

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CA 00139
DUSTIN R. BOWER	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Licking Municipal Court,  
Case No. 09-TRC-08879

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: September 14, 2010

APPEARANCES:

For Appellant:

DAVID N. STANSBURY  
41 E. Church St.  
Newark, OH 43055

For Appellee:

AMY S. WEEKS  
Assistant Director of Law  
40 W. Main St.  
Newark, OH 43055

*Delaney, J.*

{¶1} Defendant-Appellant Dustin R. Bower appeals the decision of the Licking Municipal Court to deny Appellant's motion for leave to file an untimely motion to suppress. Plaintiff-Appellee is the State of Ohio.

### **STATEMENT OF THE FACTS AND THE CASE**

{¶2} On September 4, 2009, Trooper Thaxton of the Ohio Highway Patrol observed Appellant driving westbound on Granville Road, in the city of Newark, Licking County, Ohio. The trooper saw Appellant's vehicle drive over the middle yellow line three times before Trooper Thaxton activated his overhead emergency lights and pulled Appellant over.

{¶3} When the trooper approached Appellant's vehicle, he immediately noticed an odor of an alcoholic beverage emanating from the interior of the vehicle. The trooper noticed that Appellant's eyes appeared bloodshot and glassy. Appellant explained that his passenger had a beer spilled on her earlier in the evening. Appellant denied having consumed an alcoholic beverage prior to the traffic stop. The trooper asked Appellant to exit the vehicle and the trooper conducted standardized field sobriety tests on Appellant.

{¶4} Trooper Thaxton determined that Appellant failed all of the sobriety tests. The trooper requested that Appellant submit to a portable breath test. Appellant complied and registered 0.09 ml/210 L of breath.

{¶5} Trooper Thaxton placed Appellant under arrest and he was transported to the Heath Police Department. At the police department, Appellant was read the 2255 form and he submitted to a breath test, registering 0.085 ml/210 L of breath.

{¶6} Appellant was cited with one count of OVI, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(a) and/or (A)(1)(d), and one count of driving left of center, a minor misdemeanor in violation of R.C. 4511.25.

{¶7} Appellant was arraigned on September 9, 2009. He entered not guilty pleas and a court appointed attorney was granted on September 11, 2009. Appellant's counsel filed for discovery on September 24, 2009, which the State responded to on September 25, 2009.

{¶8} On November 9, 2009, Appellant filed a motion for leave to file an untimely motion to suppress. The trial court denied the motion.

{¶9} Appellant changed his not guilty pleas to no contest and the trial court found Appellant guilty of both charges. The trial court sentenced Appellant to 30 days in jail, with 27 days suspended. Appellant was ordered to attend a driver's intervention program in lieu of three days in jail.

{¶10} Appellant now appeals and raises one Assignment of Error:

{¶11} "THE TRIAL COURT COMMITTED HARMFUL ERROR WHEN IT DENIED THE DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO FILE AN UNTIMELY MOTION TO SUPPRESS EVIDENCE FILED PURSUANT TO RULE 12(D) OF THE OHIO RULES OF CRIMINAL PROCEDURE."

{¶12} Pursuant to Crim.R. 12(D), all pre-trial motions are required to be filed within thirty-five days after arraignment or seven days before trial, whichever is earlier. A defendant's failure to timely file a motion to suppress results in a waiver of the issue, but the court for good cause shown may grant relief from the waiver. *State v. Rush*, Delaware App. No. 03CAC01002, 2003-Ohio- 3915, citing Crim. R. 12(H). The decision

as to whether to permit leave to file an untimely motion to suppress is within the sound discretion of the trial court, and we will not reverse a trial court's decision regarding an untimely filed motion absent an abuse of discretion. *Id.*, citing *State v. Hoover*, Wayne App. No. 02-06-0964, 2003-Ohio-2344. An abuse of discretion connotes more than an error in law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Maurer* (1984), 15 Ohio St.3d 239, 253, 473 N.E.2d 768.

{¶13} In the present case, Appellant filed his motion for leave to file an untimely motion to suppress 62 days after his arraignment. Appellant noted the reason for his delay in filing his motion to suppress was that he was unable to meet with his trial counsel to discuss the facts of the case. Appellant stated in his motion that he had to travel out of state for work for extended periods and his attorney was on vacation.

{¶14} Upon the record before us, we find the trial court did not abuse its discretion in denying Appellant's motion for leave to file an untimely motion to suppress. Discovery was provided to counsel for Appellant in a timely fashion. Appellant was therefore aware of the facts and circumstances of the case within 35 days of the arraignment.

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

{¶16} We affirm the judgment of the Licking County Municipal Court.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

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HON. PATRICIA A. DELANEY

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

PAD:kgb

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

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DUSTIN R. BOWER	:	
	:	
	:	Case No. 2009 CA 00139
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Licking Municipal Court is AFFIRMED. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE