[Cite as *State v. Groves*, 2010-Ohio-5089.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	Case No. 10CA18
TRAVIS W. GROVES	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Apeal from the Municipal Court, Case No.10-TRC-07802
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 15, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GENYLYNN M. COSGROVE 123 East Chestnut Street P.O. Box 1008 Lancaster, OH 43130	AARON R. CONRAD 120½ East Main Street Lancaster, OH 43130

Farmer, J.

{¶1} On July 4, 2009, appellant, Travis Groves, was involved in a motorcycle accident. Lancaster Police Officers Marla Morehouse and Jared Howell responded to the scene. Appellant sustained serious injuries and was transported to the hospital. Following their investigation, appellant was charged with operating a motor vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), (b), and (f), operating a motorcycle without motorcycle endorsement in violation of R.C. 4510.12(A)(2), and failure to control in violation of Lancaster Codified Ordinance 331.34.

{¶2} On August 27, 2009, appellant filed a motion to suppress, claiming his consent to a blood draw was not voluntary. A hearing was held on January 15, 2010. By journal entry filed March 2, 2010, the trial court denied the motion.

{¶3} On April 8, 2010, appellant pled no contest to an OVI charge. The remaining charges were dismissed. By journal entry filed April 8, 2010, the trial court sentenced appellant to one hundred eighty days in jail with one hundred seventy-seven days suspended. The trial court also imposed fines and a driver's license suspension.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

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

I

{¶6} Appellant claims the trial court erred in overruling his motion to suppress. Specifically, appellant claims he was not placed under arrest pursuant to R.C. 4511.191, and there was no probable cause to arrest him. We disagree.

{¶7} 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."

{¶8} R.C. 4511.191 governs chemical tests for alcohol content of blood. Subsection (A)(2) states the following:

{¶9} "(2) Any person who operates a vehicle, streetcar, or trackless trolley 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, streetcar, or trackless trolley 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."

{¶10} In its journal entry filed March 2, 2010, the trial court specifically found under the circumstances of the case, "the reading of the words on the BMV 2255 form stating 'You are now under arrest' were sufficient to place the Defendant under arrest." The BMV 2255 form, State's Exhibit 1, states the following in pertinent part:

{¶11} "CONSEQUENCES OF TEST AND REFUSAL***4511.192) (MUST BE READ TO OVI / PHYSICAL***OFFENDER)

{¶12} " 'You now are under arrest for (specifica***the offense under state law or a substantially equivalent***ordinance for which the person was arrested operating a vehicle under the influence of alcohol, a drug, or a combination of them; operating a vehicle while under the influence of a listed controlled substance or a listed metabolite

of a controlled substance; operating a vehicle after underage alcohol consumption; or having physical control of a vehicle while under the influence).'

{¶13} " 'If you refuse to take any chemical test required by law, your Ohio driving privileges will be suspended immediately, and you will have to pay a fee to have the privileges reinstated. If you have a prior conviction of OVI, OVUAC, or operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance under state or municipal law within the preceding twenty years, you now are under arrest for state OVI, and, if you refuse to take a chemical test, you will face increased penalties if you subsequently are convicted of the state OVI.

{¶14} " 'If you have previously pled guilty or been convicted of two or more OVI's, OVUAC's, or equivalent offenses in the previous six years, or pled guilty or been convicted of five or more OVI's, OVUAC's, or equivalent offenses in the previous twenty years, or pled guilty or been convicted of a felony of any of the above violations, and you refuse to submit to a chemical test required by law, I am authorized to use whatever reasonable means are necessary to ensure that you submit to a chemical test.

{¶15} "(*Read this part unless the person is under arrest for solely having physical control of a vehicle while under the influence.)* If you take any chemical test required by law and are found to be at or over the prohibited amount of alcohol, a controlled substance, or a metabolite of a controlled substance in your whole blood, blood serum or plasma, breath, or urine as set by law, your Ohio driving privileges will be suspended immediately, and you will have to pay a fee to have the privileges reinstated.

{¶16} "If you take a chemical test, you may have an independent chemical test taken at your own expense.' "

{¶17} Officer Howell testified upon arriving at the hospital, he engaged in a conversation with appellant wherein he admitted to drinking some alcohol that evening. T. at 51. Officer Howell then read appellant the BMV 2255 form. T. at 50-52. Appellant consented to a blood draw which was performed by the hospital staff. T. at 53.

{¶18} Admittedly, Officer Howell never took "custody" of appellant as he was undergoing medical treatment at the hospital. Appellant's injuries were severe enough that he needed to be "flight-lifted" to another medical facility. T. at 54. The total time of appellant's stay at the hospital from arrival until transport was approximately twenty minutes. Id. A citation was not issued because there was not enough time to prepare a citation given the urgent need to transport appellant to another medical facility. T. at 54-55. Officer Howell had intended to arrest appellant had the medical issue not arisen. T. at 70.

{¶19} Despite this court's holding in *State v. Kirschner*, Stark App. No. 2001CA00107, 2001-Ohio-1915, the administrative regulations in the case sub judice were fulfilled. Appellant was told he was under arrest. A citation would have been issued at the hospital but for appellant's medical emergency. To disallow the results of the blood draw because of the intervening urgent circumstances would place form over substance. The purpose of the mandatory language of the implied consent law is to inform the suspect of his various rights under 4511.191 and the administrative license provisions for non-consent. The language contained in the BMV 2250 form was sufficient to establish an "arrest."

{¶20} Appellant also argues there was no probable cause to arrest him or read him the BMV 2250 form.

{¶21} Probable cause to 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. A determination of probable cause is made from the totality of the circumstances. Factors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, association with criminal and locations. Katz, Ohio Arrest, Search and Seizure (2001 Ed.), 83-88, Sections. 3.12-3.19.

{¶22} Officers Morehouse and Howell both testified to smelling alcohol on appellant's person at the scene. T. at 11, 48. During his conversation with Officer Howell at the hospital before he was read the BMV 2255 form, appellant admitted that he had been drinking. T. at 51. The accident was a one-vehicle (motorcycle) accident. T. at 8, 12. Witnesses to the accident told Officer Morehouse that appellant had lost control for no apparent reason. T. at 12, 14.

{¶23} Based upon the loss of control for no reason, the odor of alcohol on appellant's person, and appellant's admissions of drinking, the officers concluded there was sufficient probable cause to issue a citation. We agree.

{¶24} Upon review, we find the trial court did not err in denying appellant's motion to suppress.

{¶25} The sole assignment of error is denied.

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

By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_____

JUDGES

SGF/sg 825

EDWARDS, P.J., CONCURRING OPINION

{¶27} I concur in the majority's analysis and disposition of appellant's assignment of error. I write separately only to note that I reconsidered my prior position on this issue in *State v. Kirschner*, Stark App. No. 2001CA00107, 2001-Ohio-1915, based upon the majority's persuasive analysis at ¶ 18-19 concerning what constitutes a valid "arrest" for purposes of the implied consent law.

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Judge Julie A. Edwards

JAE/rad/rmn

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TRAVIS W. GROVES	:	
Defendant-Appellant	:	CASE NO. 10CA18

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

s/ Sheila G. Farmer_____

_s/ Julia A. Edwards_____

_s/ W. Scott Gwin_____

JUDGES