IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BOB SMITH JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-12743 & A-12754 Trial Court Nos. 4HB-15-00142 CR & 4HB-14-00221 CR MEMORANDUM OPINION No. 6890 — August 19, 2020

Appeal from the Superior Court, Fourth Judicial District, Bethel, Nathaniel Peters, Judge.

Appearances: Jason A. Weiner, Gazewood & Weiner, Fairbanks, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior Judge.[*]

Judge HARBISON.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Bob Smith Jr. was convicted by a jury of felony driving under the influence, felony refusal to submit to a chemical test, and fourth-degree assault.[1] The convictions arose out of an incident in Hooper Bay in which a witness reported that Smith was possibly intoxicated and had driven away from her residence on his four-wheeler. A short time later, Hooper Bay Village Police Officer, Everett Hunter, located Smith outside of Smith's parents' residence. After a brief interaction with Smith, VPO Hunter attempted to handcuff him, and Smith struck Hunter in the face. Hunter then arrested Smith and brought him back to the public safety building to take a DataMaster (breath) test. At the station, Smith was advised of his rights and the consequences of failing to take the breath test. Smith refused to provide a breath sample.

After Smith was charged, his attorney filed a motion to suppress the evidence obtained as a result of Hunter's contact with him. The trial court denied this motion, and Smith appeals that decision. On appeal, Smith argues that Hunter lacked reasonable suspicion to conduct an investigative stop of him and that Hunter unlawfully remained on the curtilage of Smith's parents' property after Smith told him to leave. Having reviewed the record in this case, we conclude that the trial court did not err in finding that the citizen report of Smith's intoxicated driving, particularly when viewed together with Hunter's own observations of Smith, provided a sufficient basis for Hunter to enter the property to question Smith.

Smith also raises two claims challenging his conviction for refusal to submit to a chemical test: that the trial court erred in denying his motion for judgment of acquittal and also in denying Smith's proposed jury instruction regarding the refusal charge. These claims are both premised on Smith's contention that he could not be convicted of refusal to submit to a chemical test unless a breath test was already

[1] AS 28.35.030(n), AS 28.35.032(p), and AS 11.41.230(a)(1), respectively. Smith was acquitted of resisting arrest.

calibrated and available at the moment he refused to take the test. Put differently, Smith argues that because the officer read him the implied consent warning and he refused to take the test *before* the officer observed him for fifteen minutes and *before* the officer calibrated the DataMaster, his refusal to take the test was not a crime. Because we reject this contention, we also reject Smith's claims relating to this contention.

Smith's final claims relate to his sentence. First, he argues that the trial court erred in finding aggravating factor AS 12.55.155(c)(21) — that Smith had a criminal history of repeated instances of conduct similar to the crimes for which he was being sentenced. Second, Smith was also on probation for reckless driving at the time he committed these new crimes, and on appeal, Smith argues that his composite sentence — including the revocation of all remaining time in the probation case — was excessive.

In particular, Smith contends that the trial court erred in imposing a sentence that substantially exceeded the mandatory minimum sentences because the DUI and refusal were his first felony offenses and represented his first opportunity to participate in felony probation. According to Smith, rehabilitation should have been the trial court's primary sentencing goal. We have reviewed the record, and we conclude that the trial court did not err in finding that the State had proved the aggravating factor. We also conclude that Smith's sentence was not clearly mistaken.

The trial court did not err in denying Smith's motion to suppress

On appeal, Smith argues that Hunter lacked reasonable suspicion to conduct an investigative stop of him and that Hunter unlawfully remained on the curtilage of Smith's parents' property after Smith told him to leave.

We review a denial of a motion to suppress evidence in the light most favorable to upholding the trial court's ruling.[2] Additionally, we will not disturb the trial court's findings of fact unless they are clearly erroneous,[3] but we independently determine whether the trial court's factual findings support its legal conclusions.[4]

In this case, the trial court's factual findings are well-supported by the record. On June 7, 2015, Hunter was on duty at the Hooper Bay Public Safety Building when Jessica Gump called at around 3:30 a.m. to report a disturbance at her home caused by Smith. Gump reported that Smith had been knocking on her door, that he sounded intoxicated, and that he had "taken off" in a vehicle away from her home. After receiving this call, Hunter walked out of the public safety building and saw a four-wheeler coming from the direction of Gump's house.

Hunter then left the public safety building, crossed the street, and walked toward Smith's parents' house, which is about 100 yards away from the public safety building. Hunter saw the four-wheeler pull up to Smith's parents' house, and he saw the driver get off and head toward the house. Hunter then called out to the driver, and when the driver responded, Hunter noticed that his speech was slow and thick and that he sounded intoxicated.

Hunter walked up the path that led to the Smiths' house and contacted the driver (who he later identified as Bob Smith Jr.) on the porch steps. After questioning Smith for several minutes, Hunter told Smith that he would need to come with him to the

---

[2] *State v. Miller*, 207 P.3d 541, 543 (Alaska 2009) (citing *State v. Joubert*, 20 P.3d 1115, 1118 (Alaska 2001)).

[3] *Joubert*, 20 P.3d at 1118 (citing *Chilton v. State*, 611 P.2d 53, 55 (Alaska 1980)).

[4] *Id.* (citing *Troyer v. State*, 614 P.2d 313, 318 (Alaska 1980)).

station. When Hunter attempted to handcuff him, Smith struck Hunter on the face. Hunter then arrested Smith and took him to the station to take a breath test.

On appeal, Smith argues that, at the time Hunter walked up the path to Smith's parents' house, Hunter lacked any reasonable suspicion of an imminent public danger and accordingly had no authority to conduct an investigative stop.[5] But under Alaska law, the lawfulness of an investigative stop rests on a balancing test — *i.e.*, "[t]he degree of threat to the public safety and the imminence of that threat (or the seriousness of an already committed crime and the recency of the crime), must be weighed against the strength of the officer's reasonable suspicion and the intrusiveness of the stop."[6]

The test for reasonable suspicion requires only a substantial possibility that criminal conduct has occurred, is occurring, or is about to occur.[7] Additionally, it is well settled that if a person who was recently driving under the influence still has access to

---

[5] *See Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976) (holding that an investigative stop is authorized "where the police officer has a reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred"); *Newsom v. State*, 199 P.3d 1181, 1185-86 (Alaska App. 2009) (explaining this Court's "broad interpretation" of the *Coleman* rule).

[6] *State v. Miller*, 207 P.3d 541, 544 (Alaska 2009) (citing *State v. G.B.*, 769 P.2d 452, 456 (Alaska App. 1989)).

[7] *Miller*, 207 P.3d at 547-48 (reiterating that something more than an "inchoate and unparticularized suspicion or hunch" is required to show reasonable suspicion, and the officer must be able to point to "specific and articulable facts" known to the officer and "in light of the officer's experience," but that amount to less information than would be needed to show probable cause) (citations omitted); *see also State v. Moran*, 667 P.2d 734, 735-36 (Alaska App. 1983) (stating that a "substantial *possibility* that criminal conduct has occurred, is occurring, or is about to occur" is sufficient to justify an investigative stop (emphasis in original) (quoting 3 Wayne R. LaFave, *Search and Seizure* § 9.3, at 65-66 (1st ed. 1978))).

their vehicle, an officer may reasonably believe that there is sufficient risk of imminent public danger to justify an investigatory stop.[8]

Here, we agree with the trial court that Hunter had reasonable suspicion both that a crime had just occurred and that there was an imminent public danger. Hunter was notified by a citizen informant that Smith, who sounded intoxicated, was driving a motor vehicle on the roadway. Hunter then saw a person driving a four-wheeler to Smith's parents' house, and he independently verified that the driver sounded intoxicated before contacting him. Moreover, when the contact occurred, Smith was still outside of the house and had access to the four-wheeler he had just been driving. Under these circumstances, given the strength of the officer's reasonable suspicion and the minimally intrusive nature of the stop, we conclude that the trial court did not err by denying Smith's motion to suppress.

Smith argues that there is an alternative reason to suppress the evidence. He notes that as Hunter was walking toward the house, Smith told Hunter that he was on private property and told him to leave. According to Smith, Hunter's remaining on the curtilage of Smith's parents' property was unlawful, and he argues that the evidence resulting from this conduct must be suppressed.

Smith relies on our decision in *Kelley v. State* as authority for his claim.[9] In *Kelley*, acting on an anonymous tip that the defendant had a marijuana grow operation, two police officers drove up the driveway to the defendant's residence shortly after midnight, rolled down the windows of their patrol car, and sniffed the air.[10] After

---

[8] *Shearer v. Anchorage*, 4 P.3d 336, 340 (Alaska App. 2000).

[9] *Kelley v. State*, 347 P.3d 1012 (Alaska App. 2015).

[10] *Id.* at 1013.

detecting the odor of marijuana, they obtained a warrant to search the defendant's home.[11]

In evaluating the validity of the warrant, we noted that, under certain situations, there may be temporal limits on the implied license for public access to private residences.[12] We explained that the officers' midnight entry onto Kelley's property, which was conducted solely for the purpose of sniffing the air, was not conducted in a manner and time consistent with the conduct of an ordinary, respectful citizen.[13] For this reason, we concluded that the officers were not in a place where they had a legal right to be when they conducted the sniff test and that the search warrant they obtained was tainted by the illegality.[14]

But the facts in this case are very different from those in *Kelley*. While in *Kelley*, the police did not intend to talk to the defendant and made no effort to do so when they entered her property, in this case, Hunter's stated purpose in walking up to the house was to have contact with Smith. Also, Hunter did not enter the property surreptitiously at a time when he expected the residents to be asleep. Instead, Hunter entered the property at a time when Smith had just been driving his four-wheeler and was still outside the house, and he called out to Smith, announcing his presence.

Moreover, we see no error in the trial court's finding that the citizen report of Smith's intoxicated driving, when viewed together with Hunter's own observations of Smith, provided sufficient grounds for Hunter to enter the property to question Smith.

---

[11] *Id.*

[12] *Id.* at 1014.

[13] *Id.* at 1015-16.

[14] *Id.* at 1016.

Hunter had a reasonable suspicion to conduct an investigative stop of Smith, and he accordingly was not obligated to comply with Smith's demand that he leave the property.

For these reasons, we reject this alternative claim that the trial court erred in denying Smith's motion to suppress.

The trial court did not err in denying Smith's motion for acquittal nor in denying Smith's proposed jury instruction

As we have explained, Smith raises two claims challenging his conviction for refusal to submit to a chemical test: that the trial court erred in denying his motion for judgment of acquittal and also in denying Smith's proposed jury instruction regarding the refusal charge. These claims are both premised on Smith's contention that he could not be convicted of refusal to submit to a chemical test unless the officer was able to administer the breath test to him at the moment he refused to take the test.

During Smith's trial, his attorney asked the trial court to instruct the jury that a person cannot be convicted of refusal to submit to a chemical test unless the breath test was "available" at the time the defendant refused to take the test. Smith's attorney asserted that the test should not be considered to be "available" until the fifteen-minute observation period has been completed and the DataMaster has been calibrated. The trial court declined to give the attorney's proposed instruction. Instead, it instructed the jury in accord with the statutory language of AS 28.30.032(a) and the corresponding criminal pattern jury instruction.

Smith's attorney also moved for a judgment of acquittal, which the trial court denied. According to Smith's attorney, he did not commit the crime of refusing to take the test because the police had not calibrated the DataMaster nor completed the required fifteen-minute observation of Smith at the time they asked him to submit to the test.

The uncontroverted evidence presented at the trial showed that, after Hunter brought Smith to the public safety building, a second officer, Officer James Hoelscher, advised Smith that he was going to conduct the DataMaster test. Hoelscher read Smith the implied consent warning and told him he had a right to an independent test, and he also advised Smith of the consequences of refusing to provide a breath sample. After this, Smith verbally refused to take the test. Hoelscher did not observe Smith for fifteen minutes and he did not start to calibrate the DataMaster at any time before or after Smith stated that he would not take the test.

On appeal, Smith relies solely on the Alaska Supreme Court's decision in *Sosa v. State* to support his argument that both the calibration of the DataMaster and the fifteen-minute observation must be completed for the defendant's refusal to constitute a crime.[15] But *Sosa* is inapposite for two reasons. First, *Sosa* involved a charge of evidence tampering rather than a charge of refusal to submit to a chemical test.[16] Second, *Sosa* did not address, nor make any suggestion, that a person in Smith's situation could not be convicted for refusing to take a chemical test. Instead, the supreme court's holding in *Sosa* was that the implied consent statutes do not permit unconsented blood draws if breath testing machines malfunction or are otherwise unavailable.[17]

We see no error in the trial court's rejection of Smith's proposed instruction or in its decision to instruct the jury based on the statutory language of AS 28.30.032(a) and the criminal pattern jury instruction. And when we view the evidence and the inferences that can be drawn from the evidence in the light most favorable to the verdict, we conclude that a fair-minded juror would reasonably conclude that Smith's guilt was

---

[15] *See Sosa v. State*, 4 P.3d 951 (Alaska 2000).

[16] *Id.* at 952-53.

[17] *Id.* at 953-54.

established beyond a reasonable doubt.[18] We accordingly reject Smith's claims relating to his conviction for refusal to submit to a chemical test.

The sentence imposed was not clearly mistaken

Smith's final claims relate to the composite sentence he received for these convictions and for violating his misdemeanor probation. He first argues that the trial court erred in finding aggravating factor AS 12.55.155(c)(21) — that Smith had a history of repeated instances of conduct similar to the crimes for which he was sentenced. Smith notes that, under AS 12.55.155(e), if a circumstance is a necessary element of the current offense, that circumstance may not be used as an aggravating factor at sentencing. He additionally notes that, to be convicted of felony DUI and felony refusal, a person must have two or more prior convictions for DUI or refusal within the last ten years.[19] Although Smith concedes that he has four prior DUI convictions, he nevertheless argues that the sentencing court erroneously found aggravating factor (c)(21). According to Smith, all four of his prior DUI convictions were necessary elements of the offense.

We disagree. Alaska Statute 28.35.030(n) states that a person "is guilty of a class C felony if the person is convicted [of DUI] and . . . has been previously convicted two or more times since January 1, 1996, and within the 10 years preceding the date of the present offense." At trial, the State proved Smith's guilt by establishing that, within ten years before he committed the current offense, he had been convicted of driving under the influence four times. Accordingly, we conclude that, because only two of Smith's four prior convictions were necessary elements of the underlying offense, the

---

[18] *See Snyder v. State*, 661 P.2d 638, 641 (Alaska App. 1983).

[19] AS 28.35.030(n); AS 28.35.032(p).

trial court properly relied on the two remaining convictions to find the proposed aggravating factor.

Smith also argues that his sentence was excessive. At the time of Smith's offenses, he was on probation for reckless driving, so the trial court conducted a single sentencing and disposition hearing to address both cases. At that hearing, the trial court imposed 36 months with 18 months suspended for the driving under the influence conviction and the same length sentence for the refusal conviction, totaling 72 months with 36 months suspended. The trial court ordered that 6 months of the active time for the refusal conviction would be concurrent with the time imposed for the driving under the influence conviction, resulting in a total composite sentence for these two convictions of 66 months with 36 months suspended. The trial court imposed 6 months flat for the fourth-degree assault conviction, and it ordered that this time would be consecutive to all other sentences. Finally, the trial court imposed 120 days — all of the remaining time — for Smith's probation revocation.

Smith argues on appeal that the trial court erred by imposing a composite sentence that substantially exceeded the mandatory minimum sentences because the DUI and refusal were his first felony convictions and represented his first opportunity to participate in felony probation. Rehabilitation, according to Smith, should have been the trial court's primary sentencing goal. We disagree that the trial court erred in sentencing Smith.

This Court will uphold a sentence on appeal unless it is clearly mistaken.[20] In this case, in addition to finding aggravating factor AS 12.55.155(c)(21), the trial court found two other aggravating factors: aggravating factor AS 12.55.155(c)(8) (repeated instances of assaultive behavior) and aggravating factor AS 12.55.155(c)(31) (five or

---

[20] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

more misdemeanor convictions). The trial court also found that the fourth-degree assault conviction was aggravated because it was directed at a police officer.

In crafting Smith's sentence, the trial court also considered each of the *Chaney* criteria. It determined that Smith had guarded prospects for rehabilitation and that a lengthy sentence was needed to protect the public. The trial court also noted that Smith had an extensive criminal history,[21] and when it revoked all of Smith's remaining probation time, the court noted that Smith had been given numerous previous opportunities to comply with misdemeanor probation conditions, and was repeatedly unsuccessful. Although the trial court acknowledged that this would be Smith's first experience on felony probation, it ultimately relied on the aggravated nature of Smith's offenses as well as his extensive criminal history, and found that the composite sentence it imposed was necessary to protect the public.

Having reviewed the record, we conclude that the trial court did not err by finding that the State had proved the aggravating factor. We also conclude that Smith's sentence was not clearly mistaken.

Conclusion

The judgment of the superior court is AFFIRMED.

[21] Smith had over twenty prior convictions, including four DUI convictions and seven assault convictions.