

NOT DESIGNATED FOR PUBLICATION

No. 115,352

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KELLY CASPER,
Appellee,

v.

KANSAS DEPARTMENT OF REVENUE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed October 14, 2016. Reversed.

J. Brian Cox, deputy general counsel, of Legal Services Bureau, Kansas Department of Revenue, for appellant.

Jonathan W. McConnell, of Wichita, for appellee.

Before BRUNS, P.J., POWELL, J., and STUTZMAN, S.J.

POWELL, J.: The Kansas Department of Revenue (KDOR) appeals the district court's reversal of the suspension of Kelly Casper's driver's license. After an administrative hearing, KDOR suspended Casper's driver's license after she was arrested and refused to take an evidentiary breath test. Casper sought judicial review; pursuant to statute, the district court conducted a de novo trial in which it concluded, under the totality of the circumstances, that the arresting police officer lacked probable cause to arrest Casper. KDOR claims the district court erred in making this finding. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On October 25, 2013, Casper was pulled over around 1 a.m. for making an improper turn. The police officer who pulled Casper over asked her if she had been drinking. Casper replied that she had. The officer then asked Casper to get out of her car and proceeded to administer a horizontal gaze nystagmus (HGN), the walk-and-turn, and one-legged-stand field sobriety tests. After Casper had completed the tests, the officer placed her under arrest for driving under the influence (DUI). Soon after, a police van arrived on scene, and Casper was asked to submit to an evidentiary breath test. She refused.

As a result of Casper's refusal to take the breath test, KDOR suspended her driver's license. Casper requested an in-person administrative hearing to challenge the suspension; after the hearing, the hearing officer summarily affirmed the suspension. Casper then filed a petition for judicial review, alleging that, based on the evidence presented at the hearing, the police officer lacked reasonable grounds to believe she was operating a vehicle while under the influence of alcohol. Specifically, Casper argued the officer did not see her drive in such a way as to indicate impairment; the officer's observations of her during the stop were insufficient to constitute reasonable grounds; and that she performed well on the field sobriety tests.

At the trial de novo, both Casper and the officer testified. The district court also watched a video of the stop. Following Casper's presentation of her case and the district court's denial of KDOR's oral motion for judgment, the trial was recessed and continued to a later date. In the meantime, KDOR filed a trial brief. When the trial resumed, the officer testified again and the parties presented closing arguments. After considering the evidence presented and listening to the parties' arguments, the district court ruled from the bench, concluding the officer lacked probable cause to arrest Casper and overturned

KDOR's suspension of her driver's license. The district court's ruling was memorialized in a written journal entry.

KDOR timely appeals.

DID THE DISTRICT COURT ERR IN DETERMINING THE OFFICER
LACKED PROBABLE CAUSE TO ARREST CASPER?

KDOR's principal complaint on appeal is that the district court should have found the officer had reasonable grounds to believe Casper was operating a vehicle while under the influence of alcohol.

When reviewing a trial de novo of an administrative license suspension, we consider whether the district court's factual findings were supported by substantial competent evidence. *Swank v. Kansas Dept. of Revenue*, 294 Kan. 871, 881, 281 P.3d 135 (2012). Substantial evidence is evidence that "'a reasonable person might accept as being sufficient to support a conclusion.' [Citation omitted.]" *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 514, 242 P.3d 1179 (2010). In determining whether substantial competent evidence exists, we do not reweigh evidence, resolve evidentiary conflicts, or redetermine credibility of witnesses. *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015). The existence of substantial competent evidence is a question of law. *Redd v. Kansas Truck Center*, 291 Kan. 176, 182, 239 P.3d 66 (2010). Once we have determined that the district court's factual findings were supported by substantial competent evidence, we then review the district court's ultimate conclusion de novo. See *State v. Fisher*, 283 Kan. 272, 280, 154 P.3d 455 (2007); *Poteet v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 412, Syl. ¶ 1, 233 P.3d 286 (2010).

K.S.A. 2015 Supp. 8-1020(h)(1) states:

"(h)(1) If the officer certifies that the person refused the test, the scope of the hearing shall be limited to whether:

(A) A law enforcement officer had reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system;

(B) the person was in custody or arrested or was involved in a vehicle accident or collision resulting in property damage, personal injury or death;

(C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and

(D) the person refused to submit to and complete a test as requested by a law enforcement officer."

"Reasonable grounds" under the Implied Consent Law is analogous to "probable cause." See *Angle v. Kansas Dept. of Revenue*, 12 Kan. App. 2d 756, 766-67, 758 P.2d 226, rev. denied 243 Kan. 777 (1988). "Probable cause is the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime." *Allen v. Kansas Dept. of Revenue*, 292 Kan. 653, 656-57, 256 P.3d 845 (2011). Moreover, probable cause is determined by considering "the information and fair inferences therefrom, known to the officer at the time of the arrest." [Citation omitted.] *Butcher v. Kansas Dept. of Revenue*, 34 Kan. App. 2d 826, 830, 124 P.3d 1078 (2005). The determination is also made by considering the totality of the circumstances. *State v. Hill*, 281 Kan. 136, 146, 130 P.3d 1 (2006). "[T]here is no rigid application of factors and courts should not merely count the facts or factors that support one side of the determination or the other." *Allen*, 292 Kan. at 657.

Here, in her petition for judicial review, Casper claimed that the officer lacked reasonable grounds to believe she was driving under the influence of alcohol. The district court also stated in its pretrial order that the issue was whether reasonable grounds

existed. At the conclusion of the trial de novo, however, the district court instead made the finding that under the totality of the circumstances there was not probable cause to arrest Casper. On appeal, KDOR frames the issue as whether the officer had reasonable grounds to request a breath test and Casper frames the issue as whether the officer had probable cause to arrest her. The distinction between how the parties frame the issue is largely immaterial as the officer would not have had lawful grounds to arrest Casper if he did not have reasonable grounds to believe that she had been operating her vehicle while under the influence of alcohol. But because KDOR frames the issue in accordance with the statute, we will examine the question as whether the officer had reasonable grounds to believe Casper was operating her vehicle while under the influence of alcohol. The other issues listed in K.S.A. 2015 Supp. 8-1020(h)(1) are not in dispute.

In finding that the officer lacked probable cause to arrest Casper, the record shows the district court considered the totality of the circumstances. It noted:

- Casper committed a traffic violation, but no evidence of further bad driving was presented.
- Casper pulled over as soon as possible.
- Casper's speech was not slurred.
- Casper appeared to be a person who was easily upset.
- Casper was able to communicate appropriately most of the time, exit the vehicle correctly, and hand over her ID properly.
- Casper did not stumble around after getting out of the car, but she also displayed poor balance at times.
- Casper did not always follow instructions, which could also be characterized as deciding whether she wanted to take the field sobriety tests.
- The officer did not ask Casper when and how much she had been drinking.

- The stop did occur late at night, but both impaired and unimpaired drivers are out late at night.
- The officer said that Casper reeked of alcohol, but no evidence of a strong odor of alcohol was presented.
- Casper had bloodshot and watery eyes, which could also be the result of being upset.
- Casper failed the field sobriety tests.
- Casper was at times uncooperative and argumentative with the officer, but the officer was also argumentative with Casper.
- Casper asked the officer to take her home only because she did not understand why she was being arrested.
- Both Casper and the officer were credible.

Ultimately, the district court determined the officer lacked probable cause namely because a preliminary breath test (PBT) was not performed.

The only factual finding KDOR challenges is the district court's finding that there was no evidence of a strong odor of alcohol. Although the district court did make that finding, it noted that the officer indicated that Casper reeked of alcohol, which it considered inculpatory evidence. To the extent the district court intended to find that there was no evidence of a strong odor of alcohol, that finding is not supported by substantial competent evidence because the officer told Casper in the video that she reeked of alcohol.

KDOR principally challenges the district court's ultimate legal conclusion that the officer lacked probable cause to arrest Casper or, in other words, the finding that the officer lacked reasonable grounds to believe that Casper was operating her vehicle while under the influence of alcohol. In her brief, Casper argues that KDOR is asking us to

reweigh the evidence, but KDOR clarifies in its reply brief that it is claiming the district court's ultimate legal conclusion was erroneous.

It appears the district court's ruling was based primarily on (1) Casper not appearing to be under the influence of alcohol in the video; (2) the officer's failure to ask Casper when she last had a drink and how many drinks she had; and (3) the lack of a PBT. The district court discussed at length our Supreme Court's decision in *City of Wichita v. Molitor*, 301 Kan. 251, 341 P.3d 1275 (2015), noting that it had determined that an officer's subjective observations of a driver are more compelling if the only question is whether the driver has alcohol in his or her system. But the district court then relied on how Casper appeared in the video. However, our Supreme Court in *Molitor* also discussed how field sobriety tests are more objective, pointing out that the defendant there had passed the sobriety tests. 301 Kan. at 261-69. In *Molitor*, the driver scored one out of eight clues on the walk-and-turn test and one out of four clues on the one-legged-stand test. Here, Casper scored five out of eight and two out of four, respectively. Rather than relying on its subjective observations of Casper's behavior, the district court should have relied on the objective results of the field sobriety tests which Casper had failed.

The district court also cited *Molitor* and *Sloop v. Kansas Dept. of Revenue*, 296 Kan. 13, 290 P.3d 555 (2012), for the proposition that questions about when and how much a driver had been drinking are important in determining probable cause. Again, however, our Supreme Court has not placed a requirement on law enforcement officers to inquire about when and how much a driver had been drinking. In *Molitor*, the court found that a driver's admission to having two or three drinks was evidence that would tend to refute the notion that the driver was driving under the influence of alcohol because it was questionable whether two or three drinks would raise a person's breath or blood alcohol concentration above the legal limit. 301 Kan. at 267. In *Sloop*, the court mentioned only in the facts section that the officer did not ask the driver when he had consumed his drinks. 296 Kan. at 14-15. A panel of this court has determined that under the reasoning

in *Molitor*, a driver's admission to having two or three drinks becomes exculpatory evidence. *State v. Unrau*, No. 114,234, 2016 WL 1546435, at *7 (Kan. App.) (unpublished opinion), *rev. denied* 304 Kan. 1022 (2016). Perhaps that was the point the district court was trying to make, but its reliance on *Molitor* and *Sloop* in finding that the officer should have asked Casper about the time and quantity of her drinks is misplaced. Further, field sobriety tests are, as previously mentioned, better indicators of whether a person is impaired to the point that he or she cannot safely operate a vehicle. See *Molitor*, 301 Kan. at 267. And again, the district court found that Casper failed both tests.

It also appears from the record that the district court improperly relied upon the lack of a PBT to hold that the officer lacked probable cause to arrest Casper. While the district judge did note it did not believe a PBT was necessary in every case, the judge stated that he would have performed one if he had been the officer and that he could not overlook the lack of a PBT in this case. But this court has previously found that a police officer had reasonable grounds to request a breath test even without considering the results of the PBT. See *Garcia v. Kansas Dept. of Revenue*, No. 106,978, 2012 WL 6634405, at *2 (Kan. App. 2012) (unpublished opinion); see also *State v. Frickey*, No. 110,566, 2014 WL 5849233, at *5 (Kan. App. 2014) (unpublished opinion), *rev. denied* 302 Kan. 1014 (2015) (officer had probable cause to arrest driver even without considering HGN test and PBT results). Logic and common sense dictate that if there are no results, either because the test was administered improperly or not performed, then the PBT has no bearing on the reasonable grounds determination. In other words, the failure to perform a PBT is evidence of nothing because there is no way to know whether the driver would have passed or failed.

The record also indicates the district court put too much emphasis on what proof a PBT could have provided had one been performed. For instance, the district court thought that a PBT would have conclusively "nailed down" whether Casper was driving under the influence of alcohol. It also likened the officer's failure to perform a PBT to the failure to

perform fingerprint testing on a gun. But the question was not whether Casper was *guilty beyond a reasonable doubt* of operating a vehicle under the influence of alcohol. Instead, the issue was merely whether the officer had, at the time, *reasonable grounds to believe* Casper was operating her vehicle while under the influence of alcohol. The results of a PBT are just another factor for a court to consider when examining this question. An evidentiary breath test would have "nailed down" whether Casper was driving under the influence of alcohol—not a PBT.

Based upon the facts found by the district court and excluding consideration of the lack of a PBT, we find the district court's legal conclusion that the officer lacked probable cause to arrest Casper was in error. The totality of the circumstances supports instead a finding that the officer had reasonable grounds to believe that Casper was operating her vehicle while under the influence of alcohol. The other issues raised by KDOR are moot.

The judgment of the district court reversing KDOR's suspension of Casper's driver's license is reversed. KDOR's suspension is affirmed.