[Cite as *State v. Hale,* 2015-Ohio-5533.]

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. 2015-L-076**
- vs -	:	
ANDREW M. HALE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 14 TRC 08447.

Judgment: Affirmed.

Richard J. Perez, City of Willoughby Prosecutor, City of Willoughby, One Public Square, Willoughby, OH 44094 (For Plaintiff-Appellee).

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

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Andrew M. Hale, appeals from the Judgment Entry of the Willoughby Municipal Court, denying, in part, his Motion to Suppress. The issue before this court is whether there is probable cause to arrest an individual for Operating a Vehicle While Under the Influence (OVI) when he left the scene of an accident, then became stuck in mud on the side of the road, and a police officer observed that he had

glassy, sleepy eyes, the odor of alcohol on his person, and exhibited confusion. For the following reasons, we affirm the decision of the court below.

{¶2} On December 3, 2014, Hale was issued a Traffic Citation, charging him with two counts of OVI, in violation of R.C. 4511.19(A)(1)(a) and (A)(2)(a) & (b); Failure to Drive within Marked Lanes, in violation of Willoughby Codified Ordinance (W.C.O.) 432.08(a)(1); and Failure to Wear a Seat Belt, in violation of W.C.O. 438.27(b)(1).

{¶3} Hale filed a Motion to Suppress on March 6, 2015, arguing that there was no reasonable articulable suspicion to believe he was driving under the influence to detain him for field sobriety tests and no probable cause for his arrest. He also asserted that the field sobriety tests were not performed in accordance with guidelines.

{¶4} On April 16, 2015, a hearing was held on the Motion to Suppress.

{¶5} The sole witness was Willoughby Police Department Patrolman Paul Sciarrino. According to Sciarrino's testimony, on the night of December 3, 2014, he was on patrol and approached the scene of an accident. A witness reported that a party had left the scene, headed westbound on Mentor Avenue. Dispatch informed Sciarrino that a witness to the accident was following a blue Ford Ranger to an address on Kirtland Road. Sciarrino drove to that area, which was half a mile to a mile from the accident, and located the vehicle. He observed it off on the right side of the roadway at a 45 degree angle, stuck in the mud.

{¶6} Hale was the only occupant and operator of the Ranger. Upon Sciarrino's initial observation of Hale, he had glassy, sleepy eyes and an odor of alcohol on his person. He also seemed confused, when walking he was "unsure of himself," and was "clearly intoxicated." After approaching Hale, Sciarrino ordered him out of the car and

handcuffed him. Hale was not under arrest at that time, but was detained and placed in the cruiser while Sciarrino inspected his vehicle. Sciarrino noticed that the Ranger had damage, which he believed had occurred in the accident. He also saw empty beer cans in the bed of the truck.

{¶7} Based on his observations, Sciarrino requested that Hale perform sobriety tests. A horizontal gaze nystagmus (HGN) test was performed and was indicative of a high level of alcohol. Hale then refused to take any further tests. Sciarrino explained on cross-examination that he did not arrest Hale prior to his refusal to do additional tests because he "needed more probable cause to arrest him."

{¶8} On April 20, 2015, the trial court issued a Judgment Entry on the Motion to Suppress, making factual findings consistent with the testimony outlined above. The court denied the Motion as to the issues of reasonable suspicion to detain and probable cause to arrest, based on Hale fleeing the scene of an accident, being stuck in the mud, and the officer's observations of Hale's intoxication, including the "glassy eyes, odor of alcohol, empty beer cans, and the state of confusion of the defendant." The Motion was granted as to the results of field sobriety testing, and the results of the HGN test were suppressed on the grounds that "the tests were not fully completed" and "the results cannot be considered in part." The trial court also suppressed the results of the vertical gaze nystagmus (VGN) test, since there "was no foundation as to the specifics of the administration of [that] test."

{¶9} On May 21, 2015, Hale entered a plea of no contest to one count of OVI, in violation of R.C. 4511.19(A)(1)(a) and the remaining counts were nolled. He was ordered to serve a sentence of 90 days in jail, with 85 days suspended, one year of

probation, a license suspension, and to pay a fine of $475 and court costs. The court stayed the sentence pending appeal.

{¶10} Hale timely appeals and raises the following assignment of error:

{¶11} "The trial court erred when it denied in part the defendant-appellant's motion to suppress where the police had no probabl[e] cause to make an arrest for operating a vehicle under the influence, 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."

{¶12} In his sole assignment of error, Hale argues that the trial court erred in denying his Motion to Suppress, in part, since Patrolman Sciarrino "had no probable cause to believe that he committed the offense of OVI, and, as a result, his arrest for OVI was unlawful."

{¶13} At a suppression hearing, "the trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 41. "Its findings of fact are to be accepted if they are supported by competent, credible evidence." *Id.*

{¶14} "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." (Citation omitted.) *State v. Ferry*, 11th Dist. Lake No. 2007-L-217, 2008-Ohio-2616, ¶ 11; *Mayl* at ¶ 41 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard").

{¶15} "Whether [an] arrest was constitutionally valid depends * * * upon whether, at the moment the arrest was made, the officers had probable cause to make it." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). "A police officer has reasonable or probable cause to arrest when the events leading up to the arrest, 'viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *State v. Steele*, 138 Ohio St.3d 1, 2013-Ohio-2470, 3 N.E.3d 135, citing *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

{¶16} "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. Lake No. 2008-L-097, 2009-Ohio-1830, ¶ 19. "[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 [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." (Citation omitted.) *Id.* at ¶ 20.

{¶17} In the present matter, the totality of the circumstances provided probable cause for Patrolman Sciarrino to arrest Hale for OVI. The testimony indicated that Hale had glassy, sleepy eyes and was walking in an "unsure manner." Hale exhibited confusion, including being unaware of the name of the street where he was located. Based on Sciarrino's experience, he believed Hale was "clearly intoxicated." Patrolman

Sciarrino's testimony established that a vehicle of his description, which was followed by a witness, had been involved in an accident and fled the scene, consistent with the damage on Hale's car. When Patrolman Sciarrino discovered Hale, he had driven partially off of the side of the road and his vehicle was stuck in the mud. After initially agreeing to perform sobriety tests, Hale then refused.

{¶18} Hale raises specific arguments relating to the applicability of several of these facts. First, he takes issue with the fact that Patrolman Sciarrino stated he did not believe he had probable cause to arrest Hale prior to his decision to discontinue the field sobriety tests. He asserts that, given these statements and that the results of the HGN test were excluded, no probable cause existed for an arrest.

{¶19} Even if Sciarrino did not believe he had probable cause in the absence of the results of field sobriety tests, this court is required to consider the circumstances to determine whether probable cause existed under the law. In addition, although the trial court did exclude the results of the HGN test, as noted above, probable cause can be found in the absence of the results of any field tests. *McNulty*, 2009-Ohio-1830, at ¶ 20. "'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." (Citation omitted.) *State v. Wiesenbach*, 11th Dist. Portage No. 2010-P-0029, 2011-Ohio-402, ¶ 29. Sciarrino testified that, during the HGN test, additional signs of intoxication were exhibited, including the bouncing of Hale's eyes, another consideration to be weighed.

{¶20} While Hale argues, citing a Second District case, that his refusal to perform additional field sobriety testing could not be considered, this court has held that

the "refusal to submit to field sobriety tests is [a] factor that may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol." (Citation omitted.) *State v. Holnapy,* 194 Ohio App.3d 444, 2011-Ohio-2995, 956 N.E.2d 897, ¶ 49. Thus, the refusal was both properly considered and could have provided the necessary probable cause that Hale argues Sciarrino lacked prior to his refusal.

{¶21} Hale also argues that his confusion regarding which road he was on was understandable and not necessarily evidence of intoxication. He contends that any confusion may have resulted from an injury caused by the accident, which Patrolman Sciarrino did not take into account.

{¶22} Sciarrino testified that Hale had no visible injury, nor did he state that he was injured. Even if Hale had experienced an injury, "the actual cause of * * * [the suspect's] physical condition is only relevant to a defense to the charge. Those issues are more properly left for the trier of fact at trial to determine the relationship, if any, between [the suspect's] injuries and the conditions observed by the arresting officer." *Kirtland Hills v. Deir*, 11th Dist. Lake No. 2004-L-005, 2005-Ohio-1563, ¶ 22, citing *State v. Hummel*, 154 Ohio App.3d 123, 2003-Ohio-4602, 796 N.E.2d 558, ¶ 35 (11th Dist.).

{¶23} Hale argues that an odor of alcohol does not necessarily mean impairment, as it could merely be evidence of some drinking. When considered in light of the other circumstances, however, the odor of alcohol is another factor weighing in favor of a probable cause finding. Similarly, while Hale argues that a car accident does not necessarily indicate impairment, it must also be considered in light of the totality of the circumstances. Hale not only was in an accident, but also fled the scene, drove off

of the road less than a mile away, and exhibited physical signs of intoxication.[1] *State v. Harvey*, 4th Dist. Vinton No. 446, 1988 Ohio App. LEXIS 4783 (Dec. 2, 1988), cited by Hale, is distinguishable, since, in that case, probable cause for an arrest did not exist when the defendant had an odor of alcohol on his person and had been in an accident. There, the additional factors regarding his movement, eyes, and confusion were not present.

{¶24} Finally, Hale contends that old beer cans in his truck did not indicate present intoxication. Given the foregoing analysis, the evidence of intoxication and totality of the circumstances outlined above provided more than enough to find probable cause justifying arrest.

{¶25} Hale's sole assignment of error is without merit.

{¶26} For the foregoing reasons, the Judgment Entry of the Willoughby Municipal Court, denying, in part, Hale's Motion to Suppress, is affirmed. Costs to be taxed against appellant.

THOMAS R. WRIGHT, J., concurs in judgment only,

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion.

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1. The State takes issue with the trial court's decision to exclude the results of the HGN test since the additional field sobriety tests were refused. While it is unclear what the trial court's basis for this determination was, even in the absence of the HGN test results, there was more than sufficient probable cause to conduct the arrest under the facts of this case and consistent with a multitude of similar cases within this court. *See McNulty*, 2009-Ohio-1830, ¶ 19; *Wiesenbach*, 2011-Ohio-402, ¶ 29. Thus, we decline to address the propriety of the lower court's decision on this issue. *State v. Hurtuk*, 11th Dist. Portage Nos. 2008-P-0077 and 2008-P-0096, 2009-Ohio-1004, ¶ 14 (declining to express an opinion on an issue unnecessary to resolve the appeal).

TIMOTHY P. CANNON, P.J., concurring in judgment only.

{¶27} I concur with the judgment of the majority that the trial court's denial of the motion to suppress should be affirmed. I write separately to address a portion of the trial court's entry that was questioned by the state in its brief on appeal.

{¶28} The officer administered two separate nystagmus tests. With regard to the horizontal gaze nystagmus (HGN) test, the trial court specifically found the following:

> The testimony of the officer as to his administration of this test as to the defendant was competent and credible, and based upon his training and years of experience with persons suspected of driving while impaired. Based upon the testimony of the officer and his detailed explanation of the administration of the HGN, the Court finds the specific test he was able to administer (HGN) was conducted in substantial compliance with his training and the guidelines for the administration of the testing. However, as the tests were not fully completed, due to the inability or refusal of the defendant to perform same, the results cannot be considered *in part* and are therefore suppressed. The observations of the officer, based on his years of experience and his training, may be admitted.

(Emphasis added.) With regard to the vertical gaze nystagmus (VGN) test, the trial court found: "The officer testified as to the administration of a vertical Nystagmus test, however, as there was no foundation as to the specifics of the administration of this test, any results from the vertical Nystagmus test are suppressed."

{¶29} While the trial court's entry is confusing on the issue, it seems illogical that it would suppress the results of the HGN. There is no authority for the proposition that the results of a properly conducted field sobriety test should be suppressed merely because other tests were not completed.

{¶30} I agree that a trial court's findings in an entry ruling on a motion to suppress presents to this court a mixed review of fact and law. We defer to the factual findings and review application of the law de novo. As a matter of law, based on the

trial court findings, the results of the HGN were admissible and should have been considered in the determination of probable cause. The officer testified that from the clues he saw on the test, appellant was "well over" the legal limit.

{¶31} In its brief, the state notes that if the trial court did not consider the HGN results, it should have. This should have been more clearly presented as a cross-assignment of error, pursuant to R.C. 2505.22. That is the vehicle to employ when an appellee does not seek to reverse the judgment of the trial court but wishes to defend it on other grounds. *State v. Rouse*, 11th Dist. Portage No. 2012-P-0030, 2012-Ohio-5584, ¶17. Cross-assignments of error may be considered when necessary to prevent a reversal of the judgment. *State v. Barnes*, 11th Dist. Trumbull No. 2012-T-0049, 2013-Ohio-1298, ¶17. The problem is the statute indicates the cross-assignment should be presented according to "rule of court," but there are no clear rules establishing how and when a cross-assignment of error should be presented. This is an issue for the Rules Committee to address. *See OAPSE/AFSCME Local 4 v. Madison Local Sch. Dist. Bd. of Educ.*, 190 Ohio App.3d 254 (11th Dist.2010) (Cannon, J., concurring), ¶83-89.

{¶32} Here, I would find that the trial court should not have granted the motion to suppress with respect to the HGN results. With the inclusion of the results of that test, I believe the officer had probable cause to arrest appellant for OVI. Accordingly, I concur in judgment only.