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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
Plaintiff/Appellee,)	Supreme Court No. 2008-0153
)	
v.)	
)	
Larry John Buck,)	District Court No. 06-K-2187
Defendant/Appellant.)	

STATE OF NORTH DAKOTA

OCT 30 2008

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APPEAL FROM THE DISTRICT COURT JUDGMENT OF CONVICTION
OF JUNE 10, 2007 IN AND FOR
THE COUNTY OF WARD, STATE OF NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
DISTRICT COURT NO. 06-K-2187
THE HONORABLE DOUGLAS L MATTSON

APPELLEE'S BRIEF

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STATEMENT OF ISSUE

- I. District Court did not err in its determination at the suppression hearing that there was probable cause to support the arrest for driving under the influence.

STATEMENT OF CASE

The defendant was arrested for Driving Under the Influence of Alcohol with BAC .08% or greater, in violation of NDCC 39-08-01, on September 29, 2006. The defendant filed a motion to suppress based upon the lack of probable cause. A hearing was held on his motion on June 12, 2007. The trial court denied the defendant's motion. A jury trial was held on June 9, 2008. The jury found the defendant guilty. The defendant filed a timely Notice of Appeal.

FACTS

On September 29, 2006 Deputy Lockrem, [hereinafter "Lockrem"], was working patrol. (App. Appendix p 17). During that time he was dispatched to respond to the area near the Minot Air Force Base on a report that a vehicle was traveling northbound in the southbound lanes of Highway 83. (App. Appendix 17.) Deputy Lockrem did not see the vehicle as he approached the base, so he drove onto base to check on a vehicle he saw turn in there. (App. Appendix 17). During that time his attention was drawn to a pickup that was parked on an approach on the east side of Highway 83. (App. Appendix 18). Lockrem followed that vehicle and observed it make a U-turn against a no U-turn sign across two yellow lines. (App. Appendix 18). Lockrem continued to follow the vehicle and observed the vehicle weave and almost strike some construction cones. (App. Appendix 18). The defendant was identified as the person driving the vehicle. (App. Appendix 18).

When Lockrem made contact with the defendant, he observed a strong odor of alcohol, slurred speech, glassy and bloodshot eyes. (App. Appendix 19). Lockrem asked the defendant for driver's license, registration and proof of insurance. (App. Appendix 19). During the time the defendant was retrieving those documents Lockrem observed that the defendant's motor skills appeared to be impaired. (App. Appendix 19). Lockrem also observed the defendant had poor balance, needing to use his vehicle for balance as he got out for support. (App. Appendix 30). Lockrem asked the defendant if he had consumed alcohol. (App. Appendix 32). The defendant admitted to drinking three or four drinks the first time, then changed that to four or five another time. (App. Appendix 31-32). The defendant was also asked when he had his last drink, again he gave different answers. (App. Appendix 32). The first time he stated an hour and a half; the second answer was 20 minutes. (App. Appendix 32).

Lockrem did not request the defendant to perform the standardized sobriety tests, because the defendant, an 18 year retired law enforcement officer, stated that he had

natural nystagmus of his eyes and that he had a back injury or bad back. (App. Appendix p. 19, Trial Transcript p. 63). Lockrem had the defendant recite the alphabet. (App. Appendix p. 20). The defendant was able to recite the alphabet, during that time Lockrem again observed slurred speech. (App. Appendix 21). Lockrem also had the defendant perform a counting test. (App. Appendix p. 20). The defendant did not complete the test as instructed, and Lockrem observed his speech was slurred. (App. Appendix 20). Lockrem also had the defendant submit to a preliminary breath test. (App. Appendix 20). Based upon the result, along with the other observations Lockrem made, described above, he placed the defendant under arrest for Driving Under the Influence of Alcohol with BAC .08%>.

ARGUMENT

- I. District Court did not err in its determination at the suppression hearing that there was probable cause to support the arrest for driving under the influence.

At the hearing on the defendant's motion to suppress, after hearing the testimony of Lockrem, the trial court denied the defendant's motion. The Supreme Court will defer to a trial court's findings of fact in the disposition of a motion to suppress. State v. Olson, 2007 ND 40 ¶7, 729 NW2d 132, 134 (ND 2007)(citing State v. Torkelsen, 2006 ND 152, ¶8, 718 NW2d 22 (ND 2006). Generally, a trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence. Id. There was sufficient competent evidence supporting the trial court's decision in this matter. The trial court's decision to deny the defendant's motion to suppress, based upon lack of probable cause for the arrest, was not contrary to the manifest weight of the evidence.

The Court in Moran v. North Dakota Dep't of Transp., 543 NW2d 767, 770 (ND 1996), citing *Salhus* as authority, held that two elements were necessary to arrest a driver for driving under the influence of alcohol: "the law enforcement officer first must

observe signs of impairment, physical or mental. Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol. Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶19, 663 NW2d 161, 166 (ND 2003). Probable cause to arrest exists when the facts and circumstances within police officers' knowledge and of which they have reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing an offense has been or is being committed. Id. At 166. When making a probable cause determination, we consider the totality of the circumstances. Id., State v. Waltz, 2003 ND 197, ¶10, 672 NW2d 457, 461 (ND 2003). In reviewing the totality of the circumstances, discussed below, the trial court found sufficient probable cause existed for the arrest.


In this case, Lockrem observed a U-turn made against a "No U-turn" sign. Evidence of a traffic violation is a relevant factor in determining whether probable cause exists for driving under the influence of alcohol. Sonsthagen at 168. *Citing* Baer v. North Dakota Dep't. of Transp., 1997 ND 222, ¶12, 571 NW2d 829 (1997), Moran, *supra*. at 770. Lockrem also observed blood shot, glassy eyes. The observation of glassy, red, watery, or bloodshot eyes is a relevant factor in a probable cause determination to arrest for driving under the influence of alcohol. Id. (other citations omitted). Lockrem also observed the defendant displaying poor motor skills while he was looking for his driver's licence, registration and proof of insurance. Lockrem testified the defendant's speech was slurred. He also testified that the defendant had poor balance and had to use his vehicle to steady himself when he got out of the vehicle. The defendant admitted to consuming alcohol. Finally, the defendant failed the on-site breath screening test. Based upon the totality of the circumstances, Lockrem had sufficient probable cause for the arrest. *See e.g.* Zietz v. Hjelle, 395 NW2d 572, 575 (ND 1986)(finding admissions of alcohol, slurred speech and failed sobriety tests sufficient for arrest on a violation of NDCC 39-08-01), State v. Knowels, 2003 ND 180, 671 NW2d 816 (ND 2003) (affirming a conviction wherein the officer testified to the defendant's poor balance, bloodshot eyes,

slurred speech and smell of alcohol). The trial court did not err in finding sufficient probable cause and denying the defendant's motion.

CONCLUSION

Based upon the above argument, the State respectfully requests the Court summarily affirm the trial court's denial of the defendant's motion to suppress.

Dated this 20 day of October, 2008.


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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

AFFIDAVIT OF SERVICE BY MAIL

vs.

Tamara M. Woody,

Defendant.

Criminal No(s). 51-07-K-2274

Betsy J. Trumbauer, being first duly sworn, deposes and says:

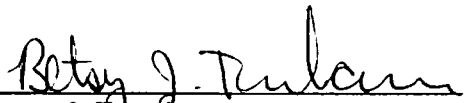
That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the ___ day of October, 2008, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

APPELLEE'S BRIEF

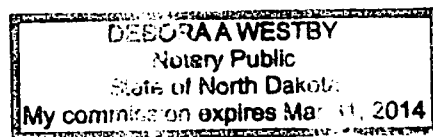
That said envelope was addressed to the following person at his address as follows:

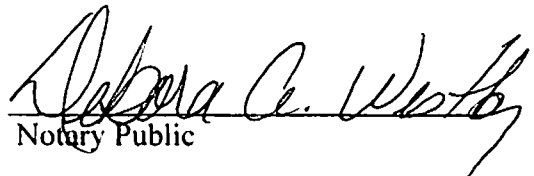
Robert W. Martin
North Dakota Public Defenders' Office
18 3rd St SE, Ste. 300
Minot ND 58701

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


Betsy J. Trumbauer

Subscribed and sworn to before me this 30 day of October, 2008, by Betsy J. Trumbauer.




Notary Public