[Cite as *State v. Brabant*, 2011-Ohio-161.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-04-031
	:	O P I N I O N
- vs -		1/18/2011
	:	
DONNIE R. BRABANT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2010TRC03261

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffman, 123 North Third Street, Batavia, Ohio 45103, for plaintiff-appellee

Lawrence R. Fisse, 34 North Third Street, Batavia, Ohio 45103, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Donnie R. Brabant, appeals the judgment of the Clermont County Municipal Court denying his appeal of an administrative license suspension (ALS) imposed after his arrest for driving under the influence of alcohol. For the reasons that follow, we affirm.

{¶2} On March 6, 2010 at approximately 11:35 P.M., Officer Michael Shimko of the Ohio State Highway Patrol was dispatched to a single-vehicle crash on

Cedarville Road in Clermont County, Ohio. Officer Shimko arrived to discover an abandoned vehicle parked sideways in the westbound lane with its headlights on and severe rear-end damage. As Officer Shimko prepared his crash investigation, a woman who wished to remain anonymous approached the scene and identified appellant as the driver.

{¶3} Between 1:00 and 1:30 A.M. on March 7, 2010, Officer Shimko arrived at appellant's residence to find appellant in a heavily intoxicated condition. At that time, Officer Shimko read appellant the contents of the Bureau of Motor Vehicles Form 2255, which included the consequences of refusing to submit to a blood, breath or urine test. Officer Shimko then requested appellant to perform a breath test, but appellant refused, based on advice from his attorney.

{¶4} As a result of the events occurring on March 6 and early March 7, 2010, appellant was placed under an ALS. Appellant appealed the ALS pursuant to R.C. 4511.197(A), at which time a hearing was held. During the hearing, appellant argued Officer Shimko lacked reasonable grounds to believe appellant was operating a motor vehicle under the influence of alcohol at the time of the crash. See R.C. 4511.19(A). The Clermont County Municipal Court denied appellant's appeal and upheld his license suspension.

{¶5} Appellant subsequently filed the instant appeal, asserting a single assignment of error for review:

{¶6} "THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S APPEAL FROM AN ADMINISTRATIVE LICENSE SUSPENSION IMPOSED FOR REFUSING A REQUESTED CHEMICAL BREATH TEST SUBSEQUENT TO HIS ARREST FOR OPERATING A VEHICLE UNDER THE INFLUENCE OF ALCOHOL."

{¶7} Appellant first argues Officer Shimko lacked reasonable grounds to believe he was under the influence of alcohol at the time of the crash where the evidence established appellant consumed alcohol at home *after* the crash. We disagree.

{¶8} Pursuant to R.C. 4511.197(C), the scope of an ALS appeal is limited to: (1) whether the arresting officer had reasonable grounds to believe defendant was driving under the influence of alcohol or with a prohibited concentration of alcohol in the blood, breath, or urine; (2) whether defendant was placed under arrest; (3) whether the officer requested defendant to submit to a chemical test; (4) whether the officer informed defendant of the consequences of either refusing the test or of submitting to it; and (5) whether defendant refused to submit to the test or failed it. R.C. 4511.197(C)(1)-(4)(a).

{¶9} Appellant argues that because the state did not establish (1) the precise time of the crash, and (2) appellant's condition at the time of the crash, it failed to prove Officer Shimko had a reasonable belief that appellant was under the influence of alcohol at the time of the crash. However, our review of the record reveals sufficient evidence to support the trial court's conclusion that Officer Shimko had reasonable grounds to believe appellant crashed the vehicle while under the influence of alcohol.

{¶10} After leaving the crash site, Officer Shimko encountered appellant at his residence between 1:00 and 1:30 A.M., at which time Officer Shimko noticed a strong odor of alcohol coming from appellant's person, along with his bloodshot eyes and slurred speech. After reading appellant *Miranda* warnings, Officer Shimko asked appellant whether he drove the vehicle at the time of the crash. At first, appellant denied driving the vehicle at all that evening. Eventually, appellant admitted to driving at the time of the crash, and explained that he left the scene because he was "scared."

Appellant also told Officer Shimko he crashed the vehicle because the front axle snapped. However, based on his previous crash investigation, Officer Shimko testified there was no evidence of damage to the front axle.

{¶11} When Officer Shimko asked appellant if he consumed alcohol prior to the crash, appellant responded he consumed only half of one beer, but that he drank vodka upon returning to his residence after the crash. When Officer Shimko asked appellant to produce the vodka bottle, appellant stated he instead drank Bacardi after the crash, but failed to produce either bottle from the residence. As a result, Officer Shimko testified he did not believe appellant's explanation for his intoxication, based on his "evasive" behavior and refusal to submit to field sobriety tests. See, e.g., *State v. Arnold* (Sept. 7, 1999), Butler App. No. CA99-02-026, at 5 (refusal to take field sobriety tests can be a factor in reasonable grounds evaluation). Moreover, while appellant's mother testified appellant drank alcohol when he returned home, she admitted she did not witness appellant consuming any such beverages.

{¶12} In the case at bar, despite appellant's claim that his intoxication occurred after the crash, we find the abundant inconsistencies in his story, coupled with Officer Shimko's training and experience, provided Officer Shimko with reasonable grounds to believe appellant violated R.C. 4511.19 at the time of the crash. See, e.g., *State v. Heiney*, Portage App. No. 2006-P-0073, 2007-Ohio-1199, ¶23 ("[b]eing involved in a single-vehicle accident with no significant outside factors is circumstantial evidence of erratic driving [and] * * * the fact that the driver leaves the scene of a single-vehicle accident * * * suggests that the driver may have been impaired at the time of the accident[.]"). Moreover, given appellant's bloodshot eyes and slurred speech, Officer Shimko testified it was "highly unlikely" that appellant could have reached his level of intoxication by drinking solely after the crash. See *State v. Evans* (Mar. 30, 1998), 127

Ohio App.3d 56, 63 (citing a non-exhaustive list of factors to be considered in a totality of the circumstances analysis of whether an officer had a reasonable suspicion sufficient to conduct field sobriety tests, including: (1) the condition of the suspect's eyes; (2) the suspect's ability to speak; (3) the odor of alcohol on the suspect's person or breath; (4) the intensity of the odor of alcohol; and (5) the suspect's admission of alcohol consumption, the number of drinks had).

{¶13} Given the significant circumstantial evidence that appellant was under the influence of alcohol at the time of the crash, we find no error in the trial court's decision to overrule appellant's motion and uphold his ALS. See *Hieney*, 2007-Ohio-1199 at ¶17.

{¶14} Secondly, appellant argues R.C. 4511.192(A) requires that the blood, breath, or urine test must be offered to a person arrested for operating a vehicle under the influence of alcohol ("OVI") within two hours of the alleged violation in order for a refusal to result in the imposition of an ALS. As a result, appellant argues the state's failure to establish the exact time of the crash precluded it from proving appellant refused to take the chemical test within two hours of the crash.

{¶15} R.C. 4511.192(A) states, in pertinent part, "[t]he person must submit to the chemical test or tests, subsequent to the request of the arresting officer, within two hours of the time of the alleged violation and, if the person does not submit to the test or tests within that two-hour time limit, the failure to submit automatically constitutes a refusal to submit to the test or tests." While the state clearly did not establish that Officer Shimko asked appellant to submit to a field sobriety test within two hours of the crash, such evidence is irrelevant to the case at bar, where appellant *explicitly refused* to take the breath test.

{¶16} The quoted language of R.C. 4511.192(A) addresses situations in which

a suspect engages in behavior to delay or obstruct the chemical testing, thereby constituting an implied or "automatic" refusal. However, in the case at bar, the evidence indicates appellant did more than not submit to, or delay, chemical testing. Rather, appellant explicitly refused chemical testing upon the advice of his attorney.[1] In such a situation, the basis for the ALS is neither the suspect's behavior aimed at delaying the testing process, nor his particular blood-alcohol concentration. See *Andrews v. Turner* (1977), 52 Ohio St.2d 31, 36-38 (discussing conduct constituting a refusal to take a chemical test). Instead, the ALS is imposed due to the driver's explicit refusal of chemical testing. See R.C. 4511.191(B).

{¶17} Additionally, we note the Ohio Supreme Court has held "that a person arrested for operating a vehicle under the influence of alcohol who refuses to submit to a chemical test, *even though the test is requested more than two hours after the alleged violation*, is subject to the implied consent law if the police officer making the request has 'reasonable grounds to believe the person to have been operating a vehicle upon the public highways in this state while under the influence of alcohol.'" *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 99. (Emphasis added.)

{¶18} Therefore, the "two-hour time limit," which forms the basis of appellant's second argument, is not relevant to this case, where the ALS resulted from an explicit refusal of chemical testing. See R.C. 4511.191(B); *State v. Lewis*, 187 Ohio App.3d 701, 2010-Ohio-2872, ¶4.

{¶19} Accordingly, appellant's single assignment of error is overruled.

{¶20} Judgment affirmed.

1. We note that whether the arresting officer requested appellant to submit to a chemical test and whether the officer informed appellant of the consequences of refusing to be tested or of submitting to chemical testing are not at issue in the case at bar. See R.C. 4511.192(A); 4511.197(C).

BRESSLER, P.J., and RINGLAND, J., concur.

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