

**This Order Is Not Precedential  
And Is Not To Be Cited**

No. 2--00--0130

**FILED**

JUL 11 2001

LOREN J. STROTZ, CLERK  
APPELLATE COURT 2nd DISTRICT

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Jo Daviess County.
	)	
Plaintiff-Appellant,	)	
	)	No. 99--DT--104
v.	)	
	)	
THOMAS W. TIPPETT,	)	Honorable
	)	Victor V. Sprengelmeyer,
Defendant-Appellee.	)	Judge, Presiding.

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**RULE 23 ORDER**

Defendant, Thomas W. Tippett, filed a motion to suppress the results of the breathalyzer test he was given when he was arrested for driving while under the influence of alcohol (DUI) (625 ILCS 5/11--501(a)(1), (2) (West 2000)). The trial court granted this motion, finding that defendant was not driving or in physical control of the car on a public highway. The State filed this timely appeal, and we affirm.

Officer Kevin Turner testified at the suppression hearing that he was on duty and in Galena at 1:34 a.m. on July 23, 1999. At this time, Officer Turner saw a car with a flat tire parked suspiciously in the middle of the Happy Joe's parking lot, which is a private parking lot located next to Route 20. Officer Turner approached the car and saw defendant sleeping in a reclined position behind the steering wheel. The passenger-side window was open, and the keys to the car were lying on the front passenger

seat. A strong smell of alcohol was emanating from inside the car and through the open passenger window.

Officer Turner approached the driver's side of the car and saw vomit on the ground next to the driver's side of the car. Officer Turner knocked on the driver's side window, which was closed, and tried to wake defendant. After 10 to 12 knocks on the window, defendant woke up, opened the door, and spoke to Officer Turner. Officer Turner asked defendant if he was there by himself, and defendant said yes. Defendant told Officer Turner that he was coming from East Dubuque. Officer Turner asked defendant if he had anything to drink since he left East Dubuque, and defendant said no. While observing defendant's demeanor, Officer Turner concluded that defendant was under the influence of alcohol. Officer Turner asked defendant to perform several tests to confirm or deny his suspicions. A breathalyzer test was one of the tests Officer Turner asked defendant to complete, and Officer Turner warned defendant pursuant to the implied consent statute (see 625 ILCS 5/11--501.1(a) (West 2000)) before the test was administered. After the tests were completed unsatisfactorily, Officer Turner placed defendant under arrest for DUI. Officer Turner testified that he never saw defendant drive the car.

The trial court found that defendant obviously had consumed alcohol at some point that morning because the breathalyzer test clearly indicated that defendant's blood-alcohol level exceeded the legal limit. However, the problem with this cause was the warning the officer gave to defendant. Officer Turner advised defendant pursuant to the implied consent statute that defendant was required

to submit to the breathalyzer test. The trial court found that, because defendant was not on a public highway, which was a condition of the implied consent statute, Officer Turner should have advised defendant that defendant was not required to take the breathalyzer test. Thus, the trial court granted defendant's motion to suppress evidence related to the breathalyzer test.

We initially must address the standard of review that applies in this cause. In reviewing a trial court's ruling on a motion to suppress evidence, the appellate court first must review the trial court's findings of fact under a manifestly erroneous standard. People v. Nadermann, 309 Ill. App. 3d 1016, 1020 (2000). Under this standard, a trial court's findings will be reversed only if the findings are arbitrary, unreasonable, and not based on the evidence. Nadermann, 309 Ill. App. 3d at 1020.

Here, the trial court found that Officer Turner never saw defendant driving at any time prior to defendant's arrest. Further, the court found that defendant was on private property at the time that he was arrested and told that his driving privileges would be summarily suspended if he refused to take the breathalyzer test. We determine that these findings of fact were not manifestly erroneous. We now review de novo the legal conclusions that the trial court reached. See Nadermann, 309 Ill. App. 3d at 1021.

The implied consent statute gives police the authority to require a defendant to submit to a chemical test by threatening the statutory summary suspension of the defendant's driving privileges if the defendant refuses to take the test. People v. Garriott, 253 Ill. App. 3d 1048, 1051 (1993). However, the implied consent

statute conditions consent on three issues: (1) whether the driver was on a public highway; (2) whether the driver was arrested; and (3) whether the testing procedures of section 11--501.2 of the Illinois Vehicle Code (625 ILCS 5/11--501.2 (2000)) were met. 625 ILCS 5/11--501.1(a) (West 2000); People v. Tomlinson, 295 Ill. App. 3d 193, 198 (1998). The issue we must resolve is whether defendant was on a public highway.

This court has concluded that defendants who are in control of a car while on privately owned parking lots are not subject to the implied consent statute. People v. Kissel, 150 Ill. App. 3d 283, 285-86 (1986) (People v. Brown, 175 Ill. App. 3d 725, 728 (1988) overruled only the portion of Kissel that addressed the admissibility of breathalyzer test results during a DUI trial when the defendant did not expressly consent to the test). The evidence presented here revealed that defendant was not seen in control of the car on a public highway at any time prior to his arrest. Thus, the implied consent statute did not apply to defendant, and the trial court did not err when it granted defendant's motion to suppress evidence related to the breathalyzer test.

The State argues that the circumstantial evidence established that defendant was recently driving on a public highway, Route 20, while he was intoxicated. See People v. Brummett, 279 Ill. App. 3d 421, 429 (1996). Specifically, the State suggests that defendant's admission that he last had a drink in East Dubuque when coupled with the fact that he was found in Galena means that defendant drove from East Dubuque to Galena while under the influence of alcohol. We do not agree, and we find Brummett distinguishable.

In Brummett, the defendant was involved in a property damage accident. Brummett, 279 Ill. App. 3d at 427. When the arresting officer arrived at the scene of the accident, he found the defendant alone. The officer later discovered that the car was registered to the defendant. When the defendant was questioned about who was driving the car, the defendant admitted that he was the driver. The defendant later recanted his story after he was placed under arrest.

The arresting officer initially testified that the defendant's car was found on private property. Brummett, 279 Ill. App. 3d at 429. Later, the officer explained that the defendant's car was mostly on a public sidewalk. The appellate court affirmed the trial court, which found that the defendant's car was on a public highway. Brummett, 279 Ill. App. 3d at 429. The reviewing court noted that the circumstantial evidence, that the defendant's car was found just off the street on a public sidewalk right next to a severed telephone pole and recently downed power lines, established that the defendant was on a public highway right before he was arrested. Brummett, 279 Ill. App. 3d at 429.

The State also cites to People v. Culbertson, 258 Ill. App. 3d 294, 296 (1994), for the proposition that a private parking lot available to the public is a public highway. Culbertson does not stand for such a proposition.

Here, the trial court heard the circumstantial evidence and found that defendant was not in control of the car on a public highway right before he was arrested (the police officer testified that the car was parked for at least 30 minutes prior to his

approach of the vehicle and he did not know how long the car was parked prior to his approach). We determine that this finding is not against the manifest weight of the evidence. Specifically, no evidence was presented that defendant drove from East Dubuque to Galena. Officer Turner only testified that defendant said he was "coming from" East Dubuque. Although Officer Turner stated that defendant told him he was alone, this does not mean that defendant was alone and driving from East Dubuque to Galena. The evidence also failed to show that defendant owned the car in which he was found. If evidence was presented that defendant owned the car, we may have reached a different conclusion. Finally, in contrast to Brummett, the scene of defendant's arrest did not suggest that defendant had been driving on a public road right before he was arrested. Although Route 20 is close to the parking lot in which defendant was found, the facts presented here, in contrast to Brummett, did not show that the probability was great that defendant only could have arrived in the parking lot if he drove the car on a public highway while intoxicated.

For these reasons, the judgment of the circuit court of Jo Daviess County is affirmed.

Affirmed.

McLAREN, J., with O'MALLEY and CALLUM, JJ., concurring.