# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES PATRICK OLSON,

Defendant-Appellant.

UNPUBLISHED
March 25, 2021

No. 353982
Gogebic Circuit Court
LC No. 19-000234-AR

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals on leave granted the order of the circuit court affirming the order of the district court, which denied defendant's motion to suppress evidence of his breath alcohol content derived from the DataMaster breath alcohol test. We reverse and remand.

## I. FACTS

This case arises from a traffic stop that occurred in the early morning of Sunday, June 23, 2019. Shortly before 4:00 a.m. on that date, a sheriff's deputy saw a car driven by defendant roll through a stop sign. While following the car, the deputy observed that the license plate on the car did not have current tags. As recorded by the deputy's body camera, upon stopping the car the deputy informed defendant that he stopped him because the car lacked valid license plate tags. Defendant explained that the car belonged to his cousin. During this exchange, defendant's speech was normal and not slurred. The deputy returned to his vehicle and contacted dispatch, which informed him that defendant had a prior OWI conviction and that defendant's driver's license had restrictions that allowed him to drive only to work, to school, to court, and to receive medical treatment. The deputy also ascertained that the license plate on the car was not registered to that vehicle.

The deputy then asked defendant to step out of his car. Defendant did not have any difficulty getting out of the car or walking. Defendant explained to the deputy that he was coming from a social gathering where he had consumed "a couple" alcoholic drinks, and that he had agreed to drive his cousin's car to her home. Defendant told the deputy that he did not know that his

license had restrictions. When the deputy asked defendant if he would agree to take a preliminary breath test (PBT), defendant asked, "Do I have to?" The deputy responded, "No, you don't have to, I can charge you for refusing if you don't, but that's—that's up to you." Defendant agreed to take a PBT. The PBT indicated that defendant's breath alcohol content was 0.191. When the deputy saw the results of the test, he commented to defendant, "You're up there, you can hold your alcohol, I would never have guessed that high." The deputy also noted that defendant had bloodshot eyes, but did not mention during this exchange whether he detected the odor of any intoxicants. After arresting defendant, the deputy administered a DataMaster breath alcohol test at the jail that indicated defendant had a breath alcohol content of 0.14.

Although the record is not entirely clear, defendant apparently was charged with operating a motor vehicle while intoxicated, MCL 257.625(1). Before the district court, defendant moved to suppress the results of the PBT and the DataMaster test. Defendant asserted that the deputy did not have reasonable cause to administer the PBT, and therefore the deputy lacked probable cause to arrest defendant and to require him to submit to the DataMaster test. The district court denied defendant's motion to suppress, concluding that the deputy had reasonable cause based on the totality of the circumstances to administer the PBT at the time of the traffic stop.

Defendant appealed the district court's order to the circuit court, contending that the deputy did not have reasonable cause within the meaning of MCL 257.625a(2) to administer the PBT. The circuit court affirmed the district court's order, reasoning that although the meaning of "reasonable cause" under MCL 257.625a(2) is unclear, the deputy had probable cause to believe that defendant was operating a vehicle while intoxicated, which was sufficient to support administering the PBT. This Court granted defendant's application for leave to appeal.

## II. DISCUSSION

Defendant contends that the district court erred by ruling that the arresting officer had reasonable cause to administer the PBT to defendant and that the circuit court therefore erred by affirming the decision of the district court. We agree.

We review de novo questions of law related to a motion to suppress. *People v Booker*, 314 Mich App 416, 419; 886 NW2d 759 (2016). We also review de novo issues of statutory construction, *id.*, and constitutional issues. *People v Wiley*, 324 Mich App 130, 150; 919 NW2d 802 (2018). We review a trial court's factual findings underlying its ruling on a motion to suppress for clear error, and we affirm those findings unless we are left with a definite and firm conviction that a mistake has been made. *People v Mazzie*, 326 Mich App 279, 288-289; 926 NW2d 359 (2018). When the record contains a video recording of the events in question, however, we need not rely on the trial court's conclusions regarding the contents of the video. *People v Campbell*, 329 Mich App 185, 193; 942 NW2d 51 (2019). We also observe that for purposes of this appeal, defendant does not challenge the district court's factual findings, but rather the application of the law to those facts.

The Fourth Amendment to the United States Constitution, and the Michigan Constitution, guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). Both constitutions require a warrant supported by probable cause for a search and seizure to be

reasonable, and thus constitutional, unless an exception to the warrant requirement applies. *People v Franklin*, 500 Mich 92, 100-102; 894 NW2d 561 (2017). Generally, the exclusionary rule bars the introduction into evidence of materials seized and observations made during an unreasonable, and thus unconstitutional,[1] search. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

The use of chemical breath testing for alcohol constitutes a "search" for constitutional purposes. *Skinner v Railway Labor Executives Ass'n*, 489 US 602, 616-617; 109 S Ct 1402; 103 L Ed 2d 639 (1989). "It is well established that the taking of a breath sample to test for the presence of alcohol constitutes a search under the Fourth Amendment. As such, the search must be reasonable." *People v Chowdhury*, 285 Mich App 509, 523; 775 NW2d 845 (2009) (quotation marks and citation omitted). This Court has included PBTs in the category of breath testing that constitutes a search under the Fourth Amendment. See *id*. at 524. Because searches and seizures are reasonable for purposes of the Fourth Amendment only if based on probable cause, *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792 (2002), the use of chemical breath testing must be supported by probable cause to be constitutionally permissible.

With that backdrop, MCL 257.625a(2) provides that an officer may require a person to participate in a PBT if the officer has "reasonable cause" to believe that the person was operating a vehicle upon a public highway while that person's ability to do so was affected by the consumption of alcohol. MCL 257.625a(2) provides, in relevant part:

> A peace officer who has reasonable cause to believe that a person was operating a vehicle upon a public highway or other place open to the public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state and that the person by the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of them may have affected his or her ability to operate a vehicle, . . . may require the person to submit to a preliminary chemical breath analysis.

MCL 257.625a does not define "reasonable cause," and there is little authority regarding what constitutes "reasonable cause" for purposes of the statute. In the related context of determining whether an arrest was legal, this Court, noting that "[a]n arrest is legal if an officer

[1] In *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the United States Supreme Court carved out an exception to the probable cause requirement that permits the police to stop and briefly detain a person for investigation based on reasonable and articulable suspicion of criminal activity. The *Terry* exception has been extended to incorporate investigative stops under a variety of circumstances for specific law enforcement needs, including traffic stops. *People v Nelson*, 443 Mich 626, 631-632; 505 NW2d 266 (1993). Reasonable suspicion enables the officer to "briefly detain [a] vehicle and make reasonable inquiries aimed at confirming or dispelling his suspicions." *People v Rizzo*, 243 Mich App 151, 156; 622 NW2d 319 (2000) (quotation marks and citation omitted). For purposes of this appeal, defendant does not challenge that the deputy had reasonable and articulable suspicion of criminal activity when he stopped defendant's car.

has reasonable cause to believe that a crime was committed by the defendant," stated that " '[r]easonable cause' means having enough information to lead an ordinarily careful person to believe that the defendant committed a crime." *People v Freeman*, 240 Mich App 235, 236; 612 NW2d 824 (2000). This definition is consistent with that of "probable cause" articulated by our Supreme Court in an arrest context, being that "[p]robable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019), quoting *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Whether probable cause exists depends upon the totality of the circumstances. *People v Nguyen*, 305 Mich App 740, 752; 854 NW2d 223 (2014).

Reasonable cause has thus been defined comparably to probable cause. Moreover, as discussed, a search and seizure must be reasonable to be constitutional, *Chowdhury*, 285 Mich App at 523, and to be reasonable for purposes of the Fourth Amendment, a search and seizure must be based on probable cause. *Lewis*, 251 Mich App at 69. Thus, because the use of chemical breath testing, including a PBT, has been determined to be a search and seizure, see *Chowdhur*y, 285 Mich App at 524, such testing must be supported by probable cause to be constitutionally permissible.

In this case, the circuit court concluded that the deputy had probable cause to believe that defendant was operating a motor vehicle while intoxicated, and, therefore, that the PBT was properly administered irrespective of the precise definition of "reasonable cause." We disagree. Here, early on a Sunday morning, defendant was driving a vehicle with an expired license plate when he rolled through a stop sign. After stopping defendant's car, the deputy learned that defendant had a restricted driver's license which did not permit him to be driving at the time of the stop; defendant had a prior OWI; he was driving a car that did not belong to him, and that car had a license plate that was not registered to that vehicle. Defendant explained to the deputy that the car belonged to his cousin, that he had just been socializing with the cousin nearby, that he had agreed to drive the car home for her, and that he had had "a couple of drinks." Defendant's circumstances, though problematic in other respects, did not suggest that he was intoxicated. Although the deputy noted after administering the PBT that defendant had bloodshot eyes, neither defendant's speech nor his physical abilities suggested impairment by alcohol or other substance, and the deputy did not mention that he observed any odor of intoxicants. The fact that his appearance and demeanor did not suggest intoxication is reinforced by the deputy's comment to defendant upon seeing the PBT result, that "You're up there, you can hold your alcohol, I would never have guessed that high." In the end, defendant had "rolled through" a stop sign and admitted to having "a couple" alcoholic drinks.

As discussed, the determination whether probable cause exists to believe a crime has been committed is made by examining the totality of the circumstances. *Nguyen*, 305 Mich App at 752. In this case, the totality of the circumstances suggested that defendant was driving an improperly licensed vehicle and driving outside the restrictions of his license, but the totality of the circumstances was not sufficient to support the conclusion that defendant "by the consumption of alcoholic liquor . . . may have affected his ability to operate a vehicle." See MCL 257.625a(2). Thus, insufficient circumstances existed to support the deputy's decision to require a PBT in this case under MCL 257.625a(2). We therefore conclude that the circuit court erred by affirming the

order of the trial court denying defendant's motion to suppress the DataMaster[2] test results on this basis.

Defendant also contends that he did not consent to the PBT, and that as a result the search was not valid under the consent exception to the search warrant requirement. Whether consent was validly given is a question of fact for determination in the first instance by the trial court. See *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). Because the trial court in this case has not yet addressed this issue, we decline to do so in this appeal.

Reversed and remanded to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

[2] We note that the result of a PBT generally is inadmissible in an intoxicated-driving prosecution, and is admitted only to rebut certain types of testimony or to challenge the validity of the arrest. See MCL 257.625a(2)(b); *People v Parrott*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350380); slip op at 3; *Booker*, 314 Mich App at 420.