

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 14-COA-016
GREGORY D. EMMONS	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Ashland Municipal Court, Case No. 13-TRC-06665ABC

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 31, 2014

APPEARANCES:

For Plaintiff-Appellee

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Gwin, J.

{¶1} Defendant-appellant Gregory D. Emmons [“Emmons”] appeals his conviction and sentence in the Ashland County Municipal Court on one count of OVI “prohibited level” in violation of R.C. 4511.19(A)(1)(d). Plaintiff-appellee is the State of Ohio.

Facts and Procedural History

{¶2} Sergeant Brad Bishop of the Ashland Post of the Ohio State Highway Patrol testified as the sole witness for the state. Emmons presented no evidence or witnesses beyond cross-examination of Sgt. Bishop. Sgt Bishop's dash camera tape for the encounter was admitted by the state.

{¶3} Sgt. Bishop testified that he is a 15-year veteran of the Ohio State Highway Patrol. Sgt. Bishop testified that on September 2, 2013, at roughly 8:50 a.m., he first noticed Emmons’ vehicle traveling south on State Route 60 just north of the Village of Savannah. Sgt. Bishop was northbound on the same roadway. He visually estimated Emmons’ vehicle to be traveling at 65 m.p.h. in the 55 m.p.h. zone north of the village. Sgt. Bishop's vehicle was equipped with a Python II radar device, which he activated and used to confirm Emmons’ speed at 64 m.p.h. (1T. at 11). Sgt. Bishop noted that Emmons’ vehicle passed the posted 35 m.p.h. sign at 48 m.p.h. and continued to slow down to 35 m.p.h. (1T. at 26-27). Sgt. Bishop then turned around and got behind Emmons’ vehicle. He followed for approximately one-half mile before pulling him over near the intersection with State Route 302. Prior to making the traffic stop, Sgt. Bishop also noticed Emmons' registration was expired. No bad driving other than the speeding was observed.

{¶4} Upon approaching the vehicle, Sgt. Bishop detected a slight to moderate order of an alcoholic beverage. Emmons was wearing sunglasses which Sgt. Bishop found "kind of odd" because it was a relatively overcast morning. (1T. at 29). As Emmons reached for documents in his glove box, Sgt. Bishop said he saw, through the side of Emmons' glasses, that Emmons' eyes were "very bloodshot." (Id.) On cross-examination, he claimed Emmons' eyes were both "glassy and bloodshot." (2T at 13-14).

{¶5} Once out of the vehicle, Emmons was asked how much alcohol he had consumed, and Emmons admitted drinking six beers, with the last one being sometime around 2:00 a.m. that morning.

{¶6} Sgt. Bishop asked Emmons to step out of the vehicle for standardized field sobriety tests ["SFST's"], including the horizontal gaze nystagmus test ["HGN"], the "walk and turn divided attention skills test" ["WAT"], and the "one-leg stand" ["OLS"].

{¶7} Emmons made an improper turn and lost balance while turning on the WAT, which the Officer recorded as one clue. No clues were observed on OLS. Sgt. Bishop observed six of six clues on the HGN test.

{¶8} Based on his personal observations of Emmons, Emmons' admission of consuming six beers, and Emmons' performance on the SFST's, Sgt. Bishop formed the opinion that Emmons was under the influence of alcohol and placed him under arrest. Emmons was then given *Miranda* warnings. No incriminating statements were made subsequent to Emmons being taken into custody. He was transported to the Ashland Patrol Post. Sgt. Bishop read the BMV 2255 Form to Emmons, who indicated he understood. Emmons consented to a BAC Test, which was conducted by the Sgt.

Bishop at 9:51 a.m. Emmons blew a .116 and was subsequently charged with Operating a Vehicle While Under the Influence of Alcohol.

{¶9} Emmons filed a motion to suppress. Emmons contended that all evidence obtained, including his statements and the results of SFST's and BAC tests should be suppressed based on several distinct theories. Emmons alleged that the officer involved lacked justification to stop him, and submits that all evidence flowing from the stop should be suppressed. Further, Emmons alleged that Sgt. Bishop lacked probable cause to arrest him for OVI subsequent to the stop, due in part to an alleged failure to perform SFST's in conformity with the standards promulgated by the National Highway Traffic Safety Administration ["NHTSA"]. Emmons also asserted that certain incriminating statements he made should be suppressed based on an alleged failure to give *Miranda* warnings. Finally, Emmons maintained that the results of the BAC Datamaster evaluation of Emmons' breath should be suppressed for a long list of alleged reasons.¹

The Trial court's decision.

{¶10} By Judgment Entry filed March 21, 2014, the trial court overruled Emmons' motion to suppress.

{¶11} The trial court determined that the stop of Emmons vehicle was proper, Speeding and Driving on an Expired Registration are both minor misdemeanor violations of Title 45 of the Revised Code. Sgt. Bishop testified convincingly that [Emmons] was speeding and that his registration was expired. The Court found him credible, and no evidence to the

¹ On appeal, Emmons has abandoned all of the claims. His sole assignment of error centers exclusively on probable cause to arrest based upon Sgt. Bishop's lack of substantial compliance in the performance of the SFST's.

contrary was presented. The Court, therefore, finds that Sgt. Bishop did in fact have reasonable suspicion that [Emmons] committed an offense, and that said suspicion was based on articulable observed facts.

{¶12} Turning to the issue of probable cause to arrest for OVI, the trial court observed,

In the present case, [Emmons] does not allege a lack of substantial compliance with the applicable regulations with respect to the Walk and Turn Test and the One-Legged Stand Test. However, [Emmons] takes issue with the manner in which Sgt. Bishop conducted the HGN. [Emmons'] objections are confined to the time which Sgt. Bishop took to move, and hold, the stylus during each of the three phases of the HGN. With respect to the "Lack of Smooth Pursuit [sic.] portion, [Emmons] contends that the stylus was moved too quickly. Sgt. Bishop conceded that he was "not precise" in taking two seconds to move the pen each direction. The N.H.T.S.A. Manual requires that it should take approximately 16 seconds to test both eyes for lack of smooth pursuit. The Court finds, based upon the testimony and the Officer's dash cam tape, which was admitted into evidence, that Sgt. Bishop completed his evaluation of both eyes for smooth pursuit in a total of 14 seconds. With respect to the "Maximum Deviation" portion of the HGN, [Emmons] asserts that the Officer erred by holding the pen at maximum deviation for less than the minimum 4 seconds required by the manual. [Emmons] puts the timing at 3 seconds on three of the subtests and 2 seconds on the fourth.

This position is based in part on a mathematical calculation, as it is impossible in the Court's view to tell from the video precisely how long the pen was at maximum deviation and how long it spent moving from eye to eye. [Emmons] estimates how much time it would take to move the pen and subtracts that time from the total. It is clear to the Court that the entire Maximum Deviation portion took 23 seconds, more than enough time for the pen to have been held at maximum deviation for the minimum 4 seconds for each eye. Further, Sgt. Bishop testified that he felt he held it there for approximately 4 seconds based on his count. With respect to the "Onset Prior to 45 Degrees" portion of the HGN, [Emmons] claims Sgt. Bishop moved the pen too slowly. [Emmons] asserts that Sgt. Bishop took at least 7 seconds to reach 45 for each eye, as opposed to the approximately 4 seconds set forth in the manual. Further, [Emmons] notes that the Sargent [sic.] did not specifically testify that he watched to make sure [Emmons'] eyes kept jerking after the pen stopped.

With respect to all of [Emmons'] concerns regarding the HGN, the Court would note that Sgt. Bishop testified that he had been trained to perform all the subtests in conformity with the current edition of the NHTSA Manual. He demonstrated familiarity with all the requirements of the Manual as they pertained to each subtest within the HGN. He testified that he performed all portions of the HGN in conformity with his training and the NHTSA Manual. The Court found that testimony credible and to be supported by the video and audio recordings admitted into evidence.

The time used by an Officer for moving the stylus during the various stages of the HGN has been the source of a considerable amount of litigation in Ohio. The NHTSA manual, adopted by the Ohio Department of Health, specifically sets forth approximate time frames for each of the numerous individual movements. These are substantive requirements that are central to the scientific validity of the test, as contrasted with mere technical requirements. However, the manual sets forth the time requirements in language that makes it clear that exactitude is not required. The stylus is to take "approximately" four seconds to reach the shoulder. It is to be held at maximum deviation for "a minimum of four seconds." In the present case, the Court finds that Sgt, Bishop did in fact conduct all portions of the HGN in substantial compliance with the applicable regulations and that any deviations were minor and inconsequential. *Middleburg Heights v. Gettings*, (8th Dist.) 2013-Ohio-3536.

{¶13} Subsequently Emmons entered a plea of no contest to one count OVI "prohibited level" in violation of R.C. 4511.19(A)(1)(d). The remaining charges were dismissed by the state. Emmons was sentenced to thirty days in jail, all suspended, one-year probation, and a \$375.00 fine plus court costs. In addition, Emmons' driver's license was suspended for a period of one year.

Assignments of Error

{¶14} Emmons raises one assignment of error,

{¶15} “I. THE TRIAL COURT ERRED BY DENYING APPELLANT’S MOTION TO SUPPRESS.”

Analysis

{¶16} 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, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 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*, 73 Ohio St.3d 308,314, 1995-Ohio-243, 652 N.E.2d 988; *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). 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; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1(4th Dist.1998); *State v. Medcalf*, 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist.1996). However, once this 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*, 124 Ohio App.3d 706, 707 N.E.2d 539(4th Dist 1997); See, generally, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740(2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996). 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.

The Traffic Stop

{¶17} The Ohio Supreme Court has emphasized that probable cause is not required to make a traffic stop; rather the standard is reasonable and articulable suspicion. *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4358, 894 N.E.2d 1204, ¶ 23. Further, neither the United States Supreme Court nor the Ohio Supreme Court considered the severity of the offense as a factor in determining whether the law enforcement official had a reasonable, articulable suspicion to stop a motorist. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89(1996); *City of Dayton v. Erickson*, 76 Ohio St.3d 3, 665 N.E.2d 1091(1996).

{¶18} In the case at bar, the record establishes Emmons was speeding and had an expired registration sticker on his license plate. The judge is in the best position to determine the credibility of witnesses, and his conclusion in this case is supported by competent facts. See *State v. Burnside*, 100 Ohio St.3d 152, 154-55, 797 N.E.2d 71, 74(2003). The fundamental rule that weight of evidence and credibility of witnesses are primarily for the trier of fact applies to suppression hearings as well as trials. *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583, 584(1982). The trooper's testimony, which is supported by the video evidence admitted during the suppression hearing, represents competent, credible evidence that Emmons was speeding and had an expired registration sticker on his license plate. Therefore, the factual finding of the trial court that Emmons was speeding and had an expired registration sticker on his license plate is not clearly erroneous.

{¶19} We accept the trial court's conclusion that Emmons' violation of the traffic laws gave Sgt. Bishop reasonable suspicion to stop Emmons' vehicle because the

factual findings made by the trial court are supported by competent and credible evidence. Thus, the trial court did not err when it denied Emmons' motion to suppress on the basis that the initial stop of his vehicle was valid. *State v. Busse*, 5th Dist. No. 06 CA 65, 2006-Ohio-7047, ¶ 20.

The SFST's and Probable Cause to Arrest

{¶20} Emmons argues that the trial court erred in admitting the results of the HGN field sobriety test because it was not conducted in substantial compliance with the NHTSA guidelines. He further contends that the trooper lacked sufficient probable cause to arrest him for OVI.

{¶21} In *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, the Court held, "... HGN test results are admissible in Ohio without expert testimony so long as the proper foundation has been shown both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test." *Id.* at ¶27. In accordance with R.C. 4511.19(D)(4)(b) HGN test results are admissible when the test is administered in substantial compliance with testing standards. *Boczar*, at ¶28.

{¶22} The timing required to complete the various elements with respect to both eyes of the HGN test as set forth in the NHTSA manual are approximate. *State v. Lominack, III*, 5th Dist. Stark No. 2012CA00213, 2013-Ohio-2678, ¶31. Further, the standard for admissibility is substantial not strict compliance. *Id.*

{¶23} While field sobriety tests must be administered in substantial compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these

tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered. *State v. Homan*, 89 Ohio St.3d 421, 732 N.E.2d 952(2000), *superseded by statute on other grounds as stated in State v. Boczar*, 113 Ohio St.3d 148, 863 N.E.2d 155, 2007–Ohio–1251. In *Homan*, the facts which supported a finding of probable cause were: red and glassy eyes, breath which smelled of alcohol, erratic driving and an admission that the suspect had consumed alcohol.

{¶24} The case law is in agreement that probable cause to arrest may exist, even without field sobriety tests results, if supported by such factors as: evidence that the defendant caused an automobile accident; a strong odor of alcohol emanating from the defendant; an admission by the defendant that he or she was recently drinking alcohol; and other indicia of intoxication, such as red eyes, slurred speech, and difficulty walking. *Oregon v. Szakovits*, 32 Ohio St.2d 271, 291 N.E.2d 742(1972); *Fairfield v. Regner*, 23 Ohio App.3d 79, 84, 491 N.E.2d 333(12th Dist. 1985); *State v. Bernard*, 20 Ohio App.3d 375, 376, 485 N.E.2d 783(9th Dist. 1985); *Westlake v. Vilfroy*, 11 Ohio App.3d 26, 27, 462 N.E.2d 1241(8th Dist. 1983); *State v. Judy*, 5th Dist. No. 2007-CAC-120069, 2008-Ohio-4520, ¶27. Further, the Ohio Supreme Court has made clear that the officer may testify regarding observations made during a defendant's performance of standardized field sobriety tests even absent proof of "strict compliance." *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, (2004), ¶15.

{¶25} In the case at bar, the probable cause to arrest Emmons for OVI was supported by the trooper's observation of glassy eyes, odor of alcohol, admission that he had been drinking, and speeding.

{¶26} Accordingly, the totality of the evidence, even excluding the HGN test, gave rise to probable cause to arrest for OVI. *Homan* at 427, 732 N.E.2d 952. As such, we find it was not error for the trial court to determine there was probable cause to support Emmons' arrest for OVI.

{¶27} We further note that Emmons entered a plea to a "per se" violation under R.C. 4511.19(A)(1)(d). In *State v. Lucas*, the Supreme Court observed,

The *per se* offenses define "the point the legislature has determined an individual cannot drive without posing a substantial danger, not only to himself, but to others." *State v. Tanner* (1984), 15 Ohio St.3d 1, 6, 15 OBR 1, 5, 472 N.E.2d 689, 693. In determining whether one of these *per se* offenses was committed by the defendant, the trier of fact is not required to find that the defendant operated a vehicle while under the influence of alcohol or drugs, but only that the defendant operated a vehicle within the state and that the defendant's chemical test reading was at the proscribed level. The critical issue at trial is the accuracy of the test, not the behavior of the accused. See Katz & Sweeney, *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence* (1983-1984), 34 Case W.Res.L.Rev. 239, 243.

40 Ohio St.3d 100, 103, 532 N.E.2d 130(1988). Emmons has not challenged the accuracy of the BAC test in this appeal. The HGN test results are not relevant to a determination of whether 1). Emmons was operating a vehicle within this state and 2). whether at the time he had a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten

liters of his breath. In other word, the SFST's are not necessary to the determination of guilt or innocence for a "per se "offense.

{¶28} We additionally note that the NHTSA manual itself contains the following caveat:

Even when administered under less than ideal conditions, they [SFST's] will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e., the inability to find a perfectly smooth surface at roadside, may have some affect on the evidentiary weight given the results. However, this does not necessarily make the SFSTs invalid.

National Highway Traffic Safety Administration, *DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing*, Student Manual at Preface (2006). [Admitted as Defendant's Exhibit B]. The NHTSA manual further notes with respect to the HGN test,

Based on the original research, if you observe four or more clues it is likely that the suspect's BAC is above 0.10. Using this criterion, you will be able to classify about 77% of your suspects accurately.

Id. at VIII-8. We note in the case at bar Sgt. Bishop found six clues. Further, we cannot help but observe Emmons' BAC registered as a 0.116. It would appear to this Court then that Sgt. Bishop's performance of the HGN in the case at bar accurately predicted that Emmons BAC would be above 0.08, which is the legal limit in Ohio. Thus, any deviations in Sgt. Bishop's administration of the HGN test to Emmons were de minimis, as the trial court found. Therefore, Sgt. Bishop had probable cause to arrest Emmons for OVI.

{¶29} For all the foregoing reasons, Emmons' sole assignment of error is overruled in its entirety. The judgment of the Ashland Municipal Court, Ashland County, Ohio is hereby affirmed.

By Gwin, J., and

Wise, J., concur;

Hoffman, P.J., concurs separately

Hoffman, P.J., concurring

{¶30} I concur in the majority's analysis and decision regarding the validity of the initial stop of Appellant. I further concur in the majority's analysis and decision probable cause to arrest for OMVI existed independent of the results of the field sobriety tests.

{¶31} While I would find the HGN tests were not done in substantial compliance with the NHTSA manual and should have been suppressed, I find such to be harmless error given the fact Appellant was convicted of the "per se" offense. Accordingly, I join the majority's disposition of Appellant's assignment of error and decision to affirm the trial court's judgment.