

COURT OF APPEALS OF VIRGINIA

Record No. 0996-25-1

HENRY BARON WHITAKER, III
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Beales, White and Duffan

Argued at Norfolk, Virginia

Opinion Issued September 1, 2026*

FROM THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

Matthew Hoffman, Judge

Daniel B. Winegard, Assistant Public Defender (Newport News Public Defender's Office, on brief),
for appellant.

Brooke I. Hettig, Assistant Attorney General (Jason S. Miyares,¹ Attorney General, on brief), for
appellee.

MEMORANDUM OPINION BY JUDGE KIMBERLEY SLAYTON WHITE

Henry Baron Whitaker, III challenges the trial court's denial of his motion to suppress evidence. Whitaker argues that the officer lacked probable cause to arrest him for driving while intoxicated (DWI). He also argues that a blood draw was not authorized under the circumstances. Thus, he contends, the certificate of blood analysis was subject to suppression. Finding no error, we affirm the trial court's judgment.

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

¹ Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND

We recite the facts “in the ‘light most favorable’ to the Commonwealth, the prevailing party in the trial court.” *Hammer v. Commonwealth*, 74 Va. App. 225, 231 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)). In doing so, we discard any evidence that conflicts with the Commonwealth’s evidence, and regard as true all the credible evidence favorable to the Commonwealth and all inferences that can be fairly drawn from that evidence. *Cady*, 300 Va. at 329.

Newport News Police Officer Christopher Mazzucca “was running radar” when Whitaker’s “vehicle hit [the] radar at 67 miles per hour” where the posted speed limit was 45 miles per hour. Mazzucca conducted a traffic stop.² When he approached Whitaker’s vehicle, he noticed “an odor of alcohol . . . coming from the vehicle.” Whitaker had “slurred speech” and “bloodshot glassy eyes.” Whitaker admitted that he had consumed two beers an hour earlier. During his conversation with Mazzucca about his medical issues, Mazzucca noticed that the alcohol odor persisted, even after the passengers had exited the car.

Whitaker agreed to perform field sobriety tests. He passed the finger touch test, and performed the counting test, but “skipped some letters” during the alphabet test. Mazzucca saw “involuntary jerking of [Whitaker’s] eyes” during the horizontal gaze nystagmus test. During the walk-and-turn test, Whitaker “did not take 9 steps. He took 14 steps. He did step off the line on the 8th and 9th step. He then missed heel-to-toe, 4, 5, 8, and 9 step,” and he “stopped walking at the 14th step” and did not make the second turn or walk the prescribed nine steps back to the starting point. Although Whitaker counted as instructed, he was “swinging off balance and . . . put his foot down” during the one-legged stand test.

² Mazzucca’s body-worn camera footage was played for the trial court during the suppression hearing.

Considering Whitaker's performance on the field sobriety tests, Mazzucca determined that he had probable cause to arrest Whitaker for driving while intoxicated. After arresting Whitaker, Mazzucca advised him of his *Miranda* rights, and the following exchange occurred:³

Mazzucca: "In the state of Virginia, if you're placed under arrest for a DUI, it is mandatory that you take a breath or blood sample, okay? If you choose not to, it's an additional charge of refusal which is a civil penalty, okay? I just need a simple yes or no if you're willing to take that breath test."

Whitaker: "Umm, I'll take the blood test."

Mazzucca: "Is there any reason why you want to take the blood test?"

Whitaker: "Why do you think?"

Mazzucca: "It's a simple question. If you feel comfortable taking the blood test we can take the blood test."

Whitaker: "I'll take the blood test because by the time the blood's drawn then I'll be below the legal limit."

Mazzucca: "Okay, I mean, if you feel comfortable. Is there any reason why you don't want to take the breath test? Is it, do you feel like you're not able to give a sample?"

Whitaker: "No, it's just science, really. It's, like you said, the field sobriety test is inadmissible against me in court."

Mazzucca: "The breath test out here is not permissible in court."

Whitaker: "Correct, yeah. So by the time we get to the hospital, everyone, the phlebotomist comes out, it'll be like an hour or two and my BAC will drop low enough to where I'll be in the legal limit, which is admissible in court."

Mazzucca drove Whitaker to the hospital for a blood draw.⁴

Before trial, Whitaker moved to suppress the evidence. At a hearing on his motion, he argued that "there was no probable cause to arrest [him] for DWI" and that "the preliminary

³ CW Ex. 1 at 17:56-19:21. See *Miranda v. Arizona*, 382 U.S. 925 (1965).

⁴ The certificate of analysis showed that Whitaker's blood alcohol content was 0.120.

breath test was not voluntary.”⁵ Whitaker contended that his blood was “illegally seized” because Mazzucca deviated from Code § 18.2-268.2 when he “provided [him] the *choice* of a breath or blood test.” He also argued that any “allegation of [his] ‘voluntariness’ in his choice to take the blood test will not deem the blood certificate admissible.”

The trial court found that Mazzucca had probable cause to arrest Whitaker for driving under the influence of alcohol. It denied Whitaker’s motion to suppress the blood certificate of analysis. Whitaker then entered a conditional guilty plea, preserving his right to appeal the court’s rulings on his motion to suppress.

ANALYSIS

I. There was probable cause for Whitaker’s arrest.

A trial court’s denial of a motion to suppress presents us with a “mixed question of law and fact.” *Durham v. Commonwealth*, 303 Va. 310, 321 (2024) (quoting *Jones v. Commonwealth*, 277 Va. 171, 177 (2009)). When reviewing a trial court’s denial of a motion to suppress, this “Court is ‘bound by the trial court’s findings of historical fact unless plainly wrong or without evidence to support them.’” *Moreno v. Commonwealth*, 73 Va. App. 267, 274 (2021) (quoting *Williams v. Commonwealth*, 71 Va. App. 462, 475 (2020)). “This standard requires us ‘to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.’” *Commonwealth v. White*, 293 Va. 411, 414 (2017).

“Where an issue ‘turns entirely upon a question of law, we review the circuit court’s decision de novo.’” *Heald v. Rappahannock Elec. Coop.*, 80 Va. App. 53, 74 (2024) (quoting *Heron v. Transp. Cas. Ins. Co.*, 274 Va. 534, 538 (2007)). “To the extent the Court’s analysis involves statutory interpretation, questions of statutory construction are also reviewed under a de

⁵ The court granted Whitaker’s motion to strike the preliminary breath test.

novo standard.” *Rosson v. Erie Ins. Exch.*, 79 Va. App. 266, 277 (2023) (quoting *Ruderman v. Pritchard*, 76 Va. App. 295, 302 (2022)).

“Probable cause exists when the facts and circumstances known to the officer ‘are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed.’” *Park v. Commonwealth*, 74 Va. App. 635, 646 (2022) (quoting *Al-Karrien v. Commonwealth*, 38 Va. App. 35, 47 (2002)). It is evaluated at the moment of arrest. *Smith v. Commonwealth*, 56 Va. App. 592, 600 (2010) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *Russell v. Commonwealth*, 33 Va. App. 604, 609 (2000) (same). Whether a warrantless arrest is supported by probable cause “is determined under an objective test based on a reasonable and trained police officer’s view of the totality of the circumstances.” *Brown v. Commonwealth*, 270 Va. 414, 419 (2005); *Park*, 74 Va. App. at 646. Under settled precedent, officers may consider: the odor of alcohol, as well as the defendant’s manner, disposition, speech, muscular movement, general appearance, or behavior in determining whether he or she is “intoxicated.” See *McGhee v. Commonwealth*, 280 Va. 620, 624 (2010) (quoting *Hill v. Lee*, 209 Va. 569, 572 (1969)).

Whitaker passed Mazzucca driving more than 20 miles per hour above the posted speed limit in the early hours of the morning. When Mazzucca stopped Whitaker and spoke with him, he smelled the odor of alcohol on Whitaker. Whitaker’s speech was slurred and his eyes were bloodshot and “glassy.” He admitted that he had consumed two beers in the past hour. Whitaker also performed poorly on the field sobriety tests, skipping letters in the “ABC” test, prematurely stopping the walk-and-turn test after making multiple mistakes, being unsteady and swaying during the one-legged stand test, and failing to follow directions. These observable facts would lead a reasonable police officer to believe that Whitaker was driving while intoxicated. In short, we find no error in the trial court’s conclusion that Mazzucca had probable cause to believe that Whitaker was driving while intoxicated. *McGhee*, 280 Va. at 624.

II. Mazzucca substantially complied with the informed consent statute.

“‘By operating a motor vehicle on the highways of the Commonwealth,’ a motorist ‘consent[s], as a condition of that operation, to have tests made to determine’ if that person is intoxicated.” *Patterson v. Commonwealth*, 62 Va. App. 488, 494 (2013) (alteration in original) (quoting *Cash v. Commonwealth*, 251 Va. 46, 52 (1996)). Virginia’s implied-consent statute provides:

A. Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he is arrested for violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or of a similar ordinance within three hours of the alleged offense.

B. Any person so arrested for a violation of clause (i) or (ii) of § 18.2-266 or both, § 18.2-266.1 or subsection B of § 18.2-272 or of a similar ordinance shall submit to a breath test. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. The accused shall, prior to administration of the test, be advised by the person administering the test that he has the right to observe the process of analysis and to see the blood-alcohol reading on the equipment used to perform the breath test. If the equipment automatically produces a written printout of the breath test result, the printout, or a copy, shall be given to the accused.

Code § 18.2-268.2. The defendant’s arrest “triggers the statutory consent requirement.” *Green v. Commonwealth*, 299 Va. 593, 595 (2021) (quoting *Bristol v. Commonwealth*, 272 Va. 568, 578 (2006)). The statute does not permit the “arrestee to ‘elect’ whether to submit to a breath test or a blood test.” *Patterson*, 62 Va. App. at 494 (quoting *Brown-Fitzgerald v. Commonwealth*, 51 Va. App. 232, 236 (2008)).

Hence, Whitaker argues that because Mazzucca permitted him to choose a blood test, his blood sample was seized improperly, so “the trial court should have suppressed the seizure of

blood and the resulting blood certificate of analysis.” Nonetheless, we find Whitaker’s argument meritless and thus reject it.

“Absent an infirmity of constitutional dimensions, the ‘mere violation of state statutory law does not require that the offending evidence be suppressed, unless the statute expressly provides for an evidentiary exclusion remedy.’” *Cutright v. Commonwealth*, 43 Va. App. 593, 600 (2004) (quoting *Seaton v. Commonwealth*, 42 Va. App. 739, 757 n.7 (2004)). “The DUI statutes nowhere provide for a suppression remedy for procedural violations.” *Id.* Instead, substantial compliance with Code §§ 18.2-268.2 through 18.2-268.9 is sufficient. Code § 18.2-268.11.

Although not in the most precise manner, Mazzucca correctly advised Whitaker that Virginia law required him to submit to a breath or blood test. He then properly inquired whether Whitaker was willing to submit to a breath test, as required under Code § 18.2-268.2(B). Whitaker said that he would voluntarily submit to a blood test and explained why he preferred it. Mazzucca honored Whitaker’s request, though he was under no obligation to do so. *Patterson*, 62 Va. App. at 494 (“the implied consent statute ‘does not impose any obligation upon the police officer to offer a breath test,’” or “any chemical testing at all” (quoting *Brown-Fitzgerald*, 51 Va. App. at 236)). But just because Whitaker’s calculus for taking the blood test was flawed does not mean that he was entitled to have the evidence suppressed.

“The steps set forth in §§ 18.2-268.2 through 18.2-268.9 relating to *taking*, handling, identifying, and disposing of blood or breath samples are procedural and not substantive.” Code § 18.2-268.11 (emphasis added). “Failure to comply. . . shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered with all the evidence in the case.” *Id.* Hence, because the arresting officer substantially complied with the implied consent statute, and Mazzucca does not contend otherwise, “any deficiency in

the required procedures is a matter of weight and sufficiency of the evidence to be determined by the trier of fact.” *Snider v. Commonwealth*, 26 Va. App. 729, 732 (1998) (quoting *Artis v. City of Suffolk*, 19 Va. App. 168, 171 (1994)). Thus, Whitaker was not entitled to have the evidence of the blood test suppressed.

CONCLUSION

Accordingly, we affirm the trial court’s judgment.

Affirmed.