think it fair to conclude that an officer who encounters a speeding driver who crosses or touches the center line, smells of alcohol, is evasive about how much alcohol he consumed, but eventually admits to having had six drinks, pleads to be "let off," and stumbles during the heel-to-toe test, can reasonably believe there is a substantial chance that the driver operated his vehicle while intoxicated.

[7] Because we find probable cause existed given the totality of the above considered circumstances, we need not address whether it was proper to disregard the PBT results.

He remained sitting there, while handcuffed behind his back, for the next 13 minutes and 29 seconds. During the same time, Officer Johns stood in the booking room, often with his back to defendant as he worked on some equipment. Officer Johns also exited and reentered the booking room on several occasions. At 2:31:53 a.m., Officer Johns closed the door to the booking room, defendant stood, Officer Johns photographed defendant from several angles, and defendant sat back down. Officer Johns exited the booking room again from 2:34:53 a.m. to 2:35:05 a.m. When he returned, Officer Johns removed defendant's handcuffs and fingerprinted him. To complete these tasks, Officer Johns periodically turned away from defendant. Next, while sitting directly across from defendant from 2:39:38 a.m. to 2:41:42 a.m., Officer Johns completed some paperwork. Afterward, Officer Johns prepared the Datamaster machine and, in the process, directed defendant to move across the booking room to sit adjacent to him and the machine. Finally, defendant blew into the Datamaster machine at 2:45:28 a.m., and again, at 2:47:46 a.m.

These facts do not demonstrate a violation of R 325.2655(1)(e). Defendant was in Officer Johns's presence from 2:18:24 a.m. until the first test at 2:45 a.m., a span of approximately 28 minutes. Consistent with the plain language of the rule, when Officer Johns performed other tasks inside the booking room, defendant was always within his field of vision and he glanced at defendant on several occasions during that time span. It is clear that Officer Johns left the booking room several times prior to 2:35:05 a.m., but Officer Johns testified that he likely went to the nearby front desk, which was no more than ten feet away, and he could still see defendant through a large eight-foot by four-foot window. According to the plain language of the rule, the breaks in direct observation prior to 2:35:05 a.m. do not invalidate the observation. R 325.2655(1)(e). Officer Johns could "reasonably determine" that defendant did not smoke, regurgitate, or place anything in his mouth during the breaks, in part because defendant's hands were handcuffed behind his back, and in part because Officer Johns maintained his peripheral observation of defendant. For these reasons, no violation of the administrative rule occurred and the Datamaster results are reliable and admissible.

In his motion to suppress, defendant argued that the actual observation period began once Officer Johns closed the door to the booking room at 2:31:53 a.m. If the observation period began at 2:31:53 a.m. and ended when the first test occurred at 2:45:28 a.m., the period lasted 13 minutes and 35 seconds, instead of 15 minutes as required under R 325.2655(1)(e). Assuming arguendo that the observation period did not start until 2:31:53 a.m., "there is no bright-line rule of automatic suppression of evidence where an administrative rule has been violated." *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998). Suppression is required "only when there is a deviation from the administrative rules that call into question the accuracy of the test." *Fosnaugh*, *supra* at 450.

The accuracy of the first test cannot be seriously questioned. First, as we noted, *supra*, defendant was handcuffed behind his back for more than one minute and 25 seconds before the observation period arguably started. Therefore, he could not have placed anything in his mouth during this time. Moreover, there is no evidence that defendant regurgitated during this small window, and no evidence that he regurgitated or placed anything in his mouth throughout the observation period. Second, a subsequent Datamaster test was administered at 2:47:46 a.m. Because it occurred 15 minutes and 53 seconds after the time defendant argued the observation period began, it complied with the 15-minute observation period requirement. Again, the first test yielded a 0.17 BAC result and the second test yielded a 0.18 BAC result. Thus, the accuracy

of the allegedly "compromised" first test cannot be seriously called into question, since it is bolstered by the result of the second test. For the foregoing reasons, it was error to suppress the results.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens