

DISSENTING OPINION BY FOLEY, J.

On January 6, 2007, Police Officer Vinzant confirmed through a dash-mounted doppler radar that Defendant-Appellee Kaaina Shayne Hull (Hull) drove his vehicle at 54 mph in a 25 mph speed zone past Officer Vinzant. Officer Vinzant followed Hull's vehicle for approximately one and a half to two minutes before stopping the vehicle. During Officer Vinzant's observation of Hull's vehicle, the officer did not notice anything unusual about Hull's driving except for the excessive speed. After stopping Hull's vehicle, Officer Vinzant approached the vehicle and asked Hull to produce his driver's license, proof of insurance, and vehicle registration. Officer Vinzant did not observe anything unusual in the manner in which Hull produced these documents. Officer Vinzant was able to see that Hull was the only occupant of the vehicle and that Hull's eyes appeared to be red, watery, and glassy. The officer also detected the smell of an alcoholic beverage emanating from inside the vehicle, but could not tell at that point if the alcohol smell was coming from Hull's facial area.

Officer Vinzant informed Hull of his observations and asked Hull if he would take a field sobriety test. Hull refused. Officer Vinzant then informed Hull that he was under arrest for Operating a Vehicle Under the Influence of an Intoxicant (OVI) and ordered Hull to exit his vehicle. Officer Vinzant did not observe any unsteadiness in Hull as he exited his vehicle. After Hull complied with the order to exit his vehicle, Officer Vinzant determined that the smell of alcohol was coming from Hull's facial area.

On February 2, 2007, the State of Hawai'i (State) charged Hull by Complaint with OVI, in violation of Hawaii

Revised Statutes § 291E-61(a)(1) and (3) (Supp. 2006),¹ and Inattention to Driving, in violation of HRS § 291-12 (2007 Repl.).²

On February 28, 2007, Hull filed a Motion to Suppress Evidence Due to Lack of Probable Cause for Arrest (Motion), which came on for hearing on March 14, 2007. The District Court of the Fifth Circuit, Lihue Division, (district court) granted Hull's Motion, and, in its August 29, 2007 "Amended Findings of Fact, Conclusions of Law and Order re Defendant's Motion to Suppress Evidence Due to Lack of Probable Cause for Arrest Filed February 28, 2007" (Amended Order), concluded that Hull's arrest was made without probable cause because Officer Vinzant had placed Hull under arrest after Hull had refused to perform any field sobriety tests and prior to Hull exiting his vehicle. The district court concluded that Officer Vinzant's observation of Hull's speeding and Hull's red, watery, glassy eyes was "insufficient to support a finding of probable cause to arrest one for for [OVI]" and ruled that all evidence discovered after

¹ HRS § 291E-61 provides in relevant part:

§291E-61 Operating a vehicle under the influence of an intoxicant. (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:

- (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;
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- (3) With .08 or more grams of alcohol per two hundred ten liters of breath[.]

² HRS § 291-12 provides:

§291-12 Inattention to driving. Whoever operates any vehicle without due care or in a manner as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property shall be fined not more than \$500 or imprisoned not more than thirty days, or both.

Hull was told that he was under arrest was suppressed and precluded from use at trial.

The facts in State v. Ito, 90 Hawai'i 225, 978 P.2d 191 (App. 1999), are similar to the case at hand. Ito was stopped for speeding, and the police officer who made the stop observed that Ito's eyes were red and stated that he "detected a strong odor of alcohol on [Ito's] person." Id. at 227, 978 P.2d at 193. The trial court "concluded that the smell of alcohol and the officer's observation of Defendant's red eyes amounted to reasonable suspicion" to order Ito out of the car. Id. at 228, 978 P.2d at 194. In finding that the officer had probable cause to arrest Ito, the trial court noted that if it were not for the results of the Horizontal Gaze Nystagmus (HGN) test conducted after the stop, the court "would rule that there was not probable cause [for the arrest] based on the evidence that [the officer] had in front of him." Id. at 229, 978 P.2d at 195. On appeal, this court vacated and remanded, holding that the HGN test was improperly administered and without the results of a properly conducted HGN test, there was not probable cause to arrest. Id. at 244-45, 978 P.2d at 210-11.

In the instant case, Officer Vinzant testified that, at the time of arrest, he observed that Hull had red, watery, and glassy eyes and he detected the odor of alcohol inside the vehicle, but was unsure if the odor was coming from Hull's person. Officer Vinzant did not describe the odor of alcohol as being strong or pervasive.

The mere odor of alcohol about a driver's person, not even characterized by such customary adjectives as "pervasive" or "strong," may be indicia of alcohol ingestion, but is no more a probable indication of intoxication than eating a meal is of gluttony.

Saucier v. State, 869 P.2d 483, 486, 869 P.2d 483, 486 (Alaska Ct. App. 1994) (quoting State v. Taylor, 3 Ohio App. 3d 197, 444 N.E.2d 481, 482 (1981)).

No field sobriety test was conducted before Hull's arrest and no indication of instability or erratic driving was observed by the arresting officer prior to arrest. As in Ito, the district court in Hull's case found that the speeding offense, the officer's observation of red eyes, and the smell of alcohol coming from the vehicle did not amount to probable cause for arrest.

I do not agree with the majority opinion that the district court erred in not inferring consciousness of guilt on Hull's part because he refused to take a field sobriety test. This court in State v. Ferm, 94 Hawai'i 17, 7 P.3d 193 (App. 2000), held that the refusal to take a field sobriety test is admissible evidence. This court did not require the trial court to infer consciousness of guilt on the part of the defendant, stating only that such an inference is "permissible," not required. Id. at 28, 7 P.3d at 204.

I would not disturb the district court's ruling that the facts, as presented in this case, did not amount to probable cause to arrest Hull. Therefore, I respectfully dissent.

Daniel R. Foley