

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADAM CHRISTOPHER ROBE,

Defendant-Appellant.

UNPUBLISHED

March 18, 2021

No. 355005

Jackson Circuit Court

LC No. 19-002895-FH

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted¹ the trial court's order denying his motion to suppress evidence of his preliminary breath test (PBT) results. We reverse.

I. BACKGROUND

Defendant was involved in a two-car accident after the driver of the other vehicle ran a red light. The record reveals that the other driver was at fault. When the officers arrived on the scene they focused on assisting the driver of the other vehicle who had sustained serious injuries. Afterwards, an officer spoke with defendant for about three minutes before asking him to take a PBT. Defendant consented to the test, which indicated a 0.114 blood alcohol content (BAC). Field sobriety tests were not performed, and on the basis of the PBT results the officer arrested defendant and obtained a search warrant for a blood draw. The blood draw revealed a 0.134 BAC.

After he was bound over to the circuit court, defendant filed a motion to suppress the PBT results on the ground that the PBT was not administered in accordance with the administrative rules. Specifically, defendant contended that the officer administering the PBT failed to observe him for 15 minutes before administering the PBT. Defendant explained that if the PBT results were suppressed, he would then bring a motion challenging whether there was probable cause for

¹ *People v Robe*, unpublished order of the Court of Appeals, entered November 6, 2020 (Docket No. 355005).

his arrest. The prosecutor did not file a written response but argued at the hearing that the motion should be denied because the PBT results would not be admitted at trial. Defendant voluntarily submitted to the PBT, and the 15-minute observation period did not have to be 15 uninterrupted minutes. The trial court took the matter under advisement and later issued an oral ruling from the bench denying defendant's motion. The court assumed that the administrative rule had been violated, but determined that under the facts of this case the violation did not warrant suppressing the PBT results.

II. ANALYSIS

Defendant argues that the trial court erred by failing to suppress the PBT results. We agree.²

“For an arrest to be lawful, the police officer making the arrest must have probable cause.” *People v Vandenberg*, 307 Mich App 57, 69; 859 NW2d 229 (2014). See also *People v Lyon*, 227 Mich App 599, 611; 577 NW2d 124 (1998) (“The constitutional validity of an arrest depends on whether probable cause to arrest existed at the moment the arrest was made by the officer.”).

The PBT administered to defendant indicated a breath-alcohol content of 0.114 percent, which is sufficient to establish probable cause to believe that he was operating a motor vehicle while intoxicated. MCL 257.625(1)(b) (Operating while intoxicated means the person has an alcohol content of 0.08 grams or more per 210 liters of breath.). The question is whether defendant's PBT can be considered when determining whether there was probable cause to arrest since it was not administered in compliance with Mich Admin Code R 325.2655. That provision states in pertinent part:

(2) A procedure that is used in conjunction with preliminary breath alcohol analysis must be approved by the department and shall be in compliance with all of the following provisions:

* * *

(b) A person may be administered a preliminary breath alcohol analysis on a preliminary breath alcohol test instrument only after the operator determines that the person has not smoked, regurgitated, or placed anything in his or her mouth for at least 15 minutes. [See also, *People v Mullen*, 282 Mich App 14, 23; 762 NW2d 170 (2008) (“A PBT should be administered only after the defendant's mouth has been clear of foreign substances for 15 minutes.”).]

² We review a trial court's findings of fact associated with a motion to suppress evidence for clear error, but we review de novo both questions of law relevant to the suppression motion and the judge's ultimate decision. See *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003); *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008).

“The purpose of this rule is to ensure the accuracy of the test results.” *Mullen*, 282 Mich App at 23.

There does not appear to be any dispute that the officer who administered the PBT did not comply with this administrative rule. The officers who arrived on the scene began assisting the other driver. It follows that defendant went unobserved during this period. An officer then observed defendant for approximately three minutes before administering the PBT. Thus, the officer who conducted the PBT did not observe defendant for 15 minutes, either continuously or collectively. Nor did the officer ask defendant questions to determine whether he smoked, regurgitated, or placed anything in his mouth for at least 15 minutes.

Defendant relies on two cases where the administrative rule requiring a 15-minute observation period before administering a Breathalyzer test was not complied with: *People v Boughner*, 209 Mich App 397; 531 NW2d 746 (1995) and *People v Wujkowski*, 230 Mich App 181; 583 NW2d 257 (1998). Because the administrative rule governing Breathalyzer tests³ is similar to the one controlling the administration of PBTs, we view *Boughner* and *Wujkowski* as instructive to the resolution of the question presented in this appeal.

In *Boughner*, 209 Mich App at 398-400, this Court held that the failure to comply with the 15-minute observation rule sufficiently undermined the accuracy of the defendant’s Breathalyzer test results to warrant the reversal of his plea-based conviction. We reasoned that even though there was video of approximately 35 minutes before the Breathalyzer was administered the defendant was only observed by the operator of the Breathalyzer for no more than eight minutes. *Id.* at 399. Moreover, the operator did not continuously observe the defendant for those eight minutes, and the defendant’s hand was either on his face, or in his mouth. *Id.* at 399-400. We concluded that it was impossible to tell whether defendant placed something in his mouth during these times, and because of the questions that arose from a review of the video, the accuracy of the Breathalyzer results was put into question. *Id.* at 400.

In *Wujkowski*, 230 Mich App at 189, we held that violation of the 15-minute observation rule did not warrant suppression of the Breathalyzer test results because there was only a de minimis violation of the regulation. In that case, the operator who conducted the Breathalyzer test observed the defendant from 5:05 a.m. to 5:23 a.m., i.e., for more than 15 minutes, before administering the first test. *Id.* at 185. The alleged variance from the rule was a six second period during which the operator walked away from the defendant to check the machine and during that time there was another officer present when the operator left to check the machine. *Id.* at 185-186. We concluded that “the momentary time that the officer did not observe defendant was so minimal that the test results cannot be assumed to be inaccurate, and there was no allegation that defendant placed anything in his mouth or regurgitated.” *Id.* at 186. Accordingly, we held that “suppression of the Breathalyzer test results is not an appropriate remedy in this case because any violation of

³ The administrative rule governs the administration of “evidential breath alcohol test instrument[s],” Mich Admin Code R 325.2655(1)(e), and the breath test at issue in *Boughner* and *Wujkowski* was the Breathalyzer.

the administrative rule was harmless.” *Id.* at 187. As we stated in the opinion, the facts of the case were materially distinguishable from those in *Boughner*. *Id.* at 187-188.

This case is far closer to *Boughner* than it is *Wujkowski*. Unlike *Wujkowski*, there was much longer than six seconds of nonobservance. Rather, similar to *Boughner*, the officer who administered the test only observed defendant for three minutes, and there is no evidence that anyone else observed defendant for the additional 12 minutes before the test was administered. Further, defendant was left unobserved for a substantial period of time following the accident. Considering the amount of time defendant went unobserved, along with the fact that a significant portion of the 15-minute period remained, the violation of the administrative rule was significant and calls into question the accuracy of the PBT. Accordingly, the trial court erred by denying defendant’s motion to suppress.

Defendant requests that we remand so that he may file a motion challenging whether there was probable cause for his arrest absent the PBT results. The prosecution maintains that defendant’s arrest and the search warrant for the blood draw were supported by probable cause even without the PBT results. The trial court did not address this issue, however, and we do not view it as properly before us considering that defendant’s motion only sought to suppress the PBT results. On remand, defendant may file a motion to determine whether there was probable cause to arrest him for operating a motor vehicle while intoxicated.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola