

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

06-1128 c/w 06-1140

STATE OF LOUISIANA

VERSUS

MICHAEL GORDON

COOKS, J., dissents in part.

I respectfully dissent from the majority's decision to affirm the suppression of the toxicology report. Initially, I note the opinion hinges its result on the fact that the State failed to establish that Officer LaBorde had probable cause to believe Defendant was under the influence when he ordered the blood test. The opinion specifically states as follows:

As stated by the trial court, the prosecution failed to establish that reasonable grounds existed to believe that the defendant had been driving under the influence of an intoxicating substance.

There are a number of problems with that conclusion. First, as will be discussed in detail later, I find the record establishes a clear basis for probable cause on the part of Officer LaBorde to believe Defendant may have been under the influence of intoxicating substances when he ran over the victim. Second, a review of the record reveals the trial court DID NOT state that "the prosecution failed to establish that reasonable grounds existed to believe that the defendant had been driving under the influence of an intoxicating substance." Lastly, the trial court specifically based its ruling on an alleged uncertainty over what rights were read to Defendant, and not on the issue of probable cause. The following colloquy occurred at the close of the hearing:

THE COURT:

I understand that. Was there any evidence presented that there was probable cause?

MR. GREEN: (Counsel for the State)

I believe the probable cause for it was presented at the last hearing with agent Scotty LaBorde, and what he had to do in his investigation. In fact the drugs were found in the vehicle, drugs were found in the home. That was handled, I believe in the other hearing.

MR. SMALL: (Counsel for Defendant)

It was handled in the other hearing, and let me refer to page forty-eight, "At the time you instructed Officer West to transport Dr. Gordon to a hospital to have blood drawn, at that time were you possessed or were you aware of evidence which caused you to believe there was probable cause to think that he was under the influence of alcohol or controlled substances at the time he was operating the vehicle that apparently struck Ms. Hoskins? No, sir." Clear as a - -

THE COURT:

Right. That is my recollection also. Plus, even if you - - even if there was probable cause Officer West said, well the fact that he was advised that he could take an additional test was on the form, but - - I don't know what is on a standard form because a copy of a standard form wasn't presented into evidence or shown to Officer West to show what he would have read. And that is the problem that we see. So, even if you say or we don't need to read 661 (C) (c) (1) those rights, which I think you do have to read, I mean advise them anyway, there is no way to know whether or not he was advised that there was an additional test that needed to be run. And when you look at 666, when they talk about the additional test - - that is going to be, I'm sorry, 664(B), when he is supposed to be advised of the independent test, you know the Off - - there is no proof that that was read or even that the Court can glean that it was read because the Court doesn't know if it is on it or not.

MR. GREEN:

I believe whenever Mr. Small was asking the question as to, was these certain rights specifically read, Officer West said that he could not specifically remember - -

THE COURT:

That is correct.

MR. GREEN:

- - but those are the rights on the form that he would read.

THE COURT:

I understand that. But, then whenever he asked about certain other rights he just said, no, I didn't specifically said - - no, I didn't specifically say that. As to 664, as to that right, he said that is on the form. As to the consequences of 14:98.2, he said, yeah, that is on the form. But as to rights of 661(C)(1), he would specifically say, no, no, no, I can't specifically recall, I can't specifically recall. And I think that is vital. There is some things that are not fatal, for example, there is no writing to indicate that - - that they - - designate at arriving what conditions the test were to be - - under what conditions the test would

be administered, well, I don't think that is fatal, or that they didn't have a sworn report saying what they - - what they did do, I mean, they obviously don't cause they don't have anything. So, I think that is a real problem. How do you respond to that Mr. Green?

MR. GREEN:

With the problems as far as the rights form, I think they had already testified that they couldn't find that specific rights form.

THE COURT:

No, I understand that.

MR. GREEN:

Yes, ma'am.

THE COURT:

But as to testimony to overcome that, to show that these are the rights that I did read because I always read them and these are the ones.

MR. GREEN:

My understanding was that the Officer testified that those specific rights were the kind that he would ordinarily read and did so in that situation. I think I specifically asked him, did you read to him those rights.

THE COURT:

I understand that, but I don't know what those rights are. You didn't go over each one or show him a copy so I don't know that that is what was read, I mean there has been no evidence to show that. As I said, the failure of 32:661(A) (2) (a), I don't think that is fatal. I think that the person who - - the registered nurse actually drew the blood, I don't think she has to know what kind of preservatives in there. There is some problems with the kit. The testor, I think was certified by the state. He didn't say he had a valid permit, but he had a certification. And he did test his machine on a daily basis, both the gas chromatograph and the spectrometer. Those were tested on a daily basis if they wouldn't work. He tested two samples to make sure - - if there would have been a difference then that would have presented a problem. So, I mean, he was qualified - - eight years of experience, had the necessary background. What I have a problem with are due process and constitutional rights read to Mr. Gordon. I don't think there was sufficient proof to show that. So, the test results are suppressed.

Although the trial court referenced the probable cause issue, it made no definitive ruling in that area, and based its judgment on different grounds. Despite this, the proposed opinion states:

The prosecution does not object to or seek review of the trial court's finding that the state's failure to establish reasonable grounds for believing the defendant to have been intoxicated while driving the

vehicle was fatal to the admissibility of the blood analysis. Review of the evidence submitted at both hearings shows that Lieutenant LaBorde ordered the blood test solely on the basis that there was a fatality involved in the accident and that Officer West administered the test strictly in response to Lieutenant LaBorde's orders.

Thus, there is no merit in this assignment of error because the prosecution failed to establish either reasonable grounds or probable cause to believe that the defendant had been operating the motor home under the influence of an intoxicating substance.

It is unreasonable to hold the State at fault for failing to address an issue which was not the basis for the trial court's ruling. The State's brief before this court addressed the question of whether the appropriate rights were read to Defendant, which was the issue the trial court based its ruling on.

Further, I find the record establishes that Officer LaBorde had reasonable grounds to believe Defendant had been operating his vehicle under the influence of an intoxicating substance. Although Officer LaBorde answered in the negative when questioned whether, at the time he ordered the blood test, he had probable cause to think that Defendant was under the influence of alcohol or controlled substances at the time he ran over his wife, his actions at the scene and other testimony at trial establish probable cause.

The prosecution noted that, while at the scene, Officer LaBorde ordered a drug dog to search for drugs. Officer LaBorde also secured warrants to search Defendant's mobile home and residence for drugs. Officer LaBorde testified he had previous knowledge from "confidential informants or reliable persons indicating to [him] that Dr. Gordon used drugs." Officer LaBorde also acknowledged he was very familiar with defendant, having associated with him in social settings. Defendant's behavior coupled with the officer's knowledge of past drug use by Defendant, provides more than reasonable grounds to assume possible intoxication. Taking into account the entire picture, any reasonable person, and especially any reasonable police officer, would have a particularized and objective basis for suspecting Defendant's possible

intoxication. Probable cause does not rest on an officer's subjective beliefs or attitudes but turns on a completely objective evaluation of all of the circumstances known to the officer at the time of his challenged action. *See State v. Kalie*, 96-2650 (La. 9/19/97), 699 So.2d 879. The United States Supreme Court has held an officer's subjective determination as to whether or not he had probable cause to arrest is not determinative of the issue. *See Florida v. Royer*, 460 U.S. 491, 507 (1983) (plurality). The officers who seized Royer at the airport and searched his suitcase did not believe there was probable cause to arrest and proceeded on a consensual or Terry-stop rationale. Nevertheless, the Supreme Court recognized that the officers' belief did not foreclose the State from justifying Royer's custody by proving probable cause. 460 U.S. at 507. Whether or not there is probable cause must be assessed under an objective standard. *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993). "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott v. United States*, 436 U.S. 128, 138 (1978).

Accordingly, I do not find Officer LaBorde's testimony with respect to whether or not he had probable cause to order the blood test determinative on this issue. Despite Officer LaBorde's puzzling answer to defense counsel's question, I find the record clearly established that reasonable grounds existed to believe the Defendant may have been driving under the influence of an intoxicating substance.

As to whether Defendant's due process rights were violated, I find they were not. It was undisputed that the actual standard rights form, which was signed by Defendant, could not be located by the State and presented as evidence at the suppression hearing. However, the testimony elicited at the hearings established the standard rights found in La.R.S. 32:661(c)(1) were read to defendant. Officer Virgil

West testified he read the rights form to the Defendant, and that it was the form that had been in use with the Oakdale Police Department for many years. Officer West testified as follows:

Q. Okay. And just so that we are clear on the record, in what way is the form we are discussing now different than the plain Miranda form?

A. Well, it list - - it lists your Miranda rights on it but it also lists consequences if you refuse the test, how much amount of time you have to serve if you fail the test, different things like that.

Q. Right. And it lists a number of things that are listed in Title 32 regarding chemical test. Is that your understanding?

A. Yes, sir.

Officer West testified he was positive he read the rights off the DWI chemical testing form, stating "if it is on that rights form, I read it to him."

Nurse Charlotte Eschette, who drew the blood sample, recalled waiting for Officer West to read the rights form to Defendant. She stated:

Q. Okay. You testified earlier ma'am - - I don't know if you testified to this, but you wait for the reading of the rights in relation to chemical test.

A. Yes, sir.

Q. Did that happen in this case?

A. Yes, sir.

...

Q. Okay. And you said that you had heard one of the officers read Mr. Gordon his rights?

A. Yes, sir. I think Virgil is the one who did it.

Q. And you - - I don't know if you testified before or not to that, but you state that you heard those rights being read before?

A. Yes, sir.

Q. Okay. Would these be the rights relating to a chemical test?

A. Yes, sir.

Q. For drawing blood?

A. Yes, sir.

Q. Okay. I mean, in other words, are you familiar with what the Miranda rights are?

A. Yes, sir.

Q. Was it a short Miranda rights or was it a - -

A. It was a long one.

Q. Okay. How long did it take him to read that?

A. It takes him a little while - -

Q. Okay.

A. - - because it is very lengthy.

The record establishes Defendant was provided due process in the drawing of blood. The State notes Defendant voluntarily waived his Miranda rights prior to consenting to the chemical test. Both Officer West and Nurse Eschette testified Defendant voluntarily consented to the blood draw. Further, prior to the actual drawing of blood, defendant was read the rights found in Title 32 relating to the chemical test. Therefore, Defendant received sufficient due process and was fully informed of his constitutional rights. The trial court erred in granting Defendant's Motion to Suppress the toxicology report. I would grant the State's writ on this issue.