IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEREK LLWELLYN HENRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 88580-COA

FILED

JUN 16 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Derek Llwellyn Henry appeals from a corrected judgment of conviction, entered pursuant to a jury verdict, of driving under the influence of alcohol and/or controlled or prohibited substance, above the legal limit, with a prior felony driving under the influence conviction. Second Judicial District Court, Washoe County; Lynne K. Jones, Chief Judge.

First, Henry argues the district court erred by denying his motion to suppress evidence because Deputy Smith lacked reasonable articulable suspicion to conduct a traffic stop. "Suppression issues present mixed questions of law and fact." *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013) (quotation marks omitted). Findings of fact are reviewed for clear error, but the legal consequences of those facts involve questions of law subject to de novo review. *Id.* at 486, 305 P.3d at 916. "In order for a traffic stop to comply with the Fourth Amendment, there must be, at a minimum, reasonable suspicion to justify the intrusion." *State v. Rincon*, 122 Nev. 1170, 1173, 147 P.3d 233, 235 (2006). Reasonable suspicion to justify the stop requires "specific, articulable facts supporting an inference of criminal activity." *Id.* "In determining the reasonableness of a stop, the evidence is viewed under the totality of the circumstances and

in the context of the law enforcement officer's training and experience." *Id.* at 1173-74, 147 P.3d at 235.

Here, the district court found that Deputy Smith used his speedometer and paced Henry's vehicle as going 40 miles per hour on a street where the posted speed limit was 35 miles per hour and that Deputy Smith had no reason to doubt the accuracy of his speedometer. Because Deputy Smith, who worked in the sheriff's department's patrol division at the time of the traffic stop and had been an officer for seven years, observed Henry traveling at a speed faster than the posted speed limit in violation of NRS 484B.600(1)(c) (prohibiting driving at a rate of speed greater than the posted speed limit), the district court concluded the circumstances in this case demonstrated Deputy Smith was justified in stopping Henry's vehicle. Substantial evidence supports the district court's findings. Therefore, we conclude the district court did not err in denying Henry's motion to suppress evidence related to the traffic stop.

Second, Henry argues the district court committed reversible error by denying his motion to suppress the blood test results that were obtained by a search warrant because the telephonic warrant application was not transcribed and filed and thus the warrant was insufficient on its face.[1] *See* NRS 179.045(3) (providing that, where a magistrate takes an oral

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[1]To the extent Henry also contends that suppression was warranted because neither the warrant nor the inventory were served upon him prior to the blood draw pursuant to NRS 179.075(2), and (3), we are not convinced NRS 179.075 applies to warrants for the collection of a biological specimen such as blood, which has its own statute governing the execution and return of such warrants. *See* NRS 179.077; *see also* NRS 179.075(1) ("Except as otherwise provided in NRS 179.077, a warrant may be executed and returned only within 10 days after its date."). Therefore, we conclude Henry

statement for a search warrant, it must be recorded, transcribed, certified, and filed with the court clerk). "A person aggrieved by an unlawful search and seizure" may file a motion to suppress the seized evidence on the basis that the warrant was insufficient on its face. NRS 179.085(1)(b).

The Nevada Supreme Court recently addressed an analogous challenge to a search warrant in *Alvarez v. State*, 140 Nev., Adv. Op. 79, 561 P.3d 23, 28 (2024). In that case, Alvarez argued the search warrant was illegally executed because the State failed to timely return the warrant in violation of NRS 179.075(1). *Id.* Interpreting NRS 179.075(1) and NRS 179.085(1)(d) (providing for suppression where a warrant was illegally executed), the court disagreed with Alvarez's contention that suppression was warranted, holding "that a motion to suppress on the ground that a warrant was 'illegally executed' does not encompass a warrant that was properly executed but untimely returned." *Id.*

Similar to the argument in *Alvarez*, Henry argued for suppression based on ministerial error—the failure to transcribe and file the oral statement establishing the grounds for the warrant for his blood draw.[2] While an oral search warrant application must be transcribed and filed with the clerk of the court, *see* NRS 179.045(3), the failure to do those things does not implicate the facial sufficiency of the warrant itself, *see State v. Allen*, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003) (providing that a "search warrant has three basic components: (1) it must be issued upon

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fails to demonstrate the district court abused its discretion by denying his motion to suppress the blood evidence on this ground.

[2]Henry was provided a copy of the recording of the oral statement and did not challenge the statement itself but rather the fact that it had not been transcribed and filed.

probable cause and have support for the statement of probable cause; (2) it must describe the area to be searched; and (3) it must describe what will be seized"). Therefore, we conclude the district court did not err in denying Henry's motion to suppress the blood evidence.

Finally, Henry argues the district court erred by allowing the State to admit into evidence Deputy Smith's body camera footage depicting Henry's reaction to the preliminary breath test (PBT) results. Henry contends his reaction was "visual and negative" and constituted a showing of the PBT results, which is not allowed. *See* NRS 484C.150(3) (providing that "[t]he result of the preliminary test must not be used in any criminal action, except to show there were reasonable grounds to make an arrest"). The district court admitted the video based on the State's representation that it was needed to show probable cause for the arrest and admissions Henry made. We review a district court's decision to admit or exclude evidence for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

We initially note that Henry did not include the body camera video in the record on appeal. *See* NRAP 10(a) (stating that "[t]he district court record consists of the papers and exhibits filed in the district court"); NRAP 10(b)(1) (providing that the parties shall include in an appendix "the portions of the district court record to be used on appeal"); *see also* NRAP 10(b)(2) (stating that "[i]f exhibits cannot be copied to be included in the appendix the parties may request transmittal of the original exhibits"). And because it is the appellant's burden to ensure that a proper appellate record is prepared, *see Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980), we necessarily presume that the missing body camera video supports the

district court's decision to admit the evidence, *cf. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Further, we reject Henry's contention that a defendant's reaction to the results of a PBT is inadmissible because it is akin to admission of the results themselves. The prohibition against admitting PBT results appears to be based on concerns about obtaining a conviction based solely on blood alcohol concentration (BAC) evidence obtained through a means of testing that is comparatively less accurate than other forms of testing. *See People v. Parrott*, 968 N.W.2d 548, 555-56, 556 n.8 (Mich. Ct. App. 2021) (providing that the "purpose of the PBT use restrictions seems to be to prevent unwarranted convictions based solely on evidence obtained from a testing system which is comparatively unreliable" and describing a similar statute to NRS 484C.150(3) as "restrict[ing] the admission of PBT results for intoxicated-driving prosecutions because of concerns about the test's reliability" (quotation marks omitted)). Such a concern, however, does not mean that PBT results have no evidentiary value. They can, as they did here, support an officer's probable cause to arrest a defendant accused of driving while intoxicated. *See id.* at 556 (providing Michigan's legislature "permits the use of PBTs to assist police officers in determining whether there is probable cause to arrest"); *see also* NRS 484C.150(3). But where the potentially unreliable BAC result obtained from a PBT is not itself admitted into evidence, as are the facts here, the public policy against obtaining a conviction using a potentially inaccurate BAC is not implicated. For these reasons, we conclude the district court did not abuse its discretion in admitting the evidence.

Even if the district court erred by admitting the video, we conclude any error is harmless in light of overwhelming evidence of Henry's

guilt based on the results of the evidentiary testing of his blood that was more than twice the legal limit. *See Schoels v. State*, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999) (noting that an error is harmless if in absence of the error the outcome would have been the same). For these reasons, Henry is not entitled to relief based on this claim, and we

ORDER the corrected judgment of conviction AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Lynne K. Jones, Chief Judge
Evenson Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk