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No. 202
The People &c.,
 Appellant,
 v.
Jeanne M. Vandover,
 Respondent.

Robert H. Middlemiss, for appellant.
Matthew S. Lerner, amicus curiae.

CIPARICK, J.:

 In determining probable cause, the standard to be applied is that it must "appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice" (People v Carrasquillo, 54 NY2d 248,

254 [1981])). Applying this standard, there is support in the record for the Appellate Term's determination that the facts did not support probable cause to arrest defendant. That determination, based on a mixed question of law and fact, is beyond our further review.

On October 1, 2008, defendant appeared in Justice Court on an unrelated traffic ticket. While at the courthouse, defendant spoke with an Officer James who noticed that she had glassy, bloodshot eyes, an odor of alcohol on her breath and seemed lethargic. Concerned that defendant may well be intoxicated and intending to drive a vehicle, Officer James informed Officer Barry of his observations. Both officers proceeded to follow defendant to the parking lot where they observed her getting into her automobile and moving in reverse for approximately two feet as she exited the parking spot. Officer Barry stopped defendant. Upon her exiting the vehicle, Officer Barry administered a field sobriety test. Officer James had gone to the nearby police headquarters to retrieve a portable breath analyzer and did not observe the full field sobriety test given by Officer Barry. When Officer James returned with the equipment, he noticed, for the first time a young child in the back seat of the car without a seatbelt. Officer Barry also performed the portable breath test on defendant, which recorded a positive result. Defendant made statements, prior to her arrest, to the effect that she "had gotten off work at 8:00 A.M." and

"had a couple of drinks," but those were consumed several hours prior and that she was not currently under the influence of alcohol. Defendant was arrested and charged with two counts of driving while intoxicated in violation of Vehicle and Traffic Laws §§ 1192 (2) and (3), operating a vehicle with a backseat passenger, under 16 years of age without a seatbelt, in violation of Vehicle and Traffic Law § 1229-c (1) (b) and endangering the welfare of a child (Penal Law § 260.10 [1]).

Defendant moved to suppress her statements and other evidence obtained and a probable cause hearing was held at which Officer James and a Sergeant Metzgar, who had come upon the scene, testified. Officer Barry, who administered the field sobriety test and the portable breathalyser test, however, did not testify. Justice Court found the officers' testimony to be credible but that Sergeant Metzgar's testimony was generally cumulative of Officer James' testimony. However, Sergeant Metzgar did testify that the positive reading of the portable breath analyzer, in this instance, was as consistent with an alcohol content below the statutory level of impairment as with a blood alcohol level above the limit. Justice Court noted Officer Barry's absence and stated that "without [his] testimony there is insufficient testimony in the record necessary for a finding that the arrest on any of the charges was based on probable cause" (People v Vandover, Just Ct, Orange County, August 29, 2009, Golden, J). Justice Court, citing the testimony of Officer

James, that defendant had glassy bloodshot eyes, breath that smelled of alcohol and a generally fatigued demeanor, found that this was insufficient to establish probable cause to arrest defendant and accordingly dismissed the charges. The Appellate Term affirmed the dismissal (People v Vandover, 31 Misc 3d 131[A], 2011 NY Slip Op 50592[U] [App Term, 9th & 10th Jud Dist 2011]). A Judge of this Court granted leave to appeal (17 NY3d 802 [2011]) and we now affirm.

Insofar as the People argue that the Appellate Term applied an incorrect standard of proof for determining probable cause, i.e. proof beyond a reasonable doubt as opposed to the lesser standard of more probable than not, that argument must fail. While the Appellate Term did state that "[t]he hearing proof failed to establish that defendant exhibited 'actual impairment, to any extent, of the physical and mental abilities which a person is expected to possess in order to operate a vehicle as a reasonable and prudent driver'" (id. at *1, quoting People v Cruz, 48 NY2d 419, 427 [1979]), we do not read the Appellate Term as departing from the correct standard. The standard to be followed is that it is more probable than not that defendant is actually impaired. Both Justice Court, citing Carrasquillo, and the Appellate Term, citing Cruz, applied the correct standard in reaching their conclusions.

Having determined that the courts below applied the correct standard in deciding the question of probable cause for

arrest, we come next to the question of reviewability of the lower court findings. The conclusion that no probable cause existed to arrest defendant is a mixed question of law and fact for which there is support in the record (see People v Omowale, 18 NY3d 825, 827 [2011]; People v Gomcin, 8 NY3d 899, 901 [2007]) and is therefore otherwise unreviewable (see People v Williams, 17 NY3d 834, 835 [2011]). Although different inferences may have been drawn from these facts, we are faced with affirmed findings of fact precluding further review by this court (see Gomcin, 8 NY3d at 901).

Accordingly, the order of the Appellate Term should be affirmed.

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Order affirmed. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith and Pigott concur.

Decided November 29, 2012