

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-943
Jill D. Cromer,	:	(M.C. No. 2012 TR 119452)
Defendant-Appellee.	:	(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on September 19, 2013

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

The Koeffel Law Firm, and William H. Nesbitt, for appellee.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the State"), appeals from a decision of the Franklin County Municipal Court granting a motion to suppress evidence filed by defendant-appellee, Jill D. Cromer ("defendant").

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On March 3, 2012, Ohio State Highway Patrol Trooper, John Chaney, stopped defendant's vehicle after he observed her commit two lane violations. When Trooper Chaney approached the vehicle, he detected the odor of alcohol. He also noticed that defendant's eyes were blood shot and glassy, and that her speech was slurred. When Trooper Chaney asked to see defendant's driver's license, she handed him a transit card.

Defendant admitted to consuming two or three alcoholic drinks before getting behind the wheel.

{¶ 3} After defendant performed poorly on several field sobriety tests, Trooper Chaney placed her under arrest for operating a motor vehicle while intoxicated. Trooper Chaney transported defendant to the Delaware County Highway Patrol Post where she submitted to a Breath Alcohol Test ("BAT"). Trooper Chaney conducted the BAT using a device known as the BAC DataMaster. The results of the BAT revealed a breath alcohol level of .151 grams per 210 millimeters of breath, well over the .10 threshold for a violation of R.C. 4511.19(A)(1)(d). Defendant was charged with violations of both R.C. 4511.19(A)(1)(a) and (d).

{¶ 4} On May 23, 2012, defendant moved the trial court to suppress the test results on a number of grounds. Following an evidentiary hearing held on September 27, 2012, the trial court granted defendant's motion and suppressed the BAT results. The trial court decision reads in relevant part:

The government failed to show that Trooper Chaney was properly issued his operator's permit, specifically because it did not elicit testimony from Trooper Chaney that he had reviewed self-study materials provided to him by the Ohio Director of Health, or that he had completed an in-service course for the applicable type of breath testing instrument.

(Oct. 29, 2012 Entry and Order.)

{¶ 5} The State has appealed the decision of the trial court pursuant to Crim.R. 12(K) and App.R. 4(B)(4), and assigns the following as error:

The trial court erred when it suppressed the results of Appellee's breath alcohol test based on a finding that the trooper did not have a valid senior operator permit at the time he administered Appellee's test.

II. STANDARD OF REVIEW

{¶ 6} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Cordell*, 10th Dist. No. 12AP-42, 2013-Ohio-3009, ¶ 16. When considering a motion to suppress, the trial court assumes the role of trier of fact, and therefore is in the best position to resolve factual questions and evaluate the credibility of

witnesses. *State v. Castle*, 10th Dist. No. 12AP-369, 2012-Ohio-6028, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Then, the appellate court must independently determine whether the facts satisfy the applicable legal standard, pursuant to a de novo review, and without giving deference to the conclusion of the trial court. *Id.*

III. ANALYSIS

{¶ 7} In order to be entitled to a hearing on a motion to suppress evidence, a defendant "must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler*, 70 Ohio St.3d 54 (1994), syllabus. When a defendant challenges the results of a breath alcohol test by way of a motion to suppress, the State has the burden to show that the test was administered in substantial compliance with the Ohio Department of Health ("ODH") regulations. *Burnside* at ¶ 24; *State v. Plummer*, 22 Ohio St.3d 292, 294 (1986). This substantial compliance standard excuses errors that are clearly de minimis, errors which the Supreme Court of Ohio has characterized as " 'minor procedural deviations.' " *Burnside* at ¶ 34, quoting *State v. Homan*, 89 Ohio St.3d 421, 426 (2000).

{¶ 8} "The nature of the prosecution's burden to establish substantial compliance is determined by the degree of specificity with which the accused challenges the legality of the test." *Columbus v. Aleshire*, 187 Ohio App.3d 660, 674, 2010-Ohio-2773, ¶ 32 (10th Dist.), citing *Columbus v. Morrison*, 10th Dist. No. 08AP-311, 2008-Ohio-5257, ¶ 9. "When a motion to suppress raises only general claims, the burden imposed upon the city is general and slight." *Id.*, citing *Morrison* at ¶ 9. "If the motion to suppress is general, the prosecution is required to demonstrate, in general terms, only that it substantially complied with the regulations. Unless the accused raises a specific issue in his motion to suppress, specific evidence is not required." *Id.*, citing *Morrison* at ¶ 9.

{¶ 9} The State first contends that defendant's boilerplate motion to suppress asserts only a generalized claim regarding the validity of the senior operator permit issued to Trooper Chaney by ODH. We agree.

{¶ 10} Defendant's motion contains 22 enumerated grounds for suppression. Number 19 reads as follows:

The operator was not licensed to operate the machine analyzing the Defendant's alcohol level nor was supervised by a senior operator in accordance with OAC 3701-53-07. The person or persons calibrating the machine were not currently licensed to calibrate the instrument in accordance with OAC 3701-53-07.

(Emphasis added.)

{¶ 11} Defendant argues that the language cited above constitutes a specific challenge to Trooper Chaney's senior operator permit for the BAC DataMaster. However, given the myriad of "licensing" requirements contained in the relevant administrative code provisions, defendant's generic challenge to the validity of Trooper Chaney's permit is nothing more than a generalized claim of non-compliance. Indeed, the boilerplate language used by defendant does not provide the State with any notice of the specific aspect of the rules that Trooper Chaney allegedly failed to satisfy. Such an omission is particularly problematic given the fact that ODH did, in fact, renew Trooper Chaney's permit.

{¶ 12} The transcript of proceedings upon the motion to suppress reveals that, just prior to the testimonial portion of the hearing, the State was informed of the particular enumerated grounds for suppression that defendant intended to pursue. Of the 22 grounds alleged, defendant elected to proceed on 10. Defendant did not expressly state the specific nature of her challenge to the validity of Trooper Chaney's permit until the testimonial portion of the hearing had ended. Given the generalized nature of defendant's claim, we find that the State's burden to demonstrate substantial compliance with the Ohio Administrative Code was only general and slight. *See Aleshire*.

{¶ 13} Trooper Chaney testified briefly on direct examination regarding the training he received over the years in the operation of the BAC DataMaster. Trooper Chaney also testified that ODH renewed his senior operator permit for the one-year period beginning on August 26, 2011. A copy of Trooper Chaney's ODH certificate was admitted into evidence as exhibit No. 2.

{¶ 14} Based upon the ODH certificate and Trooper Chaney's testimony, we find that the State met its initial burden of showing substantial compliance with the relevant provisions of the Ohio Administrative Code. *See also State v. Ginn*, 2d Dist. No. 25325, 2013-Ohio-1692, ¶ 14, quoting *State v. Bissaillon*, 2d Dist. No. 06-CA-130, 2007-Ohio-2349, ¶ 15 (" 'when a motion to suppress fails to allege the fact-specific way in which a violation occurred, the State meets its burden by offering basic testimony from an officer responsible for complying with the ODH regulations.' ").

{¶ 15} Defendant next contends that, defense counsel elicited specific evidence upon cross-examination of Trooper Chaney that calls into question the validity of his senior operator permit, and that the existence of such evidence places a burden squarely upon the State to present specific evidence of substantial compliance. Although defendant's boilerplate motion to suppress did not have the affect of raising the State's burden of proof in this case, "the state's burden can also be raised through cross-examination." *State v. Dugan*, 12th Dist. No. CA2012-04-081, 2013-Ohio-447, ¶ 36.

{¶ 16} To properly determine the validity of Trooper Chaney's permit, the court must consider the regulations governing permits for individuals who perform alcohol breath tests. *See State v. Dumitrescu*, 10th Dist. No. 09AP-659, 2009-Ohio-6850, ¶ 10. To qualify for a senior operator's permit, the individual must be a certified law enforcement officer, a high school graduate, and the individual must have successfully completed a basic senior operator upgrade or conversion training course. Ohio Adm.Code 3701-53-07(D); *Id.* The director of health shall issue a permit to an individual who meets those initial qualifications and applies for a permit. Ohio Adm.Code 3701-53-09(B); *Id.*

{¶ 17} ODH regulations also require that an individual permit holder seek renewal each year. Ohio Adn.Code 3701-53-09. When an individual permit holder wishes to renew, such an individual is required to satisfy Ohio Adm.Code 3701-53-09(F), which provides, in relevant part:

To qualify for renewal of a permit under paragraph (A) or (B) of this rule:

(1) A permit holder shall present evidence satisfactory to the director that he or she continues to meet the qualifications established by the

applicable provisions of rule 3701-53-07 of the Administrative Code for issuance of the type of permit sought.

* * *

(3) If the individual seeking a renewal permit currently holds an operator or senior operator permit, the permit *holder shall have completed satisfactorily an in-service course for the applicable type of evidential breath testing instrument which meets the requirements of paragraph (B) of this rule, which includes review of self-study materials furnished by the director.*

(Emphasis added.)

{¶ 18} Defendant does not allege that Trooper Chaney has failed to satisfy the requirements of Ohio Adm.Code 3701-53-07. Rather, defendant argues that, in spite of the facially valid ODH permit, the State failed to show that Trooper Chaney substantially complied with Ohio Adm.Code 3701-53-09(F)(3). Specifically, that he reviewed ODH study materials and that he passed an in-service course.

{¶ 19} Trooper Steven Schemine testified that the pre-examination requirements for renewal include a review of both the BAC manual and the ODH study manual. According to Trooper Schemine, the ODH study manual contains the relevant provisions of the Ohio Administrative Code and Ohio Revised Code, and instructions on performing the test and checking the instrument. (Tr. 89.) Trooper Schemine related that the candidate must pass two separate examinations in order to be renewed: a written examination, and a hands-on proficiency test conducted by an ODH representative.

{¶ 20} Trooper Chaney's testimony upon cross-examination is as follows:

[Defense counsel:] Okay. And Trooper Chaney, you got this nice certificate that you are a senior operator. And this is effective August 26th, 2011, through August 26th, 2012. What did you do to get that?

[Trooper Chaney:] I went through the initial training.

[Defense counsel:] Okay.

[Trooper Chaney:] And I go and take a recertification test once a year. I also study on my own to make sure that I am able to pass those tests each time.

[Defense counsel:] Okay. What do you study? You said you study on your own.

[Trooper Chaney:] Study on my own the manuals, and I study just questions associated with the manuals.

[Defense counsel:] Okay. So you study the manuals of the BAC DataMaster?

[Trooper Chaney:] Correct.

[Defense counsel:] And because you're a senior operator, you know how to calibrate these machines?

[Trooper Chaney:] I do.

[Defense counsel:] So, basically, you have to reapply to get your certificate. Where did you go to do the exam?

[Trooper Chaney:] It varies. They hold exams across the state on, like, a weekly basis.

[Defense counsel:] Okay. And then before you go there, you bone up on the materials, the manual to the machine?

[Trooper Chaney:] The manual and study materials.

(Tr. 61-62.)

{¶ 21} Contrary to defendant's assertion, defendant's counsel never specifically asked Trooper Chaney whether he had reviewed the ODH self-study materials in connection with his 2011 permit renewal. Nor did counsel ever specifically ask Trooper Chaney whether he had taken and passed either an in-service course or an in-service test.

{¶ 22} Moreover, it is clear to this court that Trooper Chaney's use of the plural "manuals" means that he reviewed more than one publication during the renewal process. Indeed, it is reasonable to infer from Trooper Chaney's reference to "study materials" that he did, in fact, review the ODH self-study materials in the pre-examination process. No other "study materials" were referenced in the testimony. Similarly, while Trooper

Chaney was not specifically asked whether he took both a written examination and an in-service test during his latest renewal period, his testimony clearly refers to more than one test. The testimony of Trooper Schemine confirms that there is one written examination and one hands-on proficiency test in each renewal period. (Tr. 89.)

{¶ 23} "[M]erely asserting during cross-examination * * * the possibility * * * that a very specific aspect of the regulation was not followed, without a factual basis to support the assertion, will not increase the burden on the state." *State v. Embry*, 12th Dist. No. CA2003-11-110, 2004-Ohio-6324, ¶ 27. Although it is possible to infer from Trooper Chaney's cross-examination that he did not review the ODH study materials and that he did not take and pass an in-service course, the mere possibility of non-compliance does not elevate the State's burden of proof. Indeed, as noted above, it is reasonable to infer from the all of the testimony in the record, that Trooper Chaney did, in fact, satisfy all the requirements of Ohio Adm.Code 3701-53-09(F)(3).

{¶ 24} In short, defendant's cross-examination of Trooper Chaney did not have the effect of elevating the State's burden of proof in this case. Thus, the trial court erred when it required the State to present specific evidence that Trooper Chaney had reviewed ODH study materials and that he had taken and passed an in-service course. Additionally, given the fact that ODH issued a facially valid permit to Trooper Chaney, as evidenced by exhibit No. 2, and in light of the testimony of Troopers Chaney and Schemine, we conclude that the State satisfied its relatively slight burden of proving substantial compliance with the Ohio Administrative Code. It follows then that the trial court erred in granting defendant's motion to suppress the BAC results.

{¶ 25} Based upon the foregoing, the State's sole assignment of error is sustained.

{¶ 26} Furthermore, a finding of substantial compliance in the context of a motion to suppress is entitled to finality, which means that defendant may not challenge the admissibility of the test results on the same basis at trial. *State v. Syx*, 190 Ohio App.3d 845, 2010-Ohio-5880, ¶ 20 (2d Dist.), citing *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, paragraph one of the syllabus; *State v. French*, 72 Ohio St.3d 446 (1995).¹

¹ Evidentiary objections to the chemical test results based upon other grounds can still be raised at trial. See, e.g., *Syx*; *French*; and *Edwards*.

Upon remand from an appellate court, the trial court is to proceed from the point at which the error occurred, which means that no further proceedings upon the motion to suppress are required. *See Syx*.

IV. DISPOSITION

{¶ 27} Having sustained appellant's sole assignment of error, we reverse the judgment of the Franklin County Municipal Court and remand the case for further proceedings consistent with this decision.

*Judgment reversed;
cause remanded.*

BROWN and SADLER, JJ., concur.
