

**REPUBLIC OF PALAU,
Plaintiff,**

v.

**EMIROSE NIRO,
Defendant.**

CRIMINAL CASE NO. 12-003

Court of Common Pleas
Republic of Palau

Decided: May 2, 2012

[1] Criminal Law: Information

In order for the Republic to maintain charges against a defendant, it must have probable cause to support the conclusion that an offense was committed by the defendant.

[2] Criminal Law: Information

Probability, and not a prima facie showing of criminal activity, is the standard of probable cause. Therefore, an affidavit is sufficient when it demonstrates in some trustworthy fashion the likelihood that an offense has been committed.

[3] Criminal Law: Information

18 PNC § 208 requires that a court be persuaded that probable cause is present and, as the *Gibbons* court established, a court need only find that trustworthy evidence would support a reasonable person’s conclusion that the crime was committed by the defendant.

[4] Criminal Law: Driving Under the Influence

The slight impairment standard is the appropriate metric for gauging whether someone is “under the influence.”

[5] Criminal Law: Driving Under the Influence

Generally, the “under the influence” of alcohol element is satisfied by a showing that an individual is affected to a noticeable or perceptible degree. Although it is not necessary for the government to prove that the defendant was drunk when driving, there must be some showing that he or she was under the influence of alcohol so as to make it less safe for him or her to operate a motor vehicle.

[6] Criminal Law: Driving Under the Influence

Although a blood alcohol level of 0.10 percent determines conclusively that someone is intoxicated, a lower blood alcohol level does not exclude the possibility that someone is under the influence.

[7] Criminal Law: Driving Under the Influence

In order to establish probable cause for driving under the influence, the Republic must establish that someone was at least slightly perceptibly impaired by intoxicating liquor. This can be accomplished by an affidavit alleging evidence of actual intoxication (such as blood alcohol level or failed sobriety tests) or evidence that a person was otherwise impaired by the consumption of alcohol (such

as erratic driving or slurred speech combined with the smell or presence of alcohol).

[8] Criminal Law: Information

If the Republic lacks probable cause, the Defendant cannot be summoned to appear at trial.

Counsel for Plaintiff: Vameline Singeo
Counsel for Defendant: Rachel Dimitruk

The Honorable HONORA E. REMENGESAU RUDIMCH, Senior Judge:

Before the Court is Defendant Emirose Niro's motion to dismiss the criminal charges against her for lack of probable cause.

BACKGROUND

According to the Amended Affidavit of Probable Cause submitted by the Republic, Defendant was driving and was hit by another vehicle. A witness said that Defendant smelled of alcohol, and a police officer recovered three beer cans from her car. There is no allegation that Defendant was at fault in the accident.

ANALYSIS

I. Driving Under the Influence

[1, 2] 42 PNC § 514 defines the crime of driving under the influence: "It shall be unlawful for any person . . . who is under the influence of intoxicating liquor . . . to drive any vehicle upon any highway within the Republic." In order for the Republic to maintain charges against a defendant, it must

have probable cause to support the conclusion that an offense was committed by the defendant. The Appellate Division has described probable cause as "an objective standard . . . Probability, and not a prima facie showing of criminal activity, is the standard of probable cause. Therefore, an affidavit is sufficient when it demonstrates in some trustworthy fashion the likelihood that an offense has been committed." *ROP v. Gibbons*, 1 ROP Intrm. 547A, 547I (1988). 18 PNC § 208 further states that a warrant or penal summons may issue only

[i]f the information states the essential facts constituting a criminal offense or offenses by one or more persons named or described therein and is supported by one or ore written statements under oath showing to the satisfaction of the court that there is probable cause to believe or strongly suspect that the offense complained of has been committed by such person or persons"

[3] In this case, the Republic reads the Defendant's motion as suggesting that the language of § 208 requires more than mere "probable cause" to sustain a criminal information because the motion relies on the Defendant's position that there was no basis to "believe or strongly suspect" that she drove under the influence. To the extent that this accurately reflects Defendant's position, the Court rejects the interpretation. Section 208 requires that a court be persuaded that probable cause is present and, as the *Gibbons* court established, a court need only find that

trustworthy evidence would support a reasonable person's conclusion that the crime was committed by the defendant.

Having established the applicable standard for a finding of probable cause, the question becomes whether the Republic has probable cause in this case to maintain a charge of driving under the influence against Defendant. Defendant cites cases supporting a conclusion to the contrary. First, in *People v. Alberto*, 877 N.Y.S.2d 628, 632 (Dist. Ct. 2008), a New York court concludes that there was no probable cause where an officer smelled alcohol on the defendant's breath, observed bloodshot and glassy eyes, and the defendant was involved in an accident. The court found the officer's observations to be insufficient in part because bloodshot and glassy eyes could have resulted from the defendant being in an accident. *Id.* Similarly, in *State v. Brown*, 853 N.E.2d 1228, 1233 (Ohio Ct. App. 2006), an Ohio court found that the state lacked probable cause to arrest the defendant for a DUI where the officer observed nervous behavior, noted the defendant's glassy bloodshot eyes, smelled alcohol, and caught the defendant speeding. The Defendant contends that this case, in which the only evidence of her intoxicated state is the smell of alcohol and three empty beer cans, is analogous to *Alberto* and *Brown*. The Republic counters that the presence of the beer cans distinguishes this case.

Along the same lines, Defendant argues that 42 PNC § 514 requires more than a simple showing that Defendant operated her vehicle after drinking — Defendant contends that the Republic must have probable cause to believe that her consumption of alcohol *influenced* her driving. Defendant offers

several cases illustrating different standards for determining if someone is “under the influence.” Standards range from mere ingestion of alcohol with no requisite showing of impairment, *e.g.*, *Milwaukee v. Richards*, 69 N.W.2d 445, 448 (Wis. 1955), to appreciable impairment that “threatens public welfare,” *e.g.*, *Commonwealth v. Connolly*, 474 N.E.2d 1106, 1110 (Mass. 1984). In *Snyder v. City of Denver*, 227 P.2d 341, 343 (Colo. 1951), the Colorado Supreme Court charted the middle ground and concluded that “under the influence of intoxicating liquor” meant the ingestion of any amount of liquor which renders a person “less able, either mentally or physically or both, to exercise a clear judgment and with steady hands and nerves operate an automobile with safety to himself [or herself] and to the public.”¹

[4, 5] The Court concludes that the slight impairment standard articulated in *Snyder* is the appropriate metric for gauging whether someone is “under the influence.” This interpretation is consistent with the general rules articulated in the applicable *American Jurisprudence* volume. Generally, the “under the influence” of alcohol element is satisfied by a showing that an individual is “affected to a noticeable or perceptible degree.” 7A Am. Jur. Automobiles § 341 (2007) (citing authority from a plethora of American jurisdictions). Although “it is not necessary for the [government] to prove that [the] defendant was drunk when driving,” there must be some showing “that he or she was under the influence of alcohol so as to make it

¹ Although the Colorado statute at issue in *Snyder* specified that the smell of alcohol was insufficient to show intoxication, the phrase that the court focused on was identical to that in 42 PNC § 514.

less safe for him or her to operate a motor vehicle.” *Id.*

[6] This interpretation of “under the influence” is also in line with the purpose of the applicable statute and its amendments to “deter . . . dangerous . . . conduct . . . for the protection of the public.” RPPL No. 7-48. The Court’s rejection of an intoxication requirement is not in tension with the blood alcohol limit found elsewhere in the Code. The subchapter entitled Driving Under the Influence, states that intoxication is “conclusively presumed . . . if the alcohol content of [someone’s] blood is 0.10 percent.” 42 PNC § 608. Although a blood alcohol level of 0.10 percent determines conclusively that someone is intoxicated, a lower blood alcohol level does not exclude the possibility that someone is under the influence. *See 7A Am. Jur. Automobiles* § 341 (2007).

[7] Thus, in order to establish probable cause for driving under the influence, the Republic must establish that someone was at least slightly perceptibly impaired by intoxicating liquor. This can be accomplished by an affidavit alleging evidence of actual intoxication (such as blood alcohol level or failed sobriety tests) or evidence that a person was otherwise impaired by the consumption of alcohol (such as erratic driving or slurred speech combined with the smell or presence of alcohol).

In this case, the Republic has produced ample evidence to show that the Defendant drank alcohol at some time before she drove her car. The smell of alcohol further suggests that her consumption was proximate to her driving. However, the scent of alcohol does not give any indication whatsoever of the

amount of alcohol she consumed or the degree to which she was “influenced” by it. Further, the presence of three beer cans, without further evidence of when their contents were consumed, does not give rise to “likelihood” or “probability” that the Defendant was under the influence of alcohol. *Gibbons*, 1 ROP Intrm. at 547I. The Court notes that if the Government had produced evidence that Defendant was careless and caused the accident, its case against her would be stronger and could give rise to probable cause. Absent such evidence, or other evidence of perceptible influence by alcohol, probable cause is lacking.

[8] The Republic also argues that this is a matter to be reserved for trial. However, the question is one appropriately addressed prior to trial because, if the Republic lacks probable cause, the Defendant cannot be summoned to appear at trial. 18 PNC § 208.

Because the Republic lacks probable cause, the Court dismisses Count Three of the Information (Driving Under the Influence).

II. Reckless Driving

The Court agrees with the Republic’s premise that probable cause for driving under the influence amounts to probable cause for reckless driving. However, for the reasons explained above, the Republic lacked probable cause to charge Defendant for driving under the influence. The Government offers no further evidence that Defendant drove recklessly. Thus, the Court dismisses Count Four of the Information (Reckless Driving).

CONCLUSION

The Court hereby **DISMISSES** Counts
Three and Four of the Information.