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Georgia Court of Appeals

EVIDENCE SUFFICIENT FOR CONVICTION OF DUI LESS SAFE

On June 16, 2019, around 1:00 AM, King was traveling alone on I-75 in Henry County. A Georgia State Patrol trooper noticed King fail to maintain his lane multiple times. A traffic stop was initiated, and King pulled over on the left shoulder of the road instead of the right. The trooper asked King for his license and King fumbled through a number of items before ultimately producing his license. The trooper observed that King had needle punctures and track marks on his hands and that he was "discombobulated." When King stepped out of his vehicle and walked to the rear of his car, the trooper observed that his movements were "jumpy" and that his reflexes were exaggerated. King eventually admitted that he broke his wrist and was taking prescribed narcotics.

The trooper asked King to submit to field sobriety evaluations. During the horizontal gaze nystagmus test, the trooper observed "that King's pupils were dilated and reacted slowly to the application of light." He also had difficulty balancing and standing still while the test was being conducted. Because King stopped on the left shoulder of the road, the trooper did not ask him to perform the walk and turn or a one leg stand evaluation due to safety concerns.

During the lack of convergence test, King's eyes did not cross. When the trooper checked King's heart rate, it was 108 beats per minute, which the trooper described as "high." Additionally, King's conjunctiva was red, and his tongue displayed raised tastebuds. The trooper's experience, training and observations—including King's driving and his physical manifestations—led him to conclude that King was under the influence to the extent that he was a less safe driver.

(The trooper's training included "field sobriety and a 160-hour drug recognition course, which included both classroom instruction on the effects of various drugs, including both depressants and stimulants, on the human body, as well as in-person evaluation of impaired volunteers.")

King was arrested and read implied consent, and he refused the trooper's request for a chemical test of his blood. After a jury trial, during which the trial court admitted the trooper as an expert witness in drug recognition, King was found guilty of driving under the influence and failure to maintain lane.

King appealed his conviction, arguing that "the trial court erred in denying his motion for directed verdict of acquittal on Count 1 [the DUI charge] and that the evidence was insufficient to sustain his conviction on Count 1."

> [T]he standard of review for the denial of a motion for a directed verdict of acquittal is the same as for determining the sufficiency of the evidence to support a conviction: the evidence must be sufficient for a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of the charged offense. The evidence must be viewed in the light most favorable to support the verdict and the defendant no longer

> enjoys a presumption of innocence; moreover, an appellate court determines evidence sufficiency and does not weigh the evidence or determine the credibility of witnesses.

There are three elements to the offense of driving while under the influence of drugs to the extent that it is less safe to drive: (1) driving, (2) under the influence of [any drug], and (3) to the extent that it is less safe for the person to drive. The State is not required to show a chemical analysis of any specific drug in the defendant's system or provide any specific concentration levels. When the Court reviewed the evidence provided by the trooper, it found King's driving manifestations and physical manifestations of being under the influence to be compelling. The Court concluded that the evidence was sufficient for a "rational trier of fact to find King guilty beyond a reasonable doubt" and that the trial court did not err in denying the motion for directed verdict. *King v. State*, No. A22A0263, 2022 WL 2092827 (Ga. Ct. App. June 10, 2022).

PROBABLE CAUSE TO SEARCH VEHICLE ESTABLISHED BY ODOR OF MARIJUANA ALONE

On October 3, 2019, around 3:00 AM an officer was on patrol in Athens, Georgia when he noticed Johnson drive his vehicle a few feet past the stop line at a red light. When the light turned green, Johnson proceeded to the next red light and, again, stopped his vehicle "a few feet past the stop line." The officer initiated a traffic stop for Johnson's failure to stop at the lines for two lights in a row.

As the officer approached the open window of Johnson's vehicle, he immediately smelled the odor of marijuana. He also observed Johnson trying to stuff a plastic baggie into his pocket. When the officer questioned Johnson about the baggie, "Johnson denied that he had it in his pocket." The officer ordered Johnson to get out of the vehicle and performed a search. Marijuana, a gun, and other items were found during the search.

Johnson was charged with possession of marijuana with intent to distribute and possession of a firearm during the commission of a felony, among other offenses. Johnson filed a motion to suppress, arguing that the stop was invalid and that the officer lacked probable cause to search the vehicle.

> After an evidentiary hearing, the trial court granted the motion, finding that the traffic stop was unlawful because the arresting officer did not have articulable suspicion to make the stop and that even if the stop was lawful, the officer did not have probable cause to search the vehicle based on the odor of marijuana alone.

Traffic Stop

The state appealed the trial court's ruling, arguing "that the trial court erred in granting the motion to suppress based on its finding that the traffic stop was unlawful." The Court of Appeals agreed with the state, citing its 2000 holding in *Navicky v. State*, which authorizes the stop of a vehicle if an officer observes a traffic offense. The Court noted that Johnson failed to stop at the designated stop line for two consecutive red lights in violation of OCGA § 40-6-20 (a). **The Court determined that the officer's observation of these violations clearly authorized him to stop Johnson's vehicle. Therefore, the Court found that Johnson's stop was legal, and the trial court erred in granting the motion to suppress as to the traffic stop.**

Probable Cause to Search

The state argued that the trial court also erred in its ruling that the odor of marijuana alone does not give probable cause to search a vehicle. The Court cited the Georgia Court of Appeals' 2019

decision in *Cromartie v. State*, in which the Court determined: "[T]he automobile exception to the search warrant requirement ... permits officers to search a vehicle that is being used on the highways if they have probable cause to believe that it contains contraband." Additionally, the Court looked to its 2018 ruling in *Caffe v. State*, which held that "[a] police officer has probable cause to search when that officer, through training or experience, detects the smell of marijuana."

At the trial court motion hearing, the officer testified regarding his training and experience in identifying the odor of marijuana, and that he searched the vehicle pursuant to that odor being present. **The Court of Appeals determined that no findings were made by the trial court "as to the officer's testimony about his training or experience or detection of the odor of marijuana[.]" Instead, the Court found, that the trial court based its decision solely on "the legally erroneous finding that the odor of marijuana alone could not provide probable cause for the search." The Court held:**

> We therefore vacate the portion of the trial court's order finding insufficient probable cause for a search and remand the case with direction that the trial court determine the credibility of the officer's testimony; make findings of fact as to his training, experience, and detection of the odor of marijuana; and then determine whether there was sufficient probable cause to authorize the warrantless search of the vehicle.

State v. Johnson, No. A22A0522, 2022 WL 1656195 (Ga. Ct. App. May 25, 2022).

ALS REMINDER

If you are unavailable for an ALS Hearing, a **written** continuance motion must be filed. The ALS Court does **not** accept continuance requests by telephone or in the body of an email. If you need assistance with a continuance motion, please email **both** Dee (dbrophy@gsp.net) and Grace (gmatthews@gsp.net) and provide the court date, location, and case name in your email. Continuance motions must be filed with the Court at least ten days prior to the ALS Hearing date, so please notify us **before** the ten-day deadline to allow sufficient time for the motion to be filed.

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