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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MORGAN HARRISON BERING,

Defendant and Appellant.

F069044

(Super. Ct. No. VCF274337)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge and Gary L. Paden, Judges.\*

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General and Daniel B. Bernstein, Deputy Attorney General, for Plaintiff and Respondent.

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Appellant Morgan Harrison Bering's motion to suppress evidence was denied. He thereafter pled no contest to possession of methamphetamine (count 1/Health & Saf. Code, § 11377, subd. (a)) and driving when his driving privilege was suspended

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\* Judge Alldredge presided over appellant's motion to suppress; Judge Paden presided over appellant's sentencing hearing.

**SEE DISSENTING OPINION OF PEÑA, J.**

(count 3/Veh. Code, § 14601.2, subd. (a)). Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), and after having the parties brief one issue, we affirm.

### **FACTUAL AND PROCEDURAL HISTORY**

On July 10, 2012, at 7:50 p.m., Bering was driving a truck that was involved in an accident with another vehicle.<sup>1</sup> Shortly after midnight, California Highway Patrol Officer Jeremiah Johnson arrested Bering at his house for driving under the influence of alcohol and assault with a deadly weapon. During a search of Bering, Officer Johnson found a bindle containing 0.03 grams of methamphetamine. A subsequent blood test disclosed that Bering was under the influence of methamphetamine.

On April 2, 2013, the district attorney filed an information charging Bering with possession of methamphetamine (count 1), being under the influence of methamphetamine (count 2), and driving when his driving privilege was suspended (count 3).

On May 9, 2013, Bering filed a motion to suppress.

On July 18, 2013, the court denied the motion. Bering then entered his no contest plea to counts 1 and 3 in exchange for the dismissal of count 2.

On January 10, 2014, the court suspended imposition of sentence and placed Bering on probation on condition that he serve 180 days in custody.

Bering's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*Wende, supra*, 25 Cal.3d 436.) Bering has not responded to this court's invitation to submit additional briefing.

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<sup>1</sup> At the time, Bering's driver's license was suspended for a prior driving under the influence conviction.

However, on July 16, 2015, we directed the parties to file a letter brief addressing whether the court erred when it denied Bering's motion to suppress. We consider the parties' arguments below.

## **DISCUSSION**

### ***The Suppression Motion Hearing***

At the hearing on Bering's motion to suppress, Tulare County Sheriff's Deputy Derek Hood testified that on July 10, 2012, at approximately 9:00 p.m., he was dispatched to assist California Highway Patrol Officer Jeremiah Johnson regarding a possible hit and run accident that occurred at 7:50 p.m. Based on his discussion with the victim, Deputy Hood determined that Bering, whom he had known since Bering was a child, was a possible suspect.

Deputy Hood looked for Bering at several locations in the Springville area where Bering lived. At 11:12 p.m., Deputy Hood received a call from Bering on Hood's personal cell phone inviting him to meet at Bering's residence. Hood went to Bering's house and arrived there at 11:19 p.m. He pulled into the driveway and spoke with Bering until Officer Johnson arrived at 11:50 p.m. Deputy Hood asked Bering if earlier he had been involved in an accident on Balch Park Road and Bering replied that he had.

Officer Johnson testified that he arrived at Bering's house to investigate an assault with a deadly weapon, i.e., a motor vehicle, that was initially called in as a hit and run. Officer Johnson asked Bering if he had been involved in the earlier accident and he said he had. As he spoke with Bering, Officer Johnson noticed Bering was exhibiting objective signs of alcohol intoxication: his speech was slurred, his eyes were red and watery, and he seemed unsteady on his feet. Bering told Johnson that he had been drinking earlier in the evening, but not prior to the accident Johnson was questioning him about. According to Bering, he had consumed "some beers," but it was "at approximately 10:30 p.m.," after he returned home.

Officer Johnson asked Bering to perform some field sobriety tests, which he did not perform the way Johnson explained and demonstrated them. Officer Johnson also took two readings of Bering's blood-alcohol content (BAC) with a preliminary alcohol screening (PAS) device that measured Bering's BAC at 0.111 percent and 0.125 percent. Based on his observations and the PAS results, Officer Johnson believed that Bering was likely under the influence of alcohol at the time of the earlier incident.<sup>2</sup>

Officer Johnson placed Bering under arrest for assault with a deadly weapon and for driving under the influence of alcohol. During a search of Bering, incident to arresting him, Officer Johnson found a small bundle containing methamphetamine.

### ***Analysis***

“Broadly speaking, evidence may be excluded as ‘fruit of the poisonous tree’ where its discovery ‘results from’ or is ‘caused’ by a Fourth Amendment violation.” (*In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262.) Since the evidence underlying the charges Bering pled to was obtained as a result of his arrest, the main issue at the suppression hearing was whether Officer Johnson had probable cause to arrest Bering. Bering contends the court erred in denying his motion to suppress because it applied the wrong standard in determining the validity of the arrest, Officer Johnson did not have probable cause to arrest him, and Officer Johnson could not arrest him for a misdemeanor offense of driving under the influence because the offense did not occur in his presence. He further contends that since the arrest was unlawful the evidence obtained pursuant to that arrest must be suppressed. Respondent contends Officer Johnson had probable cause to arrest Bering for driving under the influence of alcohol based on Bering's BAC of 0.125 percent when contacted by the officer, and Bering's admission that he had been

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<sup>2</sup> Officer Johnson testified that he had investigated approximately 300 cases of driving under the influence in which he used field sobriety tests and that over 200 of those cases resulted in arrests for driving under the influence.

driving at the time of the accident.<sup>3</sup> Respondent further contends that Officer Johnson could make a warrantless arrest for this misdemeanor offense pursuant to Vehicle Code section 40300.5, subdivision (a).

Preliminarily, we reject Bering's contention that his arrest by Officer Johnson was unlawful because he did not have authority to arrest him without a warrant for a misdemeanor that did not occur in his presence. (See Pen. Code, § 836, subd. (a).) Bering forfeited this issue by his failure to raise it in the trial court. (*People v. Williams* (1999) 20 Cal.4th 119, 128.) However, even if this issue were properly before us we would reject it. Bering had been involved in a traffic accident four hours prior to being contacted by Officer Johnson. Even if Officer Johnson did not see the accident, Vehicle Code section 40300.5, subdivision (a), authorized him to arrest Bering without a warrant for driving while under the influence of alcohol or drugs *if he had probable cause to do so*. Vehicle Code section 40300.5, subdivision (a) provides:

“In addition to the authority to make an arrest without a warrant pursuant to paragraph (1) of subdivision (a) of Section 836 of the Penal Code, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug when any of the following exists:

“(a) The person is involved in a traffic accident.”

Vehicle Code section 40300.6 provides:

“Section 40300.5 shall be *liberally interpreted* to further safe roads and the control of driving while under the influence of an alcoholic beverage or any drug in order to permit arrests to be made pursuant to that section within a reasonable time and distance away from the scene of a traffic accident.” (Italics added.)

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<sup>3</sup> Respondent concedes that Officer Johnson did not have probable cause to arrest Bering for assault with a deadly weapon. In light of this concession, we limit our discussion to whether Officer Johnson had probable cause to arrest Bering for driving under the influence.

Thus, an officer may arrest without a warrant for driving under the influence (misdemeanor) if he has probable cause to believe the offense was committed even though it was not committed in his presence. The Legislature has declared that the officer's power to arrest under this statute shall be liberally construed to promote road safety. The issue in this case is whether Officer Johnson was aware of facts sufficient to satisfy the probable cause standard. In answering that question we are guided by the following well settled principles.

“[Moreover,] [a]n appellate court's review of a trial court's ruling on a motion to suppress is governed by well-settled principles. [Citations.] ¶ In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] “The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.” [Citations.] ¶ The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law ... is also subject to independent review.”  
(*People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

““Probable cause exists when the facts known to the arresting officer would persuade someone of ‘reasonable caution’ that the person to be arrested has committed a crime. [Citation.] ‘[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts ....’ [Citation.] It is incapable of precise definition. [Citation.] “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” and that belief must be ‘particularized with respect to the person to be ... seized.’ [Citation.]” [Citation.]’ [Citation.]  
““[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.” [Citations.] [Citation.]” (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1044.)

“The governing law is well settled. An arrest is valid if supported by probable cause. Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a

crime.” (*People v. Price* (1991) 1 Cal.4th 324, 410 (*Price*); *People v. Kraft* (2000) 23 Cal.4th 978, 1037.)

In denying Bering’s suppression motion the court found that Officer Johnson had a “reasonable suspicion” that Bering had been driving under the influence when he was involved in the accident. While the correct standard is that an officer must have “probable cause” to believe that a person committed a crime in order to lawfully arrest that person for the crime, such standard is satisfied if the existing facts would “lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime.” (*Price, supra*, 1 Cal.4th at p. 410; *People v. Kraft, supra*, 23 Cal.4th at p. 1037.) We apply that standard in our independent review of the record.

In order for Officer Johnson to arrest Bering for driving under the influence, he had to reasonably infer from the facts known to him that Bering had consumed alcoholic beverages prior to being involved in an accident at 7:50 p.m. and that he was driving under the influence when the accident occurred four hours earlier than when Officer Johnson interviewed him.

The testimony during the suppression hearing did not disclose any details of the accident other than it was being investigated for possible assault with a deadly weapon and hit and run. While Bering admitted he was driving a vehicle that was involved in the accident that occurred four hours earlier, he denied consuming any alcohol *before* the incident. There was ample evidence that Bering was intoxicated at the time Officer Johnson met with him, but that doesn’t necessarily mean he was intoxicated four hours earlier. Bering’s intoxication at approximately 11:50 p.m. could have resulted from his having consumed alcohol before the accident, after the accident or from both before and after the accident.

Officer Johnson questioned Bering about his prior alcohol consumption. When asked if he had had any alcohol that day, Bering stated he had some beers after, but not before, the accident. Officer Johnson was not obliged to accept what Bering told him as

true. Based on his law enforcement experience and the totality of circumstances of which the officer was aware, he had the discretion to believe all, part or none of what Bering told him so long as there was an articulable basis for his opinion.

The only alcohol Bering admitted to consuming that day were some beers at approximately 10:30 p.m. Since Bering did not claim that he continued drinking after that time, Officer Johnson could reasonably interpret Bering's statement to mean that he only consumed alcohol that day around 10:30 p.m. Based on Officer Johnson's experience, he could also reasonably conclude that whatever beer Bering consumed at 10:30 p.m. was not enough for Bering to register a BAC of 0.111 or more percent shortly after 11:50 p.m. He could also reasonably believe that Bering's claim that he only drank alcohol after the accident was false and that it reflected a consciousness of guilt. (CALCRIM No. 362.) He could reasonably conclude that Bering's statement was fabricated as a way of explaining his obvious intoxication at 11:50 p.m. without implicating himself as having driven under the influence four hours earlier. For probable cause purposes, the officer was reasonably entitled to disbelieve Bering's statement that he only consumed alcohol after the accident. If the only evidence of postincident drinking was Bering's statement that he drank beers at 10:30 p.m. and the officer reasonably believed that statement to be self-serving and untrue, then it was reasonable for Officer Johnson to conclude that Bering's intoxicating condition at 11:50 p.m. derived from having consumed alcohol before the accident. Although Officer Johnson was not asked and did not expressly testify that he disbelieved Bering's statement about when he drank alcohol that evening, it is clearly inferable from the officer's testimony that he disbelieved that part of Bering's statement.

It is common knowledge that one's BAC will diminish over time. Also, the law permits an inference to be drawn that a person has 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving a vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a

chemical test *within three hours* after the driving. (Veh. Code, § 23152, subd. (b); *People v. Thompson* (2006) 38 Cal.4th 811, 826.) Although the BAC reading in this case was obtained four hours after the driving, it produced a BAC as high as 0.125 percent, not just 0.08 percent. If a 0.08 BAC obtained three hours after driving creates an inference that the driver had a BAC of at least 0.08 percent three hours earlier, it is not unreasonable for an officer in the field to form an “honest and strong suspicion” (*Price, supra*, 1 Cal.4th at p. 410) that a 0.125 percent BAC obtained four hours after driving means that the driver had at least a 0.08 BAC four hours earlier. (Veh. Code, § 23152, subd. (b) [“It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle”].) It is also worth mentioning that section 23152 has two provisions, one which punishes driving while under the influence of alcohol (subd. (a)) and one which punishes driving with a BAC of 0.08 percent or more (subd. (b)). One can violate subdivision (a) without violating (b).

Officer Johnson was aware of facts sufficient to lead a person of ordinary care and prudence to entertain “an honest and strong suspicion” (*Price, supra*, 1 Cal.4th at p. 410) that Bering had driven a vehicle while under the influence of alcohol four hours earlier. Those facts included: there was a report of a hit and run accident occurring four hours earlier than Officer Johnson’s contact with Bering; Bering admitted he was the driver of a vehicle involved in that accident; he showed objective signs of intoxication; he failed a field sobriety test; his PAS tests indicated a BAC of 0.111 percent and 0.125 percent; and the only alcohol he claimed to have consumed that evening occurred around 10:30 p.m. and consisted of beer. With this factual backdrop, the officer was entitled to disbelieve Bering’s statement about when and how much alcohol he drank that evening, and to entertain an honest and strong suspicion that Bering drove a vehicle four hours earlier while under the influence of alcohol.

Vehicle Code section 40300.5, subdivision (a), authorizes a warrantless arrest based on probable cause. Section 40300.6 directs that section 40300.5 be construed

broadly in order to promote road safety. This officer had made scores of stops and arrests for driving under the influence and it was his considered belief that Bering was under the influence at the time of the accident earlier that evening. His belief, based on the facts recounted here, satisfies the probable cause standard.

Since Officer Johnson had probable cause to arrest Bering for this offense, the court did not abuse its discretion when it denied Bering's suppression motion. Further, following an independent review of the record we find that, with the exception of the suppression issue discussed above, no other reasonably arguable factual or legal issues exist.

**DISPOSITION**

The judgment is affirmed.

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KANE, Acting P.J.

I CONCUR:

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POOCHIGIAN, J.

**PEÑA, J.**

I respectfully dissent.

The majority opinion correctly sets forth the underlying facts, which are essentially undisputed. The majority also correctly concludes that Vehicle Code section 40300.5 is an exception to Penal Code section 836, subdivision (a), and grants a peace officer the authority to make a misdemeanor arrest without a warrant under specified circumstances. As our Supreme Court noted in *People v. Thompson* (2006) 38 Cal.4th 811, 821:

“When the Legislature amended Vehicle Code section 40300.5 to allow warrantless arrests for this misdemeanor offense not committed in the presence of the officer, it found and declared ‘that driving while under the influence of alcohol or drugs continues to pose a substantial danger to public health and safety, injuring over 65,000 people per year and killing an additional 2,400. Given the severity of the conduct involved, the exception in Section 40300.5 of the Vehicle Code from the general requirements of Section 836 of the Penal Code should be expanded to cover other instances in which the officer has reasonable cause to believe that the person to be arrested had been driving while under the influence of alcohol, drugs, or both.’ (Stats. 1984, ch. 722, § 2, pp. 2646–2647; see also *People v. Schofield* [(2001)] 90 Cal.App.4th [968,] 973 [‘The Legislature has recognized that driving under the influence is widespread and serious with potential for catastrophic consequences’].)”

Finally, I agree the trial court’s reference to a “reasonable suspicion” is not material to a reviewing court’s analysis of whether the trial court erred in denying the motion to suppress. “When, as here, we review a ruling on a defense motion to suppress evidence, we defer to the trial court’s factual findings, but we independently apply the requisite legal standard to the facts presented.” (*People v. Celis* (2004) 33 Cal.4th 667, 679.)

My disagreement lies in the analysis and conclusion reached by the majority on the issue of probable cause to arrest.

“When the seizure of a person amounts to an arrest, it must be supported by an arrest warrant or by probable cause. [Citation.] Probable cause exists

when the facts known to the arresting officer would persuade someone of ‘reasonable caution’ that the person to be arrested has committed a crime. [Citation.] ‘[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts ....’ (*Illinois v. Gates* (1983) 462 U.S. 213, 232.) It is incapable of precise definition. (*Maryland v. Pringle* (2003) 540 U.S. 366, 371.) “‘The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’” and that belief must be ‘particularized with respect to the person to be ... seized.’ (*Ibid.*)” (*People v. Celis, supra*, 33 Cal.4th at p. 673.)

The majority correctly notes:

“In order for Officer Johnson to arrest Bering for driving under the influence, he had to reasonably infer from the facts known to him that Bering had consumed alcoholic beverages prior to being involved in an accident at 7:50 p.m. and that he was driving under the influence when the accident occurred four hours earlier than when Officer Johnson interviewed him.

“The testimony during the suppression hearing did not disclose any details of the accident other than it was being investigated for possible assault with a deadly weapon and hit and run.”

I agree with the foregoing statements, but would add there was no evidence either driver in the accident had consumed alcoholic beverages or was otherwise driving while under the influence (DUI) of alcohol or drugs. The accident was not being investigated for possible DUI by Bering, at least not until four hours later.

Acknowledging the record contains no direct evidence Bering had been drinking prior to his vehicle accident, the majority relies on a series of suppositions and what it calls “reasonable” inferences to find probable cause to arrest him for DUI. I am not persuaded.

It is undisputed Bering exhibited the signs of intoxication when questioned by Officer Johnson after he contacted Bering between 11:50 p.m. and midnight. Bering stated he had “consumed some Coors original beers but it was after the altercation or the incident and after he had returned home.” Bering stated he “had not consumed any

alcohol prior to driving his vehicle” and “had consumed alcohol at approximately 10:30 p.m.”

The majority states:

“Officer Johnson was not obliged to accept what Bering told him as true. Based on his law enforcement experience and the totality of circumstances of which the officer was aware, he had the discretion to believe all, part or none of what Bering told him so long as there was an articulable basis for his opinion.”

I agree with the foregoing statement if (1) it is supported “by the totality of the circumstances of which the officer was aware” and (2) “there was an articulable basis for his opinion.” As I will explain, neither of these requirements was met here.

The majority states Officer Johnson could reasonably interpret Bering’s statement to mean he only consumed alcohol that day at 10:30 p.m. and “could also reasonably conclude that whatever beer Bering consumed at 10:30 p.m. was not enough for Bering to register a BAC [blood-alcohol content] of 0.111 or more percent shortly after 11:50 p.m.” The majority, however, fails to cite to any testimony to support this so-called reasonable conclusion, or any testimony that Officer Johnson articulated this as a basis for any conclusion he may or may not have reached. Officer Johnson provided no testimony about how many beers one would have to consume to reach a BAC of 0.111 on the preliminary alcohol screening (PAS) device. He also did not testify as to how many beers he thought Bering consumed based on his statement he had consumed some beers. He did not testify it was impossible, or even unlikely, that a person consuming some beers at 10:30 p.m. could register a 0.111 on the PAS device if tested after midnight. In fact, “medical studies demonstrate that the majority of ingested alcohol is absorbed by the body within 15 to 20 minutes and that the brain, requiring as it does a large blood supply, is one of the first organs of the body affected. [Citation.]” (*People v. Schrieber* (1975) 45 Cal.App.3d 917, 922.) Officer Johnson also did not testify how many alcoholic drinks it would take a person who started drinking before 7:50 p.m. to register a BAC of 0.111

on the PAS device if tested after midnight. The fallacy in the majority's reasoning is that there was absolutely no testimony on this subject at all. Because it is fairly brief, I will quote the entire testimony and articulated basis for the arrest here:

“Q. [PROSECUTOR] ... What were you investigating when you went to meet with the defendant?

“A. [OFFICER JOHNSON] An assault with, assault with a deadly weapon, motor vehicle.

“Q. Was it also related to a hit and run?

“A. It was called in initially as a hit and run.

“Q. And it was investigating this assault and battery with the deadly weapon is what called you to the defendant's residence?

“A. Yes.

“Q. And you said you spoke to the defendant, what did you say to him when you first arrived?

“A. I don't recall exactly what was said. I just remember I started asking him questions about the earlier incident.

“Q. Okay. And what did you ask him about the earlier incident?

“A. If he had been involved in the earlier incident.

“Q. And what did the defendant say?

“A. He said he had.

“Q. While you were speaking to the defendant did you notice anything unusual about him?

“A. I did.

“Q. What was that?

“A. I noticed he was displaying objective signs and symptoms of alcohol intoxication.

“Q. And what were those symptoms and signs that you observed initially?

“A. His speech was slurred as he spoke in response to my questions, his eyes were red and watery. He seemed a little unsteady on his feet.

“Q. Okay. At some point did you ask him to speak with you in front of your patrol vehicle?

“A. I did.

“Q. Did you tell him he had to speak with you in front of your patrol vehicle?

“A. No.

“Q. And at some point based on your observations, possible intoxication, did you ask him some standard field sobriety questions?

“A. I did.

“Q. And how did he respond to those?

“A. He related he had been drinking earlier in the evening but not prior to the incident which I had been questioning him about. He related that he had consumed some Coors original beers but it was after the altercation or the incident and after he had returned home.

“Q. Okay. Did you have the defendant perform some field sobriety tests?

“A. I did.

“Q. Did you order him to do them or did you ask him to do them?

“A. I asked him.

“Q. And did he consent to perform those field sobriety tests?

“A. He did.

“Q. And what field sobriety tests did you have him do?

“A. Had him do HGM which is horizontal gaze nystagmus, Rhomberg and the finger count and the last FST was the PAS device.

“Q. Is that the Preliminary Alcohol Screening device?

“A. Yes.

“Q. Prior to the PAS device, how did the defendant do on the FST’s?

“A. He did not perform them as explained and demonstrated.

“Q. All right. And what were the result of the PAS device?

“A. I believe it was .111 and .125.

“Q. Based on your observations and the defendant’s admissions, did you arrive at an opinion as to whether or not he had been the driver of the vehicle involved in this assault and battery with a deadly weapon that evening?

“A. Yes. He had stated he had been involved, been the driver at the time of the incident.

“Q. Okay. And based on your observations of the field sobriety tests and your earlier observations of slurred speech, red, watery eyes, did you have an opinion as to whether or not the defendant had been intoxicated while he was driving?

“A. Yes, I did.

“Q. And what was that?

“A. I determined he was likely under the influence of alcohol at the time of the incident.

“Q. Okay. And when you arrived at both of those opinions what did you do?

“A. I placed him under arrest for the assault and for the DUI.

“Q. Let me back up a little bit. Have you had cause to investigate people driving under the influence previous to this incident?

“A. Yes.

“Q. How many times?

“A. I couldn’t tell you.

“Q. Best guess.

“THE COURT: We don’t want a guess, we want a good faith estimate if you have one.

“THE WITNESS: Rough estimate since I have been on, arrest or FST’s?

“[PROSECUTOR]:

“Q. How many times have you investigated using FST’s?

“A. I would say an honest 300.

“Q. How many of those resulted in DUI arrests?

“A. Well over 200.

“Q. Okay. Some people aren’t arrested?

“A. No.

“Q. And why is that?

“A. Because they are not determined to be under the influence.”

Alas, on page 8 the majority acknowledges what the record plainly establishes or, in this case, fails to establish: “Although Officer Johnson was not asked and did not expressly testify that he disbelieved Bering’s statement about when he drank alcohol that evening, it is clearly inferable from the officer’s testimony that he disbelieved that part of Bering’s statement.” I submit this is not the articulable basis that Fourth Amendment jurisprudence requires, however the majority’s acknowledgement of this important point will be discussed in my concluding paragraph.

First, if we look at the totality of the circumstances of which Officer Johnson was aware, we find (1) Bering admitted driving a motor vehicle at 7:50 p.m. during which there was an incident with another driver; (2) Bering was very cooperative in the investigation; (3) Bering denied drinking alcohol before 7:50 p.m.; (4) Bering admitted drinking some beers at approximately 10:30 p.m.; (5) Bering was obviously intoxicated

sometime after midnight, registering a BAC of 0.111 and a 0.125; and (6) Officer Johnson had conducted an honest 300 DUI investigations using field sobriety tests, with over 200 arrests.

The majority correctly notes it is common knowledge that one's BAC will diminish over time. This is why timing is very important. A chemical "test must be incidental to both the offense and to the arrest" and it is critical "that no substantial time elapse occurs between the offense and the arrest." (*People v. Schrieber, supra*, 45 Cal.App.3d at p. 921.) Here Officer Johnson for his part assessed the alcohol intoxication in a timely manner, however, through no fault of his own, it was four hours after the uncharged "offense." Officer Johnson was not asked about his expertise regarding the rate at which blood alcohol diminishes. Nor was he asked about the accuracy and reliability of a PAS device test for BAC. Based on the paltry record we do have, there is no basis from which he could reasonably conclude that Bering "likely" was driving under the influence at 7:50 p.m. simply because he was under the influence over four hours later. Even assuming Officer Johnson held a subjective but unarticulated belief Bering was lying, without more, this does not reasonably tend to show he "likely" was driving under the influence four hours earlier. At most, it tends to show Bering lacked credibility in Officer Johnson's lay opinion.

To make up for the glaring lack of evidence, the majority attempts to bolster its probable cause to arrest determination by relying on Vehicle Code section 23152, subdivision (b) (section 23152(b)). That section provides, in pertinent part:

"In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving."

There are several reasons the majority's reliance on this statute is misguided. First, at the time Bering was arrested, "a chemical test within three hours after the

driving” to determine his BAC had not been administered. The record does not show if or when a chemical test was actually administered, or its results. The record shows only that Bering consented to do a blood chemical test. To the extent the majority is relying on the PAS Officer Johnson administered as part of his field sobriety tests, no evidence was presented that such a screening device constituted a “chemical test” for purposes of section 23152(b). Further, there was no evidence the PAS device used in this case met the requirements of title 17, California Code of Regulations section 1219 et seq. (See, e.g., *People v. Vangelder* (2013) 58 Cal.4th 1, 29-35.)

Second, even if the PAS test were to fall within the ambit of section 23152(b), Officer Johnson did not administer the PAS test within three hours of the alleged and admitted driving on the part of Bering. It is undisputed the PAS test was administered more than four hours after the accident under investigation.

Third, the instant proceeding was not a “prosecution under this subdivision.” In other words, the statute provides for a “rebuttable presumption” *at a trial* for a violation of section 23152(b). However, as pointed out in *People v. Thompson, supra*, 38 Cal.4th at page 826, the provision “is not a presumption at all, but only a permissive inference.” A “jury may, but is not required to, conclude [a] defendant’s blood-alcohol level was in excess of the legal limits based on a test taken within three hours of the driving ....” (*Ibid.*) There are many policy reasons why the Legislature enacted this provision for trials, not the least of which was to avoid “expensive and time-consuming battles of experts ... concerning the effect of partition ratio variability factors ... based on the facts of the case.” (*People v. Vangelder, supra*, 58 Cal.4th at p. 20.)

In any event, the permissive inference loses much, if not all, of its validity when a person consumes alcohol after the driving and before the breath test. In my opinion, based on the undisputed evidence in the record, the facts known to Officer Johnson at the time he arrested Bering would not persuade someone of “reasonable caution” that the person to be arrested had committed the crime of driving under the influence. It bears

repeating there is no evidence Bering had been driving under the influence at the time of the accident—none. The undisputed and unimpeached evidence Bering drank some Coors beers at home and became intoxicated after the accident is not such evidence. Someone of reasonable caution would not make this jump in logic because the totality of the circumstances did not make such an inference reasonable. The conclusion Bering had committed the crime of driving under the influence is more aptly described as sheer speculation or a hunch. Officer Johnson did not testify he thought Bering was lying about his alcohol consumption. More importantly, he provided no basis to support such a conclusion of falsity or consciousness of guilt on Bering’s part.<sup>1</sup>

As the quoted parts of the record reveal, the evidence presented at the hearing was perfunctory at best. Did Officer Johnson have any reasons to disbelieve Bering? We do not know. What we do know is if the prosecution had additional evidence to support the arrest, it should have presented it. A reviewing court’s function entails critical examination of the record, especially on de novo or independent review. When a reviewing court fails this primary function, it rewards and encourages slipshod trial work and impinges on the due process rights of the litigants to meaningful appellate review. In light of the present record, I would find the trial court erred in denying Bering’s motion to suppress the evidence seized incident to his arrest. As the arrest was not supported by

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<sup>1</sup> The Attorney General’s reliance on *Corrigan v. Zolin* (1996) 47 Cal.App.4th 230 to support a finding of probable cause to arrest in this case is misplaced. First, the *Corrigan* case was not concerned with the existence of probable cause to arrest under the Fourth Amendment. Instead, it pertained to an administrative hearing involving a driver’s license suspension after Corrigan was arrested for driving under the influence of alcohol. (*Corrigan*, at p. 233.) The question presented was “whether there was ‘reasonable cause’ under [Vehicle Code] section 40300.5 to arrest a driver in circumstances . . . where [Corrigan] was arrested at her home over two hours after the accident occurred.” (*Id.* at p. 235.)

Moreover, in *Corrigan*, the driver not only admitted driving during the accident, she told the arresting officer she had *not* been drinking *since* the accident. Yet, the driver showed all the signs of alcohol intoxication.

probable cause, I would reverse and remand the matter with directions the motion be granted.

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PEÑA, J.