IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. VANSCOYK

STATE OF NEBRASKA, APPELLEE,
V.
TIMOTHY P. VANSCOYK, APPELLANT.

Filed December 18, 2012. No. A-12-024.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Timothy P. Vanscoyk appeals a judgment and sentence of the district court for Sarpy County, Nebraska, convicting him of driving under the influence of alcohol (DUI), fourth offense, and sentencing him to 3 to 6 years in the Nebraska Department of Correctional Services. Vanscoyk challenges his conviction and sentence, as well as the order overruling his motion to suppress. We find no merit to Vanscoyk's assertions, and we affirm.

BACKGROUND

In April 2010, an employee of a fast-food restaurant called the Bellevue Police Department around 10 p.m. to report that the driver of a maroon pickup truck was intoxicated. Officer Matthew Kowalewski and an Officer Miller responded to the call within minutes. They positioned their cruiser across from the fast-food restaurant and began observing the only maroon pickup in the area. About 5 minutes later, the pickup drove over a curbed grass median for 10 feet and then turned onto a street. The officers immediately followed, activating the

cruiser's lights and sirens. The driver did not yield, but eventually came to a stop at a trailer park, which was later determined to be Vanscoyk's residence.

Officer Kowalewski frisked the individual he saw exit the driver's side of the pickup and noticed a strong odor of alcohol. After the individual refused to take field sobriety tests, the officers transported him to the Sarpy County jail, where he submitted to a breath test. The breath test revealed a blood alcohol content of .185.

The Sarpy County Attorney charged Vanscoyk with DUI, ".15 or over, 5th or subsequent offense." Vanscoyk filed a motion to suppress, alleging the police officers had no grounds to initiate a traffic stop or to arrest him.

MOTION TO SUPPRESS

Officer Kowalewski testified consistently with the facts stated above at the motion to suppress hearing. He stated that after he observed the pickup drive over the median, he suspected the driver of careless driving or criminal mischief. At that point, he activated the cruiser's lights and sirens and the cruiser camera began videotaping. The officers followed directly behind the pickup and never lost visual contact. They did not observe the pickup violate any Nebraska Rules of the Road other than failing to yield to the cruiser's lights and sirens.

Officer Kowalewski testified that after the pickup stopped, he ordered the driver out of the pickup and frisked him to check for weapons. He noticed the driver's breath smelled like alcohol. He later identified the driver as "Timothy P. Vanscoyk."

Officer Kowalewski asked Vanscoyk to submit to field sobriety tests, but he tensed up and refused to move. The officers then carried him to the front of the cruiser and handcuffed him.

The officers took Vanscoyk to the Sarpy County jail to conduct field sobriety tests in a closed environment. Vanscoyk continued to refuse field sobriety tests, but eventually submitted to a breath test. According to Officer Kowalewski, he administered the breath test using a DataMaster machine because of the call from the employee of the fast-food restaurant, his observation that Vanscoyk drove over a curb, Vanscoyk's demeanor at the time of the stop, the smell of alcohol on Vanscoyk's breath, and his refusal to take a field sobriety test. The parties stipulated that the DataMaster machine properly registered Vanscoyk's blood alcohol content at .183.

The trial court found that the officers had grounds to initiate a traffic stop because they observed Vanscoyk drive carelessly, a violation of Neb. Rev. Stat. § 60-6,212 (Reissue 2010). The trial court also found that the officers had probable cause to arrest Vanscoyk because they received a citizen's complaint and smelled alcohol coming from his person.

TRIAL

At trial, Officer Kowalewski testified consistently with his testimony at the motion to suppress hearing except that at trial, he testified he did not order Vanscoyk out of his pickup after it stopped. Officer Kowalewski said that he had already parked the cruiser and had begun to exit when the pickup stopped and Vanscoyk exited. He said that he maintained visual contact with the driver's side of the pickup.

Officer Miller also testified at trial. He stated that he could not see the driver's side of the pickup, but that he maintained visual contact with the passenger's side. Officer Miller testified that he did not see anyone exit from the passenger's side of the pickup.

The only other passenger in the pickup, Daniel Ertz, also testified. He denied that Vanscoyk was the driver of the pickup. According to Ertz, he was at Vanscoyk's residence on the date of the incident, along with Vanscoyk and another individual named "Juan." Ertz wanted to go back to his hotel room, and Juan offered to drive. According to Ertz, he and Juan used the drive-through lane at the fast-food restaurant but were unable to purchase food because Ertz could not find his credit card. Ertz and Juan returned to Vanscoyk's residence to search for it, at which time Ertz saw a police car following them. Ertz confirmed that they did not pull over. Ertz testified that when they arrived at Vanscoyk's, Juan exited the pickup and Vanscoyk came out of a shed and walked toward the front of the pickup. Ertz has not since seen Juan.

Vanscoyk testified that on the date of the incident, both Ertz and Juan were at his residence. According to Vanscoyk, Juan wanted to go to a grocery store and offered to take Ertz to his hotel. Vanscoyk said he stayed home and was putting away tools behind the shed when he heard police sirens. After seeing Juan exit the pickup, Vanscoyk headed toward the officer in an attempt to defuse the situation. Vanscoyk advised the officer that he was not the driver of the pickup, but within a matter of seconds, the officer threw him against the hood of the pickup. He did not recall being asked to take field sobriety tests.

The trial court found Vanscoyk guilty of DUI, .15 or over. Following an enhancement hearing, the defendant was convicted of DUI, ".15 or over, 4th offense," which included a 2000 Iowa DUI conviction. Vanscoyk objected to the court's considering the 2000 conviction on the basis that the evidence failed to show he was properly advised and waived his rights as we detail later in the analysis section. The court overruled the objection, sentenced him to a prison term of 3 to 6 years, and fined him $600.

ASSIGNMENTS OF ERROR

Vanscoyk argues that the trial court erred in (1) overruling his motion to suppress, (2) finding him guilty beyond a reasonable doubt, (3) finding that his 2000 Iowa DUI conviction was a valid prior conviction, and (4) imposing an excessive sentence.

ANALYSIS

MOTION TO SUPPRESS

An appellate court reviews a trial court's findings of fact for clear error; it reviews findings of law de novo. See, *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995). In determining whether a trial court properly overruled a motion to suppress, an appellate court considers all evidence from the trial and hearings on a motion to suppress. *State v. White*, 15 Neb. App. 486, 732 N.W.2d 677 (2007). An appellate court does not reweigh the evidence, but recognizes the trial court as the finder of fact. *Id*. The ultimate determination of whether an officer had reasonable suspicion to conduct an investigatory stop is a question of law that an appellate court reviews de novo, but the facts supporting the decision are reviewed for clear error. *Id*.

Vanscoyk argues that the trial court erred in overruling his motion to suppress. Specifically, Vanscoyk argues that the trial court erred in finding that Officer Kowalewski had proper grounds to initiate the traffic stop and the arrest. Vanscoyk properly preserved his objection at trial.

The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect citizens against unreasonable seizures by police officers. Police-citizen encounters fall into three categories, and each requires a different level of justification.

> "'The first tier of police-citizen encounters involves no restraint of the liberty of the citizen, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. . . . The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a "seizure" sufficient to invoke fourth amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. . . . The third type of police-citizen encounters, arrests, [is] characterized by highly intrusive or lengthy search or detention. The fourth amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.'"

State v. Hisley, 15 Neb. App. 100, 105, 723 N.W.2d 99, 106 (2006).

Vanscoyk challenges the legality of both the investigatory stop and the arrest.

INVESTIGATORY STOP

A police officer may initiate an investigatory stop if he can articulate facts to support a reasonable suspicion that the person he seeks to stop is, was, or is about to be engaged in criminal activity. *State v. White*, *supra*. Reasonable suspicion requires some minimal level of objective justification for detention. *Id.*

In this instance, the police officers had objective justification to reasonably suspect Vanscoyk was guilty of careless driving. Careless driving violates § 60-6,212. Section 60-6,212 does not apply to driving on private property unless the private property is open to public use. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

An officer may, however, stop a vehicle after observing careless driving on private property if he observes a driver engage in suspicious and dangerous driving behavior and then watches the driver enter onto a public road. *Id.* In *Garcia*, the Nebraska Supreme Court found that a police officer had reasonable suspicion to stop a driver for careless driving after observing him drive into a pole in a private parking lot and then enter onto a public roadway. The *Garcia* court reasoned that even if the driver did not commit a crime while driving on the private lot, "an officer observing this behavior could conclude that the driver remained thus impaired when he sped out from the lot and onto a public road." 281 Neb. at 7, 792 N.W.2d at 888.

In this case, Officer Kowalewski received a telephone call from a citizen-informant alerting him to the possibility that Vanscoyk was driving while he was under the influence of alcohol. He then observed Vanscoyk drive his pickup over a grass median for 10 feet and enter a public roadway from an inappropriate location. Officer Kowalewski testified that the fast-food restaurant was open to the public. Even if the vicinity was not open to the public, Officer

Kowalewski would have been justified in initiating a traffic stop because he observed dangerous driving and then saw the driver enter a public roadway. The facts in this case are analogous to the facts in *Garcia* where officers had reasonable suspicion to initiate a traffic stop after observing a driver drive into a pole in a private parking lot and then enter a public road.

The totality of the circumstances in this case shows articulable facts support the police officer's reasonable suspicion that a crime had been, was, or was about to be committed. The trial court did not abuse its discretion in overruling Vanscoyk's motion to suppress on the ground that the police officers lacked reasonable suspicion to initiate a traffic stop.

PROBABLE CAUSE FOR ARREST

Vanscoyk also argues that the trial court should have sustained his motion to suppress because Officer Kowalewski did not have probable cause to arrest him. He asserts Officer Kowalewski arrested him based on a telephone call from an anonymous caller and the odor of alcohol coming from his person, which he argues is insufficient evidence to support probable cause. The State argues that Officer Kowalewski had sufficient cause to arrest Vanscoyk based on evidence that he was intoxicated and that he failed to pull over after police officers attempted to initiate a traffic stop.

As discussed previously, an officer may properly make an arrest without violating the Fourth Amendment if he has probable cause that the person he arrests has committed, or is committing, a crime. *State v. Hisley*, 15 Neb. App. 100, 723 N.W.2d 99 (2006). An officer has probable cause to make an arrest if he has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id*. A court determines probable cause using an objective standard of reasonableness, given the known facts and circumstances. *Id*.

In *State v. Fischer*, 194 Neb. 578, 234 N.W.2d 205 (1975), the Nebraska Supreme Court found an officer had probable cause to make an arrest after detecting the odor of alcohol emanating from a vehicle's driver following a collision. Similarly, in *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011), the Nebraska Supreme Court found an officer had probable cause to make an arrest for DUI after the officer observed that the driver's eyes were glassy and bloodshot and that he had trouble standing. In *Huff*, the court also noted that "[n]early everyone who had contact with [the driver] that night reported a strong odor of alcohol coming from him." 282 Neb. at 107, 802 N.W.2d at 101. The court stated that the officer had probable cause for arrest even without a preliminary breath test or field sobriety tests.

The facts Officer Kowalewski knew when he arrested Vanscoyk would lead a reasonably cautious person to believe Vanscoyk was driving while he was under the influence of alcohol. Officer Kowalewski had received a tip that the driver of a maroon pickup was operating a motor vehicle while he was under the influence of alcohol. He then observed that driver maneuver over a grass median for 10 feet, inappropriately enter a public roadway, and fail to yield to the cruiser's lights and sirens. Upon contact, Officer Kowalewski smelled alcohol while frisking Vanscoyk for weapons. These facts sufficiently support a finding of probable cause.

BURDEN OF PROOF AT TRIAL

Vanscoyk argues that the State failed to prove he was guilty beyond a reasonable doubt at trial. The State was required to prove that Vanscoyk operated or was in actual physical control of a motor vehicle while he was under the influence of alcohol and had a concentration of at least .08 grams of alcohol per 210 liters of his breath in order to find him guilty of DUI. See Neb. Rev. Stat. § 60-6,196(1) (Reissue 2010).

Neither party contests the fact that Vanscoyk's maroon pickup drove on a public road or that Vanscoyk had a blood alcohol content level of .183. The only element in dispute is whether Vanscoyk was the driver of the maroon pickup.

Vanscoyk argues that the video from Officer Kowalewski's cruiser contradicts Officer Kowalewski's testimony. He asserts that the video should have sufficiently impeached the testimony, making it impossible for a rational trier of fact to find Vanscoyk guilty beyond a reasonable doubt. The State argues that the video bolsters Officer Kowalewski's testimony.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, an appellate court must determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

After reviewing the video in the light most favorable to the prosecution, we find that it could persuade any rational trier of fact that Vanscoyk was the driver of the maroon pickup. The video largely supports Officer Kowalewski's testimony, although it may impeach his testimony on a few collateral facts. It confirms that the officers pulled into Vanscoyk's driveway almost immediately after Vanscoyk and lends credibility to their testimony that Vanscoyk exited the vehicle from the driver's side.

Vanscoyk essentially asks us to reweigh evidence and witness credibility to determine whether Officer Kowalewski's testimony is credible in light of the video. This is not the appropriate province of an appellate court. The video does not so wholly destroy Officer Kowalewski's testimony that it would prevent a rational trier of fact from believing that Vanscoyk was the driver of the pickup and finding Vanscoyk guilty beyond a reasonable doubt.

PREVIOUS IOWA DUI CONVICTION

An appellate court will not disturb a trial court's determination that a prior conviction is valid for enhancement purposes absent clear error. *State v. Miller*, 11 Neb. App. 404, 651 N.W.2d 594 (2002), *superseded on other grounds by statute*, Neb. Rev. Stat. § 60-6,197.02(2) (Cum. Supp. 2008). An out-of-state DUI comviction is valid for enhancement if it is for a violation within the previous 12 years that would have constituted a DUI in Nebraska at the time. § 60-6,197.02(1)(a)(i)(C) (Reissue 2010).

Vanscoyk argues that his 2000 Iowa DUI conviction was not valid for enhancement purposes because it was a guilty plea by waiver, which Nebraska does not allow. Specifically, Vanscoyk argues that the evidence does not prove he knowingly waived his right to counsel, his right to confront witnesses, his right to a jury trial, and his privilege against self-incrimination as required by *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999). Vanscoyk does not argue that the Iowa DUI conviction would not have constituted a DUI in Nebraska at the time.

In support of enhancement, the State offered a certificate of transcript from the Crawford County District Court clerk that attached a copy of the (1) traffic citation; (2) waiver of right to have counsel present; (3) waiver of rights, written plea of guilty, and plea agreement; and (4) record of arraignment, plea of guilty, verdict, and judgment entry. The waiver of right to have counsel present and the record of arraignment, plea of guilty, verdict, and judgment entry are purportedly signed by Vanscoyk; the waiver of rights, written plea of guilty, and plea agreement is purportedly signed by Vanscoyk and the Crawford County Attorney. These combined documents include a waiver of all rights required by *State v. Louthan, supra*.

Nebraska does not allow collateral attacks on previous DUI convictions unless the attack is that the convicting court lacked personal or subject matter jurisdiction or violated the defendant's right to due process. *State v. Anderson*, 279 Neb. 631, 781 N.W.2d 55 (2010). A defendant's right of direct appeal from a plea-based DUI and right to challenge a DUI that was obtained in violation of a Sixth Amendment right to counsel satisfy the due process requirements of both the state and federal Constitutions. *State v. Louthan, supra*.

The record does not contain any evidence that Vanscoyk challenged the 2000 Iowa DUI verdict and judgment. Therefore, even absent proof that it is Vanscoyk's signature on the documents, his failure to appeal or challenge the verdict precludes a collateral attack on the verdict. The trial court's consideration of Vanscoyk's 2000 Iowa DUI conviction was not clear error.

EXCESSIVE SENTENCE

Vanscoyk argues that the trial court imposed an excessive sentence because it improperly considered his 2000 Iowa DUI conviction. Because the trial court did not err in considering this conviction, this argument is without merit.

CONCLUSION

The trial court did not err in overruling Vanscoyk's motion to suppress, in finding Vanscoyk guilty beyond a reasonable doubt, or in using Vanscoyk's previous 2000 Iowa DUI conviction to enhance his sentence. Accordingly, we affirm.

AFFIRMED.