

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROGER CARL LANTZ,

Defendant-Appellee.

UNPUBLISHED

February 6, 1998

No. 202166

Isabella Circuit Court

LC No. 96-009162-AV

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM.

The prosecutor appeals by leave granted from a circuit court order reversing defendant's jury trial conviction in district court of operating a motor vehicle under the influence of intoxicating liquor (OUIL). The circuit court based its reversal on a finding that defendant's preliminary Breathalyzer tests result was improperly admitted at defendant's trial. We reverse the circuit court's order and reinstate defendant's conviction.

The arresting officer observed defendant drive his vehicle onto the road's shoulder and back onto the road, while traveling at approximately thirty-five miles per hour. The vehicle then accelerated to approximately sixty-five to seventy miles per hour, crossed the double yellow center line, and completely entered the approaching lane of traffic. After the officer pulled over defendant's automobile, defendant had difficulty producing his driver's license from his wallet. The officer noted that defendant's face was flushed, he smelled of intoxicants, and his balance was unstable. Defendant could not recite the entire alphabet, and his speech was slurred. Defendant told the officer that he had been canoeing and drinking beer. When the officer asked defendant's passenger to step out of the car, the officer observed spilled beer on the floorboards and removed two half-full beer cans from underneath the passenger's seat.

Defendant agreed to take a preliminary Breathalyzer test (hereinafter PBT) but indicated that he had breathing difficulties and was unsure how he would perform on the test. The test showed a blood alcohol level of .16 percent. The officer then took defendant to the county jail for a second PBT test. Defendant attempted several times to blow into the Breathalyzer machine but was unsuccessful in

providing an adequate breath sample. The officer then obtained a search warrant and took defendant to a hospital emergency room to have blood drawn. The blood sample revealed a .11 percent blood alcohol content.

At his trial, defendant testified that on the day in question he had been canoeing from approximately 1:30 to 6:00 p.m. Defendant described the day as sunny and explained that his face was easily sun burned. Defendant stated that he began drinking at approximately 1:30 p.m., that he consumed six and one-half Budweiser beers, that he drank the majority of the beers during the later part of his canoe trip, and that he opened his last beer shortly before being pulled over by the officer. He denied being intoxicated or impaired when he was pulled over, and explained that he was unable to completely recite the alphabet because his dentures kept “releasing.” He admitted to having difficulty in removing his license from his wallet but explained that the license had become stuck to the plastic in his wallet.

Following his jury trial conviction in district court, defendant appealed to the circuit court, arguing that the district court erroneously admitted the PBT results because the prosecutor failed to lay a proper foundation. Defendant had objected to the admission of the results based on the foundation at trial, contending that the prosecution failed to establish that a qualified operator had checked the PBT instrument for accuracy or maintenance. The district court noted that the foundation was “thin” but allowed the evidence to be admitted. On appeal, the circuit court reversed defendant’s conviction, vacated his sentence, and discharged defendant. The prosecutor moved for reconsideration, arguing that even if the district court erred there was not a miscarriage of justice, and defendant’s conviction should not have been set aside. The circuit court denied the motion for reconsideration, finding that the prosecutor’s lack of preparation at trial was intentional misconduct, that double jeopardy had attached, and the prosecutor was not entitled to a new trial.

The prosecutor now argues that the district court did not abuse its discretion in admitting the results of defendant’s PBT test because the prosecution laid a sufficient foundation at trial. We review the admission of test results into evidence for an abuse of discretion. *People v Prelesnik*, 219 Mich App 173, 178; 555 NW2d 505 (1996). An abuse of discretion exists when the court’s decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Stated somewhat differently, an abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for ruling. *Id.*

In *People v Tipolt*, 198 Mich App 44; 497 NW2d 198 (1993), this Court reiterated the four prerequisites for the admissibility of results of chemical tests of blood alcohol:

First, it must be shown that the operator was qualified. Second, the proper method or procedure must be demonstrated as having been followed in the tests. Third, the tests must have been performed within a reasonable time after the arrest. *Finally, the testing device must be shown to be reliable.* [*Id.* at 46 (emphasis added).]

In *People v Krulikowski*, 60 Mich App 28; 230 NW2d 290 (1975), this Court reversed the defendant's OUIL conviction because the prosecution failed to lay a proper foundation for the introduction of Breathalyzer test results. The Court noted that the state was required to introduce foundational evidence regarding the accuracy of the instrument used in the test. *Id.* at 31. The accuracy could be established by evidence that the instrument was calibrated and/or maintained in such a manner as to render accurate and correct results. *Id.* Moreover, "failure to meet any of the foundational requirements will preclude the use of the test results." *Tipolt, supra* at 46.

The Michigan State Department of Police has promulgated certain administrative rules concerning the accuracy of PBT instruments. In pertinent part, the administrative rules provide: "A preliminary breath alcohol test instrument shall be verified for accuracy at least monthly, or more frequently as the department may require, by a Class IIIA or class IV operator." 1994 AACs, R 325.2653(2). In the present case, to satisfy the fourth foundational requirement, the prosecution would have had to introduce evidence at trial that the PBT instrument used to test defendant was maintained by either a Class IIIA or IV operator. We reject the prosecutor's argument that the admission of the calibration and maintenance log for the instrument was a sufficient foundation. The administrative rules clearly indicate that only Class IIIA or IV operators are authorized to calibrate and maintain the PBT instruments. Although the maintenance log indicated that the instrument had been inspected by a sergeant the week before it was used on defendant, the log did not indicate the sergeant's class operator status nor was there any testimony about the sergeant's status. Thus, the circuit court properly concluded that the district court abused its discretion in admitting defendant's PBT result without the proper foundation regarding the accuracy of the PBT instrument.

Finding an abuse of discretion in the admission of evidence does not necessarily require that the defendant's conviction be set aside. The appropriate standard for setting aside a verdict is provided in MCL 769.26; MSA 28.1096:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of the properly admitted evidence. *People v Huyser*, 221 Mich App 293, 299; 561 NW2d 481 (1997).

We find that the admission of defendant's PBT result at trial was harmless error because ample properly admitted evidence established defendant's guilt. The arresting officer testified that he observed defendant's vehicle move onto the shoulder of the road and later cross the double yellow center line and enter the approaching lane of traffic. After stopping the defendant's automobile, the officer noted that defendant's face was flushed, he smelled of alcohol, and his speech was slurred. Defendant failed various field sobriety tests. Moreover, defendant admitted consuming almost seven beers in

approximately six hours and admitted that he drank most of these beers just prior to being stopped. Finally, defendant's blood sample, obtained through a search warrant, revealed a blood alcohol content of .11 percent. Given this overwhelming evidence of defendant's guilt, we find that the jury could have properly convicted defendant of OUIL if the PBT result had not been admitted at trial. No miscarriage of justice occurred because of the admission of the results of defendant's PBT test. The jury's verdict, therefore, should not have been vacated.

Given this ruling, we do not need to address the prosecutor's argument that the Double Jeopardy Claus does not preclude retrial.

We reverse the circuit court's order vacating defendant's conviction and reinstate the jury's verdict.

/s/ Roman S. Gibbs
/s/ William B. Murphy
/s/ Hilda R. Gage