IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JOSHUA DEVLIN,
Petitioner,

v.

HON. CHRISTOPHER BROWNING, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

THE STATE OF ARIZONA,
Real Party in Interest.

No. 2 CA-SA 2019-0061
Filed June 5, 2020

Special Action Proceeding
Pima County Cause No. CR20192077001

JURISDICTION ACCEPTED; RELIEF DENIED

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OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Eppich concurred and Judge Eckerstrom dissented.

E S P I N O S A, Judge:

¶1 In this special action, Joshua Devlin challenges the respondent judge's reversal of the Tucson City Court's grant of his motion to suppress evidence gained from a roadside driving under the influence (DUI) investigation following a traffic stop. Because we conclude the respondent judge properly reversed the city court's determination, we accept jurisdiction but deny relief.

Factual and Procedural Background

¶2 In October 2017, Tucson Police Department Officer Jonathan Kinkade, a five-year patrol officer with extensive training and experience in DUI enforcement, was on duty in the early morning hours when he observed a car travelling over the speed limit on Broadway Boulevard, a major artery near the Tucson downtown area with its many bars and restaurants closing at 2:00 a.m. Kinkade stopped the car and, upon contacting the driver, Devlin, saw that he had bloodshot, watery eyes and smelled the odor of alcohol; there was a passenger in the car as well. Kinkade asked Devlin if he had been drinking, and Devlin acknowledged he had. Devlin handed the officer his license without difficulty, did not appear confused, answered questions appropriately, and did not have "problems with his speech." The officer then conducted a "one pass" nystagmus test to determine whether the cause of Devlin's bloodshot watery eyes might be due to fatigue rather than alcohol consumption and observed a lack of smooth pursuit in Devlin's left eye.

¶3 Officer Kinkade asked Devlin to step out of the vehicle and he administered several field sobriety tests. Devlin exhibited various "cues" of impairment, and, in response to questioning, stated he had been at two different establishments from around 11:00 p.m. to 1:00 a.m., had a "single drink at each place," and did not feel "any of the effects of the alcohol he drank." After administering a breath test, Kinkade arrested Devlin for driving under the influence. The entire encounter lasted about fifteen minutes.

¶4 Devlin was charged with DUI in Tucson City Court, and he filed a motion to suppress, arguing that Officer Kinkade "had no reasonable suspicion that . . . Devlin was engaged in criminal activity at the time he initiated the DUI investigation." In response, the state argued the detention was authorized by A.R.S. § 28-1594, was based on reasonable suspicion, and was reasonable in any event. Following an evidentiary hearing, the city court judge granted the motion to suppress, concluding the officer's observations were insufficient to justify a DUI investigation.

¶5 The state appealed that decision to the superior court, arguing again that the detention was authorized by statute, was based on reasonable suspicion, and was reasonable. In a notice of supplemental authority, the state also cited *Newell v. Town of Oro Valley*, 163 Ariz. 527 (App. 1990), "as additional authority for the proposition that because Devlin had been lawfully detained for speeding . . . the officer was authorized to require [him] to exit the vehicle regardless of whether [he] suspected Devlin was impaired." Citing *Newell*, but concluding there had been reasonable suspicion of driving under the influence, the respondent judge reversed the city court's ruling and remanded the matter. Devlin thereafter filed this petition for special action.

Jurisdiction

¶6 "Whether to accept special action jurisdiction is for this court to decide in the exercise of our discretion," *Potter v. Vanderpool*, 225 Ariz. 495, ¶ 6 (App. 2010), and "[a] primary consideration is whether the petitioner has an equally plain, speedy and adequate remedy by appeal," *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, ¶ 9 (App. 2009). Other considerations include whether the case raises issues of statewide importance, issues of first impression, pure legal questions, or issues that are likely to arise again. *Luis A. v. Bayham-Lesselyong*, 197 Ariz. 451, ¶ 2 (App. 2000).

¶7 Because this case arises from the state's successful appeal of the city court's order to the superior court, the sole avenue for Devlin to seek appellate review is through special action. *See* A.R.S. § 22-375 (prohibiting appeal from a final judgment of the superior court in an action appealed from a city court unless the action "involves the validity of a tax, impost, assessment, toll, municipal fine or statute"); *State v. Superior Court ex rel. Norris*, 179 Ariz. 343, 344 (App. 1994). Additionally, the question presented is a purely legal one and capable of recurring. *See State ex rel. Romley v. Martin*, 203 Ariz. 46, ¶ 4 (App. 2002) (special-action jurisdiction appropriate for "cases involving purely legal questions, or issues that are

likely to arise again"). We therefore accept jurisdiction of this special action.[1]

Discussion

¶8 On special-action review, Devlin argues the respondent judge improperly substituted his judgment for that of the trial court and that he misapplied *Newell* in his ruling. We review a trial court's ruling on a motion to suppress for an abuse of discretion. *State v. Ontiveros-Loya*, 237 Ariz. 472, ¶ 5 (App. 2015). "We consider only the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to sustaining the court's rulings." *Id.* However, a court's determination as to whether an officer has reasonable suspicion to detain a driver for further investigation is a legal question, which we review de novo. *See Ornelas v. United States*, 517 U.S. 690, 698-99 (1996) (appellate court should review de novo ultimate questions of reasonable suspicion and probable cause); *State v. Rogers*, 186 Ariz. 508, 510 (1996).[2]

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[1]Devlin filed his special-action petition over four months after the superior court's judgment, and the state argues it is untimely and we should decline jurisdiction on that basis. The record reflects the court entered its ruling in July 2019 and the charges against Devlin, which had been dismissed by the state, were reinstated in August; he then filed a notice that he would seek an "interlocutory appeal" in September. Although his petition was not filed until November 14, well beyond the time period for an appeal, *see State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 75 (1990) (delay in seeking special-action relief beyond time for appeal a factor in whether special-action jurisdiction accepted), we conclude the petition was not so untimely as to preclude our discretionary acceptance of jurisdiction. *Cf. Anserv Ins. Servs., Inc. v. Albrecht*, 192 Ariz. 48, ¶¶ 10-11 (1998) (denying relief because of petitioner's several-month delay in filing special action and waiting sixteen months to request stay of proceedings); *Dep't of Child Safety v. Beene*, 235 Ariz. 300, n.5 (App. 2014) (special-action jurisdiction would ordinarily be declined due to six-month delay in bringing special action).

[2]Our dissenting colleague maintains that the superior court failed to honor some of the city court's conclusions as "factual findings," such as its determinations that Devlin's speeding and his bloodshot eyes, considered individually, were not standardized "cue[s] of impairment." But Officer Kinkade explained that factors to be considered in the field are not limited to defined National Highway Traffic Safety Administration (NHTSA)

¶9 Devlin contends that the officer's observations when he stopped Devlin and before asking him to step out of his vehicle were sufficient only for him to suspect Devlin had consumed alcohol, but "there was no reasonable suspicion of impairment by alcohol." As Devlin points out, consuming alcohol and driving is not a crime in itself. Rather, Arizona statutes prohibit driving while "impaired to the slightest degree," or with a blood alcohol content (BAC) of .08 or more. *See* A.R.S. §§ 28-1381, 28-1382. Thus, in order to form reasonable suspicion of a *crime* in this context, an officer must base that suspicion on some indicia of impairment or a BAC over the legal limit.

¶10 Reasonable suspicion is a justifiable suspicion that the particular individual to be detained is, or has been, involved in criminal activity. *State v. Canales*, 222 Ariz. 493, ¶ 9 (App. 2009). It does not, however, "require solid proof, but rather an objective basis to believe that criminal activity might be occurring sufficient to justify further investigation." *State v. Turner*, 243 Ariz. 608, ¶ 7 (App. 2018). Although, as Devlin asserts, "circumstances that 'describe a very large category of presumably innocent travelers' are insufficient to establish reasonable suspicion because travelers would then be subject to 'virtually random seizures,'" *State v. Teagle*, 217 Ariz. 17, ¶ 25 (App. 2007) (quoting *Reid v. Georgia*, 448 U.S. 438, 441 (1980)), "[a]n officer need not 'rule out the possibility of innocent explanations for [a defendant's] conduct,'" *Turner*, 243 Ariz. 608, ¶ 7 (quoting *State v. Evans*, 237 Ariz. 231, ¶ 11 (2015)).

¶11 We agree with the respondent judge that under the totality of the circumstances here, Officer Kinkade had reasonable suspicion to conduct a DUI investigation. That reasonable suspicion stemmed from the time of night and area involved, which Kinkade testified was a known artery for impaired drivers leaving nearby "alcohol establishments," a car travelling ten miles per hour over the speed limit, his observations that Devlin's eyes were bloodshot and watery, the odor of alcohol emanating from the car, Devlin's admission to consuming alcohol not long before driving, and the indication of nystagmus in one of Devlin's eyes. Taken

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impairment cues, and he acknowledged their absence here. Thus, the city court's findings more accurately constitute legal conclusions regarding the effects of undisputed facts on the sole issue at hand—whether the officer's observations and totality of the circumstances justified a reasonable suspicion of impairment. As such, they are entitled to no special deference on review. *See State v. Olm*, 223 Ariz. 429, ¶ 7 (App. 2010).

together, these factors collectively gave rise to reasonable suspicion.[3] *See State v. Childress*, 222 Ariz. 334, ¶¶ 4, 23 (App. 2009) (reasonable suspicion to administer field sobriety tests where driver exhibited slight odor of alcohol, red, watery eyes, and admitted to drinking); *State v. Santimore*, 987 A.2d 332, ¶ 11 (Vt. 2009) (reasonable suspicion for DUI investigation based on smell of alcohol and bloodshot, watery eyes); *cf. State v. Gutierrez*, 240 Ariz. 460, ¶ 8 (App. 2016) (reasonable suspicion to stop vehicle for possible impaired driving based on unnecessary braking and crossing fog line).

¶12 Our dissenting colleague mistakenly asserts that our conclusion dispenses with "any evidence whatsoever" of impairment and permits police to detain "every person who attempts to drive after leaving a bar or tavern." But that not only disregards the totality of circumstances in this case and the reasonableness component of a constitutionally compliant investigatory detention, it ignores that Devlin was initially stopped and detained not for consuming alcohol, but for speeding. Only after a routine traffic stop did Officer Kinkade observe signs that Devlin might be impaired.

¶13 The dissent also charges a lack of fidelity to the record, but true fidelity here requires considering *all* the evidence that was introduced, *see State v. O'Meara*, 198 Ariz. 294, ¶ 10 (2000) (court looks at all facts collectively), rather than focusing on isolated factors and potentially innocent explanations for each one in order to argue that "standing alone," they are not enough to establish reasonable suspicion. It is well established that the existence of possible innocent explanations does not obviate a reasonable suspicion based on articulable facts. In *State v. Ramsey*, this court noted:

> [P]olice are not required to rule out the possibility of innocent explanations for a defendant's conduct. [Citations omitted.] The facts constituting reasonable suspicion cannot

[3]Despite the dissent's implication that we engage in a rogue fact-finding mission, each factor noted was testified to in detail by Officer Kinkade, who was neither impeached nor found to lack credibility at the evidentiary hearing, and upon which evidence the respondent judge was entitled to rely, as is this court. In reviewing a suppression decision, we look to the "totality of the circumstances," which means considering all factors adduced at the hearing. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002); *State v. O'Meara*, 198 Ariz. 294, ¶ 10 (2000).

> be viewed in isolation, or subtracted in a piecemeal fashion from the whole, but must be considered in the context of the totality of all the relevant circumstances.

223 Ariz. 480, ¶ 23 (App. 2010) (citing *United States v. Arvizu*, 534 U.S. 266, 277 (2002) and *State v. Fornof*, 218 Ariz. 74, ¶ 7 (App. 2008)); *Turner*, 243 Ariz. 608, ¶ 7 (same).

¶14 Officer Kinkade's observations sufficiently distinguished between innocent behaviors and suspect ones. Indeed, he testified he had conducted the brief single-pass nystagmus test while Devlin was still seated in his car to get a quick indication whether Devlin, as opposed to his passenger, might be under the influence, and if not, to "speed[] [up] the process so I don't have to detain him much longer." *See State v. Evans*, 235 Ariz. 314, ¶¶ 18, 19 (App. 2014) (noting the reasonable suspicion process "does not deal with hard certainties, but with probabilities"). The officer's observations and surrounding circumstances here collectively provided, at the very least, "minimal, objective justification for an investigatory detention," *Teagle*, 217 Ariz. 17, ¶ 25, particularly in light of the standard being "considerably less than proof of wrongdoing by a preponderance of the evidence," *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see O'Meara*, 198 Ariz. 294, ¶ 10 (Appellate court must not "parse out each individual factor, categorize it as potentially innocent, and reject it. Instead, [we] must look at all of the factors, (all of which would have a potentially innocent explanation, or else there would be probable cause), and examine them collectively.").

¶15 The dissent takes special aim in particular at any consideration of the preliminary nystagmus test administered by Officer Kinkade, and finds it "unsettling." But it was clearly another objective factor relied upon by the officer in assessing Devlin's condition, notwithstanding the city court's discrediting it as inadmissible evidence of guilt at trial. The officer had training and experience with the technique, contrary to the dissent's implication, and the rules of evidence generally do not apply at suppression hearings and to an officer's reasonable suspicions based on training, experience, and common sense under field conditions. *See* Ariz. R. Evid. 104(a) (evidence rules not binding in suppression hearings); *United States v. Matlock*, 415 U.S. 164, 172-73 (1974) (rules of evidence "do not operate with full force" at hearings to determine admissibility of evidence); *Hall v. State*, 297 S.W.3d 294, 297 (Tex. Crim. App. 2009) (lower court erred in applying Rule 702 at suppression hearing to determine reliability of evidence providing basis for stopping

defendant). Officer Kinkade testified he was "notic[ing] some signs and symptoms of possible impairment" at the time he employed the technique, and it legitimately contributed to his expert assessment of Devlin's potential impairment while driving. *See Ornelas*, 517 U.S. 690, 699-700 (1996) (police officer "may draw inferences from his own experience" and those inferences should be given due weight by reviewing courts); *Evans*, 237 Ariz. 231, ¶ 8 (same); *see also United States v. Cortez*, 449 U.S. 411, 418 (1981) ("a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person").

¶16 The dissent also contends that because certain indications of intoxication were *not* present, Officer Kinkade only observed signs of alcohol consumption, and not impairment, and therefore lacked reasonable suspicion to conduct any further investigation. But no Arizona statute or case has narrowed reasonable suspicion to such an impracticable standard. Significantly, § 28-1381(A)(2) prohibits driving while impaired "to the slightest degree," and impairment is not always visible. In fact, it may be that a driver has a BAC above the legal limit—at which point impairment is presumed—but does not exhibit *any* symptoms of impairment. *See State v. Superior Court (Blake)*, 149 Ariz. 269, 272 (1986) ("the [horizontal gaze nystagmus] test is especially useful in detecting violations where a driver with BAC over .10 percent is able to pull himself together sufficiently to pass the traditional field sobriety tests and thus avoid arrest and subsequent chemical testing"). To require an officer to ignore confirmed alcohol consumption, significant corporal and contextual indicators, and his own expert assessment of potential impairment in a driver operating a vehicle on a public street, and investigate further only if patent signs of impairment were observed such as slurred speech and confusion, would not only endanger public safety, but would also impose a higher standard than reasonable suspicion. *See State v. Sisco*, 239 Ariz. 532, ¶ 9 (2016) (probable cause leads "a reasonable person to believe that . . . evidence of a crime is present"); *O'Meara*, 198 Ariz. 294, ¶ 10 ("By definition, reasonable suspicion is something short of probable cause.").

¶17 Finally, we note that an officer may have reasonable suspicion that a driver is in violation of § 28-1381(A)(2) even lacking observations of *any* signs of physical impairment entirely. That statute requires only that the defendant drove a vehicle, had an alcohol concentration of .08 or more within two hours of driving, and the concentration resulted from alcohol consumed either before or while driving. § 28-1381(A)(2); *see State ex rel. Montgomery v. Harris*, 234 Ariz. 343, ¶ 21 (2014) (noting that under BAC statute, it "does not matter" whether the driver is impaired); *State v. Mara*, 987 A.2d 939, ¶¶ 7-8 (Vt. 2009) (external manifestations of drunkenness not

required for an officer to have reasonable suspicion of DUI). Devlin's speeding ten miles per hour over the posted limit, the odor of alcohol emanating from the vehicle, his admission that he had been drinking, and the 2:00 a.m. time when many area alcohol-serving establishments had just closed, might arguably suffice to warrant further investigation. But Kinkade had significantly more to go on, including, as noted above, Devlin's watery and bloodshot eyes, and the tell-tale clue from the initial nystagmus indication before being asked to exit his car, all adding up to a totality of circumstances justifying the officer's reasonable suspicion of impairment. As Kinkade testified, although referring more generally to probable cause, "in the field, . . . we take everything into consideration."

¶18 In sum, we agree with the respondent judge that reasonable suspicion supported the officer's briefly extended detention of Devlin to conduct a DUI investigation.[4] *See* A.R.S. § 28-1594; *State v. Nevarez*, 235 Ariz. 129, ¶ 9 (App. 2014) (upon completion of traffic stop mission, officer must let driver continue on his way unless he develops reasonable suspicion that "criminal activity is afoot."). Accordingly, we need not address Devlin's argument that the trial court erroneously relied on *Newell* in reaching its decision. Nor need we address the state's additional argument that the DUI investigation was consensual. *See State v. Causbie*, 241 Ariz. 173, ¶ 27 ("[W]e will affirm the court's ruling if legally correct for any reason.").

[4]Although the dissent characterizes a roadside DUI investigation as "humiliating," asking a driver to exit the vehicle has been deemed "a de minimis" intrusion, *Newell*, 163 Ariz. at 529 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977)); *see State v. Kjolsrud*, 239 Ariz. 319, ¶ 13 (App. 2016), and the short duration of the investigation here, as the superior court noted "seven or eight minutes," served to ameliorate any discomfort and inconvenience, *see Teagle*, 217 Ariz. 17, ¶ 33 (brevity of investigatory detention a factor in assessing its reasonableness and burden on the suspect); *State v. Solano*, 187 Ariz. 512, 516 (App. 1996) (duration of detention a factor in determining whether intrusion is a *Terry* stop or arrest); *see also State v. Jarzab*, 123 Ariz. 308, 311 (1979) (constitutional "reasonableness" of investigatory detention balances extent and burden of the intrusion against legitimate needs of law enforcement and public safety).

Disposition

¶19 Although we accept jurisdiction of Devlin's special-action petition, relief is denied.

E C K E R S T R O M, Judge, dissenting:

¶20 The majority holds that, as to a criminal offense that is distinguished from lawful activity only by a suspect's impairment, an officer may detain a person and investigate without any evidence whatsoever of such impairment.[5] In drawing this extraordinary conclusion, my colleagues overlook that the act of driving after responsibly consuming alcohol is both commonplace and legal in our society. For this reason, an officer must observe some cue of a driver's impairment by alcohol to have reasonable suspicion that a crime may have been committed. Here, after an extensive hearing, the trial judge found that the defendant had exhibited several signs of alcohol consumption but no cues of potential impairment. Because that finding is amply supported by the record before us, I must respectfully dissent.

¶21 The majority maintains that, because a defendant can be convicted of DUI by possessing a BAC of .08 within two hours of driving, an officer "may have reasonable suspicion that a driver is in violation of § 28-1381(A)(2) even lacking observations of *any* signs of physical impairment entirely." *Supra* ¶ 17. But the United States Congress mandated states to enforce the .08 standard as the legal limit in part because "[v]irtually all drivers are substantially impaired at .08 BAC." National Highway Traffic Safety Administration (NHTSA), Report No. DOT HS 809 286, "Final Report: Legislative History of .08 *Per Se* Laws" (July 2001), https://one.nhtsa.gov/people/injury/research/pub/alcohol-laws/08History/1_introduction.htm; *see also* S. Fact Sheet for S.B. 1089, 45th Leg., 1st Reg. Sess. (Ariz. Apr. 23, 2001). By enacting § 28-1381(A)(2) in conformity with that federal mandate, the Arizona legislature provided an alternate evidentiary method for convicting those who drive while impaired by alcohol. It manifestly did not suggest that an unimpaired person could be convicted of DUI. Indeed, as a practical matter, the state cannot charge a driver under that statute without conducting a breath, blood, or urine test

[5]As the majority appears to occasionally overlook, we address here not whether Officer Kinkade had a lawful basis to stop Devlin for speeding or the authority to require Devlin to exit his vehicle pursuant to that stop. Rather, we address whether Kinkade had reasonable suspicion to prolong that stop to conduct a DUI investigation.

revealing a result of .08 or above. *Wozniak v. Galati*, 200 Ariz. 550, ¶ 14 (App. 2001) (Arizona's supreme court has "required that 'regardless of the quality and abundance of other evidence, a person may not be convicted of a violation of [A.R.S. § 28-1381(A)(2)] without chemical analysis of blood, breath or urine showing a proscribed blood alcohol content.'") (alteration in *Wozniak*) (quoting *Blake*, 149 Ariz. at 279). These are tests that officers cannot require without probable cause to believe a defendant has committed a DUI offense. *See* A.R.S. § 28-1388(E) (requiring law enforcement to have "probable cause to believe that a person has violated § 28-1381" for "a sample of blood, urine or other bodily substance [to be] taken from that person"). For this reason, any criminal investigation leading to a test, and thereafter a charge under § 28-1381(A)(2), will necessarily involve an officer identifying some cue of the driver's impairment. *E.g.*, *State v. Quinn*, 218 Ariz. 66, ¶ 7 (App. 2008) (in absence of traffic accident resulting in death or serious physical injury, "statutes which authorize warrantless blood draws from drivers require the existence of probable cause that a driver is impaired before his or her blood may be taken").

¶22 By implicitly holding that officers may detain a driver based on mere evidence of alcohol consumption, the majority renders those who responsibly consume alcohol insecure from humiliating interference with their lives. Persons may now be exposed to investigative detention, upon police contact, whenever they seek to drive home from a social gathering, nightclub, or restaurant after they have consumed a draft of beer or a glass of wine.[6] And, such an application of reasonable suspicion would arguably permit officers to detain for investigation every person who attempts to drive after leaving a bar or tavern—establishments that many persons presumably patronize specifically to consume alcohol. Although our law enforcement officers might well exercise restraint, such broad authority to invade our private affairs is fundamentally at odds with the norms of a free society.

¶23 We should instead apply the reasonable suspicion standard in a fashion that would require officers to distinguish between commonplace innocent behavior and those cues suggesting the possibility of criminal conduct. By insisting that an officer identify at least one cue of impairment before initiating a DUI investigation, the Tucson City

[6]This might plausibly occur, for example, at a DUI checkpoint or when a driver is stopped for a traffic infraction unrelated to poor driving. *See State v. Superior Court*, 143 Ariz. 45, 47-49 (1984) (authorizing DUI checkpoints).

magistrate, Hon. Jeffrey Klotz, articulated a principled and practical standard for making that distinction.

¶24 In assessing whether the trial court correctly determined that the state had failed to show any evidence of impairment, we must demonstrate fidelity to the factual record before us.[7] And, we must assess the hearing testimony with reference to each of the behaviors that, the state claims, provided reasonable suspicion of criminal activity.

¶25 The record does not support the majority's suggestion that Devlin's driving behavior was a cue of impairment. *See supra* ¶¶ 11-12, 17. Devlin had been stopped only for modest speeding on a major uncrowded artery. The arresting officer, a trained and experienced DUI expert, repeatedly conceded that modest speeding, under NHTSA standards, is not a cue of impairment. That testimony was confirmed by Devlin's own expert and by the DUI checklist provided by the Tucson Police Department for its officers in the field. Nor did the state elicit any testimony that the court should consider modest speeding a cue of impairment notwithstanding NHTSA standards. And, nothing in the officer's testimony suggested that he had considered it as a basis of reasonable suspicion to initiate the subsequent DUI investigation. To the contrary, the officer testified that Devlin's other driving—which included an alert response to a left-turn signal, a well-executed left turn, together with a prompt, safe, and correct stop—was flawless.

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[7]Whether a particular behavior is a cue of alcohol impairment, as distinguished from mere evidence of alcohol consumption, is a factual question. It is a factual question that NHTSA has taken pains to scientifically explore and which, on the record before us, counsel explored with two expert witnesses, the officer and the criminologist, in some detail. Those two experts, one called by the state and one by the defense, did not offer fundamentally different opinions as to any of the cues. For this reason, the contrary conclusion my colleagues have implicitly adopted—that the behaviors are actually cues of impairment—finds no support whatsoever in the record before us and constitutes fact-finding beyond the institutional competence of this court. Once the nature and features of the defendant's behavior have been appropriately determined by the trial court, this court has the authority to assess the legal question of whether those behaviors collectively provided reasonable suspicion. The majority's reasoning conflates those two steps.

¶26 Thus, the trial court's finding that Devlin's speeding was not a cue of impairment finds ample support in the record. The majority violates our traditional standard of review in failing to honor that factual conclusion. *See State v. Nissley*, 241 Ariz. 327, ¶ 9 (2017) (appellate court must "defer to the trial court's factual findings if they are supported by the record").

¶27 The majority also fails to honor the magistrate's finding that Devlin's "watery, bloodshot eyes" provided no cause to suspect that Devlin might be impaired by alcohol. The testimony established that: (1) Devlin was arrested at 2:00 a.m. when most persons on a normal sleeping schedule would experience eye fatigue; (2) Devlin did not display a flushed face; and (3) according to unchallenged expert testimony, "you'd expect to see a flushed face if the bloodshot, watery eyes are from ingesting alcohol." Further, at the hearing, the officer acknowledged that eye fatigue could be a cause of the red eyes, and the state asserted only that "the bloodshot, watery eyes" evidenced consumption of alcohol, not impairment from it. In short, the state presented no testimony or argument that the condition of Devlin's eyes was evidence that he was impaired.

¶28 The officer possessed only two other cognizable bases for reasonable suspicion: (1) Devlin's admission that he had consumed alcohol; and (2) the aroma of alcoholic beverages emanating from the passenger compartment of the vehicle. Notably, the experienced DUI-trained officer acknowledged that the latter circumstance demonstrated only alcohol consumption, not impairment. The state presented no testimony or argument otherwise. And while Devlin admitted he had consumed alcohol, he did not admit that it impaired him.

¶29 Finally, the officer testified that he observed a lack of smooth pursuit when he passed a penlight across Devlin's left eye, an action the magistrate aptly characterized as a "partial, quasi-HGN exam." However, the officer conceded that there was no scientific basis to believe that this perfunctory test, of his own devise, produced valid results. Nor did the officer testify that, in his experience, the test yielded valid results. For this reason, the magistrate questioned its evidentiary value and the superior court judge declined to consider it at all. The superior court emphasized that its ruling was "not based in any way" on the "'preliminary' non-standardized HGN test," explaining that, because the test "has apparently never been validated," the superior court "d[id] not believe that such a test has any probative value" and should not be considered.

¶30 For this reason, I find it unsettling that the majority would include this "test" among the factors relevant to determining reasonable suspicion. *Supra* ¶¶ 11, 14-15, 17. And, although our trial courts may relax some evidentiary standards to efficiently conduct suppression hearings, we should not so casually discard evidentiary standards designed to assure reliable testimony on the central factual question of the hearing. *See State v. Bernstein*, 237 Ariz. 226, ¶¶ 14-15 (2015) (purpose of Ariz. R. Evid. 702 is ensuring presentation of reliable, relevant evidence to fact-finder, and even in case of "generally reliable" testing methodology, "omission of a step necessary to obtain valid results or a procedural misstep that plausibly could skew the outcome might justify excluding the results and any opinion based on them").

¶31 Further, even if the test could be considered, we have no basis to disturb the trial court's conclusion that, as conducted under the circumstances here, it was not a credible indicator of impairment. As the magistrate correctly observed, the officer only asserted that the test verified Devlin's consumption of alcohol. The officer never maintained, and the state has never asserted, that Devlin's lack of smooth pursuit suggested impairment.

¶32 On this record, the magistrate reasonably concluded that, although the officer had a fair basis to believe that Devlin had consumed alcohol, *none* of the cues he identified, whether considered individually or collectively, provided any evidence of *impairment* by alcohol. An insufficient basis for reasonable suspicion—that a person has merely consumed alcohol before driving—does not become a sufficient one merely because it has been demonstrated by several evidentiary means.

¶33 In enforcing a distinction between evidence of impairment and evidence of mere consumption, the magistrate was legally correct. Our settled standard for reasonable suspicion instructs that a driver's mere consumption of alcohol cannot be a sufficient ground to compel a DUI investigation. To meet the threshold for reasonable suspicion, an officer "must derive 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Evans*, 237 Ariz. 231, ¶ 8 (quoting *Cortez*, 449 U.S. at 417-18). Put another way, the officer must identify a basis for believing a suspect might have committed a crime, grounded in distinct features of the suspect's behavior, which, in context, logically eliminates most law-abiding members of the public. *Id.* ¶ 10.

¶34 The consumption of alcohol and the operation of a motor vehicle are commonplace behaviors in our society. It is likewise

commonplace for persons to drive a vehicle after consuming alcoholic beverages. Such normal behavior is not a sufficiently particularized basis to reasonably suspect a person has committed a crime.[8] The standard requires reasonable suspicion of "criminal activity." The mere act of driving after consuming alcohol does not itself suggest criminal activity. *See id.* ¶ 11 (wholly lawful conduct "might justify the suspicion that criminal activity was afoot" only in "an unusual case" (quoting *Reid*, 448 U.S. at 441).

¶35 The majority chides the dissent for "focusing on isolated factors" and the "possible innocent explanations" for them. *Supra* ¶ 13. But one cannot assess the cumulative weight of such factors without evaluating each item on the scale. Here, the trial court found the evidence of unlawful behavior insufficient not because each factor was subject to an innocent explanation, but rather because none of the factors suggested an inculpatory one. The majority fails to explain how five factors, none of which shows impairment by alcohol, can collectively raise suspicion of such impairment.[9]

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[8] Although evidence of alcohol consumption after driving cannot alone provide evidence of reasonable suspicion, this does not render such evidence irrelevant in assessing reasonable suspicion. One cannot commit DUI by alcohol consumption without consuming alcohol and driving. Such evidence is therefore relevant but not alone a sufficient basis for establishing reasonable suspicion.

[9] Citing *State v. Childress*, the majority suggests that we have previously held that watery bloodshot eyes, slight aroma of alcohol, and admission to drinking together constitute reasonable suspicion to prolong a stop for field sobriety testing. *Supra* ¶ 11. But that question was not squarely presented to the court and it did not so hold. Rather, the court held that once one officer conveyed his suspicion to the second officer, that provided reasonable cause for the latter to approach the defendant's vehicle to inquire about whether he had been drinking. *Childress*, 222 Ariz. 334, ¶ 23. Once the officer began to approach, Childress spontaneously stepped outside of his vehicle, admitted to driving under a suspended license, and agreed to undergo field sobriety testing. *Id.* Further, that case was decided before the United States Supreme Court issued its opinion in *Rodriguez v. United States*, which held for the first time that officers may not prolong a traffic stop to conduct further investigation in the absence of reasonable

¶36 Without question, the state has a compelling law enforcement interest in removing impaired drivers from our streets and highways. *See* Press Release, NHTSA, NHTSA to Motorists: Drive Sober or Get Pulled Over (Dec. 20, 2019), https:/www.nhtsa.gov/press-releases/drive-sober-or-get-pulled-over-2019 (more than 10,000 drunk-driving-related deaths per year in United States). But the proper enforcement of settled standards for reasonable suspicion would not significantly hamper those efforts. Evidence of a driver's alcohol consumption coupled with *any observation showing impairment* would distinguish the level of cause supporting reasonable suspicion from that provided here. Officers are trained to make such observations. As the record before us demonstrates, most defects in driving, even subtle ones, are considered potential cues of impairment.[10] And, as here, once a driver is stopped for any reason, our officers are trained to identify a host of non-driving cues of impairment.[11] The DUI investigation form provided by the Tucson Police Department for its officers itemizes twenty-four cues of impairment: cues that repeat themselves so frequently they appear on a checklist. Because our laws render driving while impaired "to the slightest degree" a crime, § 28-1381(A)(1), any cue that shows slight impairment would provide reasonable suspicion. Thus, the correct application of our law of reasonable suspicion—so as to require some evidence of impairment—is far from "impracticable" in the DUI context. *Supra* ¶ 16. To the contrary, our settled

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suspicion the defendant has committed another offense. 575 U.S. 348, 355 (2015).

[10] Here, the officer's testimony suggested that any hesitation by Devlin in responding to the left-turn signal, any deviation from a correct lane in turning left, or any hesitation in pulling over would have been noted as a cue of potential impairment. Moreover, if in other cases the state were to present credible testimony that modest speeding under the circumstances there would suggest impairment, a court might find accordingly.

[11] The officer suggested that any defects in Devlin's responsiveness or allocution, difficulty locating his driver's license, or fumbling with those documents would have been identified as a cue of potential impairment. Indeed, if in another case, the state were to present credible testimony that the aroma of alcohol correlates with impairment, as distinguished from mere consumption, a trial court could come to a different conclusion about whether reasonable suspicion had been established.

jurisprudence and the testimony in the record before us together suggest that securing reasonable suspicion based on some evidence of impairment is already the intended practice.

¶37 I would hold only that evidence of a driver's modest consumption of alcohol,[12] standing alone, is an insufficient basis to prolong a traffic stop to conduct a DUI investigation.[13] Because, on the record presented here, the trial court reasonably found that the officer lacked any cause to believe Devlin might be impaired by his alcohol consumption, I would accept jurisdiction and grant relief.

[12]If a driver admitted that he or she had consumed a specific quantity of alcohol sufficient to cause slight impairment, that admission would likewise elevate the level of reasonable suspicion from that provided here.

[13]Citing *Newell v. Town of Oro Valley*, 163 Ariz. 527 (App. 1990), the state has contended that the officer needed no cause to order Devlin out of his car because officers are entitled to do so for officer safety reasons. But that case and its holding do not resolve the legal question here: whether the officer had reasonable suspicion to prolong a traffic stop to conduct a DUI investigation.