[Cite as *State v. Reed*, 2010-Ohio-299.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23357
vs.	:	T.C. CASE NO. 08CR1344
JAMES M. REED	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 29th day of January, 2010.

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GRADY, J.:

{¶ 1} Defendant, James Reed, appeals from his conviction and sentence for OMVI, which were entered on Reed's plea of no contest following the trial court's denial of his Crim.R. 12(C)(3) motion to suppress evidence.

{¶ 2} Reed was arrested at approximately 12:45 a.m. on February

22, 2009, by Kettering Police Officers Schomburg and Woolf. Officer Schomburg testified that he and Officer Woolf were both in a UDF store on Stroop Road, in Kettering, and that:

{¶ 3} "We were just standing there talking, having a cup of, cup of hot chocolate; and then Patricia Wolfe, who's a clerk at UDF she came running toward us and said that the defendant just bought some alcohol, bought some beer, and when he was leaving, he was stumbling, and he had a very, very strong odor of alcohol. She said that he was, he was drunk.

{¶ 4} "Q. Okay. What did you upon receiving that information?

{¶ 5} "A. At that time I then went outside, and he was getting in his truck start, starting to back up.

{¶ 6} "Q. Okay. Had he actually started the vehicle?

{¶ 7} "A. Yes, he was actually backing up.

{¶ 8} "Q. Okay. So the vehicle was moving when --

{¶ 9} "A. Yes.

{¶ 10} "* * *

{¶ 11} "Q. Once you see him in the vehicle moving the car, what do you do?

{¶ 12} "A. I knocked on the, the window.

{¶ 13} "Q. The window of the truck?

{¶ 14} "A. Yes.

{¶ 15} "Q. Okay. And what was your reason for doing that?

{¶ 16} "A. Based on what the clerk told me that he was very intoxicated. He had a strong odor of alcohol. He, he was, he was staggering when he was walking out to the parking lot.

{¶ 17} "Q. Okay. Once you knocked on the window, what did the defendant do at that time?

{¶ 18} "A. The defendant put the truck, just put it in park right there and stepped out.

{¶ 19} "Q. Okay. What, if anything, did you notice about him?

{¶ 20} "A. I immediately noticed a strong odor of alcohol on him. I started talking with him, and then I, his speech was slurred and when I was talking to him, he, he was swaying back and forth.

{¶ 21} "Q. Okay. You, you said you started talking to him.

{¶ 22} "A. Yeah.

{¶ 23} "Q. What, what was the conversation that you had with the defendant?

{¶ 24} "A. I asked him how much alcohol has he had to drink, and he advised that he had a few.

{¶ 25} "* * *

{¶ 26} "He just said that he's going through a lot of personal problems. He was being apologetic. You know, pleading. He said

don't arrest me. Don't arrest me. That this will be a felony DUI if I get arrested and just basically saying he's sorry.

{¶ 27} "Q. How long would you say you conversed with the defendant?

{¶ 28} "A. At that time probably a minute, minute or two.

{¶ 29} "Q. Okay. And is there anything else you noticed about his appearance that was unusual?

{¶ 30} "A. Just the very strong odor of alcohol, the slurred speech, his eyes were blood shot, and when I was talking to him, he was swinging back and forth.

{¶ 31} "Q. Was he swinging back and forth the entire course of your conversation?

{¶ 32} "A. Pretty much. I mean, he was, he wasn't, he was going back and forth as I was talking to him.

{¶ 33} "Q. Okay. What did you do at that point?

{¶ 34} "A. I then asked him if he wanted to take some field, field sobriety tests.

{¶ 35} "Q. Okay. And what was his response to you?

{¶ 36} "A. He said he would." (T. 6-10).

{¶ 37} Officer Schomburg testified that he administered the horizontal gaze nystagmus (HGN) test, the walk-and-turn test, and the one-leg stand test. The officer also administered the

"alphabet test," the "counting backward test," and the finger-to-nose test. Officer Schomburg testified that Defendant failed each test he was given, and was thereafter arrested on an OMVI charge. A breath test that subsequently was administered when Reed was taken to jail yielded a result of 0.166, more than twice the legal limit.

{¶ 38} Defendant was charged with operating a motor vehicle while having a prohibited concentration of blood/alcohol in violation of R.C. 4511.19(A)(1)(a). The charge was filed as a felony, due to Reed's conviction for OVI in 2003. Reed pled not guilty and filed a motion to suppress evidence. The trial court overruled Reed's motion on July 9, 2008.

{¶ 39} Reed obtained new counsel, and after that was granted leave to file another motion to suppress. The new motion challenged Reed's stop, his field sobriety tests, and his arrest, as the previous motion had, and in addition challenged the results of Reed's breath test. The new motion was not heard, because on February 9, 2009, Reed changed his plea to "no contest" and was found guilty. Reed thereafter withdrew his challenge to his breath test, also indicating that his other grounds for suppression had "been previously overruled."

{¶ 40} Reed was sentenced to a one-year term of incarceration and his operating privileges were suspended for one year. Reed

filed a notice of appeal to this court. The trial court stayed execution of Reed's sentence pending this appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 41} "APPELLANT WAS UNLAWFULLY SEIZED, BECAUSE THE OFFICER LACKED REASONABLE ARTICULABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT TO JUSTIFY APPELLANT'S WARRANTLESS SEIZURE"

{¶ 42} Consistent with the Fourth Amendment, police may stop a motorist to investigate a reasonable suspicion of criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *City of Maumee v. Weisner*, 87 Ohio St.3d 295, 1999-Ohio-68. A determination of whether reasonable suspicion exists involves a consideration of the totality of the circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177. Under that analysis, both the content of the information possessed by police and its degree of reliability are relevant to the determination. *Weisner*.

{¶ 43} When the information possessed by the police before a stop stems solely from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip. *Weisner*. The appropriate analysis is whether the tip itself has sufficient indicia of reliability to justify the investigative stop. *Id*. Factors considered highly relevant are the informant's veracity, reliability, and basis

of knowledge. *Id.*

{¶ 44} An anonymous informant is generally regarded as comparatively unreliable, and his tip, therefore, will ordinarily require independent and objective corroboration. Ohio courts have generally accorded the identified citizen informant greater credibility. *Id.* Information from an ordinary citizen who has personally observed what appears to be criminal conduct carries with it indicia of reliability, and is therefore presumed to be reliable. *State v. Carstensen* (Dec. 18, 1991), Miami App. No. 91-CA-13; *City of Centerville v. Gress* (June 19, 1998), Montgomery App. No. 16899.

{¶ 45} Defendant argues that the tip the officers were given by Patricia Wolfe, the UDF store clerk, provided an insufficient basis for the officers to stop Defendant from driving away. In this context, a tip is a "piece of advance or confidential information given by or received from one thought to have access to special or inside sources." Webster's Third International New Dictionary. It is those limitations that bring the reliability of the tip into question, requiring independent and objective corroboration.

{¶ 46} The report the officers received from Patricia Wolfe does not correspond to a true tip. The information she imparted was neither in advance of the matter concerned nor confidential

to her. It was instead acquired through Wolfe's own observations of Defendant, moments before. Wolfe's opportunity to make those observations was implicit in the report she made, and her motivation in reporting what she believed to be Defendant's impaired condition was clear from the concern she manifested. Those circumstances make it highly unlikely that Wolfe would make a false report. *Weisner*. For these purposes, Wolfe should be classified as an identified citizen informant whose report of unlawful conduct is presumed reliable because her identity, the basis of her knowledge, and her motivation were evident. *Id.*

{¶ 47} Defendant nevertheless argues that Wolfe's tip was insufficient to give rise to a reasonable suspicion of criminal activity and justify an investigative stop. Defendant relies upon previous decisions of this court wherein we stated that an odor of alcohol, or a slight odor of alcohol, coupled with a de minimus traffic violation, glassy bloodshot eyes, and an admission to having consumed one or two beers, was insufficient to create a reasonable suspicion of driving under the influence and justify the administration of field sobriety tests. *State v. Spillers* (Mar. 24, 2000), Darke App. No. 1504; *State v. Dixon* (Dec. 1, 2000), Greene App. No. 2000-CA-30. This court has, however, repeatedly held that a strong odor of alcohol alone is sufficient to provide an officer with reasonable suspicion of criminal behavior. See:

State v. Marshall, Clark App. No. 2001-CA-35, 2001-Ohio-7081 (and the cases cited therein). Patricia Wolfe told Officers Schomburg and Woolf not only that Defendant was staggering when he left the store, but that Defendant had a "very, very strong odor of alcohol." That is sufficient to give rise to a reasonable suspicion of criminal behavior and justify the investigative stop of Defendant. *Marshall*.

{¶ 48} Defendant relies on *State v. Brant*, Franklin App. No. 01AP-342, 2001-Ohio-3994. In that case an employee at a drive-thru called police to say he believed a driver was intoxicated because the driver had repeatedly honked his vehicle's horn for ten minutes, his speech was very slow, and his shirt was on backwards and inside out. An officer followed the driver when he drove away, and though the officer observed no erratic driving while following the driver's vehicle, he stopped the driver and arrested him for OMVI. On appeal, the court in *Brant* noted that while the report police received was credible, the store employee had not witnessed any traffic violations, unlawful behavior, or evidence of impaired driving. Neither did the employee in *Brant* report that the driver had a "very, very strong odor of alcohol" about him, or that he was stumbling when he walked, as the store employee in the present case did. Those facts portray an alcoholic impairment which justified the officers in stopping Defendant before he could drive

away. We believe that *Brant* is distinguishable from the present case on its facts.

{¶ 49} Defendant further argues that Patricia Wolfe's tip was unreliable because she lost all credibility by violating the law herself by selling beer to a person she believed to be intoxicated, in violation of R.C. 4301.22(B). By approaching the officers in the UDF store and telling them that she had just sold beer to a person she believed to be drunk, Patricia Wolfe brought her own possible violation of the law to the attention of the officers and exposed herself to the potential adverse consequences in order to stop an intoxicated person from posing a risk to public safety. A good argument can be made that Wolfe's willingness to expose her own possible violation of the law in order to protect the motoring public's safety makes her tip more credible and reliable, not less so.

{¶ 50} Patricia Wolfe's tip was both credible and sufficient to give rise to a reasonable suspicion of criminal behavior that justified the investigative stop of Defendant. The officers did not act on a mere inchoate hunch, as Defendant contends. Defendant's Fourth Amendment rights were not violated by his stop.

{¶ 51} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 52} "OFFICER SCHOMBURG DID NOT ADMINISTER ANY OF THE FIELD

SOBRIETY TESTS IN SUBSTANTIAL COMPLIANCE WITH ANY SET OF FIELD SOBRIETY STANDARDS THAT WERE IN EFFECT AT THE TIME OF THE STOP."

{¶ 53} The results of field sobriety tests are admissible at trial if the State presents clear and convincing evidence that the officer administered the tests in substantial compliance with National Highway Traffic Safety Administration ("NHTSA") standards. R.C. 4511.19(D)(4)(b); *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37; *State v. Davis*, Clark App. No. 2008-CA-65, 2009-Ohio-3759. The State can satisfy its burden without explicit testimony from the officer that he or she substantially complied with NHTSA standards in administering the tests. *Davis*. Neither is the State required to actually introduce the NHTSA manual or testimony concerning the standards, where the record demonstrates, if only by inference, that the court took judicial notice of the NHTSA standards. *State v. Knox*, Greene App. No. 2005-CA-74, 2006-Ohio-3039.

{¶ 54} Evidence showing that the pertinent rules and regulations have been followed in conducting field sobriety tests, if unchallenged, constitutes a sufficient foundation for admission of the test results. *State v. Murray*, Greene App. No. 2002-CA-10, 2002-Ohio-4809. Only when a defendant sufficiently challenges the evidence would the State then need to present more particular evidence of compliance. *Id*. For example, testimony by the

officer that he or she had been trained to perform the horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one-leg stand test under NHTSA standards, and that the tests were performed in the manner in which the officer had been trained, would suffice for admission of the field sobriety test results, absent a challenge to some specific way the officer failed to comply with NHTSA standards. *Murray; Knox*.

{¶ 55} Officer Schomburg testified at the suppression hearing that he was trained at the Ohio Highway Patrol in 1996 in how to administer the HGN test, the walk and turn test, and the one-leg stand test, and that "those are NHTSA tests." (T. 11). Schomberg testified that he was given a NHTSA manual as part of his training, and he has since been provided periodic updates to the manual, the most recent being one he received a couple of years before. (T. 11).

{¶ 56} Officer Schomburg explained in detail how he administered each of the three NHTSA field sobriety tests to Defendant, including the screening questions he asked, the instructions he gave, his demonstrating how to perform each test, what he was looking for in each test, and how and why Defendant failed each test. When he was asked, "Did you administer (those tests) in accordance with the National Highway Traffic Administration Standards," Officer Schomberg replied, "Yes." (T.

29). He also affirmed that compliance with the NHTSA standards is "the official policy of the Kettering Police Department." (*Id*)

{¶ 57} In order for the substantial compliance permitted by R.C. 4511.19(D)(4)(b) to be found, the State must offer evidence showing what the particular NHTSA standards are and that the officer acted in conformity with them. *State v. Perkins*, Franklin App. No. 07AP924, 2008-Ohio-5060. Officer Schomberg's testimony concerning what he was looking for when he administered the HGN, walk-and-turn, and one-leg stand tests, that Defendant failed those tests, and that the tests were administered in accordance with the NHTSA standards, was sufficient to permit the court to find substantial compliance with the NHTSA standards, by clear and convincing evidence.

{¶ 58} In the present case, the prosecutor inquired of Officer Schomberg whether and how he administered the tests in accordance with his training. A witness's direct responses to that line of inquiry may be insufficient to satisfy R.C. 4511.19(D)(4)(b), where there is no testimony as to the particular NHTSA standard and the manual itself is not admitted in evidence. *State v. Nickelson*, (July 20, 2001), Huron App. No. H-00-036. We therefore urge prosecutors to first establish from the testifying officer what a particular NHTSA standard requires before inquiring what the officer did in administering a particular test and whether a

defendant satisfied the applicable NHTSA standard.

{¶ 59} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 60} "ONCE THE FIELD SOBRIETY TESTS ARE SUPPRESSED, OFFICER SCHOMBURG DID NOT HAVE PROBABLE CAUSE TO ARREST REED FOR OVI."

{¶ 61} As we noted in disposing of the second assignment of error, the trial court properly refused to suppress the results of the field sobriety tests. When those results are considered in conjunction with the other evidence, Officer Schomburg had ample probable cause to arrest Defendant for driving under the influence of alcohol. *Murray; Davis*.

{¶ 62} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 63} "REED SHOULD HAVE BEEN GRANTED LEAVE TO FILE A NEW MOTION TO SUPPRESS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 64} Defendant argues that the trial court abused its discretion when it reversed its original decision granting Defendant leave to file a new motion to suppress, because Defendant was denied the effective assistance of counsel during the suppression hearing.

{¶ 65} The trial court's decision granting Defendant leave to file a new motion to suppress is part of the record in this case (Dkt. 22), but its judgment reversing that decision to which

Defendant refers in this assignment of error is not part of the record before us. The State argues that Defendant withdrew his new motion to suppress. That is not entirely correct. Defendant withdrew only that portion of his new motion to suppress that related to his breath test. Defendant also indicated that the remainder of his motion to suppress had been previously overruled by the trial court. (Dkt. 30). That is not the equivalent of withdrawing the motion to suppress in its entirety.

{¶ 66} In any event, counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, the defendant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To prove prejudice the defendant must demonstrate that were it not for counsel's errors, the result of the trial would have been different. *Id.*, *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶ 67} Defendant argues that his counsel performed deficiently by not adequately cross-examining Officer Schomburg on several issues, including Patricia Wolfe's tip and the inconsistencies between her verbal statement to the officers in the UDF store and her subsequent written statement. However, Officer Schomburg did not rely on Wolfe's written statement for the reasonable suspicion

necessary to justify his investigative stop of Defendant. Instead, Schomburg relied solely upon Wolfe's verbal statement, as he recalled it. He testified that after receiving Wolfe's verbal report, Officer Schomburg immediately went outside and stopped Defendant, who was in his truck backing up, preparing to drive away. What Wolfe put into her written statement after the stop occurred did not affect the totality of the facts and circumstances known to Officer Schomburg at the time he stopped Defendant, and could not have impacted the trial court's decision that Schomburg therefore possessed sufficient reasonable suspicion to stop Defendant. Neither deficient performance by counsel nor resulting prejudice to Defendant has been shown.

{¶ 68} Next, Defendant claims that his counsel did not adequately cross-examine Officer Schomburg about Wolfe's commission of a criminal offense when she sold beer to a person she believed to be intoxicated. R.C. 4301.22(B). Defendant asserts that such questioning would have destroyed Wolfe's credibility and the reliability of her tip. As we discussed in reviewing Defendant's first assignment of error, revealing conduct on her part that may have violated the law arguably could demonstrate that Wolfe was more credible and reliable, not less so, because she was willing to bring her own potentially illegal conduct to the attention of officers. Neither deficient

performance by counsel nor resulting prejudice to Defendant has been shown.

{¶ 69} Defendant also argues that his counsel performed deficiently by failing to adequately cross-examine Officer Schomburg about the field sobriety tests he administered. Specifically, Defendant claims that had his counsel cross-examined Schomburg about the four to five minutes he took to administer the HGN test, it would demonstrate that the test was not conducted in substantial compliance with NHTSA standards, which specify sixty-eight seconds as the time required to perform the HGN test.

{¶ 70} The length of time Officer Schomburg took to perform the HGN test is something that counsel did cross-examine Schomburg about. Schomburg testified that he spent four to five minutes in performing the HGN test, and that when he checked Defendant for nystagmus at maximum deviation, he held the pen at maximum deviation for four seconds after seeing nystagmus. That is in accordance with NHTSA requirements. See: *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672; *State v. Mai*, Greene App. No. 2005-CA-115, 2006-Ohio-1430. Furthermore, the sixty-eight seconds that the NHTSA manual suggests is needed to perform all three phases of the HGN test is the minimum time required, and performing the test faster than that calls in question the

reliability of the test results. *Id.* That is not an issue here, because Officer Schomburg took more than the minimum amount of time required to perform the HGN test.

{¶ 71} Other than the amount of time Officer Schomburg took to perform the HGN test, Defendant does not explain how Schomburg's administration of the field sobriety tests failed to comply with NHTSA standards. Accordingly, Defendant has not shown that his counsel performed deficiently by not eliciting on cross-examination of Schomburg areas of non-compliance, or that he suffered prejudice as a result.

{¶ 72} Defendant also argues that his counsel performed deficiently by failing to introduce the NHTSA manual or call an expert witness who could testify that Officer Schomburg's administration of the field sobriety tests was not in substantial compliance with NHTSA standards. This argument contradicts Defendant's contention in his second assignment of error that it was the State's burden to show compliance with NHTSA standards by introducing such evidence. In any event, Defendant has not demonstrated that he suffered any prejudice as a result of his counsel's failure to introduce this evidence. The trial court has the discretion to implicitly take judicial notice of the requirements in the NHTSA manual, even in the absence of a formal request to do so. *Knox.* Ineffective assistance of counsel has

not been demonstrated.

{¶ 73} Finally, Defendant asserts that his counsel performed deficiently by failing to adequately cross-examine Officer Schomburg about the walk and turn test. Defendant's counsel cross-examined Schomburg concerning each of the three NHTSA field sobriety tests that Schomburg administered. Counsel cross-examined Schomburg in detail concerning the instructions he gave for the walk and turn test, his demonstration of how to perform that test, and the conditions existing at the time. Defendant does not specify how Schomburg's administration of the walk and turn test fails to comply with NHTSA standards. Accordingly, no deficient performance by counsel, much less resulting prejudice to Defendant, has been shown.

{¶ 74} Defendant's fourth assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FROELICH, J., concur.

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