

*Note: In the case title, an asterisk (\*) indicates an appellant and a double asterisk (\*\*) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2019-235

APRIL TERM, 2020

State of Vermont v. Skyler C. Bushey*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 39-4-19 Frcs
		Trial Judge: A. Gregory Rainville

In the above-entitled cause, the Clerk will enter:

Defendant appeals the civil suspension of his driver’s license for operating a vehicle under the influence of alcohol. We reverse and remand for further proceedings.

According to the police affidavit, on April 13, 2019 at approximately 2:30 a.m., defendant was stopped by police after making an illegal left-hand turn onto North Main Street in St. Albans. The police officer noticed a moderate odor of alcohol emanating from defendant and observed that defendant had watery and bloodshot eyes. Defendant admitted to drinking approximately three beers earlier in the evening. Defendant consented to field sobriety tests, during which, according to the affidavit, he displayed signs of impairment. A preliminary breath test (PBT) indicated that defendant’s blood alcohol content was 0.142%. The police officer arrested defendant and transported him to the St. Albans Police Department. After speaking to an attorney, defendant agreed to give an evidentiary breath sample, which indicated that defendant’s blood alcohol content was 0.109%.

Defendant moved to exclude the PBT result, arguing that his consent was not voluntary, and to dismiss the case because the officer did not have probable cause to arrest him. These issues were both scheduled to be heard at the suspension hearing. He argued that his performance during the field sobriety tests objectively dispelled any suspicion of impairment and therefore the officer lacked justification to request a PBT. He further denied that he voluntarily consented to the PBT. He argued that without the PBT result, the officer lacked probable cause to arrest him for driving under the influence of alcohol (DUI).

The court began the civil suspension hearing by stating that the facts of the case appeared to be similar to those in State v. Mara, 2009 VT 96A, 186 Vt. 389, in which we held that the defendant’s commission of a traffic violation, odor of alcohol, watery and bloodshot eyes, and admission to drinking earlier in evening gave a police officer reasonable suspicion to request a PBT even though the defendant had passed field sobriety tests. Id. ¶ 12. “[R]ather than going through the whole dog and pony show,” the court asked the parties to stipulate that defendant made an illegal turn, emitted a moderate odor of alcohol, had watery and bloodshot eyes, and admitted to drinking two beers approximately two hours earlier in the evening. The court noted that in

Mara, the defendant performed well on the field sobriety tests, but interpreted that decision to mean that “they don’t count positives, you only count negatives.” The court concluded that even without the PBT result, the stipulated facts were sufficient to provide the officer with probable cause to arrest defendant for DUI under Mara. The court did not address whether the officer was justified in requesting the PBT or whether defendant’s consent was voluntary, stating that the “PBT is a total red herring.”

The State then offered, and the court admitted, exhibits 1 and 3, which were the evidentiary breath test result and an affidavit from the state chemist opining that the test was reliable. The court held that the civil suspension criteria were satisfied. Defense counsel asked what was on exhibit 2. The State responded that it contained body camera footage of the roadside stop. At defense counsel’s request, the court admitted the exhibit. The hearing then concluded. This appeal followed.\*

Defendant argues that the trial court erred in concluding that the officer had probable cause to arrest him for DUI based solely on the stipulated facts, because it was premised on an incorrect interpretation of the law and because the video recording, which the court did not view, plainly contradicted some of those facts. We agree that the trial court’s interpretation of our law and the procedure it followed were flawed and require reversal.

Under the United States and Vermont Constitutions, a warrantless arrest must be supported by probable cause. State v. Richard, 2016 VT 75, ¶ 14, 202 Vt. 519. Probable cause “exists when the facts and circumstances known to an officer are sufficient to lead a reasonable person to believe that a crime was committed and that the suspect committed it.” State v. Arrington, 2010 VT 87, ¶ 11, 188 Vt. 460 (quotation omitted). “The court must consider the totality of the circumstances to determine whether probable cause exists.” State v. Guzman, 2008 VT 116, ¶ 11, 184 Vt. 518. Whether the facts met the proper standard to justify the detention is a question of law that we review without deference to the trial court. State v. Lawrence, 2003 VT 68, ¶ 9, 175 Vt. 600 (mem.).

Here, the trial court declined to allow defendant to present evidence, and apparently declined to view the video recording defendant offered as an exhibit, because it concluded based on Mara that defendant’s stipulation to the traffic violation, watery and bloodshot eyes, odor of alcohol, and recent consumption of two beers constituted probable cause to arrest him for DUI, even if there was evidence contradicting the conclusion that defendant was impaired. This conclusion was incorrect for two reasons.

First, the trial court improperly relied on Mara to support its conclusion that probable cause existed. Although the underlying facts were similar to this case, Mara did not address probable cause. The question in Mara was whether a police officer had reasonable suspicion to extend a traffic stop to conduct a PBT. 2009 VT 96A, ¶ 7. We concluded that the defendant’s traffic violation, coupled with his odor of alcohol, watery and bloodshot eyes, and admission to drinking earlier in the evening gave the officer reason to administer the PBT. 2009 VT 96A, ¶ 12. We did not consider whether these same facts would be sufficient to establish probable cause to arrest the defendant for DUI. In holding that they did, the trial court improperly conflated reasonable suspicion with probable cause, which is a more demanding standard. See State v. Lamb, 168 Vt. 194, 196 (1998) (explaining that reasonable-suspicion standard is “less demanding” than probable cause because it can be established with information that is different in quantity or content and less

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\* The trial court stayed the civil suspension pending appeal.

reliable than information required to show probable cause (citing Alabama v. White, 496 U.S. 325, 330 (1990)).

Second, the trial court improperly declined to consider conflicting evidence in conducting its probable-cause analysis. A court must consider the totality of the circumstances to determine whether probable cause to conduct a warrantless arrest exists. Guzman, 2008 VT 116, ¶ 11. “[T]he totality of the circumstances test for probable cause is an all-things-considered approach that calls for consideration of any and all facts that a reasonable person would consider relevant to a police officer's belief that contraband or evidence of a crime is present.” Zullo v. State, 2019 VT 1, ¶ 77, 209 Vt. 298 (quoting People v. Zuniga, 2016 CO 52, ¶ 16, 372 P.3d 1052). The court did not examine the totality of the circumstances, instead relying on a few bare “stipulations” based on the State’s claims that defense counsel accepted with numerous caveats. The court did not consider the video recording it admitted into evidence and did not give defendant an opportunity to cross-examine the State’s witnesses. Without considering all of the evidence and making findings, the court could not make a proper determination regarding probable cause.

For these reasons, we reverse and remand for the trial court to allow the parties to present evidence, to weigh the evidence and resolve conflicts between the State’s evidence and defendant’s evidence, and to apply the proper legal standard. See State v. Burnett, 2013 VT 113, ¶ 30, 195 Vt. 277 (reversing and remanding civil suspension for trial court to weigh evidence it improperly excluded).

Reversed and remanded for further proceedings consistent with this opinion.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice