COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| CITY OF ONTARIO | : | JUDGES: |
| | : | Hon. John W. Wise, P.J. |
| Plaintiff - Appellee | : | Hon. Patricia A. Delaney, J. |
| | : | Hon. Craig R. Baldwin, J. |
| | : | |
| -vs- | : | |
| | : | |
| NICHOLAS WRIGHT | : | Case No. 14CA56 |
| | : | |
| Defendant - Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Mansfield Municipal Court, Case No. 2012 TRC 7057 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT: | April 13, 2015 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
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| ANDREW J. BURTON<br>Assistant Ontario Law Director<br>9 N. Mulberry Street<br>Mansfield, OH 44902 | CASSANDRA J. M. MAYER<br>452 Park Ave. West<br>Mansfield, OH 44906 |

*Baldwin, J.*

{¶1} Defendant-appellant Nicholas Wright appeals his conviction and sentence from the Mansfield Municipal Court on one count each of driving under the influence of alcohol and failure to display headlights. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 14, 2012, appellant was cited for operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(H) and failing to display headlights in violation of R.C. 4513.03(A). The citation indicated that appellant had a blood alcohol concentration of .256. At his arraignment on July 18, 2012, appellant entered a plea of not guilty.

{¶3} Appellant, on November 21, 2012, filed a Motion to Suppress and/or Limit the Use of Testimony. Appellant, in his motion, argued that the field sobriety tests administered by the arresting officer were not in substantial compliance with National Highway Traffic & Safety Administration (NHTSA) guidelines and that, therefore, the results of the tests could not be used as evidence. Appellant argued that there was no probable cause to arrest appellant. A hearing on such motion was held on January 3, 2013 before a Magistrate.

{¶4} At the hearing, Patrolman Jeromie Barnhart, who is with the City of Ontario Police Department, testified that on July 13, 2012, he was working the night shift and was in uniform in a marked patrol car when he observed appellant's vehicle drive past him without the headlights illuminated. Appellant, he testified, had his fog and parking lights on. After the Patrolman stopped appellant's vehicle in the early hours of July 14, 2012, he walked up to appellant's car and smelled alcohol. Patrolman Barnhart testified that appellant's female passenger told him that the alcohol was coming from her.

{¶5} Patrolman Barnhart had appellant exit his vehicle. He testified that

appellant smelled strongly of alcohol and that his speech was slurred and his eyes were "extremely glassy and bloodshot." Transcript at 8-9. Patrolman Barnhart performed a quick horizontal gaze nystagmus test (HGN) on appellant and testified that "I started seeing nystagmus and I knew at that point in time he [appellant] was lying about only having one drink,…" Transcript at 8. Based on appellant's performance on the quick HGN test, Patrolman Barnhart asked appellant to submit to field sobriety tests and appellant agreed. He testified that he observed all six clues on the HGN test, three out of four clues on the one-leg stand test and six out of eight clues on the walk and turn test. Patrolman Barnhart testified that with respect to the one-leg stand test, appellant raised his hands for balance, put his foot down and swayed to keep his balance. With respect appellant's performance on the walk and turn test, Patrolman Barnhart testified as follows:

> Um, I got all, six out the eight clues as he couldn't keep his balance as you saw, when he was trying to count the steps he kept stepping off, um, he stepped off the line, he missed heel to toe on just about every step, it's hard to see that because of the way the video is, he raised his arms, I think he took, I want to say he took ten or eleven steps on the way there, so he took more than nine and then he didn't turn around properly, his feet were off to the side, but you can't see that because he was to close to the cruiser.

{¶6} Transcript at 16.

{¶7} Appellant was then arrested for being under the influence of alcohol. A breath test was administered at the station and appellant tested .256 grams per 210 meters.

{¶8} After the hearing, on January 18, 2013, appellee filed a response to

appellant's Motion to Suppress. Appellant, on January 22, 2013, filed written closing arguments.

{¶9} The Magistrate, as memorialized in a report filed on January 30, 2013, found that appellant's Motion to Suppress was without merit and recommended that such motion be overruled. Appellant filed objections to the same.

{¶10} Pursuant to a Judgment Entry filed on January 9, 2014, the trial court upheld the Magistrate's decision. The trial court found that there was probable cause for the initial stop of appellant. The trial court also found that the "mini" HGN test had not been administered properly and stated that it would not consider the same in determining whether the officer had reasonable suspicion to go forward with the field sobriety tests. The trial court, in its Judgment Entry, stated, in relevant part, as follows**:**

> In the case at the bar the officer testified that a strong odor of alcohol was emanating from the defendant, that his speech was slurred, and his eyes were red and glassy. These observations alone are arguably probable cause to arrest. However, the officer conducted field sobriety tests and regardless of either HGN, the defendant's performance of the one leg stand and walk and turn, combined with the odor of alcohol, slurred speech, and red glassy eyes were enough to establish probable cause for his arrest.

{¶11} Thereafter, on May 13, 2014, appellant pleaded no contest to both charges. He was sentenced to 180 days in jail with 174 days suspended as were his fines.

{¶12} Appellant filed a Notice of Appeal on May 14, 2014. After this Court, pursuant to a Judgment Entry filed on June 2, 2014, dismissed appellant's appeal for lack of a final, appealable order, the trial court, on June 12, 2014, issued a Judgment

Entry Nunc Pro Tunc.

{¶13} Appellant now appeals from the June 12, 2014 Judgment Entry, raising the following assignment of error:

{¶14} I. THE TRIAL COURT ERRED WHEN IT UPHELD THE MAGISTRATE'S DECISION FINDING REASONABLE SUSPICION AND PROBABLE CAUSE EXISTED TO STOP WRIGHT AND WHEN IT DETERMINED THE FIELD SOBRIETY EXERCISES WERE ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH NHTSA STANDARDS.

{¶15} A. THE TRIAL COURT ERRED WHEN IT DETERMINED THERE EXISTED REASONABLE SUSPICION AND/OR PROBABLE CAUSE FOR THE INITIAL STOP OF WRIGHT'S VEHICLE RELATED TO THE TIMING FOR LIGHTED LIGHTS ON A MOTOR VEHICLE.

{¶16} B. THE TRIAL COURT ERRED WHEN IT DETERMINED THE FIELD SOBRIETY EXERCISES CONSISTING OF HGN, THE WALK AND TURN AND ONE LEG STAND WERE ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH NHTSA GUIDELINES AND THEREFORE ADMISSIBLE AS EVIDENCE.

I

{¶17} Appellant, in his sole assignment of error, argues that the trial court erred in denying his Motion to Suppress. We disagree.

{¶18} 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,* 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist .1998). 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,* 75 Ohio St.3d 148, 154, 1996-Ohio-134, 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. Medcalf,* 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). 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,* 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶19} 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,* 1 Ohio St.3d 19 (1982); *State v. Klein,* 73 Ohio App.3d 486 (4th Dist.1991); *State v. Guysinger,* 86 Ohio App.3d 592 (4th Dist.1993). 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. See *Williams*, supra. 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,* 95 Ohio App.3d 93 (8th Dist.1994); *State v. Claytor,* 85 Ohio App.3d 623 (4th Dist.1993); *Guysinger.* As the United States Supreme Court held in *Ornelas v. U.S.,* 517 U.S. 690, 116 S.Ct. 1657, 1663 (1996), "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶20} Appellant initially argues that there was not reasonable suspicion to stop his vehicle. The Fourth Amendment to the United States Constitution prohibits

warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). An investigative stop, or Terry stop, is a common exception to the Fourth Amendment warrant requirement. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 889 (1968). Because the "balance between the public interest and the individual's right to personal security" tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot." *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). In *Terry,* the Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion based upon specific and articulable facts that criminal behavior has occurred or is imminent. See, *State v. Chatton,* 11 Ohio St.3d 59, 61, 463 N.E.2d 1237 (1984).

{¶21} The propriety of an investigative stop must be viewed in light of the totality of the circumstances surrounding the stop "as viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews,* 57 Ohio St.3d 86, 87–88, 565 N.E.2d 1271 (1991); *State v. Bobo,* 37 Ohio St.3d 177, 178, 524 N.E.2d 489 (1988).

{¶22} Appellant contends that there was no reasonable suspicion to stop him because he did not violate R.C. 4513.03(A). Appellant argues that the vehicle that he was driving at the time of the stop displayed two "lighted lights" and that there is no requirement that the two lights be headlights.

{¶23} Appellant was cited for failing to use headlights in violation of R.C. 4513.03. R.C. 4513.03 states, in relevant part, as follows:

> A) Every vehicle, other than a motorized bicycle, operated upon a street or highway within this state shall

> display lighted lights and illuminating devices as required by sections 4513.04 to 4513.37 of the Revised Code during all of the following times:
>
> (1) The time from sunset to sunrise;
>
> (2) At any other time when, due to insufficient natural light or unfavorable atmospheric conditions, persons, vehicles, and substantial objects on the highway are not discernible at a distance of one thousand feet ahead;
>
> (3) At any time when the windshield wipers of the vehicle are in use because of precipitation on the windshield.

{¶24} R.C. 4513.04 requires every motor vehicle to be equipped with two operable headlights. R.C. 4513.14 provides, in relevant part, as follows: "At all times mentioned in section 4513.03 of the Revised Code at least two lighted lights shall be displayed, one near each side of the front of every motor vehicle and trackless trolley, …" As noted by Ohio Supreme Court in *State v. Jones* 121 Ohio St.3d 103, 2009-Ohio-316, 902 N.E.2d 464, fn 3, R.C. 4513.14 requires that headlights must be on during the times set forth in R.C. 4513.03. See also *State v. Jones*, 4th Dist. Ross No. 1620, 1991 WL 28319, in which the court held that the appellant, who was driving with two parking lights but only one headlight, was in violation of the law. The court rejected the appellant's argument that R.C. 4513.03, .04, and .16, when read in pari materia, did not require a motor vehicle to have two functioning headlights when operating at night.

{¶25} We find, based on the foregoing, that there was reasonable suspicion to stop appellant.

{¶26} Appellant, in his first assignment of error, also argues that there was not probable cause to arrest him for driving under the influence because the field sobriety tests were not administered in substantial compliance with NHTSA guidelines. "[T]he results of the field sobriety tests are not admissible at trial unless the state shows by clear and convincing evidence that the officer administered the test in substantial compliance with NHTSA guidelines." *State v. Codeluppi,* 139 Ohio St.3d 165, 2014–Ohio–1574, 10 N.E.3d 691, ¶ 11.

{¶27} The burden of proof in a motion to suppress the results of a field sobriety test is on the state once the defendant has made an issue of the legality of the test. *State v. Ryan,* 5th Dist. Licking No. 02–CA–00095, 2003–Ohio–2803, ¶ 21.

{¶28} Appellant, in the case sub judice, submitted to a "mini" HGN test, a HGN test, the one leg stand test and the walk and turn test. The trial court, in its January 9, 2014 Judgment Entry, held that "regardless of either HGN, [appellants] performance of the one leg stand and walk and turn, combined with the odor of alcohol, slurred speech, and red glassy eyes were enough to establish probable cause for his arrest." We agree.

{¶29} As noted by appellee in its response to appellant's objections to the Magistrate's decision, appellant "raises vague objections to both these tests [the one leg stand and walk and turn tests]." Appellant argues that Patrolman Barnhart asked appellant whether or not there was anything that would prevent him from performing the tests before explaining the test instructions. She further argues that appellant had no problems with balance while standing on the roadway with both feet and that balance issues only occurred when appellant was "asked to perform exercises that required the human body to be placed in unnatural positions."

{¶30} However, at the hearing, Patrolman Barnhart testified that appellant indicated that he did not have any medical problems that the officer needed to know about and was not on any medications. He further testified that during the entirety of the

traffic stop, appellant never told him that he had any physical or medical conditions that prevented him from performing the field sobriety tests. We find that appellant did not raise any substantive objections to these tests and that, based on appellant's performance on the same and the other factors in this case, there was probable cause to arrest appellant for driving under the influence of alcohol.

{¶31} Appellant's sole assignment of error is, therefore, overruled.

{¶32} Accordingly, the judgment of the Mansfield Municipal Court is affirmed.

By: Baldwin, J.

Wise, P.J. and

Delaney, J. concur.