[Cite as *State v. Rice*, 2009-Ohio-6332.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-090071 C-090072 C-090073
Plaintiff-Appellant,	:	TRIAL NOS. 08TRC-45048A, B, and C
vs.	:	
RICHARD RICE,	:	*D E C I S I O N.*
Defendant-Appellee.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 4, 2009

John P. Curp, City Solicitor, *Ernest F. McAdams*, City Prosecutor, and *Jennifer Bishop*, Assistant City Prosecutor, for Plaintiff-Appellant,

James S. Arnold, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} This is an appeal from the trial court's partial granting of defendant-appellee Richard Rice's motion to suppress. For the following reasons, that part of the trial court's judgment suppressing evidence must be reversed.

Factual Background

{¶2} On August 16, 2008, Ohio State Highway Patrol Trooper Michael Shimko stopped Rice for failing to yield to a motorcycle as Rice merged onto I-275. Shimko approached the passenger side of Rice's vehicle, where he noticed both a strong odor of alcohol emanating from the car and that Rice had bloodshot eyes. After Rice admitted that he had consumed a few beers, Shimko had Rice exit from his vehicle. Shimko then conducted a brief pat-down search of Rice and placed Rice, unhandcuffed, in the back seat of his cruiser. While in the back seat, Rice stated that he had consumed four 16-ounce beers.

{¶3} Trooper Shimko conducted three field-sobriety tests on Rice. He testified at the hearing on Rice's motion to suppress that Rice had exhibited six out of six possible clues, or signs, of impairment on the Horizontal Gaze Nystagmus ("HGN") test. He further testified that Rice had exhibited three clues on both the walk-and-turn and the one-leg-stand tests.

{¶4} Following these tests, Trooper Shimko placed Rice under arrest and read him his *Miranda* rights. Shimko transported Rice to the trooper outpost station, where Rice submitted to a breath test. The breath test indicated that Rice had a breath alcohol content of .105 grams by weight of alcohol per 210 liters of

breath. Rice was charged with driving under the influence, driving with a prohibited concentration of breath alcohol, and failure to yield.

{¶5} Rice filed a motion to suppress, which the trial court granted in part. Specifically, the trial court issued the following rulings: Rice's statements made in the back of the police cruiser were suppressed because he had been in custody but had not been read his *Miranda* rights; all evidence concerning the HGN field-sobriety test was suppressed; various clues derived from the walk-and-turn and the one-leg-stand tests were suppressed, but the remaining evidence concerning these tests was admissible; and all the evidence concerning the breath test conducted on Rice was suppressed because only one manual for the breath-testing machine had been present at the testing site.

Ohio Appellate Rule 3

{¶6} The state appeals from that part of the trial court's decision suppressing evidence and raises three assignments of error. It argues that the trial court erred in suppressing Rice's statements made while in the police cruiser; that the trial court erred in suppressing the evidence concerning the HGN field-sobriety test and various clues on the walk-and-turn and one-leg-stand tests; and that the trial court erred in suppressing the results of Rice's breath test.

{¶7} Rice also raises three assignments of error. But Rice has not filed a notice of appeal from the trial court's decision. App.R. 3(C) states when a notice of a cross-appeal is required. Section 3(C)(2) provides that "[a] person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal."

{¶8} Rice argues in his first and second assignments of error that the trial court erred in failing to suppress all the evidence concerning the walk-and-turn and one-leg-stand tests. These assignments of error seek a reversal of part of the trial court's decision and cannot be considered under App.R. 3(C)(2) in the absence of a notice of cross-appeal. Consequently, we strike Rice's first and second assignments of error. In his third assignment of error, Rice defends the trial court's suppression of the results of his breath test on additional grounds. This assignment of error may properly be raised without a notice of cross-appeal and will therefore be considered by this court.

{¶9} This court's review of a ruling on a motion to suppress presents a mixed question of law and fact.[1] We must accept the trial court's findings of fact if they are supported by competent, credible evidence, but we review de novo the trial court's application of the law to the relevant facts.[2]

Rice was not in Custody

{¶10} As we have stated, the trial court suppressed Rice's statements made while in the back seat of the police cruiser because it determined that Rice had been in custody at that point but had not been given his *Miranda* rights. In its first assignment of error, the state argues that *Miranda* warnings had not been required because Rice had not been in custody.

{¶11} *Miranda* warnings must be provided when a defendant is subject to a custodial interrogation.[3] A custodial interrogation is "questioning initiated by law

[1] *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.
[2] Id.
[3] *Miranda v. Arizona* (1966), 384 U.S. 436, 467-468, 86 S.Ct. 1602.

enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[4]

{¶12} Generally, "motorists temporarily detained pursuant to ordinary traffic stops are not in custody for purposes of *Miranda*."[5] But "if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*."[6]

{¶13} In this case, Rice was not in custody. Trooper Shimko had valid reasons for removing Rice from his vehicle and placing him in the cruiser. Two other passengers were in the vehicle that was stopped, and Shimko needed to determine whether the odor of alcohol had come from Rice. The interests of safety further justified placing Rice in the cruiser, since Rice had been stopped near high-speed traffic on the side of an interstate highway.[7]

{¶14} Although Rice had been placed in the back seat of the cruiser, this did not transform a routine stop into a custodial interrogation. Trooper Shimko did not subject Rice to a lengthy interrogation, and Rice was not handcuffed while he was in the cruiser. Further, the interaction between Rice and Shimko was neither combative nor intimidating.

{¶15} Because Rice had not been subject to a custodial interrogation, *Miranda* warnings were not required, and his statements made in the cruiser should not have been suppressed. The state's first assignment of error is sustained.

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[4] Id. at 444.
[5] *State v. Leonard*, 1st Dist. No. C-060595, 2007-Ohio-3312, ¶19, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S. Ct. 3138.
[6] *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138.
[7] See *State v. Polen*, 1st Dist. Nos. C-050959 and C-050960, 2006-Ohio-5599, ¶¶12-13.

Field-Sobriety Tests

{¶16} In its second assignment of error, the state argues that the trial court erred in suppressing the results of the HGN field-sobriety test and in suppressing various clues on both the walk-and-turn and the one-leg-stand tests.

{¶17} The results of a field-sobriety test are admissible when the state demonstrates by clear and convincing evidence that the officer has substantially complied with the regulations established by the National Highway Traffic and Safety Administration ("NHTSA").[8]

1. HGN Test

{¶18} The trial court suppressed all the evidence concerning the HGN test, stating that "[t]he HGN is suppressed because part of the test was performed while the Defendant was viewing the flashing strobe lights from the police vehicle as well as incorrect timing on the onset prior to 45 degrees test."

{¶19} Trooper Shimko testified that he had performed the field-sobriety tests behind his cruiser for safety purposes. But because the tests were conducted in this location, they were not captured on the cruiser's camera. With respect to the strobe lights, Shimko testified that he had Rice face away from the strobe lights, which were still on but had been switched to a lower level. On this level, the red and blue lights were on, but the white lights had been eliminated.

{¶20} With respect to the onset-prior-to-45-degrees portion of the test, NHTSA regulations state that the officer should move the stimulus from the suspect's eye to his shoulder at a speed of four seconds. But Trooper Shimko testified that, for this portion of the test, it took him two seconds to move the stimulus across this

[8] R.C. 4511.19(D)(4)(b).

distance. Shimko further referred to this portion of the test as "distinct nystagmus at 45 degrees."

{¶21} Following our review of the record, we conclude that the trial court's finding with respect to the flashing strobe lights was not supported by the evidence. Shimko testified that his lights had been lowered and that Rice had been facing away from the lights. Nothing from the cruiser's camera contradicted his statements, and Rice did not testify. Accordingly, the trial court did not have any persuasive evidence before it that the strobe lights had interfered with the HGN test. The evidence concerning the test should not have been suppressed on these grounds.

{¶22} The trial court correctly noted that Shimko had incorrectly timed the "onset prior to 45 degrees" portion of the test. And as we have noted, Shimko also incorrectly referred to this portion of the test as "distinct nystagmus at 45 degrees." But other than the incorrect timing and phrasing, Shimko performed the test correctly. An officer performing an HGN test is required to check for various factors; the "onset prior to 45 degrees" is just one part of the entire HGN test. The officer must also check for other factors, including tracking, lack of smooth pursuit, and nystagmus at maximum deviation. Given Shimko's otherwise accurate performance, we cannot conclude that incorrect timing on one portion of the test rendered all the evidence concerning the test inadmissible. Officers are required to substantially comply with the NHTSA regulations; strict compliance is not required.

{¶23} The state presented clear and convincing evidence that Trooper Shimko had substantially complied with the NHTSA regulations for the HGN test, and the evidence concerning this test should not have been suppressed.

2. One-Leg-Stand and Walk-and-Turn Tests

{¶24} In a novel action, the trial court suppressed one clue on both the one-leg-stand and the walk-and-turn tests. The court otherwise admitted the remaining evidence concerning these tests.

{¶25} The trial court specifically stated that "[t]he walk-and-turn test clue of stopping in between steps is suppressed and not to be used against the defendant. The trooper never instructed the defendant, as NHTSA requires, that 'Once you start walking, don't stop until you have completed the test.' " The trial court further stated that "[t]he one-leg stand clue of Defendant putting his foot down is suppressed. In this case, the trooper gave an instruction to the Defendant, 'If you happen to put your foot down during the test, just pick it back up.' This is not an instruction per NHTSA, rather it is an instruction for the officer to tell the defendant only if he puts his foot down."

{¶26} We have found no legal support for the trial court's suppression of individual clues on field-sobriety tests. R.C. 4511.19(D)(4)(b) provides that a trial court must determine whether an officer has substantially complied with the NHTSA regulations for each test. It provides that the court must determine whether the entire test was conducted in substantial compliance with the regulations, rather than whether the officer's actions regarding the detection of each individual clue were in substantial compliance.

{¶27} In this case, the trial court found that the officer had failed to substantially comply with one portion of each of these two field-sobriety tests. The trial court's findings regarding how Rice was instructed were correct. But because all but one clue from each test was deemed admissible, it is clear that the trial court

ruled that there was substantial compliance with the applicable regulations for each test. And following our review of the record, we hold that there was proof of substantial compliance.

{¶28} The trial court erred in suppressing one clue from both the walk-and-turn and the one-leg-stand tests. Because none of the evidence concerning the HGN, walk-and-turn, and one-leg-stand tests should have been suppressed, the state's second assignment of error is sustained.

Breath Test

1. State's Arguments

{¶29} In its third assignment of error, the state argues that the trial court erred in suppressing the results of Rice's breath test on the grounds that a procedural manual had not been present at the testing site.

{¶30} Ohio State Highway Patrol Trooper Kevin Long testified at the hearing on the motion to suppress that the operational manual for the breath-test machine, a BAC DataMaster, had been present. Trooper Long offered no testimony concerning a procedural manual.

{¶31} In its decision suppressing the breath-test results, the trial court determined that both Ohio Adm.Code. 3701-53-01(B) and this court's decision in *State v. Douglas*[9] required the presence of two manuals in the testing area.

{¶32} The trial court was incorrect. Ohio Adm.Code 3701-53-01(B) states that "[a]t least one copy of the written procedural manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other

[9] *State v. Douglas*, 1st Dist. No. C-030897, 2004-Ohio-5726.

bodily substance tests shall be on file in the area where the analytical tests are performed. In the case of breath tests using an approved evidential breath testing instrument listed in paragraphs (A) and (B) of rule 3701-53-02 of the Administrative Code, the operational manual provided by the instrument's manufacturer shall be on file in the area where the breath tests are performed."

{¶33} In our judgment, the Ohio Administrative Code requires the presence of one manual every time a test is performed on a bodily substance. In the case of breath tests conducted on an approved breath-testing instrument, that required manual is the operational manual provided by the instrument's manufacturer. The code does not require the presence of both an operational manual and a separate procedural manual when such breath tests are conducted.

{¶34} The trial court additionally relied on this court's holding in *State v. Douglas* to suppress the results of Rice's breath test. *Douglas* also involved a breath-alcohol test. In *Douglas*, this court noted that "Ohio Adm.Code 3701-53-01(B) requires that there be two manuals, one a written procedure manual for performing the substance tests to be kept in the area where the analytical tests are performed and the other an operational manual provided by the instrument's manufacturer to be kept where the breath tests are performed."[10] The *Douglas* court determined that the record in that case failed to include any evidence concerning the presence of an operational manual, and, consequently, that the state had failed to demonstrate substantial compliance with the Ohio Administrative Code.[11] But the *Douglas* decision made no reference to, and provided no analysis concerning, whether a separate procedural manual must be present when breath tests are conducted.

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[10] Id. at ¶5.
[11] Id. at ¶6.

{¶35} To the extent that the *Douglas* decision might be read to require the presence of both a procedural and an operational manual when breath tests are conducted on approved breath-testing instruments, such language is dicta and is not binding in this case.

{¶36} The state must demonstrate substantial compliance with the Ohio Administrative Code regulations.[12] In this case, Trooper Long's testimony concerning the presence of an operational manual for the BAC DataMaster was sufficient to establish substantial compliance with Ohio Adm.Code 3701-53-01(B). The trial court should not have suppressed Rice's breath-test results on the ground that the regulation had been violated. The state's third assignment of error is sustained.

2. Rice's Arguments

{¶37} In his third assignment of error, Rice argues that the trial court's suppression of his breath-test results should be upheld on several grounds not specifically relied upon by the court.

{¶38} Rice argues that the state failed to demonstrate substantial compliance with Ohio Adm.Code 3701-53-02(C), 3701-53-09(B), and 3701-53-07(C)(2). These provisions, respectively, require that breath samples be analyzed according to an operational checklist for the machine used to conduct the breath test; that the operator of the breath-test machine apply for a permit from the department of health for the specific machine being used; and that the operator of a breath-test machine demonstrate that he or she has completed an operator-training class for the breath-test machine that the operator utilizes.

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[12] *State v. Burnside*, supra, 100 Ohio St.3d 152, at ¶27.

{¶39} Ohio Adm.Code 3701-53-02(A) provides that the Ohio Department of Health has approved the following evidential breath-testing instruments: the BAC DataMaster, the BAC DataMaster cdm, and the Intoxilyzer. Rice's arguments focus on the difference between the BAC DataMaster and the BAC DataMaster cdm.

{¶40} In this case, Rice's breath test was conducted on a BAC DataMaster cdm. But the operational checklist present at the testing site was a checklist for a BAC DataMaster. And the troopers involved with Rice's case had a permit and training for the BAC DataMaster, but not the BAC DataMaster cdm. Rice asserts that, for these reasons, the state failed to demonstrate substantial compliance with the applicable regulations.

{¶41} We are not persuaded by Rice's arguments. Trooper Long testified in this case that the department of health has not issued a separate manual, checklist, or operational certificate for the BAC DataMaster cdm. Rather, the cdm version of the machine is referred to in the manual for the BAC DataMaster.

{¶42} If Rice's arguments were accepted, the BAC DataMaster cdm could never in practicality be used because the department of health has not issued a separate manual or checklist for that machine. We are skeptical that the department of health intended such a result.

{¶43} This issue has been analyzed in *State v. Staley*.[13] The *Staley* court first discussed the operational differences between the two machines and held that "[a]lthough much evidence was presented for this court's consideration, no evidence was presented that would lead this court to believe that ODH's issuance of a single permit authorizing operation of the DataMaster Standard and the DataMaster cdm

[13] *State v. Staley*, 141 Ohio Misc.2d 40, 2006-Ohio-7274, 868 N.E.2d 1284.

contradicts the purpose of ensuring the most accurate and reliable BAC test result."[14] The court further noted that the Ohio Department of Health "was thorough and deliberate in considering whether the permit authorizing operation of the BAC DataMaster could authorize operation of the BAC DataMaster cdm as well."[15]

{¶44} We conclude that the presence of an operational checklist and permit for the BAC DataMaster when a BAC DataMaster cdm is used demonstrates substantial compliance with the Ohio Administrative Code. Rice's breath-test results should not have been suppressed due to the absence of a separate permit and checklist.

{¶45} Rice next argues that the trial court correctly suppressed the results of his breath test because the state did not demonstrate substantial compliance with Ohio Adm.Code 3701-53-04(A)'s requirement concerning radio frequency interference. This provision states that "[a] senior operator shall perform an instrument check on approved evidential breath testing instruments and a radio frequency interference (RFI) check no less frequently than once every seven days."

{¶46} Rice's breath test was conducted at approximately 12:09 a.m. on August 17, 2008. Trooper Long testified that he had performed an RFI check on the BAC DataMaster cdm at approximately 1:37 a.m. on August 11, 2008. Rice's test was accordingly conducted within seven days of an RFI check, and the state demonstrated substantial compliance with Ohio Adm.Code 3701-53-04(A). Rice's breath-test results should not have been suppressed on the ground of an untimely RFI check, and Rice's third assignment of error is overruled.

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[14] Id. at ¶15.
[15] Id. at ¶19.

{¶47} Having sustained the state's assignment of error with respect to the trial court's suppression of the breath-test results based on the absence of a procedural manual, and having overruled Rice's arguments seeking to uphold the suppression order on different grounds, we conclude that the trial court erred in suppressing the results of the breath test.

Conclusion

{¶48} The trial court erred in suppressing Rice's statements made while in the back seat of the police cruiser. The court further erred in suppressing all the evidence concerning the HGN field-sobriety test and various clues on the one-leg-stand and walk-and-turn tests. The evidence concerning these tests was admissible in its entirety. Rice's breath-test result was also admissible because the state demonstrated substantial compliance with the relevant Ohio Administrative Code provisions.

{¶49} That part of the judgment of the trial court suppressing evidence is reversed, and this case is remanded for further proceedings.

Judgment reversed and cause remanded

HENDON, P.J., SUNDERMANN and **CUNNINGHAM, JJ**.

Please Note:

The court has recorded its own entry on the date of the release of this decision.