STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2008
v	No. 276046 Saint Joseph Circuit Court
STANLEY GAYHEART, Defendant-Appellant.	LC No. 06-013563-FH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of operating a vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1)(b), third offense, MCL 257.625(9)(c).[1] He was sentenced as a second habitual offender, MCL 769.10, to a jail term of 12 months for his OUIL conviction. We affirm.

I. Basic Facts

Police Officer Mark Sherer and Reserve Officer Sarah Moore were conducting a routine patrol of Constantine, Michigan, during the evening of May 24, 2006. At approximately 11:39 p.m., the police officers experienced problems with the computer in their patrol car. They rebooted the computer, and conducted a LEIN check to ensure that that system was functioning. The officers checked the license plate of a recent-model, Ford pick-up truck that was parked in front of the Harvey House, the only bar in Constantine. The LEIN check indicated that the license plate was registered to a 1978 Ford. The police officers contacted Central Dispatch to verify the LEIN check, but they did not otherwise act with respect to the improper license plate.

At approximately 12:45 a.m., the police officers saw the same Ford pick-up truck traveling on the road. They pursued the truck, confirmed that it was the same truck through another LIEN check, and conducted a traffic stop.

[1] Defendant was also charged with unlawful use of registration plate, MCL 257.256(1), to which he pleaded guilty before trial.

Officer Sherer informed defendant that he had an improper license plate, and Officer Sherer smelled intoxicants emanating from defendant. Officer Sherer requested that defendant perform certain tests, and defendant failed two out of the three tasks. Officer Sherer concluded that defendant was intoxicated, and he placed defendant under arrest. After being advised of his *Miranda*[2] rights, defendant admitted that he consumed "a couple of beers." Officer Sherer administered "chemical test rights," to which defendant initially agreed. By 1:03 a.m., the police officers were transporting defendant to the Saint Joseph County jail, arriving approximately 20 minutes later. However, defendant declined to take the test when they arrived at the jail. The police officers then obtained a search warrant to conduct a blood draw, which was performed at Three Rivers Hospital by 2:45 a.m. A Michigan State Police forensic scientist tested defendant's blood for ethanol alcohol, and the results indicated that defendant's alcohol content was 0.10 grams per hundred millimeters of blood.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support the OUIL conviction. We review claims of insufficient evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing the evidence in the light most favorable to the prosecution to determine if a rational factfinder could conclude that the prosecution proved every element of the crime beyond a reasonable doubt, *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Defendant asserts on appeal that there was no evidence regarding his blood-alcohol content at the time that he was operating his vehicle, and that defendant's expert witness testified that it was highly improbable that his blood-alcohol content at the time he operated his vehicle was the same as when he was tested. Moreover, defendant contends that there was no evidence that defendant was observed consuming alcohol or that his driving was impaired.

MCL 257.625(1) provides, in part: that,

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:
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> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

As in *People v Wager*, 460 Mich 118, 594 NW2d 487 (1999), defendant presented expert testimony at trial that it is "virtually impossible to infer blood-alcohol level from a later test," and that to determine a person's blood-alcohol level at a certain time, the test would have to be performed at that time. Defendant's expert testified that no one could conclude to a "scientific certainty" that defendant's blood-alcohol level exceeded .08 at the time he operated the vehicle.

In *Wager, supra*, our Supreme Court indicated that, despite the expert's testimony, the jury may consider as relevant evidence that "a blood test given two hours after an event does have some usefulness in determining a person's state of intoxication at the earlier point." The Court held that, "[t]o the extent that the passage of time reduces the probative value of the test, the diminution goes to weight, not admissibility, and is for the parties to argue before the finder of fact." We agree that the blood-alcohol test is relevant as evidence of defendant's "state of intoxication at the earlier point" and may form the basis for a rational trier of fact to conclude beyond a reasonable doubt that defendant's blood-alcohol content was over 0.08 at the time of the offense. Further, testimony from police officers in this case that defendant's eyes were bloodshot, that he smelled of alcohol and failed two field sobriety tests supports defendant's conviction.

III. New Trial (Great Weight of the Evidence)

Next, defendant asserts that the trial court abused its discretion in denying his motion for a new trial, because the verdict was against the great weight of the evidence. We review a trial court's denial of a motion for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.*

Defendant's argument implicitly rests on an assumption that defendant's blood-alcohol content was less than the statutorily prescribed amount when the police officers made the traffic stop. As discussed previously, *supra*, Section II, this argument lacks merit. The trier of fact is free to infer from the results of a subsequent test for alcohol that defendant was similarly intoxicated when he operated the vehicle.

Additionally, defendant asserts that the trial court misconstrued defendant's expert witness' testimony. "'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.'" *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003), quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). In *Lemmon, supra* at 643-644, our Supreme Court explained that a verdict is contrary to the great weight of the evidence only under exceptional circumstances, such as the following: where the "testimony contradicts indisputable physical facts or laws," where "a witness's testimony is . . . so inherently implausible that it could not be believed by a reasonable juror;" or "where the witness' testimony has been seriously impeached and the case marked by 'uncertainties and discrepancies" (internal quotations and citations omitted).

At the hearing on defendant's motion for a new trial, the trial court noted that the expert witness was a credible witness; however, "[t]hat doesn't mean that it's entirely helpful." The trial court stated that "I think we all agree that the tests would show that the only thing we could be 100 percent sure of was that, at the time [the blood] was drawn, the test results would show what the blood-alcohol level was at that time." But, ultimately the trial court found that

defendant "had been operating a motor vehicle on a roadway and that, at that time, he had an illegal blood-alcohol level of .08 and that was verified by the blood test of .10." This finding was not clearly erroneous.

The trial court determined the weight of the expert witness' testimony, concluding that defendant's blood-alcohol content exceeded the prescribed statutory amount when the police officers stopped defendant's vehicle. See *People v Cazal*, 412 Mich 680, 689; 316 NW2d 705 (1982) (a trial court, sitting as the trier of fact, decides the facts from the evidence presented and applies the law to the facts). See also *People v Vanderhoof*, 71 Mich 158, 173; 39 NW 28 (1888) ("[a]n expert witness is to be judged from the same stand-point as any other"). Moreover, none of the exceptional circumstances, as expressed in *Lemmon*, *supra* at 643-644, are present in this case. Thus, there is nothing that would warrant a conclusion that this verdict is contrary to the great weight of the evidence. The evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *McCray*, *supra* at 637. The trial court did not abuse its discretion in denying the new trial motion.

IV. New trial (Sequestration Order)

Defendant next contends the trial court abused its discretion in denying defendant's motion for a new trial because the prosecution's key witness violated a sequestration order. A trial court has discretion in deciding to sequester witnesses and for imposing penalties for any violations of such sequestration orders. *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987). This Court has opined that "one of the purposes of the sequestration of a witness is to prevent him from 'coloring' his testimony to conform with the testimony of another." *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). "'A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice resulted.'" *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996), quoting *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

Here, defense counsel requested a "sequestration order requiring Officer Sherer to step out during [Reserve Officer Moore's] testimony." The trial court granted the order, but the prosecution called Officer Sherer as its first witness. After Officer Sherer testified, there was a brief recess. During that time, Officer Sherer spoke with the emergency room nurse, who would be testifying later. The trial court conducted voir dire in regard to the exchange between Officer Sherer and the emergency room nurse. The emergency room nurse testified that Officer Sherer told her that there were a lot of questions about dates and times during his testimony. She indicated that she did not recall defendant or the case. She also testified that her testimony would not change due to the exchange with Officer Sherer. Nevertheless, defense counsel moved for dismissal. The trial court denied the motion, concluding that there was a violation of the sequestration order, but that "[i]t does not appear that this was going to affect the testimony of [the emergency room nurse]."

On appeal, defendant fails to demonstrate that any prejudice resulted from the violation of the sequestration order. See *King*, *supra* at 309. Defendant suggests that the emergency room nurse could not recall the case until Officer Sherer discussed the matter with her. Even assuming, as defendant suggests, that the emergency room nurse remembered drawing blood from defendant after having spoke to Officer Sherer, nothing in the record supports a claim she did not testify from her own independent recollection of the events. Absent any evidence that

the emergency room nurse altered her testimony to conform to another witness, we conclude that the trial court did not abuse its discretion in denying defendant's motion to dismiss as a remedy for the violation. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

V. Motion to Dismiss

Finally, defendant argues that the trial court abused its discretion by denying defendant's motion to dismiss the charge. Defendant asserts that there was no particularized suspicion of criminal activity before the traffic stop; thus, the traffic stop was unconstitutional. This Court reviews a trial court's ruling on a motion to dismiss for an abuse of discretion. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004). Issues of constitutional law are reviewed de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

"The constitutional validity of an arrest depends on whether probable cause to arrest existed at the moment the arrest was made by the officer." *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998). And "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *Id.* A traffic stop is permissible, where a police officer has probable cause to believe that a defendant has violated traffic laws. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002).

Defendant contends that Officer Sherer did not have a particularized suspicion that defendant was engaged in or was about to engage in criminal activity before stopping defendant's vehicle; thus, the traffic stop was unlawful. Defendant's argument is without merit. Officer Sherer found that there was an improper license plate on a vehicle in violation of MCL 257.256(1).[3] Later, Officer Sherer saw defendant driving that same vehicle; therefore, Officer Sherer had probable cause to make the traffic stop, which led to defendant's arrest. *Lyon, supra* at 611. Because Officer Sherer had probable because to believe that defendant was in violation of a traffic law, the stop was permissible. *Davis, surpa* at 363. The trial court did not abuse its discretion in denying defendant's motion for dismissal. *Stephen, supra* at 218.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher

[3] MCL 257.256(1) provides:

> A person shall not lend to another person, or knowingly permit the use of, any certificate of title, registration certificate, registration plate, special plate, or permit issued to him or her if the person receiving or using the certificate of title, registration certificate, registration plate, special plate, or permit would not be entitled to the use thereof. A person shall not carry or display upon a vehicle any registration certificate or registration plate not issued for the vehicle or not otherwise lawfully used under this act.