[Cite as *State v. Capehart,* 2011-Ohio-2602.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-035
	:	O P I N I O N
- vs -		5/31/2011
	:	
HARRY E. CAPEHART, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09CRI00200

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PIPER, J.

{¶1} Defendant-appellant, Harry E. Capehart, appeals from a Fayette County Court of Common Pleas decision denying his motion to suppress his blood-alcohol test results. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} On November 6, 2009, appellant's tractor went off the road and was overturned. Deputy Oesterle of the Fayette County Sheriff's Office responded to the scene and found appellant attempting to roll the tractor back over. Deputy Oesterle observed that appellant had bloodshot eyes, slurred speech, and the odor of an

alcoholic beverage about his person. He further observed beer cans on the ground in the vicinity and testified that appellant admitted to having consumed alcoholic beverages. Thereafter, appellant was transported to the Fayette County Memorial Hospital for treatment of a head injury. Sometime after arrival, appellant was strapped to a hospital bed. According to Deputy Oesterle, he reviewed the BMV2255 form with appellant, after which appellant verbally consented to a blood test. Amy Stewart, a hospital nurse, took the blood sample at Deputy Oesterle's direction and handed it over to the officer. The result of the blood test showed a BAC of .31 and appellant was subsequently indicted on two counts of felony OVI.

{¶3} On July 19, 2010, appellant moved to suppress the evidence of the blood test . A suppression hearing was held on August 30, 2010, and the trial court overruled the motion on September 2, 2010. With the motion denied, appellant plead no contest to both counts in the indictment on September 23, 2010.

{¶4} Appellant now appeals the denial of the motion to suppress, advancing the following assignment of error for review:

{¶5} "THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS."

{¶6} In his sole assignment of error, appellant argues that the trial court erred by denying his motion to suppress his blood-alcohol test results. We find this argument lacks merit.

{¶7} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Davenport*, Fayette App. No. CA2008-01-011, 2009-Ohio-557, ¶6; *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 weigh the evidence in order 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. Lange*, Butler App. No. CA2007-09-232, 2008-Ohio-3595, ¶4; *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. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412, ¶29; *State v. Dierkes*, Portage App. No. 2008-P-0085, 2009-Ohio-2530, ¶17.

{¶8} The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. *State v. Kelley*, Butler App. No. CA2009-03-092, 2009-Ohio-5924, ¶12. In general, warrantless searches are considered per se unreasonable. *State v. Boland*, Clermont App. Nos. CA2007-01-016, CA2007-01-017, 2008-Ohio-353, ¶11; *State v. Sisler* (1995), 114 Ohio App.3d 337, 341; *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507. Withdrawing blood from a suspect to determine his blood-alcohol content constitutes a search and seizure within the meaning of the Fourth Amendment. *State v. Abbott*, Warren App. No. CA2001-10-093, 2002-Ohio-6278, ¶10; *State v. Patterson*, Montgomery App. No. 20977, 2006-Ohio-1422, ¶26.

{¶9} A search warrant is not required where a search is conducted pursuant to a voluntary consent although there is no antecedent arrest. *Fairfield v. Regner* (1985), 23 Ohio App.3d 79, 84, citing *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 248-249, 93 S.Ct. 2041. In the present case, viewing the totality of the circumstances, the trial court found that appellant voluntarily consented to the blood withdrawal and therefore no search warrant was required. We find that the trial court had competent

and credible evidence in support of this finding. There was no evidence that appellant was placed under arrest or in police custody on the night in question. While it is accepted that appellant was strapped to a hospital bed, the record indicates that this was not done at the direction of the officer. The officer's uncontroverted testimony was that he reviewed the BMV2255 form with appellant, after which appellant verbally consented to the blood test. While appellant argues that he was confused and disoriented, the record provides no evidence that the injuries he suffered resulted in the inability to knowingly and intelligently consent to the testing. Accordingly, we find that the trial court justifiably determined that appellant voluntary consented to the testing.

{¶10} In addition, certain situations, such as where there is imminent danger that evidence will be lost or destroyed if a search is not conducted immediately, "present exigent circumstances that justify a warrantless search." *State v. Moore*, 90 Ohio St.3d 47, 52, 2000-Ohio-10; *State v. Christopher*, Clermont App. No. CA2009-08-041, 2010-Ohio-1816, ¶32. The United States Supreme Court in *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, determined that a warrantless seizure of a blood sample for purposes of testing an individual's alcohol level could be justified based on exigent circumstances resulting from the evanescent nature of the evidence, i.e., the fact that the level of alcohol in blood dissipates over time. In so holding, the Supreme Court set forth certain criteria to be used in determining if such an intrusion violates the Fourth Amendment: (1) the government must have a "clear indication" that incriminating evidence will be found; (2) there must be a search warrant or exigent circumstances, such as the imminent destruction of evidence, to excuse the warrant requirement; and (3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner. Id. at 770-772; *Christopher* at ¶32; *State v. Troyer*, Wayne App. No. 02-CA-0022, 2003-Ohio-536, ¶14. In a recent case similar to the one before

us, this court had occasion to consider a warrantless seizure of a blood sample and found it to be justified under *Schmerber*. *State v. Palmieri*, Butler App. No. CA2009-12-294, 2010-Ohio-5667.

{¶11} In the present case, based on appellant's bloodshot eyes, slurred speech, odor of alcoholic beverage on his person, beer cans nearby, and statements admitting to the consumption of beer, the officer had probable cause to believe appellant had been driving under the influence of alcohol, and therefore, there existed a clear indication that a blood-alcohol test would reveal incriminating evidence. See *State v. Woods* (Sept. 9, 1991), Butler App. No. CA90-07-125, 6-9; see, also, *State v. Hessel*, Warren App. No. CA2009-03-031, 2009-Ohio-4935, ¶23; *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶44-45; *State v. Hill*, Coshocton App. No. 2008-CA-0011, 2009-Ohio-2468, ¶21.

{¶12} Furthermore, exigent circumstances justified the warrantless search. See *Woods* at 11; *Troyer* at ¶27-28. These include the rapid rate at which alcohol diminishes in the blood and the time that had already passed since appellant drove his tractor into the ditch. Such circumstances indicate there was an imminent danger that the evidence would be lost if the blood sample was not drawn immediately.

{¶13} Finally, because the blood sample was drawn by trained medical personnel using medically acceptable procedures, it is clear that the method used to extract the evidence was reasonable and performed in a reasonable manner. Cf. *State v. Starnes* (1970), 21 Ohio St.2d 38, 43 (finding the Supreme Court's holding in *Schmerber* authorized the administration, over the objection of the accused, of the tests specified in R.C. 4511.191).

{¶14} In light of the foregoing, we find that the trial court was justified in determining that appellant consented to the blood test. Furthermore, we find the

warrantless search and seizure of appellant's blood for purposes of testing his alcohol level did not violate appellant's Fourth Amendment rights and was justified regardless of consent under the principles outlined by the Supreme Court in *Schmerber*. Due to our conclusion that the trial court did not err in its decision denying appellant's motion to suppress, appellant's sole assignment of error is overruled.

{¶15} Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.