"Tennessee Supreme Court Issues Latest DUI/Drunk Driving Opinion"

CASE NAME: State of Tennessee vs Bell, Supreme Court of Tennessee; Opinion No. E2011-01241-SC-R11-CD, February 20, 2014)

FACTS :
David Dwayne Bell stopped by The Gnome prior to a planned trip to the beach. When he left the pub in the early morning hours of May 13, 2009, Mr. Bell took a wrong turn onto U.S. Highway 441, a divided highway, and began driving south in the northbound lanes. Sevier County Deputy Sheriff Jayson Parton stopped Mr. Bell and radioed for assistance from the Sevierville Police Department because the stop occurred within the city limits of Sevierville.

When Officer Timothy Russell of the Sevierville Police Department arrived at the scene, Mr. Bell was already standing outside his automobile. Officer Russell noticed that Mr. Bell smelled of alcohol. When Officer Russell asked Mr. Bell how much alcohol he had consumed, Mr. Bell replied, "More than I should have, I know. I'm not fighting that." When asked to explain why he was driving on the wrong side of the road, Mr. Bell simply apologized and explained that he had realized his mistake as soon as he made it. Deputy Parton commented that he hoped Mr. Bell would have realized his mistake because cars had been passing him going in the opposite direction.

Officer Russell requested that Mr. Bell perform several field sobriety tests. Initially, Officer Russell administered three "pre-exit" or "non-standardized" tests. Mr. Bell first performed a four-finger count. Mr. Bell next performed an alphabet recitation in which he audibly recited the alphabet using mid-range starting and ending points, in this case beginning with the letter "G" and ending with the letter "S." Lastly, Officer Russell asked Mr. Bell his birth year and what year he turned a certain age, in this case his sixth birthday. According to Officer Russell, Mr. Bell performed each of these tests satisfactorily and his mental functioning appeared to be "excellent" at that time.

In addition to these three "non-standardized tests," Officer Russell required Mr. Bell to perform three "standardized" field sobriety tests. Officer Russell had been trained in administering and interpreting these tests. They included: (1) the horizontal gaze nystagmus ("HGN") test; (2) the one-leg stand test; and (3) the walk-and-turn test. The State did not offer the results of the HGN test at the suppression hearing, and it is not at issue on this appeal.

The one-leg stand test required Mr. Bell to raise one foot off the ground and to maintain his balance for a set time period. According to Officer Russell, putting the raised foot back on the ground before a count of ten is an indication of intoxication. Mr. Bell was able to maintain his balance on one foot until a count of twenty-three when Officer Russell advised him that he could stop

The walk-and-turn test required Mr. Bell to take nine steps, heel to toe, along a straight line and then turn and return to the starting point in the same fashion. Mr. Bell took the proper number of steps each way in a straight line without staggering or losing his

balance. However, Officer Russell faulted Mr. Bell's performance of the test because: (1) he stepped away from the starting position prematurely despite being instructed not to do so; (2) he did not execute the turn in the demonstrated manner; and (3) on several of his steps, Mr. Bell did not place his heel to his toe.

After administering the field sobriety tests to Mr. Bell, Officer Russell asked him "how bad" Mr. Bell's female passenger was. Mr. Bell initially responded, "Oh, she's better than I," but he broke off this response and said, "We're not that bad, okay." Based on the circumstances he had observed at the scene, Officer Russell was unpersuaded. He decided that Mr. Bell was under the influence of alcohol and that it was unsafe for him to continue to drive that night. Accordingly, Officer Russell placed Mr. Bell under arrest for DUI.

PROCEDURAL HISTORY:

On January 2, 2010, a Sevier County grand jury charged Mr. Bell with DUI and DUI per se. On June 23, 2010, Mr. Bell filed a motion to suppress the evidence obtained following his arrest on May 13, 2009. Mr. Bell contended that he had passed all the field sobriety tests, and as a result, his warrantless arrest was not supported by probable cause.

Officer Russell was the only witness at the suppression hearing conducted on April 19, 2011. At the conclusion of the hearing, the trial court decided that Officer Russell lacked probable cause to arrest Mr. Bell and dismissed both charges against him. More specifically, the trial court stated, "Well, as I say, I'm just afraid that as to the probable cause -- and granted, going down the wrong way, I . . . agree, but I honestly think he did pretty doggone good on the field sobriety tests, better than most I've seen." On May 18, 2011, the trial court entered a judgment dismissing both charges against Mr. Bell.

The State appealed to the Court of Criminal Appeals. On August 31, 2012, the Court of Criminal Appeals affirmed the trial court's decision. The intermediate appellate court noted, based on the circumstances leading up to the field sobriety tests, that "any reasonably prudent officer would have been justified in suspecting the defendant of DUI and in investigating further." *State v. Bell*, 2012 WL 3776695, at *4. However, the court also interpreted "the slightly more colorful comments made by the trial court in its ruling from the bench on the defendant's suppression motion as a finding, as a factual matter, that the defendant passed all of the field sobriety tests that he was given." *State v. Bell*, 2012 WL 3776695, at *4. Based on this conclusion, the Court of Criminal Appeals held that "once Officer Russell had witnessed the defendant's uninterrupted success on a battery of field sobriety tests, there was not probable cause to arrest the defendant for DUI given the totality of the circumstances and all of the information available to the officer." *State v. Bell*, 2012 WL 3776695, at *4. We granted the State's application for permission to appeal.

ISSUE:

The pivotal question in this case is whether, at the time of the arrest, the facts and circumstances within Officer Russell's knowledge, including those communicated by Deputy Parton, were sufficient to enable a prudent person to believe that Mr. Bell had committed or was committing the offense of DUI?

HOLDING:
In 1986, for example, the Minnesota Court of Appeals analyzed a DUI arrest similar to this case. A motorist, who was stopped during the early morning hours for speeding, smelled of alcohol, had bloodshot eyes, and admitted to having "had a few." He was arrested even though he performed several field sobriety tests with varying degrees of success. *State v. Grohoski*, 390 N.W.2d 348, 350-51 (Minn. Ct. App. 1986). The trial court suppressed the results of a subsequent breath test, but the appellate court reversed, faulting the trial court for having "improperly focused on the absence of other indicia of intoxication such as erratic driving, slurred speech, and dilated pupils." *State v. Grohoski*, 390 N.W.2d at 351. Noting that a "suspect need not exhibit every known sign of intoxication in order to support a determination of probable cause," the court determined that probable cause existed to arrest the motorist without a warrant, based on the motorist's traffic violation, bloodshot eyes, odor of alcohol, and admission of drinking. *State v. Grohoski*, 390 N.W.2d at 351.

In 1987, the Pennsylvania Commonwealth Court reviewed a similar DUI arrest in which the motorist was involved in an accident. His eyes were bloodshot and his pupils dilated; he smelled of alcohol; and he admitted to having one beer. However, the motorist successfully completed the heel-to-toe straight-line walk test. *Craze v. Commonwealth*, 533 A.2d 519, 520 (Pa. Commw. Ct. 1987). After the motorist's license was suspended for refusing a blood test, he challenged the suspension on the ground that the officer lacked the requisite "reasonable grounds" to request a breathalyzer test. After considering [14] the facts and circumstances "as a whole," the court concluded reasonable grounds existed "despite the fact that [the motorist] was able to pass the field sobriety test." *Craze v. Commonwealth*, 533 A.2d at 521.

In 1990, the Alaska Court of Appeals addressed a case in which the motorist was stopped for speeding during the early morning hours. The motorist smelled of alcohol, had bloodshot eyes, admitted to having consumed "two or three beers," and exhibited some confusion and difficulty in producing his driver's license. Nonetheless, he was able to satisfactorily complete four out of the five field sobriety tests administered to him.[15] *State v. Grier*, 791 P.2d 627, 628 (Alaska Ct. App. 1990). The trial court granted the motorist's motion to suppress the videotape of the stop and the results of a breathalyzer test and a blood test on the ground that the officers lacked probable cause to arrest him. *State v. Grier*, 791 P.2d at 628. Specifically, the motorist insisted "that under the totality of the circumstances the facts are as consistent with innocence as they are with guilt." *State v. Grier,* 791 P.2d at 632 n.3.

The Alaska Court of Appeals disagreed. After pointing out that "[i]n dealing with probable cause, . . . we deal with probabilities," *State v. Grier*, 791 P.2d at 631 (alteration in original) (quoting *Brinegar v. United States*, 338 U.S. at 175), the court held that "[w]here a person of reasonable caution would be justified in the belief that an offense has been committed and the defendant committed it, probable cause is established even though the facts known to the officer could also be reconciled with innocence." *State v. Grier*, 791 P.2d at 632 n.3.

Most recently, the Delaware Supreme Court addressed the weight that should be given to a motorist's successful completion of field sobriety tests when determining the existence

of probable cause. The arresting officer followed the motorist after observing her tailgating another automobile and making a left turn without signaling. After the motorist parked in a restaurant parking lot, the officer approached her automobile and noticed that the motorist smelled of alcohol and that she was argumentative. While the motorist's face was flushed, the officer could not see her eyes because she was wearing sunglasses. The motorist admitted to having had a drink one hour and a half earlier. *Lefebvre v. State*, 19 A.3d 287, 291 (Del. 2011). The officers arrested the motorist even though she performed [16] well on four field sobriety tests.[17]

The motorist conceded, and the Delaware Supreme Court agreed, that the circumstances leading up to the administration of the field sobriety tests established probable cause for a DUI arrest. The motorist had committed a traffic violation, had the odor of alcohol and a flushed face, had admitted to drinking alcohol, and had stated prior to performing the one-leg stand test that she was "not that good at this sober." *Lefebvre v. State*, 19 A.3d at 292. Nevertheless, the motorist argued that her performance on the field sobriety tests constituted "overwhelming evidence" that she was not impaired. *Lefebvre v. State*, 19 A.3d at 293-94.

The Delaware Supreme Court, in a divided opinion, found the argument unpersuasive, stating that it "misconstrues the evidentiary weight of non-failing results on standardized field sobriety tests, insofar as those results pertain to the 'totality of the circumstances' legal standard for determining probable cause to arrest for a DUI offense." *Lefebvre v. State*, 19 A.3d at 294. The court explained that the "results of field sobriety tests may either eliminate suspicion or elevate suspicion into probable cause but they are of insufficient evidentiary weight to eliminate *probable cause* that had already been established by the totality of the circumstances before the performance of the field sobriety tests." *Lefebvre v. State,* 19 A.3d at 295.

The majority of the Delaware Supreme Court also rejected the premise of the two dissenting justices that "successful performance on field sobriety tests is of such great evidentiary weight that it can defeat the probable cause that preceded the administrations of those tests." *Lefebvre v. State*, 19 A.3d at 296. Observing that this "assertion [was] not supported by NHTSA's own materials," the Court pointed out that NHTSA's validation studies found the walk-and-turn test, by itself, to be 68% accurate and the one-leg stand test, by itself, to be 65% accurate. *Lefebvre v. State*, 19 A.3d at 296 (citations [18] omitted). Thus, the Court stated that NHTSA's studies reflected "that an individual may pass field tests and still be under the influence of alcohol." *Lefebvre v. State*, 19 A.3d at 296.

We recognize that not all courts that have addressed this question have reached the same conclusion as the Delaware Supreme Court, the Alaska Court of Appeals, the Minnesota Court of Appeals, and the Pennsylvania Commonwealth Court.[19] However, we have determined that the approach employed by these courts is entirely consistent with our holdings that determining the existence of probable cause to support a warrantless arrest is not a technical process. Rather, it is a process requiring reviewing courts to conduct a common-sense analysis of the facts and circumstances known to the officers at the time of arrest to determine whether these facts and circumstances are sufficient to permit a reasonable person to believe that the defendant had committed or was committing an offense.

Accordingly, we find that performance on field sobriety tests is but one of the many factors officers should consider when deciding whether to arrest a motorist for DUI or similar offenses without a warrant.

Determinations of probable cause are extremely fact-dependent. *Ker v. California*, 374 U.S. 23, 33 (1963) (noting that because the "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," "[e]ach case is to be decided on its own facts and circumstances"); *see also State v. Garcia*, 123 S.W.3d at 344 (stating that determining whether reasonable suspicion existed is a "fact-intensive" inquiry). Accordingly, we must now examine the facts surrounding Mr. Bell's arrest to determine whether they provided Officer Russell probable cause to arrest him for DUI, notwithstanding his successful performance on the field sobriety tests.

Mr. Bell committed a significant moving violation when he drove the wrong way on a divided highway during the early morning hours of May 13, 2009. Mr. Bell offered an explanation of sorts to Officer Russell, stating that he knew his mistake as soon as he made it, the implication being that it was an innocent mistake. However, like the Alaska Court of Appeals, we recognize that "[i]n dealing with probable cause, . . . we deal with probabilities." *State v. Grier*, 791 P.2d at 631 (quoting *Brinegar v. United States*, 338 U.S. at 175). Thus, Mr. Bell's innocent explanation does not prevent us from finding probable cause for DUI in this case in light of the other circumstances surrounding the arrest. *See State v. Grier*, 791 P.2d at 632 n.3 (stating that probable cause may be established "even though the facts known to the officer could also be reconciled with innocence").

In particular, Mr. Bell smelled of alcohol, and he admitted having consumed "more than [he] should have." Mr. Bell contests the significance of these facts by pointing out that there was no proof of other indicia of intoxication, such as red or watery eyes, unsteadiness, or slurred speech. However, we agree with the Minnesota Court of Appeals that a motorist "need not exhibit every known sign of intoxication in order to support a determination of probable cause." *State v. Grohoski*, 390 N.W.2d at 351; *see also State v. Evetts*, 670 S.W.2d at 641-42 (finding probable cause even though the defendant did not exhibit red or watery eyes, unsteadiness, or slurred speech).

Thus, the record establishes that Mr. Bell was driving on the wrong side of a divided highway late at night, that he smelled of alcohol, and that he admitted having imbibed "more than [he] should have." These facts clearly support a finding of probable cause for DUI. *See State v. Evetts*, 670 S.W.2d at 642 (finding probable cause where defendant was at fault in a traffic accident and smelled of alcohol, even though he did not exhibit other outward signs of intoxication). Even if Mr. Bell correctly performed the field sobriety tests, we decline to conclude that his performance sufficiently undermines the aforementioned circumstances so as to defeat a finding of probable cause for DUI. As the Delaware [20] Supreme Court has noted, "an individual may pass field tests and still be under the influence of alcohol." *Lefebvre v. State*, 19 A.3d at 296; *see also* National Highway Traffic Safety Administration, *Development of a Standardized Field Sobriety Test (SFST) Training Management System* (2001), *available at* http://www.nhtsa.gov/people/injury/alcohol/sfst/ introduction.htm (last visited Feb. 10, 2014) ("[S]ome experienced drinkers can perform physical and cognitive

tests acceptably, even with a BAC greater than 0.10 percent.”).
We have considered the totality of the circumstances from the evidence adduced at the suppression hearing. Mr. Bell’s significant moving violation, the odor of alcohol, and his admission to drinking “more than [he] should have” were sufficient to permit a prudent person to believe that he was driving under the influence of an intoxicant, even considering successful performance on a battery of field sobriety tests. Therefore, we hold that on May 13, 2009, Officer Russell had probable cause to arrest Mr. Bell without a warrant for operating a motor vehicle while under the influence of an intoxicant.

We reverse the judgments of the Court of Criminal Appeals and the trial court suppressing the results of Mr. Bell’s blood alcohol test and dismissing the charges against him. We remand this case to the trial court with directions to reinstate the charges against Mr. Bell and for further proceedings consistent with this opinion.