[Cite as *State v. Casner*, 2011-Ohio-1190.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-489
v.	:	(M.C. No. 2009 TRC 206549)
Troy B. Casner,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 15, 2011

Richard C. Pfeiffer, Jr., City Attorney, and *Melanie R. Tobias*, for appellee.

Samuel H. Shamansky Co., *LPA*, and *Samuel H. Shamansky*, for appellant.

APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶1} Defendant-appellant, Troy B. Casner ("appellant"), appeals the judgment of the Franklin County Municipal Court convicting him of operating a vehicle with a prohibited level of alcohol in the breath ("OVI per se"). For the following reasons, we reverse that judgment and remand the matter to the trial court.

{¶2} On November 10, 2009, appellant was pulled over by Ohio Highway Patrol Trooper Jermaine Thaxton for speeding and committing a marked lane violation. Because appellant had "glassy and bloodshot" eyes and an odor of alcohol, Thaxton performed standardized field sobriety tests on him. (Feb. 16, 2010, Tr. 24.) Appellant successfully completed the one-leg stand test. However, he failed the horizontal gaze nystagmus test ("HGN") and the walk-and-turn test, and Thaxton arrested him. Afterward, appellant submitted to a breath test, which showed he had an alcohol level of .157 grams per 210 liters of breath. Because this result was over the legal limit, which is .08 grams of alcohol per 210 liters of breath, appellant was charged with operating a vehicle under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a), and OVI per se, in violation of R.C. 4511.19(A)(1)(d). He was also charged for the speeding and marked lane violations, pursuant to R.C. 4511.21 and 4511.33, respectively.

{¶3} Appellant moved to suppress the breath and field sobriety tests, and the trial court held a hearing on the motion. During the hearing, appellant stipulated that the breath test was administered in compliance with all Ohio Department of Health regulations, and therefore, the court concluded that the test result was admissible at trial. The court held, however, that Thaxton failed to comply substantially with standardized procedures on the HGN and walk-and-turn tests; the court would not allow the trooper to testify that appellant failed those tests. The court also held, however, that the trooper properly administered the one-leg stand test.

{¶4} Before trial, the prosecution obtained a dismissal on all charges except OVI per se. Appellant filed a motion in limine, asking the trial court to allow him to

introduce the video of the November 2009 traffic stop into evidence through expert testimony. The court overruled the motion, concluding that appellant's conduct during the traffic stop was irrelevant to the OVI per se charge.

{¶5} Appellant waived jury, and a bench trial ensued. At trial, Thaxton testified about the result of appellant's breath test. On cross-examination, appellant asked if Thaxton knew about the reliability of the breathalyzer, but the trial court prohibited any testimony on that line of questioning. Appellant proffered that the trooper would have testified that "he has absolutely no idea how" the breathalyzer works "either on a general scientific level or this particular machine by itself" and that "he has no idea how it functions internally * * * how it samples breath, what its downsides are" or "that it's even an accurate or functioning device." (May 20, 2010, Tr. 23.)

{¶6} Additionally, the trial court did not allow appellant to ask Thaxton any questions about the diagnostic functions of the breathalyzer. Appellant proffered that the trooper would have testified "that there is an internal diagnostic function that [he] is able to access * * * and he could do that prior to testing to make sure that the machine was accurate in all respects." (May 20, 2010, Tr. 23.)

{¶7} The trial court also prohibited Thaxton from testifying about the relationship between a person's performance on field sobriety tests and the level of alcohol in his body. Appellant proffered that the trooper would have testified "that if a person does well on the field sobriety tests * * * it is less likely that a test over .10 will be obtained." (May 20, 2010, Tr. 24.) Also, according to appellant, the trooper would have verified that he video-recorded the November 2009 traffic stop during the field sobriety

tests, and "based on that video evidence alone, it's highly unlikely that [appellant] would have tested over .10, contrary to the test result obtained from the machine." (May 20, 2010, Tr. 25.)

{¶8} After the prosecution rested its case, appellant moved for admission of the video of the traffic stop. The trial court admitted it into evidence, over the prosecution's objection. Next, appellant asked to play the video "for the sole purpose of showing that the field sobriety tests and [his] mannerisms * * * are of evidentiary value with respect to whether or not he could have blown a test over the legal limit." (May 20, 2010, Tr. 31.) The prosecution objected to appellant using the video in that manner, and the trial court sustained the objection.

{¶9} Appellant also asked to proffer testimony from a toxicologist, Dr. Harry Plotnick, regarding appellant's performance on the field sobriety tests and the amount of alcohol he consumed. The trial court asked if Plotnick was in the courtroom, and defense counsel said no. The court asked, "[w]hat if I wanted to hear from him?" (May 20, 2010, Tr. 32.) Defense counsel responded, "[w]e would spend more money and bring him up." (May 20, 2010, Tr. 32.) The court indicated that it was "just kidding" and said, "[h]e's proffered." (May 20, 2010, Tr. 32.) In making that proffer, appellant noted that Plotnick "would testify that there is a correlation between performance on standardized field sobriety tests and the likelihood that a person will test over .10." (May 20, 2010, Tr. 32.) "He would further testify that based on the consumption of two beers, which was [appellant's] consumption, * * * it would have been impossible at the time of the stop for [appellant] to have a blood alcohol level over .08 and that his

performance on the field sobriety tests is consistent with a person who had a blood alcohol level under .08." (May 20, 2010, Tr. 32-33.) Afterward, the defense rested, and the trial court found appellant guilty of OVI per se.

{¶10} Appellant appeals, raising the following assignments of error:

> [I.] The trial court deprived Appellant of his right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution by prohibiting cross examination of the State's witness regarding a chemical breath test.
>
> [II.] The trial court deprived Appellant of his right to present a complete defense as well as his right to due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution by prohibiting him from cross examining the State's witness and presenting evidence regarding reliability of the breath test result.

{¶11} Appellant's first assignment of error concerns limits the trial court imposed on his cross-examination of Thaxton. A trial court has discretion to limit the scope of cross-examination. *State v. Treesh*, 90 Ohio St.3d 460, 480-81, 2001-Ohio-4. Therefore, we need not disturb a court's limits on cross-examination absent an abuse of discretion. *State v. Bone*, 10th Dist. No. 05AP-565, 2006-Ohio-3809, ¶49. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} Appellant first argues that the trial court abused its discretion by prohibiting him from cross-examining Thaxton about the general reliability of breathalyzers. In *State v. Vega* (1984), 12 Ohio St.3d 185, 190, the Supreme Court of Ohio held that a defendant "may not make a general attack upon the reliability and

validity of the breath testing instrument." Appellant asserts that we should not apply *Vega* because the Supreme Court of Ohio subsequently held that "[e]videntiary objections challenging the competency, admissibility, relevancy, authenticity, and credibility of the chemical test results may" be raised at trial. See *State v. French*, 72 Ohio St.3d 446, 452, 1995-Ohio-32. But this court has declined to interpret *French* as departing from *Vega* and allowing a challenge to the general reliability of breathalyzers. See *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, ¶27 (noting that *French* "does not indicate that a challenge to the 'general reliability' " of breathalyzers "is among the permissible challenges" at trial).

{¶13} Appellant also argues that *Vega* infringes on his right to confront witnesses under the Sixth Amendment to the United States Constitution, but we have previously held that the prohibitions in *Vega* do not violate a defendant's constitutional rights. *State v. Sabo*, 10th Dist. No. 04AP-1114, 2006-Ohio-1521, ¶34. And we will continue to adhere to *Vega* until directed otherwise by the Supreme Court of Ohio. See *Columbus v. Duling* (Mar. 31, 1997), 10th Dist. No. 96APC07-859 (noting that "[a]ny change in the law regarding a defendant's right to challenge the general scientific reliability of a breath testing device must come from the Ohio Supreme Court, not this court.") See also *State v. Miskel* (Mar. 28, 2000), 10th Dist. No. 99AP-482 (recognizing that this court is charged with accepting and applying the law promulgated by the Supreme Court of Ohio).

{¶14} Moreover, notwithstanding *Vega*, appellant did not even lay a foundation for Thaxton to testify about the general reliability of breathalyzers because it was

proffered that the trooper did not know, "on a general scientific level," how those machines work. (May 20, 2010, Tr. 23.) See *Columbus v. McAfee* (Aug. 27, 1991), 10th Dist. No. 90AP-944 (holding that a trial court did not abuse its discretion by not allowing a witness to testify about a subject on which he lacked sufficient knowledge). Accordingly, the trial court did not abuse its discretion by prohibiting appellant from cross-examining Thaxton about the general reliability of breathalyzers.

{¶15} Next, appellant argues that the trial court abused its discretion by not allowing him to cross-examine Thaxton about the breathalyzer's internal diagnostic feature. Appellant wanted to show that Thaxton could have used the internal diagnostic check to ensure the accuracy of the breathalyzer. We have previously recognized, however, that this type of challenge to the breathalyzer is impermissible under *Vega*. *State v. Knapke*, 10th Dist. No. 08AP-933, 2009-Ohio-2989, ¶9-11. In any event, appellant laid no foundation for Thaxton to testify about the breathalyzer's diagnostic feature because it was proffered that he did not know how the breathalyzer functions internally. See *McAfee*. Thus, the trial court did not abuse its discretion by prohibiting appellant from cross-examining Thaxton about the breathalyzer's internal diagnostic feature. For all these reasons, we overrule appellant's first assignment of error.

{¶16} In his second assignment of error, appellant claims that Thaxton should have been allowed to testify on cross-examination that the field sobriety tests, as shown on the video of the November 2009 traffic stop, established that it was "highly unlikely that [appellant] would have tested over .10, contrary to the test result obtained from the machine." (May 20, 2010, Tr. 25.) Plaintiff-appellee, the state of Ohio ("appellee"),

contends that appellant's field sobriety tests were irrelevant because he was just being tried on the OVI per se charge.

{¶17} In an OVI per se case, the trier of fact must only determine whether the defendant had a prohibited level of alcohol while operating a vehicle. *Knapke* at ¶8. A defendant's "appearance, manner of speech and walking, and lack of any symptoms of intoxication are not relevant evidence and, therefore, not admissible" in an OVI per se trial. *State v. Boyd* (1985), 18 Ohio St.3d 30, 31. Consequently, this court has held that a trial court did not err in refusing to allow a defendant to use his performance on field sobriety tests as proof that his blood alcohol did not exceed the lawful limit. *State v. Obhof*, 10th Dist. No. 07AP-324, 2007-Ohio-5661, ¶16. Appellant argues that *Obhof* is inapposite because, in that case, the defendant was relying on improperly administered field sobriety tests, while here he was prepared to rely on the properly administered part of the tests. But in *Obhof*, we recognized that the "results of even a properly administered field sobriety test are not relevant in contesting" an OVI per se charge, pursuant to the "mandate" in *Boyd*. *Obhof* at ¶16. And, although appellant asserts that he had a constitutional right to present evidence of the field sobriety tests in his trial, we decline to depart from *Boyd* until the Supreme Court of Ohio instructs otherwise. See *Miskel*. Accordingly, the trial court did not abuse its discretion by prohibiting appellant from cross-examining Thaxton about the field sobriety tests.

{¶18} Next, appellant contends that the trial court erred by not allowing Plotnick to testify. Appellee claims that appellant did not preserve this issue for appeal. It argues that even though the trial court denied the motion in limine appellant filed to

request the admission of Plotnick's testimony into evidence, appellant was also required to call the witness to the stand at trial so that the court could make a final ruling on the matter.

{¶19} "At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." *State v. Grubb* (1986), 28 Ohio St.3d 199, 203. Here, appellant sufficiently proffered Plotnick's testimony at trial by explaining what he would have testified to if allowed. See *State v. Heinish* (1990), 50 Ohio St.3d 231, 240-41. In fact, the trial court stated that the testimony was proffered. After appellant submitted that proffer, the trial court indicated its final determination not to admit Plotnick's testimony into evidence. Specifically, it accepted the proffer of the expert's testimony instead of allowing him to testify, and it even said there was no need to hear from him. Accordingly, appellant preserved his challenge to the trial court's decision not to allow Plotnick to testify, and we now turn to the merits of that challenge.

{¶20} An abuse of discretion standard applies to the trial court's decision to prohibit Plotnick from testifying. See *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶62. The trial court barred Plotnick from testifying that appellant's "performance on the field sobriety tests is consistent with a person who had a blood alcohol level under .08." (May 20, 2010, Tr. 33.) But that testimony was inadmissible in appellant's

OVI per se trial, pursuant to *Boyd* and *Obhof*, and therefore, the trial court did not abuse its discretion by excluding it from evidence.

{¶21} The trial court also barred Plotnick from testifying that the amount of alcohol appellant consumed on November 10, 2009 made it "impossible at the time of the stop for him to have a blood alcohol level over .08." (May 20, 2010, Tr. 32-33.) In *Columbus v. Day* (1985), 24 Ohio App.3d 173, 175, this court held that a trial court incorrectly disallowed an expert's testimony about a breath test result "that should have been produced by a properly operated and functioning [breathalyzer], based upon assumptions of the expert witness concerning defendant's weight, the quantity and type of alcoholic beverages defendant said that he had consumed, and the period of time over which he said they were consumed." We noted that this type of testimony did not constitute a challenge to the general reliability of breathalyzers, which *Vega* proscribes. Id. at 174-75.

{¶22} Appellant has claimed on appeal that he wanted to use Plotnick's testimony concerning the amount of alcohol he consumed on the night of the traffic stop to demonstrate the probability that his breath test result was incorrect. This is permissible under *Day*. To be sure, appellant stipulated to his breath test being administered in compliance with Ohio Department of Health regulations. In *Whitehall v. Weese* (Oct. 17, 1995), 10th Dist. No. 95APC02-169, however, we said that "[t]he mere fact that the parties stipulated that the breath test was conducted in accordance with the prescribed administrative procedures did not preclude defendant from attacking the validity of his test by other methods * * * held to be admissible by the court in *Day*."

Accordingly, the trial court improperly prohibited Plotnick's testimony pertaining to the impossibility of the test result.

{¶23} In conclusion, we hold that the trial court did not abuse its discretion by prohibiting Thaxton and Plotnick from testifying about appellant's performance on the field sobriety tests, but it improperly excluded Plotnick's testimony pertaining to the impossibility of the test result. Accordingly, we overrule in part and sustain in part appellant's second assignment of error.

{¶24} In summary, we overrule appellant's first assignment of error, but overrule in part and sustain in part his second assignment of error. We reverse the judgment of the Franklin County Municipal Court and remand this matter to that court for further proceedings consistent with this decision.

Judgment reversed;
cause remanded.

BROWN and CONNOR, JJ., concur.