

[Cite as *State v. Howell*, 2004-Ohio-538.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY**

STATE OF OHIO

CASE NUMBER 8-03-21

PLAINTIFF-APPELLEE

v.

OPINION

TODD HOWELL

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: February 9, 2004

ATTORNEYS:

**WILLIAM E. SHIRK
Attorney at Law
Reg. #0006503
185 South Main Street
Lakeview, OH 43331
For Appellant.**

**WILLIAM T. GOSLEE
Chief City Prosecutor
Reg. #0041924
226 West Columbus Avenue
Bellefontaine, OH 43311
For Appellee.**

SHAW, P.J.

{¶1} The appellant, Todd Howell, appeals the August 26, 2003 judgment of the Bellefontaine Municipal Court, finding him guilty of operating a motor vehicle while intoxicated in violation of R.C. 4511.19(A)(6) and sentencing him accordingly.

{¶2} Howell was cited with, inter alia, driving under the influence of alcohol, a violation of R.C. 4511.19(A)(1), (6). He initially entered a plea of not guilty and subsequently filed a motion to suppress all evidence related to that charge. For purposes of this motion, Howell and the appellee, the State of Ohio, stipulated the relevant facts to the trial court. The stipulated facts were as follows.

{¶3} Howell was operating a motor vehicle west bound on County Road 217 in Logan County, Ohio, on the date in question. At approximately 10:00 p.m., Howell drove off the right side of the road and struck a bridge abutment. Howell was rendered unconscious and flown to a hospital in Columbus. Once at the hospital, blood was taken from Howell to test for alcohol content pursuant to a request from the Logan County Sheriff's Office. The results of this test, which were received by the Sheriff's office ten days later, revealed that Howell's blood alcohol content ("BAC") was .176.

{¶4} The trial court overruled Howell's motion to suppress on July 23, 2003. Thereafter, Howell changed his initial plea of not guilty to one of no

contest. The trial court then found him guilty of violating R.C. 4511.19(A)(6) and sentenced him accordingly. This appeal followed, and Howell now asserts two assignments of error.

The Trial Court erred in failing to suppress the blood test result from blood taken from defendant on March 20, 2003, as this constituted a warrantless search, without probable cause and without defendant's consent.

The Trial Court erred in failing to suppress the blood test result from blood taken from defendant on March 20, 2003, for the reason that defendant was not placed under arrest, nor was he charged with a violation of O.R.C. § 4511.19, as required by O.R.C. § 4511.191, which gives rise to the implied consent and provides for presumption of intoxication.

As both these assignments of error involve interrelated issues, we elect to discuss them together.

{¶5} Our review of these issues begins by noting that the facts before the trial court for purposes of the motion to suppress were not disputed. Thus, the only determination for this Court is “whether the [trial] court has applied the appropriate legal standard.” *State v. Anderson* (1995), 100 Ohio App.3d 688, 691. Further, this determination is made without deference to the trial court because it involves a question of law. *Id.*

{¶6} The United States Supreme Court has determined that compelled intrusions into the body for blood to be analyzed for alcohol content in the absence of a search warrant are not violative of the protections of the Fourth Amendment

against unreasonable searches per se. *Schmerber v. California* (1966), 384 U.S. 757, 768. Rather, the Court held that “the Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” *Id.* However, “[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.” *Id.* at 769-770. Thus, “[i]n the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.” *Id.* at 770.

{¶7} In recognition of these Constitutional constraints, the Revised Code permits a law enforcement official to request that blood be taken from a person and analyzed for a BAC level when that officer has “reasonable grounds to believe the person to have been operating a vehicle upon a highway * * * while under the influence of alcohol * * * or with a prohibited concentration of alcohol in the blood[.]” R.C. 4511.191(A). This permissible request extends to persons who are dead or unconscious. R.C. 4511.191(B). However, unlike Division (B), R.C. 4511.191(A) specifically states that a person *placed under arrest* for operating a vehicle while under the influence of alcohol or with a prohibited concentration of alcohol in his/her blood is deemed to have consented to such testing.

{¶8} Howell contends that the requirement of Division (A) that an arrest take place prior to the request for blood is also required of those who are dead or unconscious. However, we need not address this issue for the following reasons.

{¶9} Revised Code section 4511.191 mandates that a blood test be administered when requested by an officer who has *reasonable grounds to believe* that the person whose blood is being drawn was driving under the influence of alcohol, drug of abuse, etc. This requirement reflects the holding of the United States Supreme Court in *Schmerber*, wherein the Court held that to render this type of intrusion constitutional, there must be a clear indication that in fact such evidence will be found. See *Schmerber*, 384 U.S. at 770. Here, the facts, as stipulated by the parties, do not indicate reasonable grounds for the requesting officer to believe that Howell was driving under the influence.

{¶10} The only fact presented to the trial court to indicate any type of impairment was the fact that Howell was driving a motor vehicle and drove off of the right side of the road into a bridge abutment at approximately 10:00 p.m. in March, 2003. There was no evidence presented on the motion to suppress regarding the weather conditions on that night, the lighting on that portion of the road, the condition of the road, or whether the road was free from any obstacles. In fact, although this information was not included in the stipulation, the citation issued to Howell indicated that the road was wet. A wet road could indicate that

the condition of the road, rather than intoxication, caused or otherwise contributed to the cause of the accident.

{¶11} In addition, the stipulations, which were the sole evidence before the court, did not include any observations, such as the odor of an alcoholic beverage, made by the responding officer or any other witnesses that would indicate that Howell was driving under the influence. Although the State indicated in its brief to this Court that emergency personnel on the scene informed the officer that Howell smelled of a strong odor of alcoholic beverage, *this information was not included in the stipulation of fact surrounding this incident*. Thus, the trial court did not have this evidence before it in making its determination to overrule the suppression motion, and such evidence cannot be considered by this Court as it is not properly before us.

{¶12} This Court's review of the relevant case law has revealed no instance in which the sole indicium of intoxication, and, therefore, the sole basis for drawing blood, was the fact that the defendant was driving a car involved in a one-car accident. On the contrary, each case reviewed by this Court required some further indicia of intoxication, however slight. For example, "further indicia" has been found in the fact that the pavement was dry, the evening clear, and that no obstructions or other reasons were apparent to explain why the defendant had driven off the roadway. See, e.g., *State v. Bernard* (1985), 20 Ohio App.3d 375,

376-377. In addition, in most, if not all, of these cases, the officer smelled an odor of alcoholic beverage emanating from the defendant or was made aware of this information by another witness on the scene. See, e.g., *id.*; *Schmerber*, 384 U.S. at 769; *State v. Taylor* (1982), 2 Ohio App.3d 394, 395; *State v. Risner* (1977), 55 Ohio App.2d 77, 78. As previously noted, no such additional evidence was placed in the record here. Therefore, in this case we must conclude that the circumstances were not sufficient to establish reasonable grounds to believe that Howell was driving under the influence prior to drawing his blood. We note that we are compelled to reach this determination solely on the stipulated facts of the present record. Nevertheless, based on this record, the trial court erred in overruling the motion to suppress as the Fourth Amendment and R.C. 4511.191 do not permit the withdrawal of blood in the absence of a clear indication that evidence of intoxication will be found. Accordingly, the assignments of error are sustained in as much as they relate to this error on the part of the trial court.

{¶13} For these reasons, the judgment of the Bellefontaine Municipal Court is reversed and the cause remanded for further proceedings in accordance with law.

Judgment reversed
and cause remanded.

BRYANT and CUPP, JJ., concur.

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