[Cite as *State v. May*, 2010-Ohio-4594.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

TIMOTHY R. MAY

Defendant-Appellant

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010 CA 1

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 178
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 24, 2010

APPEARANCES:

For Plaintiff-Appellee

CHARLES HOWLAND
PROSECUTING ATTORNEY
JOCELYN STEFANCIN
ASSISTANT PROSECUTOR
60 East High Street
Mt. Gilead, Ohio 43338

For Defendant-Appellant

ROBERT E. WILSON
WILSON, COULTER & KOCHHEISER
& CO., LPA
181 South Main Street
Marion, Ohio 43302

Wise, J.

{¶1} Appellant Timothy R. May appeals from his conviction, in the Morrow County Court of Common Pleas, for aggravated vehicular assault and OVI. The Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows

{¶2} On the afternoon of June 1, 2008, appellant was driving his Chevrolet pickup truck on County Road 20 in Morrow County. With him were his two young grandchildren. At some point, the truck left the roadway, struck a guardrail, and overturned into a creek.

{¶3} Several Good Samaritans happened by and helped appellant rescue the two children from the water. EMS personnel also responded, as well as Trooper Holloway of the Ohio State Highway Patrol. However, by the time Holloway arrived, appellant had already been transported to Morrow County Hospital. The trooper talked to witnesses at the scene for about a half-hour and then proceeded to the hospital.

{¶4} Trooper Holloway found appellant standing by the bed of one of his grandchildren in the emergency room. He observed appellant's condition and appearance, and asked to obtain a statement from appellant about the accident. Both before and after appellant wrote out his statement, the trooper told him he was "free to go." The trooper also noticed an odor of alcoholic beverage on appellant and he proceeded to read him his Miranda rights. The trooper also asked appellant to perform field sobriety tests, but continued to tell appellant he was "free to go." Appellant agreed to allow a horizontal gaze nystagmus ("HGN") test, but would not agree to further allow field sobriety tests. The trooper then told appellant he was under arrest, but told him he would not be taken into custody at that time. The trooper also provided Form 2255 to

appellant. Finally, a hospital lab technician, at the trooper's direction, drew a blood sample from appellant, which was subsequently sent to the OSHP for analysis.

{¶5} In October 2008, the Morrow County Grand Jury indicted appellant on one count of aggravated vehicular assault (R.C. 2903.08(A)(1)(a)), and one count of OVI (R.C. 4511.19(A)(1)(f)).

{¶6} On February 3, 2009, appellant filed a motion to suppress the evidence obtained as a result of his interview by Trooper Holloway.

{¶7} The trial court conducted a hearing on March 10, 2009, and thereafter denied the motion to suppress.

{¶8} The matter proceeded to a plea hearing October 13, 2009. Appellant at that time entered pleas of no contest to aggravated vehicular assault and OVI, which the court accepted.

{¶9} At a hearing on December 16, 2009, after reviewing a presentence investigation, the trial court sentenced appellant to two years in prison on the aggravated vehicular assault count, plus a fine and a suspension of appellant's driver's license for five years. The court imposed no additional sentence for the OVI count.

{¶10} On February 8, 2010, appellant filed a notice of appeal.[1] He herein raises the following sole Assignment of Error:

{¶11} "I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE BLOOD TEST RESULTS SINCE THE OFFICER NEVER ARRESTED DEFENDANT PRIOR TO ORDERING BLOOD DRAWN PURSUANT TO R.C. 4511.191 AND, THEREFORE, THE BLOOD TEST RESULT

[1] On or about the same day, the State filed a notice of appeal regarding appellant's sentence. That appeal has been numbered Morrow County 2010CA0002.

MUST BE SUPPRESSED, SINCE IT WAS OBTAINED IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL AND STATUTORY RIGHTS."

I.

{¶12} In his sole Assignment of Error, appellant contends the trial court erred in overruling his motion to suppress the blood test results obtained at the hospital following the traffic stop. We disagree.

{¶13} 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 finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third 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 the 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; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶14} The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d

1271. Specifically, the Fourth Amendment protects persons against unjustified or improper intrusions into a person's privacy, including bodily intrusion. See *State v. Gross* (May 24, 1999), Muskingum App. No. CT 96-055, citing *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. It is well-established in American law that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576.

{¶15} The United States Supreme Court has recognized that the Fourth Amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Winston v. Lee* (1985), 470 U.S. 753, 760, 105 S.Ct. 1611, quoting *Schmerber*, supra, at 768. However, "a suspect, upon request of a police officer, may voluntarily consent to submit to a blood test to determine the concentration of alcohol in his or her blood. Such consent constitutes actual consent * * *." *Fairfield v. Regner* (1985), 23 Ohio App.3d 79, 85, 491 N.E.2d 333.

{¶16} R.C. 4511.191(A)(2) states in pertinent as follows: "Any person who operates a vehicle *** upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle *** shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or

urine *if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code*, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance." (Emphasis added).

{¶17} Appellant in the case sub judice essentially argues that the "implied consent to testing" provisions of R.C. 4511.191 are not applicable unless he was actually arrested. This Court recently addressed a similar argument in *State v. Whitt*, Licking App.No. 10-CA-3, 2010-Ohio-3761. In our decision in that case, we first reiterated the principle that an arrest occurs when four elements are present: (1) an intent to arrest, (2) under real or pretended authority, (3) accompanied by actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested. Id. at ¶ 14, citing *State v. Darrah* (1980), 64 Ohio St.2d 22. We also referenced our decision in *State v. Kirschner,* Stark App. No.2001CA00107, 2001-Ohio-1915, for the proposition that " 'a valid arrest must precede the seizure of a bodily substance, including a blood draw, and must precede an implied consent given based upon Form 2255.'" Id. at ¶ 18, quoting *State v. Rice* (1998), 129 Ohio App.3d 91, 98.[2]

{¶18} The trial court in the case sub judice declined to suppress the blood draw on the basis that Trooper Holloway had the "intent to arrest" appellant and that there had been a "constructive seizure" of appellant. Judgment Entry at 4. The transcript of the suppression reveals that Holloway himself recalled that he had repeatedly told appellant at the emergency room that he was "free to go." Ultimately, however, Holloway recalled the following interaction with appellant:

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[2] Judge Hoffman separately concurred in the *Whitt* decision.

{¶19} "A. I asked him if he understood his Miranda rights again. Did you understand those? He advised he did. I advised him that he was free to go. I advised him he was under arrest, but he is not going to be under a custodial arrest. I'm not going to physically place him under arrest at the hospital and handcuff him and take him out. He's -- I read him the BMV 2255. He advised he understood the consequences of the test and refusal of it. I asked him to submit to a blood test.

{¶20} "Q. And did he agree to do so?

{¶21} "A. Yes, ma'am, he did." Tr. at 53.

{¶22} In Ohio, the General Assembly has established the statutory prerequisite of an actual arrest for a warrantless blood draw in OVI cases. Although the trooper's complete colloquy with appellant at the hospital fell short of being unequivocal, we find the State's action in obtaining appellant's blood sample after the constructive arrest comported with R.C. 4511.191(A)(2) and was reasonable under the Fourth Amendment. The trial court therefore correctly decided the ultimate issue raised in appellant's motion to suppress.

{¶23} We hold the trial court did not err in denying the motion to suppress under the facts and circumstances of this case.

{¶24} Appellant's sole Assignment of Error is overruled.

{¶25} For the foregoing reasons, the judgment of the Court of Common Pleas, Morrow County, is affirmed.

By: Wise, J.

Edwards, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 0902

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TIMOTHY R. MAY	:	
Defendant-Appellant	:	Case No. 2010 CA 1

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES