[Cite as *State v. Fittro*, 2015-Ohio-1884.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 9-14-19**

v.

DONALD N. FITTRO, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Marion County Common Pleas Court
Trial Court No. 14-CR-0055

Judgment Affirmed

Date of Decision: May 18, 2015

APPEARANCES:

Brian G. Jones **for Appellant**

Adam D. Meigs **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Donald Fittro ("Fittro"), brings this appeal from the judgment of the Common Pleas Court of Marion County, Ohio, which denied his motion to suppress and convicted him of operation of a vehicle under the influence ("OVI"), in violation of R.C. 4511.19(A)(1)(a), after a plea of no contest to this charge. On appeal Fittro challenges the trial court's rulings with respect to the motion to suppress and demands reversal of his conviction. For the reasons that follow, we affirm the trial court's judgment.

Factual and Procedural Background

{¶2} On February 9, 2014, at 3:59 a.m., Trooper Jeremy Bice ("Trooper Bice"), from the Ohio State Highway Patrol, encountered an accident involving a white Chevy Blazer stuck on a snow pile in the parking lot of the Meeker Fellowship Hall. When he approached the Blazer to investigate, he observed another vehicle drive across the parking lot toward the Blazer. The second vehicle was a dark Honda Civic operated by Fittro. When Fittro got out of his vehicle, Trooper Bice smelled a strong odor of an alcoholic beverage coming from him. Trooper Bice also observed that Fittro had bloodshot eyes and that his speech was slurred. Trooper Bice instructed Fittro to sit on the bumper of his cruiser while he talked briefly to two females who were involved in the initial accident. Later, Trooper Bice talked to Fittro more, and subsequently asked him to sit in the front

seat of the police cruiser for additional questioning. Before placing Fittro in the cruiser, Trooper Bice patted him down for weapons.

{¶3} Due to the fact that the stop occurred on private property, Trooper Bice contacted the sheriff's department to ensure proper jurisdiction for any further action. While waiting for the sheriff's unit to arrive, Trooper Bice had Fittro perform a horizontal gaze nystagmus test (HGN), which is a field sobriety test. Based on the results of the test, Trooper Bice determined that Fittro should be arrested, but he continued to wait for the sheriff's department unit. When Deputy Brian Brown ("Deputy Brown"), from the Marion County Sheriff's Office, arrived at the scene, two more field sobriety tests were performed, the walk-and-turn test and the one-leg-stand test. Fittro was then arrested and taken to Multi-County Jail, were he was subject to a chemical breath test. The results of the test disclosed that Fittro had a prohibited level of breath alcohol concentration (BAC).

{¶4} On February 20, 2014, a two-count indictment was filed, charging Fittro with operating a vehicle under the influence, a felony of the third degree in violation of R.C. 4511.19(A)(1)(d), and operating a vehicle under the influence, a felony of the third degree in violation of R.C. 4511.19(A)(1)(a).[1] Fittro pled not guilty.

[1] The indictment specified that Fittro had previously been convicted of or pled guilty to a violation of R.C. 4511.19(A) that was a felony, which resulted in the charges in the current case being elevated to a felony of the third degree under R.C. 4511.19(G)(1)(e).

{¶5} After initial discovery in the case, Fittro filed a "motion to suppress evidence, statements, observations, tests and test results" obtained during the stop on February 9, 2014. (R. at 23.) The motion cited twelve grounds for suppression, including a lack of a "lawful cause to stop Mr. Fittro, detain Mr. Fittro, and/or probable cause to arrest Mr. Fittro without a warrant"; failure to comply with the National Highway Traffic Safety Administration (NHTSA) standards when administering field sobriety tests; and failure to comply with "the time limitations and regulations of the State of Ohio in the Revised Code §4511.19(D) and the Ohio Department of Health governing such testing and/or analysis, as set forth in OAC 3701-53-02." (*Id.* at ¶ 1, 2, 4.) Additionally, Fittro alleged that "[t]he machine or instrument analyzing Mr. Fittro's alcohol level was not in proper working order and not calibrated in accordance with the time and manner required by OAC 3701-53-04" and that "[t]he solution used to calibrate the testing equipment was invalid and not properly maintained in accordance with OAC 3701-53-04." (*Id.* at ¶ 7, 8.) Fittro attached a memorandum in support of the motion. In the memorandum, he specifically discussed some of the grounds for suppression. For example, with respect to the allegations that the solution used to calibrate the testing equipment was invalid and not properly maintained, Fittro alleged that since "no evidence has been produced verifying such compliance, * * * one can only assume" that such evidence does not exist. (*Id.* Mem. of Facts and Law at II(d)(i).) He added, however, that "[s]hould the document surface, the

government must be prepared to demonstrate compliance in the actual process." (*Id.*)

{¶6} The trial court scheduled the motion for a hearing, which, due to lengthy testimony, took place on two separate days, April 24, 2014, and April 30, 2014.[2] The State offered testimony of Trooper Bice, Deputy Brown, Trooper Benjamin Addy ("Trooper Addy"), and Trooper Eric A. Geckler ("Trooper Geckler"), a patrolman at the Marion County Post. Trooper Bice testified about the events surrounding the stop and arrest of Fittro on February 9, 2014, as well as the tests he performed. Deputy Brown testified about the arrest, transportation to the Multi-County Jail, and observation of Fittro prior to administering the BAC test. Trooper Addy testified about the calibration of the BAC Datamaster machine and about the testing solution used for the calibration, including the process of storing and maintaining the solution. Trooper Geckler also testified about the BAC Datamaster machine and the solution used for the instrument check, including the process of storing the solution when not in use.

{¶7} Fittro did not present any evidence, but at the end of the second day of the hearing, he argued that the State had not satisfied its burden of proving that the solution used for breath testing instrument check was valid and properly maintained. (Tr.2 at 135.) In particular, Fittro asserted that the State was required to prove the approval of the solution by the director of the Ohio Department of

[2] Two transcripts were prepared. For the purpose of this Opinion, we use Tr.1 to indicate Transcript of Proceedings from April 24, 2014, and Tr.2 to indicate Transcript of Proceedings from April 30, 2014.

Health by bringing the label from the solution's bottle into court and by bringing the Director of Health's certification of the solution. (*Id.*) The State disagreed, stating that the information from the bottle solution is printed on the instrument check form. (Tr.2 at 137; Ex. 11, Apr. 30, 2014.) The State suggested that it could present additional evidence "in the interest of justice" to satisfy Fittro's request that the label with certification be produced. (Tr.2 at 136-137.) Over Fittro's objection "to the reopening of the State's case," the trial court allowed the parties to submit case law on the issue. (Tr.2 at 138-139.)

{¶8} On May 7, 2014, the trial court issued its first judgment entry with respect to the motion to suppress. The trial court suppressed evidence of the walk-and-turn and the one-leg-stand field sobriety tests. The trial court also suppressed the results of the pat-down and the questioning that followed the pat-down, but these issues are not before us at this time. The trial court scheduled for a hearing "the portion of the Motion to Suppress which pertain[ed] to the use of the proper calibration solution." (R. at 51.) The trial court denied the motion "in all other respects." (*Id.*) After another hearing on May 9, 2014, during which the State presented additional testimony and exhibits, the trial court denied the portion of the motion to suppress that challenged the calibration solution. (R. at 53.)

{¶9} Fittro subsequently entered a plea of no contest to count two and was found guilty of operating a vehicle under the influence, a felony of the third degree

in violation of R.C. 4511.19(A)(1)(a). The State dismissed the charges from count one.

{¶10} Fittro now appeals alleging the following assignments of error.

Assignments of Error

ASSIGNMENT OF ERROR I – THE TRIAL COURT'S RULING THAT THE HGN TEST WAS CONDUCTED IN SUBSTANTIAL COMPLIANCE WITH THE STANDARDIZED TESTING PROCEDURES OF R.C. 4511.19(D)(4)(B) IS NOT SUPPORTED BY THE RECORD AND THEREFORE CONTRARY TO LAW. (TR., (APR. 24, 2014), *PASSIM*; TR., (APR. 30, 2014), PASSIM; TR., (MAY 9, 2014) PASSIM; JE SUPP. MOTION (MAY 7, 2014; JE SUPP. MOTION: CALIBRATION SOLUTION (MAY 12, 2014).

ASSIGNMENT OF ERROR II – THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO SUPPRESS THE RESULTS OF CHEMICAL TESTING THAT WAS NOT PERFORMED IN SUBSTANTIAL COMPLIANCE WITH OHIO ADMINISTRATIVE CODE SECTION 3701-53. (TR., (APR. 24, 2014), *PASSIM;* TR., (APR. 30, 2014), PASSIM; TR., (MAY 9, 2014) PASSIM; JE SUPP. MOTION (MAY 7, 2014); JE SUPP. MOTION: CALIBRATION SOLUTION (MAY 12, 2014).

ASSIGNMENT OF ERROR III – THE TRIAL COURT ERRED IN FINDING A SUFFICIENT BASIS AND PROBABLE CAUSE TO STOP, DETAIN, AND ARREST THE DEFENDANT-APPELLANT IN VIOLATION OF THE DEFENDANT-APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I SECTION 14 OF THE OHIO CONSTITUTION. (TR., (APR. 24, 2014), *PASSIM;* TR., (APR. 30, 2014), PASSIM; TR., (MAY 9, 2014) PASSIM; JE SUPP. MOTION (MAY 7, 2014; JE SUPP. MOTION: CALIBRATION SOLUTION (MAY 12, 2014).

ASSIGNMENT OF ERROR IV – THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION DURING THE SUPPRESSION HEARING BY ALLOWING THE STATE TO REOPEN ITS CASE AND PRESENT MORE EVIDENCE OVER THE OBJECTION OF THE DEFENDANT. (TR., APR. 30, 2014, *PASSIM;* TR., MAY 9, 2014, *PASSIM;* JE SUPP. MOTION (MAY 7, 2014); JE SUPP. MOTION: CALIBRATION SOLUTION (MAY 12, 2014).

{¶11} The first, second, and third assignments of error concern the trial court's ruling on Fittro's motion to suppress, while the fourth one challenges the trial court's procedural ruling, which allegedly was of consequence to the resolution of the motion. An appellate review of the trial court's decision on a motion to suppress involves a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Norman*, 136 Ohio App.3d 46, 51, 735 N.E.2d 953 (3d Dist.1999). We will accept the trial court's factual findings if they are supported by competent, credible evidence, because the "evaluation of evidence and the credibility of witnesses" at the suppression hearing are issues for the trier of fact. *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992); *Norman* at 51; *Burnside* at ¶ 8. But we must independently determine, without deference to the trial court, whether these factual findings satisfy the legal standard as a matter of law because "the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review." *Norman* at 52; *Burnside* at ¶ 8. With this legal standard in

mind, we proceed to review the issues raised by Fittro as they pertain to the trial court's denial of his motion to suppress.

First Assignment of Error—Compliance with Testing Procedures during Administration of the HGN Test

{¶12} Fittro starts by challenging the trial court's refusal to suppress the results of the HGN test that Trooper Bice conducted upon him. In order for the testimony and evidence of the field sobriety test results to be admissible in an OVI prosecution, the test must be administered "in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration." (Emphasis added.) R.C. 4511.19(D)(4)(b); *see also State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 28. "[T]he results of the field sobriety tests are not admissible at trial unless the state shows by clear and convincing evidence that the officer administered the test in substantial compliance with NHTSA guidelines." *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 11.

{¶13} In support of its burden of proof for substantial compliance with the NHTSA standards, the State offered testimony of Trooper Bice and submitted Exhibit 1, which is the NHTSA Manual for OVI Detection and Standardized Field Sobriety Testing. The manual describes specific procedures mandated by the

NHTSA for the HGN test. (*See* State's Ex. 1 at VIII-7.) Trooper Bice described specific steps that he took in conducting the test at issue to comply with the NHTSA standards. (Tr.1 at 20-25.) Furthermore, he testified that he performed the test in accordance with his training and experience, which included training and certification in field sobriety testing, yearly refresher courses, as well as performing this test approximately 50 to 75 times in his career. (Tr.1 at 18-20, 30-31.) All of that testimony was offered to satisfy the requirement of showing "by clear and convincing evidence that the officer administered the test in substantial compliance with NHTSA guidelines," as required under *Codeluppi* at ¶ 11.

{¶14} Fittro argues that substantial compliance was not achieved for three reasons. First, he claims that Trooper Bice performed the test in "an unjustifiably rapid pace."[3] (App't Br. at 11.) Second, he complains that Trooper Bice "did not stop the test to account for headlights arriving on scene, which would impact Mr. Fittro's performance on the test." (*Id.*) Third, Fittro criticizes Trooper Bice's allegedly "conscious decision to position the administration of the test outside of the dash camera's range of sight." (*Id.* at 12.)

[3] To bolster his argument here, Fittro states in his Brief that the trial court suppressed the one-leg-stand test "on a similar basis * * * [of] delivering the complex one-leg stand instructions in 18 seconds." (App't Br. at 11.) Fittro misinterprets the trial court's findings, however. A review of the judgment entry discloses that the one-leg-stand test was suppressed due to not being conducted "on a 'reasonably dry, hard, level, non-slippery surface' as required by the NHTSA standards," and due to the fact that the results of the test did not demonstrate impairment. (R. at 51, at 7.) Although Fittro argued that the instructions were given too quickly, this was not the reason given by the trial court for the suppression. (*Id.*; *see also* Tr.2 at 133 (recommending that "the officer talks slower in giving the instructions" as "[i]t would be a good training advise [sic]," but finding a lack of compliance "in terms of the surface that it's being done on")).

{¶15} With respect to the first argument, Fittro's assertion that the test was performed too quickly has no support in the record. Apart from questioning Trooper Bice about his practices as to the time for performing the HGN test, Fittro offered no evidence to show that the test must be performed in a specific number of seconds, which would be longer than what occurred in this case. Although Fittro elicited Trooper Bice's testimony that it should take "[r]oughly" ninety-two seconds to conduct the test, Trooper Bice specifically rejected Fittro's suggestion that eighty-four seconds or less would be "a little bit too fast." (Tr.2 at 41, 49.) Trooper Bice explained that the time for performing the test would vary depending on how quickly the clues are noticed. (Tr.2 at 49.) The NHTSA Manual for OVI Detection and Standardized Field Sobriety Testing also fails to support Fittro's assertion that the test requires a minimum of ninety-two seconds to complete. (*See* State's Ex. 1 at VIII-7.) Finally, Fittro presents no case law to support his suggestion that the test at issue here was performed too fast, so as to result in a lack of substantial compliance with the NHTSA standards.

{¶16} Fittro's second argument in this assignment of error concerns Trooper Bice's failure to "stop the test to account for headlights arriving on scene." (App't Br. at 11.) Although Fittro claims that the headlights "would impact" his performance on the test, he provides no support for this allegation. He did not provide any evidence or testimony at the hearing that would require the trial court to suppress the HGN test results based on the alleged "headlights

arriving on scene." Conversely, Trooper Bice testified that Fittro "faced away from the road. He wouldn't have seen the pickup truck." (Tr.2 at 49.) Consequently, we reject allegations that the headlights of a vehicle arriving on the scene resulted in a lack of substantial compliance with the NHTSA standards.

{¶17} With respect to the third issue in this assignment of error, although Fittro criticizes Trooper Bice's allegedly "conscious decision to position the administration of the test outside of the dash camera's range of sight," he does not provide any legal argument with respect to the administration of the test outside of the camera's view that would require suppression. (App't Br. at 12.) Therefore, this argument fails.

{¶18} In conclusion, the State satisfied its burden of showing substantial compliance with the NHTSA standards and the trial court's ruling with respect to the HGN test was supported by the record.[4] Accordingly, we overrule the first assignment of error.

Third Assignment of Error—Justification to Stop, Detain, and Arrest

{¶19} This assignment of error challenges first the initial stop and detention and then, the subsequent arrest. We address each separately.

[4] We note that the trial court found that the HGN test was conducted in *strict* compliance "with the standardized testing procedures of the National Highway Traffic Safety Administration (NHTSA)," even though strict compliance is no longer required. *See State v. Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902 (1986), syllabus. Since strict compliance standard is more favorable to Fittro, he was not prejudiced by the trial court's finding of strict rather than substantial compliance.

Trooper Bice's Justification to Stop and Detain Fittro

{¶20} Fittro asserts that Trooper Bice "exceeded the constitutional scope of the initial stop to issue a minor traffic violation citation or investigate on the basis of public safety" by the time he conducted the pat-down. (App't Br. at 16.) He argues that Trooper Bice "observed no traffic violations" and Fittro "had no issues exiting the vehicle" and therefore, the continuous detention was not justified.

{¶21} Fittro is not presenting the full picture here. A review of the trial transcript indicates that shortly before the encounter with Fittro, Trooper Bice "observed a white Blazer and a dark colored Honda go southbound past [him] at a high rate of speed. Shortly after that they went northbound back up Agosta Meeker Road." (Tr.1 at 8.) Trooper Bice testified that he went north on Agosta Meeker Road to see if he could find those two vehicles. (Tr.1 at 8.) That is when he saw the white Blazer disabled "up on the snow pile" and after he had activated his lights, he saw "the Honda come from behind the Blazer actually towards me, towards the road." (Tr.1 at 9.) Trooper Bice testified that once the Honda's driver—Fittro, saw him, he turned the lights off, "backed up, and parked." (Tr.1 at 10.) Fittro then got out of the car[5] and "was pretty unsteady." (Tr.1 at 11; Tr.2 at 3.) Trooper Bice testified that when he talked to Fittro, he could smell a strong

[5] Although in his brief, Fittro alleges that "Trooper Bice ordered Mr. Fittro out of the car," and cites the pages of the transcript that purportedly support this statement, our review of the transcript discloses that it is a misrepresentation of the record. Trooper Bice repeatedly testified that Fittro got out of his vehicle on his own initiative. (*See, e.g.*, Tr.2 at 3:18 ("he was getting out while I was pulling up"); *accord* Tr.2 at 11:11-24 (confirming that Fittro stepped out of the car "close" to "almost simultaneously with [Trooper Bice] doing the same"); *see also* State's Ex. 2, 03:59:53).

odor of an alcoholic beverage coming from him. (Tr.1 at 10-11.) Additionally, he noticed that Fittro's "eyes were bloodshot and glassy, speech was slurred." (Tr.1 at 11.) Trooper Bice testified that apart from the above-described indicia of influence, Fittro "acted normally." (Tr.2 at 13.)

{¶22} "[A] traffic stop is constitutionally valid if an officer has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit a crime." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 7. The trial court found that Trooper Bice had a reasonable and articulable suspicion that Fittro "had just committed the offense of OVI, since Trooper Bice saw [Fittro] drive a vehicle and observed an odor of alcohol, bloodshot eyes, and slurred speech."[6] (R. at 51, at 2.) We agree with the trial court's conclusion that the above-described factors, together with the other observations, gave Trooper Bice a reasonable and articulable suspicion that Fittro had committed an OVI offense. Furthermore, the Ohio Supreme Court has recognized that "the detention of a stopped driver may continue beyond the normal time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial

[6] Once again Fittro is misrepresenting facts in his Brief by claiming, "the trial court found that Mr. Fittro's 'slurred speech' was not probative as a factor of the reasonable suspicion to detain Mr. Fittro or the probable cause to arrest." (App't Br. at 17, referring to Tr.2 at 6-9, 131, and R. at 51.) Although the trial court did comment that "the slurred speech is probably--probably less probative than thee [sic] other" and "certainly isn't extremely slurred speech," the trial court did not exclude or discredit Trooper Bice's testimony about the slurred speech. (Tr.2 at 131; *see also* R. at 51, at 6, fn. 2.) Furthermore, the trial court expressly relied on Trooper Bice's observation of the slurred speech in finding that detention was justified. (R. at 51, at 2; *see also id.* at 6.)

stop." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 15, quoting *State v. Howard*, 12th Dist. Preble No. CA2006-02-002, 2006-Ohio-5656, ¶ 16. Therefore, Trooper Bice did not exceed the scope of a constitutionally permissible stop when he talked to Fittro outside of the car and subsequently asked him to sit in the cruiser for further questioning. *See State v. Aldridge*, 3d Dist. Marion No. 9-13-54, 2014-Ohio-4537, ¶ 11-15 (rejecting a similar argument).

Probable Cause for Arrest

{¶23} Fittro argues that the trial court erred when it found sufficient probable cause for an OVI arrest. "In determining whether the police had probable cause to arrest an individual for [OVI], we must consider whether, at the moment of arrest, the police had information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *State v. Dillehay*, 3d Dist. Shelby No. 17-12-07, 2013-Ohio-327, ¶ 19, quoting *State v. Thompson*, 3d Dist. Union No. 14-04-34, 2005-Ohio-2053, ¶ 18. We will evaluate the existence of probable cause in each case under the totality of the circumstances approach. *Dillehay* at ¶19, citing *State v. Cromes*, 3d Dist. Shelby No. 17-06-07, 2006-Ohio-6924, ¶ 38. Under this approach, an arresting officer may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' " *Cromes* at ¶ 38, quoting *United States v. Arvizu*, 534 U.S. 266, 273, 122

S.Ct. 744, 151 L.Ed.2d 740 (2002), *and United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). Furthermore, factors that may be taken into account in probable cause determination are not limited to the field sobriety tests. As we held,

> While field sobriety tests must be administered in [substantial[7]] compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where, as here, the test results must be excluded for lack of [substantial] compliance.

State v. Ferguson, 3d Dist. Defiance No. 4-01-34, 2002 WL 596115, *3.

{¶24} In the instant case, the trial court found that probable cause was based on Trooper Bice's observations as described above, which gave him a reasonable and articulable suspicion that Fittro had committed an OVI offense, as well as on the results of the HGN test. We additionally note that although Trooper Bice's testimony about the *results* of the one-leg-stand and the walk-and-turn tests was excluded by the trial court, the testimony about the defendant's *performance* during the administration of the excluded tests is admissible for the purpose of determining probable cause under the totality of the circumstances approach. The Ohio Supreme Court held:

[7] Although the above quote uses "strict compliance," later cases clarified that strict compliance is no longer required and substantial compliance with the testing procedures is sufficient. *See Plummer*, 22 Ohio St.3d 292, 490 N.E.2d 902, syllabus.

> 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.

State v. Schmitt, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, ¶ 14-15; *State v. Griffin*, 12th Dist. Butler No. CA2005-05-118, 2006-Ohio-2399, ¶ 11 ("Regardless of a challenge to field sobriety tests, a police officer may testify regarding his observations made during administration of the tests."). Therefore, Trooper Bice's observations about Fittro's behavior during administering field sobriety tests are admissible for the purpose of determining whether the trial court erred when it found that there was probable cause to arrest Fittro, even if the test *results* were excluded.

{¶25} In addition to the factors mentioned by the trial court in its judgment entry in support of the probable cause finding, the record discloses additional factors that Trooper Bice, drawing on his experience and specialized training, could have interpreted as indicia of influence. Fittro was unsteady when he got out of the car. (Tr.1 at 11.) After placing Fittro in the police cruiser, Trooper Bice continued to smell the strong odor of an alcoholic beverage and still observed Fittro's bloodshot and glassy eyes, as well as slurred speech. (Tr.1 at 15.)

Additionally, Fittro miscounted during the administration of the one-leg-stand test. (Tr.2 at 52.) These and other factors, under the totality of the circumstances, could sufficiently cause a prudent person to believe that Fittro was operating a vehicle under the influence. Therefore, the trial court did not err in its finding of probable cause.

{¶26} For all of the foregoing reasons, the third assignment of error is overruled.

Second Assignment of Error—Compliance with Breath Testing Procedures

{¶27} In this assignment of error, Fittro alleges two grounds for reversal. First, he asserts that the State failed to properly observe him for the required twenty-minute period prior to the BAC test. Second, he claims that the BAC Datamaster, which was used for his breath test was not properly maintained, causing condensation, which allegedly impacted the test results.

{¶28} The first challenge is based on the regulation that breath samples "shall be analyzed according to the operational checklist for the instrument being used." Ohio Adm.Code 3701-53-02(D); R.C. 4511.19(D)(1). It has been recognized that one of the elements on the BAC checklist is "that the person being tested be observed for twenty minutes before the test to prevent the oral intake of any material." *State v. Siegel*, 138 Ohio App.3d 562, 566-567, 741 N.E.2d 938 (3d Dist.). This requirement operates "to eliminate the possibility that the test result is a product of anything other than the subject's deep lung breath." *State v.*

McAuley, 8th Dist. Cuyahoga No. 76720, 2000 WL 1038186, *4 (July 27, 2000); *accord State v. Steele*, 52 Ohio St.2d 187, 191, 370 N.E.2d 740 (1977); *State v. Camden*, 7th Dist. Monroe No. 04 MO 12, 2005-Ohio-2718, ¶ 13, quoting *Bolivar v. Dick*, 76 Ohio St.3d 216, 218, 667 N.E.2d 18 (1996). Strict compliance with the twenty-minute observation period is not required, however, as the courts require substantial compliance. *See Bolivar* at 218; *Camden* at ¶ 14; *McAuley* at *4; *State v. Holly*, 135 Ohio App.3d 512, 515, 734 N.E.2d 869 (12th Dist.1999).

{¶29} Here, the trial court made the following factual findings with respect to the twenty-minute observation period:

> In the instant case, the breathalyzer test was administered at 5:45 a.m. Trooper Bice listed the observation period as beginning at 5:12 a.m. The observation was primarily conducted by Dep. Brown, although Trooper Bice was present while they were at jail. Dep. Brown remained present with the defendant from 5:12 a.m. until the test was administered at 5:45 a.m. From 5:12 a.m. until approximately 5:25 a.m., the Defendant was in the back seat of Dep. Brown's cruiser with his hands handcuffed behind him while Dep. Brown was from [sic] driving from the scene of the arrest to the jail. Once at the jail, until the breath test was administered, Dep. Brown remained present with the Defendant and observed him to ensure that nothing was placed in his mouth prior to the test.

(R. at 51, at 9, citing State's Ex. 3 and 4.) Following these findings, which are supported by the record (*see* Tr.2 at 85-93), the trial court found "that the State substantially complied with the Ohio Department of Health Regulations regarding the 20-minute observation period." (*Id.* at 10.)

{¶30} Fittro criticizes the trial court's finding, alleging that the twenty-minute observation period was not satisfied because Deputy Brown did not constantly look at Fittro while driving the car. Nonetheless, we have recognized that the State need not demonstrate that

> the subject was constantly within [the witnessing officer's] gaze, but only that during the relevant period the subject was kept in such a location or condition or under such circumstances that one may reasonably infer that his ingestion of any material without the knowledge of the witness is unlikely or improbable. *To overcome that inference, the accused must show that he or she did, in fact, ingest some material during the twenty-minute period. The 'mere assertion that ingestion was hypothetically possible ought not to vitiate the observation period foundational fact so as to render the breathalyzer test results inadmissible*.

(Emphasis sic.) *Siegel* at 569, quoting *State v. Adams*, 73 Ohio App.3d 735, 740, 598 N.E.2d 176 (2d Dist.1992), *and Steele* at 192; *see also State v. Isbell*, 3d Dist. No. 17-08-08, 2008-Ohio-6753, ¶ 34.

{¶31} Here, by showing that Fittro was in the car with his hands handcuffed behind him, the State demonstrated that his ingestion of anything was unlikely or improbable. Therefore, to overcome that inference, Fittro would have to show that he did, in fact, ingest something during that time. *See Siegel*, 138 Ohio App.3d at 569, 741 N.E.2d 938. Because no allegations were made and no evidence was provided to show that Fittro ingested something during the twenty-minute observation period, the trial court's finding of substantial compliance was proper. We came to the same conclusion in *Aldridge*, 3d Dist. Marion No. 9-13-54, 2014-

Ohio-4537, ¶ 31-34,[8] where part of the observation period was when the defendant was seated behind the trooper who drove the car, and another part, when the trooper was filling out paperwork and "did not directly stare at Aldridge." We rejected the defendant's argument that failure to constantly observe resulted in a lack of substantial compliance, because the evidence offered by the State showed that "Aldridge did not ingest anything during the twenty-minute observation period prior to the breath test." *Id.*

{¶32} Also in *Aldridge* we rejected a claim identical to the second issue raised by Fittro in this assignment of error. Without providing any evidence in support of her allegations, the defendant in *Aldridge*, just like Fittro, argued that there was condensation on the machine's simulator jar and "that the condensation proves noncompliance with the regulations of the Ohio Administrative Code." *Id.* at ¶ 29. Analyzing Aldridge's claim that she was prejudiced by water condensation on the simulator jar of the breath testing machine, we held,

> The photographs submitted into evidence were not dated and no evidence was provided to conclude that the water condensation was present on the simulator jar on the day or days in question. Aldridge offered no testimony or evidence that the condensation would affect the tests, * * * . Without any evidence that there was water condensation on the simulator jar, which was used in relation to Aldridge's breath test, we cannot hold that Aldridge was prejudiced.

[8] We note that the defendant in *Aldridge* was represented by the same appellate attorney as Fittro. Interestingly, some of the same legal arguments are raised in the instant appeal in spite of the fact that we rejected them in *Aldridge*.

Id. In the instant case, as in *Aldridge*, Fittro provided no evidence that there was any condensation on the simulator jar on the days relevant to his test or that the condensation would affect breath test results to his prejudice.[9] On the other hand, Trooper Geckler, who was responsible for instrument checks, refused to agree with a suggestion that the condensation would affect the operation of the machine. (Tr.2 at 125.) Accordingly, we reiterate our holding in *Aldridge* that unsupported allegations of condensation "are insufficient to invalidate the test result that was performed in substantial compliance with the Ohio Administrative Code regulations." *Aldridge* at ¶ 34.

{¶33} Under this assignment of error in his Brief, Fittro also criticizes the trial court for allegedly using the "preponderance of the evidence" standard for the finding that Deputy Brown substantially complied with the statutory observation requirements. (App't Br. at 14.) We find this criticism unsubstantiated because the trial court did not use the preponderance of the evidence standard in its judgment entry. While the question of the proper standard of proof was raised during the hearing (Tr.2 at 103), the trial court did not make "any conclusions on that issue" until it released its judgment entry. (Tr.2 at 134.) A review of the judgment entry and of the evidence at the hearing confirms that the State proved

[9] Even though Fittro presented no evidence in support of his contentions at the hearing, he alleges in his Brief that he "provided clear evidence to the trial court of the prejudice he suffered as a result of the State's failure to properly maintain the machines." (App't Br. at 15.) We note that cross-examination, during which the witnesses disagreed with suggestions that water condensation was present on the machine on the days at issue (*see* Tr.2 at 115, 126), or that cleaning condensation out of the hoses is required by the Ohio Department of Health (*id.* at 116-117), does not amount to "clear evidence" of prejudice.

its compliance with the twenty-minute observation period by clear and convincing evidence and the trial court did not use an improper standard here.

{¶34} Accordingly, we affirm the trial court's findings that the State substantially complied with the necessary procedures when performing the breath alcohol test, and we overrule the second assignment of error.

Fourth Assignment of Error—Procedural Ruling During the Hearing on the Motion to Suppress

{¶35} In this assignment of error, Fittro alleges that by the conclusion of the hearing on the motion to suppress the State had failed to satisfy its burden of proving substantial compliance with the Ohio Administrative Code Regulations with respect to the calibration solution used in the maintenance of the BAC Datamaster. Therefore, he claims that the trial court erred by allowing the State to present additional evidence of compliance at the subsequent hearing. Since we find that the State's burden was satisfied by the end of the suppression hearing, Fittro's argument fails.

{¶36} We have previously explained that the burden that the State must satisfy at the suppression hearing depends on the specificity of the allegations in the motion to suppress. *See State v. Blair*, 3d Dist. Marion No. 9-12-14, 2013-Ohio-646, ¶ 36.

> In seeking to suppress the results of a breath analysis test, the defendant must set forth an adequate basis for the motion. *State v. Shindler*, 70 Ohio St.3d 54, 58, [636 N.E.2d 319 (1994)]. The

> motion must state the " * * * legal and factual bases with sufficient particularity to place the prosecutor and court on notice as to the issues contested." *Id.*; Crim.R. 47. Once an adequate basis for the motion has been established, the prosecution then bears the burden of proof to demonstrate substantial compliance with the Ohio Department of Health regulations. *Xenia v. Wallace*, 37 Ohio St.3d 216, 220, [524 N.E.2d 889] (1988). * * *
>
> The extent of the prosecution's burden to show substantial compliance varies with the degree of specificity of the violation alleged by the defendant. "When a defendant's motion to suppress raises only general claims, along with the Ohio Administrative Code sections, the burden imposed on the state is fairly slight." *State v. Johnson*, 137 Ohio App.3d 847, 851, [739 N.E.2d 1249, 1252 (12th Dist.2000)]. Specifically, when a motion fails to allege a fact-specific way in which a violation has occurred, the state need only offer basic testimony evidencing compliance with the code section. *State v. Bissaillon*, 2d Dist. No. 06–CA–130, 2007–Ohio–2349, ¶ 15.

Id. at ¶ 35-36.

{¶37} Fittro's motion challenged the solution alleging that "[t]he solution used to calibrate the testing equipment was *invalid and not properly maintained* in accordance with OAC 3701-53-04." (Emphasis added.) (R. at 23, ¶ 8.) The attached memorandum specifically referred to the Ohio Administrative Code regulation requiring that the "solution may be used for no more than three months after its first use." (*Id.* Mem. of Facts and Law at II(d)(i), citing Ohio Adm.Code 3701-53-04.[10]) The memorandum further stated that since "no evidence has been

[10] Although Fittro's Brief cites to Ohio Adm.Code 3701-53-04(A)(1), it appears that the proper citation should be to paragraph (E), which states:

> A bottle of approved solution containing ethyl alcohol shall not be used more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate, whichever comes first. After first use, a bottle of approved

produced verifying such compliance, * * * one can only assume [that such evidence does not exist]." (*Id.*)

{¶38} In response to the general challenges to the validity and maintenance of the solution, the State offered testimony of Trooper Addy, who acknowledged that he was the person who performed calibration of the BAC Datamaster machine on February 2, 2014. (Tr.2 at 106.) A copy of the calibration checklist was reviewed and discussed. (Tr.2 at 107-108, State's Ex. 8.) The checklist included the following information: "solution batch or lot #," listed on the exhibit as "13180"; "bottle #," listed on exhibit as "126"; and "expiration date," listed on exhibit as "06/25/2014." (State's Ex. 8.) Additionally, Trooper Addy testified that he used the "solution which is given to us by the Ohio Department of Health." (Tr.2 at 108.) He also stated that the target value for the solution is given by the Ohio Department of Health and testified what the target value for this particular solution was, as provided to them by the Ohio Department of Health. (Tr.2 at 109.) He added that when the solution is not used, it is refrigerated at the State Highway Patrol Post in Marion, Ohio. (*Id.*)

> solution shall be kept under refrigeration when not being used. The approved solution bottle shall be retained for reference until that bottle of approved solution is discarded.

Ohio Adm.Code 3701-53-04. In contrast, paragraph (A)(1) states:

> The instrument shall be checked to detect radio frequency interference (RFI) using a hand-held radio normally used by the law enforcement agency performing the instrument check. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced.

Id.

{¶39} The State also offered testimony of Trooper Geckler to further satisfy its burden of proof on this issue, as it was raised in the motion to suppress. Trooper Geckler testified about the instrument check performed on February 9, 2014. (Tr.2 at 121-122.) Referring to State's Exhibit 11, which was the instrument check form from that date, Trooper Geckler indicated the date that the testing solution was first used, which was November 24, 2013, as well as the date when it needed to be discarded, which was February 24, 2014. (*Id.*; State's Ex. 11.) Trooper Geckler also indicated that Exhibit 11 showed the "solution bottle or batch or lot number. And then the bottle number. And then the expiration that that solution expires." (Tr.2 at 122.) He testified about the target value, which was taken from the bottle of the solution. (*Id.*) He testified that the solution came from the Ohio Department of Health and was kept at the Post when not in use. (Tr.2 at 123.)

{¶40} We conclude that the testimony of Trooper Addy and Trooper Geckler sufficiently responded to Fittro's general allegations raised in the motion to suppress, which argued that the solution was "invalid and not properly maintained." (R. at 23, ¶ 8.) Trooper Addy and Trooper Geckler testified about the specific bottle number, solution batch number, the date first used, the date the solution must be discarded, and the solution's expiration date. Trooper Addy testified that the solution was refrigerated when not in use. Together with the

provided exhibits, this testimony satisfied the State's burden to contradict Fittro's general assertion that the solution was *invalid* and *not properly maintained*.

{¶41} We thus disagree with the trial court's remark in the judgment entry, which suggested that "the State overlooked" a challenge to the solution's certification. (R. at 51, at 11.) As evidenced above, the solution's approval or certification by the Ohio Department of Health was not specifically challenged by the motion to suppress. The State thus only had to provide "basic" testimony to satisfy its "fairly slight" burden of showing compliance with Ohio Adm.Code 3701-53-04(A)(2), which requires that "[a]n instrument shall be checked using a solution containing ethyl alcohol approved by the director of health." Trooper Addy and Trooper Geckler both testified that the solution was provided by the Ohio Department of Health. This, together with the information about the lot or batch number and the expiration date, which is taken from "the approved solution certificate" under Ohio Adm.Code 3701-53-04(E), sufficiently satisfied the State's fairly slight burden. Therefore, there was no need for a continuance so that the State could further show substantial compliance with the regulations pertaining to the validity and maintenance of the calibration solution. Since the continuance to prove substantial compliance was not needed, Fittro was not prejudiced by the trial court's procedural ruling allowing the continuance.

{¶42} Furthermore, our review of the transcript of the proceedings indicates that the trial court's ruling benefited Fittro by giving him an opportunity to add a

specific challenge to the previously raised general allegations that the solution was invalid and not properly maintained. As evidenced by the transcript, at no point during the parties' presentation of the evidence, did Fittro raise an issue concerning approval or certification of the solution by the Ohio Department of Health. Fittro's questioning of the State's witnesses on the issues of calibration was limited to the questions about water condensation and radio frequency interference. (Tr.2 at112-116, 123-128.) No questions were asked about the maintenance, validity, or approval and certification of the solution. (*Id.*) Then, at the end of the second day of the hearing, after the close of both the State and Fittro's case, after the trial court had indicated its position on the other issues challenged by the suppression motion, Fittro stated:

> What we don't have that's critical to the admission of this breath test is the bottle solution, the bottle label and thee [sic] certification of that bottle by the Director of Health that have not been submitted.
>
> If you look at OAC 3701.53-4 specifically paragraph E. "A bottle of approved solution containing ethyl alcohol shall not be moved -- used more than three months after the manufacturer's expiration date after an instrument check", I'm sorry, it's "an instrument check or certification shall be made in accordance with Paragraph – (inaudible)". Help me out here. What paragraph am I lookin' at?
>
> It's got to be certified by the Department of Health, sir. And there's no certification of that.

(Tr.2 at 135.) Fittro further asserted, "They have to bring the label and they have to bring a certification that looks like this from the Director of Health that says this bottle has been approved by the Director of Health --." (Tr.2 at 136.) The State

did not agree with Fittro's last-minute suggestions, stating that the information from the bottle solution is printed on the instruments check form. (Tr.2 at 136-137; Ex. 11, Apr. 30, 2014.) It offered, however, to present additional evidence "in the interest of justice." (Tr.2 at 136-137.)

{¶43} As discussed above, the State's "slight burden" of proving substantial compliance with Ohio Adm.Code 3701-53-04, to respond to the challenges as to validity and maintenance of the calibration solution, had already been satisfied by the time Fittro raised the specific issue of approval and certification. Therefore, the trial court did not err to Fittro's prejudice by allowing the State to bring the bottle label and certificate from the Ohio Department of Health in response to Fittro's last-minute addition to his motion to suppress. For the foregoing reasons, Fittro's fourth assignment of error is overruled.

Conclusion

{¶44} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Common Pleas Court of Marion County, Ohio is therefore affirmed.

Judgment Affirmed

ROGERS, P.J. and SHAW, J., concur.

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