[Cite as *State v. Trevarthen*, 2011-Ohio-1013.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-046**
- vs -	:	
TODD A. TREVARTHEN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Painesville Municipal Court, Case No. TRC 1000314.

Judgment: Affirmed.

Joseph M. Gurley, Painesville City Law Director, 240 East Main Street, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Todd A. Trevarthen, appeals from the April 22, 2010 judgment entry of the Painesville Municipal Court, in which he was sentenced for operating a vehicle under the influence of alcohol ("OVI") and driving under suspension ("DUS").

{¶2} On January 25, 2010, a complaint was filed against appellant charging him with OVI, in violation of R.C. 4511.19(A)(1)(a); DUS, in violation of R.C. 4510.11; and operating a motor vehicle without a valid license, in violation of R.C. 4510.12. All

three charges are first-degree misdemeanors. Appellant entered a plea of not guilty at his initial appearance the following day.

{¶3} On March 19, 2010, appellant filed a motion to suppress. A hearing was held on March 30, 2010.

{¶4} At the suppression hearing, Trooper Kevin Harris, a six-year veteran with the Ohio State Highway Patrol, testified for appellee, the state of Ohio. He indicated that around midnight on January 23, 2010, he was parked in his patrol car at the Lake County Jail with an individual he had previously arrested for OVI and was waiting for someone to pick her up. Appellant dropped off the sister of the arrestee at the station and left to go to a nearby Burger King. In the meantime, the arrestee's sister approached Trooper Harris to inquire about the arrestee, who was sitting in the backseat of the patrol car. Trooper Harris testified that the arrestee's sister appeared to be intoxicated.

{¶5} Appellant returned to the station to drive the arrestee home. He pulled up and parked behind the cruiser. Trooper Harris exited his patrol car, walked to the truck, and asked appellant if he had a driver's license. Appellant responded in the negative. Trooper Harris stated that he smelled alcohol emanating from appellant. He asked appellant to exit his car and sit in the front seat of the patrol car. Trooper Harris also asked the arrestee's sister to sit in appellant's truck. A computer check revealed that appellant's driver's license was under suspension and that there were two active warrants for his arrest.

{¶6} Trooper Harris asked appellant to perform the Horizontal Gaze Nystagmus ("HGN") test, which revealed eight clues of intoxication. Trooper Harris indicated a lack

of smooth pursuit in both of appellant's eyes, onset of deviation at 45 degrees in both eyes, maximum deviation in both eyes, and vertical nystagmus in both eyes. Trooper Harris testified that appellant admitted to drinking a couple of beers that night, smelled of alcohol, had red and glassy eyes, and did poorly on the HGN test. Trooper Harris did not administer any other tests. Appellant was placed under arrest based upon the two outstanding warrants and for OVI and DUS.

{¶7} Following the hearing, the trial court denied appellant's motion to suppress.

{¶8} On April 22, 2010, appellant withdrew his former not guilty plea and pleaded no contest to OVI and DUS. Pursuant to its judgment entry, the trial court sentenced appellant to 33 days in jail with 30 days suspended. The remaining three days were ordered to be served either in jail or in a Driver's Intervention Program. The trial court suspended appellant's driver's license for six months, placed him on community control for six months, and ordered him to pay a fine in the amount of $600 plus costs. Appellant's sentence was stayed pending appeal. It is from that judgment that appellant filed a timely appeal, asserting the following assignment of error for our review:

{¶9} "The trial court erred when it overruled the defendant-appellant's motion to suppress in violation of the defendant-appellant's right to be free from unreasonable search and seizure as guaranteed by the Fourth, Fifth, and Fourteenth Amendments of the United States [Constitution] and Article I, Sections 10 and 14 of the Ohio [Constitution]."

{¶10} In his sole assignment of error, appellant argues that the trial court erred by overruling his motion to suppress. Appellant alleges that Trooper Harris did not have reasonable suspicion or probable cause to believe that he was driving under the influence of alcohol; the seizure of his person to do field sobriety testing was unlawful; the HGN test was flawed; and any evidence obtained should have been suppressed.

{¶11} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶12} Under the Fourth Amendment, searches and seizures conducted without a warrant based on probable cause are unreasonable unless the search falls within an exception to this requirement. *Katz v. United States* (1967), 389 U.S. 347, 357. There are three general categories in which encounters between citizens and police officers are classified. The first is a consensual encounter; the second is a brief investigatory stop pursuant to *Terry v. Ohio* (1968), 392 U.S. 1; and the third is formal arrest. *State v. Long* (1998), 127 Ohio App.3d 328, 333. Each category requires a heightened level of evidence to be valid under the Fourth Amendment.

{¶13} "It is well-settled that '(a)n encounter may be consensual when a police officer approaches and questions individuals in or near a parked car." *State v. Ball*, 11th Dist. No. 2009-T-0013, 2010-Ohio-714, at ¶12, quoting *State v. Staten*, 4th Dist.

No. 03CA1, 2003-Ohio-4592, at ¶18. (Citations omitted.) Police may also request identification under the purview of a consensual encounter. *State v. Kock*, 11th Dist. No. 2008-L-067, 2008-Ohio-5859, at ¶17, citing *Florida v. Bostick* (1991), 501 U.S. 429, 434.

{¶14} "Further, '(w)hen a police officer merely approaches a person seated in a parked car, no "seizure" of the person occurs so as to require reasonable suspicion supported by specific and articulable facts.'" *Ball*, supra, at ¶14, quoting *State v. Woodgeard*, 1st Dist. No. 01CA50, 2002-Ohio-3936, at ¶34. (Citation omitted.) "A consensual encounter is not a seizure, therefore no Fourth Amendment rights are invoked." Id., quoting *Bostick*, supra, at 434.

{¶15} A request that a driver perform field sobriety tests "must be separately justified by specific, articulable facts showing a reasonable basis for the request." *State v. Evans* (1998), 127 Ohio App.3d 56, 62, citing *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361. Whether a request to perform field sobriety tests was reasonable is to be considered under the totality of the circumstances. Id. at 63.

{¶16} In *Evans*, this court set forth a non-exclusive list of factors to be considered when determining whether a police officer has a reasonable suspicion of intoxication justifying the administration of field sobriety tests. That list, with no one factor being dispositive, consists of the following:

{¶17} "(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. All 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." Id. at fn. 2.

{¶18} In *State v. Brickman* (June 8, 2001), 11th Dist. No. 2000-P-0058, 2001 Ohio App. LEXIS 2575, this court noted that "[c]ourts generally approve an officer's decision to conduct field sobriety tests when the officer's decision was based on a number of factors [set forth in *Evans*, supra]." *Brickman* at *8, citing *Evans*, supra, at 63. We note, however, that "the totality of the circumstances can support a finding of probable cause to arrest, even where no field sobriety tests were administered." *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, at ¶29, citing *State v. Homan*, 89 Ohio St.3d 421.

{¶19} In the case at bar, the record establishes that appellant was not "stopped" by Trooper Harris. Rather, appellant voluntarily parked his truck behind Trooper Harris'

police cruiser in order to pick up his friend from the station. Trooper Harris approached appellant's vehicle and engaged him in conversation to confirm that he was going to drive the arrestee home and to determine if appellant was in fact a licensed driver. Such a situation amounted to a "consensual encounter" between appellant and Trooper Harris. Again, Trooper Harris asked to see appellant's driver's license. Appellant replied that he did not have it. At that time, Trooper Harris had a reasonable suspicion to conduct a further inquiry regarding the status of appellant's driver's license in order to be assured that he was releasing the arrestee for transport to a properly licensed driver. It was reasonable, based on the fact that the trooper had to be concerned with the arrestee in his car and her apparently intoxicated sister, to ask appellant to step in to his patrol car while he checked the status of appellant's driving privileges. A computer check revealed that appellant's driver's license was under suspension and that there were two active warrants for his arrest. That information provided Trooper Harris with probable cause to arrest appellant.

{¶20} However, Trooper Harris also testified that he smelled an odor of alcohol emanating from appellant. Trooper Harris stated that appellant had red and glassy eyes and admitted to drinking a couple of beers that night, which was a Saturday around midnight. The foregoing factors prompted Trooper Harris to conduct a further investigation to determine if appellant was under the influence. Trooper Harris asked appellant to perform the HGN test, which revealed eight clues of intoxication. Trooper Harris stated that appellant did poorly on that test. Appellant was then placed under arrest based upon the two outstanding warrants and for OVI and DUS.

{¶21} Appellant alleges that the HGN test was not administered in substantial compliance with standardized testing procedures. However, in his motion to suppress, appellant did not allege any deficiency in the administration of the test nor did he allege there was a lack of probable cause to arrest appellant. As a result, the state was not obligated to present testimony at the suppression hearing regarding those contentions, and they will not be considered on appeal. See *State v. Price*, 11th Dist. No. 2007-G-2785, 2008-Ohio-1134, at ¶22, citing *State v. Shindler* (1994), 70 Ohio St.3d 54, 58. The sole issue at the suppression hearing was whether, based on all the facts and circumstances, it was appropriate to request appellant to perform field sobriety tests. As we have stated, several *Evans* factors existed, which together with Trooper Harris' previous experience in dealing with drunken drivers, lead us to conclude that the trial court did not err by denying appellant's motion to suppress.

{¶22} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Painesville Municipal Court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.