[Cite as *State v. Brewer*, 2010-Ohio-3441.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 23442
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-TRC-1870
v.	:	
	:	
TITUS BREWER	:	(Criminal Appeal from Montgomery
	:	County Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 23rd day of July, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Titus Brewer appeals from his conviction for operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a). Brewer contends that allowing the testifying deputy to read from her police report on the stand constituted plain error. He also contends that his counsel was ineffective for having failed to move to suppress evidence of field

sobriety testing, which he argues was conducted without adequate cause, and as a result of the unlawful prolongation of, and expansion of the proper scope of, his traffic stop for failure to have a rear license-plate light.

{¶ 2} We conclude that allowing the deputy to testify from her report did not bring about the "manifest miscarriage of justice" needed to establish plain error. We further conclude that the totality of the circumstances provided a sufficient reasonable articulable suspicion of OVI to justify the administration of field sobriety tests. Therefore we conclude that Brewer's trial counsel was not ineffective for having failed to move to suppress the evidence of the field sobriety testing. The judgment of the trial court is Affirmed.

I

{¶ 3} One night in late April, 2008, at about 9:40 p.m., Montgomery County Sheriff's Deputy Amber Haas stopped Brewer's vehicle because it did not have a functioning rear license plate light. Deputy Haas stated that Brewer's clothes were in disarray, he was thick-tongued, was "slow to speech," and appeared nervous after the initial traffic stop. Deputy Haas also said it took Brewer a minute to find his operator's license when he was asked to provide it. Initially, Brewer could not find it and "patted himself down to try to find it and he ended up locating it." Deputy Haas did not detect any odor of alcohol at the time of the initial stop. After taking Brewer's license to her cruiser, Deputy Haas detected a "clear and strong" odor of alcohol upon returning to Brewer's car the second time.

{¶ 4} Upon smelling the alcohol when returning to Brewer's vehicle, Deputy

Haas requested that Brewer exit his vehicle. When asked if he had consumed alcohol, Brewer told Deputy Haas he had consumed alcohol earlier in the day. Deputy Haas then had Brewer perform various field sobriety tests. Brewer's failure to successfully complete the field sobriety tests led to his arrest for OVI. Brewer refused a breathalizer test.

{¶ 5} Both Brewer and the State agree that Deputy Haas used her police report of the incident at trial while she was on the stand testifying. She consulted the report while answering questions at trial. Defense counsel, however, failed to object to Deputy Haas' referring to her report during testimony. Defense counsel was also aware that Deputy Haas had a copy of her report while testifying; counsel referred to that report during cross examination.

{¶ 6} Brewer was found guilty of R.C. 4511.19(A)(1)(a), and was sentenced accordingly. From the judgment rendered against him, Brewer appeals.

II

{¶ 7} Brewer's First Assignment of Error states as follows:

{¶ 8} "IT CONSTITUTED PLAIN ERROR AT TRIAL WHEN THE TESTIFYING DEPUTY WAS ALLOWED TO BRING HER POLICE REPORT WITH HER TO THE STAND AND READ FROM IT AS SHE SAW FIT."

{¶ 9} Deputy Haas was called to the witness stand to explain what occurred on the night Brewer's vehicle was stopped. Brewer and the State agree that Deputy Haas took the stand with her police report in hand. Brewer alleges that Deputy Haas simply recited answers to counsel's questions directly from her police report.

His counsel was well aware that Deputy Haas continually referenced her report throughout her testimony and did not object to any of her answers.

{¶ 10} In his brief, Brewer says that: "A view of the trial video tape (CD) makes obvious that [Deputy Haas simply read from her report]." We have two CD-ROMs in our record, but they are, respectively, the written transcript of the trial and the written transcript of the sentencing, both in .pdf format. We have no video of the trial in our record. We nevertheless accept, for purposes of this appeal, that Deputy Haas simply read from her report, since the State does not dispute this.

{¶ 11} We begin with the claim that Deputy Haas should not have been allowed to use the police report unless it was shown that her recollection needed to be refreshed. Before using a writing to refresh the recollection of a witness, it must be established that the witness lacks a present recollection of the information or events described in the writing. *City of Dayton v. Combs,* 94 Ohio App. 3d 291, 298. Once the trial court is satisfied that the witness has no present recollection of the important information or events, the witness is allowed to read the writings silently or have some portions read to him. *State v. Woods* (1998), 48 Ohio App.3d 1.

{¶ 12} When using a statement under Evid.R. 612 to refresh recollection, "a party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury." *Barhorst v. Sonoco Products Co*. (September 12,1997), Miami App. No. 96 CA 28; citing *State v. Ballew* (1996), 76 Ohio St.3d 244, 254. Under Ohio Evid. R. 612, the witness's memory must have been exhausted after ordinary direct or cross-examination to use the technique of refreshing that witness's memory. Finally, the witness's recollection must be refreshed; that is, after

reviewing the prior statement, the witness must presently recollect the events recited therein. *State v. Scott* (1972), 31 Ohio St.2d 1, 5-6; *Lovell v. Wentworth* (1884), 39 Ohio St. 614,617; *Dellenbach v. Robinson* (1993), 95 Ohio App.3d 358, 368, motion allowed, 67 Ohio St.3d 1471, appeal dismissed as improvidently allowed, 70 Ohio St.3d 1219, 1994-Ohio-416.

{¶ 13} Brewer correctly contends that the Ohio Rules of Evidence require a procedure for refreshing the recollection of a witness. "Before a witness may be shown a writing to refresh his recollection and aid his testimony, the court must be satisfied that the witness lacks a present recollection of the relevant events. The witness is then handed a writing and asked to read the document silently to refresh his recollection." *Ohio Evidence*, Weissenberger, Glenn; Anderson Publishing Co. (1986 Chapter 12, R. 612.3). It was not first established that Deputy Haas ever lacked a present recollection of the information or events described in her report, and no foundation for the writings was laid prior to her use thereof. Deputy Haas simply carried the police report to the stand and read from it. However, because Brewer's attorneys did not object to this, he has waived all potential assignment of error except plain error.

{¶ 14} An error not raised in the trial court must be plain error in order for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St. 2d 91, 96; Crim. R. 52(B). The plain error doctrine can only be invoked in the most exceptional circumstance, and then only to avoid a manifest miscarriage of justice. *Id*. Additionally, the plain error doctrine requires this Court to conclude that, absent the

plain error, the trial outcome would have been clearly different. *State v. Slagle* (1992), 65 Ohio St. 3d. 597, 605, *citing Long,* supra.

{¶ 15} Had there been an objection, the State might then have laid a proper foundation for refreshed recollection, or for past recollection recorded, admissible under Evid.R. 803(5). We cannot conclude, from this record, that the outcome of the proceeding would clearly have been otherwise had an objection to the manner of Deputy Haas's testifying been made and been sustained. The First Assignment of Error is overruled.

III

{¶ 16} Brewer's Second Assignment of Error states as follows:

{¶ 17} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO MOVE TO SUPPRESS EVIDENCE THAT CLEARLY WOULD HAVE BEEN SUPPRESSED HAD TRIAL COUNSEL REQUESTED A SUPPRESSION HEARING."

{¶ 18} Brewer argues that he received ineffective assistance of counsel for failing to file a motion to suppress evidence. He asserts that a motion to suppress the evidence of the field sobriety tests, if one had been made, would have been granted.

{¶ 19} The United States Supreme Court established a two-prong test for ineffective assistance of counsel in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. First, the appellant must show that the defense counsel's performance was outside the range of professionally competent assistance

and, therefore, was deficient. This requires showing counsel made errors so serious that counsel was not functioning at a level required by the Sixth Amendment. Id. at 687. Second, the Appellant must show that the counsel's deficient performance prejudiced the defense and deprived the defendant of a fair trial. Id. There is prejudice if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Essentially, counsel's performance must be so deficient as to call into question the reliability of the trial. Id. Both of these elements must be met in order to establish ineffective assistance of counsel. Id.; see also *State v. Bradley* (1989), 42 Ohio St.3d 136; *State v. Lytle* (1976), 48 Ohio St.2d 391.The Fourth Amendment protects people against unreasonable searches and seizures. A stop of an individual by police for investigative purposes, albeit brief, which involves any restraint upon that citizen's freedom to walk away constitutes a “seizure” governed by the Fourth Amendment's reasonableness standard. *Terry v. Ohio* (1968),392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment, subject to only a few well recognized exceptions. *Katz v. United States* (1967), 389 U.S. 347. One of those exceptions is the rule regarding investigative stops, announced in *Terry v. Ohio,* supra, which provides that a police officer may stop an individual to investigate unusual behavior, even absent a prior judicial warrant or probable cause to arrest, where the officer has a reasonable, articulable suspicion that specific criminal activity may be afoot. Id.

{¶ 20} In order to decide the issue of ineffectiveness of Brewer's counsel, we must first look at the evidence indicating Brewer was under the influence. To justify

a brief, investigative stop, "the police officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, supra, at 392 U.S. 21. The initial stop, due to the failed brake light, would independently provide reasonable articulable suspicion to the stop the vehicle. See *Dayton v. Erickson* (1996), 76 Ohio St.3d 3. Brewer does not dispute this. Thus, the issue before us is whether Deputy Haas had reasonable articulable suspicion to administer field sobriety tests. "We have said on numerous occasions that these decisions are very fact-intensive." *State v. Wells*, Montgomery App. No. 20798, 2005-Ohio-5008; see, e.g., *State v. Criswell*, Montgomery App. No. 20952, 2005-Ohio-3876.

{¶ 21} Whether an investigative stop is reasonable, i.e. whether there was reasonable suspicion of an OVI, must be determined from the totality of the circumstances that surround it. *State v. Freeman* (1980), 64 Ohio St.2d 291. The totality of the circumstances are "... to be viewed from the eyes of the reasonable and prudent police officer on the scene who must react to the events as they unfold." *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88, citing from *State v. Freeman,* supra, at 295.

{¶ 22} Reasonable suspicion means that police "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry,* 392 U.S. at 21. When evaluating whether or not a police officer had reasonable suspicion, a court should consider "the totality of the circumstances." *U.S. v. Mims* (2007), 237 Fed.Appx.

634, 635; *citing United States v. Villegas* (1991), 928 F.2d 512, 516 (2d Cir.); *United States v. Sokolow* (1989), 490 U.S. 1.

{¶ 23} Turning to the facts of this case, Deputy Haas testified that after stopping Brewer and, upon approaching him, she observed that Brewer appeared nervous, his clothes were in disarray, he was thick-tongued, and was "slow to speech." When requesting Brewer's operator's license, it took a minute for Brewer to find it. Brewer even "patted himself down" after he could not initially locate it. After going back to her cruiser, Deputy Haas returned and smelled a strong odor of alcohol coming from Brewer. Also, Deputy Haas thought Brewer might be handicapped, because he was talking but not making sense. Upon further questioning, Brewer admitted to consuming alcohol earlier in the day.

{¶ 24} Smelling too drunk to drive, without other reliable indicia of intoxication, is not enough probable cause to arrest someone. *State v. Finch* (1985), 24 Ohio App.3d 38, 40. Traffic violations of a de minimus nature are not sufficient, combined with a slight odor of an alcoholic beverage, and an admission of having consumed a "couple" beers, to support a reasonable and articulable suspicion of DUI. *State v. Spillers* (March 24, 2000), Darke App. No. 1504. This standard is fact-sensitive, and all evidence suggesting an alcohol offense should be examined together to decide whether the officer has reasonable suspicion to administer a field sobriety test.

{¶ 25} In the case before us, we note that there are several indicia pointing to a reasonable suspicion of Brewer operating a vehicle under the influence. The events that transpired after Deputy Haas approached Brewer's car – the odor of alcohol, thick and slurred speech, disarrayed clothing, trouble finding one's drivers

license, and admission of alcohol consumption – can be aggregated in determining whether the reasonable, articulable suspicion standard was satisfied. Although we regard this as a close call, we conclude that Deputy Haas had reasonable, articulable suspicion, justifying the administration of field sobriety tests. The State and Brewer entered into a stipulation at trial that he has a speech impediment, but there is no indication that this information was related to Deputy Haas at the time that she made her decision to administer the tests, so she could reasonably include that observation in her calculus for suspecting OVI.

{¶ 26} The prejudice prong of the *Strickland* test requires more than a determination that the motion not made by trial counsel would have been a close call; it requires a finding that a motion to suppress, had it been made, would likely have been granted. We conclude, therefore, that Brewer's trial counsel was not ineffective for having failed to move to suppress the evidence. Brewer's Second Assignment of Error is overruled.

IV

{¶ 27} Both of Brewer's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

Copies mailed to:

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