[Cite as *State v. Davis*, 2009-Ohio-3759.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 65
v.	:	T.C. NO. 07TRC17363/07CRB6869
RONALD J. DAVIS	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 31st day of July, 2009.

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HARSHA, J. (by assignment)

{¶ 1} Ronald J. Davis appeals the trial court's decision overruling his motion to suppress the results of three field sobriety tests. He argues that the results of these tests are inadmissible because the state failed to show that the trooper administered the tests in substantial compliance with the applicable standards. However, the testimony shows that the trooper received proper training on how to administer field sobriety tests and that he

administered Davis's tests in accordance with his training. Thus, the trial court did not err by overruling Davis's motion to suppress.

{¶ 2} Davis additionally contends that the trial court erred by determining that the trooper possessed probable cause to arrest. He premises this argument upon the erroneous presumption that the trooper failed to substantially comply with the applicable standards when administering the tests. Because we determined that the trooper substantially complied with the applicable standards, this argument is meritless. Accordingly, we overrule his two assignments of error and affirm the trial court's judgment.

I. FACTS

{¶ 3} In the early morning hours of December 22, 2007, Ohio State Patrol Trooper Richard Dixon observed Davis's vehicle move left of the centerline. He followed the vehicle and when he saw it travel left of the centerline two additional times, he stopped it. Upon obtaining license and registration information, he smelled a strong odor of an alcoholic beverage emanating from the vehicle, which was occupied by Davis and a passenger. He noted that Davis's eyes were glassy and bloodshot and that his speech was slurred. Trooper Dixon asked Davis to exit the vehicle and when Davis did so, the trooper smelled the alcoholic odor emanating from Davis. Davis admitted having consumed " a couple" of drinks.

{¶ 4} Trooper Dixon administered three field sobriety tests: (1) the horizontal gaze nystagmus (HGN) tests; (2) the one-leg stand test; and (3) the walk-and-turn test. The trooper found six clues on the HGN test, two clues on the one-leg stand test, and four

clues on the walk-and-turn test. The trooper subsequently arrested Davis for driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a). The trooper also cited Davis for various other offenses, but they were eventually dismissed and are not relevant to this appeal.

{¶ 5} Davis later filed a motion to suppress and argued that the results of the field sobriety tests were not admissible because the trooper failed to administer them in substantial compliance with the National Highway Traffic Safety Administration (NHTSA) standards. At the motion to suppress hearing, Trooper Dixon testified that he received training in accordance with the NHTSA standards and that he administered Davis's tests in accordance with his training.

{¶ 6} Trooper Dixon stated that while searching Davis incident to arrest, he discovered that Davis has "Chrones Disease"[1] and has a colostomy bag. The trooper testified that he has "tested people with colostomy bags, wheelchairs, etcetera. I but I I've [sic] never had them perform any different than anybody else I not that would make me say have indifference in either way. [sic]" The trooper stated that Davis did not indicate that the colostomy bag would interfere with his performance on the field sobriety tests.

{¶ 7} The trial court overruled Davis's motion to suppress, finding that Trooper Dixon

{¶ 8} administered the field sobriety tests in substantial compliance with the NHTSA standards. Davis subsequently pled no contest to driving while under the influence of alcohol and filed this appeal.

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[1]We presume that the proper spelling should be Crohn's disease.

II. ASSIGNMENTS OF ERROR

{¶ 9} Davis raises two assignments of error:

First Assignment of Error:

{¶ 10} "The trial court erred in overruling the defendant's motion to suppress the results of defendant's field sobriety tests when the state failed to produce evidence the trooper substantially complied with his NHTSA training."

Second Assignment of Error:

{¶ 11} "The trial court erred in denying appellant's motion to suppress as the trooper lacked probable cause to arrest appellant after the trooper failed to demonstrate he substantially complied with his field sobriety training."

III. FIELD SOBRIETY TESTS

{¶ 12} In his first assignment of error, Davis argues that the trial court erred by overruling his motion to suppress the results of the field sobriety tests because the state failed to demonstrate that the officer substantially complied with the NHTSA standards when administering the field sobriety tests.

A. STANDARD OF REVIEW

{¶ 13} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of

witnesses. Id., citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Id., citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. Id., citing *State v. McNamara* (1997), 124 Ohio App.3d 706.

{¶ 14} In this case, the applicable legal standard is substantial compliance. See R.C. 4511.19(D)(4)(b). Thus, we will defer to the trial court's findings of fact, but we will independently determine whether those facts demonstrate substantial compliance. Cf. *Burnside*, at ¶8 (stating "[w]e therefore consider whether the facts in the instant case demonstrate substantial compliance with the Department of Health regulations under a de novo standard of review").

B. SUBSTANTIAL COMPLIANCE

{¶ 15} R.C. 4511.19(D)(4)(b) provides that the results of field sobriety tests are admissible at trial as long as the state presents clear and convincing evidence that the officer administered the tests in substantial compliance with the NHTSA standards.[2]

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[2]R.C. 4511.19(D)(4)(b) states:

"In any criminal prosecution * * * for a violation of division (A) or (B) of this section, * * * 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 national highway traffic safety administration, all of the following apply:

{¶ 16} Here, appellant asserts that the state failed to present clear and convincing evidence that the officer administered the tests in substantial compliance with the applicable testing standards for the following reasons: (1) although the state introduced part of the NHTSA manual and the officer testified that he performed the tests according to his training, the officer did not explicitly testify that he administered the one-leg stand and the walk-and-turn tests in substantial compliance with the NHTSA standards; (2) the officer failed to ask Davis if he had any medical conditions; (3) the officer did not ensure that the tests were performed on dry pavement; and (4) the officer did not recite the exact language from the NHTSA manual.

{¶ 17} First, we readily dispose of Davis's assertion that the trial court should have suppressed the field sobriety tests results because the officer failed to recite the precise language used in the NHTSA manual. An officer is not required to use the exact language in the NHTSA manual. "Instead, the instructions provided may deviate from the quoted language found in the NHTSA manual so long as they are sufficient to apprise the accused of the manner in which he is to perform the test." *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, at ¶24; see, also, *State v. Wood*, Clermont App. No. CA2007-12-115, 2008-Ohio-5422, at ¶29; *State v. Nicholson*, Warren App. No. CA2003-10-106, at ¶23. To require otherwise "amounts to strict compliance with the NHTSA standards, which is not necessary; rather, clear and convincing evidence of substantial compliance with the

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(i) The officer may testify concerning the results of the field sobriety test so administered.
(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.
(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate."

NHTSA standards is sufficient." *State v. Henry*, Preble App. No. CA2008-05-8, 2009-Ohio-10, at ¶27. Here, the trooper's testimony demonstrates that he sufficiently instructed Davis on how to perform the tests.

{¶ 18} Second, we reject any contention that the officer must explicitly testify that he administered the tests in substantial compliance with the NHTSA standards or utter the magic words "substantial compliance." As we previously stated, substantial compliance is a legal standard for a court's determination. We defer to the trial court's factual findings and independently determine whether they demonstrate substantial compliance. An officer's testimony, therefore, that he administered test results in substantial compliance with the applicable testing standards would not be dispositive of the issue. Rather, the reviewing court must review the evidence and testimony as determined by the trial court to decide whether the applicable legal standard, i.e., substantial compliance, is present.

{¶ 19} The case Davis relies upon, *State v. Brown*, 166 Ohio App.3d 638, 2006-Ohio-1172, to support his argument is distinguishable. There, the court held that a trooper's testimony that he conducted the sobriety tests in conformity with his training is not the same as testifying that he administered the tests in substantial compliance with the guidelines set forth in the NHTSA manual. However, in that case, the state did not present any evidence as to what the standardized testing procedures were. In contrast, in the case at bar, the state admitted part of the NHTSA manual to demonstrate the standard procedures, the officer testified that his training was under the NHTSA guidelines, and he stated that he administered the tests in accordance with his training. Thus, we find *Brown* distinguishable.

{¶ 20} Next, we reject Davis's assertion that the officer failed to administer the tests

in substantial compliance with NHTSA because he did not administer the one-leg stand and the walk-and-turn tests on a perfectly dry surface. In *State v. Marcinko*, Washington App. No. 06CA51, 2007-Ohio-1166, the Fourth District Court of Appeals determined that performing standardized field sobriety tests under less than ideal conditions did not necessarily show that the officer failed to administer the tests in substantial compliance with the NHTSA standards. See id. at ¶17; see, also, *State v. Smith*, Portage App. Nos. 2006-P-101 and 2006-P-102, 2008-Ohio-3251, at ¶32 (stating that " [s]imply because the environmental conditions were less than ideal does not, by itself, render the tests invalid"). We agree with this holding. To find that the officer must demonstrate that he performed the tests under the ideal conditions set forth in the NHTSA manual would be tantamount to requiring strict, not substantial, compliance. Furthermore, the obvious intent of the NHTSA guidelines suggesting that the tests be performed on a dry surface is to ensure that the subject will not slip or fall during the test. As long as that intent can be carried out, then there is substantial compliance with the NHTSA standards. Thus, substantial compliance is shown if there is no evidence that the wet or slippery conditions affected the subject's performance. Here, there is no evidence that the wet pavement affected Davis's performance of the tests. Under these circumstances, the officer's failure to perform the tests under the ideal conditions set forth in the NHTSA manual does not mean he failed to substantially comply with the standards. Cf. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294 (observing that rigid compliance is not required as such compliance is not always humanly or realistically possible). Additionally, as the Ohio Supreme Court recognized on cross-examination of the officer who administered the test, a defendant may challenge the lack of strict compliance as causing the test to be unreliable. *State v. Boczar* , 113 Ohio

St.3d 148, 2007-Ohio-1251, at ¶23 ("The potential compromise of reliability caused by the lack of strict compliance can be shown by the defense on cross-examination.").

{¶ 21} Davis's next argument, that the officer failed to administer the tests in substantial compliance with the NHTSA standards due to the officer's failure to ask him if he had any medical conditions, also is meritless. *State v. Penix*, Portage App. No. 2007-P-86, 2008-Ohio-4050, considered and rejected this same argument. That court reasoned that requiring the officer to adhere to any particular script would be tantamount to strict compliance, which is not required. We agree. Additionally, as this court stated in *State v. Hall*, Clark App. No. 05-CA-6, 2005-Ohio-6672, at ¶24: "The NHTSA Manual does not require inquiries concerning such [medical] conditions. Neither does it limit or avoid giving the tests on account of them." See, also, *Mt. Vernon v. Seng*, Knox App. No. 04CA12, 2005-Ohio-2915 (rejecting argument that officer must inquire as to medical conditions to demonstrate substantial compliance). Furthermore, the testimony shows that before the officer administered the tests, he asked Davis if he had eye problems, wore contact lenses or glasses, or had any leg, hip, or back problems. Moreover, the evidence does not show that Davis's medical condition, his colostomy bag, affected his performance on any of the tests. And, as already noted, this condition may be fertile ground for contesting the reliability of the tests in the jury's mind, but it does not prohibit admissibility of the results.

{¶ 22} In sum, our review of the motion to suppress transcript discloses that the trial court properly determined that the officer administered the field sobriety tests in accordance with the NHTSA standards. The officer testified that he was trained to administer the field sobriety tests in accordance with the 2006 NHTSA standards and that he administered Davis's tests in accordance with his training. He testified in detail as to the

methods he used to administer the tests. The state presented evidence from the NHTSA manual regarding the tests. [3] The totality of this evidence shows that the trooper administered the tests in substantial compliance with NHTSA.

{¶ 23} Accordingly, we overrule Davis's first assignment of error.

IV. PROBABLE CAUSE TO ARREST

{¶ 24} In his second assignment of error, Davis contends that the trial court erred by overruling his motion to suppress because without evidence of the allegedly improperly-administered field sobriety tests, the state failed to establish that the trooper possessed probable cause to arrest Davis.

{¶ 25} Because we determined that the officer administered the tests in substantial compliance with the NHTSA standards, Davis's second assignment of error is meritless.

{¶ 26} Accordingly, we overrule his second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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FAIN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

[3] Although the state introduced exhibits, including portions of the NHTSA manual and a videotape of some of the tests, none of those exhibits were transmitted to this court.

Copies mailed to:

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