

STATE OF MICHIGAN

IN THE SEVENTH DISTRICT COURT FOR THE COUNTY OF VAN BUREN

THE PEOPLE OF THE STATE OF MICHIGAN,

v

District Court Case
No. [REDACTED]

[REDACTED]

Defendant.

MR. JAY BLAIR (P72397)
Assistant Prosecuting Attorney
Van Buren County Courthouse
212 Paw Paw Street
Paw Paw, MI 49079

MR. MICHAEL J. NICHOLS (P59391)
Attorney for Defendant
3452 East Lake Lansing Road
Lansing, MI 48823

FINDINGS OF FACT, OPINION,
AND
ORDER FOLLOWING HEARING ON DEFENDANT'S MOTIONS

At a session of said Court held on the 31st day of
May, 2012, and December 14, 2012, in the Village
of Paw Paw, County of Van Buren, State of Michigan.

PRESENT: The Honorable Robert T. Hentchel
District Court Judge

The Defendant filed three motions in this case; Motion to Suppress Based on Spoliation of Evidence, Motion to Suppress and/or Dismiss Based on Lack of Probable Cause to Arrest and Motion to Suppress Estimate of Blood Alcohol Concentration Based upon Unreliable Methodology.

Due to the nature of the motions and the assignment of this Court, the hearings were conducted over several days and at different locations, the Court finding time to devote to the hearings when it could and taking into consideration the schedules of the attorneys.

Over the course of the hearings, four witnesses testified; Dr. Alfred Staubus, Geoffrey French, Officer Gerald Kirsch, and Dr. Andreas Stolz.

All the motions were taken under advisement due to the voluminous amount of evidence and for a thorough review of same.

Motion to Suppress and/or Dismiss on Lack of Probable Cause to Arrest

The Motion to Dismiss for lack of probable cause to arrest is granted.

In this case, the Defendant was arrested on probable cause to believe he was operating the motor vehicle under the influence of alcohol or with a blood alcohol content of point zero eight or more. There are many definitions for probable cause (which means there's no precise definition) but it always helps this Court to think of probable cause like pieces of a puzzle. For example, if we have a puzzle that when completed, is a picture of Abraham Lincoln, how many pieces of the puzzle do we need to put together to form a belief that the person is Abraham Lincoln. Certainly, we may not need every piece to complete the puzzle, but we will in all likelihood need more than one. Also of

significance is the piece of puzzle itself, i.e., a piece of puzzle with part of a top hat might be more helpful than a piece of puzzle with part of an ear on it.

In this case, the probable cause (puzzle pieces) for the arrest, according to Officer Kirsch are the following:

1. Odor of intoxicant.
2. Red and glassy eyes.
3. One drink.
4. Appeared nervous.
5. Knew Sgt. Thompson.
6. Offered to walk home.
7. The results of the Walk and Turn Test.
8. The results of the Counting Backwards Test.
9. The results of the HGN Test.
10. The results of the PBT Test.

If all of the above are true and valid then there certainly are enough “facts” to constitute probable for arrest. However, this Court agrees with Officer Kirsch’s conclusion that failure to follow the standardized test procedures compromises the validity of the Standard Field Sobriety Tests (May 31, 2012 Motion Hearing transcript pg. 142, lines 8 through 11).

First, Officer Kirsch recognized during the hearing that the HGN Test and the PBT Test were not properly administered. Indeed, he said he hasn’t had any training on these tests since 1996. Since not properly administered, this Court finds that they have no validity in the determination of probable cause and therefore cannot be used as a basis

for the arrest. If you're going to use these tests to arrest a citizen then for heaven sakes, do them right. It's not too much to require. Of equal importance, these two tests are the only two that are designed to produce a quantitative amount of alcohol, i.e., the nystagmus indicates .10 BAC or more and the PBT gives an actual BAC level.

Second, this Court finds little merit in Officer Kirsch's conclusions that appearing nervous, knowing Sgt. Thompson, and offering to walk home, constitutes "facts" showing probable cause to arrest for Operating under the Influence of Alcohol or Operating with a BAC of .08 or more; even under the totality of the circumstances. Any citizen pulled over by a police officer could display these characteristics or make these statements if stopped for any reason.

Third, according to the testimony of Officer Kirsch, the Defendant passed the Walk and Turn Test. (May 31, 2012, Hearing transcript, pg. 138, line 5).

Fourth, in the Counting Backward Test (which is not even a standardized field sobriety test), the Defendant was to count backward from 68 to 53 but stopped at 58. When asked by the officer if he recalled the test he said yes, and that he was supposed to count from 68 to 53. The Defendant was cognizant enough to remember and/or recall the number where he was supposed to stop and there's no evidence that he skipped any numbers, flubbed any numbers, had to start over, or slurred his words. In reviewing the entire testimony of Officer Kirsch this Court isn't even sure if this is considered a fail, if so, it is negligible. (May 31, 2012, Hearing transcript, pg. 119, line 21 through 25; pg. 120, lines 1 and 2)

In light of the above findings, the remaining facts constituting probable cause to arrest are the odor of intoxicants, red and glassy eyes, and one drink. The Court will note

at this point that there isn't any bad driving, slurring of words, staggering, swaying, falling, losing balance, fumbling to find paperwork, or any other indications of drinking too much alcohol, and further this Court will note that it is not against the law to drink and drive as long as you are not under the influence, impaired, or at .08 BAC or higher. In this Court's opinion the remaining facts above only show that the Defendant had a drink and then drove.

Although reasonable minds can sometimes differ, this Court cannot condone the arrest of a citizen of this county by a police officer under the circumstances and procedures used in this case.

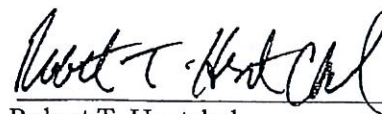
Remaining Motions

Due to the above findings and decision it is not necessary for this Court to decide the remaining motions.

Decision

This case is hereby dismissed with prejudice.

Dated: April 17, 2013



Robert T. Hentchel
District Court Judge