[Cite as *State v. Wood*, 2015-Ohio-2065.]

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 26341
	:	
v.	:	Trial Court Case No. 14-TRC-1214
	:	
BRENDEN S. WOOD	:	(Criminal Appeal from
	:	Kettering Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 29th day of May, 2015.

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HALL, J.

{¶ 1} Brenden S. Wood appeals from his conviction and sentence following a no-contest plea to charges of operating a vehicle while under the influence of alcohol in

violation of R.C. 4511.19(A)(1)(a), refusing to submit to a breath test (with a prior OVI conviction within twenty years) in violation of R.C. 4511.19(A)(2), and failing to yield the right of way in violation of Kettering Ordinance 432.16.

{¶ 2} In his sole assignment of error, Wood contends the trial court erred in overruling his combined motion to suppress/motion in limine, which was directed toward field-sobriety tests. He argues that the motion should have been sustained "because the State failed to provide evidence showing the field-sobriety tests used by a law enforcement officer were within the particular set of reliable, credible, and generally recognized field-sobriety testing standards, and that the administration thereof substantially complied with testing standards."

{¶ 3} The record reflects that Wood was cited for the above-referenced violations after being involved in a February 11, 2014 traffic accident. Kettering Police Officer Doug Stewart provided the following written statement in support of the misdemeanor citations:

> Brenden Scott Wood was the at fault driver in an injury traffic accident at the intersection of S. Dixie Drive and Springhill Avenue. Wood had an odor of alcoholic beverage about his person, his eyes were red and glassy and his speech was slurred. Ptl. D. Stewart had Wood submit to a series of Standard Field Sobriety Tests and Wood was found to be impaired. Wood was arrested for OVI and transported to the Kettering Jail for processing. Wood refused to submit to a breath test after he was read the BMV test and refusal consequences.

(Doc. #3).

{¶ 4} On March 28, 2014, Wood filed a combined "Motion to Suppress Evidence

and/or Motion in Limine." (Doc. #9). Therein, he argued, among other things, that he was arrested without probable cause and that no evidence about field-sobriety tests should be admitted at trial. In support of both arguments, Wood claimed the tests Stewart administered were not performed in substantial compliance with National Highway Traffic Safety Administration (NHTSA) standards for generally-accepted field-sobriety tests. (*Id*.). The trial court held a May 8, 2014 evidentiary hearing on Wood's motion. Officer Stewart, the sole witness, testified about his observations of Wood at the scene shortly after the accident. According to Stewart, Wood had red, glassy eyes, slurred speech, and smelled strongly of alcohol. (Hearing Tr. at 8-9). Stewart noticed that Wood was swaying and was unsteady on his feet. (*Id*.). Stewart also observed that Wood seemed a little slow or confused when responding to the officer. (*Id*. at 9). During their interaction, Wood admitted being an alcoholic and drinking about one-half liter of vodka a day. (*Id*. at 8). According to Stewart, Wood claimed to have stopped drinking, however, about nine and one-half hours before the accident. (*Id*.). Finally, Stewart testified about his administration of five field-sobriety tests: (1) the "horizontal gaze nystagmus" (HGN) test, (2) the "walk-and-turn" test, (3) the "one-leg stand" test, (4) the "alphabet" test, and (5) the "finger-to-nose" test. In Stewart's opinion, Wood performed poorly on each test and showed signs of alcohol-related impairment. (*Id*. at 14-38). Defense counsel cross examined Stewart about his administration of these tests. (*Id*. at 47-57).

{¶ 5} Following the hearing, Wood filed a May 14, 2014 post-hearing memorandum. (Doc. #14). Thereafter, the trial court overruled his motion in a short May 23, 2014 decision and entry. (Doc. #15). Wood then pled no contest to the charges against him. (Doc. #25). On July 9, 2014, the trial court entered final judgment, finding

Wood guilty and imposing sentence. (Doc. #2). Although the trial court's sentence is difficult to read (as it is memorialized on the back of Wood's traffic ticket), it appears that the trial court merged the refusal-to-submit conviction into the OVI conviction for purposes of sentencing and imposed a partially-suspended fine, partially-suspended jail time, and two years of probation. (*Id*.). On the failure-to-yield conviction, the trial court imposed a fine. (*Id*.). It suspended execution of the sentences pending appeal. (*Id*.).

{¶ 6} In his assignment of error, Wood first challenges Stewart's administration of the alphabet test and the finger-to-nose test. Wood asserts that applicable NHTSA guidelines do not include these tests among three widely-used, scientifically-validated, standardized field-sobriety tests (namely the HGN test, the walk-and-turn test, and the one-leg stand test). To the extent that the NHTSA manual approves the alphabet test and the finger-to-nose test at all, Wood maintains that these tests are recognized only as screening tools to assist an officer in determining whether reasonable, articulable suspicion exists to require a suspect to perform the more accurate HGN test, walk-and-turn test, and one-leg stand test. Therefore, Wood claims Stewart acted improperly, and violated NHTSA standards, by having him perform the alphabet test and the finger-to-nose test *after* performing the other three tests. Wood also claims the NHTSA manual recognizes the HGN test, walk-and-turn test, and one-leg stand test as the only validated, reliable tests for determining alcohol impairment. For these reasons, Wood asserts that Stewart's observations during the alphabet test and the finger-to-nose test did not help establish probable cause to arrest him and also should have been declared inadmissible.

{¶ 7} Upon review, we find Wood's arguments about the alphabet test and the

finger-to-nose test to be unpersuasive. As a preliminary matter, we agree with Wood that the only three validated and standardized field-sobriety tests discussed in the NHTSA manual are the HGN test, walk-and-turn test, and one-leg stand test. This does not mean, however, that Stewart could not perform any other tests. In fact, the 2013 NHTSA "participant" manual identifies the alphabet test and other tests and techniques as things officers can use to help determine whether a driver is impaired.[1] The manual notes that such tests and techniques are not as reliable as the more accepted, standardized field-sobriety tests (i.e., the HGN test, walk-and-turn test, and one-leg stand test). Nevertheless, the manual recognizes them as being "useful for obtaining evidence of impairment" along with typical on-the-scene observations such as a suspect's slurred speech, bloodshot eyes, or an odor of alcohol. (2013 NHTSA participant manual, Session 6, pg. 4-7, 9-11).

{¶ 8} Although the NHTSA manual suggests use of the alphabet test and other tests and techniques to help determine whether the HGN test, walk-and-turn test, and one-leg stand test should be administered, we see no reason why Stewart could not perform the alphabet test and the finger-to-nose test after those other tests. The fact that the alphabet test and the finger-to-nose test may not be recognized as reliable or accepted as the HGN test, walk-and-turn test, and one-leg stand test does not preclude their consideration.

{¶ 9} In *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, the Ohio Supreme Court addressed whether an officer may testify about his observation of a

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[1] On appeal, Wood references the 2006 and 2013 NHTSA manuals. For purposes of our analysis, we will focus on the 2013 manual, which was the version in effect at the time of his offenses.

suspect's performance on standardized field-sobriety tests, such as the walk-and-turn test and the one-leg stand test, even when those tests were not administered in compliance with applicable NHTSA standards.[2] Although non-compliance with NHTSA testing procedures effectively renders such standardized tests non-standardized, the Ohio Supreme court reasoned:

> The nonscientific field sobriety tests involve simple exercises, such as walking heel-to-toe in a straight line (walk-and-turn test). The manner in which defendant performs these tests may easily reveal to the average layperson whether the individual is intoxicated. We see no reason to treat an officer's testimony regarding the defendant's performance on a nonscientific field sobriety test any differently from his testimony addressing other indicia of intoxication, such as slurred speech, bloodshot eyes, and odor of alcohol. In all of these cases, the officer is testifying about his perceptions of the witness, and such testimony helps resolve the issue of whether the defendant was driving while intoxicated.
>
> Unlike the actual test results, which may be tainted, the officer's testimony is based upon his or her firsthand observation of the defendant's conduct and appearance. Such testimony is being offered to assist the jury in determining a fact in issue, i.e., whether a defendant was driving while intoxicated. Moreover, defense counsel will have the opportunity to

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[2] *Schmitt* involved a failure to conduct the tests in strict compliance with NHTSA standards, making the actual test results inadmissible. *Schmitt* at ¶ 10. Although the strict-compliance standard no longer applies, the Ohio Supreme Court's analysis of whether an officer's observations (as opposed to actual test "results") are admissible when the applicable standard is not met remains pertinent.

> cross-examine the officer to point out any inaccuracies and weaknesses. We conclude that an officer's observations in these circumstances are permissible lay testimony under Evid.R. 701. Therefore, we answer the certified question in the negative and hold that a law enforcement officer may testify at trial regarding observations made during a defendant's performance of nonscientific standardized field sobriety tests.

Id. at ¶ 14-15.

{¶ 10} Much like *Schmitt*, we see no reason why Stewart could not testify regarding his observation of Wood's performance on the alphabet test and the finger-to-nose test. A suspect's inability to recite the alphabet or to touch his nose may be considered, under the totality of the circumstances, along with observations of his slurred speech, bloodshot eyes, or an odor of alcohol to determine whether he was driving under the influence of alcohol. Here Wood's performance of the alphabet test and the finger-to-nose test simply constituted additional information that, along with other indicia of intoxication, helped Stewart make the decision to arrest.

{¶ 11} As noted above, the NHTSA manual recognizes that the alphabet test and other techniques are relevant and useful in determining whether a driver is impaired. Stewart himself testified that the alphabet test and the finger-to-nose test were part of a "standard battery" of tests used by and taught to him by the Kettering Police Department. (Hearing Tr. at 31, 34). In his experience, he has found a correlation between a defendant's performance on the alphabet test and the finger-to-nose test and being under the influence of alcohol. (*Id*. at 36-37). Finally, we note that, following *Schmitt*, this court and others have found admissible an officer's testimony about his observations of a

suspect's performance on the alphabet test and the finger-to-nose test. *See*, *e.g.*, *State v. Wells*, 2d Dist. Montgomery No. 20798, 2005-Ohio-5008 (finding that officer had probable cause to arrest defendant based partially on her performance on tests including the alphabet test and the finger-to-nose test); *State v. Washington*, 9th Dist. Lorain No. 11CA0100042, 2012-Ohio-1391 (finding that an officer could testify about his observations while administering the alphabet test and the finger-to-nose test); *Brooklyn Heights v. Yee*, 8th Dist. Cuyahoga No. 92038, 2009-Ohio-4552 (rejecting argument that officer could not testify regarding his observations of the alphabet test and the finger-to-nose test and instead was limited to the HGN test, the walk-and-turn test and the one-leg stand test); *State v. Winland*, 5th Dist. Licking No. 07-CA-12, 2007-Ohio-7109, ¶ 42 (finding that officer could testify about observations made during suspect's performance of alphabet test and finger-to-nose test). Accordingly, we see no error in the trial court's denial of Wood's motion insofar as it pertained to the alphabet test and the finger-to-nose test.

{¶ 12} Wood next argues that the results of his HGN test were inadmissible and could not be relied on to establish probable cause because Stewart did not administer that test in substantial compliance with NHTSA standards.[3] His entire argument on the issue is as follows:

> In this case, Officer [Stewart] did not administer the Horizontal Gaze Nystagmus test in substantial compliance with the manual. In Session 8, page 27, the manual states that when checking for lack of smooth pursuit,

[3] On appeal, Wood does not challenge Stewart's reliance on, or the admissibility of, the results of the walk-and-turn test or the one-leg stand test, both of which Wood performed poorly. (Hearing Tr. at 26-30).

> the officer should move the stimulus at a speed that approximately takes two seconds to bring the eye from the center to the side. In this case, Officer [Stewart] testified that he moved the stimulus at a speed of four seconds. ([Stewart] Dep. pp. 19:18-21, 20:1-4). In the teacher's manual in 2006, it warns a defect in this test is moving the stimulus too fast or too slow toward the side. Additionally, the manual instructs an officer when checking the onset of nystagmus prior to 45 degrees to move at a speed, which takes four seconds to go from the subject's nose to his shoulder. NHTSA Manual, Session 8, p. 35.
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> In this case, Officer [Stewart] testified he went at a speed of two seconds and held the stimulus for four seconds. The teacher's manual for 2006 also warns against moving the stimulus too quickly.

(Appellant's brief at 10).

{¶ 13} As noted by Wood, the applicable legal requirement for admission of field-sobriety test results is whether the tests were conducted in substantial compliance with NHTSA standards. *State v. Davis*, 2d Dist. Clark No. 2008 CA 65, 2009-Ohio-3759, ¶ 14-15. This court has recognized that substantial compliance with NHTSA's requirements "is a legal standard for a court's determination." *Id*. at 18. "We defer to the trial court's factual findings and independently determine whether they demonstrate substantial compliance" with the standards. *Id*.

{¶ 14} Here Stewart testified about his training in the administration of field-sobriety tests, including the HGN test, and about how he performed the test in this case. (Hearing Tr. at 14-25, 49-53). Of particular relevance, Stewart testified that he

initially checked for "equal tracking" to determine whether Wood's eyes could follow the tip of a moving pen together. (*Id*. at 18). Steward observed that Wood's eyes tracked the pen, and he saw no other problems that would preclude administering the HGN test to check for nystagmus, or involuntary jerking of the eyes. (*Id*. at 19). Stewart proceeded to check for "smooth pursuit" to see whether Wood's eyes tracked the pen smoothly rather than jerking. (*Id*. at 19-20). He also checked for nystagmus at maximum deviation, which involves holding a pen so that a suspect's eyes look to the side as far as possible. (*Id*. at 20-21). Finally, Stewart checked for the onset of nystagmus prior to moving the pen at a forty-five degree angle. (*Id*. at 21-22). According to Stewart, Wood exhibited the maximum possible six clues of intoxication on the foregoing three HGN tests, i.e., one clue in each eye for each of the three tests. (*Id*. at 23).

{¶ 15} The NHTSA manual provides for the smooth-pursuit test to be performed by moving a stimulus such as a pen from the center position all the way out to the right or left side and then back to the center. (2013 NHTSA participant manual, Session 8, pg. 28). The manual states that the pen "must be moved steadily, at a speed that takes approximately 2 seconds to bring the eye from center to side." (*Id*.). Although Stewart referred to a four-second count during his testimony, he appears to have been referring to the time it took to bring each eye from the center to the side and then back to the center, which properly would be a total of four seconds. (Hearing Tr. at 20).

{¶ 16} With regard to the test for nystagmus at maximum deviation, the NHTSA manual provides for moving the pen as far to the left and right side of the suspect's field of vision as possible and holding it there for at least four seconds. (2013 NHTSA participant manual, Session 8, pg. 30). Here Stewart testified that he did hold the pen at maximum

deviation for four seconds and that nystagmus was observed. (Hearing Tr. at 20-21). Wood does not challenge this portion of the HGN test on appeal.

{¶ 17} Finally, with regard to the onset of nystagmus prior to a forty-five degree angle, the NHTSA manual provides for moving the pen from the center "at the speed that would take approximately 4 seconds for the stimulus to reach the edge of the subject's shoulder." (2013 NHTSA participant manual, Session 8, pg. 34). The pen is to be stopped and held steady at any point where eye jerking, or nystagmus, is observed. (*Id*.). Here Stewart testified that he only took two seconds to move the pen to a forty-five degree angle at Wood's shoulder. (Hearing Tr. at 21-22, 52-53). Although this was quicker than the NHTSA manual teaches, we find no reversible error for at least two reasons.

{¶ 18} First, the problem with moving the pen too quickly is that it may result in missing the onset of nystagmus. *Cleveland Heights v. Schwabauer*, 8th Dist. Cuyahoga No. 84249, 2005-Ohio-24, ¶ 25. Here, Stewart saw nystagmus despite moving the pen too quickly. That being so, moving the pen in compliance with NHTSA standards "would have rendered the same, if not worse, results." *Id*. As a result, Wood was not prejudiced by Stewart's quick hand. The Eighth District reached the same conclusion in *Schwabauer*, where an officer moved his pen at a speed of two or three seconds rather than the NHTSA-mandated four seconds. *Id*.

{¶ 19} Second, even if we were to disregard the portion of the HGN test involving onset of nystagmus prior to forty-five degrees, four valid clues of intoxication would remain on the other portions of the test. The NHTSA manual provides that exhibiting four clues constitutes a failure and, alone, establishes an eighty-eight percent likelihood of being under the influence of alcohol. (2013 NHTSA participant manual, Session 8, pg.

37). Consequently, we are unpersuaded that Stewart's quick hand on one portion of the HGN test required its exclusion or negated the existence of probable cause to arrest Wood for driving under the influence of alcohol. *Cf. State v. Tyner*, 2d Dist. Montgomery No. 25405, 2014-Ohio-2809, ¶ 8, fn.3 (finding no basis to suppress HGN test results where an officer failed to hold the defendant's eye at "maximum deviation" for the required time because four valid clues of intoxication still remained on the other portions of the HGN test).

{¶ 20} Based on the reasoning set forth above, we overrule Wood's assignment of error and affirm the judgment of the Kettering Municipal Court.

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

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