[Cite as *State v. Moore*, 2004-Ohio-6678.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

LARRY L. MOORE

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 03 CA 17

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Municipal Court, Case No. TRC 0301685(A)(B)
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 10, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES SKELTON ASSISTANT PROSECUTOR 760 Chestnut Street Coshocton, Ohio 43812	BRIAN W. BENBOW BENBOW LAW OFFICES 239 North Fourth Street Coshocton, Ohio 43812

Wise, J.

{¶1} Appellant Larry L. Moore appeals his conviction for driving under the influence of alcohol, in the Municipal Court of Coshocton County. The relevant facts leading to this appeal are as follows.

{¶2} After midnight on July 13, 2003, Deputy Nicholas Strasser of the Coshocton County Sheriff's Department was on routine patrol in his cruiser on State Route 16, which in the area in question has a speed limit of 50 M.P.H. Strasser was traveling in the left eastbound lane of the four-lane highway at about 1:20 A.M., when he noticed headlights in his rearview mirror, approaching "fairly quickly." Tr. at 15. The vehicle, in the right eastbound lane, thereupon caught up to Strasser and suddenly swerved into the deputy's lane, nearly striking the cruiser. Strasser was forced to swerve slightly, but proceeded to follow the vehicle, a 1989 Mercury, and began "pacing" it at about 65 M.P.H. The Mercury turned onto the Three Rivers Bridge, and then made a right-hand turn onto State Route 541. At about this point, Strasser activated his overhead lights, following which the Mercury turned into the parking lot of a fast-food restaurant.

{¶3} Deputy Strasser approached the Mercury, which was being operated by appellant. Strasser asked appellant for his license, registration, and proof of insurance. Strasser noted an odor of alcoholic beverage on appellant, and observed that his speech was slightly slurred. Tr. at 18-19, 29. Appellant admitted at that time that he had recently consumed three beers.

{¶4} The deputy first asked appellant to exit the Mercury and perform a one-leg stand test. Strasser recalled that appellant failed to keep his arms at his side and that

he swayed during the test. Appellant then dropped his foot to the ground on the counts of fifteen and sixteen.

{¶5} Strasser next requested that appellant perform a walk-and-turn test. According to Strasser, appellant failed to stand as advised during the instruction phase of the test, failed to take the correct number of steps, and departed from the "line" while making his turn.

{¶6} Finally, the deputy had appellant perform a finger-to-nose test. According to Strasser, appellant failed to follow the instruction to hold his right hand to the tip of his nose. Appellant opened his eyes and was asked to close them, but thereafter correctly completed the test using his left hand.

{¶7} Appellant was thereupon arrested and charged with driving under the influence, R.C. 4511.19(A)(1). On August 29, 2003, appellant filed a motion to dismiss/motion to suppress, alleging a lack of probable cause. Following a suppression hearing on September 15, 2003, the trial court issued a judgment entry denying appellant's motion, including therein the following findings:

{¶8} "Upon the evidence presented and examination of the briefs and case law provided by the parties the Court finds that the arresting officer had probable cause to arrest the defendant based upon his erratic driving, slurred speech, odor of alcohol, and defendant's own admission to the deputy that he had consumed alcohol. Since probable cause exists with or without consideration of the evidence of the field sobriety tests [,] the determination of whether such tests were performed in strict compliance with NHTSA regulations is moot." Judgment Entry, Nov. 14, 2003, at 1.

{¶9} A jury trial was thus set for December 10, 2003. On the day before trial, appellant filed a motion in limine requesting that the field sobriety tests be excluded at trial, or in the alternative, that the deputy not be permitted to testify as an expert on the field sobriety test results. However, on the day of trial, appellant entered a plea of no contest to the DUI charge. Appellant was found guilty and sentenced to 120 days in jail, assessed a $650 fine plus court costs, and had his license suspended for twelve months.

{¶10} On December 12, 2003, appellant filed a notice of appeal, and herein raises the following two Assignments of Error:

{¶11} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FINDING THAT THERE WAS PROBABLE CAUSE TO ARREST APPELLANT FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL.

{¶12} "II. A. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO DETERMINE WHETHER ANY OF THE FIELD SOBRIETY TESTS WERE CONDUCTED IN STRICT COMPLIANCE WITH THE NHTSA MANUAL.

{¶13} "B. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO RULE ON APPELLANT'S MOTION IN LIMINE THUS IMPROPERLY LEAVING THE ISSUE OF STRICT COMPLIANCE TO THE JURY."

I.

{¶14} In his First Assignment of Error, appellant contends the trial court erred in denying the motion to suppress. We disagree.

{¶15} 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; *State v. Klein* (1991), 73 Ohio App.3d 486; *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. 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; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysiner*, supra.

{¶16} An officer has probable cause to arrest if the facts and circumstances within the officer's knowledge are sufficient to cause a prudent person to believe that a suspect has committed the offense. *State v. Heston* (1972), 29 Ohio St.2d 152. In the case sub judice, we find appellant essentially challenges the trial court's decision denying suppression as being against the manifest weight of the evidence. 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. *Guysinger*, supra, at 594 (citations omitted). Accordingly, an appellate court is bound to accept the trial

court's findings of fact if they are supported by competent, credible evidence. Id., citing *State v. Fausnaugh* (Apr. 30, 1992), Ross App. No. 1778.

{¶17} Although appellant does not challenge the fact of his earlier consumption of three beers on the night of the stop, he directs us to evidence that the deputy testified to having swerved "a little bit" (Tr. at 16) to avoid a collision, and that the there was no check in the box marked "Crash: almost caused" on the ticket. Appellant further recites that the incident report states appellant indicated swerving to miss an animal along the road,[1] and that there was no evidence that his three turns in the minutes following the swerving incident were anything but normal. Appellant also challenges the deputy's testimony that appellant's "speech was slurred a little bit as he was speaking with me," (Tr. at 29), arguing that the incident report did not mention this, and that a videotape of appellant's custodial questioning does not reveal any slurred speech.[2] Appellant also contrasts the deputy's first recollection at the suppression hearing of a "strong odor of alcohol" about appellant (Tr. at 36) with his earlier written statement of an "odor of alcohol." Tr. at 37. Finally, appellant challenges the consideration of the field sobriety tests because the State failed to introduce the controlling NHTSA Manual. Appellant contends this prevented him the opportunity to effectively cross-examine the deputy regarding strict compliance with testing procedures. See *State v. Homan* (2000), 89 Ohio St.3d 421.

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[1] Deputy Strasser specifically denied seeing any animals on or near the road at the time. Tr. at 18.

[2] This tape was not made a part of the record on appeal. See App.R. 10(A).

{¶18} As Ohio courts have often emphasized, the trier of fact, as opposed to this Court, is in a far better position to weigh the credibility of witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230. "While field sobriety tests must be administered in strict 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 * * * the test results must be excluded for lack of strict compliance." *Homan* at 427. Upon our examination of the "totality" of facts and circumstances surrounding the stop and arrest, we conclude the record of the suppression hearing provided competent, credible evidence that appellant had admitted to consuming alcohol that night, that his speech was slightly slurred, and that he had an odor of alcoholic beverage about his person. Taken in conjunction with the marked lane swerving incident, we hold the circumstances as a whole created probable cause to believe that appellant was operating a motor vehicle while under the influence of alcohol, regardless of the level of strict compliance with NHTSA field sobriety procedures. Therefore, we find no error in the trial court's denial of appellant's motion to suppress.

{¶19} Appellant's First Assignment of Error is overruled.

II.

{¶20} In his Second Assignment of Error, appellant argues that (1) the court erred in failing to determine whether the field sobriety tests were done in strict compliance with NHTSA standards and (2) the court erred in failing to rule on his motion in limine to exclude the field sobriety evidence from the jury.

{¶21} In *State v. Schmitt* (2004), 101 Ohio St.3d 79, the Ohio Supreme Court extended its holding in *Homan* to the admissibility of field sobriety test results at trial; i.e., in order for the results of a field sobriety test to be allowed as evidence at trial, the police must have administered the test in "strict compliance" with standardized procedures.[3] However, in the case sub judice, based on our holding that probable cause was established even in the absence of field sobriety testing, the strict compliance issue is rendered moot. In addition, by entering a plea of no contest prior to the jury's intervention, appellant failed to preserve his objection regarding the admissibility of the evidence addressed in the motion in limine. See, e.g., *State v. Martin*, Fairfield App. No. 03 CA 69, 2004-Ohio-1561, ¶ 13, citing *State v. Grubb* (1986), 28 Ohio St.3d 199.

{¶22} Appellants' Second Assignment of Error is therefore overruled.

{¶23} For the reasons stated in the foregoing opinion, the judgment of the Municipal Court of Coshocton County, Ohio, is hereby affirmed.

By: Wise, J.
Hoffman, P. J., and
Farmer, J., concur.

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JUDGES

JWW/d 1116

[3] Since the time of the judgment in the case sub judice, the General Assembly amended R.C. 4511.19. Hence, R.C. 4511.19(D)(4)(b) now utilizes "substantial compliance" language.

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IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LARRY L. MOORE	:	
	:	
Defendant-Appellant	:	Case No. 03 CA 17

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Coshocton County, Ohio, is affirmed.

Costs to appellant.

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JUDGES