NOT DESIGNATED FOR PUBLICATION

No. 125,536

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ADRIAN GARCIA-OREGEL,
Appellant.

MEMORANDUM OPINION

Appeal from Ness District Court; BRUCE T. GATTERMAN, judge. Opinion filed June 9, 2023. Affirmed.

Michael S. Holland II, of Holland and Holland, of Russell, for appellant.

Jacob T. Gayer, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PER CURIAM: After the State charged Adrian Garcia-Oregel with driving under the influence (DUI), he asked the district court to suppress the results of his blood-alcohol test, arguing the warrant application was invalid because it relied on the results of a horizontal gaze nystagmus (HGN) field sobriety test. The district court denied the motion, finding the evidence supported the probable cause determination. Here, Garcia-Oregel makes the same, unpersuasive challenge on appeal. We find the district court did not err in denying Garcia-Oregel's motion to suppress because the inclusion of the HGN results does not invalidate the warrant application. And even if the HGN results were

excised from the application, the totality of the circumstances shows there was a substantial basis to support the probable cause determination.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2019, Deputy Cordell Stover of the Ness County Sheriff's Office responded to a possible ongoing domestic dispute reported in Ness City, Kansas. Upon arriving at the described address, Deputy Stover spoke with the reporting party, Garcia-Oregel's wife, about her husband, who was no longer at the residence. The wife informed Deputy Stover that she and Garcia-Oregel had been drinking all day and were arguing that night. She reported that Garcia-Oregel broke their daughter's phone and then pushed both herself and the couple's son. The wife provided a description of Garcia-Oregel's vehicle and told Deputy Stover that Garcia-Oregel left the residence driving southbound.

A short time later, Deputy Stover conducted a traffic stop on a vehicle matching the provided description. The vehicle was operated by Garcia-Oregel, the sole occupant. After stopping Garcia-Oregel's vehicle and approaching, Deputy Stover noticed an odor of alcohol coming from Garcia-Oregel, along with other indications of consumption and possible impairment. Deputy Stover and another officer, Deputy Jose Sandoval, then proceeded to investigate whether Garcia-Oregel was driving under the influence.

Deputy Sandoval began administering standardized field sobriety tests (SFSTs) and also noticed an odor of alcohol on Garcia-Oregel. Deputy Sandoval completed the HGN portion of the tests, but Garcia-Oregel became argumentative when Deputy Sandoval instructed him on the walk-and-turn test. After several minutes of arguing, Deputy Stover interfered and Garcia-Oregel became extremely belligerent. After refusing to respond to Deputy Stover's questions and failing to participate in the walk-and-turn or one-leg stand examinations, Deputy Stover informed Garcia-Oregel that his failure to participate in the SFSTs would be considered a refusal.

After finishing the roadside evaluations, Deputy Sandoval applied for a blood search warrant using a preprinted form, which was granted by a Ness County District Court magistrate judge. Upon the completion of a blood draw, the Kansas Bureau of Investigation Forensic Lab concluded Garcia-Oregel had an ethyl alcohol level of .14 grams of alcohol per 100 milliliters of blood. The State then charged Garcia-Oregel with driving under the influence, along with other charges, but the other charges were later dismissed.

Garcia-Oregel moved to suppress the results of the blood draw and requested an evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), which permits a defendant to challenge a search warrant under certain circumstances. Garcia-Oregel argued Deputy Sandoval's inclusion of the HGN test results in the probable cause affidavit was impermissible and rendered the warrant invalid because HGN results are not admissible for any purpose. The State argued the motion should be denied because the totality of the circumstances supported a probable cause finding. By written order, the district magistrate judge denied Garcia-Oregel's motion to suppress and request for a *Franks* evidentiary hearing. The district court found the form warrant application contained other evidence tending to show probable cause, and Garcia-Oregel "failed to show that the sheriff's office acted improperly in gathering information pursuant to obtaining a search warrant."

The parties agreed to a set of stipulated facts and proceeded to a bench trial. Under the stipulation, the parties noted Garcia-Oregel's contemporaneous objection to the denial of his motion to suppress. On review of the parties' stipulation, the district court found Garcia-Oregel guilty of driving under the influence of alcohol and sentenced him to one year in county jail but granted 12 months' probation.

Garcia-Oregel appeals.

DID THE DISTRICT COURT ERR IN DENYING GARCIA-OREGEL'S MOTION TO SUPPRESS AND *FRANKS* HEARING REQUEST?

In his sole issue on appeal, as in his motion to suppress, Garcia-Oregel contends the warrant authorizing his blood draw was invalid because it rested, in part, on his failed HGN test. Relying on *City of Wichita v. Molitor*, 301 Kan. 251, 264, 341 P.3d 1275 (2015)—wherein our Supreme Court found that because the HGN test is based on scientific principles, its results cannot be used without a showing of reliability—Garcia-Oregel argues the results of his HGN test were too unreliable to justify a search warrant. Without those results, Garcia-Oregel contends the officers lacked probable cause to obtain a valid warrant for his blood draw. The State responds, arguing the exception delineated in *Franks* does not apply to Garcia-Oregel because he did not show his motion met the requirements for the *Franks* warrant exception to apply. The State also claims that even without the challenged information, the warrant application was sufficient to establish probable cause. We will address each contention.

Applicable legal standards

The basis for our decision must arise from the Fourth Amendment to the United States Constitution. This Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. To secure that right, the Fourth Amendment requires warrants based on probable cause be presented under oath to a judicial officer. *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001). Any warrant must describe, with particularity, the places to be searched and the objects to be seized. *State v. Francis*, 282 Kan. 120, 126, 145 P.3d 48 (2006). Probable cause to search exists where the known facts warrant a person of reasonable prudence in the belief that evidence of a crime will be found. *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). Because a search warrant requires an evidentiary foundation, law enforcement officers

may not rely on conclusory assertions or opinions unmoored from specific factual representations. See *Illinois v. Gates*, 462 U.S. 213, 239, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and . . . wholly conclusory statement[s] . . . fail[] to meet this requirement.").

As a general rule, appellate courts presume the validity of an affidavit in support of a search warrant, and in most cases, the facts within the affidavit may not be disputed by the party against whom the warrant is directed. See *Franks*, 438 U.S. at 171. In *Franks*, the United States Supreme Court addressed a defendant's right to challenge the veracity of a search warrant and the Court delineated an exception to the general rule in instances when the affidavit contains false or misleading information. See *Francis*, 282 Kan. at 128. Under *Franks*, a defendant who challenges the reliability of a search warrant's accompanying affidavit may be entitled to an evidentiary hearing if he or she submits a sworn statement alleging the affidavit "(1) contains statements that are material to the issuance of the search warrant because the statements were necessary to find probable cause and (2) the material statements (a) were a deliberate falsehood, (b) were made in reckless disregard for the truth, or (c) deliberately omitted a material fact." *State v. Adams*, 294 Kan. 171, 179, 273 P.3d 718 (2012).

If a defendant satisfies a prima facie showing of the affidavit's lack of veracity, the trial court must remove the questionable portion of the affidavit and determine whether the remaining affidavit contains sufficient evidence of probable cause. *Adams*, 294 Kan. at 179. If the court can find probable cause without the extracted statements, no evidentiary hearing under *Franks* is necessary. But, if probable cause cannot be found without the excised portion of the affidavit, a defendant is entitled to an evidentiary hearing. During such an evidentiary hearing, the defendant is provided an opportunity to demonstrate the affiant "deliberately omitted a material fact, deliberately made a false

statement, or made a statement with reckless disregard for the truth." *Adams*, 294 Kan. at 179.

When the facts are undisputed, such as here, our Supreme Court found the standard of review for issues challenging the denial of a *Franks* hearing "is the same as any case in which we review a trial court's determination regarding whether undisputed facts establish probable cause for a search warrant." *Adams*, 294 Kan. at 180. The appellate court must determine whether the judge issuing the warrant had a substantial basis for determining that probable cause existed. This is a deferential standard; as the reviewing court, we do not review this determination as a matter of law, but we evaluate the affidavit's sufficiency under this more deferential standard. 294 Kan. at 180 (citing *State v. Hicks*, 282 Kan. 599, Syl. ¶ 2, 147 P.3d 1076 [2006]).

So, utilizing this standard of review, we must determine whether the trial court—after excising the HGN test from the affidavit—would still have had a substantial basis to conclude there was probable cause. That is, we must determine whether, in the absence of the HGN test, there was a high probability that evidence of alcohol, above the legally permissible limit, would be found in Garcia-Oregel's blood. First, though, we must address Garcia-Oregel's contention that the use of the HGN test alone invalidated the warrant application.

Inclusion of Garcia-Oregel's HGN test results in the probable cause affidavit does not invalidate the search warrant.

Garcia-Oregel's argument contending the blood draw warrant was invalid because it included HGN results was recently made to, and rejected by, this court. See *State v. Fullmer*, No. 123,540, 2022 WL 4112688, at *3-4 (Kan. App. 2022) (unpublished opinion). In *Fullmer*, a panel of this court found that "[t]he presence of an unreliable test in the affidavit does not sully the entire affidavit. It simply demands reliable evidence in

order to clear the probable cause threshold." 2022 WL 4112688, at *3. Notably, the *Fullmer* panel found a warrant's validity should not be determined by "nit-picking discrete portions" of the application, but by the totality of the circumstances. *Fullmer*, 2022 WL 4112688, at *3.

In its analysis regarding the inclusion of HGN test results, the *Fullmer* panel reasoned that at the time the judge issued the warrant, the *Molitor* holding was "a three-year-old opinion" and "the district court arguably gave that factor only that measure of credence it was due." *Fullmer*, 2022 WL 4112688, at *3. And based on the totality of the circumstances presented in the probable cause affidavit, after excising the HGN results, the panel found the issuing judge had a substantial basis for determining probable cause existed to support a search warrant. 2022 WL 4112688, at *3-4.

We believe the *Fullmer* panel's decision is not only reasonable but is supported by similar precedent. As the *Fullmer* panel identified, other cases have found search warrants were not invalidated based on the inclusion of inadmissible evidence. 2022 WL 4112688, at *3. In *State v. Henry*, 263 Kan. 118, 947 P.2d 1020 (1997), the defendant challenged the inclusion of his polygraph test results in the search warrant application because such results were inadmissible at trial. Our Supreme Court disagreed, finding that "[w]hen deciding if the totality of the circumstances supports a finding of probable cause, inclusion of facts pertaining to a polygraph test will not invalidate the issuance of a search warrant." 263 Kan. at 128.

Similarly, in *Hicks* our Supreme Court held an affidavit for a search warrant may include hearsay evidence if it is accompanied by sufficient affirmative allegations of fact as to an affiant's personal knowledge related to the matter at issue. 282 Kan. at 614. And in *State v. Althaus*, 49 Kan. App. 2d 210, 224, 305 P.3d 716 (2013), a panel of this court found the facts set forth in a search warrant application "need not be in a form admissible

at trial—hearsay and other secondhand information may suffice, if the overall circumstances demonstrate reliability."

Garcia-Oregel's argument on appeal ignores the holdings delineated above. Instead, Garcia-Oregel relies on *Molitor* to argue that "[t]here is no doubt the officer knew, or should have known" that HGN tests were not admissible for any purpose. Attempting to frame his issue in terms of a *Franks* hearing request, Garcia-Oregel goes on to argue that because Deputy Sandoval included and "solely" relied upon Garcia-Oregel's HGN results, Deputy Sandoval "recklessly or intentionally includ[ed] false statements, or recklessly disregard[ed] the truth by omitting a material fact."

Because we have answered the question of whether the inclusion of the HGN test alone invalidates the entire warrant (it does not), we need not analyze whether the HGN results qualify as an unreliable statement under *Franks*. But even if we were to reach this argument, it is not persuasive.

To mandate a hearing under *Franks*, a defendant must show "by a sworn allegation" that the affidavit in support of the search warrant was unreliable because it contains material statements that "(a) were a deliberate falsehood, (b) were made in reckless disregard for the truth, or (c) deliberately omitted a material fact." *Adams*, 294 Kan. at 179.

Garcia-Oregel argues he is entitled to a *Franks* evidentiary hearing because Deputy Sandoval's inclusion of his HGN results was "tantamount to recklessly or intentionally including false statements, or recklessly disregarding the truth by omitting a material fact." But it is unclear how Deputy Sandoval's inclusion of the HGN test result could be equivalent to a deliberate falsehood, made in reckless disregard for the truth, or as deliberately omitting a material fact. Comparing Deputy Sandoval's inclusion of evidence to the standard delineated in *Adams*, Garcia-Oregel has not shown (a) the test

results were deliberately false, (b) Deputy Sandoval included the results in reckless disregard for the truth, or (c) Deputy Sandoval deliberately omitted a material fact. 294 Kan. at 179.

On the contrary, Garcia-Oregel's motion to suppress and request for a *Franks* hearing did not challenge the test results as a deliberate falsehood, did not argue Deputy Sandoval included the results in reckless disregard for the truth, and did not argue Deputy Sandoval omitted a material fact. Garcia-Oregel's motion simply argued that "[a] reasonable officer would have known that the Affidavit contained inadmissible information at the time it was submitted," and "[t]he deliberate inclusion of inadmissible HGN evidence in the search warrant affidavit necessitates a *Franks* hearing . . . ." Garcia-Oregel's argument is insufficient under *Franks*, which requires a challenger's attack to be "more than conclusory" and must contain "allegations of deliberate falsehood or of a reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." 438 U.S. 171.

As a result, Garcia-Oregel has not persuaded us that the search warrant was invalid based solely on the inclusion of his HGN results in the application for a warrant.

The totality of the circumstances supports the district court's probable cause finding.

Having found the inclusion of Garcia-Oregel's HGN test results did not render the probable cause affidavit invalid, we are now tasked with considering whether the affidavit provided a substantial basis for the magistrate's determination that there was a fair probability that the evidence would be found in the place to be searched. See *Adams*, 294 Kan. at 180. As noted above, the standard of review is whether the trial court, considering only the affidavit and application for search warrant, had a substantial basis to conclude there was a high probability that evidence of driving under the influence would be found in a blood draw. See 294 Kan. at 180-81.

Probable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime. *State v. Regelman*, 309 Kan. 52, 61, 430 P.3d 946 (2018). Here, Garcia-Oregel argues that the sole basis for a probable cause finding was the HGN evidence. But we disagree with this contention.

The affidavit and application for search warrant submitted by Deputy Sandoval indicated he observed an odor of alcohol coming from Garcia-Oregel, the driver. Deputy Sandoval also observed Garcia-Oregel repeating questions or comments and having difficulty following the officer's directions. In addition to addressing Garcia-Oregel's HGN test results, the affidavit states Garcia-Oregel refused to perform both the walk-and-turn test and the one-leg stand test. Under the section permitting additional facts supporting Deputy Sandoval's belief that Garcia-Oregel was driving under the influence of alcohol, Deputy Sandoval wrote: "Suspect was involved in Domestic Battery and fled, the victim gave us description of the vehicle. Deputy Stover pulled over the [vehicle] and confirmed." Although this narrative alone does not support probable cause for intoxication, the affidavit contained at least four other indicia of intoxication: odor of alcohol from the driver; repeating questions; difficulty following directions; and refusal of tests.

These indicia dispel Garcia-Oregel's contention that the probable cause affidavit provides "essentially no evidence, other than the HGN" to establish probable cause. Though Garcia-Oregel acknowledges the affidavit included an alcohol odor and difficulty responding to officer questions, he tries to diminish their importance. First, he argues Deputy Sandoval failed to provide a description of the alleged difficulty in following the officer's directions or the fact that the officer had to repeat questions or comments. Then, Garcia-Oregel argues for the first time on appeal that "[t]he likely explanation" for his difficulty speaking with the officers was "due to language differences" because of his "Hispanic ethnicity." And finally, Garcia-Oregel argues the number of unchecked boxes in the affidavit, in addition to the officer's lack of a preliminary breath test, tend to

support a lack of probable cause. In sum, Garcia-Oregel argues the only evidence that tends to establish probable cause is the odor of alcohol, which he argues is insufficient to establish probable cause.

But we do not consider Garcia-Oregel's claim that a language barrier explained his actions of repeating questions or comments and his difficulty following Deputy Sandoval's (a bilingual officer) directions. Garcia-Oregel did not preserve this argument for appellate review because he did not raise the argument before the district court, and he has failed to argue an exception. See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019) (delineating three exceptions to general rule against raising new issues on appeal and requiring an explanation for application of an exception); *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014) (holding an issue not raised before the district court cannot be raised on appeal). And, even if we were to consider Garcia-Oregel's claim, he provides no evidentiary support for his argument. He provides no evidence or information regarding his "Hispanic ethnicity," which language he speaks, or his inability to speak and understand English.

And, despite Garcia-Oregel's arguments to the contrary, appellate courts have considered all the factors identified in the probable cause affidavit as indicators of intoxication.

For example, in *Poteet v. Kansas Dept. of Revenue*, 43 Kan. App. 2d 412, 412-17, 233 P.3d 286 (2010), a panel of this court found the odor of alcohol from the driver, among other factors, provided sufficient reasonable grounds to believe the driver was under the influence. In *Fleming v. Kansas Dept. of Revenue*, No. 97,182, 2007 WL 2178261 (Kan. App. 2007) (unpublished opinion), this court held that the odor of alcohol coming from the driver, the driver's bloodshot eyes, and the driver's admission he had been drinking alcohol provided reasonable grounds to believe that the driver at the scene of a single-vehicle accident was under the influence of alcohol. In doing so, the panel

noted that this court in *Gross v. Kansas Dept. of Revenue*, 26 Kan. App. 2d 847, 848-50, 994 P.2d 666 (2000), and *Campbell v. Kansas Dept. of Revenue*, 25 Kan. App. 2d 430, 431-32, 962 P.2d 1150 (1998), had found probable cause for testing where the arresting officer detected the odor of alcohol on the driver's breath, the driver admitted consuming alcohol, and the driver's eyes appeared bloodshot and/or glazed. *Fleming*, 2007 WL 2178261, at *2.

In at least one case, a panel considered a defendant's "repeated questions and comments to the officers" as supporting the defendant's driving under the influence conviction. *City of Wichita v. Kisangani*, No. 111,740, 2015 WL 1882171, at *2 (Kan. App. 2015) (unpublished opinion). In *Kisangani*, the defendant challenged whether the officers had probable cause to believe he was driving under the influence. In addition to repeating questions and comments, the officer noted a strong odor of alcohol on the defendant, and the defendant refused to take the field sobriety tests.

A panel has considered the defendant's difficulty following directions as a sign of impairment. *Sander v. Kansas Dept. of Revenue*, No. 121,564, 2020 WL 4725891, at *3 (Kan. App. 2020) (unpublished opinion). In *Sander*, the panel found the district court did not err in finding the officer had probable cause to arrest the defendant and administer an evidentiary breath test. The panel identified the defendant's difficulty following the officer's directions, in addition to an odor of alcohol, as "all recognized clues of impairment." 2020 WL 4725891, at *3.

And finally, multiple panels of this court have found a defendant's refusal to perform roadside field sobriety tests could correspond with impaired driving. In *City of Salina v. McNeill*, No. 122,447, 2021 WL 642310, at *3 (Kan. App.) (unpublished opinion), *rev. denied* 314 Kan. 854 (2021), a panel found the defendant's "inability or refusal to perform the field sobriety test" provided circumstantial evidence supporting the defendant's driving under the influence conviction. The panel reasoned:

> "McNeill's inaction may have reflected a substantially impaired capacity to comprehend the instructions and respond—a lack of acuity that would correspond to an inability to drive safely. See *State v. Swingle*, No. 107,856, 2013 WL 4729565, at *2 (Kan. App. 2013) (unpublished opinion) (field sobriety tests designed to measure subject's mental acuity in understanding directions and physical coordination in performing tasks; poor performance consistent with intoxication). If McNeill deliberately refused to perform the test, that would tend to show he believed he was significantly impaired." *McNeill*, 2021 WL 642310, at *3.

While the *McNeill* opinion was unpublished, the panel supported its conclusion with a citation to *State v. Huff*, 33 Kan. App. 2d 942, 946, 111 P.3d 659 (2005). In *Huff*, the defendant argued the district court placed improper emphasis on his refusal to submit to sobriety tests. The panel disagreed, holding: "The court is justified in considering the defendant's refusal to submit to the Intoxilyzer test under K.S.A. 8-1001(i). This same rationale applies to Huff's refusal to submit to field sobriety tests. See *State v. Rubick*, 16 Kan. App. 2d 585, 587-88, 827 P.2d 771 (1992)." *Huff*, 33 Kan. App. 2d at 946.

Although not included in the briefing, appellant counsel during oral argument suggested the drivability of a defendant's vehicle should be a factor when establishing probable cause. Again, this is an unpreserved argument as it was neither raised before the district court nor expressed as an exception to the general rule of preservation. See *Johnson*, 309 Kan. at 995. And, while the physical condition of the vehicle does not appear to be a part of the equation here, it is true that a person must be "operating or attempting to operate" a vehicle as part of the DUI offense. K.S.A. 8-1567. See, e.g., *State v. Zeiner*, 316 Kan. 346, 353, 515 P.3d 736 (2022) (finding "'an "attempt to operate" under the DUI statute means an attempt to move the vehicle.'"); *State v. Darrow*, 304 Kan. 710, Syl. ¶ 1, 374 P.3d 673 (2016) (some movement of the vehicle is required); *Jarmer v. Kansas Dept. of Revenue*, 63 Kan. App. 2d 37, 41, 524 P.3d 68 (2023) (although her vehicle was stuck in the mud and did not move, Jarmer "operated" the vehicle under the DUI statute because she was in actual physical control of the machinery

of the vehicle, causing it to function when she engaged the transmission and pressed the gas pedal), *rev. granted* 317 Kan. ___ (April 19, 2023).

Here, the evidence shows that Garcia-Oregel was, in fact, operating his vehicle by driving at the time "Deputy [Stover] *conducted a traffic stop*." (Emphasis added.) The officers only began the DUI inquiry "[a]fter *stopping*" Garcia-Oregel's vehicle, of which he was the sole occupant. (Emphasis added.) In fact, the parties stipulated as much. If his vehicle had not been moving, no "stop" would have been necessary.

Given the above, we find the degree of evidence available to the district magistrate judge provided a substantial basis for determining that probable cause existed to issue the warrant for a blood draw. Garcia-Oregel did not display just one indicia of intoxication, but at least four: he exuded an odor of alcohol, repeated questions or comments, had difficulty following the officers' directions, and refused to complete two field sobriety tests. Even with the HGN results excised, the totality of the evidence was enough to afford the officers the requisite probable cause to believe Garcia-Oregel operated his vehicle while under the influence of alcohol. The district court properly denied Garcia-Oregel's motion to suppress and request for a *Franks* hearing.

Affirmed.