

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY DAVID MIX,

Defendant-Appellant.

UNPUBLISHED

May 14, 2009

No. 282948

Jackson Circuit Court

LC No. 07-005208-FH

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for operating a vehicle under the influence of alcoholic liquor (OUIL), MCL 257.625(1),¹ third offense, MCL 257.625(9)(c). We affirm.

I. Basic Facts

Defendant was arrested on February 9, 2007 for OUIL. At 8:45 that evening, Deputy Andrew Tisch stopped defendant's truck because he observed that defendant was driving above the speed limit. When Tisch spoke with defendant, he could smell an odor of alcohol emanating from defendant's truck and some of defendant's speech was slightly slurred. Tisch also noticed that defendant's eyes were glassy and bloodshot and that his face was flushed. Defendant admitted to drinking three to four 12-ounce beers 45 minutes earlier. Tisch had defendant perform a number of field sobriety tests, all of which defendant passed, albeit not perfectly. Tisch then administered a preliminary breath test (PBT), which showed that defendant's blood alcohol content to be 0.11 grams per 210 liters of breath. Tisch arrested defendant. Defendant

¹ MCL 257.625(1) provides that a person "shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated." With respect to alcohol, a person is intoxicated if he or she has "an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine" MCL 257.625(1)(b).

then consented to a blood test, which was drawn around 9:00 p.m., the results of which indicated that defendant's blood contained 0.11 grams of alcohol per 100 milliliters of blood.²

Subsequently, defendant was charged with OUIL, third offense due to two previous OUIL convictions in 1987 and 1992. After the preliminary hearing, defendant moved to suppress all the evidence because Tisch allegedly had no probable cause to stop the vehicle and because Tisch had not followed the administrative procedures for conducting the PBT. The trial court denied this motion. Thereafter, defendant sought to enter a plea agreement, but for reasons not apparent on the record, the plea was never entered. The matter went to trial, where defendant was subsequently convicted. This appeal followed.

II. Motion to Suppress

Defendant asserts that the trial court erred by denying his motion to suppress. We review the trial court's ruling on a motion to suppress *de novo*, and its related findings of fact for clear error. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). Defendant raises two separate grounds upon which he contends that the evidence against him should have been suppressed and his case dismissed.

A. Reasonable Articulable Suspicion

First, defendant contends that Tisch lacked a reasonable articulable suspicion to administer the PBT. In defendant's view, once he passed the field sobriety tests, Tisch's "suspicions that justified the detention were extinguished." Defendant did not raise this argument in his motion to suppress, nor did the trial court consider it. Accordingly, the issue is not properly preserved and it is not properly before this Court. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005).

Even if we were to review the matter, however, defendant's argument would nonetheless fail. It is well settled that police may conduct a brief investigative stop if the officer has a reasonable suspicion that criminal activity is afoot. *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). It is plain that the officer's initial detention of defendant for a traffic violation was justified under *Terry*. A second detention arose, however, when the officer smelled the odor of alcohol coming from defendant's car and defendant admitted that he had been drinking. At that point, the officer had a new suspicion unrelated to his initial reason for stopping defendant: Defendant may have been operating while intoxicated. Accordingly, the officer continued to detain defendant in order to investigate his suspicion.

We see nothing wrong with this course of action. Michigan law requires a reasonable and articulable suspicion for both the initial stop and any subsequent detention based on an *unrelated* matter. See *People v Rizzo*, 243 Mich App 151, 157-158; 622 NW2d 319 (2000). That is what happened here. The fact that defendant passed the field sobriety tests does not somehow defeat the officer's suspicion and require a new and separate suspicion to conduct the PBT, as defendant contends. Rather, the field sobriety tests and administration of the PBT were

² The results of the blood test were admitted at trial, while the results of the PBT were not.

related to the same matter and arose out of the same factors giving rise to the officer's reasonable suspicion. Thus, no new and separate reasonable articulable suspicion was required for the officer to perform the PBT as there was no new and unrelated detention. *Id.* Further, because we conclude that the PBT was legally obtained, defendant's related argument that the officer did not have probable cause to arrest him because the PBT was obtained illegally necessarily fails.

B. Administrative Rules

Defendant also argues that because the officer violated the administrative rules applicable to administering the PBT, the result was unreliable and the trial court erred by denying his motion to suppress. We disagree. 1994 AACS, R 325.2655(1)(e) provides that the test may be administered only after the person is "observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test."³ When an officer does not comply with the administrative rules for the administration of such tests, suppression may be required, but is not necessary. *People v Wujkowski*, 230 Mich App 181, 187; 583 NW2d 257 (1998). In those instances where suppression is appropriate, it is because there are some indicia that, as a result of the officer's failure to follow the rules, the test is inaccurate. *Id.*

Here, the trial court found that there was no indication that the test was inaccurate as a result of the error and that the officer acted in good faith. This finding is not clearly erroneous. Although the officer did not fully comply with the 15-minute observation requirement, he observed defendant for approximately nine to ten minutes during which time there was nothing that led the officer to believe that defendant had placed anything in his mouth, vomited, ate or drank. In addition, defendant indicated to the officer that he had not drank anything within the approximately 45 minutes preceding the stop. We see nothing in the lower court record, nor does defendant point to anything on appeal, to support defendant's allegation that the PBT was inaccurate. Accordingly, the officer's failure to follow the rule was harmless error and the trial court properly determined that suppression was not warranted. *Id.* The trial court did not err by denying defendant's motion to suppress.

III. Plea Bargain

Defendant next argues that he is entitled to specific performance of the plea bargain that was never entered because he detrimentally relied on the prosecutor's promise. We cannot agree. We review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A defendant has a right to specific performance of a prosecutor's promise to a plea agreement "only after the plea ha[s] been accepted, defendant . . . acted to his prejudice in reliance upon the agreement, and the prosecutor . . . thereafter refused to perform its part of the bargain." *People v Heiler*, 79 Mich App 714, 720 n 4; 262 NW2d 890 (1977). This right does not "inure to a defendant until after he has pled

³ In his brief on appeal, defendant incorrectly cites 1994 AACS, R 325.2655(2)(b), which also has a 15-minute requirement but does not require the officer to actually observe defendant.

guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement.” *In re Robinson*, 180 Mich App 454, 459; 447 NW2d 765 (1989).

Here, defendant never pled guilty pursuant to a plea agreement and, consequently, the trial court never accepted the alleged agreement. Nor has defendant shown that he performed part of any agreement such that his defense at trial would be prejudiced as a result, *id.*, and his claim to the contrary is unavailing. Defendant’s allegation that he was prejudiced because he filled-out a questionnaire for drug court, lacked adequate time to prepare for trial, and no longer had enough funds to pay for an expert witness or to re-hire a second attorney, is without factual backing in the record. Even if we were to assume that all of these allegations are true, we fail to see how defendant was prejudiced. Despite his contention that he did not have enough time to prepare, defendant requested a prompt trial date; defendant has not shown, or even alleged, how the drug court questionnaire prejudiced his defense; and, defendant has not demonstrated, or even speculated on, how his defense would have been different had he had enough funds to retain the attorney of his choosing, as well as the expert witness.

We must also reject defendant’s alternative argument, relying on *In re Doe*, 410 F Supp 1163, 1166 (ED Mich, 1976), that he is not required to show prejudice. The court’s opinion in *Doe*, however, despite its dicta that no showing of prejudice is required, “indicates that failure to specifically enforce the promise made would have resulted in prejudice to [the defendant.]” *People v Gallego*, 430 Mich 443, 456 n 9; 424 NW2d 470 (1988). In sum, defendant is not entitled to specific performance of the plea agreement because his right to have the plea enforced never ripened. See *Heiler*, *supra* at 720 n 4; *In re Robinson*, *supra* at 459.

IV. Heidi’s Law

Lastly, defendant contends that his two prior OUIL convictions, both of which occurred more than 10 years ago, cannot be used to enhance his sentence under MCL 257.625 because it violates the Ex Post Facto Clauses of the United States and Michigan Constitutions. US Const, art I, § 10, cl 1; Const 1963, art 1, § 10. We disagree. MCL 257.625(9)(c) provides in pertinent part that, “[i]f the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony” This Court has squarely held that MCL 257.625 does not violate the Ex Post Facto Clause and has concluded that “for offenses occurring after the effective date of amended MCL 257.625, the state may properly charge defendants on the basis of prior convictions that occurred more than 10 years before the date of the amendment.” *People v Perkins*, 280 Mich App 244, 246, 251; 760 NW2d 669 (2008). Here, the instant offense occurred on February 9, 2007, after the effective date of MCL 257.625, which was January 3, 2007. Thus, it was not improper for the state to charge him on the basis of his prior convictions pursuant to the statute. *Id.*

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering