

[Cite as *State v. Murray*, 2002-Ohio-4809.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee :
vs. : C.A. Case No. 2002-CA-10
MELISSA A. MURRAY : T.C. Case No. 01-TRC-6435
Defendant-Appellant : (Criminal Appeal from Fairborn
Municipal Court)

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OPINION

Rendered on the 13th day of September, 2002.

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BROGAN, J.

{¶1} Melissa A. Murray appeals from her conviction and sentence in the Fairborn Municipal Court following her no-contest plea to driving under the influence of alcohol in violation of R.C. §4511.19(A)(1).

{¶2} Murray advances three assignments of error on appeal. First, she contends that the trial court erred by denying her motion to suppress field sobriety

test results. Second, she argues that her motion to suppress should have been sustained because without the field sobriety test results no probable cause existed to arrest her for driving under the influence of alcohol. Third, she asserts that the trial court erred by not allowing cross examination concerning the arresting officer's knowledge of National Highway Traffic Safety Administration ("NHTSA") field sobriety testing standards.

{¶3} The facts underlying Murray's appeal were set forth in a pretrial suppression hearing held on October 2, 2001. A transcript of the hearing reveals that her appeal stems from events that occurred shortly after 1:00 a.m. on Saturday, June 16, 2001. (Tr. at 14). At that time, Ohio State Highway Patrol officer Lori Landacre observed Murray driving at a speed which the officer visually estimated to be well over the posted 60 mile-per-hour limit. (Id. at 12). Landacre then activated her radar and found that Murray was traveling 71 miles per hour. (Id. at 12-13). As a result, the officer stopped Murray for speeding. Upon approaching the stopped vehicle and speaking with Murray, Landacre smelled a "moderate odor of alcohol on her breath." (Id. at 13-14). Murray's eyes "were really glassy," and her speech was "slurred." (Id. at 14). She told the officer that she had consumed one beer. (Id. at 24).

{¶4} Based on the foregoing facts, Landacre suspected that Murray may have been impaired by alcohol. (Id. at 14-15). In order to determine whether Murray was capable of driving, the officer had her perform three standard field sobriety tests. (Id. at 15). In particular, Landacre conducted a horizontal gaze nystagmus ("HGN") test, a walk-and-turn test, and a one-leg-stand test. Landacre had been

trained to perform the HGN test in compliance with NHTSA standards, and she performed Murray's HGN test in the manner in which she had been trained. (Id. at 15). Landacre also performed the walk-and-turn and one-leg-stand tests under NHTSA standards in the manner in which she had been trained. (Id. at 15, 17, 21). Murray scored "four points" on the HGN test. (Id. at 15). Based on that score alone, Landacre believed that there was a 77 percent chance that Murray's blood-alcohol content was above the .10 legal limit in Ohio. (Id. at 16). On the walk-and-turn test, Murray failed to perform as instructed. She never walked heel-to-toe, she started walking too soon, she lost her balance and stepped sideways, and she improperly turned 360 degrees rather than 180 degrees. (Id. at 19-21). On the one-leg-stand test, Murray also failed to perform as instructed. Several times she put her raised foot down and grabbed the officer's arm for balance. (Id. at 22). She also swayed and raised her arms to keep her balance. (Id. at 23). Following the field sobriety tests, Landacre told Murray that she had poor coordination and that she appeared to be under the influence of alcohol. (Id.). As a result, the officer placed Murray under arrest. (Id.). Murray subsequently refused to take a breath test to determine her blood-alcohol content.

{¶5} After being charged with driving under the influence of alcohol and speeding, Murray filed a motion to suppress all evidence or statements obtained as a result of the traffic stop and her subsequent arrest.¹ With Murray's written consent (Doc. #21), a magistrate conducted the October 2, 2001, suppression hearing. On

¹Murray also sought to prohibit the state from introducing at trial any evidence or testimony concerning her refusal to submit to a breath test. She has not raised this issue on appeal.

October 9, 2001, the magistrate filed a written decision, finding in relevant part: (1) that officer Landacre had a reasonable, articulable basis to stop Murray for speeding, (2) that the officer had probable cause to make the subsequent arrest for driving under the influence of alcohol, and (3) that the three field sobriety tests were administered in strict compliance with NHTSA standards. (Doc. #22). On October 25, 2001, a municipal court judge adopted the magistrate's decision in its entirety. (Doc. #23). In so doing, the judge noted that neither party had filed objections to the magistrate's ruling. (Id.). Thereafter, Murray entered a no-contest plea to driving under the influence of alcohol in exchange for the dismissal of the speeding charge against her. On January 9, 2002, the trial court found her guilty of driving under the influence of alcohol and sentenced her to 180 days in jail with 160 days suspended. (Doc. #32, 35). The trial court also fined her \$550 plus court costs, placed her on probation for two years, and suspended her driver's license for two years. (Id.). On January 22, 2002, Murray filed a timely notice of appeal, and the trial court stayed execution of her sentence pending the outcome of her appeal. (Doc. #35, 36).

{¶6} Before turning to Murray's assignments of error, we pause to address a threshold issue that has not been briefed by Murray or the state, which has elected not to favor us with a brief. In particular, we note that Murray's arguments on appeal all involve the denial of her motion to suppress. As set forth above, a magistrate overruled her motion, and a municipal court judge subsequently adopted the magistrate's decision after noting that neither party had filed objections. (Doc. #23). With consent of the parties and on proper referral, a magistrate may hear and decide any pretrial motion, including a motion to suppress, in a misdemeanor case

for which imprisonment is possible. Crim.R. 19(C)(1)(f); *State v. Weierman* (Dec. 14, 2001), Montgomery App. No. 18853. In such a case, a magistrate is required to file a magistrate's decision, and any party may file timely objections. Crim.R. 19(E)(1) and (2). Furthermore, "[a] party shall not assign as error on appeal the court's adoption of the decision of the magistrate unless the party has timely objected to the magistrate's decision." *Id.* Similarly, Traf.R. 14(C) states that a court may refer contested cases to a magistrate for adjudication and written decision if the parties consent. Under Traf.R. 14, parties may file objections to a magistrate's decision pursuant to Civ.R. 53(E)(3), which provides, *inter alia*, that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."

{¶7} In light of the foregoing provisions, Murray waived her ability to appeal the denial of her motion to suppress. As noted above, she did not file any objections to the magistrate's decision, which the municipal court judge subsequently adopted as her own. Given that she filed no objections, under either Crim.R. 19(E) or Traf.R. 14, as it incorporates Civ.R. 53(E)(3), Murray cannot now argue on appeal that the trial court erred in adopting the magistrate's decision and, in so doing, overruling her motion to suppress for lack of probable cause. *State v. Givens* (Sept. 1, 2000), Tuscarawas App. No. 1999AP110069. Despite Murray's failure to file any objections, we have reviewed the record for the presence of "plain error."

{¶8} Murray contends the trial court should have suppressed the field sobriety test results because the state failed to prove that Landacre performed the

tests in strict compliance with NHTSA standards. This argument implicates *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212, in which the Ohio Supreme Court held that for field sobriety test results to serve as evidence of probable cause to arrest, the police must have administered the tests in strict compliance with NHTSA standards.

{¶9} In *State v. Rioux* (Dec. 14, 2001), Greene App. No. 2001CA26, we set forth the proper analytical framework and allocation of the burden when a defendant alleges a lack of probable cause because field sobriety tests were not administered in strict compliance with NHTSA standards, as required by *Homan*:

{¶10} “A Crim.R. 12(C)(3) motion to suppress evidence is the proper vehicle to challenge the admissibility of evidence to prove an OMVI charge on a claim that it was not procured pursuant to applicable standards or regulations. *Defiance v. Kretz* (1990), 60 Ohio St.3d 1. However, the motion must put the court and the prosecutor on notice of the particular grounds involved. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216. The grounds need only be factually particular. See *State v. Shindler* (1994), 70 Ohio St.3d 54. In cases of warrantless arrests, once that standard is satisfied by the motion to suppress the burden shifts to the State to prove that the particular requirement was satisfied. *Id.* The State may meet its burden by offering general evidence. *State v. Williams* (Nov. 2, 2001), Champaign App. No.2001CA8, unreported. If the movant challenges that evidence sufficiently, the State may then be required to present more particular evidence of compliance. *Id.*”

{¶11} In other words, after a defendant notifies the state of the grounds for

his suppression motion, “[t]he state's burden of proof of going forward is not an onerous one. It is simply the same burden as under prior practice when the state went forward at trial. Thus, as in *State v. Brown* [(1975), 49 Ohio App.2d 104], general testimony that all pertinent rules and regulations had been followed in conducting the defendant's test, if unchallenged, would amount to a sufficient foundation for the admission of the results.” *Williams*, supra, quoting Painter and Looker, *Ohio Driving Under The Influence Law* (2001 Ed.), T11.19. However, “a sufficient challenge to the State's general evidence then requires the State to present more particular evidence to prove compliance.” *Id.*

{¶12} In the present case, Murray’s counsel put the prosecutor on notice that she sought exclusion of her field sobriety tests on the basis that they were not performed in strict compliance with NHTSA standards. (Tr. at 6-7). As a result, the burden shifted to the state to prove strict compliance. On direct examination, the state met its burden through the testimony of Landacre, who explained generally that she had been trained to perform the HGN test, the walk-and-turn test, and the one-leg-stand test under NHTSA standards, and that she performed Murray’s tests in the manner in which she had been trained. As noted above, such general testimony that pertinent regulations have been followed in conducting a test, if unchallenged, is a sufficient foundation for the admission of the test results. *Williams*, supra; *Rioux*, supra.

{¶13} On cross examination, defense counsel attempted to elicit testimony from Landacre concerning how field sobriety tests should be performed in order to comply with NHTSA standards. The prosecutor objected on the basis that defense

counsel's line of questioning was overbroad. After engaging in considerable discussion with counsel, the magistrate ruled that Landacre would not be required to recite the NHTSA standards governing each test. Instead, the magistrate reasoned that defense counsel would be permitted to cross examine the officer on any particular NHTSA standard that defense counsel believed she failed to satisfy when conducting Murray's own tests. (Tr. at 53-60). Rather than reciting specific NHTSA testing standards and asking Landacre whether she had strictly complied with them, defense counsel expressed dismay at being placed in a "catch-22" and discontinued his questioning.²

{¶14} Given defense counsel's failure to identify any specific way that Landacre failed to comply with NHTSA standards in Murray's case, the officer's general testimony about her compliance with those standards was sufficient to satisfy *Homan*. See *Williams*, supra; *Rioux*, supra. Accordingly, the trial court did not commit plain error by refusing to suppress the field sobriety test results, which were obtained in strict compliance with NHTSA standards.

{¶15} In opposition to the foregoing conclusion, Murray argues that strict compliance was not shown because Landacre's video and audio equipment did not record the field sobriety tests and her memory of the tests was limited, forcing her to rely on her police report and a test sheet to refresh her recollection. Upon review, we find these arguments to be unpersuasive. Although the ability to review audio or video recordings of the field sobriety tests may have been helpful, Murray cites

²We will address the magistrate's cross examination ruling again in our analysis of Murray's third assignment of error.

absolutely no authority for the proposition that strict compliance with NHTSA standards cannot be established without such evidence. In addition, the fact that Landacre needed to refresh her recollection with her police report and a test sheet is not particularly significant. Officers frequently refresh their recollection when testifying in traffic-offense cases, and we find nothing objectionable about Landacre having done so. Regardless of whether the officer testified from her independent recollection or after prompting from her notes and report, the fact remains that she adequately testified about Murray's performance on the field sobriety tests and her own compliance with NHTSA testing standards.

{¶16} Murray asserts that her motion to suppress should have been sustained because no probable cause existed to arrest her for driving under the influence of alcohol. Murray reasons that absent the field sobriety tests officer Landacre lacked probable cause to arrest her for driving under the influence of alcohol. In particular, Murray argues that her admission of drinking one beer, coupled with her speeding, odor of alcohol, slurred speech, and glassy eyes, was insufficient to establish probable cause. As set forth above, the trial court properly declined to suppress the evidence of her field sobriety tests. When the results of those tests are considered in conjunction with the other evidence cited above, Officer Landacre had ample probable cause to arrest Murray for driving under the influence of alcohol.

{¶17} Murray argues that the trial court erred by not allowing cross examination as to Landacre's knowledge of NHTSA field sobriety testing standards. As noted above, defense counsel attempted to elicit testimony from Landacre

concerning how field sobriety tests should be performed in order to comply with NHTSA standards. (Tr. at 53-60). Defense counsel's questions were not addressed to Landacre's performance of the tests in Murray's particular case. Instead, defense counsel sought to inquire into the officer's understanding of NHTSA field sobriety testing standards generally. The prosecutor objected, arguing that defense counsel's questioning was overbroad. Ultimately, the magistrate ruled that Landacre would not be required to recite the NHTSA standards governing each test. Rather than requiring Landacre to recite every test requirement set forth in the NHTSA manual, the magistrate explained that defense counsel could question her about specific test requirements and whether she complied with them.

{¶18} Defense counsel argued that the foregoing procedure was unfair because Landacre had little independent recollection of how she conducted Murray's tests and had to refer to her notes and a test report to refresh her recollection. According to defense counsel, he could not reasonably inquire into what he believed Murray did wrong without first hearing her understanding of what the NHTSA testing manual requires. (Tr. at 55).

{¶19} Regardless of whether Landacre testified solely from independent memory or after refreshing her recollection, she did testify on direct examination about her administration of the field sobriety tests to Murray and about the fact that she performed those tests in compliance with NHTSA standards. We see no "plain error" present in the trial court's ruling that officer Landacre could not be required to testify to her understanding of the NHTSA standards since counsel could have cross-examined her with specific questions concerning her compliance with the

NHTSA standards.

{¶20} The judgment of the trial court is affirmed.

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GRADY, J., concurs.

FAIN, J., concurring in the judgment:

{¶21} Although I concur both in the judgment and in the opinion of this court in all other respects, I write to indicate that I disagree with the implication that the trial court did not err when it restricted Murray's cross-examination of Trooper Landacre.

{¶22} Pursuant to *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212, the State bore the burden of establishing Trooper Landacre's strict compliance with all of the National Highway Traffic Safety Administration field sobriety testing standards as a condition of admitting any of those tests. Although I agree that the State could satisfy this burden through Trooper Landacre's testimony that she administered the tests in accordance with those standards, Murray was entitled to test the validity of this testimony through cross-examination.

{¶23} Trooper Landacre testified that the only recollection she had of the field sobriety testing involving Murray was an incident when Murray grabbed Landacre's arms for balance and "turn[ed] around 360." She had no specific recollection of how she administered the tests, but had testified, on direct, that she "perform[ed] the tests in the manner in which [she was] trained." She had also testified, on direct, that with respect to at least one of the tests, the horizontal gaze

nystagmus test, she had “been trained to perform under NHSTA standards.”

{¶24} In my view, Murray was not required to take for granted that the manner in which Landacre had been trained to administer the field sobriety tests was, in fact, in accordance with NHSTA standards, but was allowed to test that assertion with reasonable cross-examination. Landacre testified that she had no notes or other written aids to assist her when she performed field sobriety testing. Presumably, then, she relied upon her memory of her training to conduct field sobriety tests. In my view, it was proper for Murray to test Landacre’s memory of her training with respect to each of the field sobriety tests she administered by asking her how she had been trained to perform the tests. Through cross-examination, Murray might show either that Landacre’s memory of her training is not sufficiently reliable to assure that the tests were done properly, or that the manner in which she was trained to perform the tests (or her recollection of the manner in which she was trained to perform the tests, upon which she relied in administering the tests) does not conform to NHSTA standards.

{¶25} If, during cross-examination, Landacre forgot a step, that would not necessarily have been fatal to the State’s position. On re-direct, the State could have established that Landacre just forgot a step, while on the less familiar ground of testifying in court, that she would not likely have forgot in the field, while in the familiar and routine business of administering field sobriety tests. Nevertheless, where the State relies for its proof upon testimony that the officer performed the tests in accordance with her training, and the further testimony that she was trained in accordance with NHSTA standards, the defendant may reasonably test the

reliability of the testimony by inquiring how the officer was trained to perform the tests. This is especially critical where the officer, in administering the tests, relies solely upon her memory of her training. If an officer, in administering field sobriety tests, were instead to rely upon a set of laminated cards, like the Miranda warning cards that many officers carry, then the officer could testify that she performed each test in accordance with the instructions on the appropriate card, which she always carries with her, and her independent recollection of how she was trained to perform the tests would have little, if any, relevance.

{¶26} In my opinion, it was error not to permit Murray to inquire concerning Landacre's recollection of how she was trained to administer the field sobriety tests, which, according to her own testimony, governed how she in fact administered the tests. Nevertheless, I agree that this does not rise to the level of plain error. To rise to the level of plain error, an error must have a great likelihood of affecting the outcome. In my view, this error does not meet that test. There is nothing in the record to establish a great likelihood that the cross-examination that Murray sought, if it had been permitted, would have altered the outcome of this case. Consequently, the error did not survive Murray's failure to have objected to the magistrate's decision, and I agree that this assignment of error must be overruled.

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