[Cite as *State v. Trimble*, 2011-Ohio-4473.]

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-0078**
- vs -	:	
JUSTIN J. TRIMBLE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Municipal Court, Ravenna Division, Case No. 2009 TRC 14716R.

Judgment: Affirmed.

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

J. Chris Sestak, Student Legal Services, Inc., Kent State University, 164 East Main Street, Suite 203, Kent, OH 44240 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Justin J. Trimble, appeals the judgment of the Portage County Municipal Court, Ravenna Division, denying his motion to suppress and his subsequent conviction for operating a vehicle under the influence of alcohol ("OVI"), a violation of R.C. 4511.19(A)(1)(a). For the following reasons, we affirm the judgment of the trial court.

{¶2} On November 9, 2009, appellant was arraigned on OVI charges. He subsequently filed a motion to suppress. At the suppression hearing, State Highway Patrol Trooper Lamm testified for appellee, the state of Ohio. Trooper Lamm testified that on November 6, 2009, he arrested an individual for OVI. This individual was taken to the Brimfield Township Police Station for processing. He then allowed the arrestee to call for a ride home. The arrestee notified him when his ride had arrived at the station. Trooper Lamm then walked out of the station and into the parking lot to ensure that the arrestee was being released to an individual possessing a valid driver's license. Trooper Lamm approached the vehicle, which was being driven by appellant. Appellant rolled down the window, and Trooper Lamm testified that he detected a strong odor of alcohol emanating from inside the vehicle, as well as glazed eyes and slightly slurred speech. Trooper Lamm then asked appellant if he had been drinking and if he had driven to the police station. Appellant answered that he had not been drinking and that he had driven to the station.

{¶3} Trooper Lamm asked appellant to step out of his vehicle and come into the Brimfield Township Police Station. Appellant complied. Once inside the station, Trooper Lamm continued to detect the smell of alcohol and noticed slurred speech. Appellant performed the following sobriety tests: the horizontal gaze nystagmus ("HGN") test, the walk-and-turn test, and the one-leg stand test. Appellant scored six points on the HGN test, performed poorly on the walk-and-turn test, and passed the one-leg stand test. Appellant also admitted to drinking one "SPARKS" beverage, a caffeinated alcoholic drink. Trooper Lamm arrested appellant for OVI and *Mirandized* him.

{¶4} After the hearing, the trial court overruled appellant's motion to suppress. Appellant pled no contest to a violation of R.C. 4511.19, operating a motor vehicle under the influence of alcohol. Appellant was sentenced to the following: 180 days in jail, of which 177 were suspended; a $1,075 fine, of which $650 was suspended; and a six-month license suspension.

{¶5} Appellant filed a timely notice of appeal raising the following assignment of error:

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

{¶7} Under this assigned error, appellant presents three issues for our review; we will consider his first two issues in a consolidated fashion. First, appellant argues that the trial court erred in overruling his motion to suppress because he was under arrest from the moment he was escorted into the station and, at that time, there was not probable cause to arrest him. Second, appellant maintains that because the field sobriety tests were not administered until after he was under arrest, the tests are inadmissible.

{¶8} "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 is bound to accept the trial court's factual findings, given they are supported by sound evidence. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19. Thereafter, the appellate court applies the law, de novo, to the facts discovered by the trial court to independently determine whether the facts meet the appropriate legal standard. *Ornelas v. U.S.* (1996), 517 U.S. 690, 696.

{¶9} Under the Fourth Amendment, searches conducted without warrants are generally unconstitutional, not withstanding facts showing probable cause. *Katz v. United States* (1967), 389 U.S. 347, 357, citing *Agnello v. United States* (1925), 269 U.S. 20, 33. To determine if reasonable suspicion exists, the court considers the totality of the circumstances. *United States v. Cortez* (1981), 449 U.S. 411, 417. The state has the burden of presenting an "articulable and reasonable suspicion" of criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21.

{¶10} Encounters between police and citizens can generally be classified into one of three categories: consensual encounter, brief investigatory stop, and formal arrest. Each category requires a heightened evidentiary standard. Consensual encounter, the first level, requires the lowest evidentiary standard. *State v. Trevarthen*, 11th Dist. No. 2010-L-046, 2011-Ohio-1013, at ¶12. When an officer approaches an individual in or near a parked car, the encounter is considered consensual. *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.

{¶11} Because a request that an individual perform field sobriety tests is a greater invasion of one's liberty interests, these tests must be separately justifiable by specific, articulable facts, which show a reasonable basis for the request. *State v. Evans* (1998), 127 Ohio App.3d 56, 62. (Citation omitted.) Reasonableness is shown by considering the circumstances in whole. Id. at 61.

{¶12} In *Evans*, this court outlined a non-exclusive list of factors to consider in order to determine whether a police officer has reasonable suspicion to justify

administering field sobriety tests. The factors to be considered include, but are not limited to, the following:

{¶13} "(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 of 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. No single factor is determinative." *State v. Evans*, 127 Ohio App.3d at 63, fn. 2.

{¶14} Courts generally defer to the law enforcement officer's judgment in deciding to conduct field sobriety tests when the officer's decision was based on a number of factors. Id.

{¶15} In this case, the record demonstrates that Trooper Lamm's decision to administer field sobriety tests was based on several factors, including: the time and day of the stop; the condition of appellant's eyes; the odor of alcohol coming from appellant's vehicle; and appellant's impaired speech.

{¶16} Trooper Lamm testified that he approached appellant's vehicle to determine if he was a licensed driver. When an officer approaches an individual in a parked car, the encounter is consensual. *State v. Ball*, 2009-T-0013, 2010-Ohio-714, at ¶12, quoting *State v. Staten*, 2003-Ohio-4592, at ¶18. Trooper Lamm had an affirmative duty to ensure that the arrestee in his custody was released to a licensed driver. As testified to by Trooper Lamm, it is protocol of the Ohio State Highway Patrol to release arrestees only to licensed, non-inebriated drivers. However, when Trooper Lamm approached appellant's vehicle, he smelled a strong odor of alcohol coming from inside the car. Trooper Lamm also testified that he noticed slurred speech and glazed eyes. This, coupled with the time and day of the occurrence, provided the specific, articulable facts necessary to provide a reasonable basis for asking appellant to submit to field sobriety tests.

{¶17} In his third argument, appellant contends the arrest was unconstitutional because Trooper Lamm did not have probable cause to arrest him before he entered the Brimfield Police Station. However, Trooper Lamm testified that appellant was not arrested until after he performed three field sobriety tests inside the police station. Trooper Lamm had a reasonable suspicion to ask appellant to undergo field sobriety tests once he noticed the smell of alcohol, glazed eyes, and slurred speech at appellant's vehicle. It was not until Trooper Lamm had administered a series of field

sobriety tests and completed his investigation that appellant was arrested. For this reason, we do not agree that appellant was under arrest upon being brought into the police station.

{¶18} The decision reached in this case is consistent with this court's earlier decisions in *Phipps*, *Trevarthen*, and *Hurtek*. In *Phipps*, this court held it is not necessary that an officer have reasonable suspicion to approach a parked car. *State v. Phipps*, 11th Dist. No. 2006-P-0098, 2007-Ohio-3842, at ¶20-21. Like *Phipps*, Trooper Lamm approached the vehicle only to ensure appellant was a licensed driver and that the arrestee in his custody was being released according to Ohio State Highway Patrol policy.

{¶19} Similarly, in *Hurtuk*, the appellant drove to the Ohio State Patrol Post to pick up a friend arrested for OVI. *State v. Hurtuk*, 11th Dist. Nos. 2008-P-0077 & 2008-P-0096, 2009-Ohio-1004, at ¶4. The officer in that case noticed slightly stuttered speech, glazed eyes, and a smell of alcohol when he approached the vehicle. Id. This court held that the officer's conduct in asking the appellant to undergo field sobriety tests did not require special justification following the officer's observations. Id. at ¶14. In the instant matter, Trooper Lamm's conduct is also not suspect.

{¶20} Most recently, in *Trevarthen*, this court held that a consensual encounter occurs when a trooper approaches a vehicle to determine whether the driver is licensed. *State v. Trevarthen*, 11th Dist. No. 2010-L-046, 2011-Ohio-1013, at ¶19. In *Trevarthen*, the appellant was arrested for OVI after an Ohio State Highway Patrol trooper approached him in the parking lot of the Lake County Jail. The appellant was at the station to pick up an arrestee being released following his own OVI arrest. Id. The

appellant in *Trevarthen* was then asked to leave his vehicle after the trooper noticed red and glassy eyes, the smell of alcohol emanating from the vehicle, and after an admission by the appellant of drinking a couple beers that night. The trooper in *Trevarthen* had the duty to conduct further investigation after noting the foregoing factors. Id. at ¶20.

{¶21} Comparable to the facts in *Phipps*, *Trevarthen,* and *Hurtek*, Trooper Lamm approached appellant's parked vehicle to confirm that the arrestee in custody was being released to a licensed driver. Appellant's glazed eyes, slurred speech, and the smell of alcohol gave Trooper Lamm the specific, articulable facts necessary to further investigate whether he was in violation of R.C. 4511.19, operating a vehicle under the influence of alcohol.

{¶22} Appellant argues that once he was escorted into the Brimfield Police Station, he was under arrest. Appellant contends that he was deprived of his liberty beyond a mere investigatory stop, urging this court to find these facts analogous to those in *Hayes v. Florida* (1985), 470 U.S. 811. In *Hayes*, police were investigating a series of burglary-rapes occurring in Punta Gorda, Florida. With very little specific evidence tying Hayes to the crimes, police interviewed him and 30 to 40 other men. Id. at 812. Without a warrant, the police revisited Hayes' home and told him to accompany them to the police station to obtain his fingerprints or he would be arrested. Id. Hayes was later convicted for burglary and rape. Id.

{¶23} In *Hayes*, the Supreme Court of the United States reversed the state's conviction, stating: "*** [t]he line is crossed when the police, without probable cause or a

warrant, *forcibly remove* a person from his home or other place where he is entitled to be and transport him to the police station." (Emphasis added.) Id. at 816.

{¶24} Appellant also cites to *Dunaway v. New York* (1979), 442 U.S. 200. Similarly, the court in *Dunaway* found the defendant was involuntarily seized. Id. at 212.

{¶25} In this case, appellant was not involuntarily removed from his home nor was he transported to the police station. Rather, appellant transported himself to the police station in order to pick up his friend. Trooper Lamm testified that he returned to the inside of the police station to process appellant's driver's license. Trooper Lamm testified that appellant's minimal transportation was necessary to verify appellant's license; it was not an intrusion into his Fourth Amendment rights to undergo field sobriety tests inside the station as opposed to the station's parking lot.

{¶26} Appellant's assignment of error is without merit.

{¶27} For the foregoing reasons, the decision of the Portage County Municipal Court, Ravenna Division, is affirmed.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.