[Cite as *State v. Babel*, 2004-Ohio-4151.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2003-09-245
	:	O P I N I O N
-vs-		8/9/2004
	:	
GRETCHEN BABEL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT (AREA III)
Case No. TRC 0206270

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YOUNG, P.J.

{¶1} Plaintiff-appellant, Gretchen Babel, appeals her conviction in the Butler County Area III Court for driving under the influence of alcohol ("DUI").

{¶2} In the early hours of December 7, 2002, Officer Neil Schmitz of the West Chester Police Department observed appellant drive at a high rate of speed on Tylersville Road in West Chester

Township, Butler County, Ohio. Appellant was driving between 55 and 60 m.p.h. in a 35 to 40 m.p.h. zone. While following her, the officer observed appellant's car drive on the centerline with both left tires for approximately 30 to 40 feet. The officer pulled appellant over.

{¶3} Appellant told the officer that she was on her way home from a Christmas party and that she had had a few beers at the party. As they spoke, the officer noticed that appellant smelled strongly of alcohol, that her eyes were bloodshot, that her answers were "slow delivered," and that she would not look directly at him. The officer administered the Horizontal Gaze Nystagmus ("HGN") test and the walk and turn test. When asked to also perform the one-leg stand test, appellant refused. After these tests, appellant was arrested and transported to the police station where she refused to take a breath test.

{¶4} Appellant was charged with DUI in violation of R.C. 4511.19(A)(1) and speeding in violation of R.C. 4511.21. Appellant moved to suppress the officer's observations and the results of the field sobriety tests on the ground that the tests were not administered in strict compliance with the procedures established by the National Highway Traffic Safety Administration ("NHTSA") manual. Specifically, appellant argued that the officer failed to give her several specific instructions when conducting the HGN and walk and turn tests. Following a hearing on the motion, the trial court overruled appellant's motion to suppress on the ground that the HGN and the walk and turn tests were administered

in compliance with State v. Homan, 89 Ohio St.3d 421, 2000-Ohio-212.[1]

{¶5} The case proceeded to a jury trial. On August 28, 2003, a jury found appellant guilty of DUI in violation of R.C. 4511.19(A)(1). This appeal follows.

{¶6} In her sole assignment of error, appellant argues that the trial court erred by not suppressing the results of the HGN and walk and turn tests. Appellant contends that the state failed to establish that the field sobriety tests were conducted in either strict or substantial compliance[2] with standardized testing procedures.

{¶7} To suppress evidence obtained as a result of a warrantless search or seizure, a defendant must raise the grounds on which the validity of the search or seizure is challenged with enough specificity to give the state notice of the basis for the challenge. Xenia v. Wallace (1988), 37 Ohio St.3d 216, paragraph one of the syllabus. Once a defendant has made this

1. In Homan, the Ohio Supreme Court held that "in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures." Id. at paragraph one of the syllabus.

2. Effective April 9, 2003, newly amended R.C. 4511.19 no longer requires an arresting officer to administer field sobriety tests in strict compliance with testing standards for the test results to be admissible at trial. Rather, only substantial compliance is required. Indeed, R.C. 4511.19(D)(4)(b) now provides that in driving under the influence cases, "if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the [NHTSA], *** the officer may testify concerning the results of the field sobriety test so administered; [and] the prosecution may introduce the results of the field sobriety test so administered as evidence ***."

initial showing, the state bears the burden of proof, including the burden of going forward with evidence, on the specific issues raised regarding the search or seizure. Id. at paragraph two of the syllabus; State v. Mixner, Warren App. No. CA2001-07-074, 2002-Ohio-180.

{¶8} In the case at bar, appellant's motion to suppress was specific enough to put the state on notice that appellant's bases for suppression included whether the field sobriety tests were conducted properly and in compliance with standardized testing procedures: for each field sobriety test, appellant listed a number of very specific instructions the officer had failed to give her while administering the field sobriety tests. Appellant's motion and memorandum were therefore enough to shift the burden to the state to establish that, in this instance, the field sobriety tests were conducted properly and in compliance with the NHTSA standards.

{¶9} Before we determine whether the state met its burden at the suppression hearing, however, we must first determine whether the state was required to establish strict or substantial compliance at the suppression hearing. R.C. 4511.19(D)(4)(b), which now only requires officers to administer field sobriety tests in substantial compliance with standardized testing procedures, was amended April 9, 2003, after the suppression hearing but before the trial court's denial of appellant's motion to suppress. We must therefore determine whether newly amended R.C. 4511.19(D)(4)(b) applies retroactively.

{¶10} Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws. Revised Code 1.48 codifies the long-standing rule that "[a] statute is presumed to be prospective in its operation unless expressly made retroactive." The issue of whether a statute may constitutionally be applied retroactively "requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively. *** If so, the court moves on to the question of whether the statute is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial." Bielat v. Bielat, 87 Ohio St.3d 350, 353, 2000-Ohio-451. Thus, "inquiry into whether a statute may constitutionally be applied retrospectively continues only after a threshold finding that the General Assembly expressly intended the statute to apply retrospectively." Id. "[A]bsent a clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only." State v. LaSalle, 96 Ohio St.3d 178, 2002-Ohio-4009, ¶14.

{¶11} Upon reviewing newly amended R.C. 4511.19(D)(4)(b), we find that there is no language in the provision that it be applied retroactively. "In drafting prior legislative enactments and amendments, the General Assembly certainly has demonstrated its ability to include retrospective language when it so desires." Id. at ¶15. It has failed to do so in the provision at issue. We therefore hold that R.C. 4511.19(D)(4)(b), amended

effective April 9, 2003, applies prospectively only.[3] It follows that at the suppression hearing, the state was required to establish that the field sobriety tests were administered in strict compliance with standardized testing procedures.

{¶12} At the hearing, Officer Schmitz testified that he had been trained at the Ohio State Patrol Academy and was certified to administer the HGN, walk and turn, and one-leg stand tests, that his training was "consistent" with the NHTSA manual, and that he administered the HGN and walk and turn tests in the way he had been trained. The officer described the specific instructions he gave appellant before administering the HGN and walk and turn tests. The officer also testified as to how appellant performed the HGN and walk and turn tests.

{¶13} Upon reviewing the officer's testimony, we find that while the state established that the HGN test was conducted in strict compliance with the NHTSA standards, it failed to establish that the walk and turn test was conducted in strict compliance with the NHTSA standards. The record shows that on direct examination, the officer's description of the instructions he gave appellant for each test did not specifically answer each and every allegation raised in appellant's motion to suppress regarding the two tests. However, by answering open-ended questions on cross-examination, the officer responded to each and every allegation raised in the motion to suppress regarding the

3. This ends our inquiry. We need not, and indeed may not, engage in constitutional analysis to determine whether newly amended R.C. 4511.19(D)(4)(b) is "substantive" or "remedial" in nature. See In re Busdiecker, Warren App. No. CA2002-10-104, 2003-Ohio-2556.

HGN test. As a result, the state established that the HGN test was conducted in strict compliance with the NHTSA standards.

{¶14} By contrast, while the officer's testimony on cross-examination covered most of the specific allegations raised in the motion to suppress regarding the walk and turn test, it did not respond to all of the allegations. In her motion to suppress, appellant specifically argued that when administering the walk and turn test, the officer failed to instruct her as follows: "While you are walking, keep your arms at your sides, watch your feet at all times, and count you[r] steps out loud. Once you start walking, don't stop until you have completed the test. Begin, and count your first step from heel-to-toe position as 'One'." We agree. Whether on direct or cross-examination, the officer never testified providing the foregoing instructions to appellant. As a result, the state failed to establish that the walk and turn was conducted in strict compliance with the NHTSA standards.

{¶15} Because the state failed to prove that the walk and turn test was conducted in strict compliance with the NHTSA standards, the results of this field sobriety test should have been suppressed. See State v. Nickelson (July 20, 2001), Huron App. No. H-00-036. The trial court, therefore, erred by overruling appellant's motion to suppress the results of the walk and turn test. Appellant's assignment of error is accordingly overruled with regard to the HGN test but well-taken and sustained with regard to the walk and turn test.

{¶16} The trial court's judgment is therefore affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

{¶17} Judgment affirmed in part, reversed in part, and remanded.

POWELL and WALSH, JJ., concur.