STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2011
v	No. 296893 Wayne Circuit Court
PETER WALTER MACUGA II, Defendant-Appellant.	LC No. 09-000846-FH

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of operating a vehicle while intoxicated (OWI), third offense. MCL 257.625(1), (9)(c). He was sentenced to 30 days' jail, a $4,000 fine, and two years' probation. We affirm.

The conviction arose after police officers stopped defendant's car in downtown Detroit on the evening of June 27, 2008. Detroit Police Officers Ronald Lach and Raytheon Martin observed defendant driving northbound in a southbound lane of traffic and running a red light. They stopped defendant's car and approached him. Officer Lach testified that he smelled a heavy odor of intoxicants on defendant's breath. Upon exiting the car, defendant was unsteady on his feet, his speech was slurred, and his eyes were bloodshot. Defendant ultimately admitted having a few alcoholic drinks and agreed to submit to two preliminary breath tests (PBTs), both of which revealed a breath alcohol content over the legal limit. The officers arrested defendant and he agreed to take a DataMaster breathalyzer test at the local Michigan State Police post. Once at the post, however, defendant was unable to complete the test after four attempts because he failed to seal his lips to the machine or did not exhale enough breath for the machine to register. He then agreed to submit to a blood alcohol test at Detroit Receiving Hospital. But after the officers transported him to the hospital, he refused the test and demanded that they secure a search warrant for the test. Officer Lach prepared an affidavit in application for a warrant and submitted it to a magistrate, who found the affidavit sufficient and issued a warrant for the blood test. Accordingly, defendant's blood was drawn and testing later revealed a blood alcohol level of 0.21 grams per 100 milliliters of blood.

The prosecutor charged defendant with OWI pursuant to MCL 257.625(1), which prohibits driving while under the influence of alcohol or while having an alcohol content of 0.08 grams or more per 210 liters of breath or per 100 milliliters of blood. The prosecutor also cited defendant's three prior convictions for OWI occurring on November 2, 1988, October 17, 1990, and July 7, 2004. Accordingly, the prosecutor provided notice that, upon conviction, defendant would be subject to an enhanced felony sentence under MCL 257.625(9), for multiple OWI convictions.

Following a bench trial, the trial judge found defendant guilty as charged. The court was not persuaded by the defense argument that defendant was legally insane at the time of the offense, MCL 768.21a, as a result of a depressive episode, cognitive deficits, and defendant's alleged inability to abstain from alcohol due to his depressive illness. It sentenced defendant as a felon upon proof of his prior OWI convictions.

On appeal, defendant challenges the trial court's order denying his motion for a new trial. We review a trial court's denial of a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217.

Defendant primarily argues that the trial court erred when it declined to suppress the results of the blood test; he claims that a new trial is justified for this reason. He argues that Officer Lach intentionally included a falsehood in his affidavit in support of the warrant, and therefore, the warrant was invalid. We review a trial court's ultimate decision on a motion to suppress evidence de novo; we review any underlying findings of fact for clear error. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004) (citations omitted); MCR 2.613(C). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996).

"A magistrate may issue a search warrant only when it is supported by probable cause." *People v Ulman (After Remand)*, 244 Mich App 500, 509; 625 NW2d 429 (2001), citing MCL 780.651(1). "'Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched.'" *Id*., quoting *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992). "[A]ppellate scrutiny of a magistrate's decision [to issue a warrant] involves neither de novo review nor application of an abuse of discretion standard." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Rather, a reviewing court "ask[s] only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Id*.

"'The magistrate's findings of reasonable or probable cause shall be based on all the facts related within the affidavit made before him or her.'" *Ulman*, 244 Mich App at 509, quoting MCL 780.653. "The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of

probable cause." *Id*. at 510. But the "invalid portions of an affidavit may be severed, and the validity of the resultant warrant may be tested by the information remaining in the affidavit." *Id*.

Here, the affidavit executed by Officer Lach recited various reasons to believe that defendant operated a motor vehicle while intoxicated and that the requested blood sample would provide evidence of this offense. The affidavit notes that defendant was administered two PBTs with results of 0.185 grams of alcohol per 210 liters of breath, which was well over the legal limit of less than 0.08 grams, MCL 257.625(1)(b). It also notes Officer Lach's observations that defendant had an "odor of intoxicants" on his breath, person and vehicle, exhibited slurred speech, watery eyes, or a flushed face, had difficulty with coordination, and was unsteady on his feet. It further notes that defendant admitted consuming "a few drinks" and was observed going northbound in a southbound traffic lane and running a traffic light. Finally, Officer Lach checked a box on the affidavit indicating that defendant "was asked to perform sobriety/dexterity tests" and he "refused."

Defendant cites this last assertion as a falsehood stated knowingly and intentionally or with reckless disregard for the truth as evidenced by Officer Lach's contrary testimony at trial. At trial, Officer Lach initially agreed that "it's not as if [defendant] refused" to perform the tests. Rather, defendant was so intoxicated he was unable to complete them. Officer Lach testified that for five or ten minutes, he had "tried to perform some field sobriety [tests]," but defendant was "so intoxicated he couldn't follow directions." For example, Officer Lach stated: "[Defendant] kept asking me to repeat myself when I was giving him instructions and the whole time he couldn't even stand up." But when confronted by defense counsel about his statement in the affidavit that defendant refused the tests, Officer Lach concluded that his trial testimony was mistaken, saying: "If I put that in the warrant request – the search warrant, then he did refuse." Later, in response to additional questioning by the prosecutor, Officer Lach asserted: "there was one test that I tried to do" – "the nine foot walk and turn, heel to toe." But defendant "just shook his head and – shook his head, then waved his hand at me and he says, 'I'm not taking any test.'"

The trial court opined that Officer Lach "testified two separate and distinct ways," and gave "completely inconsistent testimony." It concluded that Officer Lach was "more than negligen[t]" and "may have been a little reckless when he completed the search warrant affidavit both because of the circumstances surrounding what was going on and the animosity of his testimony [at trial]." Accordingly, the court excluded the alleged refusal from his consideration of the affidavit in order to determine whether the untainted portions of the affidavit were nonetheless sufficient to support the magistrate's finding of probable cause. The court ruled that "[m]ost of [the other] assertions standing alone – let alone in combination, . . . provide a sufficient basis for probable cause." "[T]aken together there can be no question that there was probable cause to issue a warrant to secure the blood alcohol sample . . . ." Accordingly, the court held that the warrant was valid and suppression of the blood test was not justified.

We find no error in the court's ruling and hold that it did not abuse its discretion when it denied defendant's motion for a new trial on this basis. The valid portions of Officer Lach's affidavit provided a substantial basis for the magistrate to conclude there was a fair probability that the blood test would provide evidence of OWI. See *Russo*, 439 Mich at 603-604. The affidavit described not only defendant's intoxicated odor, appearance, and behavior, but his two PBT readings of 0.185. The affidavit also left no question that defendant was operating a vehicle

and committed at least two traffic infractions just before he was pulled over. Further, because it was proper for the trial court to evaluate the affidavit by severing the untainted portions, see *Ulman*, 244 Mich App at 510, it ultimately does not matter whether Officer Lach recklessly or knowingly and intentionally included a falsehood in the affidavit.[1]

Defendant also argues that a new trial was required because the prosecutor failed to provide evidence of defendant's prior OWI convictions at trial. Defendant did not identify this issue in his statement of the questions presented on appeal and, therefore, has not properly presented it for review. See MCR 7.212(C)(5); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Further, defendant provides no authority for this position beyond the text of one technically inapplicable statute, MCL 257.625(7)(a)(*ii*); he cites no case to refute the prosecutor's and trial court's reliance on *People v Weatherholt*, 214 Mich App 507; 543 NW2d 34 (1995). A defendant cannot simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims." [*People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).] We briefly address this meritless issue, however, given that the prosecutor discusses it and the trial court expressly decided it against defendant. See, e.g., *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002) (noting that this Court may overlook preservation requirements under various circumstances including when "the issue involves a question of law and the facts necessary for its resolution have been presented").

The trial court correctly held that the prosecutor was not required to provide evidence of defendant's prior OWI convictions at trial. Rather, in order to "seek an enhanced sentence . . . based upon the defendant having 1 or more prior convictions," the prosecutor was required to "include on the complaint and information . . . a statement listing the defendant's prior convictions." MCL 257.625(15). Then, the prosecutor must "establish[] *at sentencing*" each prior conviction using one or more types of documentation, including a "copy of the defendant's driving record" or "[i]nformation contained in a presentence report." MCL 257.625(17)(e), (f) (emphasis added). *Weatherholt*, 214 Mich App at 512, thus held that the subsections of MCL 257.625 relevant to habitual OWI offenses "establish only a sentence enhancement scheme"; therefore, a "defendant is not entitled to a jury trial on the issue of his prior convictions."[2]

Here, there is no dispute that the prosecution included "a statement listing the defendant's prior convictions" on the felony information, as required by MCL 257.625(15), and established the prior convictions at sentencing by presenting defendant's certified driving record and a presentence report containing the uncontested information, as required by MCL 257.625(17).

---

[1] The prosecutor argues that the affidavit did not contain a falsehood. Rather, Officer Lach simply initially misspoke at trial when he recalled that defendant agreed or attempted to perform the sobriety tests.

[2] The Michigan Supreme Court favorably cited *Weatherholt* for this proposition in *People v Reichenbach*, 459 Mich 109, 127 n 19; 587 NW2d 1 (1998), noting that in the OWI context, *Weatherholt* "correctly observed" that "prior convictions are not elements of the offense."

Accordingly, the trial court properly denied defendant's motion for new trial on the basis of this issue; the prosecutor was not required to prove defendant's prior convictions at trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering