

NOTICE

*Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RONALD P. MARRIOTT,	)	
	)	
Appellant,	)	Court of Appeals No. A-11114
	)	Trial Court No. 4FA-10-3550 CR
	)	
v.	)	
	)	
STATE OF ALASKA,	)	<u>MEMORANDUM OPINION</u>
	)	
Appellee.	)	<u>AND JUDGMENT</u>
_____	)	No. 5972 — September 18, 2013

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Paul R. Lyle, Judge.

Appearances: Robert John, Law Office of Robert John, and Jason P. Beatty, Beatty's Law, LLC, Fairbanks, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.\*

Judge ALLARD.

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\* Sitting by assignment made pursuant to article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

Ronald P. Marriott appeals his convictions for first-degree failure to stop at the direction of a peace officer, felony driving under the influence, driving in violation of a limited license, and several minor traffic offenses. He argues that the arresting troopers lacked probable cause to arrest him because they failed to properly investigate his assertion that he was not the driver of the motorcycle in question. He also contests the superior court's exclusion of his photographic evidence. For the reasons described below, we affirm the superior court's rulings on both issues.

### *Background Facts*

On August 13, 2010, around 11:15 p.m., Trooper Keenan Mulvaney observed a motorcycle traveling south on the Parks Highway near Fairbanks commit several traffic violations. The motorcycle's headlight was not illuminated, the taillight was "flickering," and the motorcycle was swerving across the yellow center line.

Trooper Mulvaney attempted to make a traffic stop by turning on his overhead lights and his siren. Instead of stopping, the driver looked back repeatedly, increased his speed to 70 miles per hour, and began weaving between cars with a speed of, at one point, 90 miles per hour. Trooper Mulvaney stated that he saw a single rider on the motorcycle, and that at one point he was parallel to the motorcycle and approximately fifteen feet away. He also acknowledged, though, that a large passenger could obscure a motorcycle's driver.

Trooper Mulvaney saw the motorcycle head into a ditch and notified dispatch of the location. Sergeant Richard Roberts arrived on the scene and the two troopers met in the culvert area where the motorcycle had veered off the road.

Sergeant Roberts found Marriott lying next to the motorcycle in an area near a culvert. Marriott appeared intoxicated; he had bloodshot eyes, slurred speech, and

smelled strongly of alcohol. Marriott denied that he had been driving and repeatedly told the troopers that a man named Ben had been the driver. In response, the troopers used their flashlights to search the immediate vicinity for signs that a person had recently run from the area. They saw no discarded items, tracks, or “matted up” grass. They looked around for “a couple minutes” and did not take photographs of the scene or leave the immediate area to look for a person. Sergeant Roberts recalled that he could see matted vegetation where both he and Marriott had entered the area and did not see any indication in the vegetation that another person had been there.

After being arrested, Marriott submitted to a DataMaster test. The test indicated that Marriott’s breath alcohol level was .111.

#### *Procedural History*

Ronald P. Marriott was indicted for failure to stop at the direction of a peace officer<sup>1</sup> and felony driving under the influence<sup>2</sup> (DUI) and charged by information with driving in violation of a license limitation,<sup>3</sup> driving without a license,<sup>4</sup> violating the motorcycle headlight requirement,<sup>5</sup> and failure to drive on the right side of the roadway.<sup>6</sup>

Marriott filed a motion to suppress the evidence obtained after the arrest, arguing that the troopers lacked probable cause to arrest him because they had failed to

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<sup>1</sup> AS 28.35.182(a).

<sup>2</sup> AS 28.35.030(n).

<sup>3</sup> AS 28.15.291(a)(2).

<sup>4</sup> AS 28.15.011(b).

<sup>5</sup> 13 AAC 04.320(a).

<sup>6</sup> 13 AAC 02.050(a).

properly investigate his claim that the real driver had run away. Superior Court Judge Paul R. Lyle heard testimony and argument on the motion to suppress during breaks within the trial and later denied the motion, finding that the troopers had probable cause to believe that Marriott was the driver.

At trial, Marriott also attempted to introduce defense photographs of the culvert area where the motorcycle had gone off the road. The photographs had been taken shortly before trial started. The State objected on the grounds that the photographs were misleading because they did not fairly and accurately represent the area as it appeared at the time of the arrest. Judge Lyle excluded the photographs.

The jury convicted Marriott on all charges. This appeal followed.

*Did the troopers have probable cause to arrest Marriott as the driver of the motorcycle?*

The police have probable cause to arrest when they have a reasonable belief, based on credible facts in their knowledge, that a person is committing or has committed a crime.<sup>7</sup> Whether probable cause exists is “a mixed question of fact and law.”<sup>8</sup> We review the trial court’s factual findings for clear error and “independently review whether those facts justify a finding of probable cause.”<sup>9</sup>

Marriott does not contest that the troopers had probable cause to arrest whoever was driving the motorcycle; he argues only that the troopers lacked probable cause to believe that he was the driver. Marriott argues that the troopers failed to properly

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<sup>7</sup> *State v. Grier*, 791 P.2d 627, 631 (Alaska App. 1990).

<sup>8</sup> *Bessette v. State*, 145 P.3d 592, 594 (Alaska App. 2006).

<sup>9</sup> *Id.*

search the crash area for the real driver and that Marriott was wearing a dark blue shirt with a stripe, while the troopers described the driver as wearing a black jacket.

The superior court rejected Marriott's argument below. The court credited Trooper Mulvaney's testimony that he observed only one person on the motorcycle. Marriott was found lying next to the motorcycle, and Marriott's clothing closely resembled the description the troopers gave of the driver's clothing. The superior court also found that the troopers had looked for evidence that another person had been on the motorcycle but had not found any broken or matted vegetation suggesting that there had been any other person. The court concluded that the totality of these circumstances gave the troopers probable cause to believe that Marriott was the driver. The record supports the superior court's findings of fact and we agree with the court's legal conclusion.

*Did the court abuse its discretion in excluding Marriott's photographs?*

Marriott's defense at trial was that the real driver had managed to run away without the troopers ever seeing him. Marriott sought to admit photographs of the scene taken shortly before trial to show that the vegetation was sparse and that there was a wide path along the culvert through which a person could escape without leaving evidence that the troopers would have seen.

The prosecutor objected that the photographs were misleading because they were taken in May, prior to the beginning of the growing season, but the incident happened in August, at the height of the growing season when the vegetation looked very different. The prosecutor also pointed out that a construction project had widened the path since the incident and that the area looked very different at the time of trial than it had at the time of Marriott's arrest. Marriott disputed that the area had changed as much as the prosecutor claimed, putting forward testimony of a defense witness who testified

that “[y]ou can tell they ran a CAT through there” but that the trail was only “a little bit wider” than it had been in August 2010.

After hearing testimony about the various discrepancies, the superior court concluded that the photographs did not fairly and accurately depict the scene at the time of the incident and that they were misleading. The court excluded the photographs under Alaska Evidence Rule 403.

On appeal, Marriott argues that the trial court should have allowed the jurors to hear the conflicting testimony regarding the accuracy of the photographs and to decide for themselves whether, and to what extent, the pictures accurately depicted the scene at the time of the arrest. But even if the jury believed the defense witness’s testimony that the construction in the area had not changed the path as much as the troopers claimed, the significant discrepancies in terms of vegetation, time of day, and season of year would still remain.

Marriott also argues that the photographs should be considered “conditionally relevant” evidence admissible under Evidence Rule 104(b), and that the jury, not the judge, should be the one to determine the accuracy or inaccuracy of the photographs. But Marriott’s argument is based on a misunderstanding of the relationship between Rules 104(a) and 104(b), and the proper role of the trial judge under each rule.

Evidence Rule 104(a) declares that the trial judge is the one who decides, as a general matter, whether a particular witness is qualified and whether proposed evidence is admissible. This remains true even though the judge’s decisions of these questions often involve findings of fact.

In contrast, Evidence Rule 104(b) — the rule dealing with conditionally relevant evidence — deals with situations where the judge finds no foundational problem or other impediment to the admission of the evidence, except that the evidence would be

irrelevant unless the jury decides some other question of fact in favor of the proponent of the evidence. For example, a letter may be admissible under Rule 104(b) as conditionally relevant evidence of an admission of a party opponent even though there is a factual dispute (that the jury must resolve) regarding whether the party opponent actually wrote or authorized the letter.

Under this rule, a judge must admit conditionally relevant evidence if, based on *all* of the evidence presented (or expected to be presented), the jury could justifiably find in the litigant's favor on the proposition of fact that will establish the relevance of the evidence in question. But this presupposes that the jury's finding will be based on evidence that is otherwise admissible.

Evidence Rule 104(b) does not mean that a judge must allow a jury to hear and resolve competing views as to whether a witness is qualified to give expert testimony, or competing views as to whether a person's out-of-court statement was an excited utterance, or competing views as to whether a photograph fairly depicts the person, object, or scene that it purports to represent. These questions of admissibility are decided by the judge under Rule 104(a).<sup>10</sup>

Here, the question was whether the defendant's offered photographic evidence accurately depicted the scene as it existed at the time of the events in question, or at least depicted it accurately enough that the significance of any differences could be easily and clearly explained to the jurors. This was a decision for the judge under Rule 104(a).

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<sup>10</sup> For a general discussion of these matters, see 1 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, *Federal Rules of Evidence Manual* 104-4-104-6 (10th ed. 2011).

Marriott's trial judge considered this issue and concluded that, in multiple and significant ways, the photographs failed to accurately depict the scene as it appeared at the time of the events in this case, and that the jury had no good way to evaluate the significance of the differences. The judge had reasonable grounds for reaching this conclusion, and we therefore find no abuse of discretion.

*Marriott's excessive sentence claim*

Marriott withdrew his excessive sentence claim at oral argument.

*Conclusion*

The judgment of the superior court is AFFIRMED.