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IN THE UTAH COURT OF APPEALS

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State of Utah,)	OPINION	
)	(For Official Publication)	
Plaintiff and Appellant,)		
)	Case No. 20060477-CA	
v.)		
)	F I L E D	
Michael Damon Henderson,)	(April 19, 2007)	
)		
Defendant and Appellee.)	<table border="1"><tr><td>2007 UT App 125</td></tr></table>	2007 UT App 125
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Second District, Ogden Department, 051905998
The Honorable W. Brent West

Attorneys: Mark L. Shurtleff and Marian Decker, Salt Lake City,
for Appellant
Ryan Bushell, Ogden, for Appellee

Before Judges Bench, Davis, and McHugh.

BENCH, Presiding Judge:

¶1 The State appeals the trial court's order granting Defendant Michael Damon Henderson's motion to suppress. We reverse and remand.

BACKGROUND

¶2 In November 2005, Officers Boots, Draper, and Eggerman (the Officers) received a dispatch concerning a fight on Lincoln Avenue in Ogden, Utah. When the Officers arrived at the scene, they did not initially see anyone. Upon hearing a noise, the Officers observed Henderson in a back parking lot walking toward 32nd street. Officer Boots testified that "[d]uring the nighttime, [32nd street is] one of the busiest streets in the area." The Officers approached Henderson, observed that he had both hands inside the front pockets of his sweatshirt, and inquired about the fight. Henderson responded that he "didn't do shit."

¶3 Officer Boots testified that he observed that Henderson had glassy eyes, slurred speech, unsteadiness on his feet, and the

strong smell of alcohol coming from his person. Officer Boots also observed Henderson fumbling with something inside his pocket. Officer Boots asked Henderson to remove his hands from his pockets, but Henderson removed only his left hand. Because of safety concerns, Officer Boots repeatedly requested that Henderson remove his right hand. Henderson did not comply and continued to fidget with something in his right pocket.

¶4 Henderson then turned and started walking away. Officer Boots instructed him to stop and demanded that he take his hands out of his pockets. Henderson did not comply. Officer Boots grabbed Henderson by his left arm and attempted to remove Henderson's right hand from his pocket, but Henderson physically resisted Officer Boots's efforts. Subsequently, Officer Boots put Henderson in a twist lock and pushed him to the ground. The Officers tried to remove Henderson's right hand from his pocket, but Henderson continued to resist. Once the Officers gained control over Henderson, they held his right hand behind his back and placed him in handcuffs. Officer Boots noticed that Henderson's right hand was gripping a clear plastic baggie containing a white rock substance later identified as cocaine. During the confrontation, the Officers did not notify Henderson that he was under arrest.

¶5 The State charged Henderson with possession of a controlled substance with intent to distribute, interference with an arresting officer, and intoxication. Henderson moved to suppress the evidence, asserting that the Officers lacked probable cause to arrest him for intoxication. The trial court held an evidentiary hearing on Henderson's motion and determined that although the Officers had reasonable articulable suspicion to perform a weapons frisk, they lacked probable cause to arrest. Further, the trial court ruled that the Officers violated the Fourth Amendment by not informing Henderson that he was under arrest. Therefore, the trial court concluded that the evidence seized constituted "fruit of the poisonous tree," and granted Henderson's motion to suppress. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

ISSUE AND STANDARDS OF REVIEW

¶6 The State argues that the trial court erred in granting Henderson's motion to suppress. "We review the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard. We review the trial court's conclusions of law based on these facts under a correctness standard." State v. Brown, 853 P.2d 851, 854-55 (Utah 1992). Further, we apply a "non-deferential review" to the "application of the law to the underlying factual findings

in search and seizure cases." State v. Brake, 2004 UT 95, ¶15, 103 P.3d 699.

ANALYSIS

¶7 The State contends that the trial court erred in granting Henderson's motion to suppress. The trial court concluded that Henderson's arrest violated his Fourth Amendment rights and therefore suppressed the evidence seized from the search incident to the arrest. If we conclude that the arrest did not violate Henderson's rights, then the evidence seized during the search incident to the arrest should not be suppressed. Thus, our decision in this case turns solely on the validity of Henderson's arrest.

¶8 The State first argues that the trial court erred in concluding that the Officers did not have probable cause to arrest Henderson for intoxication. Second, the State asserts that the trial court erred in deciding that the Fourth Amendment requires police officers to inform an arrestee that he is under arrest before taking him into custody. We discuss each argument in turn.

I. Probable Cause Determination

¶9 The State contends that the Officers had probable cause to arrest Henderson for intoxication. Probable cause exists when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." State v. Trane, 2002 UT 97, ¶27, 57 P.3d 1052 (quotations and citation omitted). A probable cause determination is an objective test, based on whether "a reasonable and prudent person in [the officer's] position would be justified in believing that the suspect had committed the offense." Id. (alteration in original). The trial court concluded that the Officers did not have probable cause to arrest Henderson for intoxication. We disagree.

¶10 Utah Code section 76-9-701(1) provides that "[a] person is guilty of intoxication if he is under the influence of alcohol . . . to a degree that the person may endanger himself or another, in a public place or in a private place where he unreasonably disturbs other persons." Utah Code Ann. § 76-9-701(1) (2003) (emphasis added). Henderson submits that the trial court correctly ruled that probable cause did not exist because Henderson had not "unreasonably disturb[ed] other persons." Id. The State argues that the "unreasonably disturbs other persons"

element of the intoxication statute is not required when the suspect is in a "public place." Id.

¶11 "When interpreting statutes, [we] first look[] to the plain language." State v. Barrett, 2005 UT 88, ¶29, 127 P.3d 682. "When examining the plain language, we must assume that each term included in the [statute] was used advisedly." Carrier v. Salt Lake County, 2004 UT 98, ¶30, 104 P.3d 1208. In considering the plain language of the intoxication statute, we conclude that the phrase "where he unreasonably disturbs other persons" modifies only the immediate preceding phrase "in a private place." Utah Code Ann. § 76-9-701(1). The legislature specifically distinguished between private and public places. If it intended for the "unreasonably disturbs other persons" element to be part of an intoxication offense regardless of the location, there would be no reason to individually list "private place" and "public place." Id. Because we assume that the legislature used each term advisedly, see Carrier, 2004 UT 98 at ¶30, we conclude that Henderson is guilty of intoxication if he is "under the influence of alcohol . . . to a degree that [he] may endanger himself or another, in a public place." Utah Code Ann. § 76-9-701(1).¹

¶12 The State contends that the Officers had probable cause to believe that Henderson "may endanger himself or another." Id. In State v. Trane, 2002 UT 97, 57 P.3d 1052, the supreme court concluded the following:

The officers . . . noticed that [the defendant] was intoxicated enough to potentially pose a danger to himself and others. The officers feared for their safety, recognizing from past experiences with intoxicated individuals that they could

¹Henderson relies on State v. Trane, 2002 UT 97, 57 P.3d 1052, in support of his assertion that the "unreasonably disturbs other persons" phrase is always an element of an intoxication offense whether committed in a public place or a private place. In Trane, the supreme court stated that the intoxication statute provides that a person "is under the influence of alcohol . . . to a degree that the person may endanger himself or another, in a public place . . . where he unreasonably disturbs other persons." Id. at ¶37 (quoting Utah Code Ann. § 76-9-701(1) (1999)). The issue in Trane was whether there was probable cause to believe that the defendant had endangered himself or another. See id. Because the narrow question of statutory construction presented here was not at issue in Trane, the misplaced second ellipsis does not govern the outcome in this case.

become violent. In this case, [the defendant] was angry, was uncooperative, had "puffed his chest out [and] took a defensive posture similar to a boxer," and initially would not release his identification card upon [the officers'] request.

Id. at ¶40 (second alteration in original).

¶13 In the present case, the Officers responded to a report of a fight and found Henderson alone at the scene at 1:54 a.m. According to Officer Boots, the Officers observed Henderson stumbling around the "parking lot of the address in question." Henderson was walking toward a busy street. When the Officers inquired about the reported fight, Henderson responded that he "didn't do shit," and he continually refused to comply with the Officers' requests to remove his right hand from his pocket. Officer Boots testified that Henderson had "glassy eyes, slurred speech, unsteadiness on his feet, and the strong smell of alcohol coming from his person." Although being intoxicated in public does not establish all the elements of the intoxication offense, the circumstances here also reflect that Henderson "may [have] endanger[ed] himself or another." Utah Code Ann. § 76-9-701(1) (emphasis added). The Officers found Henderson intoxicated, alone, uncooperative, and walking toward a busy street.² In considering the facts and circumstances known to the Officers, which are comparable to those in Trane, we conclude that the Officers had probable cause to believe that Henderson was "under the influence of alcohol . . . to a degree that [he] may [have] endanger[ed] himself or another, in a public place." Id. By concluding that the Officers had probable cause to arrest Henderson, we are not determining whether the State can prove each element of intoxication beyond a reasonable doubt.

II. Notification of Arrest

¶14 The State also contends that the trial court erred in ruling that the Officers violated the Fourth Amendment by failing to notify Henderson that he was under arrest before taking him into

²The dissent seems to contend that because the trial court did not make specific factual findings as to all of Officer Boots's observations, we cannot consider his testimony to determine probable cause. However, a probable cause determination is based upon the "facts and circumstances within the officer's knowledge." State v. Trane, 2002 UT 97, ¶27, 57 P.3d 1052. Therefore, to determine if the trial court correctly applied the law to the facts in this case, we may consider Officer Boots's testimony.

custody. Henderson concedes on appeal that the Officers did not violate the Fourth Amendment pursuant to Devenpeck v. Alford, 543 U.S. 146 (2004), but contends that Utah statutory law supports the trial court's ruling.

¶15 Although the trial court did not rely on Utah statutory law, we may affirm a trial court's judgment on an alternative ground, but only if the alternative ground is "apparent on the record" and "sustainable by the factual findings of the trial court." State v. Topanotes, 2003 UT 30, ¶9, 76 P.3d 1159. Utah Code section 77-7-6(1) provides that "[t]he person making the arrest shall inform the person being arrested of his intention, cause, and authority to arrest him." Utah Code Ann. § 77-7-6(1) (2003). However, the statute also provides three exceptions to the above requirement:

- (a) there is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape;
- (b) the person being arrested is actually engaged in the commission of, or an attempt to commit, an offense; or
- (c) the person being arrested is pursued immediately after the commission of an offense or an escape.

Id. § 77-7-6(1). The exception in subsection 77-7-6(1)(b) specifies that the person arrested is "actually engaged in the commission of . . . an offense." Id. § 77-7-6(1)(b). At this stage of the proceedings, we need only probable cause to believe that Henderson committed the offense. Because the exception could arguably apply, it is "not apparent on the record" that the Officers violated section 77-7-6(1) by not informing Henderson that he was under arrest before taking him into custody. Topanotes, 2003 UT 30 at ¶9.

CONCLUSION

¶16 We conclude that the Officers had probable cause to arrest Henderson for intoxication. We further conclude that the Officers did not violate the Fourth Amendment or Utah law by not notifying Henderson that he was under arrest. Because the arrest did not violate Henderson's constitutional rights, the trial court erred in suppressing the evidence seized during the Officers' search incident to Henderson's lawful arrest.

¶17 For the foregoing reasons, we reverse and remand the case for further proceedings.

Russell W. Bench,
Presiding Judge

¶18 I CONCUR:

Carolyn B. McHugh, Judge

DAVIS, Judge (concurring in part and dissenting in part):

¶19 I concur with the majority's opinion except with respect to its conclusion that the police had probable cause to arrest Henderson for public intoxication. "A person is guilty of [public] intoxication if he is under the influence of alcohol . . . to a degree that [he] may endanger himself or another, in a public place" Utah Code Ann. § 76-9-701(1) (2003). The majority correctly observes that "being intoxicated in public does not establish all the elements of the intoxication offense." However, the majority's probable cause determination relies upon testimony, lack of findings, and reinterpretation of findings actually made by the trial court in order to factually compare the instant case with State v. Trane, 2002 UT 97, 57 P.3d 1052.

¶20 The majority correctly notes that "[w]e review the factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence using a clearly erroneous standard." State v. Brown, 853 P.2d 851, 855 (Utah 1992). In addition, however,

in cases in which factual issues are presented to and must be resolved by the trial court but no findings of fact appear in the record, we assume that the trier of facts found them in accord with its decision, and we affirm the decision if from the evidence it would be reasonable to find facts to support it.

State v. Ramirez, 817 P.2d 774, 787 (Utah 1991) (quotations and citation omitted). We therefore grant deference to both the trial court's stated findings of fact and to its reasonable resolution of facts in accord with its decision.

¶21 The foregoing standards of review notwithstanding, the majority discovers findings not made below and reinterprets those findings actually made. For instance, the trial court made no findings regarding whether Henderson was stumbling around the parking lot, but stated only that Officer Boots "heard a noise he later associated to be [Henderson] stumbling in the back parking lot." Second, the trial court made no finding regarding whether Henderson was walking toward a busy street, a fact which seems unlikely given that the time of the encounter was after 1:54 a.m.¹ Finally, although there appears to be no dispute that Henderson was intoxicated, the trial court did not expressly make such a finding. Rather, the trial court simply observed that Officer Boots believed that Henderson was intoxicated because Henderson had "glassy eyes, slurred speech, unsteadiness on his feet, and the strong smell of alcohol coming from his person."²

¶22 Viewing the facts of this case as found by the trial court reveals that State v. Trane is factually inapposite. In Trane, probable cause existed to arrest the defendant because he appeared to be disturbing the peace and intoxicated. Trane, 2002 UT 97 at ¶38. When police officers arrived at the scene, the complainant, a convenience store clerk, identified the defendant as the person who had been "harassing and disturbing customers." Id. The police officers noted that the defendant "smelled of alcohol and exhibited signs of intoxication." Id. at ¶39. More

¹It is ironic that the Officers' concerns for Henderson's proximity to a "busy" street resulted in Henderson being grabbed, placed in a "twist lock," and "[taken] to the ground" as he attempted to walk away.

²The majority's reliance on testimony respecting matters revealed for the first time at the suppression hearing underscores the importance of the fact that a veteran, experienced trial judge made no findings thereon. See State v. Ramirez, 817 P.2d 774, 787 (Utah 1991) (discussing standard of review when trial court does not make express findings of fact). Thus, the language from State v. Trane, 2002 UT 97, 57 P.3d 1052, quoted by the majority in footnote 2 does not dispense with the need for findings, but even further inappropriately extends the reach of Trane by suggesting the propriety of our relying on uncorroborated witness testimony upon which the trial court made no findings and which is inconsistent with the result reached by the trial court.

importantly, once confronted by police, the defendant acted in a potentially violent and dangerous manner because he "'puffed his chest out [and] took a defensive posture similar to a boxer.'" Id. at ¶40. Based on these facts, the Utah Supreme Court determined that probable cause existed to arrest Trane for public intoxication. Id. at ¶¶38-40.

¶23 Here, on the other hand, there is no indication that Henderson was involved in the alleged fight, or that he would engage in violent or dangerous behavior.³ In fact, once confronted by the Officers regarding the fight, Henderson stated that he "didn't do shit." Then, rather than taking a boxer's stance or any other confrontational position, the trial court found that Henderson turned around and started walking away from the Officers. This activity is clearly distinguishable from Trane and does not support probable cause to arrest Henderson for public intoxication.⁴

¶24 Finally, the majority's extending the reach of Trane, as a practical matter, eliminates the endangerment element. Without the requirement that a defendant be intoxicated "to a degree that [he] may endanger himself or another," Utah Code Ann. § 76-9-701(1), the police will have unfettered discretion when encountering intoxicated individuals in public. Police officers will be free to stop, arrest, and search an individual simply because the person is intoxicated and uncooperative, as was the case here. Although I understand the Officers' annoyance with Henderson, there was simply no probable cause here to believe that Henderson posed a threat to himself or to others. The trial court's grant of Henderson's motion to suppress should be affirmed.

James Z. Davis, Judge

³Moreover, the record reveals that neither of the Officers described in his police report the reasonable suspicion or probable cause that led them to initiate contact with Henderson.

⁴The trial court properly concluded that "Officer Boots had [a] reasonable articulable suspicion to perform a weapons frisk on . . . [Henderson] for officer safety." However, the trial court also entered a conclusion of law that "Officer Boots did not have probable cause to escalate the weapons frisk to [a] search for weapons." I agree.