[Cite as *State v. Bright,* 2010-Ohio-1111.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Julie A. Edwards, P. J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-28
STACY L. BRIGHT	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Cambridge Municipal Court, Case No. 09TRC01448
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 18, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
WILLIAM H. FERGUSON Law Director 134 Southgate Parkway Cambridge, OH 43725	JACK A. BLAKESLEE 421 West Street Box 284 Caldwell, OH 43724

Gwin, J.

{¶1} Defendant-appellant Stacy L. Bright appeals from the trial court's denial of her motion to suppress a field sobriety test in a driving under the influence case. Plaintiff-appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Trooper Maurice Waddell has been a Highway Patrolman for eight and a half years, graduated from the Ohio Highway Patrol Academy, and has undergone the ADAP Class, which has been periodically updated. He has completed all classes and updates on Alcohol Detection and Prosecution offered by the Ohio Highway Patrol.

{¶3} On Saturday, March 7, 2009, at approximately 10:07 p.m. Trooper Waddell was northbound on County Road 52 in Guernsey County, Ohio. The Trooper conducted a registration check on the vehicle in front of him, a blue Plymouth Voyager minivan. That registration came back as registration for a 1990 Ford Station Wagon. The Trooper initiated a traffic stop at the intersection of County Road 52 and State Route 313.

{¶4} On making contact with the Appellant, who was driving the vehicle, and while she remained seated inside the vehicle, the Trooper smelled a “strong” odor of an alcoholic beverage and observed that Appellant had “glassy” eyes. When asked by the Trooper if she had anything to drink that evening, Appellant responded, “A beer.”

{¶5} Appellant exited the vehicle and accompanied the Trooper to his cruiser. The Trooper continued to smell the “strong” odor of an alcoholic beverage coming from the Appellant. Trooper Waddell then ordered the Appellant out of the cruiser to perform field sobriety testing. At the conclusion of the tests, Appellant was arrested for OVI [second offense], Fictitious Plates, and drug abuse.

{¶6} On cross-examination, Trooper Waddell stated that he observed no moving violations committed by the Appellant. He further observed that Appellant had made an appropriately quick response to his overhead lights when he pulled over the vehicle. According to the Trooper, the Appellant had no problems pulling over and parking the vehicle.

{¶7} Trooper Waddell conceded on cross-examination that he could not tell how many drinks the Appellant had consumed, what kind of alcohol was consumed, or when it was consumed. The Trooper further conceded that the smell of alcohol could possibly remain on a person after alcohol had been processed out the system. The Trooper did not notice any slurred speech, and the Appellant produced her documents in a proper manner. The Trooper stated that there were no problems with the Appellant's behavior and that as he observed up to the point in question, her coordination was not affected.

{¶8} The Appellant filed a motion to suppress evidence on April 8, 2009. The motion was heard on May 22, 2009. The issue before the trial court was whether Trooper Waddell had sufficient evidence to request Appellant to perform field sobriety testing. The trial court overruled the motion to suppress evidence in a written opinion journalized on July 14, 2009.

{¶9} On July 20, 2009, Appellant tendered a plea of "no contest" to the OVI charge and sentence was imposed. The remaining charges were dismissed. The trial court suspended execution of the sentence pending appeal.

{¶10} Appellant has timely appealed, raising as her sole assignment of error:

{¶11} "I. THE CONTINUED DETENTION OF STACY L. BRIGHT BY TROOPER WADDELL TO SUBMIT TO STANDARD FIELD SOBRIETY TESTS WAS

IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT, AND ARTICLE I, SECTION 14 OF THE CONSTITUTION OF THE STATE OF OHIO."

I.

{¶12} Appellant argues in her sole assignment of error that Trooper Waddell lacked reasonable suspicion to conduct field sobriety testing. We disagree.

{¶13} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v*. *Burnside,* 100 Ohio St. 3d 152, 154-155, 797 N.E.2d 71, 74, 2003-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra. However, once an appellate court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, supra. Moreover, due weight should be given "to inferences drawn

from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶14} In the case at bar, the parties agree that appellant was lawfully stopped. The question in the case at bar is whether the lawful detention for the traffic infraction became an unlawful detention when the officer decided to conduct field sobriety tests. (FST's).

{¶15} "'[W]hen detaining a motorist for a traffic violation, an officer may delay a motorist for a time period sufficient to issue a ticket or a warning.' " *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204, at ¶ 12, quoting *State v. Keathley* (1988), 55 Ohio App.3d 130, 131. "This measure includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates… Further, '[i]n determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.'" *State v. Batchili,* supra. [Internal quotations omitted]. See, also *State v. Woodson*, Stark App. No. 2007-CA-00151, 2008-Ohio-670 t ¶ 21.

{¶16} However, "[a]n officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot." *State v. Batchili*, supra at ¶ 34. [Citations omitted]. "In determining whether a detention is reasonable, the court must look at the totality of the circumstances." *State v. Matteucci,* 11th Dist. No.2001-L-

205, 2003-Ohio-702, ¶ 30, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 178. See, also *Woodson,* supra at ¶ 22.

{¶17} The criminal offense involved in the case at bar is driving under the influence of alcohol. Requiring a driver to submit to a field sobriety test constitutes a seizure within the meaning of the Fourth Amendment. Courts have generally held that the intrusion on the driver's liberty resulting from a field sobriety test is minor, and the officer therefore need only have reasonable suspicion that the driver is under the influence of alcohol in order to conduct a field sobriety test. *State v. Knox*, Greene App. No. 2005-CA-74, 2006-Ohio-3039 at ¶ 11; See, also, United *States v. Hernandez-*Gomez (DC Nev. 2008), 2008WL1837255. [Citing *Vondrak v. City of Las Cruces,* 2007 WL 3319449 (D.N.M. 2007); *Rogala v. Dist. of Columbia,* 161 F.3d 44, 52 (D.C.Cir .1998); *United States v. Kranz,* 177 F.Supp.2d 760 (S.D.Ohio 2001) and *United States v. Caine,* 517 F.Supp.2d 586, 589-590 (D.Mass. 2007)].

{¶18} "What is sought to be justified here is not an arrest, but a *Terry* stop for investigation. Logically, there must be some set of circumstances short of probable cause but sufficient for reasonable suspicion which will warrant the officer in proceeding further in his or her investigation; the evidence needed for a *Terry* stop is by definition less than probable cause for arrest. *United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

{¶19} "It is the very nature of circumstantial evidence that one piece of it is seldom sufficient for conviction, which requires proof beyond a reasonable doubt. It is the combination of pieces of evidence, each of which is individually consistent with an innocent explanation, which may lead collectively to the eventual conclusion of guilt."

United States v. Frantz (SD OH 2001), 177 F. Supp. 2d 760, 762-763. The Court in *Frantz* further observed,

{¶20} "Obviously, glassy, bloodshot eyes at 2:20 a.m. [*State v.* (*Dixon*) (Dec. 1, 2000), Greene App. No. 2000-CA-30] are explicable by many innocent causes: the driver may have been awake for many hours or have an eye irritation or illness, etc. But glassy, bloodshot eyes are also an effect of alcohol on the body.

{¶21} "Obviously, the odor of alcohol coming from a vehicle is consistent with many innocent causes, e.g., a passenger spilling beer before being dropped off by the 'designated driver.' But the odor is also consistent with alcohol consumption by the driver. Obviously, the consumption of one or two beers is consistent with innocence: particularly persons who drink regularly and have some alcohol tolerance may drive after consuming one or two beers with no appreciable impact on their ability to do so*. The question is not whether all three of these together is sufficient to convict or even to arrest, but whether they merit the additional investigation, and consequent limitation on the driver's liberty, required for the field sobriety tests.*" 177 F.Supp.2d at 763. (Footnotes omitted). (Emphasis added).

{¶22} In Ohio, it is well settled that, "[w]here 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.

{¶23} The court in *State v. Knox,* Greene App. No.2005-CA-74, 2006-Ohio-3039 talked about *State v. Spillers* (Mar. 24, 2000), Darke App. No. 1504, and *State v. Dixon* (Dec. 1, 2000), Greene App. No. 200-CA-30:

{¶24} "In *Spillers* the officer was relying only on de minimus traffic violations, a 'slight' odor of alcohol, and the admission of alcohol consumption to justify the administration of field sobriety tests. We stated there that '[a] slight odor of alcoholic beverage is insufficient, by itself, to trigger a reasonable suspicion of DUI, and *nominal* traffic violations, being common to virtually every driver, add nothing of significance. Accordingly, we conclude that the trial court did not err in finding that the detention of *Spillers* for the purpose of administering a field sobriety test was unlawful.' *Spillers,* supra. (Emphasis in the original).

{¶25} "Similarly, in *Dixon* the officer stopped a car with darkly tinted windows and noticed that the driver had glassy, bloodshot eyes, a slight odor of alcohol, and the admission of alcohol consumption. Because tinted windows do not indicate impairment, the officer was attempting to rely only on the condition of the eyes, the slight odor of alcohol, and the admitted consumption of alcohol to justify the field sobriety tests."

{¶26} However, this case is distinguishable from *Spillers* and *Dixon.* Appellant concedes that Trooper Waddell had a sufficient basis for which to stop Appellant's vehicle, based upon the registration violation. We find that the totality of the circumstances beyond Appellant's traffic violation, however, gave Trooper Waddell

sufficient indicia of intoxication to establish a reasonable suspicion to request Appellant to submit to field sobriety testing.

{¶27} When speaking to Appellant, Trooper Waddell noticed a strong odor of alcohol. The scent did not dissipate or lessen when appellant was seated in the trooper's cruiser. Appellant admitted to consuming alcohol. Trooper Waddell also noticed that Appellant's eyes were "glassy."

{¶28} Based on the totality of the circumstances, we find that Trooper Waddell had sufficient indicia of intoxication to establish a reasonable suspicion to request Appellant to submit to field sobriety testing.

{¶29} Appellant's sole assignment of error is denied.

{¶30} The judgment of the Cambridge Municipal Court, Guernsey County, Ohio is affirmed.

By Gwin, J.,

Edwards, P.J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

_____

HON. JULIE A. EDWARDS

_____

HON. SHEILA G. FARMER

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[Cite as *State v. Bright,* 2010-Ohio-1111.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
STACY L. BRIGHT	:	
Defendant-Appellant	:	CASE NO. 2009-CA-28

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Cambridge Municipal Court, Guernsey County, Ohio is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____
HON. SHEILA G. FARMER