[Cite as *State v. Strope*, 2009-Ohio-3849.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08 CA 50
ETHAN C. STROPE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Municipal Court Case No. 07-TRC-12036
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 30, 2009

APPEARANCES:

For Plaintiff-Appellee:

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Delaney, J.

{¶1} Defendant-Appellant Ethan C. Strope appeals his conviction and sentence for driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a), by the Fairfield County Municipal Court. Plaintiff-Appellee is the State of Ohio. For the reasons that follow, we affirm the judgment of the Fairfield County Municipal Court.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On December 13, 2007, Sergeant Craig S. Cvetan of the Ohio State Highway Patrol arrested Appellant for operating a vehicle under the influence in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(d), and a headlight violation under R.C. 4513.14. Appellant appeared for arraignment in the Fairfield County Municipal Court on December 19, 2007, and entered a plea of "not guilty" to the three charges.

{¶3} Appellant filed a Motion to Suppress on February 27, 2008. The trial court held an evidentiary hearing on the motion on June 6, 2008. The following testimony was adduced at the hearing.

{¶4} On December 13, 2007, at approximately 10:32 p.m., Sgt. Cvetan was on patrol on U.S. 33 in Fairfield County, Ohio. At that time, Sgt. Cvetan observed Appellant operating his vehicle and that the right headlight of Appellant's vehicle was out. (T. 16). As Sgt. Cvetan followed Appellant's vehicle to initiate a traffic stop for the headlight violation, Sgt. Cvetan testified that he did not observe any erratic driving. (T. 55).

{¶5} Upon pulling the vehicle over, Sgt. Cvetan advised Appellant why the officer had stopped him, and asked Appellant for his license, registration, and proof of

insurance. (T. 17). Appellant had two passengers in the vehicle. (T. 18). Sgt. Cvetan testified that he noticed a moderate odor of an alcoholic beverage coming from the vehicle. (T. 17). When the police officer asked Appellant whether he had consumed any alcohol, Sgt. Cvetan testified, "[H]e said he had not." (T. 18). Sgt. Cvetan stated that the passengers in the car told the officer that they had been drinking. (T. 58). However, when Appellant spoke to the officer, Sgt. Cvetan testified that the odor of the alcoholic beverage became stronger and Sgt. Cvetan had a suspicion the odor was coming from Appellant. (T. 58). Sgt. Cvetan also noticed that Appellant's eyes were red and glassy. (T. 19).

{¶6} Sgt. Cvetan took Appellant's license and registration back to his cruiser to run a records check. (T. 19). Upon his return, Sgt. Cvetan asked Appellant to step out of the vehicle so that the officer could administer the standardized field sobriety tests. (T. 19-20). Before the officer had Appellant start the standardized field sobriety tests, Sgt. Cvetan stated that Appellant told him that he had a few alcoholic beverages. (T. 21).

{¶7} The first field sobriety test Sgt. Cvetan asked Appellant to complete was the horizontal gaze nystagmus ("HGN") test. (T. 29). Sgt. Cvetan testified that he observed six out of six clues on the HGN test. (T. 29). While the officer was administering the HGN test, he stood approximately a foot and a half from Appellant. (T. 30). From this distance, the officer testified that he continued to notice an odor of an alcoholic beverage coming from Appellant's breath. (T. 30).

{¶8} Sgt. Cvetan next administered the one legged stand test. On this test, Sgt. Cvetan indicated that Appellant exhibited two clues of impairment: he swayed during the count and put his foot down once at number twenty-three. (T. 33).

{¶9} Sgt. Cvetan then asked Appellant to perform the walk and turn test. The officer testified that Appellant completed this test as instructed. (T. 36). Appellant admitted to consuming alcohol again to Sgt. Cvetan. (T. 50). Finally, Sgt. Cvetan asked Appellant to submit to a preliminary breath test. (T. 36). Appellant registered a .104 on the preliminary breath test. (T. 37).

{¶10} Sgt. Cvetan then placed Appellant under arrested for operating a vehicle while under the influence and the headlight violation. The officer read Appellant his Miranda rights before placing Appellant in the officer's vehicle. (T. 53).

{¶11} On June 9, 2008, the trial court denied Appellant's Motion to Suppress. In its judgment entry, the trial court stated, "The Court finds reasonable suspicion to stop, probable cause to arrest, compliance with field sobriety tests and admission to drinking made before the arrest."

{¶12} On July 18, 2008, Appellant changed his plea of "not guilty" to "no contest" on the charge of OVI in violation of R.C. 4511.19(A)(1)(a) and the remaining charges were dismissed. The trial court found Appellant guilty. Appellant was sentenced on July 18, 2008 and the sentence was stayed during the pendency of the appeal.

{¶13} Appellant raises one Assignment of Error:

{¶14} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS."

{¶15} Before we reach the merits of Appellant's arguments, we first note 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 1141, *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, 619 N.E.2d 1141. 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, 908, and *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726.

{¶16} 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., citation omitted.

{¶17} Appellant raises three issues within his Assignment of Error. First, Appellant argues that Sgt. Cvetan lacked reasonable suspicion to conduct field sobriety testing. We disagree.

{¶18} It is well-established that an officer may not request a motorist to perform field sobriety tests unless that request is independently justified by reasonable suspicion based upon articulable facts that the motorist is intoxicated. *State v. Evans* (1998), 127 Ohio App.3d 56, 62, 711 N.E.2d 761, citing *State v. Yemma* (Aug. 9, 1996), Portage App. No. 95-P-0156, unreported. Reasonable suspicion is " * * * something more than an inchoate or unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause." *State v. Shepherd* (1997), 122 Ohio App.3d 358, 364, 701 N.E.2d 778. "A court will analyze the reasonableness of the request based on the totality of the circumstances, viewed through the eyes of a reasonable and prudent police officer on the scene who must react to events as they unfold." *Village of Kirtland Hills v. Strogin,* Lake App. No.2005-L-073, 2006-Ohio-1450, at paragraph13, citing, *Village of Waite Hill v. Popovich,* Lake App. No.2001-L-227, 2003-Ohio-1587, at paragraph 14.

{¶19} "Where a non-investigatory stop is initiated and the odor of alcohol is combined with glassy or bloodshot eyes and further indicia of intoxication, such as an admission of having consumed alcohol, reasonable suspicion exists." *State v. Wells,* Montgomery App. No. 20798, 2005-Ohio-5008; *State v. Cooper,* Clark App. No.2001-CA-86, 2002-Ohio-2778; *State v. Robinson,* Greene App. No.2001-CA-118, 2002-Ohio-

2933; *State v. Mapes,* Lake App. No. F-04-031, 2005-Ohio-3359 (odor of alcohol, 'slurred speech' and glassy and bloodshot eyes); *Village of Kirtland Hills v. Strogin,* supra; *State v. Beeley,* Lucas App. No. L-05-1386, 2006-Ohio-4799, paragraph 16, *New London v. Gregg,* Huron App. No. H-06-030, 2007-Ohio-4611.

{¶20} Appellant argues that pursuant to the holdings in *State v. Spillers* (Mar. 24, 2000), Darke App. No. 1504, unreported, and *State v. Dixon* (Dec. 1, 2000), Greene App. No. 200-CA-30, unreported, there was insufficient evidence in this case for conducting field sobriety tests. In *Spillers* and *Dixon,* the courts determined that a de minimus traffic violation, slight odor of alcohol and admission to having consumed a couple drinks was insufficient to justify the performance of field sobriety tests. "In those two cases, however, the Second District's holding hinged on the fact the arresting officer noticed only a 'slight' odor of alcohol." *State v. Perkins*, Franklin App. No. 07AP-924, 2008-Ohio-5060, at ¶ 10 citing *State v. Marshall* (Dec. 28, 2001), 2nd Dist. No.2001-CA-35 (distinguishing *Spillers* and *Dixon* and holding speeding, a "strong" odor of alcohol, and red eyes were sufficient to provide reasonable articulable suspicion to conduct field sobriety tests despite that the driver's speech was clear, he had no problems walking, and produced a valid license).

{¶21} We find the present case to be distinguishable from *Spillers* and *Dixon*, supra. Appellant concedes that Sgt. Cvetan had a sufficient basis for which to stop Appellant's vehicle, based upon the headlight violation. We find that the totality of the circumstances beyond Appellant's traffic violation, however, gave Sgt. Cvetan sufficient indicia of intoxication to establish a reasonable suspicion to request Appellant to submit to field sobriety testing. When speaking to Appellant, Sgt. Cvetan noticed a moderate

odor of alcohol. The two passengers in Appellant's vehicle admitted to drinking that evening, but when Appellant spoke to Sgt. Cvetan, Sgt. Cvetan noticed the odor of the alcoholic beverage became stronger. While initially speaking to Sgt. Cvetan, Appellant denied having anything to drink that evening. Sgt. Cvetan also observed that Appellant's eyes were red and glassy. After Sgt. Cvetan asked Appellant to exit his vehicle but before Sgt. Cvetan administered the field sobriety tests, Appellant then admitted that he had a few drinks. Based on the totality of the circumstances, we find that Sgt. Cvetan had sufficient indicia of intoxication to establish a reasonable suspicion to request Appellant to submit to field sobriety testing.

{¶22} Appellant argues as his second issue within his Assignment of Error that the trial court erred in finding that Sgt. Cvetan had probable cause to arrest Appellant without considering the results of the portable breath test. The standard for determining whether the police have probable cause to arrest an individual for OVI is whether, at the moment of arrest, the police had sufficient information, derived from a reasonable trustworthy source of facts and circumstances to cause a prudent person to believe that the suspect was driving under the influence. *State v. George*, Perry App. No. 07-CA-2, 2008-Ohio-2773, at ¶ 36 citing *State v. Homan,* 89 Ohio St.3d 421, 427, 2000-Ohio-212, 732 N.E.2d 952, citing, *Beck v. Ohio* (1964), 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142; *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 311 N.E.2d 16; *State v. Gangloff,* Hamilton App. Nos. C-060481, C-060536, 2007-Ohio-4463.

{¶23} To the extent that the State seeks to use the results of a field sobriety test as a basis for probable cause to arrest, the police must have administered the test in substantial compliance with standardized testing procedures. *Strongsville v. Troutman,*

8th Dist. No. 88218, 2007-Ohio-1310 at ¶ 22 citing R.C. 4511.19; *State v. Schmitt* (2004), 101 Ohio St.3d 79, 82, 801 N.E.2d 446. However, the totality of the circumstances can support a finding of probable cause to arrest, even where no field sobriety tests were administered. *State v. Homan* 89 Ohio St.3d 421, 427, 2000-Ohio-212, 732 N.E.2d 952., See also, *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703; *State v. Bradenburg* (1987), 41 Ohio App.3d 109, 534 N.E.2d 906.

{¶24} The trial court found, and Appellant does not argue to the contrary, that Sgt. Cvetan administered the tests in substantial compliance with standardized testing procedures. As stated above, Appellant failed the HGN test where Sgt. Cvetan observed six out of six clues. Sgt. Cvetan observed two clues on the one legged stand test. When speaking with Appellant, Sgt. Cvetan noticed the moderate odor of an alcoholic beverage on Appellant's breath. Sgt. Cvetan observed that Appellant had red and glassy eyes. After initially denying that he had anything to drink, Appellant stated later to Sgt. Cvetan that he had a few drinks. Based upon Sgt. Cvetan's testimony, we find that the totality of the facts and circumstances supported a finding of probable cause to arrest Appellant for driving under the influence of alcohol, without considering the results of the portable breath test.

{¶25} Appellant argues in his final issue under his Assignment of Error that Appellant's admission to Sgt. Cvetan that Appellant had consumed alcohol should have been suppressed because Appellant was in custody. We disagree.

{¶26} A defendant has the constitutional right against self-incrimination under both the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. In interpreting this right, it has been held that the state may not

use statements stemming from a custodial interrogation of the defendant unless it demonstrates the use of certain procedural safeguards to secure the privilege of against self-incrimination. *Miranda v. Arizona* (1966), 384 U.S. 436. The well-known *Miranda* warnings were thus created. Id.

{¶27} Over the years, the U.S. Supreme Court and the Ohio Supreme Court has developed case law pertaining to *Miranda* warnings in the context of roadside traffic stops. In *Berkemer v. McCarty* (1984), 468 U.S. 420, the U.S. Supreme Court held that roadside questioning of a motorist detained pursuant to a routine traffic stop did not constitute 'custodial interrogation" for purposes of the Miranda rule, so that pre-arrest statements motorist made in answer to such questioning were admissible against the motorist. If that person "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*" Id. at 440.

{¶28} Recently, the Ohio Supreme Court decided *State v. Farris,* 109 Ohio St.3d 519, 2006-Ohio-3255 and applied *Berkemer* in finding the driver was "subjected to treatment" that rendered him in custody and entitled to *Miranda* warnings.

{¶29} In *Farris,* after stopping a driver for speeding, a police officer noticed the odor of burnt marijuana coming from inside the car. The officer asked the driver to step out of the car, patted the driver down, and placed him in the front seat of the patrol car. Without providing *Miranda* warnings, the officer asked the driver about the smell of marijuana and told him he was going to search the car. At that point, the driver admitted that a marijuana pipe was in a bag in the trunk.

{¶30} The Ohio Supreme Court held "the officer's treatment of Farris after the original stop placed Farris in custody for practical purposes." Id. at ¶ 14. The Court, quoting *Berkemer,* held the only relevant inquiry in determining whether a person is in custody is "how a reasonable [person] in the suspect's position would have understood [their] situation." Id. The Court found that a reasonable person in Farris's position would have understood himself to be in custody of a police officer, because (1) the officer patted down Farris; (2) took his car keys; (3) instructed him to enter the cruiser; and (4) he told Farris that he was going to search Farris's car because of the scent of marijuana. Id. The Court held that the driver's pre-warning and post-warning statements were inadmissible.

{¶31} Comparing *Farris* to this case, we find *Farris* to be distinguishable as the appellant was not "subjected to treatment" which a reasonable person would have understood to be in police custody. Appellant made the admission to consuming alcohol after stepping out of his vehicle and before Sgt. Cvetan began administering the field sobriety tests. Appellant made a second admission after the walk and turn test. The record does not demonstrate that Appellant was patted down, he was not handcuffed, and his keys were not taken away when Appellant made the admissions. Appellant's statements were made a result of a routine traffic stop and prior to Appellant to being in police custody.

{¶32} Accordingly, we overrule Appellant's Assignment of Error.

{¶33} The judgment of the Fairfield County Municipal Court is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

PAD:kgb

[Cite as *State v. Strope*, 2009-Ohio-3849.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ETHAN C. STROPE	:	
	:	Case No. 08-CA-50
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Municipal Court is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS