

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee,

vs

File No. 89-5452-AR
HON. PHILIP E. RODGERS, JR.

VALERIE ANN MAURER,
Defendant/Appellant.

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Attorney for Plaintiff/Appellee

Charles H. Koop (P27290)
Attorney for Defendant/Appellant

DECISION AND ORDER

Defendant/Appellant appeals as of right from a District Court hearing where she was found responsible for two civil infractions. On appeal, Appellant maintains that she was denied due process of law, that the formal hearing procedure was violated by the trial court not adhering to the rules of evidence and that her fines and costs were assessed to punish her for requesting a hearing.

The Court has reviewed the parties' briefs and the formal hearing transcript, and finds no error in the District Court's determination that a preliminary breath test ("PBT") was lawfully required, harmless error in the mistaken finding that the rules of evidence do not apply in a formal civil infraction hearing and no error in the assessment of fines and costs. For reasons that will be discussed ahead, the appeal is dismissed.

Appellant was stopped for speeding in Grand Traverse County, July 6, 1989, where citations were issued for speeding and for the refusal to submit to a PBT. Upon request, a formal hearing was conducted in the 86th District Court and the trial court found Appellant responsible. This appeal is the result of the District Court's finding of October 5, 1987.

The first issue raised by Appellant is whether the District Court erred in determining that the rules of evidence did not apply in a formal civil infraction hearing where radar evidence was

admitted. MCLA 257.747 et seq; MSA 9.2447 et seq, describes the procedures applicable to a civil infraction hearing where the Appellant is represented by counsel and the evidentiary standard by which the court will determine responsibility. "A civil infraction action is a civil action. MCLA 257.741(1); MSA 9.2441(1)" and is therefore subject to the same rules of court and evidence as a civil action. *People v Ferency*, 133 Mich App 526, 533; 351 NW2d 225 (1984). "If the judge determines by a preponderance of the evidence that the person cited is responsible for a civil infraction, the judge shall enter an order against that person". *Id.* 533. While it is true that the court is not bound by the rules of practice, procedure, pleading or evidence in an informal hearing, except those provisions relating to privileged communications, this was a formal hearing. See, MCLA 257.746; MSA 9.2446. Here, Appellant had counsel and was defending the People's claim in a formal hearing. In such a hearing, the rules of evidence do apply.

While there are no fundamental liberties at stake in a civil infraction action, "due process requires adherence to some standards before radar speed evidence can be admitted against a Defendant at trial." *Ferency*, *supra* at 537. Before radar speed evidence could be admitted, the People were obligated to lay an appropriate foundation regarding the machine and its operator. A

review of the transcript indicates that the trial court, reluctantly and with some unnecessary hostility, did allow both counsel to question the police officer ("operator") establish the qualifications of the operator, and confirm that the radar machine satisfied applicable guidelines.

Appellant's counsel did not challenge the accuracy of the radar instrument but disputed the assertion that the radar was properly calibrated. (Transcript pp. 9 line 15 to pp. 10 line 1). The People developed the foundation necessary for the admission of the radar results. The testimony of the operating officer was sufficient to establish proper calibration. *Id.* 542-544.

Defendant next argues that Section 625h, MCLA 257.625h; MSA 9.2325(8) does not allow an officer to require a person to submit to a PBT on the facts of this case. However, the plain language of MCLA 257.625h(1) suggests to the contrary.

"A peace officer who has reasonable cause to believe that a person was operating a vehicle upon a public highway or other place open to the general public, including an area

designated for the parking of vehicles, in the state, and that the person by the consumption of intoxicating liquor may have affected his or her ability to operate a vehicle, may require the person to submit to a preliminary chemical breath analysis." (Emphasis added)

The officer needed "reasonable cause" to believe that intoxicating liquor "may have affected" Appellant's ability to drive before a PBT may be required. The Court agrees that this means probable cause. Here, the officer testified that he detected a strong odor of alcohol emanating from the breath of a driver who was travelling 75 mph in a 55 mph zone. These facts provide "reasonable cause" to believe Appellant's ability to drive "may" be affected."

In reaching this conclusion, the Court must reject Appellant's analysis of Section 625h(1). Appellant was not arrested for impaired driving or driving under the influence of intoxicating liquor. The standard for requiring a PBT in this case is derived solely from Section 625h and not from Section 625a(5). Here, the officer must meet a far lower threshold to show reasonable (probable) cause, i.e., that the driver's abilities may be affected and not that the driver is either impaired or under the influence. Appellant argues that Section 625h "only applies when the officer has probable cause to believe that the person is operating under the influence section and not the BAC section of 625." This Court

Footnote 1:While there was significant collateral evidence that Defendant's ability to drive was affected, this Court will not consider it given the trial court's refusal to allow Appellant cross-examination on the field sobriety test results.

finds no support in the language or structure of the statute or in sound public policy for such a narrow construction of Section 625h.

This Court is persuaded that the legislature intended to grant police the authority to require a PBT when confronted with a driver operating a vehicle at excessive speed and whose consumption of alcohol is evidenced by the odor of alcohol on his or her breath. The mere act of drinking and driving is not illegal - but neither is the request for a PBT when the odor of alcohol combined with excessive speed suggest probable cause to believe a driver's abilities and judgment "may" have been affected.

Finally, Appellant argues that the fines and costs levied were intended to punish her for a trial. There is no support for this argument in the record. The Court assessed fines and costs within the limits fixed by statute. No abuse of discretion is found.

Appellant's appeal is dismissed.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/20/92