ENTRY ORDER

SUPREME COURT DOCKET NOS. 2008-371 & 2008-496

MAY TERM, 2009

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
Thomas M. Pinney	}	DOCKET NOS. 67-4-08 Wrcs & 518-4-08 Wrcr
		Trial Judge: M. Kathleen Manley

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

Defendant appeals the civil suspension of his driver's license and his conviction for driving under the influence (DUI), arguing that the court erred in denying his motion to suppress. Defendant contends the court's findings are not supported by the evidence and that the court erred in finding that defendant was not compelled to perform field sobriety tests. We affirm.

The court found the following facts. On April 10, 2008, an officer of the Ludlow police department was patrolling northbound on Main Street at 1:40 a.m. The officer observed defendant's vehicle driving southbound and being operated partially in a parking space area on the side of the street. The passenger side tires of defendant's vehicle were far enough into the parking spaces lining the side of the street that the car was kicking up dust and dirt from the side of the road that had accumulated over the winter. Defendant operated his vehicle in that space for a "considerable" time—longer than the officer would have expected for a driver who was driving with diligence. The officer turned around and sped up to catch up with defendant. The officer then observed defendant turn into a school parking lot. While making the turn, defendant partially left the paved driveway and his passenger tires drove across part of the school lawn. The officer activated his blue lights and stopped defendant.

Upon approaching defendant's vehicle, the officer observed indicia of intoxication, including that defendant had watery eyes, slurred speech, and smelled of alcohol. In answer to the officer's questions, defendant confirmed that he had consumed alcohol. The officer asked defendant to exit the vehicle and instructed defendant on how to perform standard field sobriety tests. The officer did not tell defendant he was required to perform the exercises, but he did not explain to defendant that he had a right to refuse. Defendant performed the exercises without refusal. Based on the officer's observations, the results of the field sobriety testing, and the result of a preliminary breath test, defendant was arrested for DUI.

Defendant filed a motion to suppress, arguing that the officer lacked a reasonable and articulable suspicion of wrongdoing necessary to conduct a stop, and that the officer improperly

ordered him to perform field sobriety tests without informing him that he had a right to refuse. Following a hearing, the court concluded that under the totality of the circumstances, the stop was justified given the officer's observations of defendant's erratic driving, including driving in the parking area on Main Street and driving up on the grass when turning into the school. Thus, the court denied defendant's motion. Defendant entered a conditional plea and appealed his DUI conviction and the civil suspension of his driver's license.

"Resolution of a motion to suppress involves a mixed question of fact and law." State v. Simoneau, 2003 VT 83, ¶ 14, 176 Vt. 15. We will affirm the trial court's findings of fact unless they are clearly erroneous. Id. The question of whether these facts support a reasonable and articulable suspicion of wrongdoing sufficient to warrant a stop is a legal question that we review de novo. Id. "The officer must have more than an unparticularized suspicion or hunch of criminal activity, but needs considerably less than proof of wrongdoing by a preponderance of the evidence." Id.

Defendant argues that several of the court's essential findings of fact are not supported by the evidence and therefore its conclusion that the officer was warranted in conducting a stop is erroneous. Defendant first contends that there was no evidence as to how long a diligent driver would have operated her car in the parking area before correcting herself and therefore there was no basis for the court's finding that defendant drove in the parking spaces for longer than a diligent driver would have. Defendant's argument misses the relevance of the officer's testimony on this point. The officer explained that he was trained to look for visual cues of impairment and that he suspected defendant was impaired because leaving the roadway indicated the operator was having issues controlling his vehicle. The officer stated: "Most people, if they heard the dirt kicking up would come to the conclusion that they were not on the traveled portion of a roadway and would correct probably a little more quickly than [defendant] did." The trial court admitted this statement over defendant's objection for the purpose of explaining why, based on the officer's training and experience, he suspected defendant was impaired. There was no error in admission of the statement. The officer has been a police officer in Vermont since 2002 and a certified instructor on DUI detection since 2005. The officer had adequate training and experience to testify as to what behavior is indicative of impairment and the court did not err in relying on it. The officer's testimony supports the court's finding that defendant's behavior of driving in the paved area was "longer than [the officer] would have expected for a driver who was driving with diligence."

Next, defendant argues that the evidence does not support the court's finding that defendant operated his car in the parking area for a "considerable" time. The officer testified that he observed defendant's vehicle traveling southbound in the parking lane, kicking up dust and debris. In response to the question of whether this was brief or for a considerable distance, the officer replied that defendant was traveling in the parking lane for "a considerable distance." Thus, the officer's testimony supports the court's finding, and it was within the trial court's discretion to accept the officer's account. "Given the inherent difficulty in evaluating demeanor, mannerisms, and tone of voice, in addition to the quality of testimony itself, we defer to the factfinder's determination of the credibility of the witnesses and the persuasive effect of his testimony." State v. Freeman, 2004 VT 56, ¶ 8, 177 Vt. 478 (mem.).

Defendant also contends that the evidence does not support the court's finding that defendant drove "quickly" into the school parking lot. At the hearing, the officer did not testify on this point, but the officer's affidavit reported that defendant drove "quickly." Defendant

conditionally stipulated to admit the affidavit at the beginning of the hearing on the motion to suppress. We do not consider whether the court properly considered this evidence in deciding the motion to suppress because, even putting it aside, we conclude that the remaining circumstances justified a stop. Defendant's erratic driving, including driving in the parking area on the side of the road and driving onto the grass while turning, is sufficient to provide the officer with a reasonable suspicion that defendant was driving while impaired, thereby justifying the trooper's stop of defendant's vehicle. See State v. Bruno, 157 Vt. 6, 11 (1991) (defendant's erratic driving provided reasonable suspicion of DUI).

We are not persuaded by defendant's argument that we should disregard the evidence of how he drove over the grass while turning because it is unclear from the officer's testimony if this occurred before or after the officer turned on his blue lights. The court found that the stop occurred after defendant entered the parking lot, and the evidence supports the court's finding. The officer testified that he made the stop in the high school parking lot, and when defendant turned into the lot, he did not have his blue lights on. On redirect, the officer first stated that he could not remember if he activated the blue lights before or after defendant's tires went up on the school lawn. Once the officer refreshed his memory with his affidavit, he testified that he activated his blue lights after defendant turned into the driveway. Thus, the evidence supports the court's finding, and it was appropriate for the trial court to consider defendant's uncontrolled turn into the parking lot in assessing whether, under the totality of the circumstances, the officer had a reasonable and articulable suspicion that defendant was driving while under the influence of alcohol.

Defendant's final argument is that the trial court erred in finding that defendant was not forced to perform field sobriety tests. See State v. Blouin, 168 Vt. 119, 122 (1998) (explaining that police may request performance of sobriety tests which a defendant has a right to refuse). In this case, the officer was justified in ordering defendant from his vehicle and in administering field sobriety tests because he had a reasonable suspicion of DUI based on the officer's observations of defendant's watery eyes, the odor of alcohol, defendant's admission that he consumed alcohol, and the officer's observation of defendant's erratic driving. See State v. Gray, 150 Vt. 184, 190-92 (1988) (holding that officer can conduct field sobriety tests as long as the officer can "point to specific articulable facts" that there is a suspicion of DUI); see also State v. McGuigan, 2008 VT 111, ¶ 13, ___ Vt. ___ (explaining that the scope of an investigatory detention may be expanded to include field sobriety tests as long as there is a reasonable suspicion of DUI). The court's finding that defendant performed the tests without objection is supported by the officer's uncontroverted testimony.

Defendant argues that because the officer did not inform him he had a right to refuse, under the circumstances, a reasonable person would not have believed that he could refuse to perform the tests; therefore, his participation was not voluntary, and the results of the field sobriety tests should be suppressed. See State v. Sprague, 2003 VT 20, ¶¶ 28-29, 175 Vt. 123 (assessing whether the defendant voluntarily consented to exit car based on totality of circumstances, including whether the defendant knew he had a right to refuse). We conclude that voluntariness is not relevant here because the officer's exit order and subsequent request to perform field sobriety tests were supported by the officer's reasonable and articulable suspicion of DUI. The constitutional validity of the officer's requests did not rely on defendant's voluntary consent. Cf. id. ¶¶ 20, 23-24 (explaining that an exit order is justified by reasonable suspicion of wrongdoing or by voluntary consent when the facts do not demonstrate reasonable suspicion). Thus, the trial court was not required to conduct an analysis of whether defendant voluntarily

consented to exit the vehicle and submit to field sobriety tests. Furthermore, because a roadside investigation during a routine traffic stop is not the equivalent of being in custody, the officer was not required under the Vermont or Federal Constitution to inform defendant of his Miranda rights during the roadside encounter. See State v. Zumbo, 157 Vt. 589, 592-93 (1991) (Vermont constitution); State v. Boardman, 148 Vt. 229, 231 (1987) (federal constitution). While defendant could have refused to participate in the field sobriety tests, the officer was not obligated to so inform defendant. The trial court correctly found that defendant's rights were adequately protected and no suppression was required.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice