

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000002-001 DT

05/18/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
K. Waldner  
Deputy

STATE OF ARIZONA

BRIAN W ROCK

v.

ALEXANDER NATHAN KANTER (001)

THEODORE A AGNICK

PHX MUNICIPAL CT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 14113700.**

Defendant-Appellant Alexander Kanter (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss/Suppress, which alleged the officer did not have probable cause to arrest him. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On August 2, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A); making a turn without a proper signal, A.R.S. § 28–754(B); and no proof of insurance, A.R.S. § 28–4135(C). Prior to trial, Defendant filed a Motion To Dismiss/Suppress alleging the officer did not have probable cause to arrest him. Also prior to trial, Defendant filed a Motion in Limine asking the trial court to preclude evidence of the HGN test administered to him.

At the hearing on Defendant's motion, Officer Vincent Lavia testified he was on duty on August 2, 2010. (R.T. of May 18, 2011, at 42.) At 10:55 p.m., he was eastbound on Camelback Road at 11<sup>th</sup> Avenue when he saw a vehicle in the curb lane 20 feet in front of him. (*Id.* at 42–43.) He saw the vehicle drift to the right with the right tires over the white line, and the tires almost hit the curb. (*Id.* at 43, 50–51.) The vehicle then jerked back into the lane. (*Id.* at 43, 51.) The vehicle continued to weave within its lane. (*Id.* at 51, 53.) The vehicle's right turn signal came on, and the vehicle turned right approximately 20 feet later. (*Id.* at 44.) Officer Lavia then initiated a traffic stop. (*Id.* at 44.)

Officer Lavia approached the driver, whom he identified as Defendant. (R.T. of May 18, 2011, at 45.) Officer Lavia noted Defendant's eyes were bloodshot and watery, his speech was

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slurred, and his breath smelled of alcohol. (*Id.* at 46, 51–52, 54, 56.) In response to Officer Lavia’s questions, Defendant said he had four drinks of alcohol that evening. (*Id.* at 47, 52–53.) Defendant said he would not feel comfortable submitting to field sobriety tests because he had been drinking alcohol. (*Id.* at 53.) Officer Lavia therefore called for the assistance of DUI officers. (*Id.* at 47.)

Officer Christopher Talley testified he was on duty on August 2, 2010, with Officer Vanderloo. (R.T. of May 18, 2011, at 5.) Officer Vanderloo was with Officer Talley because Officer Vanderloo was in the process of being certified for HGN testing. (*Id.* at 6, 10.) Officer Talley received a call from Officer Lavia asking for assistance in a DUI investigation. (*Id.* at 6, 7–8, 9.) Officer Vanderloo then administered the HGN test to Defendant, with Officer Talley standing behind him watching. (*Id.* at 8, 9.) Officer Talley saw all six of the six cues, which indicated Defendant’s BAC was a 0.08 or above. (*Id.* at 16, 17.)

Officer Stuart Vanderloo testified he was on duty on August 2, 2010, with Officer Talley. (R.T. of May 18, 2011, at 26.) Officer Vanderloo was with Officer Talley because he was in the process of being certified for HGN testing. (*Id.* at 26.) Officer Vanderloo administered the HGN test to Defendant, with Officer Talley standing behind him watching. (*Id.* at 27–38, 40.) After the HGN testing, Officer Lavia placed Defendant under arrest. (*Id.* at 49.)

Chester Flaxmayer testified for Defendant, and then the attorneys made their arguments to the trial court. (R.T. of May 18, 2011, at 59, 78, 90, 95.) The trial court then ruled it would grant Defendant’s motion in limine to preclude the results of the HGN test. (*Id.* at 96.) It further ruled denying Defendant’s Motion To Dismiss/Suppress based on Officer Lavia’s observations of Defendant’s vehicle weaving and almost hitting the curb, Defendant’s odor of alcohol, his bloodshot watery eyes, and his admission to drinking alcohol. (*Id.* at 98–99.)

Defendant then submitted the matter on the record, which included a stipulation that Defendant’s BAC was 0.187. (R.T. of May 18, 2011, at 99–104.) The trial court found Defendant guilty of the A.R.S. § 28–1381(A)(1) and A.R.S. § 28–1382(A) charges, and responsible for making a turn without a proper signal. (*Id.* at 111.) The trial court then set the matter for sentencing. (*Id.* at 115.) On June 21, 2011, the trial court imposed sentence, and on June 28, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE OFFICERS HAD PROBABLE CAUSE TO ARREST DEFENDANT.

Defendant contends the trial court abused its discretion in finding the officers had probable cause to arrest him. In reviewing a trial court’s ruling on a motion to suppress or dismiss, an appellate court is to defer to the trial court’s factual determinations, including findings based on a witness’s credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court’s legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81

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(2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). A police officer has probable cause to arrest if the officer has reasonable grounds to believe the person arrested has committed or is committing an offense. *State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985). In reviewing whether probable cause exists, courts look to the totality of the facts and circumstances known to the officers at the time of the arrest. *Lawson*, 144 Ariz. at 553, 698 P.2d at 1272.

Defendant was charged with driving under the influence, which is defined as follows:

A. It is unlawful for a person to drive . . . in this state under any of the following circumstances:

1. While under the influence of intoxicating liquor . . . if the person is impaired to the slightest degree.

2. If the person has an alcohol concentration of 0.08 or more within 2 hours of driving or being in actual physical control of the vehicle . . . .

A.R.S. § 28–1381(A)(1) & (2). In this case, the officers knew Defendant was driving. From the odor of alcohol on his breath, his watery bloodshot eyes, and admission to drinking alcohol, the officers knew he was under the influence of intoxicating liquor. And from the observations that Defendant’s vehicle almost hit the curb and was weaving in its lane, the officers had reason to believe Defendant was impaired in general, and his ability to keep his vehicle in its lane was impaired in particular. Based on these factors, the trial court correctly found the officer had probable cause to believe Defendant was committing the offense of driving under the influence.

Defendant was also charged with driving with a BAC of 0.08 or more. The officer testified Defendant exhibited all six cues in the HGN test, which indicated his BAC was 0.08 or more. As Defendant correctly notes, the trial court granted his motion in limine to preclude admission in evidence of the results of the HGN test, but that ruling did not change the officers’ right to rely on the HGN test to determine whether there was probable cause to arrest Defendant:

Moreover, when the police make an arrest based upon probable cause, it is not material that the person arrested may turn out to be innocent, and the arresting officer is not required to conduct a trial before determining whether or not to make the arrest.

*Cullison v. City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978). Thus, the trial court’s determination that the results of the HGN test would not be admissible in evidence in court did not negate the officer’s right to rely on the results of the HGN test on the street in order to determine whether there was probable cause to make the arrest.

### III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly found the officers had probable cause to arrest Defendant, and therefore properly denied his Motion To Dismiss/Suppress.

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**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Phoenix Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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