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ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-1212

MERLE LEE BANKS, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** May 5, 2010 APPEAL FROM THE BRADLEY COUNTY CIRCUIT COURT [NO. CR-2009-6-1] HONORABLE SAM POPE, JUDGE AFFIRMED

M. MICHAEL KINARD, Judge

Merle Lee Banks, Jr., appeals from the circuit court's order finding him guilty of driving while intoxicated (DWI), first offense. He challenges the court's denial of his motion to suppress. We affirm.

Appellant was arrested after midnight on July 15, 2008, and cited for first-offense DWI. On February 20, 2009, appellant filed a motion to suppress evidence, arguing that the charge against him was the result of an illegal stop and detention. Appellant contended that Officer Greer[1] of the Warren Police Department stopped and detained him without probable cause to believe he had committed a traffic violation or crime of any sort; that after stopping him, Greer detained him to conduct a DWI investigation

[1] We note that it was actually Officer Phillip Everett who performed the traffic stop.

without reasonably suspecting that he was intoxicated; and that the evidence sought to be introduced was seized in violation of his constitutional rights and should be suppressed.

At the suppression hearing on May 18, 2009, Officer Phillip Everett of the Warren Police Department testified regarding the events leading up to appellant's arrest. Everett testified that he was sitting in the parking lot at Mad Butcher when appellant drove by with his truck radio "blaring real loud" in violation of Warren City Ordinance No. 166. Everett stated that he pulled out behind appellant and observed that appellant was swerving within his lane, not driving in a straight line. After following appellant about two blocks, Everett turned on his blue lights. Appellant did not stop right away; Everett testified that appellant could have pulled over at the tire shop or Chinese restaurant but failed to do so. Everett "bumped" his siren, and appellant eventually pulled his vehicle over. Everett testified that when he approached the vehicle, appellant immediately stated that he (appellant) knew the sheriff, he (Everett) wouldn't write appellant a ticket, and if he did write appellant a ticket, it would not go to court. Officer Everett noticed an open container of beer in the console between the seats and could smell the odor of an intoxicant from appellant's breath. He asked appellant to step out of the vehicle, and he called Officer Greer, who was dispatched on a 911 call at the time. Everett arrested appellant and took him to the police department. There, appellant was watched for thirty minutes and then was administered field-sobriety tests by Officer Greer. Officer Everett issued appellant a citation for DWI. On cross-examination, it was brought out that

appellant was not cited for a noise ordinance violation, failure to yield to an emergency vehicle, fleeing, or manner of driving, and that his speech was marked "normal."

The court denied appellant's motion to suppress. The court found that the traffic violation—failure to stop when "lighted"—provided probable cause for the arrest, despite the fact that appellant did not receive a citation for a traffic violation. The issue was raised again at trial, and the trial court this time found probable cause to detain appellant for the purpose of performing field-sobriety tests. Following the bench trial, appellant was found guilty of DWI (first offense), fined $300, ordered to pay $300 in court costs, and ordered to serve twenty-four hours in the county jail. Appellant filed a timely notice of appeal.

In reviewing the denial of a motion to suppress evidence, the appellate court conducts a de novo review based upon the totality of the circumstances, reversing only if the circuit court's ruling denying the motion to suppress is clearly against the preponderance of the evidence. *Sheridan v. State*, 368 Ark. 510, 247 S.W.3d 481 (2007). Put another way, in reviewing the denial of a motion to suppress, we make an independent determination based on the totality of the circumstances, to review findings of historical facts for clear error, and to determine whether those facts give rise to reasonable suspicion or probable cause that a crime has been committed, while giving due weight to inferences drawn by the trial court. *Lawson v. State*, 89 Ark. App. 77, 82, 200 S.W.3d 459, 462–63 (2004).

Our supreme court has written:

> We have previously explained that probable cause exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. In assessing the existence of probable cause, our review is liberal rather than strict.

Burris v. State, 330 Ark. 66, 72, 954 S.W.2d 209, 212 (1997) (citations omitted). In assessing the existence of probable cause, our review is guided by the rule that probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction; however, mere suspicion is not enough to support a finding of probable cause to arrest. *Romes v. State*, 356 Ark. 26, 144 S.W.3d 750 (2004); *Martinez v. State*, 352 Ark. 135, 98 S.W.3d 827 (2003). On review of the legality of an arrest, all presumptions are favorable to the trial court's ruling, and the burden is on the appellant to demonstrate error. *Yocum v. State*, 325 Ark. 180, 925 S.W.2d 385 (1996).

Rule 4.1 of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a traffic offense involving driving a vehicle while under the influence of any intoxicating liquor or drug or that such person has committed any violation of law in the officer's presence. Ark. R. Crim. P. 4.1(a)(ii)(C) & (a)(iii) (2009). Clearly, the police officer could not arrest appellant based on the "possibility" of DWI as he stated in his testimony; a warrantless arrest must be based upon probable cause. Nonetheless, we look to the facts within the arresting officer's knowledge—not his stated reasoning—to determine whether those facts are sufficient to

permit a person of reasonable caution to believe that an offense has been committed. *See Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008) (holding that officer had probable cause to arrest even if he did not articulate the specific offense); *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989) (stating that, although the officer testified that he did not have probable cause to arrest the defendant, the issue of probable cause to arrest or detain is a matter of law for the appellate court to determine).

Here, the arresting officer had reasonable or probable cause to believe that appellant had committed DWI. When Officer Everett first attempted to stop appellant, he had only observed a violation of the city's anti-noise ordinance. Then he observed appellant weaving within his lane and failing to heed the police lights. After the legal stop, Officer Everett observed appellant's behavior, the open container of alcohol, and appellant's breath smelling of intoxicants. A police officer's observations with regard to the smell of alcohol and other physical characteristics consistent with intoxication can constitute competent evidence to support a charge of driving while intoxicated. *Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003).

We hold that the circuit court's ruling denying appellant's motion to suppress was not clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and MARSHALL, JJ., agree.