



Missouri Court of Appeals
Southern District
Division Two

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) No. SD36489
)
 GREGORY HENSLEY,) FILED: December 8, 2020
)
 Appellant.)

APPEAL FROM THE CIRCUIT COURT OF STONE COUNTY

Honorable Alan Blankenship, Judge

AFFIRMED AND REMANDED WITH DIRECTIONS

Gregory A. Hensley (“Defendant”) appeals his convictions, following a bench trial, for driving while intoxicated (“DWI”), *see* section 577.010, and driving with excessive blood alcohol content (“BAC”), *see* section 577.012.¹ In his first three points, Defendant asserts the trial court clearly erred in not excluding the results of his post-arrest breath analysis because the arresting officer lacked probable cause to arrest Defendant, and if those results are excluded, there is insufficient evidence to support either of his convictions. In his fourth and final point, Defendant asserts the trial court’s written judgment and sentence contains a clerical error in showing he pleaded guilty to the BAC charge rather than correctly showing he was found guilty

¹ All statutory references are to RSMo 2016, unless otherwise indicated.

after a trial on that charge. Finding no clear error in the trial court's determination that the arresting officer had probable cause to arrest Defendant, we deny Defendant's first three points and affirm his convictions. Because the trial court's judgment contains a clerical error, however, we remand the case to the trial court with directions to correct that error.

Standard of Review

A trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous. *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). The trial court's ruling will be deemed clearly erroneous if, after review of the entire record, this Court is left with the definite and firm impression that a mistake has been made. *Moore v. State*, 458 S.W.3d 822, 829 (Mo. banc 2015). This Court defers to the trial court's factual findings and credibility determinations and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Sund*, 215 S.W.3d at 723. Whether conduct violates the Fourth or Fifth Amendments is a question of law that this Court reviews *de novo*. *Id.*

State v. Lammers, 479 S.W.3d 624, 630 (Mo. banc 2016).

Factual and Procedural Background

On May 18, 2017, at 10:12 p.m., Missouri State Highway Patrol Trooper Justin Choate ("Trooper Choate") was on duty at the MSHP zone office just north of Branson. At that time, he received a call for service advising him that the Hollister Police Department had received information of a two-vehicle crash near the scenic overlook² on Missouri 165 and that one of the involved vehicles, a black passenger car with a flat left front tire, had left the scene and turned west on 165.

Thirteen minutes later, Trooper Choate arrived at the scenic overlook in his patrol car and spoke with a young couple sitting in the back of a pickup. The couple related to him that a smaller dark or black vehicle had pulled into the overlook and it had a flat front left tire and front

² Trooper Choate described the scenic overlook as, "There's just -- there's a pull off -- or an asphalt area on both sides of the roadway, and it sits up high and there's a view over towards the Branson area."

left fender damage. They also advised Trooper Choate that when they spoke with the driver, they smelled alcoholic beverage on him and he appeared to possibly be under the influence of alcohol or impaired. They related that the driver got back in his vehicle and began traveling west on 165.

Trooper Choate then proceeded west on 165 and, while doing so, received a message from dispatch that another motorist had reported that he or she was following a small black passenger car with a flat front left tire traveling west on 165. Dispatch also relayed to Trooper Choate the license number of the small black car, as reported by the motorist, and notified the trooper it was further reported that the vehicle had pulled into the parking lot of the Hungry Hunter restaurant on 165 and had stopped.

When Trooper Choate arrived at the Hungry Hunter restaurant, he saw some fire and EMS personnel on the scene and observed a black Honda Accord in the parking lot that had a flat front left tire, a damaged front left fender “kind of ripped back on it[,]” and a license plate number matching that previously reported by the motorist and provided by dispatch to Trooper Choate. A firefighter approached Trooper Choate, provided him with a driver’s license for the driver of the black Honda, and said that he thought the driver possibly had been drinking.

Trooper Choate approached the black Honda and observed Defendant seated in the driver’s seat with the driver’s door closed, the engine running, and the headlights and taillights illuminated. As he began speaking with Defendant, he asked Defendant to step out of the vehicle. When Defendant stepped out of the car, Trooper Choate observed that Defendant’s “balance seemed uncertain” and that Defendant “was using his vehicle to hold onto to maintain his balance.” While speaking with Defendant, Trooper Choate observed that Defendant’s “eyes appeared watery,” and he smelled the odor of an alcoholic beverage coming from Defendant’s

mouth. Trooper Choate asked Defendant to walk over and sit in the front seat of his patrol car. Defendant complied.

While talking with Trooper Choate in the patrol car, Defendant “seemed slightly lethargic[,]” “seemed confused[,]” and his speech was “slightly slurred.” Defendant admitted he was involved in a car crash, but made conflicting statements as to the location of the crash. Defendant told Trooper Choate that “he had drank a beer about two hours before.” Also, while in the patrol car, Trooper Choate administered the horizontal gaze nystagmus (“HGN”) test on Defendant. According to Trooper Choate, the HGN test generates six potential clues of impairment. Trooper Choate observed that Defendant exhibited all six clues of impairment and, based upon his experience, concluded this indicated impairment. Trooper Choate also administered a portable breath test (“PBT”) on Defendant and its result was positive for alcohol. Trooper Choate formed the opinion that Defendant was under the influence of alcohol and advised Defendant that he was under arrest for driving while intoxicated.

Post-arrest, Trooper Choate transported Defendant to the Branson Police Department and proceeded to administer a breath analysis test on Defendant. The result indicated that Defendant had a .111% blood alcohol content.

Defendant, thereafter, was charged with DWI and BAC. He waived a jury trial and, two days before his scheduled bench trial, filed a motion to suppress any post-arrest evidence obtained as a result of his arrest because Trooper Choate did not have probable cause to make such arrest. The trial court heard Defendant’s motion to suppress at the same time as the trial and following that hearing and trial issued its written order finding that Trooper Choate had probable cause to arrest Defendant and denying Defendant’s motion to suppress. The trial court thereafter found Defendant guilty of each offense as charged and imposed sentence on each

offense, but suspended execution of those sentences and placed Defendant on probation. The written trial court judgment and sentence, however, reflects that, as to the BAC charge, Defendant was “[f]ound guilty upon a plea of guilty.” Defendant now appeals the trial court’s judgment.

Discussion

Defendant asserts in his first point relied on that the trial court clearly erred in failing to suppress the results of his post-arrest breath test taken at the Branson Police Department because Trooper Choate lacked probable cause to arrest Defendant. We disagree.

“Probable cause requires more than a mere suspicion of intoxication, but less than absolute certainty.” *Smith v. Dir. of Revenue*, 594 S.W.3d 282, 284 (Mo. App. W.D. 2020). “Probable cause to arrest exists when the arresting officer’s knowledge of the particular facts and circumstances is sufficient to warrant a prudent person’s belief that a suspect has committed an offense[.]” *White v. Dir. of Revenue*, 321 S.W.3d 298, 312 (Mo. banc 2010) (citation omitted); *Ridgway v. Dir. of Revenue*, 573 S.W.3d 129, 133 (Mo. App. E.D. 2019). Missouri courts have found a combination of observations indicating intoxication to be sufficient for a finding of probable cause. *Rain v. Dir. of Revenue*, 46 S.W.3d 584, 588-89 (Mo. App. E.D. 2001). Even absent field sobriety tests or a PBT, “probable cause is proven using other indicators of intoxication such as: an odor of alcohol, behaviors, mannerisms, and physical expressions.” *Smith*, 594 S.W.3d at 284-85; see *Rain*, 46 S.W.3d at 587-89.

State v. Long, 599 S.W.3d 908, 916 (Mo.App. 2020).

Section 577.010.1 provides that “A person commits the offense of driving while intoxicated if he or she operates a vehicle while in an intoxicated condition.” Defendant makes no contention or assertion that Trooper Choate lacked probable cause to believe that Defendant operated a vehicle under this statute. Rather, Defendant asserts that the “evidence prior to arresting [Defendant] showed mere suspicion of intoxication, but not probable cause” and all of Defendant’s arguments are directed toward that assertion.

In his argument, Defendant purports to compare and liken the circumstances leading to his arrest by Trooper Choate to the circumstances in *Rocha v. Dir. of Revenue*, 557 S.W.3d 324

(Mo.App. 2018). In **Rocha**, the Western District of our Court found “the smell of intoxicants and Rocha’s bloodshot eyes insufficient indicia of intoxication to support probable cause for Rocha’s arrest.” *Id.* at 327–28. Defendant’s case comparison, however, fails and is unpersuasive for two reasons. First, without any explanation or citation to supporting authority, Defendant confines and limits his case comparison analysis to considering *only* Trooper Choate’s observations of the indicia of intoxication exhibited by Defendant to the observations made by the arresting officer in **Rocha**. While the evidence in **Rocha** was so confined, the evidence here, as explained *infra*, was not. Within that artificial analytical constraint, moreover, Defendant cites to and relies upon testimony by Trooper Choate and by Defendant about other surrounding circumstances in an attempt to minimize and explain away the impact of Trooper Choate’s observations in giving rise to an inference of intoxication. This reliance upon testimony contrary to the trial court’s ruling to draw inferences that are also contrary to that ruling is itself contrary to our standard of review that requires us to ignore such contrary evidence and inferences, *see Lammers*, 479 S.W.3d at 630. Such reliance robs Defendant’s argument of any analytical value in supporting his claim under this point.

Second, Defendant omits from his case comparison any mention, consideration, or analysis of several relevant circumstances other than the arresting officer’s observations that are present here, but not present in **Rocha**. Here, Defendant admitted to the recent ingestion of an alcoholic beverage. Defendant also admitted his involvement in a recent car crash and then leaving the scene of that accident. Defendant’s HGN field sobriety test results indicated impairment. Defendant’s PBT result was positive for alcohol. Trooper Choate, based upon his training and experience, formed the opinion that Defendant was under the influence of alcohol.

These additional circumstances factually distinguish the present case from *Rocha*, and Defendant fails to demonstrate otherwise.

While Defendant's reliance on *Rocha* is misplaced because of distinguishing facts, his reliance upon *State v. Roark*, 229 S.W.3d 216 (Mo.App. 2007), is misplaced because of distinguishing law. *Roark* addressed and was decided based upon whether the officer had reasonable suspicion to initially stop Roark. *Id.* at 222. As expressly reinforced by Defendant in his reply brief, his "original brief is confined to arguing probable cause to arrest was lacking and it did not argue lack of reasonable suspicion for the stop." Yet, Defendant fails to argue or demonstrate in his original brief any rational basis upon which this Court may or should utilize the reasonable-suspicion-to-stop legal analysis in the circumstances applicable in *Roark* to consider or legally analyze whether Trooper Choate had probable cause to arrest Defendant in the circumstances present here. Defendant's failure to provide that context makes *Roark* inapplicable.

Here, the evidence, viewed in the light most favorable to the trial court's ruling, *see Lammers*, 479 S.W.3d at 630, was sufficient to support its finding that Trooper Choate had probable cause to arrest Defendant for driving while intoxicated. The particular facts and circumstances here include Defendant's statements of recent ingestion of an alcoholic beverage and recent involvement in a car crash and then leaving the scene of that accident; the arresting officer's observations of Defendant's exhibition of multiple indicators of intoxication, which included that Defendant's "balance seemed uncertain[,] " that Defendant "was using his vehicle to hold onto to maintain his balance[,] " that Defendant's "eyes appeared watery," that he smelled the odor of an alcoholic beverage coming from Defendant's mouth, that Defendant "seemed slightly lethargic[,] " "seemed confused[,] " and his speech was "slightly slurred," and Defendant

gave him conflicting statements about where the car crash occurred; the HGN field sobriety test results indicating impairment; the PBT positive result for alcohol; and Trooper Choate's opinion, based upon his training and experience, that Defendant was under the influence of alcohol. These circumstances are similar to those in *Long*, 599 S.W.3d at 916–17, in which this Court recently determined that their totality gave the arresting officer “a reasonable belief that Defendant operated a vehicle while intoxicated, and thus had probable cause to arrest Defendant.” *Id.* at 917. *Long* supports the same determination here.³

After review of the entire record, this Court is not left with a definite and firm impression that a mistake has been made by the trial court in finding that Trooper Choate had probable cause to arrest Defendant for driving while intoxicated and, therefore, that finding is not clearly erroneous. See *Lammers*, 479 S.W.3d at 630 (citing *Moore v. State*, 458 S.W.3d 822, 829 (Mo. banc 2015)). Defendant's first point is denied.

Defendant's second and third points challenge the sufficiency of the evidence to support his DWI and BAC convictions, respectively, if the post-arrest breath analysis administered on Defendant at the Branson Police Department is excluded for the reason asserted in his first point—Trooper Choate did not have probable cause to arrest Defendant. Our denial of Defendant's first point, therefore, defeats the premise of his second and third points and, accordingly, both points are denied.

Defendant's fourth point asserts that the trial court's written judgment and sentence recital that he was “[f]ound guilty upon a plea of guilty” on the BAC charge is a clerical error because the record reflects he was found guilty on that charge after a trial. The State concedes

³ Defendant did not cite or discuss *Long* in his opening brief. In its responding brief, the State argued extensively that *Long* was applicable here. Although he filed a reply brief, Defendant chose not to mention *Long* in it or offer any argument or explanation as to why it was not applicable here as the State contended.

this clerical error and we agree. “When a clerical error or omission has occurred, the trial court has the power to correct the inaccuracy with a *nunc pro tunc* order.” *State v. Lewis*, 582 S.W.3d 162, 167 (Mo.App. 2019). Therefore, a remand is necessary in this case for correction of the written judgment to accurately reflect the record. Defendant’s fourth point is granted.

Decision

The trial court’s judgment convicting Defendant of DWI and BAC is affirmed. The case is remanded to the trial court with directions to correct the clerical error in that judgment to accurately reflect the record on the BAC charge that Defendant was found guilty after a trial.

GARY W. LYNCH, J. – OPINION AUTHOR

JEFFREY W. BATES, C.J./P.J. – CONCURS

MARY W. SHEFFIELD, J. – CONCURS