

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA49
	:	
vs.	:	Released: August 27, 2010
	:	
AMY J. CHEVALIER,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Jim D. Fox, Belpre, Ohio, for Defendant-Appellant.

Roland W. Riggs, III, Marietta City Law Director, and Mark C. Sleeper,
Marietta City Assistant Law Director, Marietta, Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Defendant-Appellant, Amy J. Chevalier, appeals the decision of the Marietta Municipal Court convicting her of one count of operating a motor vehicle while under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a) & (d). She argues that the arresting officers lacked probable cause for her arrest and that the trial court erred in denying her subsequent motion to suppress. We disagree. Considering the totality of facts and circumstances, we find that there was probable cause for Chevalier's arrest and her motion to suppress was properly overruled.

Accordingly, we overrule her sole assignment of error and affirm the decision of the court below.

I. Facts

{¶2} In July of 2009, Sheriff Deputies Beth Mayle and Scott Smeeks clocked Chevalier driving 98 mph in a 55 mph zone, while talking on her cell phone. The ensuing traffic stop was captured by the dash cam of the deputies' cruiser.

{¶3} Both deputies interacted with Chevalier during the stop. Upon speaking with Chevalier, Smeeks immediately suspected that she might be impaired - she spoke unnaturally slowly and her demeanor was strange. Smeeks also noticed a crushed beer can pushed down between the driver's seat and the center console. At the time, Chevalier stated that she had had one drink that night. Suspecting that she might be under the influence, the deputies asked Chevalier to exit the vehicle to conduct field sobriety tests. The tests were conducted by Deputy Mayle.

{¶4} After the field sobriety tests were completed, Smeeks asked Chevalier to take a portable breath test, which she refused to do. Based on Chevalier's performance on the field sobriety tests and their other observations, the deputies placed her under arrest for operating a motor vehicle while under the influence of alcohol and/or drugs. She was

transported to the sheriff's department where she submitted to a blood-alcohol concentration ("BAC") test. The test revealed a BAC level of .159, nearly twice the legal limit.

{¶5} Chevalier pleaded not guilty and filed a "Motion In Limine/Motion to Dismiss." The motion sought to preclude the State "from introducing any evidence relative to the following field sobriety test performed by the Defendant" and sought dismissal, arguing that the arresting officers lacked probable cause for the arrest. After a full hearing on the matter, the trial court denied the motion. Chevalier subsequently changed her plea to no contest and the trial court found her guilty. In the present appeal, Chevalier challenges the trial court's denial of her "Motion In Limine/Motion to Dismiss."

II. Assignment of Error

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE BREATH TEST AND ALL OTHER EVIDENCE BECAUSE SAID TEST WAS CONDUCTED AND EVIDENCE GATHERED PURSUANT TO AN UNLAWFUL WARRANTLESS ARREST FOR WHICH THE ARRESTING OFFICERS LACKED PROBABLE CAUSE TO EFFECTUATE, IN CONTRAVENTION OF THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION AND OHIO CONSTITUTION ARTICLE I, SECTION 14.

III. Standard of Review

{¶6} Initially, we note that appellate review of a motion to suppress presents a mixed question of law and fact.¹ *State v. Featherstone*, 150 Ohio App.3d 24, 2002-Ohio-6028, 778 N.E.2d 1124 at paragraph 10, citing *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In a motion to suppress, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. See, e.g., *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard. *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657; *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

¹ Though labeled a "Motion in Limine/Motion to Dismiss," Chevalier's motion is actually a motion to suppress and we address it as such. "The determination of whether a motion is a 'motion to suppress' or a 'motion in limine' does not depend on what it is labeled. It depends on the type of relief it seeks to obtain." *State v. Massie*, 2nd Dist. No. 2007 CA 24, 2008-Ohio-1312, at 10, quoting *State v. Davidson* (1985), 17 Ohio St.3d 132, 135, 477 N.E.2d 1141.

IV. Assignment of Error

{¶7} Chevalier contends that the trial court erred in denying her motion to suppress because Deputies Mayle and Smeeks lacked probable cause to arrest her for driving under the influence. Accordingly, we state the criteria for determining probable cause in such instances:

{¶8} “The standard for determining whether the police have probable cause to arrest an individual for DUI is whether, at the moment of arrest, the police had sufficient 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. Brungs*, 4th Dist. No. 05CA18, 2005-Ohio-5776, at ¶25, citing *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952, 2000-Ohio-212. “To make this determination, the trial court should consider the totality of facts and circumstances surrounding the arrest.” *Brungs* at ¶25. *Homan*, citing *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 534 N.E.2d 906.

{¶9} “Furthermore, if an arrest is based upon R.C. 4511.19(A)(1), an officer must observe indicia of both alcohol consumption and impaired driving or coordination before there will be probable cause for an arrest.” *State v. Coates*, 4th Dist. No. 01CA21, 2002-Ohio-2160, at *6.

{¶10} Chevalier does not contest that there was indicia of alcohol consumption. Indeed, she could not, as she admitted to consuming alcohol. Instead, she argues there was no probable cause for her arrest because in addition to indicia of alcohol consumption there must also be evidence of impaired driving or impaired coordination. Chevalier claims there was no evidence of such. We disagree.

{¶11} First, there is the fact that Chevalier was traveling 98 mph, 43mph over the listed speed limit, and talking on her cell phone at the same time. Though we do not go so far as to say that driving 43 mph over the speed-limit, in and of itself, is conclusive proof of impaired driving, it should certainly be given substantial weight in the totality of the circumstances test. See, e.g., *State v. Shelpmann* (May 23, 1991), 4th Dist. No. 1632, at *2; *State v. Schweitz* (Aug. 29, 1990), 9th Dist. No. 14473, at *2-3.

{¶12} Next, there is Chevalier's performance on the three field sobriety tests conducted by Deputy Mayle: a horizontal gaze nystagmus (HGN) test; a one leg stand (OLS) test; and a walk and turn (WT) test. Though the trial court decided that the HGN test was not conducted in substantial compliance with the regulations, and thus the results of the test were not admissible, it noted that Chevalier failed to follow instructions by

moving her head during the test. During the OLS test, Chevalier did manage to remain standing on one leg, but she failed to count as instructed. Instead of sequentially counting to thirty, she only managed to reach eleven. And Mayle and Smeeks both testified that she had difficulty in doing so, repeating numbers that she had already counted. As to the WT test, Chevalier started the test too soon, did not take the correct number of steps, turned incorrectly, and showed a slight loss of balance during her turn.

{¶13} It is true that Chevalier did not demonstrate a gross lack of motor control. She did not stagger, have difficulty standing or display the extreme lack of coordination sometimes associated with being under the influence. But such blatantly obvious indicators are not the only way to demonstrate impairment. As the State noted in its brief, field sobriety tests are designed to assess physical coordination in conjunction with the ability of the subject to follow instructions. And Chevalier repeatedly failed to follow such instructions during the tests.

{¶14} Accordingly, Deputy Mayle and Deputy Smeeks had the following factors to consider when determining whether there was probable cause to arrest Chevalier for driving under the influence: 1) Chevalier was driving nearly 100 miles an hour while talking on her cell phone; 2) there was a beer can between the driver's seat and center console; 3) Chevalier

admitted to consuming one drink, and after performing the field sobriety tests, admitted that she had had three drinks; 4) immediately upon speaking with Chevalier, Deputy Smeeks thought she might be impaired (“as soon as I walked up to the car * * * I could immediately tell by her speech, and her demeanor in talking to me, that something wasn’t right”); 5) she failed to keep her head still during the HGN test; 6) during the WT test she started early, took the wrong number of steps, turned incorrectly, and slightly lost balance while turning; and 7) during the OLS test she only counted to eleven, instead of to thirty as instructed, and she repeated numbers more than once.

{¶15} In light of the foregoing, under the totality of facts and circumstances, we find there was adequate probable cause to arrest Chevalier for operating a vehicle while under the influence of alcohol. Accordingly, the trial court properly denied her motion to suppress “any evidence relative to the following field sobriety test performed by the Defendant.” As such, we overrule Chevalier's sole assignment of error and affirm the judgment of the court below.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.