

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2009-07-093 |
| - vs - | : | <u>OPINION</u> |
| | : | 1/11/2010 |
| STEVE R. LESTER, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM LEBANON MUNICIPAL COURT
Case No. TRC0900179

Matthew J. Graber, Lebanon City Prosecutor, 423 Reading Road, Mason, Ohio 45040,
for plaintiff-appellee

Rittgers & Rittgers, Nicholas D. Graman, 12 East Warren Street, Lebanon, Ohio 45036,
for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Steve R. Lester, appeals the Lebanon Municipal Court's decision denying his motion to suppress a breathalyzer test result following his arrest for driving while under the influence of alcohol. We affirm.

{¶2} At 9:21 p.m. on January 26, 2009, Trooper Christopher Creech of the Ohio State Highway Patrol was dispatched to a single car accident on State Route 123 located in Turtlecreek Township. Upon his arrival, which occurred at approximately 9:40 p.m., Trooper Creech found appellant sitting in the driver's seat of a vehicle located

"face down" in a ditch. Thereafter, following the administration of a field sobriety test, as well as appellant's submission to a "portable drug test," Trooper Jeffrey Staples, who arrived at the scene at approximately 10:00 p.m., arrested appellant for driving while under the influence of alcohol. At 10:51 p.m., after being transported to the Lebanon patrol post, appellant submitted to a breathalyzer test that indicated his sample contained .119 grams of alcohol per 210 liters of breath.

{¶13} Appellant was charged with operating his vehicle with a prohibited blood-alcohol concentration in violation of R.C. 4511.19(A)(1)(d), a first-degree misdemeanor.¹ After the trial court denied his motion to suppress, appellant pled no contest and was found guilty.

{¶14} Appellant now appeals the trial court's decision denying his motion to suppress, raising one assignment of error.

{¶15} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING APPELLANT'S MOTION TO SUPPRESS."

{¶16} In his sole assignment of error, appellant argues that the state failed to prove he submitted to the breathalyzer test within the three-hour statutory time limit, and therefore, the trial court erred by denying his motion to suppress. We disagree.

{¶17} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Wilson*, Clinton App. No. CA2006-03-008, 2007-Ohio-353, ¶17; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to resolve factual questions and evaluate witness credibility. *State v. Eyer*, Warren App. No. CA2007-06-071, 2008-Ohio-1193, ¶8. In turn, the appellate court

must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Moore*, Preble App. No. CA2009-02-005, 2009-Ohio-5927, ¶8; *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. After accepting the trial court's factual findings as true, the appellate court must then determine, as a matter of law, and without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. *State v. Burkhead*, Preble App. No. CA2008-11-022, 2009-Ohio-4466, ¶7.

{¶8} Appellant claims the state failed to prove he "submitted to a breath test within three hours of operating his vehicle" as required by R.C. 4511.19(D)(1)(b).² Whether the state complied with the statutory time limit for the administration of a breath test is a foundational question to be determined by the trial court. *State v. Robertson* (July 27, 1992), Butler App. No. CA91-10-179, at 9. In turn, because appellant challenges the trial court's factual finding that the breathalyzer test was administered to him within the statutory time limit, this court must accept that finding so long as it was supported by competent, credible evidence. *State v. Steele*, Butler App. No. CA2003-11-276, 2005-Ohio-943, ¶55, citing *State v. Fanning* (1982), 1 Ohio St.3d 19.

{¶9} At the suppression hearing, Trooper Creech testified that he was dispatched to a single car accident on State Route 123 at 9:21 p.m., and that, although he responded immediately, he arrived at the scene approximately 20 minutes later. When asked if the dispatcher indicated what time the accident occurred, Trooper

1. R.C. 4511.19(A)(1)(d) prohibits any person from operating a vehicle if, at the time of operation, "[t]he person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath."

2. {¶a} R.C. 4511.19(D)(1)(b) provides, in pertinent part:

{¶b} "In any criminal prosecution * * * for a violation of division (A) or (B) of this section * * *, the court may admit evidence on the concentration of alcohol * * * in the defendant's * * * breath * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation."

Creech testified that "they don't know exactly what time the crash occurred," but that "they dispatch it to [him] the same moment they get [the call.]" Trooper Creech also testified that upon his arrival he noticed "fresh marks going off the road," that appellant was still seated in the driver's seat, and that, although the vehicle was not running, and even though it was a cold winter evening, "it was warm inside the vehicle." In addition, while he was unable pinpoint the exact time of the accident, Trooper Creech testified it was inconceivable that the vehicle was in the ditch for several hours without being reported.

{¶10} Also at the suppression hearing, Trooper Staples, who arrived at the scene at approximately 10:00 p.m., testified that appellant "never acted like he'd been there for a tremendous amount of time," and that, after speaking with appellant, he got the impression that the accident had just occurred. Trooper Staples, who administered the breathalyzer test to appellant at 10:51 p.m., also testified that "if there's a car in the ditch anywhere in this county [people are] gonna call somebody. If there's a turtle crossing the road, they call us."

{¶11} In denying appellant's motion to suppress, the trial court found "there [was] pretty strong evidence to indicate that the driving * * * took place right before the state troopers arrived," and that the state "met their burden of showing that the test was offered and given within the appropriate time limits."

{¶12} After a thorough review of the record, we find that there was competent and credible evidence that the breathalyzer test was administered to appellant within three hours of the alleged violation. As noted above, Trooper Creech was dispatched to the scene at 9:21 p.m. and appellant submitted to the breathalyzer test at 10:51 p.m. As a result, for the three-hour statutory time limit to have expired, appellant's accident would have had to occur more than one hour and 30 minutes prior to Trooper Creech

being dispatched to the scene. *State v. Rauscher*, Marion App. No. 9-06-42, 2007-Ohio-3339, ¶12-13; *State v. Qualey* (Mar. 27, 1998), Montgomery App. No. 16705, 1998 WL 403881, at *6. However, as the trial court found, and to which we agree, there is simply no evidence, circumstantial or otherwise, to indicate anything other than the accident occurred "right before the state troopers arrived." See *State v. Cady* (Apr. 5, 1999), Warren App. No. CA97-09-102, at 7-8; see, also, *State v. Hutson*, Hamilton App. Nos. C-060274, C-060275, C-060276, 2007-Ohio-1178, ¶10; *State v. Martin*, Mahoning App. No. 01 CA 227, 2003-Ohio-1232, ¶17; *State v. Williams*, Knox App. No. 01 CA 24, 2002-Ohio-4267, ¶14-15. Therefore, because the state produced competent, credible evidence that appellant submitted to the breathalyzer test within the three-hour statutory time requirement, his lone assignment of error is overruled.

{¶13} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.