

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-1063

RUSS A. BREWER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MARCH 31, 2010

APPEAL FROM THE BAXTER
COUNTY CIRCUIT COURT
[NO. CR-2008-246-4]

HONORABLE GORDON WEBB,
JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Russ A. Brewer appeals from his conviction on a charge of boating while intoxicated. Appellant challenges the constitutionality of an Arkansas statute and the trial court's denial of his motion to suppress. In addition, appellant argues that the trial court erred by assessing excessive court costs. We affirm.

On July 19, 2008, appellant was cited by the Arkansas Game and Fish Commission for the offense of boating while intoxicated. On October 9, 2008, appellant was found guilty in Baxter County District Court of the offense. Appellant appealed his conviction to Baxter County Circuit Court.

On March 16, 2009, appellant filed a motion to suppress. In the motion, appellant argued that there was no probable cause to stop his boat and, as a result, all evidence seized and observations made by the officers who performed the stop should be suppressed. At the

hearing on the motion to suppress, Chris Majors, an officer with the Arkansas Game and Fish Commission, testified that, while on patrol, he and his partner, who did not testify, observed a passenger in a boat being operated by appellant standing up on the passenger's side of the boat with his arms held up in a pose similar to that made famous by the film "Titanic." Officer Majors testified that he believed that the passenger's conduct was a violation of Arkansas Code Annotated section 27-101-202(9).¹

When the boat was stopped, Officer Majors noticed that appellant and the passenger were moving around as though they were trying to hide something. Officer Majors noticed that there was a can of beer sitting between appellant's legs and under the seat. The officers asked appellant and the passenger about their safety equipment and requested their registration and insurance. Officer Majors testified that he smelled a strong odor of alcohol and observed appellant "stumbling around in the boat." Appellant initially denied that he had been drinking, but later admitted that he had. According to Officer Majors, appellant's speech was not impaired, but appellant was yelling at the officers from only a short distance away. Appellant's eyes were also "really, really, really red." The officers performed a horizontal-

¹Arkansas Code Annotated section 27-101-202(9) (Supp. 2009) states that no person

[i]f operating a motorboat of twenty-six feet (26') or less in length, shall allow any person to ride or sit on the gunwales or on the decking over the bow of the vessel while underway unless the vessel is equipped with adequate guards or railing to prevent passengers from being lost overboard. However, this restriction shall not apply to persons occupying the gunwales or the decking over the bow for necessary purposes such as mooring or casting off.

gaze nystagmus (HGN) test on appellant, which revealed “several indicators.” Appellant was then taken to the shore, where another HGN test and a one-leg stand test were performed. The results of the second HGN test were the same, and appellant “didn’t do very well” on the one-leg stand test. Appellant was administered a BAC test that revealed a blood-alcohol content of 0.197. Appellant stipulated that, if the evidence presented by the State were allowed to be admitted into evidence, it would be sufficient to prove the offense of boating while intoxicated. In an order entered June 3, 2009, the trial court denied appellant’s motion to suppress, found appellant guilty of the offense of boating while intoxicated, and sentenced appellant to ninety days’ imprisonment in the Baxter County Detention Facility with eighty-nine days suspended contingent upon appellant’s successful completion of twelve months’ probation. Appellant filed a timely notice of appeal on June 30, 2009.

Appellant initially argues that Arkansas Code Annotated section 27-101-105, which the State relied upon to justify the officers’ stop, violates both the Fourth Amendment to the United States Constitution and Article II, section 15 of the Constitution of the State of Arkansas. The State argues that appellant’s challenges under both the federal and state constitutions are not preserved. We agree. Constitutional arguments may not be raised for the first time on appeal. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007). Appellant never raised his argument regarding the constitutionality of the statute before the trial court. Because appellant failed to raise his constitutional arguments below, we cannot consider them now on appeal. Although his argument on this point is not entirely clear, appellant appears

to also argue that the officers were not permitted to perform a safety stop under section 27-101-105. To the extent that appellant is arguing such, this argument was never presented to the trial court and cannot be considered on appeal.

Appellant's next argument on appeal is that the trial court erred in denying his motion to suppress. In reviewing the denial of a motion to suppress, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to the inferences drawn by the circuit court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). We reverse only if the ruling is clearly against the preponderance of the evidence. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). There is currently no case law in Arkansas concerning the circumstances under which a boat operating on a waterway in this state may properly be stopped and a search conducted. However, the circumstances under which a motor vehicle may be stopped are well established and are illustrative here.

In order to be valid, a traffic stop requires that the officer have probable cause to believe that a traffic violation has occurred. *See Laine v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). Officer Majors testified that, at the time the boat was stopped, he believed that the passenger on the boat was committing an act in violation of Arkansas Code Annotated section 27-101-202(9). The Arkansas Game and Fish Commission has the authority to enforce the provisions of Chapter 101 of Title 27 of the Arkansas Code. Ark. Code Ann. § 27-101-105(a)(1)(A) (Supp. 2009). In the exercise of its duty to enforce the provisions of that

chapter, the Commission has the authority to stop and board any vessel subject to that chapter and to investigate any accident or violation involving vessels subject to that chapter. Ark. Code Ann. § 27-101-105(a)(1)(B)(2) (Supp. 2009). Obviously, the language of section 27-101-105 encompasses section 27-101-202(9). The actions of appellant's passenger gave Officer Majors probable cause to believe that a violation of section 27-101-202(9) had occurred. In addition, there was no indication from the record that the stop was prompted by anything other than the perceived violation by the boat's passenger. As noted above, once an officer has probable cause to believe that a traffic violation has occurred, a stop of the vehicle is valid. Therefore, the stop of appellant's boat, which occurred after Officer Majors had probable cause to believe that a violation of section 27-101-202(9) was occurring, was valid.

The precedent from other jurisdictions cited by appellant is of no moment because, as the trial court correctly pointed out, those cases involved situations in which boats were stopped at random, whereas the genesis of the stop in this case was a perceived violation of a statute. As the stop of appellant's boat was valid, it was then permissible for Officer Majors to investigate further the indications of intoxication exhibited by appellant.² The trial court

²The State did not argue that the presence of an open container aboard the boat constituted probable cause. Ark. Code Ann. § 5-76-102(b)(2) (Supp. 2009) ("The consumption of alcohol or the possession of an open container aboard a vessel does not in and of itself constitute probable cause."). Instead, the State relied upon the observed safety violation by the boat operator under Arkansas Code Annotated section 27-101-202(9) committed by allowing "any person" to violate the statute.

properly denied the motion to suppress. We affirm the trial court's denial of appellant's motion to suppress.

Appellant's final point on appeal is that the trial court erred in assessing \$300 in DWI court costs and \$200 in court costs. The State argues that appellant has failed to preserve the issue for appeal because he failed to object to the imposition of costs before the trial court. We agree. We will not consider issues raised for the first time on appeal. *Buford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006). Although there are certain exceptions to this rule, including claims of an illegal sentence, appellant's argument regarding the costs assessed by the trial court does not fall within the exceptions. In order to preserve his challenge to the costs assessed by the trial court, appellant was required to object to the assessment of costs before the trial court. Appellant's failure to do so precludes us from considering the issue on appeal.

Affirmed.

VAUGHT, C.J., and GRUBER, J., agree.