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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PRENTICE WILLIAMS, Plaintiff-Appellant, v. JONATHON SEALS, Officer #19343; RYAN JOHNSON, Officer #22490, Defendants-Appellees.	No. 18-15059 D.C. No. 2:16-cv-00836-NVW MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted August 15, 2019
Pasadena, California

Before: CALLAHAN and CHRISTEN, Circuit Judges, and WU,[**] District Judge.

Plaintiff-Appellant, Prentice Williams ("Williams"), appeals from the district court's grant of summary judgment in his action under 42 U.S.C. § 1983 brought against two officers of the Tempe Police Department ("Officers"). The

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable George H. Wu, United States District Judge for the Central District of California, sitting by designation.

underlying criminal charges against Williams were dismissed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

"Summary judgment is appropriate if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Reed v. Lieurance*, 863 F.3d 1196, 1204 (9th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). A district court's order granting summary judgment is reviewed de novo. *WildEarth Guardians v. Provencio*, 923 F.3d 655, 664 (9th Cir. 2019) (citing *Churchill Cty v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001)). Evidence is viewed "'in the light most favorable to the nonmoving party,' to determine 'whether genuine issues of material fact exist.'" *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 706 (9th Cir. 2019) (quoting *George v. Edholm*, 752 F.3d 1206, 1214 (9th Cir. 2014)).

Williams alleges that the Officers improperly stopped him at approximately 12:30 am for driving two wheels up onto the sidewalk, and violated his civil rights by arresting him for driving under the influence of alcohol ("DUI"). Williams denies that he had consumed alcohol, and denies that he exhibited signs of intoxication.

"An investigatory stop of a vehicle is reasonable under the Fourth Amendment if the officer reasonably suspects that a traffic violation has occurred." *United States v. Miranda-Guerena*, 445 F.3d 1233, 1236 (9th Cir. 2006). The Officers' observations of Williams' driving onto the sidewalk around 12:30 in the

morning, which Williams admits, created reasonable suspicion justifying the Officers stopping Williams.[1]

If the searching officers have probable cause for the arrest, then there is no violation of a constitutional right, and the officers are entitled to summary judgment. "An arrest without a search warrant . . . [is] valid if the arrest is based on probable cause." *United States v. Bernard*, 623 F.2d 551, 558–59 (9th Cir. 1979). Probable cause requires that "at the moment of arrest the facts and circumstances within the knowledge of the arresting officers 'and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.'" *Id*. at 559 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). In applying the *Beck* standard, the reviewing court "must consider all the facts known to the officers . . . before the arrest." *United States v. Martin*, 509 F.2d 1211, 1213 (9th Cir. 1975). This is a totality of the circumstances test. *United States v. Cortez*, 449 U.S. 411, 417 (1981). The determination of whether probable cause existed is an issue of fact to be analyzed separately given each case's unique set of facts. *Martin*, 509 F.2d at 1213.

[1] Williams denied driving in the bike lane, but did not deny the Officers' observation that he drove two wheels up onto the sidewalk. It is not clear how Williams' wheels could have touched the sidewalk if he had not, in fact, driven into the bike lane, but the district court did not rely on this fact.

Williams refused to take a field sobriety test and was arrested on suspicion of DUI. The Officers' decision to arrest Williams was based, in part, on their observation of his behavior and appearance after he was stopped. According to the Officers, Williams displayed the following signs of intoxication: "(a) after being asked to produce his driver's license, [he] present[ed] a card other than a driver's license; (b) [he] pass[ed] his driver's license twice when looking for the same; (c) [he] fumbl[ed] with documents while looking for his registration; (d) [he had] the smell of intoxicating beverage on his breath; (e) [he was] chewing . . . gum, . . . to mask odors; (f) after exiting the vehicle, [he] us[ed] it for balance; and, (g) [he had] bloodshot and watery eyes."

A blood test taken after he was arrested showed a blood alcohol concentration of 0.049%, which is within the legal limit for driving. The district court erred in citing the blood test as supporting probable cause, *see Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1995) (holding that information cannot be used to support probable cause unless it was known to the officer at the time of arrest). And because credibility assessments are impermissible at summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), we do not consider whether the blood alcohol test undermined Williams' statement to the Officers that he had not been drinking.

Williams' blanket denial of most of the facts reported by the Officers raised

contested issues that prevented the court from relying on the Officers' observations at summary judgment. But the Officers' statements also contained details about Williams' appearance, including his bloodshot eyes, and their perception that he smelled of alcohol. Williams' affidavit states that he did not "smell of intoxication on [his] breath" and asserts that his "eyes were clear and alert," but it does not explain how he was in a position to observe whether his own eyes were bloodshot or whether there was an odor of alcohol around him. *See Lowry v. City of San Diego*, 858 F.3d 1248, 1256 (9th Cir. 2017) (upholding summary judgment where plaintiff, who had been sleeping in a darkened office, lacked foundation to dispute whether a door was open, whether the room was dark, or whether the entering police officer gave a warning because plaintiff "was not in a position to perceive" those facts); *United States v. Lopez*, 762 F.3d 852, 863 (9th Cir. 2014) (holding that lay witness testimony must be based on personal knowledge "produced by the direct involvement of the senses"); *see also* 2 J. Wigmore, *Evidence* § 658 (J. Chadbourn Rev. 1979) (explaining that personal knowledge requires that the witness actually perceive or observe the subject matter). Under the circumstances of this case, Williams' denials of these two facts amount to conclusory and speculative denials concerning his appearance, and were insufficient to create a genuine dispute of material fact on summary judgment. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). We affirm the district court's

ruling that the Officers had probable cause to arrest Williams for driving while intoxicated**.**

AFFIRMED.

Williams v. Seals, No. 18-15059

Wu, J, concurring in part and dissenting in part:

I dissent because, based on the record before the district court, there are disputed material facts which preclude a grant of summary judgment in favor of the defendant officers as to the propriety of the contested arrest.

Plaintiff Williams in pro per brought this 42 U.S.C. § 1983 action raising claims of purported Fourth Amendment violations for stopping his vehicle without reasonable suspicion and thereafter arresting him without probable cause.[1] In granting the defendant officers' motion for summary judgment ("Motion"),[2] the district court delineated only the following:

> The Defendant officers state they observed Williams's vehicle drift, travel with two tires into a designated bicycle path, and drive with two tires up on the sidewalk. After they pulled him over, they observed numerous signs of intoxication. Williams refused to take a field sobriety test. They arrested Williams on suspicion of driving under the influence, and he was transported to the Tempe Police Department. At about 1:45 a.m. a phlebotomist drew a blood test, which showed an alcohol concentration of 0.049% +/- 0.003%. The officers cited

[1] The majority decision correctly concludes that there was no material disputed fact as to the presence of reasonable suspicion for the vehicle stop. *See United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006) ("A traffic violation alone is sufficient to establish reasonable suspicion."). While Williams contested virtually all of the officers' observations of his driving that night, he did not dispute that two of the vehicle's tires were driven up onto the sidewalk, which would constitute a violation of A.R.S. § 28-904.

[2] In a single document, Williams filed a cross-motion for summary judgment and a response to defendants' Motion. He included therein a short declaration and a two-page affidavit.

> Williams for: driving under the influence impaired to the slightest degree, A.R.S. § 28-1381(A)(1); driving with blood alcohol at or above .08% BrAC, A.R.S. § 28-1381(A)(2); driving in a designated bicycle path, A.R.S. § 28-815; driving on a sidewalk, A.R.S. § 28-904; and failing to carry a vehicle registration card, A.R.S. § 28-2158(C). The charges were later dismissed.
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> William denies almost everything. He did not swerve, he did not drive into the bicycle path, he had nothing to drink, and he did not exhibit any signs of intoxication. But he does not deny everything. He says he did not drive onto the sidewalk in the manner the officers say, but does not deny he drove two wheels onto the sidewalk. Though he denies he had any alcohol, the incontrovertible fact is that he had alcohol in his blood a little more than an hour later. Without any evidence to question the accuracy of the blood alcohol test, the test cannot be controverted by a naked denial.
>
> The observed driving on the sidewalk was more than reasonable suspicion for a stop. It was also probable cause, though that is not needed for a traffic stop. That offense alone was probable cause for the arrest. Once the valid traffic stop and arrest was lawfully made, the undisputable results of the blood alcohol test conclusively show he had alcohol in his blood. That suffices as probable cause for the DUI arrest and charge.

Although the district court did not articulate what were the "numerous signs of intoxication,"[3] the majority has cited to Paragraph 9 of the Defendants' Statement of Facts in Support of Motion for Summary Judgment, which recites

[3] To the extent that the district court stated that "[t]he observed driving on the sidewalk . . . . That offense alone was probable cause for the arrest," it would have been in error to hold that the traffic violation by itself could be grounds for an arrest. A contravention of A.R.S. § 28-904 constitutes a "civil traffic violation" and subjects the perpetrator merely to a "civil penalty," where the maximum amount, unless otherwise provided, is $250. *See* A.R.S. §§ 28-121(B), 28-1521, 28-1598. A police officer "may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of this title and to serve a copy of the traffic complaint . . . ." *See* A.R.S. § 28-1594. Without more, the driver cannot be arrested for an A.R.S. § 28-904 traffic offense.

only the following:

> During Officer Johnson's investigation, Plaintiff exhibited the following signs of intoxication: (a) after being asked to produce his driver's license, presenting a card other than a driver's license; (b) passing his driver's license twice when looking for the same; (c) fumbling with documents while looking for his registration; (d) the smell of intoxicating beverage emanating from his breath; (e) chewing of gum, used to mask odors; (f) after exiting the vehicle, using it for balance; and, (g) bloodshot and watery eyes.

As to the "signs of intoxication," Williams supplied his own affidavit, which challenged those factual assertions as follows:

> I exhibited No [sic] signs of intoxication or Impairment, [sic] (a) I gave him my license & insurance card directly, (b) I directly went to my license, © [sic] I didn't fumble anything, (d) No smell of intoxication on my breath. (e) I chewed gum before the stop. (f) I didn't use my car to balance myself. (g) My eyes were clear & alert . . . . My title was stuck in my visor.

As to the propriety of Williams' arrest, the majority correctly concludes that: (1) the district court erred in considering the results of Williams' blood alcohol test because it was obtained following his arrest and therefore cannot be a factor in the probable cause determination, which must only be made based upon the evidence known to the officers at the time of the arrest (*see United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1296 (9th Cir. 1998)); and (2) "Williams' blanket denial of most of the facts reported by the Officers raised contested issues that prevented the court from relying on the Officers' observations at summary judgment." Nevertheless, the majority decision goes on to hold that two of Williams' denials

of the officers' observations of his appearance (*i.e.* "his bloodshot eyes, and . . . that he smelled of alcohol") amounted to "conclusory and speculative denials . . . [which] were insufficient to create a genuine dispute of material fact on summary judgment." The alleged deficiency of the two cited denials is that Williams "does not explain how he was in a position to observe whether his own eyes were bloodshot or whether there was an odor of alcohol around him." I respectfully disagree with: (1) the procedural posture as to the majority's ruling, (2) the factual underpinning and assumptions of the majority's conclusion as to the deficiency of Williams' denials, and (3) the implications of the majority's holding.

The majority decision cites to cases for the generally accepted proposition that a witness must have personal knowledge of the matter to which he testifies, which often means laying a foundation for his ability to attest to the fact. *See e.g.*, *Lowry v. City of San Diego*, 858 F.3d 1248, 1255-56 (9th Cir. 2017) (*en banc*) (holding that, because the plaintiff was sleeping at certain points during the incident, she could not offer her contrary statements as evidence to rebut the officers' testimony regarding events which she "was not in a position to perceive"). However, in those cases, the decisions were based upon a review of evidentiary rulings made by the lower court. *Id.*; *see also United States v. Lopez*, 762 F.3d 852, 863-64 (9th Cir. 2014). Here, the trial court did not make any finding of a

lack of capacity or foundation as to Williams' denials.[4] In addition, the Defendants did not file any objections to Williams' affidavit (such as raising an evidentiary challenge to his evidence for lack of foundation) and, hence, they waived those objections. *See Hoye v. City of Oakland*, 653 F.3d 835, 841 n.3 (9th Cir. 2011) ("'Defects in evidence submitted in opposition to a motion for summary judgment are waived absent a motion to strike or other objection.' *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 485-86 (9th Cir. 1991)."). If the majority seeks to preclude consideration of the two cited denials for lack of capacity/foundation reasons,[5] it should refer the case back to the district court for its evidentiary ruling

[4] The district court appears to have accepted all of Williams' denials except for the one where he disclaimed that he had any alcohol. The basis for the district court's rejection of that denial was "the incontrovertible fact . . . that he had alcohol in his blood a little more than an hour later . . . . [and that blood] test cannot be controverted by a naked denial." However, as the majority has already noted, the results of the blood test cannot be used in deciding whether probable cause existed at the time of the arrest. Nor can it be used in weighing the credibility of Williams' statements versus the defendant officers' narratives since credibility determinations are not made in the context of summary judgment motions. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (in summary judgment motions, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," and "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor").

[5] It is difficult to imagine what additional factual evidence the majority would have required Williams to put forward in order to create a genuine dispute of material fact in a situation where the only evidence available is one party's word against another's. By refusing to credit Williams' specific denials of the officer's factual assertions, the majority essentially puts the burden on Williams to prove himself not guilty of driving under the influence of intoxicating liquor.

on that issue first.

Even if one were to consider the capacity/foundation issue at this point, the majority's conclusion is at best merely debatable, which is an insufficient basis to grant a motion for summary judgment. First, it contends that Williams did "not explain how he was in a position to observe whether his own eyes were bloodshot." As noted above, since the defendants did not raise any objection to the sworn statements in his affidavit, how was Williams apprised that he needed to lay any further foundation for that evidence? Further, unlike the situation in *Lowry* where the plaintiff was obviously incapable of establishing a foundation for certain of her testimony because she was asleep and not actually able to perceive certain of the events that were the subject of the officers' attestations, here there were a number of items which could have placed Williams in a position to be able to examine his own eyes. For example, federal law requires that "[e]ach passenger car shall have an inside rearview mirror of unit magnification." *See* 49 C.F.R. § 571.111(S5.1).

Likewise, the majority also cites to Williams' failure to explain "how he was in a position to observe . . . whether there was an odor of alcohol around him." Initially, it should be observed that the officers' statement of fact concerned "the smell of intoxicating beverage emanating from [Williams'] breath" and not the

"odor of alcohol around him." In his affidavit, Williams stated that there was "No smell of intoxication on my breath" and that he had "chewed gum before the stop." In his declaration, Williams said that he "was not drinking or impaired when stopped by Off's [sic] Seals and Johnson . . . ." Again, it is unclear what further foundation Williams would have to have laid to render his denial non-conclusory or non-speculative in the majority's view.[6] For example, if the officers had accused Williams of having breath that smelt of garlic at the time of the incident, what could he respond with to counter that accusation other than indicating that his breath did not smell of garlic at that point and he had not been eating garlic while driving?

Lastly, in the end, the only items which the majority decision relies upon to support the presence of probable cause to arrest Williams for driving under the influence in violation of A.R.S. §§ 28.1381(A)(1) or 28.1381(A)(2)[7] are: (1)

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[6] On this point, the majority decision seems to be premised on a supposition that has not been established, namely that it is absolutely impossible for a person to smell the odor of an intoxicating beverage on his or her own breath.

[7] There was no probable cause to arrest Williams for a violation of A.R.S. § 28.1381(A)(2), which covers a person who "has an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle . . . ." Williams was stopped at about 12:30 a.m. After he was arrested, he was taken to have his blood drawn, which was done at 1:45 a.m. and showed a blood alcohol concentration ("BAC") of 0.049% +/− 0.003%. Therefore, at the time of his arrest (which was before the BAC test had been given), the officers could not have had any idea of Plaintiff's BAC so as to conclude that he had violated A.R.S. § 28.1381(A)(2). Indeed, even if one were to consider the results

Williams' driving two tires of his car onto a sidewalk, (2) the officer's reporting his eyes as bloodshot and watery, which Williams denied, and (3) the officer's reporting the smell of an intoxicating beverage on his breath, which Williams also denied. Clearly, if Williams' denials were accepted as sufficient to create factual disputes, then the only evidence to support the existence of probable cause would be the traffic violation, which as discussed above would not be grounds for an arrest.

Despite the majority's professed refusal to consider the 1:45 a.m. BAC test results for purposes of evaluating probable cause for Williams' arrest, one must wonder whether the majority actually would have found no dispute of any material fact herein due to a lack of foundation for Williams' denials if the 1:45 a.m. test result had been 0.00%. Unless its answer is an unequivocal "yes," the majority has *sub silentio* engaged in "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" and has not believed the

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of the test taken at 1:45 a.m. (which would be improper for the probable cause determination), it would have been virtually impossible for Williams to have had a BAC of 0.08% during the relevant period. *See generally Missouri v. McNeely*, 569 U.S. 141, 152 (2013) ("as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated . . . . Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed.").

"evidence of the non-movant" and drawn "all justifiable inferences . . . in his favor."[8] *See Anderson*, 477 U.S. at 255.

For the above reasons, I dissent from the majority's decision to affirm the grant of summary judgment on Williams' § 1983 claim for arrest without probable cause.

[8] And if the majority's answer is "yes," then no individual can avoid losing at summary judgment in a § 1983 case after being arrested for a violation of A.R.S. § 28-1381(A)(1) following a traffic stop where the officer states that at the time of the traffic stop the arrestee's eyes were watery and bloodshot and there was the smell of an intoxicating beverage emanating from the driver's breath, and where the individual's proof in opposition to the motion consists only of the evidence that would be available to him, namely: (1) his denial that he had been drinking any intoxicating beverage during the time period, (2) his declaration that his eyes were not bloodshot or watery, and (3) his statement that he did not have the smell of alcohol on his breath.