[Cite as *State v. Hollowell,* 2011-Ohio-1130.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 24010

v. : T.C. NO. 09CR2884

GEORGE W. HOLLOWELL : (Criminal appeal from Common Pleas Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 11th day of March, 2011.

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JOHNNA M . SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

KATHRYN L. BOWLING, Atty. Reg. No. 0084442, 111 W. First Street, Suite 205, Dayton, Ohio 45402
Attorney for Defendant-Appellant

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FROELICH, J.

{¶ 1} After the Montgomery County Common Pleas Court overruled in part his motion to suppress, George Hollowell pled no contest to aggravated vehicular assault, a second degree felony due to Hollowell's driving under suspension. The trial court sentenced him accordingly.

{¶ 2} Hollowell appeals from his conviction, claiming that the trial court erred in overruling his motion to suppress. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} The State's evidence at the suppression hearing reveals the following facts:

{¶ 4} At approximately 6:17 p.m.[1] on October 27, 2008, J. Daniel McMillen observed a three-vehicle crash on North Main Street near Macy Lane in Harrison Township. McMillen immediately called 911.

{¶ 5} Deputy Josh Walters of the Montgomery County Sheriff's Office responded to the scene at 6:20 p.m. A black Pontiac Sunfire was partially on the sidewalk in the grass area, a Cadillac Escalade was in the middle of the road on its side (driver's side down), and an older Ford Escort with heavy front-end damage was just south of the Escalade. Walters blocked the roadway with his cruiser, checked all of the vehicles to see if anyone was still inside, called an ambulance for an injured woman, and removed a dog from one of the vehicles. Walters spoke briefly with several individuals, including Hollowell, gathering basic information about the crash. Several people reported that Hollowell, the driver of the Escalade, was responsible for the accident.

{¶ 6} Deputy Walters spoke with Hollowell a second time. During this conversation, Walters smelled the odor of an alcoholic beverage on Hollowell's breath, and he noticed that Hollowell's speech was slurred. At this point, however, Walters did not

[1]There was substantial testimony related to the time at which the 911 call was made. This evidence will be discussed more fully in our analysis of Hollowell's assignment of error.

know if Hollowell's slurred speech was due to being shaken from the accident, the cold weather, or the consumption of alcohol. Walters asked Hollowell if he had been drinking. Hollowell stated that he had, but he did not volunteer how much he had drunk.

{¶ 7} Deputy Walters placed Hollowell into the back of his cruiser (without handcuffs) and took Hollowell's crash statement. Walters noticed that Hollowell's speech was very slurred, his eyes were bloodshot, and the odor of alcoholic beverage "was filling up the inside of the car." The heat was on in the cruiser, and Walters discounted the possibility that Hollowell's slurred speech was due to the cold weather; Walters concluded that consumption of alcohol was the probable cause of the slurred speech. Walters asked Hollowell several times if he would take the standardized field sobriety test; Walters informed Hollowell that the failure to do so might result in his arrest. Hollowell declined to submit to the test.

{¶ 8} Walters arrested Hollowell, informed him of his *Miranda* rights, and read him a copy of BMV Form 2255. Hollowell made no statements after receiving his *Miranda* warning. Walters asked Hollowell if he would consent to a chemical (breathalyzer) or blood test. Hollowell refused.

{¶ 9} Deputy Walters spoke with Sergeant Richard Moebius, who had also responded to the scene, along with other deputies. Sgt. Moebius had not talked to any of the drivers, but he had looked inside the vehicles and observed an empty Budweiser Select beer bottle inside the Escalade; an evidence technician later removed the empty bottle and one full bottle from the vehicle. After Deputy Walters advised Sgt. Moebius that Hollowell had refused the breathalyzer test, Moebius prepared an affidavit for a search warrant to

obtain blood from Hollowell. Walters transported Hollowell to Miami Valley Hospital and waited for the search warrant to be signed.

{¶ 10} At 9:00 p.m., a judge signed the search warrant. Sgt. Moebius called Deputy Walters on his cell phone and advised him to have hospital staff remove some of Hollowell's blood. A phlebotomist drew Hollowell's blood, using an OVI kit, at 9:17 p.m. The phlebotomist sealed the kit and gave it to Walters. After Moebius got to the hospital, Walters handed the kit to Moebius, who took the kit to the property room at the Montgomery County Sheriff's Office and placed it in the refrigerator. The following day, the kit was taken to the Miami Valley Regional Crime Lab (MVRCL) to be tested for the alcohol concentration in the blood. The sample was stored in a refrigerator at the lab until it was tested on November 5, 2008.

{¶ 11} On November 12, 2008, Deputy Joshua Evers, a crash reconstructionist, obtained a search warrant for the Escalade. Evers downloaded data from the vehicle's airbag control module, which can provide information about the vehicle at or near the time of the crash.

{¶ 12} In October 2009, Hollowell was charged with aggravated vehicular assault, in violation of R.C. 2903.08(A)(1), with a specification that he was driving under suspension, and with operating a vehicle while under the influence (prohibited concentration), in violation of R.C. 4511.19(A)(1)(f).

{¶ 13} Hollowell moved to suppress the evidence against him on four grounds. First, he argued that the blood was not drawn and stored in compliance with Ohio Administrative Code 3701-53-05 through 3701-53-07. Second, Hollowell argued that any

items seized from him on October 29, 2009, should be suppressed on the ground that the warrantless search was unlawful. Third, Hollowell sought suppression of any statements that he made prior to his being given *Miranda* warnings. Fourth, he argued that the search of his person and vehicle on November 13, 2008, was unlawful, because it was not based on probable cause, consent, or a valid warrant.

{¶ 14} The trial court held hearings on the motion to suppress on December 16 and 18, 2009. On January 20, 2010, the trial court orally overruled in part and sustained in part Hollowell's motion. Beginning with Hollowell's statements, the court found that Hollowell voluntarily waived his *Miranda* rights and that any statement made subsequent thereto was admissible. The court found that Hollowell was not in custody before he was placed in the cruiser and, thus, any statements made outside the vehicle were constitutionally valid. However, the court suppressed any written statement that Hollowell made in the back of the cruiser. As for the beer bottles, the court determined that they were lawfully seized under the plain view doctrine.

{¶ 15} Turning to the two search warrants, the trial court concluded that the first warrant was issued based upon probable cause to believe Hollowell's blood would contain evidence of an OVI violation. Similarly, the court found that the second warrant was based on probable cause to believe that the data obtained from the airbag control module would have evidentiary value regarding the offenses with which Hollowell was charged.

{¶ 16} Finally, the court addressed compliance with the statutory and administrative standards relating to a blood draw from a person and the analysis of that blood. The court found that the 911 call was made at 6:17 p.m. and, thus, "by the thinnest of margins, the

blood was drawn within the required three-hour time period." The court further found that the blood was kept refrigerated (other than when it was in transit), that the refrigerator was at an appropriate temperature to preserve the blood, that the blood was drawn in the manner prescribed by Ohio Admin. Code 3701.53.05, that the forensic chemist had the requisite qualifications to perform the blood analysis, and that MVRCL was an appropriate and accredited laboratory. The trial court adopted its oral reasoning in a subsequent written entry.

{¶ 17} On March 24, 2010, Hollowell pled no contest to aggravated vehicular assault. The State agreed to nolle the OVI charge. The court subsequently sentenced Hollowell to a mandatory term of two years in prison, suspended his driver's license for four years, and ordered him to pay restitution to the victim.

{¶ 18} Hollowell appeals, raising one assignment of error.

II

{¶ 19} In his assignment of error, Hollowell claims that the trial court erred in overruling his motion to suppress. His sole argument is that the blood test should have been suppressed, because the investigating officers failed to collect a blood sample within the required three-hour time period. Hollowell does not challenge any other portion of the trial court's ruling.

{¶ 20} In addressing a motion to suppress, the trial court assumes the role of the trier of fact. *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268, citing *State v. Curry* (1994), 95 Ohio App.3d 93, 96. The court must determine the credibility of the witnesses and weigh the evidence presented at the hearing. Id. In reviewing the trial

court's ruling, an appellate court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. Id. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶ 21} Hollowell pled no contest to a violation of R.C. 2903.08(A)(1), which states:

{¶ 22} "(A) No person, while operating or participating in the operation of a motor vehicle, *** shall cause serious physical harm to another person *** in any of the following ways:

{¶ 23} "(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance[.]"

{¶ 24} Of relevance, R.C. 4511.19 prohibits driving while under the influence of drugs or alcohol, R.C. 4511.19(A)(1)(a), and proscribes the operation of any vehicle if, at the time of the operation, "[t]he person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood," R.C. 4511.19(A)(1)(f).

{¶ 25} R.C. 4511.19(D)(1)(b) provides, in pertinent part: "In any criminal prosecution *** for a violation of division (A) or (B) of this section ***, the court may admit evidence on the concentration of alcohol *** in the defendant's whole blood, blood serum or plasma *** at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. ***" Ohio Admin. Code Chapter 3701-53 sets forth requirements and procedures for the collection, handling, and testing of blood and other bodily substances.

{¶ 26} In *Newark v. Lucas* (1988), 40 Ohio St.3d 200, the Ohio Supreme Court first addressed the admissibility of blood drawn outside of the then-two-hour time limit in R.C. 4511.19(D). The Court distinguished between prosecutions based on driving under the influence of drugs or alcohol (former R.C. 4511.19(A)(1)) and those based on operating a vehicle with a prohibited concentration, i.e.,"per se" violations (former R.C. 4511.19(A)(2), (3), or (4)). The *Lucas* court held that, in a criminal prosecution based on a per se violation of R.C. 4511.19(A), "the results of a properly administered bodily substances test may be admitted in evidence only if the bodily substance is withdrawn within two hours of the time of the alleged violation." Id. at paragraph one of the syllabus. In contrast, in a criminal prosecution for violation of R.C. 4511.19(A)(1), "the results of a properly administered bodily substances test presented with expert testimony may be admitted in evidence despite the fact that the bodily substance was withdrawn more than two hours from the time of the alleged violation." Id. at paragraph two of the syllabus.

{¶ 27} Confusion regarding the continued viability of *Lucas* arose after *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, which held that "in a criminal prosecution for aggravated vehicular homicide that depends upon proof of an R.C. 4511.19(A) violation, laboratory test results are admissible only if the state shows substantial compliance with [then] R.C. 4511.19(D)(1) and Ohio Adm.Code Chapter 3701-53, even if the test was conducted in an accredited hospital laboratory." *Mayl* at ¶3.[2]

{¶ 28} The Supreme Court has since clarified that *Mayl* "complemented" *Lucas* and

[2]Since *Mayl*, the Ohio General Assembly enacted R.C. 4511.19(D)(1)(a), which allows the admissibility of the test results for blood or urine withdrawn and analyzed by a health care provider.

that *Lucas*'s holding remains valid. *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, ¶12. The Court stated:

{¶ 29} "As outlined above, *Lucas* and *Mayl* deal with two distinct issues. *Lucas* focused on the two-hour window prescribed in the statute, while *Mayl* addresses the nature of substantial compliance with the ODH regulations. In fact, like *Lucas* before it, *Mayl* acknowledges that the purpose of substantial compliance with the ODH regulations is 'to ensure the accuracy of bodily substance test results,' *Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, ¶ 40; cf. *Lucas*, 40 Ohio St.3d at 103, 532 N.E.2d 130. The time frame at issue here does not by itself implicate the accuracy of the test results. The substantial-compliance component of *Mayl*, therefore, does not overrule *Lucas*." *Hassler* at ¶15.

{¶ 30} In the present case, Hollowell was charged with aggravated vehicular assault based on a violation of R.C. 4511.19(A). Although that charge did not identify the specific section of R.C. 4511.19(A) underlying the offense, the State chose to also indict Hollowell under R.C. 4511.19(A)(1)(f) – a prohibited concentration charge – rather than R.C. 4511.19(A)(1)(a) for driving under the influence. Because Hollowell's aggravated vehicular assault charge was based on a per se violation of the statute, his blood-alcohol test results were admissible only if the blood sample was taken within the three-hour period set forth in R.C. 4511.19(D). [3] See *State v. Ross*, Greene App. No. 06-CA-148,

[3] The Ninth District has recently applied the substantial compliance standard to the time requirement set forth in R.C. 4511.19(D)(1)(b), stating: "This Court concludes that a mere one minute deviation from the three-hour time limit is inherently de minimis. A slight deviation between an officer's watch at the scene of the alleged incident and a hospital clock where the blood is drawn could reasonably skew the documentation of the passage of time one way or the other. A deviation from the standard of

2008-Ohio-1758 (applying *Lucas*).

{¶ 31} The trial court found that the 911 call was made at 6:17:38 p.m. (17 minutes after 6:00, and 38 seconds), immediately after the accident occurred; that finding was supported by the record. McMillen, an associate pastor, testified that he was working in the pumpkin patch at his church when he observed the car accident. He stated that he had been on a different telephone call at 6:15 p.m. when the church bells chimed the quarter hour, and the accident occurred a few minutes after that. McMillen called 911 "immediately after" he witnessed the crash. He believed that he called 911 at "about 6:19 to 6:20 p.m." (On cross-examination, defense counsel noted that McMillen's prior statement had said "a little after six p.m." The trial court, however, believed McMillen's testimony that he called around 6:20 p.m.) Deputy Walters testified that he was dispatched to the scene at 6:20 p.m.

{¶ 32} Matthew Haines, administrative sergeant for the regional dispatch center, was called as a witness by defense counsel to discuss the dispatch log for the accident. Haines discussed the term "initiate" on the call log, stating that the "initiate" time is the first time that the dispatcher entering information actually hit the "enter" button on the keyboard. Haines stated that the "initiate" time is typically when the 911 call comes in, but it could be off for various reasons. The dispatch log for the accident showed an "initiate" time of 6:17 p.m. and 38 seconds.

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what may be mere seconds cannot logically negate substantial compliance with the code provision." *State v. Slates*, Summit App. No. 25019, 2011-Ohio-295, ¶37. However, in reaching this conclusion, the Ninth District cited *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, and *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, both of which (like *Mayl*) addressed substantial compliance with the ODH regulations.

{¶ 33} As for the time of the blood draw, Deputy Walters testified that he transported Hollowell to Miami Valley Hospital and waited until Sgt. Moebius called to say that a search warrant for Hollowell's blood had been signed. Moebius called Walters on his cell phone at 9:00 p.m., while leaving the judge's residence, and told Walters to have hospital staff draw Hollowell's blood. Walters was present during the blood draw; he testified that it occurred at 9:17 p.m. Jenna McCoy, the phlebotomist who drew Hollowell's blood in the hospital emergency room, testified that she did at least ten OVI kits per week while working at the hospital, and she described the procedure she used. Although she did not remember Hollowell, she recognized the kit that was used and she recognized her name, which was written on the two labels that go over the test tubes. The test tube labels also included Hollowell's name, the date (10/27/2008), and the time (2117 hours). McCoy testified that she always wore a watch, and the time on the label was "exactly what time I drew it."

{¶ 34} In short, the record supports findings that the 911 call was placed at 6:17:38 p.m., immediately after the accident, and that the blood was drawn at 9:17 p.m., exactly three hours later. Based on the evidence, the trial court found that, "though obviously it is by the thinnest of margins, the blood was drawn within the required three hours, and therefore the timing of the blood draw does not preclude its admissibility." We find no fault with that conclusion.

{¶ 35} Hollowell's assignment of error is overruled.

III

{¶ 36} The trial court's judgment will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

Johnna M. Shia
Kathryn L. Bowling
Hon. Michael L. Tucker