

[Cite as *State v. Schmitt*, 2002-Ohio-4615.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
MERCER COUNTY**

STATE OF OHIO

CASE NO. 10-01-16

PLAINTIFF-APPELLANT

v.

KEVIN S. SCHMITT

OPINION

DEFENDANT-APPELLEE

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed.

DATE OF JUDGMENT ENTRY: September 6, 2002

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SHAW, P.J.

{¶1} The appellant, the State of Ohio, appeals the December 24, 2001 judgment entry of the Common Pleas Court of Mercer County, Ohio, suppressing evidence obtained during three field sobriety tests.

{¶2} The relevant facts of this case are as follows. On June 22, 2001, the appellee, Kevin Schmitt, was stopped by Trooper Westerfield of the Ohio State Highway Patrol. Suspecting that Schmitt was under the influence of alcohol and/or a drug of abuse, Trooper Westerfield conducted three field sobriety tests: the Horizontal Gaze Nystagmus (“HGN”), the one-leg-stand, and the walk-and-turn test. After concluding these tests, Schmitt took a portable breath test, which yielded a result of .143. Trooper Westerfield then arrested Schmitt for DUI and took him to the patrol post, where Schmitt refused to submit to a breathalyzer test. Thereafter, Schmitt was indicted by the Mercer County grand jury for a felony DUI in violation of Revised Code section 4511.19(A)(1), having previously been convicted of three DUI offenses within the last six years.

{¶3} On August 13, 2001, Schmitt pleaded not guilty to the charge and subsequently filed a motion to suppress all testimony at trial relative to the field sobriety tests on October 12, 2001. The trial court set the matter for a hearing to be held on November 14, 2001. At the hearing, counsel for both the State and Schmitt presented evidence in the form of joint exhibits and a written stipulation

that the field sobriety tests in question were not performed in strict compliance with the standardized testing procedures as set forth in the National Highway Traffic Safety Administration (“NHTSA”) Manual. Neither side presented actual witness testimony. The trial court granted the motion to suppress, finding that the performance by the defendant of the field sobriety tests was not admissible at trial, through a written judgment entry on December 24, 2001. This appeal followed, and the State now asserts two assignments of error.

{¶4} “IN ORDER FOR THE RESULTS OF THE FIELD SOBRIETY TEST TO SERVE AS EVIDENCE OF PROBABLE CAUSE TO ARREST, THE POLICE MUST HAVE ADMINISTERED THE TESTS IN STRICT COMPLIANCE WITH STANDARDIZED TESTING PROCEDURES.”

{¶5} “ANY EXTENSION OF THE OHIO SUPREME COURT SYLLABUS IN STATE V. HOMAN SHOULD BE LIMITED TO EXCLUDING THE CONCLUSION OR STATISTICAL RESULTS OF THE TESTS, NOT THE ACTUAL EVIDENCE, FACTS, OR CONDUCT WITNESSED BY THE PEACE OFFICER.”

{¶6} As these two assignments of error are related, they will be addressed together.

{¶7} We begin our discussion of this assignment of error by noting that “the decision of whether or not to admit evidence rests in the sound discretion of

the court and will not be disturbed absent an abuse of that discretion.” *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 437 (citing *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299); see also *State v. Sage* (1987), 31 Ohio St.3d 173, 182. Thus, this Court will not disturb the trial court’s decision unless it is unreasonable, arbitrary, or capricious. In the case sub judice, the trial court found that Schmitt’s performance of the field sobriety tests was not admissible because of the inherent unreliability of the tests, which the State stipulated were not conducted in strict compliance with the NHTSA standards. Therefore, the court found that the danger of unfair prejudice to Schmitt outweighed any probative value that his performance of these tests might have.

{¶8} In making its determination to exclude the evidence at issue, the trial court relied upon a recent decision by the Ohio Supreme Court: *State v. Homan* (2000), 89 Ohio St.3d 421. In *Homan*, the Court held that “[i]n order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures. *Id.* at paragraph one of the syllabus. The Court reasoned “that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized test procedures.” *Id.* at 425 (citations omitted). In addition, the Court found that “[t]he small margins of error that characterize field sobriety tests make strict compliance critical.” *Id.* The Court

further held that the critical nature of strict compliance applied not only to the HGN test but equally applied to the walk-and-turn test and the one-leg-stand test. *Id.*

{¶9} While *Homan* is not entirely dispositive of this case, as its holding was limited to determinations of probable cause, we find that the rationale of the Court in reaching its decision is applicable to the facts of this case. In the case sub judice, the State *stipulated* that the field tests conducted by Trooper Westerfield did not strictly comply with the standards established by the NHTSA. In so doing, the State effectively stipulated that the tests were *unreliable*. When evidence such as this has been deemed inherently unreliable, as the Ohio Supreme Court determined it to be in *Homan*, the danger of unfair prejudice to a defendant is present. Therefore, a trial court is well within its discretion in excluding such evidence, as *Homan* implicitly mandates such a result.

{¶10} This court is aware of the recently published decision of the Lima Municipal Court in *State v. Koepfel* (2002), 117 Ohio Misc.2d 17, in which certain observations of the arresting officer, made during a “walk and turn” field sobriety test, were deemed admissible at trial, notwithstanding the court’s determination that the test was not administered in strict compliance with the NHTSA procedures, and, therefore, could not be used in determining whether the officer had probable cause to arrest the defendant. *Id.* at 4-5. In that case, the

court distinguished field tests that are based upon scientific theory outside the lay expertise of a jury such as the HGN test, where the possibility of misleading the jury is great if improperly administered, and the observations of a police officer relating to basic psychomotor skills, such as displayed in walk-and-balance tests, which are akin to other physical indicators such as bloodshot eyes, slurred speech or staggering, normally considered to be within the common experience of police officers to testify about and of jurors to understand.

{¶11} Thus, in terms of the reliability standard set forth in the *Homan* decision, the rationale underlying the *Koepfel* decision would be that certain behavior of a suspect during a “walk-and-turn” field test would display inherently reliable indicators of alcohol influence (subject to rebuttal evidence and cross-examination), even where the test itself was found not to comply with NHTSA standards. Specifically, proponents of “selective” admissibility, as expressed in *Koepfel, supra*, would interpret *Homan* as allowing the trial court to separate unreliable test *results* from test *performance*, excluding both from the probable cause determination, but excluding only the test *results* (presumably meaning the officer’s description of the test protocol and/or conclusion testimony about failing the test) at trial. On the other hand, an officer’s observations of the suspect’s *performance* of such a test would come before the jury at trial, provided the

conduct displays independently reliable or commonly recognized indicators of alcohol influence.

{¶12} There is a certain appeal to this reasoning. After all, we routinely allow police officers to testify as to slurred speech, odor of alcohol, glassy eyes, and awkward physical reactions as indicators of alcohol influence, both for probable cause and at trial, without conducting any field test. However, we also see a number of difficulties with this approach. For one, despite the inherently demonstrable quality of some psychomotor activities for indicating that a person is under the influence of alcohol, the Supreme Court of Ohio, together with the NHTSA, have separately classified that conduct when it takes place in the course of administering a recognized field test and have assigned specific legal consequences to the failure to administer that test properly. One of these consequences is that the test itself is deemed legally unreliable, and another is that it shall be excluded from the determination of probable cause. *Homan, supra*.

{¶13} Additionally, we question the wisdom of allowing case law to evolve in this area based entirely upon the efforts of individual trial courts to separate prejudicial evidence of unreliable test results from evidence of a suspect's performance on the same test, on a case-by-case basis. For example, if the test is being improperly conducted by the police officer, the suspect may well be engaging in specific acts that are not uniformly accurate indicators of alcohol

influence. At the same time, the suspect may blurt out verbal responses to improper commands or engage in other extraneous behavior during a test. In each such case, the trial court would then be called upon to determine whether the conduct was or was not sufficiently related to the improper command to be independently reliable or perhaps whether, but for being asked to perform the improper act, the conduct would have occurred at all. In short, we are not convinced that when multiplied throughout the appellate district, these are the sort of determinations that are likely to assist this court in promoting a single, consistent, and fair approach to these cases.

{¶14} Finally, we are not convinced that suppression of test results for failure to comply with NHTSA standards merely for purposes of a probable cause determination, while admitting the same test performance at trial, comports with any sound principle for governing the admission of evidence in criminal cases. Specifically, the State has not directed us to any authority or other example whereby improperly gathered evidence in a criminal case would be so unreliable as to require suppression for purposes of evaluating the arrest but be perfectly admissible for use at trial in the State's case in chief as evidence of guilt.

{¶15} In sum, it seems to us that if the *results* of an improperly conducted test are deemed unreliable under the *Homan* decision, then the *conduct of a suspect during that test* must be considered inherently unreliable as well.

Moreover, if such conduct is deemed unworthy as a matter of law for a police officer to rely upon in determining probable cause under the *Homan* decision, we are not persuaded that the same conduct should become worthy for the jury to consider and quite possibly rely upon in determining guilt beyond a reasonable doubt at trial.¹

{¶16} For the foregoing reasons, it is our determination that the better construction of the *Homan* decision is that where a recognized NHTSA field test is conducted in a manner that fails to comply with NHTSA standards, the reliability of the entire test process is called into question. In this case, as noted earlier, the State effectively stipulated to the noncompliance and, hence, to the unreliability of the field tests. As a result, *all* evidence obtained against Schmitt by the State during these tests should have been considered unreliable and excluded, both for purposes of reviewing probable cause to arrest and from the State's case in chief at trial. As this was the ruling of the trial court in this case, the assignments of error are overruled and the judgment of the Common Pleas Court of Mercer County is affirmed.

Judgment affirmed.

BRYANT, J., concurs.
HADLEY, J., dissents.

¹ We are aware that in reaching the *Koepfel* decision, the Lima Municipal Court cited our decision in *State v. Matson* (Nov. 27, 2001), Seneca App. No.13-01-09, 2001 WL 1504190, in support of its ruling. We believe *Matson* is distinguishable from the case before us in that our holding in *Matson* was primarily directed to whether the defendant was prejudicially deprived of the opportunity to present a full defense at

HADLEY, J., dissenting.

{¶17} I respectfully dissent from the decision of the majority because I believe that a defendant's performance on certain field sobriety tests should be admissible at trial as lay evidence of a defendant's impairment.

{¶18} I believe that a distinction can be drawn between so-called psychomotor field sobriety tests, which assess a defendant's ability to perform simple physical tasks, and the horizontal gaze nystagmus test (HGN), which results in scientific evidence of intoxication. Strict compliance with NHTSA guidelines should be a prerequisite to the admission of evidence gleaned from the HGN, because the scientific nature of the test means that the results of a test performed incorrectly would potentially lead to unfair prejudice, confusion, and misleading the jury. However, with regards to the psychomotor tests, I do not feel that there should be a per se rule of exclusion.

{¶19} It is worth noting at the outset that intoxication or lack thereof is generally recognized by courts as being within the experience of lay witnesses. In fact, the Supreme Court of Ohio held that virtually any lay witness, without special qualifications, can testify as to whether an individual is or was intoxicated.² It is also well established that a police officer may provide lay

trial in that case. However, to the extent that the *Matson* opinion could be interpreted as implicitly authorizing the approach taken in the *Koeppele* decision, we expressly overrule the *Matson* decision today.

² *City of Columbus v. Mullins* (1954), 162 Ohio St. 419, 421.

testimony as to his or her opinion regarding a defendant's lack of sobriety.³ Much of a defendant's performance on psychomotor field sobriety tests fall within the realm of the common perception of sobriety or inebriation. Accordingly, it seems reasonable to allow an officer to testify to a defendant's performance on these tests as a lay witness.

{¶20} Several courts have held that the one-legged test and the walk and turn tests are admissible as nonscientific evidence because they involve observations within the common understanding of ordinary citizens.⁴ “There are objective components of the field sobriety exercises, which are commonly understood and easily determined, such as whether a foot is on a line or not.”⁵ In other words, performance of the psychomotor tests involves observations that parallel those that a layperson would make in assessing an individual's sobriety. Thus, a defendant's ability to perform such simple tasks is within the juror's common understanding. Therefore, the tests are probative and should be admitted provided that their value as evidence is not outweighed by the danger of unfair prejudice.

³ *State v. Holland* (Dec. 17, 1999), Portage App. No. 98-P-0066.

⁴ *State v. Meador* (1996), 674 So.2d 826; *Commonwealth v. Ragan* (1995), 438 Pa.Super. 505; *Seewar v. Town of Summerdale* (1992), 601 So.2d 198; *Nuyt v. Director of Revenue* (1991), 814 S.W.2d 690; *State v. Gilbert* (1988), 751 S.W.2d 454.

⁵ *Meador*, 672 So.2d at 831.

{¶21} I am cognizant of the Ohio State Supreme Court's case of *State v. Homan*,⁶ which opines that "[w]hen field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable."⁷ However, I believe that the unreliable, and therefore inadmissible, results the psychomotor skills tests can be distinguished from a defendant's performance on the tests. For example, if the walk-and-turn test was not conducted in strict compliance with the National Highway Traffic Safety Administration (NHTSA) guidelines, the administering officer should not be permitted to take the stand as an expert witness and testify that he observed all of the indicators of drunkenness. However, he should be able to testify as a lay witness regarding the defendant's performance on the test. For instance, in the instant case, when requested to perform the walk-and-turn test, the defendant herein stated that he could not even perform such a test when sober. Such evidence should be admissible, subject to the rules of evidence, because it is not a result of the test. It goes without saying that any of the victim's performance that is let into evidence would be subjected to cross-examination, at which point the defense would be free to point out the inadequacies in the tests' administration.

{¶22} Finally, I also object to the trial court's characterization that individual trial courts are not suited to make determinations regarding the

⁶ (2000) 89 Ohio St.3d 421.

⁷ Id. at 424.

admissibility of evidence gleaned from field sobriety tests. Such a decision runs afoul of most other appellate rulings regarding evidentiary matters since, in most instances, the determinations regarding whether or not to admit evidence are left to the sound discretion of the court.⁸ Although the majority apparently fears allowing precedent in this area to be set by individual trial courts, most evidentiary law evolves through discretionary rulings by lower courts that are then subjected to appellate review.

{¶23} The majority bemoans the possibility that case-by-case determinations in this area will fail to promote a “single, consistent, and fair approach to these cases.” I, however, am reminded of the axiom that foolish consistency is the hobgoblin of small minds. By championing a single and consistent approach to these types of cases, the majority does not necessarily advance the cause of fairness. To the contrary, fairness in the realm of evidentiary rulings is often furthered by just the opposite of what the majority suggests: the ability of individual trial court judges to use their particular knowledge of an individual case and their singular expertise in trial procedure to determine the most just and legally sound ruling in a particular instance.

⁸ *Wightman*, 86 Ohio St.3d at 437.