[Cite as *State v. Montelauro*, 2011-Ohio-6568.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-413
v.	:	(M.C. No. 2010 TRC 173909)
Joseph A. Montelauro,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 20, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker,* City Prosecutor, and *Melanie R. Tobias,* for appellee.

Eric E. Willison, for appellant.

APPEAL from the Franklin County Municipal Court.

BRYANT, P.J.

{¶1} Defendant-appellant, Joseph A. Montelauro, appeals from a judgment of the Franklin County Municipal Court finding him guilty, (1) pursuant to no contest plea, of one count of operating a vehicle while under the influence of alcohol, drugs of abuse, or both ("OVI") and one count of driving with a prohibited breath alcohol content ("per se OVI"), as well as (2) pursuant to guilty plea, one count of driving with expired tags. Defendant assigns a single error:

> The Trial Court erred when it failed to suppress all evidence after the initial stop of the Defendant, including but not limited to the results of field sobriety testing, statements made during field sobriety testing, the arrest, and the results of the blood alcohol content of the Appellant together with any evidence gathered thereafter.

Because the trial court properly concluded the police officer who stopped defendant had probable cause to stop defendant for an expired tags violation, had reasonable suspicion to ask defendant to perform field sobriety tests, and had probable cause to arrest defendant as a result of those field sobriety tests, we affirm.

I. Facts and Procedural History

{¶2} On October 4, 2010 at 1:46 a.m., Officer Erick Moynihan stopped defendant for driving with expired tags on his vehicle, a violation of R.C. 4503.11. When he spoke with defendant, the driver and only occupant of the vehicle, the officer noticed an obvious odor of alcohol, asked defendant to perform field sobriety tests, and ultimately arrested defendant for OVI and per se OVI in violation of R.C. 4511.19(A)(1)(a) and (d), respectively, charging him also with the expired tags violation. A breath alcohol test administered at 2:41 a.m. revealed a breath alcohol content of .15. Defendant responded with a request for discovery, a request that the state preserve evidence, and a motion to suppress.

{¶3} In the motion to suppress, defendant asserted the officer had no lawful cause to stop defendant, to detain defendant, or to arrest him. Defendant thus asked the court to suppress the results of tests of defendant's coordination or sobriety, the results of any administered chemical tests, the officer's observations and opinions regarding defendant's sobriety, and any statements defendant made. At a pretrial the trial court conducted, defendant withdrew his motion as to the initial stop, but continued to assert

the officer lacked reasonable suspicion to detain defendant beyond the tags violation and similarly lacked probable cause to arrest him. The trial court conducted a hearing on defendant's motion to suppress on April 5, 2011. Officer Moynihan testified for the state; defendant relied on the traffic manual admitted as an exhibit in the hearing.

{¶4} In resolving the motion, the court noted defendant did not dispute that the officer validly stopped defendant for driving with expired tags. As to defendant's contentions that the officer lacked reasonable suspicion to further detain and probable cause to arrest, the court concluded the information the officer gathered on stopping defendant for driving with expired tags gave the officer reasonable suspicion to administer field sobriety tests, and the results of those tests supported probable cause to arrest defendant. With those determinations, defendant changed his plea to no contest to the OVI and per se OVI charges, and to guilty to the expired tags violation. Finding defendant guilty, the trial court sentenced defendant accordingly. Defendant appeals, contesting the trial court's resolution of his motion to suppress.

II. Assignment of Error—Motion to Suppress

{¶5} Defendant's single assignment of error asserts the trial court should have suppressed all evidence the officer gathered after initially stopping defendant, including the results of field sobriety tests, defendant's statements made during the testing, and results of alcohol testing administered to defendant.

A. *Applicable Law*

{¶6} "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* (1994), 95 Ohio App.3d 93, 96. A reviewing court is bound to 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. Claytor* (1993), 85 Ohio App.3d 623, 627. Nevertheless, without deference to the trial court's conclusion, the reviewing court must independently determine as a matter of law whether the trial court's decision meets the appropriate legal standard. *State v. Turner* (Dec. 21, 2000), 10th Dist. No. 00AP-248, appeal not allowed (2001), 91 Ohio St.3d 1509.

{¶7} 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* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514. An investigative stop, or *Terry* stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. The Supreme Court held in *Terry* that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See also *State v. Chatton* (1984), 11 Ohio St.3d 59, 61, cert. denied, 469 U.S. 856, 105 S.Ct. 182.

{¶8} A person has been seized for purposes of the Fourth Amendment when an officer conducts an investigative stop and detains the person in order to administer field sobriety tests. *State v. Robinette,* 80 Ohio St.3d 234, 240-41, 1997-Ohio-343; *State v. Cominsky,* 11th Dist. No. 2001-L-023, 2001-Ohio-8734, appeal not allowed (2002), 95 Ohio St.3d 1421; *State v. Litteral* (June 14, 1994), 4th Dist. No. 93CA510 (determining roadside sobriety tests are a "search" within the meaning of the Fourth Amendment). Accordingly, an officer must have reasonable suspicion based upon specific, articulable facts that a driver is intoxicated before the officer may conduct field sobriety tests. *State v.*

Perkins, 10th Dist. No. 07AP-924, 2008-Ohio-5060, ¶8, appeal not allowed, 121 Ohio St.3d 1409, 2009-Ohio-805; *State v. George,* 5th Dist. No. 07-CA-2, 2008-Ohio-2773, ¶22. Although the officer here had probable cause to stop defendant for the tag violation, his continuing to detain defendant violates the Fourth Amendment unless he had the requisite reasonable, articulable suspicion that defendant was intoxicated. The propriety of such an investigative stop must be viewed in light of the totality of the circumstances. *United States v. Cortez* (1981), 449 U.S. 411, 101 S.Ct. 690; *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus, cert. denied, 488 U.S. 910, 109 S.Ct. 264.

B. *The Officer's Testimony*

{¶9} Officer Erick Moynihan, with the Blendon Township Division of Police, was the sole witness at the motion to suppress hearing. According to his testimony, he was on patrol on October 4, 2010, when he first noticed defendant at a traffic light at Dempsey Road and State Route 3. A random check of defendant's license plate on the officer's in-car computer revealed the tag had expired. After double checking that he had entered the correct tag number into the computer, the officer activated his red and blue overhead lights and performed a traffic stop on the vehicle. Defendant pulled over in just a few seconds, and the officer informed him the tags had expired. Defendant acknowledged that fact and advised the officer he was trying to save money for his upcoming wedding.

{¶10} Once the window was down, the officer "immediately detected an obvious odor of alcoholic beverage emitting from the vehicle and noted that [defendant's] eyes were glassy and bloodshot." (Tr. 14-15.) The officer acknowledged during his testimony that he did not "feel comfortable saying strong, moderate or light" with respect to the odor of alcohol. (Tr. 15.) As he explained, "To me it's just obviously an odor of alcoholic

beverage, something I've come to detect and I find difficult to quantify," but "it's just an obvious odor, that's what it is, and it's obvious and apparent to me." (Tr. 15.)

{¶11} The officer testified defendant was polite, cooperative, and able to provide a driver's license. When the officer asked defendant if he had been drinking, defendant said he had consumed one Long Island Iced Tea. The officer testified a Long Island Iced Tea is a particularly strong alcoholic beverage made of several different "alcohols." (Tr. 16.) He described it as a more potent drink than some others and noted defendant was a slender male, not large by any means.

{¶12} The officer asked defendant from where he came, and defendant said he was coming from Cushions, a billiards bar in Blendon Township. The officer knew the drinks at the bar were half-price that night. He further knew that when drivers have "an obvious odor of alcoholic beverage, glassy and bloodshot eyes, folks tend to admit to having just one or two drinks. And it's been noted on more than one occasion, they have many more than that." (Tr. 19-20.) In the end, the officer decided to conduct field sobriety tests on defendant because defendant was coming from Cushions, drinks were half price that night, defendant admitted to consuming a strong drink, he had an odor of alcohol about his person, and his eyes were glassy and bloodshot.

{¶13} On cross-examination, the officer testified defendant was not driving erratically at the time the officer stopped him, did not have slurred speech, was not disheveled or inappropriate in appearance, pulled over almost immediately, and did not fumble with his license. The officer further admitted defendant's face was not flushed or red, and defendant was not disoriented, confused, overly emotional, loud, obnoxious, or aggressive but was polite, respectful, and friendly. Defendant had no trouble

concentrating before field sobriety tests were administered, did not use his car for support in getting out of it, did not have to hold onto the car to keep from swaying or falling over, and was not staggering or unsteady on his feet.

{¶14} Relying heavily on two cases from the Second District and one from the Seventh District, *State v. Dixon* (Dec. 1, 2000), 2d Dist. No. 2000-CA-30, *State v. Spillers* (Mar. 24, 2000), 2d Dist. No. 1504, and *State v. Derov,* 7th Dist. No. 07 MA 71, 2009-Ohio-5513, defendant contends that, on the facts produced at the hearing, the officer lacked reasonable suspicion to conduct field sobriety tests. Defendant's reliance on those cases is misplaced for several reasons.

{¶15} Initially, none of the cases emanates from this district and, although they are persuasive authority, they lack the precedential value of cases from this district. Moreover, the cases are factually distinguishable from defendant's circumstances. In *Derov,* the court addressed an early morning stop where the driver had a strong odor of alcoholic beverage and bloodshot, glassy eyes. Although the court concluded the officer lacked reasonable suspicion to administer field sobriety tests, the court based its conclusion in part on the lack of clarity in the trooper's testimony about whether Derov admitted, prior to the officer's administering field sobriety tests, that he consumed an alcoholic beverage.

{¶16} *Derov* relied on *Dixon,* which in turn relied on *Spillers*. *Spillers* involved a de minimus traffic violation where the driver had a slight odor of alcohol and admitted to having consumed one or two beers. The court concluded the evidence "was insufficient, by itself, to trigger reasonable suspicion of DUI, and *nominal* traffic violations, being common to virtually every driver, add nothing of significance." (Emphasis sic.) In *Dixon,*

the officer cited the driver for a tinted windows violation. The driver had a slight odor of alcohol, his eyes were glassy and bloodshot, and he admitted to consuming one or two beers. *Dixon* concluded the indicia were insufficient to create reasonable suspicion to administer field sobriety tests. Here, by contrast, the officer not only had the immediate and obvious odor of alcoholic beverage but knew the nature of the beverage to be a strong drink, knew drinks to be half price, and by experience knew an admission of drinking one drink was, on more than one occasion, an understatement of the amount of alcoholic beverage consumed.

{¶17} Perhaps more detrimental to defendant's reliance are subsequent decisions from the Second District that appear to reject defendant's interpretation of *Stillers* and *Dixon*. See *State v. Hido,* 2d Dist. No. 10CA0046, 2011-Ohio-2560, ¶10, citing *State v. Marshall,* 2d Dist. No. 2001-CA-35, 2001-Ohio-7081. In *State v. Santiago,* 2d Dist. No. 2010 CA 33, 2011-Ohio-5292, the court preliminarily pointed out that "[w]hether an officer has reasonable articulable suspicion to administer field sobriety tests is a 'very fact-intensive' determination." Id. at ¶13, quoting *State v. Wells,* 2d Dist. No. 20798, 2005-Ohio-5008, ¶9. As *Santiago* explained, a court determines "the existence of reasonable suspicion of criminal activity by evaluating the totality of the circumstances, considering those circumstances 'through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.' " Id., quoting *State v. Heard,* 2d Dist. No. 19323, 2003-Ohio-1047, ¶14, quoting *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88.

{¶18} Although *Santiago* acknowledged the decisions in *Spillers* and *Dixon,* it, like *Hido*, noted the Second District has held that "a strong odor of an alcoholic beverage, without other significant indicia of intoxication, may be sufficient to provide an officer with

reasonable suspicion of driving under the influence." Id. at ¶12. See also *Columbus v. Shepherd,* 10th Dist. No. 10AP-483, 2011-Ohio-3302, ¶38, appeal not allowed, 2011-Ohio-5883, citing *State v. Strope,* 5th Dist. No. 08 CA 50, 2009-Ohio-3849, ¶19, quoting *Wells* (stating that "where 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"); *Perkins* at ¶10 (noting the Second District's holding in *Dixon* and *Spillers* "hinged on the fact that the arresting officers noticed only a 'slight' odor of alcohol").

{¶19} As is true in the cases that distinguish S*pillers* and *Dixon,* the facts here are sufficient to provide reasonable suspicion to conduct field sobriety tests. Although the issue is less clear than it might otherwise be if the officer had characterized the odor of alcohol as either slight, moderate or strong, the officer nonetheless noted an obvious odor of alcohol, which the trial court concluded was more than slight, defendant's admission to drinking Long Island Iced Tea, not one or two beers, the officer knew drinks were half price that night, and defendant had glassy, bloodshot eyes, all giving the officer a reasonable, articulable suspicion to conduct field sobriety tests.

C. *Probable Cause to Arrest*

{¶20} In determining whether a police officer has probable cause to arrest a suspect for OVI, a court considers whether, at the moment of arrest, the officer had information within the officer's knowledge, or derived from a reasonably trustworthy source, of facts and circumstances sufficient to cause a prudent person to believe the suspect was driving under the influence of alcohol, drugs, or both. *State v. Homan* (2000), 89 Ohio St.3d 421, 427 (superseded by statute on other grounds); *Beck v. Ohio* (1964),

379 U.S. 89, 91, 85 S.Ct. 223, 225; *Perkins* at ¶26. In making this determination, the trial court examines the totality of facts and circumstances surrounding the arrest. *Homan.*

{¶21} The officer administered three field sobriety tests to defendant: the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand. The horizontal gaze nystagmus test rendered results of noticeable jerking on each eye on each of three phases of the test for a total of six out of six possible clues indicating impairment. In the walk-and-turn test, the officer noted defendant attempted to start the test before being instructed to do so, asked after nine steps whether he needed to walk backwards, a question "absolutely inconsistent with the instructions," and then turned improperly. (Tr. 30.) In doing so, defendant demonstrated on the walk-and-turn test three of eight clues indicating impairment. He exhibited no clues indicating impairment on the one-leg stand. Based on the results of the tests, the officer estimated defendant had an 80 percent chance of being over the legal limit in breath alcohol content and so arrested defendant. Given defendant's performance of the field sobriety tests, the state presented sufficient evidence to support probable cause to arrest defendant.

III. Disposition

{¶22} Because the officer had a reasonable, articulable suspicion to support asking defendant to perform field sobriety tests, and because defendant's performance on the tests gave the officer probable cause to arrest defendant, we overrule defendant's single assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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