

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 12, 2009 Session

STATE OF TENNESSEE v. ROBERT LESLIE BROWN

**Direct Appeal from the Criminal Court for Davidson County
No. 2006-B-1694 Mark J. Fishburn, Judge**

No. M2008-01828-CCA-R3-CD - Filed August 7, 2009

The defendant, Robert Leslie Brown, was convicted by a Davidson County Criminal Court jury of driving under the influence (“DUI”), third offense, and violation of the implied consent law. For the DUI, he was sentenced to eleven months, twenty-nine days, suspended to probation after service of 120 days, fined \$1100, and had his driving privileges revoked for three years. His driver’s license was revoked for two years for violation of the implied consent law. On appeal, he argues that the trial court erred in denying his motion to suppress evidence based on an illegal stop of his vehicle and challenges the sufficiency of the evidence convicting him of driving under the influence. After review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Larry Hagar, Madison, Tennessee, for the appellant, Robert Leslie Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Kyle Anderson, Rebecca Schwartz, and Deborah Housel, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Suppression Hearing

Sergeant Kenneth Walburn of the Metropolitan Nashville Police Department testified that on August 12, 2005, he was working as a training officer in the Hermitage precinct patrol division. On that evening, he was training Officer Laura Thomas. At approximately 6:30 p.m., they noticed a vehicle driven by the defendant traveling westbound on Lebanon Road, a four-lane road with two eastbound and two westbound lanes divided by a double yellow line. The road has “slight hills” and “several slight curves” but is a “normal road” with no sharp curves or steep hills. They observed the

left wheel of the defendant's vehicle cross over the center line into the oncoming traffic lane two times, and then "[the defendant] crossed over . . . [and] the right wheel of his vehicle crossed over . . . to the right lane[.]" Sergeant Walburn testified that other cars were traveling on Lebanon Road that evening although he could not specifically recall the number of cars.

Sergeant Walburn testified that, as a "rule of thumb," he liked to observe a driver for a longer distance than he observed the defendant, but he was only able to observe the defendant for less than the length of a football field because the defendant turned into the parking lot of the Veterans of Foreign Wars ("VFW") building. Sergeant Walburn said that they activated the emergency equipment when the defendant turned into the parking lot, and he acknowledged that the defendant used his turn signal. The defendant drove to the back of the building and parked his truck in a parking space. The defendant exited his truck, but he had to "brace himself against the vehicle" to step out. He also attempted to light a cigarette, but he fumbled with it and dropped it several times. The officers approached the defendant to engage him in a conversation about his driving and noticed immediately that the defendant's "speech was very slurred, and that he kept bracing himself against his truck to keep himself from falling over." The defendant was also belligerent toward the officers and yelled at passing motorists.

Sergeant Walburn testified that the defendant performed poorly on the field sobriety tests and refused to take a breath test. The officers were informed that the defendant had undergone hip surgery two weeks prior to the stop, but the defendant indicated that he could still perform the tests. Sergeant Walburn acknowledged that Officer Thomas prepared all reports of the incident and that his testimony was based on Officer Thomas' report and not his memory. He clarified that from "my training and my experience when I say somebody crosses out of their lane of traffic, we've been trained that they have to cross the line with their tire. That would be something consistent that I would train Officer Thomas with." Sergeant Walburn stated that his standard procedure was to observe a driver cross over the line more than two times before pulling him or her over because someone may drive over the line for a reason other than being intoxicated.

Sergeant Walburn testified that, as a field training officer, he provided two weeks of demonstration for the trainees and had them perform the duties for another two weeks under his observation to "make sure that they're proficient in traffic stops, and officer safety, and issues like that." If a trainee attempted to stop a vehicle and Sergeant Walburn did not believe there was reasonable suspicion for the stop, he would disallow the stop and discuss the legal basis and supporting facts with the trainee. Sergeant Walburn "[a]bsolutely" believed there was a valid legal reason to stop the defendant. He said that he also reviewed the reports as the trainee prepared them to ensure they were "going to stand up in court."

Officer Laura Thomas with the Metropolitan Nashville Police Department testified that she graduated from the police academy in June 2005 and was receiving field training by Sergeant Walburn on August 12, 2005. Officer Thomas and Sergeant Walburn were traveling on Lebanon Road around 6:30 p.m., and traffic was light at the time. They caught sight of the defendant's vehicle from approximately seventy-five to one hundred feet behind him and sped to catch up with

his vehicle. They observed the defendant's left tire "clear[] the double yellow line" into the opposite lane of travel twice. His vehicle did not jerk, but instead, it appeared that he "drift[ed]" over the center line. The defendant then stopped, turned his blinker on, and made a left-hand turn into the VFW parking lot. They followed the defendant and saw him pull into a parking space and get out of his vehicle. They had followed him for approximately 200 feet, and the defendant had not impeded any other motorists.

Officer Thomas testified that the defendant informed them that he had undergone hip surgery two weeks earlier. She said that should have been noted on the C-132 form under injuries or surgeries, and it was her mistake for failing to note it. Officer Thomas stated that she learned in training, when dealing with someone with an injury to the extremities, to ask if the person felt comfortable performing the field sobriety tasks and inform him that he could stop if he felt any discomfort. She said that she asked the defendant if he felt comfortable taking the tests. She acknowledged that this was her first time arresting someone for DUI.

Officer Thomas testified that although she prepared the report, as her training officer, Sergeant Walburn helped her with it and answered her questions. She said that she noted on her report that the defendant refused to answer general investigative questions, appeared angry and hysterical, and was insulting, profane, and uncooperative. She noted that his clothing was disarranged, his eyes were watery, he walked unsteady, he was loud, and he slurred his words. She also noted that he had an extreme odor of alcohol about him and was crying. In her opinion, the effects of the intoxicant were extreme. When asked whether he had been drinking, the defendant refused to answer. However, Officer Thomas acknowledged that on the C-132 form she marked that the defendant said he had not been drinking.

Trial

Officer Laura Thomas testified that on August 12, 2005, around 6:30 or 7:00 p.m., she and Sergeant Walburn noticed a pickup truck driven by the defendant cross the double yellow line into the oncoming traffic lane on two occasions. She noted that the tire went "completely across that double yellow line. It then came back into its lane of travel, and then it once again crossed the double yellow line. . . . [A]s it then came back, instead of staying in his lane of travel, he then crossed . . . the dotted white line into the right-hand lane[.]" He did not use a turn signal when he went over the lines.

When Officer Thomas was closer to the defendant's vehicle, the defendant made an abrupt stop in the lane of travel and turned into the VFW. There was no traffic light or car that necessitated the defendant's stopping before making the turn. Officer Thomas followed the defendant into the parking lot and then activated the emergency equipment on the police car. The defendant drove to the back of the building and pulled into a parking space. The defendant traveled approximately seventy-five to one hundred feet from the time Officer Thomas activated the emergency equipment until he pulled into the parking space, although there was nothing preventing him from stopping where he was when she turned on the blue lights.

Officer Thomas testified that once the defendant stopped, he proceeded to exit his vehicle, placing his hand on the bed of the truck to steady himself. As the officers approached the defendant, he remained braced against the truck. While they tried to talk to him, he started to “fumb[e] with a cigarette.” She explained that he tried to light the cigarette, it fell to the ground, and he had to bend down to pick it up. The defendant was “extremely unsteady” on his feet, there was an “extreme, obvious” odor of alcohol coming from his person, he had watery eyes, and his clothing seemed disarrayed.

Officer Thomas stated that the defendant refused to answer whether he had been drinking and was “a little belligerent and he wouldn’t exactly answer yes or no.” He also “had a hard time” getting his driver’s license out of his wallet. The defendant cursed at the officers and said they “would burn in hell for arresting him.” The defendant’s speech was slurred, and he was crying “almost to the hysterical point.” Officer Thomas noted that the defendant was generally belligerent and would not answer any of their health and general investigative questions aside from informing them of his recent hip surgery prior to the field sobriety tests.

The defendant agreed to submit to field sobriety tests. Before giving the tests, Officer Thomas inquired whether there was any medical reason he could not perform any of the tests. The defendant said that he had recently undergone hip surgery, but he indicated that he felt comfortable performing the tasks. He was not using crutches. Officer Thomas had the defendant perform the walk and turn test. With that test, the officers look for eight possible clues of impairment; the presence of two clues indicates impairment. The defendant exhibited six clues. He did not keep his balance during the instructional phase, he started too soon, he missed placing his heel to toe on two occasions, he stepped off the line, he raised his arm more than six inches, and he took ten steps instead of nine on the return walk. To his credit, the defendant performed the turn correctly and did not stop until the test was complete.

Officer Thomas also had the defendant perform the one-leg stand test. The defendant did not indicate that his hip surgery would prevent him from performing the test or cause him discomfort. In this test, the officers look for a maximum of four clues with two clues indicating impairment. The defendant exhibited all four clues. He swayed while standing on one leg, he raised his arms, he hopped on one foot, and he put his foot down twice before the end of the testing period. Because of his swaying and putting his foot down, the officers stopped the test for the defendant’s safety.

Based on the defendant’s driving, his failure to stop when they first activated the emergency equipment, his performance on the field sobriety tasks and demeanor, the officers determined that the defendant was intoxicated. Officer Thomas informed the defendant of the implied consent law, and the defendant refused to take the breath test. When the officers placed the defendant in the back of the patrol car, he banged his head against the partition separating the front and back seats several times to the point they were afraid he might injure himself. As they were driving to the police station, the defendant yelled a racial slur at a passing motorist.

Officer Thomas acknowledged that this was her first DUI stop. She said that she conducted the investigation on her own, but Sergeant Walburn consulted with her before and after the tests to make sure she did things correctly.

On cross-examination, Officer Thomas admitted that she learned in training that field sobriety tests are not 100% accurate and that individuals with lower extremity injuries have a difficult time performing the tests. However, she gave the tests to the defendant based on his statements that he could perform them. Officer Thomas acknowledged that she did not indicate on her "132 Report" that the defendant had a hip injury and that her failure to do so was an error. She admitted that typical protocol for the Metropolitan Nashville Police Department is to call a trained DUI officer, if one is available, to conduct the field sobriety tests and that one was not called in this case.

Officer Thomas conceded that watery eyes can be caused by smoking and that she had never spoken with the defendant before this incident to know whether he typically had slurred speech. She admitted that she could not tell how much an individual had been drinking by an odor of alcohol. A search of the defendant's vehicle did not reveal anything unusual. Officer Thomas stated that prior to her encounter with the defendant, she had only performed field sobriety tests "a handful of times."

On redirect examination, Officer Thomas explained that the reason she did not call a DUI officer to perform the field sobriety tests was because those officers work a later shift "and then there's always the option of performing it yourself."

Sergeant Walburn testified that he and Officer Thomas observed the defendant's vehicle "travel out of its lane of travel into the oncoming lane of travel two times . . . and then across the dash line between the left lane and the right lane[.]" He clarified that all three times, the defendant's tire crossed completely over the line into the other lane. The defendant then turned on his turn signal, stopped in the lane of traffic, and turned into the VFW. Once the defendant turned into the VFW, the officers activated their blue lights and siren to initiate a traffic stop. The defendant drove to the parking lot behind the building and got out of his vehicle.

Sergeant Walburn testified that as they approached the defendant, they noticed that "he was fumbling with his cigarette, dropped it several times while trying to light it, he had to use his vehicle to keep himself from falling over to keep himself standing up, very slurred speech, lethargic movements and appeared to us to be visibly intoxicated." Sergeant Walburn stated that he had received additional DUI training from the National Highway Transportation Safety Administration by attending both a twenty-four-hour course and a two-week, eighty-hour course.

Sergeant Walburn testified that the defendant failed two field sobriety tests. He watched Officer Thomas administer the two tests and would have stopped and corrected her had she said or done something wrong. Based on the defendant's performance on the field sobriety tests and the indicators he exhibited when stopped, the officers believed the defendant to be under the influence. Officer Thomas read the defendant the implied consent law, and he refused to take a breath test.

They placed the defendant in custody, and during the ride to the police station, he was “very belligerent” toward the officers and cursed at them and passing motorists.

On cross-examination, Sergeant Walburn acknowledged that Lebanon Road is somewhat hilly with slight curves. He agreed that the defendant did not appear to be speeding, made a proper left-hand turn into the VFW, and pulled into a parking space correctly. He stated that before Officer Thomas administered the field sobriety tests, the defendant indicated that he had a hip injury but he did not recall the defendant mentioning that he had recently undergone surgery. Sergeant Walburn acknowledged that field sobriety tests are not 100% conclusive but explained that they give “clues of impairment.”

Sergeant Walburn testified that his training indicated that a car should travel out of its lane three times before initiating a stop, and the defendant “went over the double yellow line two times, but he crossed over into the other lane of traffic one time as well.” Asked why they did not call the DUI task force, Sergeant Walburn explained, “[I]t is their preference that if the person is obviously intoxicated to take them downtown for all the breathalyzer [sic] information, he also had refused the breath test, so there was no need to tie up [a] DUI car to come out and do a refusal[.]”

Diana Holt, the office manager and keeper of the records at Premiere Orthopedics and Sports Medicine, testified on behalf of the defendant. She introduced the defendant’s medical records, which reflected that the defendant had surgery on his left hip on July 22, 2005.

The jury convicted the defendant of DUI and having stipulated to two prior DUI convictions, the court entered judgment for DUI, third offense. For the DUI conviction, he was sentenced to eleven months, twenty-nine days, suspended to probation after service of 120 days. He also received an \$1100 fine and loss of his driving privileges for three years. For violation of the implied consent law, his license was revoked for two years.

ANALYSIS

I. Motion to Suppress

The defendant argues that the trial court erred in denying his motion to suppress evidence. In denying the motion, the court found that the officers had reasonable suspicion to make an investigatory stop of the defendant’s vehicle, noting the officers’ testimony that the defendant’s vehicle crossed over “the double yellow lines twice and the right lane once.” The court found that the defendant’s driving plus the officers’ observations that the defendant fumbled out of his vehicle, smelled of alcohol, had slurred speech, was unsteady on his feet, was very emotional, and performed poorly on the field sobriety tests provided the officers with reasonable grounds that the defendant was driving under the influence in order to request a breath alcohol test. The court found that the defendant’s additional refusal to take the breath alcohol test gave the officers probable cause to arrest the defendant.

When this court reviews a trial court's ruling on a motion to suppress evidence, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The party prevailing at the suppression hearing is afforded the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998). The findings of a trial court in a suppression hearing are upheld unless the evidence preponderates against those findings. See id. However, the application of the law to the facts found by the trial court is a question of law and is reviewed *de novo*. See State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998); State v. Perry, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999).

Both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution protect individuals against unreasonable searches and seizures. See U.S. Const. Amend. IV; Tenn. Const. art. I, § 7. "These constitutional provisions are designed to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" Keith, 978 S.W.2d at 865 (quoting Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730 (1967)). A search or seizure conducted without a warrant is presumed unreasonable, and evidence obtained as a result will be suppressed "unless the prosecution demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement." Id. at 865 (citations omitted).

One of those exceptions is when an officer makes an investigatory stop based on reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); State v. Binette, 33 S.W.3d 215, 219 (Tenn. 2000). Reasonable suspicion is an objective standard and must be determined from the totality of the circumstances. United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981); see Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62 (1996). If an officer observes a violation of a traffic law, the officer has an objective basis for stopping the vehicle. See, e.g., State v. Vineyard, 958 S.W.2d 730, 734 (Tenn. 1997); State v. Levitt, 73 S.W.3d 159, 173 (Tenn. Crim. App. 2001).

The defendant argues that his actions were not enough, under Binette, to give reasonable suspicion for the traffic stop. He also asserts that "the Tennessee Courts have never adhered to a black letter rule of law that every motorist who crosses the center line of the roadway created reasonable suspicion that justifies a traffic stop."

In Binette, our supreme court reversed the trial court's determination that the officer had reasonable suspicion to stop the defendant because the videotape of the officer following the defendant only showed the defendant making unpronounced lateral movements within his own lane of travel. Binette, 33 S.W.3d at 220. The court stated that the "number of times that a vehicle touches the center line or drifts within in a lane is not dispositive of the issue before this Court.

Rather, . . . a court must consider the totality of the circumstances in determining whether reasonable suspicion was present at the time a stop was initiated.” Id. at 219.

We believe this case is distinguishable from Binette. Unlike in Binette, there is no videotape of the defendant’s driving in this case. Therefore, the officers’ testimony, accredited by the trial court, is the basis by which we discern whether there was reasonable suspicion for the stop. In that regard, the officers testified that in a distance of approximately 200 feet, the defendant crossed over the double yellow line into the oncoming traffic lane on two occasions and then traveled across his lane and over the dotted white line into the right-hand lane. At the suppression hearing, Officer Thomas testified that the defendant’s tire “cleared the double yellow line.” Sergeant Walburn testified at trial that the defendant’s “tire crossed . . . completely over the center line twice and then back into its lane of travel and then across the dash line between the left lane and the right lane and . . . the right tire crossed completely over into the right lane.”

Sergeant Walburn described the road they were traveling as a “normal road” with slight hills and slight curves, but no sharp curves or steep hills. It was not raining that day. Sergeant Walburn had made “several” DUI arrests in the past and had received additional DUI training from the National Highway Transportation Safety Administration. We conclude that even though the defendant made a proper turn and pulled into a parking space correctly, the sum of the officers’ testimony supports that there was reasonable suspicion for the traffic stop. The articulable facts suggest that the defendant’s driving was more than imperfect driving or mere weaving within his own lane of travel.

Moreover, even if it is true that “the Tennessee Courts have never adhered to a black letter rule of law that every motorist who crosses the center line of the roadway created reasonable suspicion that justifies a traffic stop,” a number of Tennessee courts have concluded that crossing the center line on more than one occasion provided reasonable suspicion for a stop. See, e.g., State v. Jody Glen Loy, No. E2006-02206-CCA-R3-CD, 2008 WL 2229259, at *5 (Tenn. Crim. App. May 30, 2008); State v. Danny Trout, No. M2001-00462-CCA-R3-CD, 2002 WL 708262, at *4 (Tenn. Crim. App. Apr. 24, 2002), perm. to appeal denied (Tenn. Oct. 21, 2002).

The defendant also argues that “the language contained in the trial court’s order and the testimony adduced at the suppression hearing . . . [indicate that] the trial court failed to apply [the] correct legal standard for traffic stops based on alleged swerving[.]” It is true that the trial court’s order does not specifically enunciate the standard it used to determine whether there was reasonable suspicion for the stop. However, at the hearing on the motion to suppress, the parties discussed Binette in quite detail and the record supports the trial court’s determination.

II. Sufficiency of the Evidence

The defendant challenges the sufficiency of the convicting evidence arguing that “there are alternative explanations for the potentially incriminating evidence that was presented at trial.” When reviewing a challenge to the sufficiency of the convicting evidence, we note that the relevant

question of the reviewing court is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) (“Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Tennessee Code Annotated section 55-10-401(a)(1) provides, “It is unlawful for any person to drive . . . any automobile . . . on any of the public roads and highways of the state while . . . [u]nder the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system[.]”

In the light most favorable to the State, the evidence shows that the defendant was observed driving his vehicle over the double yellow line into the oncoming traffic lane on two occasions and then driving across his lane of travel and across the white dotted line into the right-hand lane. His tire crossed completely over the line on all three occasions. Once stopped, the officers noticed that the defendant was unsteady on his feet, had watery eyes and slurred speech, and fumbled for a cigarette. The defendant had an extreme obvious odor of alcohol about him. The defendant was belligerent toward the officers and at one point yelled a racial insult at a passing motorist. The defendant was given two field sobriety tests. He exhibited ten clues of impairment out of a maximum of twelve, with four clues being enough to indicate impairment.

The defendant argues that his hip surgery could have explained his poor performance on the field sobriety tests; however, he indicated to the officers that he nevertheless felt comfortable

performing the tasks. Moreover, many of the clues of impairment exhibited by the defendant, e.g., he started too soon, raised his arm more than six inches, and took ten steps instead of nine, were based on his not following instructions, not his physical ability. The jury heard the testimony and allusions to “alternative explanations” by the defense and, as its prerogative, accredited the testimony of the officers. This court has often found that an arresting officer’s testimony alone is sufficient to support a defendant’s conviction for DUI. See, e.g., State v. Vasser, 870 S.W.2d 543, 544 (Tenn. Crim. App. 1993); State v. Lester Boyd Baird, No. M1999-00181-CCA-R3-CD, 2000 WL 175343, at *2-3 (Tenn. Crim. App. Feb. 16, 2000). We conclude the evidence was sufficient to convict the defendant of DUI.

CONCLUSION

Based on the aforementioned authorities and reasoning, we affirm the judgments of the trial court.

ALAN E. GLENN, JUDGE