[Cite as *State v. Alborn*, 2003-Ohio-973.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Hon. William B. Hoffman, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2002CA00171
JACK L. ALBORN, JR.	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case No. 2002TRC1969
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 3, 2003

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
LEWIS GUARNIERI CANTON PROSECUTOR 218 Cleveland Avenue South Canton, Ohio 44601	WILLIAM H. GEORGES 220 Market Avenue South, Ste. 604 Canton, Ohio 44701-0407

Hoffman, P.J.

{¶1} Defendant-appellant Jack L. Alborn, Jr. appeals his convictions entered by

the Canton Municipal Court for driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1) and (A)(3), following a jury's verdict of guilty on both counts. The trial court also found appellant guilty of driving on left side of roadway, in violation of R.C. 4511.30. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 2, 2002, Officer Terry Rupert observed a truck driven by appellant go left of center while turning right onto another street. Officer Rupert testified he saw appellant ride close to the berm on the white line a couple of times after completing the turn before the officer stopped appellant at the next intersection where appellant had stopped for a stop sign. The videotape of appellant's driving did not show any traffic violation. Officer Rupert asked appellant for proof of insurance and his driver's license and registration. The officer noticed appellant did not seem to be able to handle multiple tasks at once. Officer Rupert did not detect the odor of alcohol coming from any of the three occupants of the truck at this time. Officer Rupert returned to his cruiser to check for warrants. The second time the officer approached the truck, he noticed a mild smell of an alcoholic beverage on appellant's breath. Officer Rupert also noticed appellant's speech was slightly slurred and slow.

{¶3} At trial, Officer Rupert testified appellant's eyes were bloodshot although no such testimony was elicited from Officer Rupert at a suppression hearing held on March 28, 2002, nor was Officer Rupert's observation about the appearance of appellant's eyes noted in his written report of the incident.

{¶4} Officer Rupert requested appellant perform some field sobriety tests. At the suppression hearing, the trial court determined the horizontal gaze nystagmus test (HGN) was not properly administered by Officer Rupert; and therefore, ruled the results of the HGN test inadmissible.

{¶5} Officer Rupert also had appellant perform the one leg stand test and the walk and turn test. Appellant could not complete his first attempt at the one leg stand test. Appellant swayed slightly and lost count. Appellant stopped before being told to stop. During the walk and turn test, appellant did not touch heel to toe the full way, missing his foot by four inches. Appellant staggered slightly during the test. At trial, appellant testified he was having problems with his right ankle and left knee.

{¶6} Appellant admitted he had drank two beers. After completion of the field sobriety tests, appellant was arrested and taken to the Malvern Police Department for a blood alcohol test. At the suppression hearing, Officer Rupert testified appellant was tested only one time and a videotape of appellant's breath test might exist. At trial, Officer Rupert conceded appellant was given two breath tests, but the first test result slip had been lost or misplaced.

{¶7} Appellant was arraigned on March 8, 2002, at which time he entered not guilty pleas to all the charges. On the same day, appellant filed his request for discovery, request for bill of particulars, and a motion to suppress. Appellee filed its response to appellant's discovery request on March 27, 2002, which included an illegible BAC Datamaster ticket and a legible ticket showing a .161 result. No mention of videotape evidence of the breath test was made in appellee's discovery response.

{¶8} The trial court conducted a hearing on appellant's motion to suppress on March 28, 2002. The trial court overruled the motion to suppress by Judgment Entry filed April 2, 2002, but ruled the results of the HGN test would be inadmissible at trial.

{¶9} On April 11, 2002, appellant filed a response to appellee's request for discovery, listing Alfred E. Staubus as a proposed witness.

{¶10} On April 15, 2002, appellant filed a Motion in Limine to suppress the BAC Datamaster test results and a Motion for Additional Hearing on the basis of newly

discovered evidence, i.e., the videotape of the breath test. Also on April 15, 2002, appellee filed a Motion in Limine to exclude appellant from presenting expert testimony relative to the B.A.C. test because no report had been provided to it and the trial was scheduled to commence April 22, 2002. On April 18, 2002, the trial court continued the jury trial to May 13, 2002.

{¶11} On April 16, 2002, appellee filed a Supplemental Response to Discovery revealing a videotape of the breath testing procedure. On April 16, 2002, the trial court summarily overruled appellant's Motion in Limine and Motion for Additional Hearing. On April 23, 2002, the trial court sustained the State's Motion in Limine to prevent appellant from presenting expert testimony at trial. The trial court further ruled appellee could not present the videotape of the breath test given to appellant.

{¶12} The case proceeded to jury trial on May 13, 2002. After deliberations, the jury ultimately returned a verdict of guilty on both the (A)(1) and (A)(3) counts. The trial court found appellant guilty of driving on left side of roadway and entered convictions based upon the jury's verdicts. Appellant was sentenced accordingly via Judgment Entry filed May 14, 2002. Appellant filed a motion for a new trial, which was overruled via Judgment Entry filed May 21, 2002. It is from the April 2, 2002; April 16, 2002; May 14, 2002; and May 21, 2002 Judgment Entries appellant prosecutes this appeal, assigning as error:

{¶13} "I. WHETHER THE POLICE OFFICER LACKED SPECIFIC AND ARTICULATE REASONS TO JUSTIFY AN INVESTIGATORY STOP ON MR. ALBORN'S VEHICLE THEREBY VIOLATING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 14 OF THE OHIO CONSTITUTION?

{¶14} "II. WHETHER THE POLICE OFFICER LACKED PROBABLE CAUSE TO

JUSTIFY THE ARREST OF MR. ALBORN AND THE ADMINISTRATION OF A BREATH ALCOHOL TEST THEREBY VIOLATING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 14 OF THE OHIO CONSTITUTION?

{¶15} "III. WHETHER THE APPELLANT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO ALLOW THE APPELLANT TO PRESENT EXPERT TESTIMONY AT THE SUPPRESSION HEARING AND/OR AT TRIAL TO CHALLENGE THE ACCURACY OF THE SPECIFIC BAC DATAMASTER TESTING PROCEDURE AND RESULTS IN THIS SPECIFIC CASE?

{¶16} "IV. WHETHER THE APPELLANT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION BY THE TRIAL COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING TO SUPPRESS BASED UPON EVIDENCE DISCLOSED BY THE GOVERNMENT DURING AND AFTER APPELLANT'S ORIGINAL MOTION TO SUPPRESS HAD BEEN HEARD BY THE COURT.

{¶17} "V. WHETHER THE APPELLANT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 10 AND 16 OF THE OHIO

CONSTITUTION."

I.

{¶18} In appellant's first assignment of error, he challenges whether there existed specific articulable facts sufficient to justify an investigatory stop of appellant's truck.

{¶19} 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 against the manifest weight of the evidence. *See: State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 114; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. 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. *See: 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, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; and *State v. Guysinger*, supra. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690 116 S.Ct. 1657, 134 L.E2d 911". . .as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶20} Herein, appellant argues because Officer Rupert only observed two "minor" traffic violations (not shown on the videotape taken prior to the stop of appellant's truck),

one of which occurred on an extremely winding road and the other while making a right hand turn, there was in sufficient reason to justify the stop of appellant's truck. (Appellant's Brief at 10). Appellant notes no other violations were found during the three to four minutes the officer observed appellant's driving. Appellant argues "a slightly flawed right turn . . . only a minor traffic irregularity" is not enough to give an officer reasonable and articulate suspicion the driver may be under the influence of alcohol. (Appellant's Brief at 11, 12). Appellant argues such is not suggestive of impaired driving. We believe appellant's argument flawed.

{¶21} It was not necessary to find specific, articulable facts to support a reasonable belief appellant was driving while impaired before a valid traffic stop could be made. To the contrary, we find the stop was not an investigatory stop, but rather a stop for a traffic violation. Because there was probable cause appellant had violated a statute regulating traffic (R.C. 4511.30), the stop was constitutionally valid.

{¶22} Appellant's first assignment of error is overruled.

II.

{¶23} Herein appellant challenges whether probable cause existed to justify appellant's arrest and the subsequent administration of the breath alcohol test.

{¶24} Appellant correctly notes the law does not prohibit drinking and driving. It does prohibit driving with an alcohol level above certain standards and/or while under the influence of alcohol, i.e., impairment to an appreciable degree.

{¶25} In support of his argument probable cause did not exist, appellant notes the HGN test results were held inadmissible; the officer did not notice the smell of an alcoholic beverage during his first conversation with appellant; the officer made no record of red or bloodshot eyes in any written report of the incident; appellant advised the officer he had bad legs; appellant retrieved the items requested by the officer; the officer did not record

appellant's speech was slurred in his written report; no mention of disheveled or shabby clothing or hygiene was noted; and the one leg stand test was not administered in compliance with standardized testing procedures.[1]

{¶26} The trial court found probable cause existed to arrest appellant for driving under the influence of alcohol based upon the following evidence presented at the suppression hearing. Appellant drove his truck left of center and off the right side of the roadway onto the berm. Officer Rupert noticed a mild smell of alcohol on his second approach to appellant's vehicle.[2] Appellant's speech was slightly slurred and slow. Appellant was moderately disoriented and could not handle multiple tasks at once. Appellant performed

{¶27} poorly on the one leg stand test and failed the walk and turn test.

{¶28} Based upon the aforementioned facts, we agree with the trial court probable cause existed for appellant's arrest.

{¶29} Appellant's second assignment of error is overruled.

III.

{¶30} Herein appellant claims error as a result of the trial court's refusal to permit him to present expert testimony at the suppression hearing and/or at trial to challenge the accuracy of his breath test.

{¶31} A defendant may challenge the accuracy of his specific test result through the use of expert testimony to show he could not have produced the test result claimed by the

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[1]Appellant has not separately assigned as error the trial court's failure to suppress the results of the one leg stand as required by App. R. 16(A). Accordingly, we believe the results of one leg tests are admissible to determine whether probable cause existed to arrest appellant and administer the breath test. Although admittedly dicta, we note our determination regarding the existence of probable cause would not change even if we determined the results of the one leg stand test were inadmissible.

[2]Appellant had a sandwich in his mouth during the first conversation.

prosecution. *City of Columbus v. Day* (1985), 24 Ohio App.3d 173; *State v. Walton* (Jun. 30, 1999), Fairfield County 98CA00046, unreported.

{¶32} Appellant notified the trial court it was his intention to present Dr. Staubus to challenge the specific test results because of the failure to change the mouth piece before appellant's second breath test. Appellant claims he first discovered this fact upon viewing the videotape, which was first provided to him after the conclusion of the suppression hearing. Accordingly, appellant contends the trial court's decision to refuse to reopen the suppression hearing or permit Dr. Staubus to testify at trial denied him a meaningful opportunity to present contrary evidence or otherwise challenge the specific testing procedures, thereby violating his United States and Ohio Constitutional rights. We disagree.

{¶33} The trial court granted appellee's motion in limine to prevent appellant from presenting Dr. Staubus' trial testimony. The granting or denial of a motion in limine is a tentative, interlocutory, precautionary ruling reflecting the trial court's anticipatory treatment of an evidentiary issue. *State v. Grubb* (1986), 28 Ohio St.3d 199, 201. Appellant fails to identify in the record where he attempted to seek introduction of Dr. Staubus' testimony at trial and never proffered what his testimony would have been into the record. Having failed to do so, appellant has failed to preserve this issue for appellate review and cannot demonstrate prejudice.

{¶34} Appellant's third assignment of error.

IV.

{¶35} Herein, appellant argues the trial court erred by refusing to reopen or conduct a second suppression hearing based upon the "newly discovered" evidence of the videotape of appellant's breath test. As noted supra, the videotape was provided to appellant after the first suppression hearing had concluded. By the time it was provided,

the time for filing a second motion to suppress had expired pursuant to Crim. R. 12(D). The trial court overruled appellant's motions.

{¶36} Crim R. 12(D) permits the trial court to extend the time for making pretrial motions in the interest of justice. Although under the circumstances the trial court certainly could have allowed the motion and conducted a second supersession hearing, we cannot find the trial court abused its discretion in failing to do so. While the trial court did not provide its reasons for denying the motion, we note the videotape was not truly "newly discovered" evidence. Appellant was fully capable of advising his counsel he took two breath tests and the mouth piece was not changed between the two tests. Such information was within the knowledge of appellant, regardless of whether a videotape of the breath test existed, and Dr. Staubus' expert opinion could have been secured prior to the first suppression hearing. Because the evidence was available by due diligence within the time limits of Crim. R. 12(D) and because the motion to reopen or conduct a second suppression hearing was made untimely, we find the trial court did not abuse its discretion in overruling it.

{¶37} Appellant's fourth assignment of error is overruled.

V.

{¶38} Herein, appellant challenges the effectiveness of his attorney.[3] Specifically, appellant claims his trial counsel's failure to object to the exclusion of his expert at trial and proffer his testimony, was ineffective.

{¶39} The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must

[3]Appellant's trial counsel is also his appellate counsel.

demonstrate both (1) deficient performance, and (2) resulting prejudice, *i.e.,* errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Combs,* supra.

{¶40} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶41} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley,* supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

{¶42} Based upon the record before this Court, appellant is unable to demonstrate prejudice under the second prong of *Strickland*. Accordingly, we overruled appellant's fifth assignment of error.

{¶43} The judgment of the Canton Municipal Court is affirmed.

By: Hoffman, P.J.

Boggins, J. concur

Edwards, J. dissents

topic: illegal stop; probable cause to arrest; ineffective assistance of counsel.

EDWARDS, J., DISSENTING

{¶44} I respectfully dissent from the majority as to its disposition of a portion of the third assignment of error and as to its disposition of the fourth assignment of error.

{¶45} I find the trial court did abuse its discretion by refusing to reopen or conduct a second suppression hearing based upon the "newly discovered" evidence of the videotape of appellant's breath test. By the time the State revealed that there was a videotape, the first suppression hearing was over. That tape provided information which caused defense counsel to question the validity of the breath testing procedure. Allowing a second suppression hearing based on information seen on the videotape was the fair and just procedure and could have been done with little delay in the proceedings of the case.

{¶46} I concur in all other respects with the opinion of the majority, but based on my dissent I would vacate the convictions for violations of O.R.C. Sec. 4511.19(A)(1) and (A)(3) and remand this matter for further proceedings.

{¶47} I would sustain the conviction and sentence for driving on the left side of the roadway.

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JUDGE JULIE A. EDWARDS