

[Cite as *State v. Miller*, 2018-Ohio-4898.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 106946

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**GARY MILLER**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-17-616149-A

**BEFORE:** Celebrezze, J., McCormack, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** December 6, 2018

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, Gary Miller brings this appeal challenging his conviction for operating a vehicle under the influence of alcohol or drugs (hereinafter “OVI”).<sup>1</sup> Specifically, Miller argues that the trial court erred by denying his motion to suppress and finding him guilty of fourth-degree felony OVI because the state failed to prove that he had been previously convicted of or pled guilty to three violations of the OVI statute or other equivalent offenses. After a thorough review of the record and law, this court affirms.

### **I. Factual and Procedural History**

{¶2} On April 4, 2017, in Beachwood, Ohio, firefighters and police officers responded to

a dispatch report involving a male, later identified as Miller, asleep at the wheel of his vehicle on an exit ramp on Chagrin Boulevard. Beachwood Fire Department's emergency medical services ("EMS") personnel were the first to arrive on the scene. EMS employees approached the vehicle, woke Miller up, and escorted him into an ambulance for a medical evaluation.

{¶3} Officer Terrill Rodgers of the Beachwood Police Department subsequently arrived on the scene. After EMS personnel took Miller to the ambulance, Officer Rodgers looked inside Miller's vehicle in an attempt to locate a driver's license or some other type of identification. As he searched for Miller's identification, Officer Rodgers noticed a tall, extra large plastic cup that appeared to contain some sort of alcoholic beverage and smelled like wine or alcohol.

{¶4} Officer Rodgers and Beachwood Police Officer Andrew Calvey spoke with Miller in the ambulance. Miller did not have a driver's license with him, so the officers attempted to identify Miller using his name, social security number, and date of birth. Officer Rodgers ran Miller's information through the Mobile Data Terminal in his police cruiser and determined that Miller's driver's license was suspended. When Officer Rodgers spoke with Miller inside the ambulance, he noticed that Miller's "speech was slurred, his eyes were bloodshot red, and he was very confused as to which direction he was coming, where he was going, whether he was coming to work, going to work." (Tr. 33.)

{¶5} In addition to asking for Miller's identifying information, Officer Rodgers asked Miller about the plastic cup inside his vehicle. Miller informed Officer Rodgers that the liquid inside the plastic cup was wine that he had consumed.

{¶6} Based on his interaction with and observations of Miller, Officer Rodgers decided to

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<sup>1</sup> The indictment alleged that Miller committed the offenses of "driving while under the influence."

administer field sobriety tests. He explained the rationale for his decision: “[j]ust because of the totality of everything that is going on, [Miller is] asleep behind the wheel, the eyes, the slurred speech, not knowing where he was going and his admission to drinking the wine.” (Tr. 34.)

{¶7} Officer Rodgers first administered the horizontal gaze nystagmus (“HGN”) test. He testified that he checked Miller’s eyes for lack of smooth pursuit and determined that Miller showed clues of intoxication in both eyes during this aspect of the HGN test. Officer Rodgers observed a total of four clues of impairment during the HGN test.

{¶8} Officer Rodgers then administered the walk and turn test.<sup>1</sup> Miller was unable to stand in the starting position, placing his right foot directly in front of his left foot, during the instruction phase of the test. Miller also lost his balance before he started the test. During the test, Miller stepped off of the straight line and lost his balance on his fourth step. An individual is supposed to take a total of nine steps during the test; Miller took a total of 13 steps. Officer Rodgers observed a total of three clues of impairment during the walk and turn test.

{¶9} The final test administered by Officer Rodgers was the one-leg stand test. During this test, an individual is instructed to stand on one leg, lift his or her foot six inches off of the ground in a parallel position, and stand for 30 seconds without losing his or her balance. Miller put his foot down three times during the one-leg stand test, lost his balance, and swayed while balancing. Officer Rodgers observed a total of two clues of impairment during this test.

{¶10} After the field sobriety tests were administered, Miller was given an opportunity to submit to a “portable breath test.” Officer Rodgers initially informed Miller that he was required to take the breath test and it was not optional. Officer Rodgers explained why he

believed Miller was required to take the breath test: “[b]ased off of my understanding of the BMV 2255<sup>2</sup> at the time and based off [Miller’s] previous conviction, I was under the impression that he did not have a choice according to [the BMV 2255 form].” (Tr. 37-38.)

{¶11} Officer Calvey corrected Officer Rodgers and informed Miller that the breath test was optional, and that he was not required to submit to it. Miller elected to take the test which revealed that his breath level was .15. Officer Rodgers confirmed that Miller’s breath level was above the legal limit in the state of Ohio.

{¶12} At this point, Officer Rodgers believed that he had probable cause to arrest Miller for OVI. He explained all of the factors that led him to this belief: “starting off with [Miller] falling asleep on the highway, 12:00, bloodshot eyes, admission of drinking, his performance on the Standardized Field Sobriety Test and sample in the Portable Breath Test.” (Tr. 38-39.)

{¶13} On May 15, 2017, the Cuyahoga County Grand Jury returned a two-count indictment charging Miller with (1) driving while under the influence, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(d), and (2) driving while under the influence, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(a). Both counts contained furthermore specifications alleging that within six years<sup>3</sup> of the April 4, 2017 incident, Miller had been convicted of or pled guilty to three violations of R.C. 4511.19(A) or (B) or other equivalent offenses. Pursuant to R.C. 4511.19(G)(1)(a), the furthermore specifications enhanced the OVI offenses from first-degree misdemeanors to fourth-degree felonies. Miller was arraigned on May 30, 2017. He pled not guilty to the indictment.

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<sup>1</sup> Miller advised Officer Rodgers that he had hip surgery for a broken hip. (Tr. 35.)

<sup>2</sup> This form sets forth the consequences when an individual refuses to take a breathalyzer test. *See State v. Zaree*, 9th Dist. Lorain No. 17CA011111, 2017-Ohio-9081, ¶ 13.

<sup>3</sup> House Bill 49, effective June 29, 2017, increased the “look-back” period for OVI convictions from six to ten years.

{¶14} On August 4, 2017, Miller filed a motion to suppress the evidence obtained during the stop and seizure, and any statements he made during the police's interrogation. Miller filed a motion in limine on August 18, 2017, in which he argued that the furthermore specifications charged in the indictment should be dismissed with respect to his December 2015 conviction in Shaker Heights Municipal Court. Miller filed supplemental information in support of his motion to strike the furthermore specifications on August 25, 2017.

{¶15} The state filed a brief in opposition to Miller's motion to suppress on August 25, 2017. On August 29, 2017, the state filed a brief in opposition to Miller's motion to strike the furthermore specifications. On October 5, 2017, the trial court denied Miller's motion to strike the furthermore specifications.

{¶16} The trial court held a hearing on Miller's motion to suppress on October 26, 2017. Officers Rodgers and Calvey testified during the suppression hearing. The trial court also viewed a video of dash camera footage from the April 4, 2017 incident during the hearing.

{¶17} On December 1, 2017, the trial court held a hearing during which it denied Miller's motion to suppress. The trial court thoroughly reviewed the evidence presented during the suppression hearing and explained its rationale for denying the motion. (Tr. 74-89.)

{¶18} On January 16, 2018, Miller entered a plea of no contest to the driving while under the influence offenses charged in the indictment. After the trial court accepted Miller's no contest plea, the prosecutor outlined the facts supporting the OVI offenses. The trial court incorporated the testimony that was presented during the suppression hearing and, after considering the allegations in the indictment, the testimony during the suppression hearing, and the additional information provided by the prosecution, the trial court found Miller guilty on both counts. (Tr. 108.) The trial court referred Miller to the probation department for a presentence

investigation report and set the matter for sentencing.

{¶19} The trial court held a sentencing hearing on February 21, 2018. The trial court determined that the driving while under the influence offenses merged for sentencing purposes. The state elected to proceed to sentencing on Count 1. The trial court sentenced Miller to a prison term of ten months. The trial court imposed a Class 2 driver's license suspension, and suspended Miller's driver's license until February 21, 2023. Finally, the trial court ordered Miller to pay a fine in the amount of \$1,350 and court costs.

{¶20} On March 16, 2018, Miller filed the instant appeal challenging the trial court's judgment. He assigns two errors for review:

- I. The trial court erred when it denied [Miller's] motion to suppress.
- II. The trial court erred when it found [Miller] guilty of felony OVI after his no contest plea.

## **II. Law and Analysis**

### **A. Motion to Suppress**

{¶21} In his first assignment of error, Miller argues that the trial court erred by denying his motion to suppress.

#### **1. Standard of Review**

{¶22} This court reviews a decision on a suppression motion under a mixed standard of review. "In 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 evaluate witness credibility." *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist.1994). The reviewing court must accept the trial court's findings of fact in ruling on a motion to suppress if the findings are supported by

competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

## **2. Vehicle Search**

{¶23} First, Miller argues that Officer Rodgers's warrantless search of his vehicle upon arriving on the scene was unconstitutional.

{¶24} As noted above, when Officer Rodgers arrived on the scene, he looked inside Miller's vehicle for a driver's license or some type of identification. During this search, Officer Rodgers observed the plastic cup containing an alcoholic beverage. Furthermore, Officer Rodgers asked Miller about the cup and the liquid inside when he spoke with Miller inside the ambulance.

{¶25} It is undisputed that Officer Rodgers searched Miller's vehicle without a warrant. The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them, per se, unreasonable unless an exception applies. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Article I, Section 14 of the Ohio Constitution affords Ohioans the same protections against unreasonable searches and seizures. *State v. Robinette*, 80 Ohio St.3d 234, 245, 685 N.E.2d 762 (1997).

{¶26} In denying Miller's motion to suppress, the trial court appeared to conclude that Officer Rodgers's warrantless search of the vehicle was not improper. The court explained that Officer Rodgers searched the vehicle for a driver's license or other documentation that would enable the first responders to identify Miller, rather than searching the vehicle for evidence of a crime.

{¶27} Assuming, arguendo, that Officer Rodgers’s warrantless search of Miller’s vehicle during which he observed the plastic cup and detected the odor of alcohol was unconstitutional, we find that the evidence would have been admissible pursuant to the inevitable-discovery doctrine.

Pursuant to the inevitable-discovery doctrine, “illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation.” *State v. Perkins* (1985), 18 Ohio St.3d 193, 196, 480 N.E.2d 763.

*State v. Huffman*, 8th Dist. Cuyahoga No. 93000, 2010-Ohio-5116, ¶ 18.

{¶28} In the instant matter, the record reflects that the discovery of the plastic cup inside Miller’s vehicle was inevitable. Officer Rodgers determined that Miller was driving with a suspended driver’s license. Based on this violation alone, Officer Rodgers testified that Miller would not have been free to leave the scene in his vehicle — Miller would have either been arrested or issued a citation and his vehicle would have been towed, depending on the type of driver’s license suspension imposed. Under either scenario, the plastic cup inside Miller’s vehicle would have been discovered during a lawful search incident to arrest or a lawful inventory search.

{¶29} Based on the foregoing analysis, we find that the discovery of the plastic cup inside Miller’s vehicle was inevitable, and the trial court properly denied Miller’s motion to suppress in this respect.

### **3. *Miranda* Warnings**

{¶30} Second, Miller argues that the trial court erred by denying his motion to suppress the statements he made to the police inside the ambulance and during the administration of field

sobriety tests because the officers did not provide him with the requisite warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Prior to a custodial interrogation, the accused must be apprised of his or her right against self-incrimination and right to counsel. [*Id.*] *Miranda* defines “custodial interrogations” as any “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444.

*Cleveland v. Oles*, 2016-Ohio-23, 45 N.E.3d 1061, ¶ 13 (8th Dist.). In determining whether questioning by police constitutes a “custodial interrogation” for *Miranda* purposes, the inquiry is whether a reasonable person, under the totality of the circumstances presented at the time of the questioning, would feel free to leave the interview. *State v. Duhamel*, 8th Dist. Cuyahoga No. 102346, 2015-Ohio-3145, ¶ 21, citing *State v. Biros*, 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997).

#### **a. Questioning Inside Ambulance**

{¶31} In the instant matter, Miller contends that the questioning initiated by the police inside the ambulance constituted a custodial interrogation. In support of his position, Miller emphasizes that his vehicle was “boxed in” on the exit ramp between an ambulance and a police cruiser, preventing him from driving away from the scene, and that he was questioned by two police officers inside the ambulance. Accordingly, Miller argues that any and all statements he made to the police inside the ambulance should have been suppressed.

{¶32} The record reflects that EMS personnel escorted Miller from his vehicle into the ambulance. Officers Rodgers and Calvey eventually convened with the EMS personnel and Miller in the ambulance. The officers asked Miller questions regarding whether Miller had identification on his person, if he knew his social security number, if he had an Ohio driver’s license, his name, his middle initial, and his birthday. In response to these questions, Miller

provided the officers with his name, date of birth, and social security number. Miller also acknowledged that he was driving with a suspended license.

{¶33} Initially, we find that the questions about Miller’s identity do not constitute an “interrogation” for purposes of *Miranda* because they are not likely to elicit incriminating responses. See *State v. Ambartsoumov*, 10th Dist. Franklin No. 09AP-1054, 2010-Ohio-6293, ¶ 71, quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) (“Interrogation includes words or actions on the part of the police that the police ‘should know are reasonably likely to elicit an incriminating response.’”). There is no evidence that Officer Rodgers was seeking to incriminate Miller at this point in the encounter — the officers were trying to confirm Miller’s identity. Accordingly, the questions regarding Miller’s name and other information that would enable the police to confirm his identity were not impermissible in the absence of *Miranda* warnings. See *State v. Justice*, 2d Dist. Montgomery No. 23744, 2010-Ohio-6484, ¶ 27 (officers’ questions regarding the defendant’s name and where he lived were not impermissible in the absence of *Miranda* warnings).

{¶34} The officers additionally questioned Miller about the contents of the plastic cup inside his vehicle. After Miller acknowledged that the plastic cup contained wine, the officers asked Miller whether he drank the wine, how much alcohol he had consumed, and whether he was under the influence of any other substances. In response to these questions, Miller informed the officers that he had not consumed much and that he had just started consuming the wine.

{¶35} Initially, we find that these questions were not designed to elicit information that would enable the officers to identify Miller. Nevertheless, even if Miller’s responses to these questions were obtained in violation of *Miranda* and should have been suppressed, we cannot say

that the trial court's failure to suppress these statements prejudiced Miller or would have changed the outcome of the proceedings.

{¶36} As noted above, first responders found Miller asleep at the wheel of his car that was stopped in one of the exit ramp's lanes of travel. Officer Rodgers smelled an odor of alcohol emanating from the plastic cup inside Miller's vehicle, and observed that Miller's speech was slurred, his eyes were bloodshot red, and he was very confused about where he was coming from and where he was going. Officer Rodgers observed multiple clues of impairment on all three field sobriety tests he administered to Miller. Finally, the results of Miller's breathalyzer test confirmed that his blood alcohol content was over the legal limit.

{¶37} For all of these reasons, even if Miller's statements had been suppressed, it would not have changed the outcome of the proceedings below. Accordingly, any error in the trial court's failure to suppress Miller's statements that (1) he was driving under suspension and/or (2) he consumed the wine that was in the plastic cup inside his vehicle was harmless. *See Justice*, 2d Dist. Montgomery No. 23744, 2010-Ohio-6484, at ¶ 27; *State v. Boiani*, 8th Dist. Cuyahoga No. 98314, 2013-Ohio-1342, ¶ 18; *see also State v. Durham*, 2016-Ohio-691, 60 N.E.3d 552, ¶ 172-173 (8th Dist.) (even if a *Miranda* violation occurred, any error was harmless because the record contained overwhelming evidence of the defendant's guilt).

#### **b. Questioning During Field Sobriety Tests**

{¶38} Finally, Miller appears to argue that any questioning during the field sobriety tests was also a custodial interrogation implicating *Miranda*. He does not, however, specify the statements he made during the field sobriety tests that should have been suppressed. Nevertheless, we find no merit to this argument.

Performance of a field sobriety test, like a breath or blood test, is not testimonial in nature, and therefore is not subject to the *Miranda* decision. Moreover, the request to submit to a field sobriety test is a preparatory step in a police investigation and therefore is not a “critical stage” that would entitle [a defendant] to a constitutional right to counsel.

*State v. Arnold*, 12th Dist. Butler No. CA99-02-026, 1999 Ohio App. LEXIS 4159, 6 (Sept. 7, 1999); *State v. Davis*, 4th Dist. Ross No. 10CA3188, 2011-Ohio-1747, ¶ 22, citing *State v. Rupp*, 11th Dist. Portage No. 2007-P-0095, 2008-Ohio-4052, ¶ 40 (the results of field sobriety tests and blood alcohol tests were not inadmissible based on the officer’s failure to provide *Miranda* warnings to the defendant before administering the tests). The Ohio Supreme Court has explained that “the nonverbal results of [a defendant’s] breathalyzer and field sobriety tests are not self-incriminating statements.” *State v. Henderson*, 51 Ohio St.3d 54, 57, 554 N.E.2d 104 (1990).

{¶39} For all of the foregoing reasons, we find that the trial court properly denied Miller’s motion to suppress the statements he made to the police officers. Furthermore, even if the trial court erred in failing to suppress Miller’s statements, any error was harmless.

#### **4. Field Sobriety Testing**

{¶40} Third, Miller argues that Officer Rodgers lacked reasonable suspicion to conduct field sobriety tests.

{¶41} After a police officer has lawfully stopped a vehicle for a traffic infraction, the officer is permitted to request the motorist to perform field sobriety tests when “the request is separately justified by a reasonable suspicion based upon articulable facts that the motorist is intoxicated.” *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 29, citing *State v. Evans*, 127 Ohio App.3d 56, 62, 711 N.E.2d 761 (11th Dist.1998).

“Probable cause is not needed before an officer conducts field sobriety tests. Reasonable suspicion of criminal activity is all that is required to support further investigation.” *Columbus v. Anderson*, 74 Ohio App.3d 768, 770, 600 N.E.2d 712 (10th Dist.1991), citing *State v. Bobo*, 37 Ohio St.3d 177, 178, 524 N.E.2d 489 (1988). Moreover, to evaluate the reasonableness of the request for field sobriety tests, we evaluate “the totality of the circumstances, viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold.” *Dedejczyk* at ¶ 29, citing *State v. Dye*, 11th Dist. Portage No. 2001-P-0140, 2002-Ohio-7158, ¶ 18.

*Cleveland v. Reese*, 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, ¶ 19.

{¶42} In *Evans*, the Eleventh District identified the following factors that courts may consider in determining whether an officer had reasonable suspicion, based on the totality of the circumstances, to administer field sobriety tests:

(1) the time and 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.); (9) the suspect’s demeanor (belligerent, uncooperative, 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.

*Evans* at fn. 2. The court went on to explain that “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. No single factor is determinative.” *Id.*

{¶43} In the instant matter, viewing the totality of circumstances through the eyes of a reasonable and prudent police officer, we find that Officer Rodgers reasonably suspected that

Miller was driving while intoxicated and he was justified in administering field sobriety tests after his initial interaction with Miller inside the ambulance.

{¶44} Officer Rodgers testified that he observed the plastic cup inside Miller’s vehicle containing a liquid that smelled like alcohol. Miller admitted that the liquid inside the cup was wine and that he had drank the wine. When Officer Rodgers spoke with Miller inside the ambulance, he noticed that Miller’s “speech was slurred, his eyes were bloodshot red, and he was very confused as to which direction he was coming, where he was going, whether he was coming to work, going to work.” (Tr. 33.)

{¶45} Based on these observations and Miller’s admission to drinking wine, Officer Rodgers was “leaning towards” administering field sobriety tests. Officer Rodgers ultimately decided to conduct the field sobriety tests. He explained the rationale for his decision: “[j]ust because of the totality of everything that is going on, [Miller is] asleep behind the wheel, the eyes, the slurred speech, not knowing where he was going and his admission to drinking the wine.” (Tr. 34.)

{¶46} Based on the foregoing analysis, we find that Officer Rodgers had reasonable suspicion to conduct the field sobriety tests, and the trial court properly denied Miller’s motion to suppress in this respect.

## **5. Arrest**

{¶47} Fourth, Miller argues that Officer Rodgers lacked probable cause to arrest him for OVI. Relying on the video of the incident and Officer Rodgers’s testimony, Miller asserts that he “did not have an odor of alcohol about his person; he was walking normally; he was talking normally; he exited the vehicle and ambulance normally; he understood all of the instructions and responded appropriately to all questions.” Appellant’s brief at 12-13. Furthermore, Miller

appears to argue that Officer Rodgers arrested him based on the fact that he had previously been arrested for OVI.

{¶48} “An officer may arrest a suspect without a warrant when he has probable cause to believe that the suspect was operating a motor vehicle under the influence of alcohol.” *Cleveland v. Giering*, 2017-Ohio-8059, 98 N.E.3d 1131, ¶ 15 (8th Dist.), citing *Henderson*, 51 Ohio St.3d 54, 554 N.E.2d 104. “In the OVI context, courts must determine whether, ‘at the moment of the arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence.’” *Cleveland v. Hyppolite*, 2016-Ohio-7399, 76 N.E.3d 539, ¶ 57 (8th Dist.), quoting *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000), *superseded by statute on other grounds*.

{¶49} After reviewing the record, we find that there were sufficient facts that would have caused a prudent person to believe that Miller was driving under the influence of alcohol. Officer Rodgers testified that during his interaction with Miller, he observed that Miller’s speech was slurred, his eyes were bloodshot red, and he appeared to be “very confused.” (Tr. 33.) Officer Rodgers testified that he smelled an odor of alcohol coming from the plastic cup inside Miller’s vehicle. Miller admitted to drinking wine. Miller’s impairment was indicated on all three field sobriety tests. Finally, the results of the breath test confirmed that Miller was over the legal limit.

{¶50} Based on the foregoing analysis, we find that Officer Rodgers had probable cause to arrest Miller for OVI. The trial court properly denied Miller’s motion to suppress in this respect.

{¶51} For all of the foregoing reasons, we overrule Miller’s first assignment of error. The trial court did not err in denying Miller’s motion to suppress.

### **B. Previous OVI Convictions**

{¶52} In his second assignment of error, Miller argues that the trial court erred by finding him guilty of fourth-degree felony OVI, rather than first-degree misdemeanor OVI, because the state failed to prove that he had been previously convicted of or pled guilty to three violations of R.C. 4511.19 or other equivalent offenses. In support of his argument, Miller contends that the furthermore specifications charged in the indictment were defective with respect to the February 2012 conviction in Bedford Municipal Court and the June 2011 conviction in Cleveland Municipal Court.

{¶53} The furthermore specifications underlying the two OVI counts in the indictment alleged, in relevant part,

FURTHERMORE, and [Miller] within six years of the offense, previously has been convicted of or pleaded guilty to three violations of division (A) or (B) of [R.C. 4511.19] or other equivalent offenses, to wit: (1) on or about 12/1/15, case #13TRC00197, in the Shaker Heights Municipal Court, in violation of 4511.19A2B; (2) and on or about 2/24/12, case #11TRC02103, in the Bedford Municipal Court, in violation of 333.01A1; (3) and on or about 6/16/11, case #2011TRC026292, in the Cleveland Municipal Court, in violation of 433.01A9[.]

{¶54} Miller appears to argue that the indictment was defective because the furthermore specifications (1) fail to identify the specific subsection of Bedford Codified Ordinances (“BCO”) Section 333.01(a)(1), governing operating a vehicle while under the influence, that he was convicted of, and (2) cite subsection (a)(9) of Cleveland Codified Ordinances (“CCO”) Section 433.01, governing driving under the influence, as the ordinance he was convicted of when that particular subsection does not exist. After reviewing the record, we find no merit to Miller’s argument that the trial court erred by finding him guilty of fourth-degree felony OVI.

{¶55} As an initial matter, we note that Miller was charged with violating R.C. 4511.19(A)(1)(a) and (d) which provide, in relevant part,

(1) No person shall operate any vehicle \* \* \* within this state, if, at the time of the operation \* \* \*:

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

\* \* \*

(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

Accordingly, the specific subsections of the BCO and CCO were not elements of the OVI offenses charged in Counts 1 and 2 of the indictment. Rather, by operation of law, Miller's December 2015 conviction in Shaker Heights Municipal Court, February 2012 conviction in Bedford Municipal Court, and June 2011 conviction in Cleveland Municipal Court elevated the OVI offenses from first-degree misdemeanors to fourth-degree felonies pursuant to R.C. 4511.19(G)(1)(d). Furthermore, pursuant to Crim.R. 11(B)(2), Miller admitted the truth of the allegations in the indictment by entering the no contest plea — that he had three previous convictions, either for OVI under R.C. 4511.19 or other equivalent offenses, within six years of the April 4, 2017 offense.

{¶56} The record reflects that Miller was neither misled nor prejudiced by the clerical errors in the indictment. During the change of plea hearing, the following exchange took place between the trial court and the prosecutor:

THE COURT: And then there are further findings listed [in the indictment]?

[PROSECUTOR]: Yes. Additionally, that was the — this would be the fourth OVI in the past six years for [Miller].

(Tr. 107-108.) Neither Miller nor defense counsel objected to the prosecutor's recitation of the facts. The furthermore specifications list the dates, case numbers, and jurisdictions of Miller's three prior convictions based upon which R.C. 4511.19(G)(1)(d) applied.

{¶57} The language of the indictment and the facts set forth by the prosecutor during the change of plea hearing clearly indicate that Miller was charged with and convicted of fourth-degree felony OVI pursuant to R.C. 4511.19(G)(1)(d). Miller pled no contest to these facts establishing fourth-degree felony violations of R.C. 4511.19(A)(1)(a) and (d). Accordingly, the record clearly reflects that Miller was not misled or prejudiced by the citations to the BCO and CCO in the indictment's furthermore specifications.

{¶58} Based on the foregoing analysis, we find no basis upon which to conclude that the trial court erred by finding Miller guilty of fourth-degree felony OVI after he entered his no contest plea. Accordingly, Miller's second assignment of error is overruled.

### **III. Conclusion**

{¶59} After thoroughly reviewing the record, we affirm the trial court's judgment. The trial court did not err in denying Miller's motion to suppress or finding Miller guilty of fourth-degree felony OVI.

{¶60} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

TIM McCORMACK, P.J., and  
SEAN C. GALLAGHER, J., CONCUR