

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI,
APPELLANT**

vs.

**KATHRYN AVENT,
RESPONDENT**

DOCKET NUMBER WD76395

DATE: APRIL 1, 2014

Appeal from:

The Circuit Court of Johnson County, Missouri
The Honorable Sue Dodson, Judge

Appellate Judges:

Division Two: Mark D. Pfeiffer, P.J., Joseph M. Ellis and Victor C. Howard, JJ.

Attorneys:

Jennifer Rodewald, for Appellant

Lance A. Riddle, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI, APPELLANT

v.

KATHRYN AVENT, RESPONDENT

WD76395

Johnson County, Missouri,

Before Division Two Judges: Mark D. Pfeiffer, P.J., Joseph M. Ellis and Victor C. Howard, JJ.

The State of Missouri appeals from an order issued in the Circuit Court of Johnson County granting Kathryn Avent's motion to suppress evidence obtained subsequent to her arrest for driving while intoxicated based upon a lack of probable cause to support her arrest.

AFFIRMED.

Division Two holds:

1. Contrary to the assertions of the Dissent, this is not a case where the trial court's decision was rendered based on uncontested facts and the question presented to the trial court was merely an issue of law. Avent challenged the testimony of the arresting officer through cross-examination and argued about the weight and meaning of the evidence. The only facts that have been conceded by Avent on appeal are that she admitted having consumed alcohol on the day of her arrest, that a PBT was administered, and that she had alcohol on her breath.
2. When determining whether the trial court abused its discretion in granting a motion to suppress evidence, the facts and reasonable inferences drawn from the facts are viewed in the light most favorable to the trial court's ruling and contrary evidence and inferences are disregarded. The weight of the evidence and credibility of the witnesses are for the trial court's determination.
3. Where the trial court makes no findings of fact in ruling on a motion to suppress, the trial court is presumed to have found all facts in accordance with its ruling. The trial court will be deemed to have implicitly found not credible, or entitled to little to no weight, any testimony or other evidence that does not support its ruling. If the ruling is plausible, in light of the record viewed in its entirety, we will not reverse, even if we would have weighed the evidence differently.

4. The trial court was not bound to believe any of the arresting officer's testimony, even if uncontradicted, and the fact that the court made gratuitous comments related to some of the evidence does not establish that the remaining evidence was deemed credible or entitled to any evidentiary weight. In fact, gratuitous oral statements made by the trial court are to be disregarded by this Court entirely unless there is an ambiguity in the language of the written judgment or order.

5. Under our standard of review, the trial court must be deemed to have found not credible, or entitled to little weight, the officer's testimony regarding Avent having watery/glassy eyes, her admitting to have consumed four or five beers in the four to five hours preceding her arrest, her having a strong odor of alcohol on her breath, and her exhibiting six clues of intoxication on the HGN test.

6. Properly viewed, the evidence in this case reflects that the officer was aware that Avent was speeding, that she had some alcohol on her breath, a fact confirmed by the PBT, and that she had admitted having consumed some alcohol on the afternoon in question. The officer was also aware that she had exhibited a significant number of behaviors and physical characteristics indicative of not being intoxicated. The officer did not observe Avent showing any difficulty controlling her vehicle. After he initiated the traffic stop, Avent stopped her car promptly in a controlled, reasonable manner. When asked, Avent promptly provided her license and registration to the officer without difficulty. Avent's eyes were not bloodshot, dilated, constricted, staring, or slow to react to light. She did not appear confused or incoherent, was wholly cooperative with the officer, and she spoke clearly when communicating with him. Avent showed no difficulty when walking to and from the patrol car and performed well on the walk-and-turn and one-leg-stand tests.

7. The trial court weighed the evidence and determined that, under the totality of the circumstances existing at the time of Avent's arrest, the officer did not have probable cause to believe that Avent was intoxicated. The record contains substantial evidence to support that determination, and it is not within the province of this Court to reweigh the evidence.

Opinion by Joseph M. Ellis, Judge

Date: April 1, 2014

The Dissenting Opinion holds:

The author would hold that because there were sufficient *conceded* facts regarding probable cause to arrest for DWI, this court should reverse the trial court's judgment.

Probable cause is a legal question that we review without deference to the trial court's ruling. Avent concedes that there was evidence of her intoxication. But, in her

“poster list” presentation, Avent submits that there are more pieces of evidence pointing away from intoxication. However, Avent’s “list” argument, which the trial court accepted, is **not** the law. The facts of this case are conceded. Application of the *law* to these conceded “poster lists” of *facts* to determine whether probable cause exists to arrest Avent for DWI is a question that we answer without deference to the trial court’s suppression ruling.

The arresting officer must have “reasonable grounds” to believe that the person was driving while intoxicated. “Reasonable grounds” is virtually synonymous with probable cause. Probable cause exists when a police officer observes an unusual or illegal operation of a motor vehicle and **observes indicia of intoxication** upon coming into contact with the motorist. The level of proof necessary to show probable cause is substantially less than that required to establish guilt beyond a reasonable doubt. Proof of probable cause need only meet the preponderance of the evidence standard. This merely requires that the evidence, taken as a whole, is sufficient to show the fact to be proven is more likely than not. The trial court must assess the facts by viewing the situation as it would have appeared to a prudent, cautious, and trained police officer.

Corporal Owens lawfully stopped Avent’s vehicle because she was speeding. Thereafter, Corporal Owens observed a strong odor of alcohol coming from Avent’s breath; Avent, though 20 years old at the time of the traffic stop, admitted she had been drinking; Avent’s eyes were watery and glassy; Avent failed one field sobriety test; and the results of the PBT were positive for the presence of alcohol. While it is also undisputed that Avent satisfactorily performed two other field sobriety tests, and her speech, demeanor, and ability to ambulate were all consistent with a person who was not intoxicated, the officer’s probable cause determination leading to Avent’s arrest only required the officer to have reasonable grounds to *believe* that Avent was intoxicated—not that she was *actually* intoxicated.

Under the *conceded* factual circumstances of this case, a cautious, trained, and prudent officer would believe he had reasonable grounds to arrest Avent for suspicion of driving while intoxicated. There is good reason for this rule of law: Avent’s BAC of .150% was almost twice the legal limit. Corporal Owens’s prudence, caution, and training as a police officer led him to the reasonable conclusion of *believing* Avent was intoxicated. As a matter of *law* applied to the conceded *facts*, Corporal Owens had probable cause to arrest Avent for DWI.

Dissenting Opinion by Mark D. Pfeiffer, Presiding Judge

April 1, 2014

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