[Cite as *State v. Horvath*, 2018-Ohio-5379.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
GEORGE HORVATH	:	Case No. 18 CAC 01 0006
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Municipal Court, Case No. 17TRC12155
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 26, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
CHRISTOPHER E. BALLARD Assistant City Prosecutor 70 North Union Street Delaware, Ohio 43015	MICHAEL A. MARROCCO 98 North Union Street Delaware, Ohio 43015

Baldwin, J.

{¶1} George Horvath appeals the decision of the Delaware County Municipal Court denying his motion to suppress evidence from a traffic stop and his subsequent conviction for OVI in violation of R.C. 4511.19(A)(1)(a). Appellee is the State of Ohio.

STATEMENT OF FACTS AND THE CASE

{¶2} Appellant was stopped after Trooper Darius Patterson observed his driving and concluded that he violated R.C. 4511.33 by making a wide right turn and crossing over the lane marker. The traffic stop was extended to investigate a violation of R.C. 4511.19 and appellant was charged. Appellant contends that the Trooper did not have cause to stop his vehicle and, after stopping, did not have cause to extend the stop and investigate the violation of R.C. 4511.19.

{¶3} Trooper Darius Patterson was on duty at 12:39 A.M., following appellant on Lazelle Road in Delaware County. Appellant turned right from Lazelle on to another two lane road, crossed over the double yellow line lane marker and brought his vehicle back into the right lane. After the turn, appellant's vehicle touched the center line on more than one occasion as he was followed by Trooper Patterson. The Trooper triggered his lights and appellant stopped at the side of the road.

{¶4} Appellant was unhappy with the stop and when the trooper explained that he watched him make a wide right turn and cross over the double yellow line, appellant denied the violation and was persistently argumentative. Trooper Patterson noticed that appellant's eyes were glassy and bloodshot and he detected the odor of an alcoholic

beverage over the smell of cigarette smoke in the vehicle. Appellant admitted he was at a local bar, but claimed to have drunk only ginger beer. He claimed he took medication for a back problem but refused to reveal the type of medication. Trooper Patterson made repeated requests to appellant to exit the vehicle before appellant complied.

{¶5} When appellant exited the vehicle, the Trooper noted that he was not stable on his feet, that he still emitted a strong odor of an alcoholic beverage and he continued to be argumentative. At this point, Trooper Patterson decided that he would conduct field sobriety tests, concerned that appellant had been driving while impaired.

{¶6} Trooper Patterson administered the Horizontal Gaze Nystagmus Test and the walk and turn test, both of which supported a conclusion that appellant was impaired. The appellant declined to do the one leg stand test, citing knee, hip and back problems. The Trooper then asked appellant to recite the alphabet from “d” to “n” and appellant recited “d” to “z.” The Trooper instructed appellant to perform the five finger dexterity test, but he was unable to successfully complete the test.

{¶7} The Trooper arrested appellant and he was charged with Operating a Vehicle Under the Influence of Alcohol or Drug of Abuse, in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(d), and a Marked Lane violation under R.C. 4511.33.

{¶8} Appellant filed a motion to suppress the evidence from the traffic stop arguing that the state did not have probable cause or reasonable suspicion to conduct the traffic stop and that the state did not have reasonable suspicion to expand the stop to conduct field sobriety tests. The state presented the testimony of Trooper Patterson, as well as a copy of the video that was recorded by the cruiser’s camera beginning before appellant began his right turn and concluding with the appellant’s arrest. The camera

preserved the entire encounter, though the audio is often difficult to hear due to passing traffic and chatter from the trooper's radio.

{¶9} Appellant argued that the video does not show that appellant crossed over the double yellow line and contradicts the testimony of the Trooper. Appellant also highlighted the fact that aside from the right turn, the Trooper noted no other signs of impaired driving. As to grounds to expand the stop, appellant points to all the facts that support his contention there was no evidence of impairment: no slurred speech; no problems with fine motor skills and no stumbling as he exited the vehicle.

{¶10} The court denied the motion to suppress and, after a trial comprised of the testimony and cross-examination of Trooper Patterson and replay of the video, appellant was found guilty of a violation of R.C. 4511.19(A)(1)(a), driving while impaired. Appellant filed a notice of appeal and submitted three assignments of error:

{¶11} "I. THE TRIAL COURT ERRED IN FINDING A LAWFUL BASIS TO STOP APPELLANT'S VEHICLE."

{¶12} "II. THE TRIAL COURT ERRED IN FINDING THERE WAS A REASONABLE SUSPICION TO EXPAND APPELLANT'S STOP TO PERFORM FIELD SOBRIETY TESTS."

{¶13} "III. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF OVI WHEN THE EVIDENCE WAS INSUFFICENT TO SUPPORT THE CONVICTION AND THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

STANDARD OF REVIEW

{¶14} Assignments of error one and two address the trial court's decision regarding the motion to suppress. Appellate review of a motion to suppress presents a

mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 154–155, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap*, 73 Ohio St.3d 308, 314, 1995-Ohio-243,652 N.E.2d 988; *State v. Fanning,* 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap, supra.* However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside, supra, citing State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist. 1997); See, also, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, *supra*. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, *supra* at 698.

{¶15} Appellant's third assignment of error posits that the verdict was not supported by the manifest weight of the evidence and the record contains insufficient evidence to support the verdict. On review for sufficiency, the reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus, following *Jackson* v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶16} On review for manifest weight, the reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine "whether in resolving conflicts in the evidence, the [trial court] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); see also *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin, supra* at 175.

{¶17} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Deas,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260, 674 N.E.2d 1159.

ANALYSIS

{¶18} Appellant asserts the trial court erred by finding that the trooper had a lawful basis to stop appellant in his first assignment of error, attacking the trial court's factual findings. The trial court concluded that the evidence was sufficient to support the trooper's reasonable suspicion that appellant committed a traffic violation and that his driving was indicative of some impairment. Appellant contends that the Trooper's testimony was contradicted by the dash cam video which, he argues, reflects that he did not cross the marked lane.

{¶19} Appellant suggests that the trooper must have probable cause to initiate a traffic stop, but "the Ohio Supreme Court has emphasized that probable cause is not required to make a traffic stop; rather the standard is reasonable and articulable suspicion." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 23. Consequently, Trooper Patterson was required to have a reasonable, articulable suspicion of a traffic violation to support his decision to stop appellant. Trooper Patterson primarily relies upon his perception of appellant's execution of a wide right turn, and secondarily the wheels of appellant's vehicle touching the dividing line after the execution of the turn.

{¶20} As this argument turns on a factual finding, we are obligated to give deference to the trial court absence abuse of discretion. Appellant insists the court erred when it found he made an improper wide right turn and crossed over the lane markers. After a review of the record, including the dash cam video of the appellant's vehicle as he made the right turn, we cannot agree that the trial court erred. The record provides unrebutted testimony from the trooper and, despite appellant's assertions to the contrary, the video recording of the turn can be reasonably interpreted to support the trooper's testimony that appellant violated R.C. 4511.33 by executing a wide right turn crossing over the marked line. While the position of the dash cam prevents a complete view of the appellant as he makes the turn, the position of the vehicle when it returns to the camera's field of view lends support to the trooper's eye witness testimony that appellant committed a traffic offense, providing sufficient cause for the stop. *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091 (1996); *State v. Jones*, 5th Dist. Muskingum No. CT2001-0033, 2001-Ohio-1672 (a police officer possesses probable cause to stop a

motorist for purposes of issuing a citation when the motorist commits a minor traffic violation in the officer's presence).

{¶21} Appellant's first assignment of error is overruled.

{¶22} In his second assignment of error, appellant argues that the trooper had insufficient justification to expand the traffic stop to include field sobriety tests, and therefore those tests should be excluded. The appellant is attacking the trial court's application of the law to the facts, so our standard of review is *de novo.*

{¶23} After Trooper Patterson stopped the appellant for a traffic violation, and while appellant was adamantly denying he had committed any offense, the Trooper noted that appellant's eyes were bloodshot and glassy. He also noticed a strong odor of an alcoholic beverage about his person while he was in the vehicle and when he exited. He testified that appellant was unsteady on his feet when he exited the vehicle and the video from the dash cam can be interpreted to support that conclusion. Appellant admitted only to drinking ginger beer, but the record does not contain any evidence to support or refute that ginger beer is an alcoholic beverage with the exception of the odor exuding from appellant.

{¶24} Appellant notes facts in his favor, including the lack of slurred speech and no evident problem with fine motor skills. However, these observations are not conclusive, but only facts that the Trooper and the trial court take into consideration. The trial court noted that appellant was argumentative, aggressively denying that he committed any traffic violation and, in addition to crossing the lane marker the appellant's driving took him onto the lane markers on more than one occasion.

{¶25} In analyzing the facts presented, we accept the template set forth by the Supreme Court of Ohio in *State v. Batchili,* 113 Ohio St.3d 403, 2007–Ohio–2204, 865 N.E.2d 1282, paragraph two of the syllabus: "The 'reasonable and articulable' standard applied to a prolonged traffic stop encompasses the totality of the circumstances, and a court may not evaluate in isolation each articulated reason for the stop." The intrusion on the drivers' liberty resulting from a field sobriety test is minor, and the officer therefore need only have reasonable suspicion the driver is under the influence of alcohol in order to conduct a field sobriety test. *State v. Knox,* Greene App. No. 2005–CA–74, 2006–Ohio–3039. See also, *State v. Bright*, 5th Dist. Guernsey App. No. 2009–CA–28, 2010–Ohio–1111.

{¶26} A request made of a validly detained motorist to perform field sobriety tests is generally outside the scope of the original stop, and must be separately justified by other specific and articulable facts showing a reasonable basis for the request. *State v. Albaugh*, 5th Dist. Tuscarawas No. 2014 AP 11 0049, 2015–Ohio–3536, 2015 WL 5096900, ¶ 18, quoting *State v. Anez* (2000), 108 Ohio Misc.2d 18, 26–27, 738 N.E.2d 491. We have often referred to a non-exclusive list of facts compiled by the court in *State v. Evans*, 127 Ohio App.3d 56, fn. 2 (11th Dist.1998):

> (1) the time of day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition

> of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor as described by the officer ('very strong,['] 'strong,' 'moderate,' 'slight,' etc.); (10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably.

State v. Carter, 5th Dist. Stark No. 2013CA00036, 2013-Ohio-5153, ¶ 12.

{¶27} This court has added to this list the arresting officer's observation of appellant's weaving or drifting within his lane of travel. *State v. Jones*, 5th Dist. Muskingum No. CT2001-0033, 2001-Ohio-1672, *4; *State v. Shullo*, 5th Dist. Stark No. 2010 CA 00261, 2011-Ohio-1619, ¶ 16.

{¶28} In the case at bar, the totality of the circumstances provided the Trooper a "particularized and objective basis" for suspecting the appellant was impaired by alcohol. The Trooper first noticed the appellant when he made an excessively wide turn to the right, crossing into left lane of the road rather than the right lane as might normally be expected, and weaving within his lane prior to stopping. The time of the offense, 12:46

a.m., appellant's admission of recently spending time at a local bar, and his apparent unsteady gait as he stepped along his vehicle are additional relevant facts. The Trooper noticed that appellant had glassy, bloodshot eyes and a strong odor of alcohol about his person while he was in his car and after he stepped out. All of these details, in addition to the trooper's training and experience, provide a sufficient basis for a conclusion that the trooper was warranted in having reasonable suspicion the appellant had violated the Revised Code.

{¶29} This Court has held that "[I]n Ohio, it is well settled that, "[w]here a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes and further indicia of intoxication, such as an admission of having consumed alcohol, reasonable suspicion exists." (citations omitted) *State v. Smith,* 5th Dist. Licking No. 09-CA-42, 2010-Ohio-1232, ¶ 34. The facts of this case fit precisely within the holding of *Smith*. Trooper Patterson testified that appellant had glassy and bloodshot eyes, and that he noticed a strong odor of alcohol. Those facts, combined with the wide right turn, weaving within his lane, and the admission that appellant had just left a bar, supply "indicia of intoxication" and provide abundant evidence from which reasonable suspicion can be derived to support extending the stop to perform field sobriety tests.

{¶30} Appellant cites the Sixth District Court of Appeal's holding in *Whitehouse v. Stricklin*, 6th Dist. Lucas No. L-10-1277, 2012-Ohio-1877 in support of his argument that the facts are insufficient to provide reasonable suspicion of the commission of a crime. That case is distinguishable in that the odor of alcohol about appellant in that case was described as slight, whereas the trooper in the case at bar described the odor as strong. Further, the officer in *Strickland* stopped the driver for a nonworking headlight, not for

driving in a manner that can be viewed as an indicia of intoxication. This distinction is significant because the Sixth District Court of Appeals has held that the strong odor of alcohol and an admission of consumption of alcohol are sufficient to justify administration of field sobriety tests. "These two factors, perceived *** during the initial stop, created a reasonable suspicion that appellant's blood-alcohol level was over the proscribed limits and justified field sobriety tests." *State v. Beeley,* 6th Dist. Lucas No. L-05-1386, 2006-Ohio-4799, ¶ 18. While appellant in the case *sub judice* did not clearly admit to consuming alcohol, the record contains other indicia of intoxication. Consequently, following the precedent of the Sixth District Court of Appeals would not alter our analysis or conclusion.

{¶31} Appellant refers to cases cited in *Stricklin*, *State v. Spillers,* (Mar. 24, 2000), 2d Dist. 1504, 2000 WL 299550, and *State v. Dixon* (Dec. 1, 2000), 2d Dist. No. 2000-CA-30, 2000 WL 1760664, but those cases provide no support for appellant. The Second District "has repeatedly held that a strong odor of alcohol alone is sufficient to provide an officer with a reasonable, articulable suspicion of driving under the influence." (Citations omitted) *State v. Louis,* 2nd Dist. Montgomery No. 27268, 2017-Ohio-8666, ¶ 33. The Second District would presumably not reach a different result in this case as the trooper has testified that appellant had about him a strong odor of alcohol even when he was outside his vehicle.

{¶32} The appellant also refers to our decision in *State v. Hall*, 5th Dist. No. 2015 CA 00213, 2016-Ohio-5787, 70 N.E.3d 1154, but appellant in that case exhibited no other indicia of intoxication aside from the odor of alcohol and bloodshot, water red eyes. He was able to carry on a basic conversation regarding his pastime of fishing while searching for driver's paperwork. He did not stumble when he exited his vehicle and the reason for

the traffic stop was not "the "garden variety" drunk driving characteristics such as weaving***". *State v. Klein*, 5th Dist. Stark No. CA-6617, 1985 WL 8272, *2. Appellant in the case at bar was observed weaving within his lane after allegedly committing a traffic violation, was argumentative and found unsteady on his feet as he got out of his vehicle, facts that distinguish this case from our decision in *Hall.*

{¶33} Based upon the totality of the circumstances, we find Trooper Patterson relied upon specific, articulable facts giving rise to a reasonable suspicion appellant was driving under the influence; that an extension of the initial detention for the performance of field sobriety testing was justified and the ruling of the trial court was correct.

{¶34} The second assignment of error is denied.

{¶35} Appellant contends that the trial court erred in finding him guilty of R.C. 4511.19(A)(1)(a) because the evidence was insufficient to support the conviction and that the conviction is against the manifest weight of the evidence in his final assignment of error.

{¶36} Appellant was convicted of a violation of R.C. 4511.19(A)(1)(a) which provides in part that "[n]o person shall operate any vehicle . . . within this state, if, at the time of operation . . . "[t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶37} The State provided the testimony of Trooper Patterson and corroborating cruiser video evidence. The evidence demonstrated that Appellant was operating a motor vehicle within Delaware County, State of Ohio, on the night he was detained by Trooper Patterson. Trooper Patterson observed what appeared to be traffic violations and initiated a stop.

{¶38} During the stop, appellant was combative and argumentative, and unsteady on his feet. His eyes were glassy and bloodshot and he emitted as strong odor of an alcoholic beverage. Appellant failed several field sobriety tests, including the (1) horizontal gaze nystagmus (2) walk and turn; and (3) alphabet recitation; (4) five-finger dexterity. Appellant's behavior while the Trooper attempted to instruct him in performing these tests suggests he was incapable of receiving and comprehending simple instructions. Viewing these facts in favor of the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt and the trial court did not clearly lose its way in making its finding.

{¶39} Appellant's final assignment of error is denied.

{¶40} The judgment of the Municipal Court of Delaware County is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Hoffman, P.J. and

Wise, Earle, J. concur.