

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI FILED
ASSOCIATE CIRCUIT DIVISION AT INDEPENDENCE DIVISION 28

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CIRCUIT COURT OF JACKSON COUNTY, MO

BY *James King*

RICHARD MARK BECK,)
MO. LICENSE NO. T20-12-57018)
Petitioner,)

v.)

DIRECTOR OF REVENUE,)
Respondent.)

Case No. 1916-CV13168
Division 28

FINDINGS OF FACT, CONCLUSIONS of LAW and JUDGMENT

Respondent, the Director of Revenue, bore the burden of proving by a preponderance of the evidence that: (1) there was probable cause to arrest Petitioner for an alcohol-related traffic offense; and (2) Petitioner was driving a motor vehicle with a blood alcohol concentration (BAC) of .08% or higher. *See* Mo Rev. Stat. § 302.505 (Supp. 2019). The cause was submitted to the Court upon the certified copy of the Alcohol Influence Report (Respondent's exhibit "A") with attachments, a certified copy of the DWI ticket and judgment (Respondent's exhibit "E"), and a disc containing video of stop and arrest (Petitioner's exhibit "1"), along with:

The testimony of the arresting officer, Robert Brown.

The court makes the following findings and conclusions:

Credibility

The evidence adduced by the Director was not credible, in that:

- A. In the video, Officer Brown was asked if Petitioner was intoxicated. Officer Brown replied, "Not that I can tell." This observation was not mentioned in the incident report. Instead, Officer Brown reported and testified that he could smell a strong odor of alcohol coming from Petitioner after he was out of the car.
- B. The Alcohol Influence Report indicated Petitioner's balance was swaying. The Court understands that video does not capture every nuance that a person standing a few feet away from a subject can perceive; however, it did not appear to the Court that Petitioner was swaying.
- C. The Alcohol Influence Report indicated that Petitioner's speech was slurred, and Officer Brown testified Petitioner's speech was slurred and slow. The Petitioner's speech in the video did not sound slurred. Petitioner's speech pattern may have been slow. However, Petitioner may have a normally slow pattern of speech.

1. Probable Cause

There was not probable cause to arrest the Petitioner for an alcohol related traffic offense. Due to cold weather, Officer Brown did not have Petitioner complete all of the standardized field sobriety tests (SFST's). Officer Brown correctly assigned the Petitioner's health higher priority than conducting SFST's. Nevertheless, rather than completing the SFST's on the road, Officer Brown could have asked Petitioner if he would voluntarily go to the police station. This decision left scant information available to establish probable cause to arrest. The law is clear that probable cause must be established before the arrest and cannot be supplemented by information obtained or observations made after the arrest. Domsch v. Dir. of Revenue, 767 S.W.2d 121, 123 (Mo. App. W.D. 1989).

Significantly, Officer Brown's initial observation was that Petitioner was not intoxicated. When asked, Officer Brown said, "Not that I can tell." It is clear from the circumstances that Officer Brown was actively looking to see if Petitioner was intoxicated when he made this observation. Officer Brown later noted that the odor from Petitioner's breath was strong. Evidently, the odor was not strong enough to smell while he was in the car. Officer Brown testified Petitioner's balance was swaying, though not enough to see on the video. He further testified Petitioner's speech was slurred, though not obvious in the video. Officer Brown reported Petitioner's eyes were watery, bloodshot, and glassy. Officer Brown conducted a Horizontal Gaze Nystagmus (HGN) test. When conducted properly, HGN can be a useful tool in establishing probable cause to arrest for intoxication. The evidence is clear that Officer Brown failed to administer HGN properly, so the evidence is excluded. "If not properly administered, the HGN test loses its scientific reliability and becomes irrelevant to the issues before the court. . . . the State failed to lay a proper foundation, and this evidence should have been excluded." State v. Browning, 458 S.W. 3d 418,429 (Mo. App. W.D. 2015). Officer Brown did not administer a Preliminary Breath Test (PBT), which also could have been used to establish probable cause in this case.

Operation of the vehicle, whether proper or improper, is a factor used to determine if probable cause to arrest is present. The video exhibit, as well as Officer Brown's testimony, shows that Petitioner was stopped at a light and had his right turn signal on. The light changed, and he executed a proper turn into the proper lane within the proper time. Officer Brown turned on his light bar and hit his siren with two short bursts. Petitioner turned on his turn signal, pulled to the far right shoulder that was parallel to the fog line, turned on his hazard lights, and put his vehicle in park. His driving was what you would expect from a sober driver.

Demeanor is also a factor to consider when determining probable cause to arrest. The evidence shows Petitioner was polite, cooperative, and respectful during the entire process.

The move to arrest happened too quickly. PBT could have been given. The other standardized field sobriety tests, (i.e., the walk-and-turn and the one-leg stand), could have been given at the station. HGN could have been administered properly. The result is that probable cause to arrest was not proven.

2. BAC

Petitioner was driving with a BAC of .08% or higher. The evidence on this point is uncontroverted.

Judgment

The revocation of Petitioner's driving privilege is set aside.

IT IS SO ORDERED this 19 day of December 2019.

Judge Jeffrey C. Neal

A handwritten signature in black ink, appearing to read "Jeffrey C. Neal", is written over a horizontal line. The signature is cursive and somewhat stylized.