[Cite as *State v. Wiesenbach*, 2011-Ohio-402.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2010-P-0029
- vs -	:	
CHRISTOPHER A. WIESENBACH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2009 TRC 14859R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Mordechai Osina*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Carol J. Crimi, Student Legal Services, Inc., Kent State University, 164 East Main Street, #203, Kent, OH 44240 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Christopher Wiesenbach, appeals the Judgment Entry of the Portage County Municipal Court, Ravenna Division, in which the trial court denied Wiesenbach's Motion to Suppress. For the following reasons, we affirm the decision of the trial court.

{¶2} On November 7, 2009, around 12:45 a.m., Trooper Jonathan Ganley, of the Ohio State Highway Patrol, Ravenna Post, observed Wiesenbach driving a vehicle

with no front license plate on State Route 82 in Mantua Township. Based upon this observation, Ganley conducted a traffic stop of Wiesenbach's vehicle.

{¶3} Upon approaching Wiesenbach's car and after carrying on a discussion with Wiesenbach, Ganley discovered that Wiesenbach had his front license plate inside of the car but had not properly displayed it on the front of the vehicle. While speaking with Wiesenbach, Ganley noticed that there was an odor of alcohol coming from Wiesenbach's vehicle. Ganley also observed that Wiesenbach's eyes were "slightly red and glassy." Ganley asked Wiesenbach if he had been drinking alcohol, to which Wiesenbach responded that he had an alcoholic beverage a few hours prior to the traffic stop.

{¶4} Ganley asked Wiesenbach to exit his vehicle and sit in the front passenger seat of the police cruiser. Ganley did so to separate Wiesenbach from his vehicle in order to "pinpoint the odor or the source of the odor of the alcoholic beverage," and also to run a license status check. Once in the cruiser, Ganley could "pinpoint [the odor as] coming directly from Mr. Wiesenbach." Ganley also performed a "preliminary" horizontal gaze nystagmus (HGN) test while still inside of the cruiser. This was a "twenty second or so" test consisting of the first part of the full HGN test. Ganley testified that he immediately detected the two initial clues of intoxication during this test.

{¶5} Ganley then asked Wiesenbach to exit the cruiser to perform three standard field sobriety tests. Wiesenbach first performed the HGN test. Ganley found that Wiesenbach displayed four out of six possible indicators of intoxication while performing this test. Ganley then administered the one-legged stand test. Ganley found two indicators on this test; Wiesenbach put his foot down on the ground during

the test and also swayed while he was balancing. Ganley finally administered the walk-and-turn test. During this test, Ganley found two indicators; Wiesenbach separated his feet during the instructional period and came off of the line while performing the turn. Wiesenbach failed all three sobriety tests and was placed under arrest for Operating a Vehicle While Intoxicated (OVI).

{¶6} At the suppression hearing, Ganley testified that there was a "slight uphill grade" to the road surface on which the field tests were administered. Additionally, the surface of the road was not smooth. Ganley testified that he chose the "most reasonably level surface area of the road" on which to perform the tests. He also stated that he believed the test conditions were reasonable under the National Highway Transportation Safety Administration (NHTSA) standards and that he was able to successfully demonstrate the tests to Wiesenbach without difficulty.

{¶7} Ganley also stated that during the one-legged stand test, Ganley asked Wiesenbach if he had any medical conditions with his knees, ankles, legs, or back. Wiesenbach informed Ganley he had a knee injury that occurred about eight years before, during high school. However, Ganley testified that Wiesenbach was able to move and "had an excellent range of mobility." Ganley did not feel that the past knee injury affected Wiesenbach's performance on the tests.

{¶8} Wiesenbach was subsequently charged with Operating a Vehicle While Intoxicated, in violation of R.C. 4511.19(A)(1) and R.C. 4511.19(A)(1)(d). He was also charged with Failure to Display a Front Plate, in violation of R.C. 4503.21. The original complaint was later amended to include that this was Wiesenbach's second OVI offense.

{¶9} Wiesenbach filed a Motion to Suppress, contending, among other arguments, that there was no reasonable cause to stop or detain him, that there was no probable cause to conduct an arrest for OVI, and that the field sobriety tests were not administered properly.

{¶10} After a hearing on the motion, held on February 16, 2010, the court found that, based upon the odor of alcohol, the bloodshot, glassy eyes, the time of night, and Wiesenbach's statements about drinking alcohol earlier, Ganley had "probable cause to ask [Wiesenbach] to take the field sobriety tests." Additionally, the court held that Ganley administered the sobriety tests in substantial compliance with NHTSA standards and thus there was probable cause to arrest Wiesenbach for OVI. The court overruled Wiesenbach's motion and set the matter for trial.

{¶11} On April 6, 2010, Wiesenbach entered a plea of no contest, and the court found him guilty of OVI. Wiesenbach was sentenced to 180 days in jail, 170 days suspended, a fine of $1,625, $1,000 suspended, and 24 hours of community service. The jail time was to be suspended on the condition that Wiesenbach complete 12 months of supervised probation, complete community service, have no related offenses for two years, and not drive during the period of his license suspension, which is to last for one year.

{¶12} Wiesenbach timely appeals and raises the following assignment of error:

{¶13} "The trial court erred in overruling appellant's motion to suppress."

{¶14} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Ferry*, 11th Dist. No. 2007-L-217, 2008-Ohio-2616, at ¶11 (citations omitted). "[T]he trial court is best

able to decide facts and evaluate the credibility of witnesses. Its findings of fact are to be accepted if they are supported by competent, credible evidence." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at ¶41. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." *Ferry*, 2008-Ohio-2616, at ¶11 (citations omitted); *Mayl*, 2005-Ohio-4629, at ¶41 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

{¶15} Wiesenbach first argues that Ganley did not have sufficient reasonable suspicion that Wiesenbach was impaired to detain him for a full OVI investigation. Wiesenbach also asserts that under *State v. Evans* (1998), 127 Ohio App.3d 56, he should not have been detained for a full OVI investigation because his case does not involve many of the factors to be considered to determine whether reasonable suspicion existed, listed in *Evans*.

{¶16} The state argues that Wiesenbach's red and glassy eyes, the odor of alcohol, the time of night of the stop, and his admission that he had been drinking alcohol provided reasonable suspicion for a full OVI investigation.

{¶17} "Probable cause is not needed before an officer conducts field sobriety tests. Reasonable suspicion of criminal activity is all that is required to support further investigation." *Columbus v. Anderson* (1991), 74 Ohio App.3d 768, 770, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 178; *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, at ¶20 (reasonable suspicion was necessary to detain appellant further after the initial stop to conduct field sobriety tests).

{¶18} In *Evans*, this court set forth a non-exclusive list of factors to be considered when determining whether reasonable suspicion exists to conduct field sobriety tests. This list includes the following factors:

{¶19} "(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." *Evans*, 127 Ohio App.3d at 63, fn. 2.

{¶20} "This court has held that '[o]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches

and seizures[;] *** it is proper for an officer to order a driver to exit a lawfully stopped vehicle, even if there was no reasonable suspicion of criminal activity.'" *State v. Wojewodka*, 11th Dist. No. 2009-P-0029, 2010-Ohio-973, at ¶14, citing *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶¶17-18, quoting *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111. "[T]he order to step out of the vehicle is not a stop separate and distinct from the original traffic stop." *State v. Evans*, 67 Ohio St.3d 405, 408, 1993-Ohio-186. "'Unlike an investigatory stop, where the police officer involved 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion,' *Terry* [*v. Ohio* (1968), 392 U.S. 1,] 21, a *Mimms* order does not have to be justified by any constitutional quantum of suspicion.'" *Lett*, 2009-Ohio-2796, at ¶20, citing *Evans*, 67 Ohio St.3d at 408.

{¶21} It was proper for Ganley to ask Wiesenbach to exit his car in order for Ganley to determine whether the smell of alcohol was coming from Wiesenbach and to perform a license check. While performing the license check, Ganley also conducted a preliminary HGN, during which Wiesenbach exhibited two clues of intoxication, prompting Ganley to conduct the three standard field sobriety tests. However, Wiesenbach asserts that Ganley had no justification for performing the field sobriety tests after Wiesenbach exited his vehicle.

{¶22} "A reviewing court must examine the totality of the circumstances surrounding the stop as 'viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.'" *State v. Tournoux*, 11th Dist. No. 2009-P-0065, 2010-Ohio-2154, at ¶15**,** citing *State v. Andrews* (1991), 57 Ohio

St.3d 86, 87-88. "The court reviewing the officer's actions must give due deference to the officer's experience and training." *State v. Teter*, 11th Dist. No. 99-A-0073, 2000 Ohio App. LEXIS 4656, at *8 (citations omitted).

{¶23} While the *Evans* factors are relevant, not all must be present for an officer to have reasonable suspicion. We must look at the totality of the circumstances through the eyes of Ganley, giving due deference to his training and experience, to determine whether reasonable suspicion existed for Ganley to conduct field sobriety tests. In this case, at least four of the *Evans* factors were met. Wiesenbach was stopped at 12:45 a.m., early on a Saturday morning, driving home from band practice. He smelled of alcohol, had bloodshot and glassy eyes, and admitted that he had been drinking a few hours prior to the traffic stop. These factors, along with the officer's experience, gave reasonable suspicion that further investigation should be done to determine whether Wiesenbach should be arrested for OVI.

{¶24} "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." *State v. Strope*, 5th Dist. No. 08 CA 50, 2009-Ohio-3849, at ¶19; *State v. Gregg*, 6th Dist. No. H-06-030, 2007-Ohio-4611, at ¶19. See *State v. Mapes*, 6th Dist. No. F-04-031, 2005-Ohio-3359, at ¶42 (finding reasonable suspicion to conduct sobriety tests when the officer "noticed an odor of alcohol in the vehicle as well as appellant's glassy and bloodshot eyes *** [and] appellant's speech was 'somewhat slurred'"). In this case, a valid stop for a license plate violation occurred and the odor of alcohol was combined with glassy, bloodshot eyes, and an admission of consuming alcohol. Although there was no slurred

speech in this case, Wiesenbach's admission of drinking alcohol, along with the other factors, provided Ganley reasonable suspicion to conduct further investigation.

{¶25} Wiesenbach next asserts that the state "failed to meet its burden of proving that the field sobriety tests were administered in substantial compliance with the testing regulations" set forth by the NHTSA, as required by R.C. 4511.19(D)(4)(b). Wiesenbach asserts that the tests were performed improperly because the road had an uphill grade and because Wiesenbach had a knee injury that affected his performance.

{¶26} The state argues that it "met its burden of demonstrating both the administering officer's training and ability to administer the challenged field sobriety test[s] and the actual technique used by the officer in administering the challenged test[s]."

{¶27} "In determining whether the police had probable cause to arrest an individual for OVI, we consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *State v. McNulty*, 11th Dist. No. 2008-L-097, 2009-Ohio-1830, at ¶19, citing *Beck v. Ohio* (1964), 379 U.S. 89, 91; *State v. Timson* (1974), 38 Ohio St.2d 122, 127. "[P]robable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's *** performance on one or more of these [field sobriety] tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where *** the test results must be excluded." *McNulty*, 2009-Ohio-1830, at ¶20 (citation omitted). See *State v. Perkins*, 10th Dist. No. 07AP-924, 2008-Ohio-5060, at ¶29

("[B]ased on the totality of the circumstances, the facts within the knowledge of the arresting officer were sufficient to cause a prudent person to believe that defendant was driving under the influence of alcohol and thereby sufficient to establish probable cause for the arrest" when, although the defendant was polite and cooperative, there was no sign of bad driving or slurred speech, and he produced his license without trouble, the defendant had a strong odor of alcohol, glassy and bloodshot eyes, and he failed only one field sobriety test.)

{¶28} While the law allows an arrest for OVI to be conducted even in the absence of properly obtained field sobriety test results, Ganley complied with the NHTSA standards. It is not disputed by Wiesenbach that Ganley complied with the NHTSA guidelines for the administration of the HGN test, which Wiesenbach failed. Additionally, Ganley testified, and the trial court concluded, that he used a reasonably level, dry, and hard surface for the one-legged stand and walk-and-turn tests, as is required by the NHTSA guidelines. Ganley chose the most suitable and most level surface possible to conduct these tests and was able to successfully demonstrate the tests to Wiesenbach without difficulty, signifying that the surface of the road was reasonable for performing these tests. Further, Ganley testified that Wiesenbach's prior knee injury did not appear to affect the results of these tests.

{¶29} "Regardless of a challenge to field sobriety tests, a police officer may testify regarding his observations made during administration of the tests," which can support a finding of probable cause to conduct an arrest. *State v. Griffin*, 12th Dist. No. CA2005-05-118, 2006-Ohio-2399, at ¶11, citing *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, at ¶¶14-15.

{¶30} Even if the one-legged stand and walk-and-turn tests were not administered according to NHTSA guidelines, probable cause to conduct an arrest still existed. The HGN test results, the validity of which Wiesenbach does not challenge, along with Ganley's observations of unsteadiness and inability to follow instructions during the walk-and-turn and one-legged stand test, Wiesenbach's glassy and red eyes, admission of drinking alcohol, the odor of alcohol, and the time of the stop, provided sufficient probable cause to arrest Wiesenbach for OVI.

{¶31} Based on Ganley's testimony, we find that the totality of facts and circumstances supported a finding of probable cause to arrest Wiesenbach for OVI.

{¶32} Wiesenbach's sole assignment of error is without merit.

{¶33} For the foregoing reasons, the Judgment Entry of the Portage County Municipal Court, Ravenna Division, denying Wiesenbach's Motion to Suppress, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.