[Cite as *State v. Kissinger*, 2010-Ohio-2840.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23636
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-TRC-05421
v.	:	
	:	
JOSHUA L. KISSINGER	:	(Criminal Appeal from Kettering
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 18th day of June, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Joshua Kissinger appeals from his conviction and sentence, following a no-contest plea, for Operating a Motor Vehicle Under the Influence, in violation of R.C. 4511.19(A)(1)(a). Kissinger contends that the police officer who stopped him, Ryan Vandergrift, lacked a reasonable, articulable suspicion

that he was driving while impaired, so that the officer's prolonged detention for the purpose of administering field sobriety tests was unlawful. We conclude that an in-car horizontal gaze nystagmus test, not to be confused with a subsequent, properly administered horizontal gaze nystagmus test, can properly be considered by a stopping police officer, along with other facts, in determining whether the officer has a reasonable, articulable suspicion justifying the administration of field sobriety tests. In any event, it appears that the trial court gave the in-car horizontal gaze nystagmus little weight. Even without the in-car horizontal gaze nystagmus test, the officer had a reasonable, articulable suspicion that Kissinger was impaired.

{¶ 2} Kissinger next contends that the trial court erred by overruling his objection to Vandergrift's testimony concerning his police report of the incident. The report did not satisfy the requirement for refreshed recollection, under Evid. R. 612, since Vandergrift testified that even after reading his report, he had no independent recollection of the field sobriety tests or their results. Neither did the report satisfy the formal foundational requirement for recorded recollection, under Evid. R. 803(5), since Vandergrift never actually vouched for the accuracy of his report. But the Ohio Rules of Evidence do not apply, in full force, to hearings on the admissibility of evidence, Vandergrift testified that anything unusual would have been noted in his report, and a police officer's official report has sufficient inherent reliability, in the absence of anything in the record suggesting the contrary, to justify a trial court, in the exercise of its discretion, to consider testimony by a police officer concerning his official report at a hearing on the admissibility of evidence.

{¶ 3} Finally, Kissinger contends that there was insufficient evidence that he

was under police observation for 20 minutes preceding the breathalyzer test, as required by Ohio Admin. Code § 3701-53-02. We conclude that Vandergrift's testimony that he had Kissinger under observation, generally, albeit not continuously, during the 20-minute period preceding the breathalyzer test, and that Vandergrift had ascertained that Kissinger had nothing on his person or in his mouth that could affect the validity of the test, satisfied the requirement of the rule.

{¶ 4} For these reasons, the judgment of the trial court is Affirmed.

I

{¶ 5} Kettering police officer Ryan Vandergrift was patrolling in his marked cruiser in the early morning hours of May 17, 2009. A little before 3:00 a.m., Vandergrift noticed the vehicle Kissinger was driving:

{¶ 6} "The vehicle came to a stop at Bigger at a red light. Crossed over the stop bar and uh, over the pedestrian walkway nearly into crossing traffic.

{¶ 7} "Q. Then what happened?

{¶ 8} "A. The vehicle, the light cycled to green, the vehicle proceeded to go eastbound, weaved into the curb lane from the through lane it had been traveling in. At that time I activated my lights and the vehicle pulled over to the right up onto, over the curb and onto the grass."

{¶ 9} When Vandergrift approached Kissinger, Vandergrift detected an odor of an alcoholic beverage coming from both the vehicle and from Kissinger's person. Kissinger's eyes appeared "blood shot, watery or glassy." Initially, Kissinger denied having been drinking, but he later admitted "he'd had a few."

{¶ 10} Kissinger "fumbled" through his wallet before producing his operator's license. Vandergrift then did a brief check for nystagmus, which he explained as follows:

{¶ 11} "As opposed to pulling him out of the vehicle and putting him through all the steps, I'll simply take a stimulus, a pen, check his eyes. See if any type of proof of nystagmus in the eyes and then at that point make my decision to pull him out and do the full field sobriety tests."

{¶ 12} Vandergrift later described nystagmus as "an involuntary jerking of the eyes," and "* * * best way to describe it is a marble on glass as it rolls smoothly versus marble on glass with grains of sand over it. If the marble has the grains of sand it will kind of stop and start again and be real bumpy. That's what I'm checking for."

{¶ 13} Based on everything he had observed, Vandergrift asked Kissinger to step out of his vehicle and submit to field sobriety tests. Vandergrift administered a proper horizontal gaze nystagmus test, finding five clues out of a possible six, a walk-and-turn test, a one-leg stand test, an alphabet test where the subject is asked to recite the letters D through K, a counting-backward test, where the subject is asked to count backwards from 67 to 53, and a fingertip-to-nose touching test. Vandergrift found evidence of impairment on all six tests.

{¶ 14} Vandergrift arrested Kissinger and transported him to the police station. Vandergrift kept Kissinger under general, but not continuous, observation for twenty minutes preceding a breath alcohol test on a BAC Datamaster, which was administered by Kettering police officer Ryan Meno, who also testified.

{¶ 15} Kissinger's breath tested at 0.144 percent alcohol concentration. He was

charged with Operating a Motor Vehicle while Under the Influence of Alcohol or Drugs, in violation of R.C. 4511.19(A)(1)(a).

{¶ 16} Kissinger moved to suppress the breath alcohol test result. Following a hearing, his motion to suppress was overruled. He then pled no contest, was found guilty, and was sentenced accordingly. From his conviction and sentence, Kissinger appeals.

II

{¶ 17} Kissinger's First Assignment of Error is as follows:

{¶ 18} "THE OFFICER LACKED REASONABLE SUSPICION TO DETAIN THE APPELLANT AFTER INITIATING A TRAFFIC STOP."

{¶ 19} Kissinger contends that the in-car horizontal gaze nystagmus test, not having been conducted in accordance with standards set by the National Highway Traffic Safety Administration, cannot be considered in determining whether Vandergrift had the requisite reasonable, articulable suspicion to detain him for the purpose of conducting field sobriety tests. He argues that without the in-car horizontal gaze nystagmus test, Vandergrift lacked the requisite reasonable, articulable suspicion.

{¶ 20} Kissinger cites *State v. Stritch*, Montgomery App. No. 20759, 2005-Ohio-1376, for the proposition that the result of a horizontal gaze nystagmus test that is not conducted in accordance with NHTSA standards may not be considered in determining whether a police officer has probable cause to arrest a motorist for OMVI. Although our opinion in that case did not expressly so hold, we agree that the proposition Kissinger asserts is implied by our opinion. But the issue in this case is not

whether Vandergrift's observations while conducting the in-car horizontal gaze nystagmus test, which was clearly not conducted in accordance with NHTSA standards, may be considered in assessing whether there was probable cause for an arrest. The issue here is whether those observations could be considered, along with other observations, in determining whether Vandergrift had reasonable and articulable suspicion to detain Kissinger for the purpose of administering field sobriety tests.

{¶ 21} Kissinger also cites *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, and *State v. Kennedy*, Tuscarawas App. No. 2008 AP 04 0026, 2009-Ohio-1398, but those cases involve the admissibility of a non-complying field sobriety test on the issues of guilt and probable cause to arrest, not, as here, on the issue of reasonable, articulable suspicion to detain a motorist for the purpose of administering field sobriety tests.

{¶ 22} Finally, Kissinger cites *State v. Zimmers* (January 23, 2008), Montgomery County Common Pleas No. 07 CR 1579, for the proposition that an in-car horizontal gaze nystagmus test, not conducted in accordance with NHTSA standards, cannot be considered in determining whether a police officer had a reasonable, articulable suspicion to detain a motorist for the purpose of administering field sobriety tests. *State v. Zimmers*, being a decision of the Montgomery County Common Pleas Court, is, of course, not binding on us. We do not find it persuasive. The court analyzed the in-car horizontal gaze nystagmus test performed in that case, and found it not to be in substantial compliance with NHTSA standards because the motorist in that case was not facing away from traffic, and was therefore exposed to "potential stimuli distractions." The court then sustained the motion to suppress, and added, without any

additional analysis or consideration, the subsequent field sobriety tests within the scope of its holding:

{¶ 23} "The results of the HGN test – as well as the subsequent sobriety tests that were, as Officer Knierim testified, predicated upon the HGN test – are hereby suppressed."

{¶ 24} An arrest is a substantial intrusion upon the arrestee's protected liberty interests, and therefore requires the full measure of probable cause to satisfy the Fourth Amendment to the United States Constitution. A brief, investigative stop is far less intrusive, and requires a correspondingly smaller quantum of probable cause for its justification, described as reasonable and articulable suspicion. The administration of field sobriety tests is intermediate between these two in terms of the intrusion it represents upon the subject's protected liberty interest. See *State v. Smethurst* (February 13, 1995), Clark App. No. 94-CA-24, and *State v. Spillers* (March 24, 2000), Darke App. No. 1504. The imposition upon the subject's time is apt to be not much greater than the imposition represented by the typical investigative stop, but the indignity inflicted upon the subject's person, while far less than the indignity represented by an arrest, is greater than any indignity inflicted by the typical investigative stop.

{¶ 25} We note that the trial court evidently gave the in-car horizontal gaze nystagmus test no weight in determining whether Vandergrift had reasonable and articulable suspicion sufficient to justify field sobriety testing. The trial court did not mention the in-car horizontal gaze nystagmus test either in its oral decision announced at the conclusion of the suppression hearing, or in its written decision.

{¶ 26} We conclude that even without the in-car horizontal gaze nystagmus test,

Vandergrift had reasonable, articulable suspicion sufficient to justify field sobriety testing. The aberrant driving he observed was not minimal. He saw Kissinger go all the way past the stop bar, into the pedestrian walkway, and almost into crossing traffic, at a red light. After seeing Kissinger, on the green light, weave from the through lane into the curb lane, upon activating his overhead flashing lights, Vandergrift saw Kissinger pull over, go over the curb, and onto the grass. Combined with the odor of alcohol emanating from Kissinger's person, the bloodshot, watery or glassy eyes, and Kissinger's belated admission that he had "had a few," Vandergrift had a sufficient basis for a reasonable, articulable suspicion that Kissinger was under the influence, albeit possibly not enough for probable cause for an arrest. See *State v. Beagle*, Clark App. No. 2002-CA-59, 2003-Ohio-4331.

{¶ 27} Kissinger's First Assignment of Error is overruled.

III

{¶ 28} Kissinger's Second Assignment of Error is as follows:

{¶ 29} "THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF OFFICERS VANDERGRIFT AND MENO AS IT WAS INADMISSIBLE HEARSAY AND THE OFFICERS LACKED INDEPENDENT RECOLLECTION OF THE STOP AND ARREST."

{¶ 30} We agree with Kissinger that officers Vandegrift and Meno acknowledged that, for the most part, their police reports did not refresh their recollection to the point that they had any independent recollection of events. Vandergrift, the key witness, testified that he could recall the circumstances of the stop, and his interactions with

Kissinger, but not the details of the administration of the tests, and Kissinger's performance of the tests.

{¶ 31} Nor did the State satisfy the requirement of Evid. R. 803(5) for recorded recollection, since neither officer actually vouched for the accuracy of their reports.

{¶ 32} But we agree with the State that full compliance with the Ohio Rules of Evidence is not required in connection with a hearing conducted on the issue of the admissibility of evidence. *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180. Evid. R. 104(A). A trial court has discretion to determine the admissibility of evidence at a suppression hearing. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 33} In this case, Vandergrift testified that the reason he writes reports is to remember what happened, and that if something unusual had happened, he would have put it in his report. A police report is not a casual document. A police officer can expect that his report may have significance in legal proceedings. In the absence of any indication to the contrary, a trial court can reasonably conclude that a police officer has made an effort to prepare an accurate report. Consequently, we conclude that a trial court, in the absence of any indication that a police report is inaccurate, does not abuse its discretion in allowing testimony concerning the contents of the report at a suppression hearing, even though neither the requirements for refreshed recollection, under Evid. R. 612, nor for recorded recollection, under Evid. R. 803(5), have been satisfied. This holding should not be taken to mean that in a proceeding where the requirements of the Ohio Rules of Evidence are fully applicable – in a criminal trial, for example – the contents of a police report can be admitted in evidence without compliance with the applicable Rules.

{¶ 34} Kissinger's Second Assignment of Error is overruled.

IV

{¶ 35} Kissinger's Third Assignment of Error is as follows:

{¶ 36} "THE TRIAL COURT ERRED IN NOT SUPPRESSING THE BREATH TEST RESULTS AS THE STATE FAILED TO PROVE THE OFFICERS CONDUCTED THE REQUIRED TWENTY MINUTE OBSERVATION PERIOD."

{¶ 37} Concerning this issue, Vandergrift testified on cross-examination as follows:

{¶ 38} "Q. Okay. And I take it that would also be when you had him, when you said you were watching him for 20 minutes, you don't remember where he was sitting or what was going on during those 20 minutes?

{¶ 39} "A. During the 20 minutes?

{¶ 40} "Q. Um huh.

{¶ 41} "A. Absolutely. I mean –

{¶ 42} "Q. You remember those 20 minutes?

{¶ 43} "A. – once he gets out of the vehicle, at that point he's in my custody with me. He's taken into custody. He sits in the backseat of my car. And then he's transported to the jail at which point he sits in a holding cell.

{¶ 44} "Q. And that's what you typically do?

{¶ 45} "A. And that's what I recall.

{¶ 46} "Q. Okay. On this case do you remember where he was sitting in the jail house for the 20 minutes?

{¶ 47} "A. No I can't recall which cell he was in that night. No.

{¶ 48} "Q. And he's in the cell by himself during the 20 minutes?

{¶ 49} "A. Yes.

{¶ 50} "Q. Are you in there with him?

{¶ 51} "A. No.

{¶ 52} "Q. Okay. So you're not actually observing him during these 20 minutes, correct?

{¶ 53} "A. What I will do, not straight 20 minutes –

{¶ 54} "Q. Okay.

{¶ 55} "A. – he will be, I will check to make sure he doesn't have anything on his person or in his mouth.

{¶ 56} "Q. Observe him for the full 20 minutes?

{¶ 57} "A. Correct. I don't sit there with him for the 20 minutes.

{¶ 58} "Q. He's in a cell out of your view?

{¶ 59} "A. Uh, no. Not necessarily.

{¶ 60} "Q. You have the ability to kind of look in?

{¶ 61} "A. Correct. Yes.

{¶ 62} "Q. Okay. And, as I said, I know you said that's what you typically did, but on this occasion do you remember going back and checking on him specifically on these events or are you telling what you typically do on an arrest?

{¶ 63} "A. Un, I couldn't give you any specific examples of checking on him. No.

{¶ 64} "Q. Okay. So it would be the same thing as the other things. You don't

remember these 20 minutes or checking on him. You were just telling us what you would typically do, because you don't have an independent memory of this event. Would that be a fair statement?

{¶ 65} "A. That portion correct. Yes.

{¶ 66} "Q. So it would be, again, useless for me to even ask any questions because other than repeating what's in your report, you can't testify because you don't remember?

{¶ 67} "A. For the most part, correct.

{¶ 68} "Q. And that would apply to the reading of the 2255 and everything else, correct.

{¶ 69} "A. Yes."

{¶ 70} The Ohio Administrative Code requires that a police officer must observe a suspect for twenty minutes before administering a breath alcohol test. Ohio Admin. Code § 3701-53-02. "The purpose of the observation rule is to require positive evidence that during the twenty minutes prior to the test the accused did not ingest some material which might produce an inaccurate test result." *State v. Adams* (1992), 73 Ohio App.3d 735, 740. This purpose is satisfied, and there is substantial compliance with the rule, if "during the relevant period the subject was kept in such a location or condition or under such circumstances that one may reasonably infer that his ingestion of any material without the knowledge of the witness is unlikely or improbable." Id., at 740.

{¶ 71} "To overcome that inference, the accused must show that he or she did, in fact, ingest some material during the twenty-minute period. The 'mere assertion that

ingestion was hypothetically possible ought not to vitiate the observation period foundational fact so as to render the breathalyzer test results inadmissible.'" *State v. Steele* (1977), 52 Ohio St.2d 187, 192.

{¶ 72} "[T]he absence of any evidence that the defendant had ingested any material during the twenty-minute period preceding the test is a significant factor in determining compliance with the regulations." *State v. Armbrust* (November 24, 1989), Greene App. No. 89-CA-20, citing *City of Bellbrook v. Kyne* (June 26, 1984), Greene App. No. 83-CA-102.

{¶ 73} Applying these holdings, we conclude that there is sufficient evidence in this record for the trial court to have found substantial compliance with the twenty-minute-observation-period rule. Vandergrift testified that he determined, at the outset of the twenty-minute period, that Kissinger had nothing on his person or in his mouth that would interfere with the result of the breathalyzer test. Vandergrift testified that he had Kissinger under general observation, in his holding cell, if not under continuous observation, during the twenty-minute period. Finally, there was no evidence that Kissinger did, in fact, ingest anything that would have interfered with the test result, a fact we found significant in the *Armbrust* and *Bellbrook v. Kyne* cases.

{¶ 74} Kissinger's Third Assignment of Error is overruled.

V

{¶ 75} All of Kissinger's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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