

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN SCOTT NEWTON,

Defendant-Appellee.

UNPUBLISHED
November 6, 2007

No. 273318
Oakland Circuit Court
LC No. 2006-209334-FH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion to quash and dismissing the case. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with operation of a motor vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1) and (9)(c), and operating a motor vehicle while license suspended, second offense, MCL 257.904(3)(b).

At the preliminary examination, Michelle Newton, defendant's former wife, testified that at approximately 6:30 a.m. on January 17, 2006, defendant telephoned her, told her he had been "picked up" for drinking, asked her to retrieve his belongings from the police department, and asked her to tell the police that she had been driving the car. Newton told the police that she had been driving, but that when she was questioned, she recanted the statement. Newton stated that on January 16, 2006, she took the car, which was titled in her name, to defendant's place of employment.

Officer Bowen testified that at approximately 4:40 a.m. on January 17, 2006, he responded to an apartment complex where a person was knocking on a window. Bowen saw a car sitting on some rocks. He encountered defendant, who stated that he had been in an accident. Defendant exhibited signs of being intoxicated, and gave contradictory accounts of how he had arrived at the location. Defendant maintained that someone had rear-ended his car while he was sitting in it; however, Bowen stated that defendant's car showed no signs of having been rear-ended. Bowen examined the car, and found that the engine was still warm to the touch. Defendant performed poorly on several field sobriety tests, and Bowen concluded that defendant was too intoxicated to drive.

The parties stipulated that a blood test revealed that defendant had a blood alcohol content of .16%.

The district court found that sufficient circumstantial evidence existed to conclude that defendant was driving the car, and that probable cause existed to find that defendant drove the car while he was intoxicated, and consequently bound defendant over for trial as charged. In the circuit court, defendant moved to quash the information, arguing that the district court abused its discretion by binding him over for trial. The circuit court granted defendant's motion, stating that while "[c]ircumstantial evidence and the reasonable inferences drawn therefrom certainly point to the defendant having driven the crashed station wagon just prior to Officer Bowen's arrival[.]" it did "not think there is enough that it's going to survive if it were to go to the Court of Appeals, as a very practical matter."

The purpose of a preliminary examination is to determine if probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Fiedler*, 194 Mich App 682, 689; 487 NW2d 831 (1992); MCL 766.13; MCR 6.110(E). Probable cause is defined as evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

During a preliminary examination, the prosecutor is not required to prove the defendant's guilt beyond a reasonable doubt. However, the prosecutor must produce evidence of each element of the crime charged, or evidence from which the elements can be inferred. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Circumstantial evidence and reasonable inferences drawn from the evidence can be sufficient. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003). A magistrate should not discharge a defendant if the evidence conflicts or raises a reasonable doubt of guilt. Such questions should be left for the jury to resolve. *People v Drake*, 246 Mich App 637, 640; 633 NW2d 469 (2001). The decision to discharge or bind over a defendant is reviewed for an abuse of discretion. *People v Vasher*, 167 Mich App 452, 456; 423 NW2d 40 (1988). The trial court may not substitute its judgment for that of the district court. *Drake, supra* at 639-640. The trial court's decision that the district court abused or did not abuse its discretion is reviewed de novo. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

If a defendant operates a vehicle while under the influence of intoxicating liquor, and the offense occurred after two or more prior convictions for the same offense, the defendant is guilty of a felony. MCL 257.625(1) and (9)(c).

Plaintiff argues that the district court did not abuse its discretion by binding defendant over for trial, and that the circuit court erred by granting defendant's motion to quash. We agree.

We reverse the circuit court's order granting defendant's motion to quash, and remand this case for reinstatement of the charges against defendant. A person is said to be operating a motor vehicle for purposes of the OUIL statute if he has "put the vehicle in motion, or in a position posing a significant risk of collision" *People v Wood*, 450 Mich 399, 405; 538 NW2d 351 (1995). However, a person who was not operating a vehicle at the moment police made contact may still be charged with OUIL if circumstantial evidence establishes that the person was operating the vehicle while intoxicated shortly before the police arrived. *People v*

Solmonson, 261 Mich App 657, 662; 683 NW2d 761 (2004); see also *People v Stephen*, 262 Mich App 213, 219-220; 685 NW2d 309 (2004). In this case, the circuit court found, correctly, that plaintiff presented circumstantial evidence that defendant was operating the car shortly before Bowen arrived on the scene. This evidence, along with the undisputed evidence that defendant had a blood alcohol content of .16%, supported a conclusion that probable cause existed to believe that defendant drove the car while intoxicated.

The fact that contradictory evidence, i.e., that defendant denied driving the car and that the car keys were not found on defendant's person, existed did not warrant dismissal of the charges. Plaintiff was not required to negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Moreover, conflicts in the evidence are to be resolved by a jury, and the circuit court should not substitute its judgment for that of the district court. *Drake, supra* at 239-240. The circuit court erred by concluding that the district court abused its discretion by binding defendant over for trial as charged. *Orzame, supra*.

Reversed and remanded for reinstatement of the charges. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood