IN THE SUPREME COURT OF THE STATE OF NEVADA

TANYA MARIE PHILLIPS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58098

FILED

JAN 12 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of felony driving under the influence of intoxicating liquor. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. Appellant Tanya Marie Phillips raises three issues on appeal.

First, Phillips argues that the district court erred by denying her motion to suppress evidence of her intoxication because the police officer did not have probable cause to initiate a traffic stop. We disagree. A police officer is permitted to make a traffic stop and administer field sobriety tests based only on a reasonable suspicion that a driver is intoxicated. See Dixon v. State, 103 Nev. 272, 273, 737 P.2d 1162, 1164 (1987); see also State v. Rincon, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006) ("In order for a traffic stop to comply with the Fourth Amendment, there must be, at a minimum, reasonable suspicion to justify the intrusion."); Terry v. Ohio, 392 U.S. 1, 21-22 (1968); NRS 171.123(1). At the suppression hearing, the police officer explained that a witness reported late at night that a white SUV almost hit him on the highway, and the officer then drove in the direction that the witness indicated and shortly came up behind a white SUV that was weaving in its lane. The

district court found that, based on the totality of these circumstances, the traffic stop was reasonable. See State v. Sonnenfeld, 114 Nev. 631, 633-35, 958 P.2d 1215, 1216-17 (1998) (reasonable suspicion may be based on citizen's tip so long as the tip is sufficiently reliable); see also Alabama v. White, 496 U.S. 325, 332 (1990) (a traffic stop may be justified based upon a citizen's tip that is independently corroborated by the police). We conclude that the district court's findings were not clearly erroneous and that the court did not err by denying Phillips's motion to suppress. See Somee v. State, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008) ("We review the district court's findings of historical fact for clear error but review the legal consequences of those factual findings de novo.").

Next, Phillips argues that evidence of her blood alcohol level should not have been admitted at trial because she was charged only under the theory of "driving under the influence of intoxicating liquor," and not under the alternative theories of having a blood alcohol concentration of 0.08 or more while driving or within two hours of driving. She contends that her blood alcohol level, which was admitted in the form of a laboratory report, was not relevant under the charged theory of DUI and was more prejudicial than probative because the State did not produce a witness to correlate the blood alcohol level with some degree of actual impairment. Phillips also argues that the district court erred by instructing the jury on the three alternative theories of DUI when she was only charged under one of those theories. We agree and conclude that the erroneous admission of the blood alcohol evidence and the erroneous jury instructions require reversal of her conviction.

The district court admitted the blood alcohol evidence after finding that the State had charged Phillips with all three DUI theories

under NRS 484C.110(1),[1] i.e., driving "while under the influence of intoxicating liquor," driving while having a blood alcohol concentration of 0.08 or more, and having a blood alcohol concentration of 0.08 or more within two hours of driving. See NRS 484C.110(1); see also Dossey v. State, 114 Nev. 904, 909 & n.2, 964 P.2d 782, 785 & n.2 (1998). However, as conceded by the State on appeal, the information charged Phillips only under the theory of driving "while under the influence of intoxicating liquor." While the presence of alcohol in Phillips's system was relevant to proving the offense of driving under the influence, we conclude that evidence of the actual blood alcohol level, without any evidence correlating that blood alcohol level with impairment in driving, was unfairly prejudicial. Therefore, we conclude that the district court erred in admitting evidence of Phillips's blood alcohol level. See Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

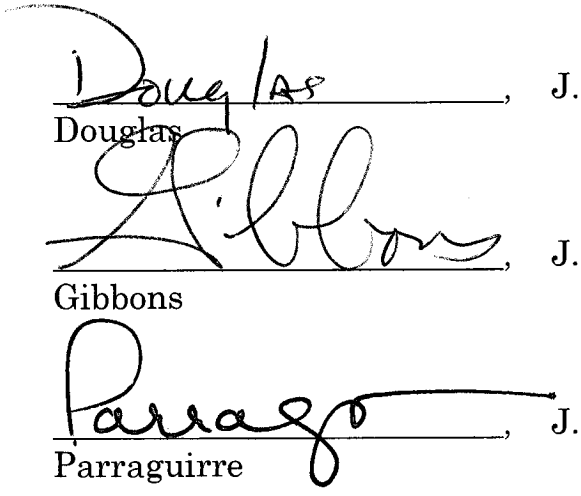
We further conclude that this error was compounded when the district court erroneously instructed the jury that it could find Phillips guilty if she had a blood alcohol concentration of 0.08 or more while driving or within two hours after driving—two theories of criminal liability that were not charged in the information. The State concedes that the jury instructions regarding the alternative means for committing a DUI were error, but argues that they were harmless. While sufficient evidence may have been adduced to support a conviction for driving "while under the influence of intoxicating liquor," we are not convinced beyond a reasonable doubt that the error did not contribute to the jury's verdict,

---

[1]Formerly codified at NRS 484.379(1).

particularly in light of the admission of evidence of Phillips's blood alcohol level. See Nay v. State, 123 Nev. 326, 333-34, 167 P.3d 430, 435 (2007) (applying Chapman v. California, 386 U.S. 18, 24 (1967), harmless error analysis to an instructional error of constitutional dimension). We therefore conclude that the error was not harmless and Phillips's conviction must be reversed. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Robert H. Perry, District Judge
Walter B. Fey
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk