

[Cite as *State v. Maly*, 2015-Ohio-2784.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2015-CA-5
	:	
v.	:	Trial Court Case No. 2013-CR-625
	:	
ROBERT J. MALY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 10th day of July, 2015.

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FAIN, J.

{¶ 1} Defendant-appellant Robert J. Maly appeals from his conviction and sentence, following a no-contest plea, for one count of Operating a Motor Vehicle Under

the Influence of Alcohol or Drugs, in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree. Maly contends that the trial court erred when it overruled his motion to suppress evidence.

{¶ 2} We conclude that the trial court did not err in overruling Maly's motion to suppress. Accordingly, the judgment of the trial court is Affirmed.

I. Maly Exits a Car in a Ditch

{¶ 3} Michelle Mack was a passenger in a car being driven by a friend one night in early November, 2013, when she noticed a car in a ditch off the side of Kemp Road. The car she was in was at the intersection of Knoll and Kemp. Mack saw that the car's wheels were spinning, "as if the accelerator were being pushed." Mack saw a person, later identified as Maly, get out of the car from the driver's door.

{¶ 4} Mack concluded that Maly was intoxicated, based upon the fact that he "was stumbling around quite a bit; I believe he even attempted to sit down at one point. He seemed to be having trouble keeping balance, changing directions quite a bit." Mack called 9-1-1, identified herself and gave her phone number, and reported what she had seen. By this time, Maly was walking in a shopping center parking lot. Mack, with the assistance of her friend, kept Maly in continuous observation, entering the same parking lot.

{¶ 5} Beaver Creek police officer Barry Wisecup was dispatched. Mack stayed on the 9-1-1 line, with Maly in view, until Wisecup made contact with Maly, and remained nearby. To Wisecup, Maly "appeared to be stumbling; what I consider unsteady on his feet."

{¶ 6} Wisecup asked Maly where he had come from. Not understanding Maly's response, Wisecup repeated the question. Maly responded: "I don't know. I'm pretty f****d up."¹ Notwithstanding the information Wisecup had received from dispatch that Maly had been seen exiting the car from the driver's door, Maly denied that the car in the ditch was his. Wisecup detected the strong odor of an alcoholic beverage on Maly's person, and observed that Maly had bloodshot, glassy eyes, and slurred speech. Wisecup decided to detain Maly for further investigation.

{¶ 7} Wisecup had Maly get into the back of Wisecup's cruiser, and drove to the scene with the car in the ditch. After Maly again denied that the car was his, Wisecup ran the license plate, which "returned" to Maly. After Wisecup talked directly to the witnesses who had seen Maly walking from the car in the ditch and, before that, the car moving, Wisecup asked Maly to take field sobriety tests. Maly refused.

{¶ 8} Wisecup then arrested Maly and took him to the Fairborn jail for the administration of a breath test. Upon being advised of the consequences, Maly refused the breath test.

II. The Course of Proceedings

{¶ 9} Maly was charged by indictment with one count of Operating a Motor Vehicle Under the Influence of Alcohol or Drugs, in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree, and one count of Operating a Motor Vehicle Under the Influence of Alcohol or Drugs, in violation of R.C. 4511.19(A)(2)(a) and (b), a felony of the fourth degree.

¹ Due to the availability of our opinions on the internet, we generally use asterisks for obscenities in quotations.

{¶ 10} Maly moved to suppress evidence, contending that it was obtained as the result of an unlawful search and seizure. Following a hearing, his motion to suppress was overruled. Thereafter, Maly pled no contest to the first count, and the second count was dismissed. Maly was sentenced to prison for seven months, basic probation supervision for five years, six months in the county jail, various evaluation and treatment programs, was fined \$1,350, and was ordered to pay a probation supervision fee of \$1,200. From his conviction and sentence, Maly appeals. His sole assignment of error is as follows:

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S
MOTION TO SUPPRESS.

**III. Officer Wisecup Had Reasonable, Articulable Suspicion to Detain
Maly, and, Later, Probable Cause for Maly's Arrest**

{¶ 11} Wisecup initially detained Maly for further investigation by putting Maly in the back of the cruiser and driving to the scene of the car in the ditch. Maly argues that he was arrested when Wisecup placed him in the back of the cruiser. But Wisecup testified that he was merely detaining Maly for further investigation at that point, and the evidence in the record would support a finding that a reasonable person in Maly's position would not have considered himself under arrest at that time.

{¶ 12} At this point, Maly's own observation gave rise to a reasonable suspicion that Maly was under the influence of alcohol. The strong odor of an alcoholic beverage, Maly's stumbling and unsteadiness, and Maly's glassy, bloodshot eyes and slurred speech were facts giving rise to that reasonable suspicion, as well as Maly's statement to

Wisecup that he didn't know where he had come from, because he was "pretty f****d up." In support of a reasonable suspicion that Maly had been operating a motor vehicle – the car in the ditch – were the observations of Mack, a known citizen, which had been relayed to Maly by the dispatcher. These facts included the fact that Maly had been seen emerging from the car from the driver's door, that no one else was seen in the car, and that prior to Maly's emergence, the wheels of the car were seen spinning, as if the accelerator were being pushed. Furthermore, the fact that Maly's car was facing straight into the ditch from the side of the ditch away from the road suggests that the car got into the ditch as a result of impaired driving, rather than as the result of some mishap occurring while driving along the roadway.

{¶ 13} We conclude that Officer Wisecup had a reasonable, articulable suspicion that Maly was guilty of OVI, justifying his detention of Maly for further investigation.

{¶ 14} When Wisecup subsequently arrested Maly, Wisecup had talked directly to the witnesses. Also, Wisecup had determined, despite Maly's protestations to the contrary, that Maly was the owner of the car in the ditch. Finally, Maly had declined Wisecup's request to perform field sobriety tests, which supports an inference that Maly knew he would perform poorly. We conclude that this additional information, together with the information previously known to Wisecup, gave rise to probable cause to believe that Maly was guilty of OVI, which supported Maly's arrest.

{¶ 15} Maly also argues that Wisecup had insufficient personal knowledge to justify either the stop or the arrest, relying upon the "unverified statements of a citizen caller." Because Mack was not an anonymous informant, her information did not need to be corroborated to be deemed reliable. *Compare Alabama v. White*, 496 U.S. 325, 110

S.Ct. 2412, 110 L.Ed.2d 301 (1990). But there was some corroboration. Wisecup's observation that Maly was stumbling and unsteady on his feet corroborated Mack's similar observations.

{¶ 16} Maly's sole assignment of error is overruled.

IV. Conclusion

{¶ 17} Maly's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH, P.J., and WELBAUM, J., concur.

Copies mailed to:

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