[Cite as *New Lexington v. Stanley*, 2010-Ohio-1916.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF NEW LEXINGTON	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-5
LARRY STANLEY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the County Court of Perry County Case No. TRC 0801380
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	April 23, 2010

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, Larry Stanley, appeals his conviction for one count of Operating a Vehicle under the Influence of Alcohol or Drugs of Abuse ("OVI"), in violation of R.C. 4511.19(A)(2) and one count of Reckless Operation, in violation of R.C. 4511.20.

{¶2} On September 20, 2008, Jennifer Stenson was outside of her home at 402 Mill Street, in New Lexington, Ohio, when she heard a car crash nearby. Ms. Stenson was sitting outside in her yard with several friends after a local high school football game when she heard the crash.

{¶3} Ms. Stenson, and others who were with her, began to look around for the source of the crash. As she walked towards an alley to the side of her house, Ms. Stenson observed a dark colored pickup truck wrecked in some bushes in the alley. She approached the driver's side door of the truck and a man, later identified as Appellant, exited the vehicle. She described Appellant as wearing an orange shirt, a hat, and jeans. Ms. Stenson asked the man exiting the truck if he was okay. He responded that he was "fine" and walked away. It was Ms. Stenson's impression at that time that the man was drunk.

{¶4} As the man walked away, Ms. Stenson observed a police cruiser at the other end of the alley on Mill Street. Ms. Stenson relayed her observations to Sergeant Richard Cline. Sergeant Cline contacted dispatch and relayed the license plate of the truck. Dispatch reported that the owner of the vehicle was an individual named Larry Stanley. Sergeant Cline drove his cruiser away from the scene in order to look for the man who had exited the truck. Within five minutes, Sergeant Cline found Appellant

between two houses, wearing an orange shirt, a ball cap, and jeans. He appeared to have stumbled and fallen and was trying to get up when Sergeant Cline approached him.

{¶5} Appellant had his hands in his pockets and Sergeant Cline ordered Appellant to remove his hands from his pockets. Appellant refused to do so, and Sergeant Cline withdrew his taser and held Appellant at taser-point and once again ordered Appellant to remove his hands from his pockets. At that time, Appellant complied with Sergeant Cline's order.

{¶6} Sergeant Cline asked Appellant his name and Appellant responded that he was Larry Stanley. Appellant was swaying back and forth and slurring his words as he spoke with Sergeant Cline. According to Sergeant Cline, he had to assist Appellant in standing and Appellant had an odor of alcohol on his person. At that time, Sergeant Cline arrested Appellant, handcuffed him and placed him in the back of his police cruiser. Sergeant Cline did not feel that it was safe to administer field sobriety tests to Appellant at that time due to his condition.

{¶7} Sergeant Cline returned to the scene with Appellant in the back of the cruiser. At that time he asked Ms. Stenson if she could identify Appellant. He escorted her to the cruiser and shined his flashlight into the back of the cruiser. Ms. Stenson positively identified Appellant as being the man she saw exit from the driver's side of the wrecked truck.

{¶8} Sergeant Cline then observed the damage to other vehicles in the area that Appellant had hit with his truck before wrecking into the bushes. He looked in

Appellant's truck for the car keys, but they were not there. He was able to retrieve the keys from Appellant's pants pocket.

{¶9} Sergeant Cline attempted to get statements from other witnesses at the scene; however, the witnesses stated that they did not want to give statements or stated that Ms. Stenson saw what had happened and that their statements would be the same as hers. He testified that he could not force people to write out statements.

{¶10} Sergeant Cline then informed Appellant that he would be transporting him to the Sheriff's Department in order to administer a blood alcohol content ("BAC") test to him. Appellant replied that he was going to "plead no contest" and that he was going to "refuse any test."

{¶11} Sergeant Cline proceeded to transport Appellant to the Sheriff's Department where Appellant refused to submit to the BAC test.

{¶12} Appellant was charged with one count of OVI, in violation of R.C. 4511.19(A)(1)(a), one count of OVI and refusing to submit to a Chemical Test, in violation of R.C. 4511.19(A)(2), one count of reckless operation, in violation of R.C. 4511.20, and one count of safety belt violation, in violation of R.C. 4513.263(B)(1).

{¶13} On September 24, 2008, Appellant filed a request for Discovery. On October 17, 2008, Appellee, City of New Lexington, complied with the request for Discovery and filed a reciprocal request.[1] On October 22, 2008, Appellee filed a Supplemental Reply to Appellant's Discovery request.

[1] Appellee, City of New Lexington asserts in its brief that it gave its complete file to Appellant in discovery. Appellant does not contest this assertion.

{¶14} On November 4, 2008, Appellant filed a Motion To Suppress, claiming that Sergeant Cline lacked probable cause to arrest him and also challenging the identification process employed by Sergeant Cline.

{¶15} On December 2, 2008, the trial court held a hearing on Appellant's Motion to Suppress.[2] At the conclusion of the hearing, the court instructed the parties to file written memorandums in support of their arguments with respect to the hearing. Appellee filed its memorandum on December 16, 2008. Appellant filed his memorandum on December 19, 2008.

{¶16} On January 7, 2009, the trial court issued a judgment entry denying Appellant's Motion To Suppress.

{¶17} On April 3, 2009, Appellant exercised his right to a jury trial. At trial, the state presented two witnesses: Jennifer Stenson and Sergeant Cline. Appellant did not present any witnesses on his behalf. The jury found Appellant guilty of OVI, in violation of R.C. 4511.19(A)(2). The trial court found Appellant guilty of Reckless Operation, in violation of R.C. 4511.20.

{¶18} Appellant now challenges those convictions, raising four Assignments of Error:

{¶19} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ENTERTAIN DEFENDANT'S ATTEMPT TO BRING THE MATTER TO THE COURT'S ATTENTION OR MAKE A MOTION IN REGARD THERETO AT TRIAL AFTER IT BECAME CLEAR THAT THE PROSECUTING ATTORNEY FAILED TO DISCLOSE EXCULPATORY EVIDENCE TO DEFENDANT PRIOR TO TRIAL.

[2] A transcript of the suppression hearing was not included in the appellate record.

{¶20} "II. THE PROSECUTING ATTORNEY FOR THE CITY OF NEW LEXINGTON FAILED TO DISCLOSE EXCULPATORY EVIDENCE TO DEFENDANT PRIOR TO TRIAL.

{¶21} "III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION TESTIMONY.

{¶22} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF A WARRANTLESS ARREST."

I & II

{¶23} In Appellant's first and second assignments of error, he challenges the trial court's ruling with respect to Appellant's assertion that the prosecutor violated the discovery rules.

{¶24} Crim. R. 16(B)(1)(f) governs the disclosure of evidence favorable to a defendant by the prosecutor. The rule states, in pertinent part:

{¶25} "Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment."

{¶26} In *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

faith of the prosecution." See also *State v. Treesh* (2001), 90 Ohio St.3d 460, 475, 739 N.E.2d 749, 767. "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus (following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481).

{¶27} In the present case, the State did nothing to prevent Appellant from learning of additional witnesses by conducting his own investigation. Furthermore, there is no evidence in the record that the State in fact knew of additional witnesses when Appellant requested discovery or that the State failed to disclose such witnesses to Appellant.[3] In addition, Appellant has cited no authority and this Court has found no authority that would require the State to independently investigate each of its witnesses for information that a defendant may deem exculpatory. There is no evidence of any kind that these unnamed witnesses that Appellant blanketly asserts could be exculpatory were contained in the State's file or that anyone under the control of the prosecutor was aware of these potential witnesses at the time of trial. Accordingly, Appellant has failed to present credible evidence of a *Brady* violation.

{¶28} Moreover, we find Appellant's argument that the trial court prevented him from making a record to be without merit. Appellant had the opportunity at trial to raise his objection, and the trial court addressed that objection.

[3] There is a brief mention in the trial transcript by the prosecutor and an acknowledgement by defense counsel that Ms. Stenson indicated at the suppression hearing that others were present in the yard when the crash occurred.

{¶29} Appellant's First and Second Assignments of Error are overruled.

III & IV

{¶30} Appellant's third and fourth assignments of error challenge the arrest of Appellant as lacking in probable cause as well as the subsequent identification of Appellant by Jennifer Stenson.

{¶31} Prior to trial, Appellant filed a Motion to Suppress, arguing that Sergeant Cline lacked the requisite probable cause to arrest Appellant for OVI. Additionally, Appellant argued that the subsequent show up identification of Appellant by Jennifer Stenson was unduly suggestive, and therefore invalid. He now raises those same claims on appeal, arguing that the trial court abused its discretion in denying his motions at trial. For the following reasons, we reject both of Appellant's arguments:

{¶32} **A. Standard of Review For Motion To Suppress**

{¶33} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 713 N.E.2d 1. During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, (1996), 75 Ohio St.3d 148, 661 N.E.2d 1030. A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf* (1996), 111 Ohio App.3d 142, 675 N.E.2d 1268. Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141.

{¶34} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583; and *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141. Second, an appellant may argue that 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, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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 623, 620 N.E.2d 906.

{¶35} **B. Probable Cause to Arrest**

{¶36} An officer has probable cause to arrest a suspect for OVI if, "at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *State v. Homan* (2000), 89 Ohio St.3d 421, 427, 732 N.E.2d 952, citing *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145; *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 67 O.O.2d 140, 143, 311 N.E.2d 16, 20. In making the determination as to whether probable cause existed, a reviewing court will examine the "totality" of facts and

circumstances surrounding the arrest. *Homan*, supra, citing *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703, 710; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111, 534 N.E.2d 906, 908.

{¶37} In the case at bar, Sergeant Cline arrived at the scene of the car crash within seconds of Appellant getting out of his wrecked truck and walking down the alley. Upon his arrival at the scene, Sergeant Cline spoke with Jennifer Stenson, whom he had had previous contact with in her capacity as a school official who had previously reported a child abuse/neglect case to him within the prior year.

{¶38} Ms. Stenson informed Sergeant Cline that the driver of the truck was wearing an orange shirt, blue jeans and a hat, and that he walked in the opposite direction out of the alley. Ms. Stenson stated that Appellant appeared drunk.

{¶39} Sergeant Cline had determined that the license plate on the vehicle belonged to a Larry Stanley. Within five minutes, Sergeant Cline discovered Appellant, who identified himself to Sergeant Cline as Larry Stanley, stumbling and attempting to stand back up. Appellant appeared to be staggering when he tried to walk, he was slurring his words, he had a strong odor of alcohol on his person and admitted to having consumed a “couple” of beers. Sergeant Cline also discovered the keys to the wrecked truck in Appellant’s pants pocket. Sergeant Cline noted that Appellant could barely stand without his support, so he declined to administer field sobriety tests to Appellant at that time for safety reasons.

{¶40} As such, we do not find that the trial court abused its discretion in denying Appellant’s Motion to Suppress on the basis of lack of probable cause to arrest for OVI.

{¶41} **C. Show-Up Identification of Appellant**

{¶42} A "show-up" identification is inherently suggestive. *Ohio v. Barnett* (1990), 67 Ohio App.3d 760, 588 N.E.2d 887. However, the "admission of evidence of a show-up without more does not violate due process." *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375. A defendant is entitled to the suppression of eyewitness identification of the defendant at a show-up only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. Id.; *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967; *State v. Madison* (1980), 64 Ohio St.2d 322, 331, 415 N.E.2d 272. When "evaluating the likelihood of misidentification, the court must consider factors such as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, supra, at 199.

{¶43} Here, Ms. Stenson testified that she observed Appellant get out of his truck and walk off down the alley. She stated that the person who exited the truck was wearing blue jeans, an orange shirt, and a hat. When he exited the vehicle, she spoke to him, asking him if he was okay, to which he replied that he was "fine." Within ten minutes of speaking to Sergeant Cline, the Sergeant returned to the scene with Appellant in the back of his cruiser. Appellant was still wearing his orange shirt, hat, and blue jeans.

{¶44} Given Ms. Stenson's ability to view Appellant as he exited the vehicle, her opportunity to speak with Appellant and observe his attire, her accurate description of

Appellant, and the short period of time from which he exited the vehicle until Sergeant Cline returned with him to the scene, we cannot say that the show-up procedure created a substantial likelihood of misidentification such that counsel's motion to suppress Ms. Stenson's identification of Appellant should have been granted.

{¶45} Appellant's Third and Fourth Assignments of Error are overruled.

{¶46} For the foregoing reasons, the judgment of the County Court of Perry County is affirmed.

By: Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

[Cite as *New Lexington v. Stanley*, 2010-Ohio-1916.]

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CITY OF NEW LEXINGTON	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LARRY STANLEY	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-5
	:	

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

_____
HON. PATRICIA A. DELANEY

_____
HON. W. SCOTT GWIN

_____
HON. SHEILA G. FARMER