[Cite as *State v. Griton*, 2005-Ohio-1043.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
vs.	:	
	:	
NEIL GRITON	:	Case No. 04COA032
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Ashland Municipal Court, Case No. 03TRC13075
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 7, 2005

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Farmer, J.

{¶1} On December 20, 2003, Ohio State Highway Patrol Trooper Logan Putman observed appellant, Neil Girton, drive over the white edge line on four occasions. As a result, Trooper Putman stopped appellant. Upon investigation, Trooper Putman conducted field sobriety tests and transported appellant to the patrol post for a breathalyzer test. Appellant's result was .16. Thereafter, Trooper Putman charged appellant with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1) and (3) and marked lane violation in violation of R.C. 4511.33.

{¶2} On March 2, 2004, appellant filed a motion to suppress, claiming unreasonable stop and arrest and the field sobriety and breathalyzer tests did not conform to standards. A hearing was held on March 26, 2004. By judgment entries filed April 8 and 14, 2004, the trial court denied the motion.

{¶3} On April 27, 2004, appellant pled no contest. By judgment entry filed same date, the trial court sentenced appellant to fifteen days in jail, imposed a $350 fine plus costs, and suspended appellant's driver's license for one year.

{¶4} Appellant filed a notice of appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED DEFENDANT'S MOTION TO SUPPRESS."

II

{¶6} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO SUPPRESS AS THE ADMINISTRATION OF THE HGN TEST WAS NOT IN STRICT CONFORMITY OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION."

III

{¶7} "DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT REFUSED TO SUPPRESS THE RESULTS OF THE BREATHALYZER WHEN THE OFFICER'S PERMIT HAD NOT BEEN RENEWED IN ACCORDANCE WITH THE OHIO ADMINISTRATIVE CODE."

I

{¶8} Appellant claims the trial court erred in denying his motion to suppress based on a lack of probable cause to stop. We disagree.

{¶9} 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. *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."

{¶10} In *Terry v. Ohio* (1968), 392 U.S. 1, 22, the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the police officer. *State v. Freeman* (1980), 64 Ohio St.2d 291, paragraph one of the syllabus.

{¶11} Appellant argues the trial court erred in finding Trooper Putman had sufficient "specific and articulable facts" giving rise to a reasonable suspicion of criminal activity. Appellant argues Trooper Putman's observations did not justify the stop.

Specifically, appellant argues that crossing the white edge line four times is not a violation of R.C. 4511.33 which states the following:

{¶12} "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

{¶13} "(1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶14} In support of his position, appellant argues our brethren from the Fourth District in *State v. Brite* (1997), 120 Ohio App.3d 517, found crossing the white edge line on two occasions was not sufficient to rise to the level of probable cause to stop.

We find the facts sub judice to be distinguishable from *Brite*. In this case, Trooper Putman testified while observing appellant drive on U.S. 250, appellant crossed over the white edge line four times. T. at 52. Although it can be argued in defense to an arrest for a violation of R.C. 4511.33 that there were reasons why staying within the marked lane was not "practicable," these reasons do not impact on a test for reasonable articulable suspicion. Probable cause to arrest carries a higher burden than reasonable articulable suspicion to stop. Arrest focuses on the prior actions of the accused. Probable cause exists when a reasonable prudent person would believe that the person arrested had committed a crime. *State v. Timson* (1974), 38 Ohio St.2d 122.

{¶15} Upon review, we find the trial court did not err in denying appellant's motion to suppress based on a lack of probable cause to stop.

{¶16} Assignment of Error I is denied.

II

{¶17} Appellant claims the trial court erred in not suppressing the horizontal gaze nystagmus (hereinafter "HGN") test results as the test did not strictly comply with the standards set by the National Highway Traffic Safety Administration (hereinafter "NHTSA"). We disagree.

{¶18} The date of appellant's arrest was December 20, 2003. The suppression hearing was held on March 26, 2004, and the trial court filed its judgment entries denying the motion on April 8 and 14, 2004. As amended on April 9, 2003, R.C. 4511.19(D)(4)(b) provides for the admissibility of field sobriety tests if administered "in substantial compliance with the testing standards." Therefore, the applicable standard sub judice is *substantial* not *strict* compliance.

{¶19} Trooper Putman testified he administered the HGN test according to the NHTSA standards. T. at 44. The NHTSA regulations were not entered into evidence.

{¶20} In its judgment entry of April 8, 2004, the trial court concluded the following:

{¶21} "While the Court finds that Trooper Putman's administration of the said [HGN] test took approximately one (1) minute and fifty (50) seconds, the Court is not aware of any authority that requires suppression of the test because it exceeds forty-two (42) seconds. Further, the Court finds that the Defendant did not submit authority requiring that the test be suppressed if it exceeds forty-two (42) seconds."

{¶22} Upon review, we find the trial court did not err in finding the HGN test was administered according to NHTSA standards.

{¶23} Assignment of Error II is denied.

III

{¶24} Appellant claims the trial court erred in finding Sergeant Chad Enderby had a valid permit to operate the breathalyzer machine. We disagree.

{¶25} Ohio Adm.Code 3701-53-09(C) as amended on September 30, 2002 states a permit to operate a BAC DataMaster breath testing machine is valid for one year. Sergeant Enderby received a two year permit on February 16, 2002 which expired on February 16, 2004. The test sub judice was administered on December 20, 2003. Appellee argues Sergeant Enderby's permit was invalid because of the one year requirement cited supra.

{¶26} In *State v. Dingman,* Tuscarawas App. No. 2003AP120096, 2004-Ohio-4172, ¶12-14, this court examined this issue and held the following:

{¶27} "On the face of the senior operator's certificate, the permit was issued for two years. The mere fact that subsequent to its issuance new guidelines were established limiting a certificate's life to one year does not in and of itself invalidate a previously issued valid certificate.

{¶28} "***

{¶29} "The change in the administrative regulation did not address a substantive issue, but a procedural one, to wit, the length of a certificate's validity.

{¶30} "We are loath to set a procedure where the term of a certificate, valid when issued, becomes invalid by subsequent regulation that does not affect the substantive nature of the certificate."

{¶31} Upon review, we find the trial court did not err in finding Sergeant Enderby had a valid permit to operate the breathalyzer machine.

{¶32} Assignment of Error III is denied.

{¶33} The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

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JUDGES

SGF/jp 0302

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JUDGMENT ENTRY
vs.	:	
	:	
NEIL GRITON	:	
	:	
Defendant-Appellant	:	CASE NO. 04COA032

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Municipal Court of Ashland County, Ohio is affirmed.

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JUDGES