IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Appellant,

v.

EFRAIN ENRIQUE TORRES-DIAZ,

Appellee.
_____/

CASE NO. 2014-AP-25-A-O
Lower Court Case 2014-CT-553-A-O

On Appeal from the County Court
for Orange County
Judge Carolyn B. Freeman

Jeffrey L. Ashton, State Attorney
Cherish R. Adams, Assistant State Attorney
Attorney for Appellant

Robert Wesley, Public Defender
Kathleen Shea, Assistant Public Defender
Attorney for Appellee

Before WOOTEN, DAVIS, DAWSON, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State appeals the trial court's order granting Appellee's motion to suppress evidence stemming from a DUI arrest. While the trial court's findings of fact with regard to a suppression motion are given great weight, "applying those facts to determinations of reasonable suspicion and probable cause are reviewed de novo on appeal" as questions of law. *D.H. v. State,* 121 So. 3d 76, 79 (Fla. 3d DCA 2013).

Corporal Mayer of the Orange County Sheriff's Office testified at the suppression hearing held on April 25, 2014. He said that at about 2:00 p.m. on January 18, 2014, he received information about a car parked at a Wal-Mart with a damaged front end and a shredded tire. He found the car legally parked, with the damage as described. He parked and walked up to the car.

The person behind the wheel, Appellee, was either asleep or unconscious in a reclining position. There was an open Heineken bottle in the center console. The corporal testified that it appeared to contain beer. A set of keys was also in the center console. A second Heineken bottle, unopened, was on the passenger seat. There was a pile of vomit on the pavement next to the driver's door. The corporal knocked on the window for several minutes before Appellee responded. When Appellee awoke, the corporal asked him to step out of the car, which he did. The corporal testified that Appellee leaned on the car, swayed while standing in place, and had bloodshot, watery eyes. The odor of alcohol emanated from his breath. The corporal called for assistance and deputies arrived to conduct a DUI investigation. The corporal wrote a citation for an open container violation and the subsequent DUI investigation resulted in Appellee's arrest.

The trial court granted Appellee's motion to suppress the evidence stemming from Appellee's encounter with law enforcement, finding that there was no basis to detain Appellee to begin a criminal investigation.

There is no constitutional barrier to a law enforcement officer approaching any person in an attempt to speak to that person. The corporal could approach Appellee's car, make observations, and knock on the window without any articulated reason or suspicion. *Golphin v. State*, 945 So. 2d 1174, 1181 (Fla. 2006). The detention did not occur until Appellee was asked to exit his car. *Popple v. State*, 626 So. 2d 185, 188 (Fla. 1993).

In order to detain Appellee for an investigation, the corporal needed reasonable suspicion of illegal activity. Reasonable suspicion must have "a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience." *State v. Castaneda*, 79 So. 3d 41, 42 (Fla. 4th DCA 2011). It "is a less demanding standard than that for probable cause, and considerably less than proof of wrongdoing by preponderance of the evidence." *State v. Lennon*, 963 So. 2d 765, 768 (Fla. 3d DCA 2007).

The State argues that the open beer bottle itself was sufficient to allow the corporal to detain Appellee as this, by itself, constitutes a traffic offense. Appellee contends that there was no testimony that there was liquid in the open bottle or that it was beer, but the corporal did testify that the bottle appeared to contain beer. Reasonable suspicion to investigate did not require the corporal to know in advance what, if anything, was actually in the bottle since an officer is not required to have all the facts prior to the investigation. A stop is valid where an officer has a reasonable suspicion that a traffic infraction has occurred. *Hilton v. State*, 961 So. 2d 284, 295 (Fla. 2007). The corporal could reasonably assume that the open beer bottle that appeared to contain a liquid contained beer and he could lawfully detain Appellee long enough to investigate this infraction and to write a ticket if appropriate. Even if the corporal turned out to be wrong about the beer, a "traffic stop based on an officer's incorrect but reasonable assessment of the facts does not violate the Fourth Amendment." *State v. Wimberly*, 988 So. 2d 116, 119 (Fla. 5th DCA 2008).

The corporal also had reasonable suspicion of DUI to detain Appellee. The open bottle, coupled with Appellee being very soundly asleep or possibly unconscious in the Wal-Mart parking lot (which, like the convenience store in *Vitale v. State*, 946 So. 2d 1220, 1223 (Fla. 4th DCA 2007) was "not a place where drivers ordinarily pull over to take a nap"), along with the vomit, was sufficient to allow a DUI investigation. See, e.g., *State v. Jimoh*, 67 So. 3d 240 (Fla. 2d DCA 2010): where police had difficulty getting a sleeping driver to wake up and where they smelled alcohol through the open car window, reasonable suspicion existed to conduct a DUI investigation. Here, the corporal had visual rather than olfactory evidence of drinking (an open beer bottle) but likewise had difficulty waking Appellee. The vomit was another possible indication that the driver might be ill or impaired, adding to the reasonable suspicion. The more substantial evidence of DUI came as soon as Appellee exited the car. But the pre-detention facts observed by the corporal permitted him to briefly detain Appellee to investigate further.

The trial court also found that the State failed to demonstrate probable cause to believe that Appellee was in physical control of the car, an essential element of an arrest for driving under the influence. The court ruled that there was no evidence the keys found in the console would have started the car. Probable cause, although a higher standard than reasonable suspicion, "does not require the proof that the beyond a reasonable doubt standard or even the preponderance of the evidence standard requires." *State v. Grue*, 130 So. 3d 256, 260 (Fla. 5th DCA 2013). The question is "whether all the facts . . . viewed through the lens of common sense, would make a reasonably prudent person think" that something was true. *Grue* at 260. It takes only common sense to think that the keys in the console, within Appellee's reach from the driver's seat, were most likely the keys to the car in which Appellee was sitting; thus there was probable cause to support the conclusion that Appellee was in physical control of the car. Whether the State can prove this element of DUI beyond a reasonable doubt is a question to be left to the jury. *Baltrus v. State*, 571 So. 2d 75, 76 (Fla. 4th DCA 1990); *State v. Fitzgerald*, 63 So. 3d 75 (Fla. 2d DCA 2011).

IT IS THEREFORE ORDERED AND ADJUDGED that the Order of the trial court is REVERSED and the matter REMANDED for further proceedings.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 14th day of April, 2015.

/S/
WAYNE C. WOOTEN
CIRCUIT COURT JUDGE

DAVIS and DAWSON, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished to **the Honorable Carolyn B. Freeman,** Orange County Courthouse, 425 North Orange Avenue, Orlando, Florida 32801; **Cherish R. Adams,** Assistant State Attorney, Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801 and Kathleen, Shea, Assistant Public Defender, Office of the Public Defender, 435 North Orange Avenue, Orlando, Florida 32801, on the 14th day of April, 2015.

/S/

Judicial Assistant