[Cite as *State v. Kirschner*, 2001-Ohio-1915.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
STATE OF OHIO	:	**Hon. Julie A. Edwards, P.J.**
	:	**Hon. William B. Hoffman, J.**
Plaintiff-Appellee	:	**Hon. John F. Boggins, J.**
	:	
-vs-	:	
	:	**Case No. 2001CA00107**
DON ALEXANDER KIRSCHNER	:	
	:	
Defendant-Appellant	:	**O P I N I O N**

CHARACTER OF PROCEEDING:	**Criminal appeal from Canton Municipal Court, Stark County Case No. 2001TRC00825**
JUDGMENT:	**Vacated, Reversed and Remanded**
DATE OF JUDGMENT ENTRY:	**12/3/2001**

APPEARANCES:

For Plaintiff-Appellee	**For Defendant-Appellant**
EUGENE D. O'BYRNE **Assistant City Prosecutor** **218 Cleveland Avenue, Southwest** **Canton, Ohio 44702**	**KENNETH W. FRAME** **Stark County Public Defender Office** **200 West Tuscarawas Street** **Canton, Ohio 44702**

Boggins, J.

On January 26, 2001, Defendant-Appellant was involved in a one-car accident.

Stark County Sheriff's Deputy David Garrick was dispatched to the accident scene.

Upon arriving on the scene, Deputy Garrick noticed the odor of alcohol about the Defendant-Appellant and unsteadiness on his feet. (T. at 19). Deputy Garrick also observed that Defendant-Appellant was bleeding. (T. at 19).

Defendant-Appellant was transported to Mercy Medical Center by EMS. (T. at 21).

Deputy Garrick followed Defendant-Appellant to the hospital to acquire a blood sample. (T. at 22).

Prior to ordering hospital personnel to draw Defendant-Appellant's blood, Deputy Garrick read BMV 2255 to Defendant-Appellant. (T. at 24).

On January 26, 2001, Defendant-Appellant was charged with one count of Driving Under the Influence of Alcohol, in violation of R.C. §4511.19, and one count of Driving with an FRA Suspension, in violation of R.C. § 4507.02.

On March 13, 2001, a hearing was held on Defendant-Appellant's Motion to Suppress.

By Judgment Entry dated March 16, 2001, the trial court denied Defendant-Appellant's Motion to Suppress.

On March 27, 2001, Defendant-Appellant entered a plea of "No Contest" to the charges and was found guilty of same.

On March 28, 2001, Defendant-Appellant filed the instant appeal, assigning the following error:

ASSIGNMENT OF ERROR

THE JUDGMENT OF THE TRIAL COURT DENYING DEFENDANT-APPELLANT'S MOTION TO SUPPRESS WAS AN ERROR OF LAW.

Appellant claims the trial court erred in denying his motion to suppress. We agree.

There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are again the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, " . . . as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

Appellant's motion questioned the legality of the blood draw. Appellant argues the trial court's conclusion and findings are not supported by the weight of the evidence.

By judgment entry filed March 26, 2001, the trial court found the following:

> ***
> 8. While at the hospital, the Defendant was read BMV Form 2255, which the Defendant refused to sign. A copy was delivered to the Defendant within two days of the blood draw.
> 9. The Defendant did, however, consent to his blood bring drawn.
>
> In determining the voluntariness of a Defendant's consent or refusal to submit to a chemical or other test requested by a law enforcement officer, words alone may not be determinative. A person by his acts, words or general conduct may shed light on his willingness or unwillingness to a test. See *Hoban v. Rice* (1971), 25 Ohio St.2d 111. The Court does not find that the Defendant was coerced into submitting to a blood test.

Defendant- Appellant argues that Defendant-Appellant's consent to the blood draw was coerced in that he was advised by the Deputy via the reading of BMV 2255 implied consent form that his driver's license would be suspended for one year as a consequence of refusal to submit to the blood draw.

Defendant-Appellant argues that the provisions of R.C. 4511.191 are not applicable unless the Defendant was validly arrested. *State v. Taggart* (August 29, 1987), Washington App.No. 86 CA 21, 1987 WL 15982, unreported.

Arrest occurs when four elements are present: (1) an intent to arrest, (2) under real or pretended authority, (3) accompanied by

actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested. *State v. Darrah* (1980), 64 Ohio St.2d 22.

From our review of the evidence, we find the direct testimony of the Deputy Garrick as to the issue of whether Defendant-Appellant was under arrest is clear:

> Deputy Garrick: ..I came in and told him that I had no intentions of taking him to jail because of the automotive accident.
>
> Mr. Vance: Did you, did you tell him what your intentions were?
>
> Deputy Garrick: Yes, my, I told him that my intentions were that I would ask him to submit to a test, to what's called a legal blood draw. And I would read him a form. And,....that the phlebotomist would take his blood.
>
> Mr. Vance: Did you tell him that you were going to summons him into court rather than arresting him?
>
> Deputy Garrick: Yes.

(T. at 23-24)

> ***
> Mr. Frame: Now, you said that you specifically told Mr. Kirschner that he was not under arrest?
>
> Deputy Garrick: When I got to the hospital, yes.
>
> Mr. Frame: Okay, so he, so he knew he was not under arrest because you told him he was not under arrest?
>
> Deputy Garrick: ...Correct.
>
> Mr. Frame: And he never was under arrest...

Deputy Garrick: ...No...

Mr. Frame: Correct?

Deputy Garrick: ...he was never in, my custody.

(T. at 27-28).

Deputy Garrick admitted that he never arrested appellant, nor did he ever tell him he was under arrest at the scene of the accident or at the hospital prior to the blood draw. It is clear that the officer did not consider appellant to be under arrest prior to the drawing of his blood. However, Ohio Bureau of Motor Vehicles Form 2255 includes the provision that an officer must read to the alleged offender a passage that specifically states that the offender is under arrest

Revised Code §4511.191 provides:

> "(A) Any person who operates a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking * * * shall be deemed to have given consent to a chemical test or tests of the person's blood * * * for the purpose of determining the alcohol * * * content of the person's blood * * * *if arrested* for operating a vehicle while under the influence of alcohol * * * or for operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine." (Emphasis added.)

The Court of Appeals for the Seventh District in *State v. Rice* (1998), 717 N.E. 2d 351, held that:

> Consent to a blood test is not voluntarily given where the officer was unable to conduct field sobriety tests at the scene or at the

> hospital, and where motorist "consented" to having his blood drawn only after officer told him that she was going to order the procedure and only after the officer read the motorist the implied consent form, which included information as to the consequences of his failure to consent to the draw.

The *Rice* court went on to hold:

> The language of R.C. 4511.191 specifically provides that an arrest is necessary, and, throughout the additional sections accompanying this statute, reference is repeatedly made to "the person under arrest" and the "arresting officer." It would be absurd to conclude from Form 2255 that its language is sufficient to "imply" arrest, which is then sufficient to "imply" consent to draw body fluids from this implied arrestee. The mandatory statutory language, coupled with the legislative intent behind the statute and the *Risner* and *Bustamonte* cases, leads this court to hold that a valid arrest must precede the seizure of a bodily substance, including a blood draw, and must precede an implied consent given based upon Form 2255. *Id.*

Upon review, we join the Seventh District and find the trial court erred in denying Appellant's motion to suppress. Appellant's sole assignment of error is sustained.

For the foregoing reasons, the judgment of the Canton Municipal Court is reversed, and appellant's conviction is vacated. The cause is remanded to the trial court for further proceedings in accord with law and consistent with this opinion.

By Boggins, J.

Edwards, P.J. concurs

Hoffman, J. dissents

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JUDGES

Hoffman, J., dissents

I respectfully dissent from the majority decision.

The majority opinion recites a portion of Deputy Garrick's testimony to support its conclusion appellant was not under arrest prior to the blood draw. Upon review of Deputy Garrick's entire testimony, it appears the portion relied upon by the majority relates only to appellant's status while at the hospital. The deputy's testimony that appellant was never under arrest and never in custody may have been limited to the officer's understanding of appellant's status after he had been transported to the hospital or as a misunderstanding of the technical meaning of arrest.

Prior to the testimony referenced in the majority opinion, Deputy Garrick testified about his conversation with appellant prior to appellant's transport to the hospital.

> **Q. Did you say anything to him at this point about, about his options?**

> **A. I, I advised him that I did feel that he was under some kind of an influence of an alcoholic beverage. And I advised him that his only other option was to go with me and do some tests at the Sheriff's Office, being the standardized field sobriety tests, and offered to take any blood alcohol content, machine, or the breath machine at the Stark County Sheriff's Office.**
>
> **Q. And what happened after that?**
>
> **A. I believe he was coursed (sic) by the EMS crew to go to the hospital to be checked out.**
>
> **Q. How would you describe the Defendant's demeanor at this point, Deputy?**
>
> **A. He was very somber; spoke very little. I, I still believe that he was in some kind of shock due to the accident. But he was very - he answered yes or no, he did answer my questions; he wasn't combative with me then, until I told him that he was going to go, that I was going to take him to do some tests and inevitably be booked into the Stark County Jail.**[1]

As to his intention prior to arriving at the hospital, Deputy Garrick testified:

> **Q. What, Deputy Garrick, were you intentions at this point?**
>
> **A. My intentions at this point were to go to Mercy Medical Center - first of all, assess the situation to see if he was going to be admitted, if he had any internal injuries or anything like that. And, to get a legal blood draw.**
>
> **Q. And in, in regards to the FRA Suspension?**
>
> **A. I'm sorry?**
>
> **Q. What were your intentions regarding the FRA Suspension?**
>
> **A. It is our policy at the Stark County Sheriff's Officer to, if you are caught driving under FRA Suspension, that you are immediately arrested and your vehicle is impounded.**

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[1] **Tr. at 20-21, emphasis added.**

> **Q. All right.**
>
> **A. It was my intention that if his injuries weren't severe, that he would be taken to the Stark County Sheriff's Office.**
>
> **Q. What difference would it make if his injuries were severe?**
>
> **A. Umm, it's also a policy at the Stark County Jail that if their injuries were severe, or if they have some kind of injuries due to an .... an automotive accident, that they're just let go on summons.**
>
> **Q. Okay. Which was the case in this particular incident?**
>
> **A. After confirming with my Supervisor, he said, he stated to me that if he did have injuries, just to let him go on summons.**
>
> **Q. All right. So after, the - so at some point, you made it out to Mercy Medical Center?**
>
> **A. Correct.**
> **Q. And did you make contact with the Defendant there?**
>
> **A. Correct.**
>
> **Q. All right. Tell me what happened then.**
>
> **A. He was not aware that I was going to let him go on summons . . .**[2]

When considering this portion of Deputy Garrick's testimony, the trial court found:

> **6. The defendant was advised that if he refused to transport to the hospital, he would be taken to the Stark**

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[2] **Tr. at 22-23.**

Count Jail for testing.

7. The defendant chose to go the hospital.[3]

[3]**March 16, 2001 at 1, unpaginated.**

Applying the *Darrah*[4] test to these circumstances, I believe there was evidence of intent on the part of Deputy Garrick to arrest appellant prior to the defendant's request to be transported to the hospital, under real authority, accompanied by constructive seizure of appellant, and so understood by appellant. Deputy Garrick's statement appellant was never under arrest and appellant was never in custody may have been understood by Deputy Garrick as meaning only actual physical seizure/arrest. In determining when a person is arrested, a reviewing court should ask, in view of all the circumstances surrounding the incident, would a reasonable person believe he or she was not free to leave.[5] The officer's subjective belief as to the status of appellant's custody does not control our decision.[6] The fact Deputy Garrick did not intend to take actual physical custody of appellant after appellant had been transported to the hospital, does not negate the constructive seizure/arrest of appellant which occurred prior to his transport to the hospital. Likewise, the fact Deputy Garrick elected to issue a summons at the hospital rather than take actual physical custody of appellant does not negate his constructive seizure/arrest which occurred prior to his transport.

I would affirm the judgment of the trial court.

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[4]***State v. Darrah*** **(1980), 18 Ohio St.3d 193.**

[5]***State v. Stringer*** **(Feb. 24, 1999), Scioto County App. No. 97CA2506, unreported, at * * 9, citing *United States v. Hammock* 860 F.2d 390, 393.**

[6]***Id.*** **at * * 10.**

JUDGE WILLIAM B. HOFFMAN

[Cite as *State v. Kirschner*, 2001-Ohio-1915.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
	:	
-vs-	:	**JUDGMENT ENTRY**
	:	
	:	
DON ALEXANDER KIRSCHNER	:	
	:	
Defendant-Appellant	:	**CASE NO. 2001CA00107**

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Canton Municipal Court of Stark County, Ohio is vacated, reversed and remanded. Costs assessed to Appellee.

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JUDGES