Affirmed and Memorandum Opinion filed June 24, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00281-CR

BRADLEY JAMES SCHARF, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 1538544

M E M O R A N D U M O P I N I O N

Appellant Bradley James Scharf appeals his conviction for driving while intoxicated (DWI) challenging the trial court's ruling on his motion to suppress. We affirm.

I. Factual and Procedural Background

Late in the evening on July 18, 2008, Bryan Bayani, an Emergency Medical Technician, was dispatched to the scene of a motor vehicle accident. When he first entered the parking lot in which the accident took place, Bayani observed a van with its

front tires over the curb that acted as a barricade for the lot. As he approached the vehicle, he heard the engine running. He observed appellant in the driver's seat slumped toward the center of the vehicle with the transmission in the drive position. He knocked on the window at which point appellant awakened and opened the door. Bayani reached into the van, put the transmission in park, and removed the keys from the ignition. After appellant opened the door, Bayani noticed a strong odor of alcohol and asked appellant whether he had been drinking. Appellant answered that he had been drinking. Bayani noted that appellant had difficulty standing and his speech was slurred.

Harris County Deputy Corey Alexander also responded to the scene of the accident. He also observed the vehicle stopped over the curb in the parking lot. He talked with appellant who informed Deputy Alexander that he was trying to go home. Deputy Alexander asked whether appellant had been drinking and appellant admitted he had been at a local bar with several co-workers having a few drinks. Deputy Alexander asked appellant to step out of the vehicle. Appellant had difficulty maintaining his balance, had red, glassy eyes, and spoke with slurred speech. Appellant performed several field sobriety tests in which he showed signs of intoxication. Deputy Alexander formed the opinion that appellant had lost the normal use of his mental faculties due to the ingestion of alcohol. Deputy Alexander arrested appellant for driving while intoxicated.

Prior to trial, appellant filed a motion to suppress in which he alleged that he was seized without any reasonable suspicion that he was engaged in criminal activity. The trial court held a hearing at which Bayani and Alexander testified. Appellant argued in his motion and at the hearing that Deputy Alexander lacked probable cause to arrest appellant because there was insufficient evidence that appellant was operating the vehicle. The trial court denied appellant's motion stating, "There's clearly sufficient evidence in this record to indicate there was probable cause to arrest the defendant for public intoxication, if not D.W.I.[.]"

In a single issue, appellant contends the trial court erred in denying his motion to

suppress because the evidence did not establish probable cause for arrest.

II. Standard of Review

The appropriate standard of review for a suppression ruling is a bifurcated review, giving almost total deference to the trial court's findings of fact, but conducting a de novo review of its application of law to those facts. *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002). The denial of a motion to suppress should be upheld if the ruling is reasonably supported by the record and correct on any theory of the law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003).

III. Discussion

Appellant argues his arrest was without probable cause because there was insufficient evidence to show he was operating the vehicle. A police officer may make a warrantless arrest if (1) there is probable cause to believe that an offense has been committed or is being committed and (2) the arrest falls within one of the statutory exceptions to the warrant requirement specified in articles 14.01 through 14.04 of the Texas Code of Criminal Procedure. *Stull v. State*, 772 S.W.2d 449, 451 (Tex. Crim. App. 1989). Probable cause for a warrantless arrest exists when a police officer has reasonably trustworthy information, considered as a whole, that is sufficient to cause a reasonable, prudent officer to believe that a particular person has committed or is committing an offense. *See Hughes v. State*, 24 S.W.3d 833, 838 (Tex. Crim. App. 2000). A reviewing court is to consider the totality of the circumstances when determining whether the facts were sufficient to give the officer probable cause to arrest the defendant. *Chilman v. State*, 22 S.W.3d 50, 56 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

As a general rule, an officer may not make a warrantless arrest for DWI unless probable cause exists and the DWI is committed in the presence or view of an officer. Tex. Code Crim. Proc. Ann. art. 14.01 (Vernon 2005);); *see also Atwater v. City of Lago Vista*, 534 U.S. 318, 354, 121 S.Ct. 1536, 1557, 149 L.Ed.2d 549 (2001) ("If an officer

has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). However, if Deputy Alexander had probable cause to arrest appellant for public intoxication and the offense of public intoxication was committed in Alexander's presence or view, the arrest is considered valid. *See Warrick v. State*, 634 S.W.2d 707, 709 (Tex. Crim. App. 1982); *Alonzo v. State*, 251 S.W.3d 203, 209–10 (Tex. App.—Austin 2008, pet. ref'd). "Whenever an intoxicated person is in an officer's presence and there is probable cause to arrest him for public intoxication, the officer may do so without a warrant, even though a warrantless arrest of that person for the offense of driving while intoxicated would be unlawful." *Mathieu v. State*, 992 S.W.2d 725, 728 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Moreover, the arrest is not invalid simply because the officer labels the offense "driving while intoxicated." *Id.*

The offense of public intoxication occurs when an individual (1) appears in a public place while intoxicated, and (2) is so intoxicated that he might endanger himself or another. *See* Tex. Penal Code Ann. § 49.02(a) (Vernon Supp. 2009). The danger need not be immediate or apparent; it is sufficient if the defendant places himself or others in potential danger. *See Dickey v. State*, 552 S.W.2d 467, 468 (Tex. Crim. App. 1977).

In this case, both Bayani and Alexander testified that appellant appeared intoxicated, had difficulty standing, and spoke with slurred speech. Therefore, we look to whether the evidence established that under the facts and circumstances within the officer's knowledge, he had reasonably trustworthy information that would warrant a prudent person in believing that the defendant or others were facing potential danger. *See Britton v. State*, 578 S.W.2d 685, 689 (Tex. Crim. App. 1978); *see e.g.*, *White v. State*, 714 S.W.2d 78, 79 (Tex. App.—San Antonio 1986, no pet.) (probable cause to arrest for public intoxication existed because of the dangers inherent in a parking lot). When an officer is confronted with a person intoxicated in a public place, his determination as to probable danger that may befall the individual is not reviewed under the same standard used in a judicial determination of guilt. *Britton*, 578 S.W.2d at 689, *citing McCray v.*

Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967) *and Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

In this instance, Deputy Alexander formed the opinion, based on the totality of the circumstances, that appellant was intoxicated and was a danger to himself or others. The factors leading him to this conclusion were that appellant had a strong odor of alcohol on his breath, his eyes were red and glassy, he was unsteady on his feet, had slurred speech, and admitted to consuming alcoholic beverages prior to the accident. Appellant was discovered passed out in his vehicle with the engine running and the transmission in drive. Considering the totality of the circumstances, it was not unreasonable for Alexander to believe that appellant was intoxicated in a public place and presented a danger to himself or others. *See Reynolds v. State*, 902 S.W.2d 558, 560 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (holding that intoxicated subject, after causing accident, posed danger to himself and others because if he had not been arrested, "he would have been free to depart in his car"); *Segura v. State*, 826 S.W.2d 178, 185 (Tex. App.—Dallas 1992, pet. ref'd) (holding that appellant, who had been involved in an accident, posed danger to himself or others because he "could have run or driven from the scene in an intoxicated manner").

Because there was probable cause to arrest appellant for public intoxication, we need not decide whether there was probable cause to arrest him for driving while intoxicated. Appellant's arrest for public intoxication was lawful; therefore, the trial court did not err in denying appellant's motion to suppress. Accordingly, we overrule appellant's issue.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Anderson, Frost, and Seymore.
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