[Cite as *State v. Gray*, 2015-Ohio-1659.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
RYAN W. GRAY	:	Case No. 14-COA-027
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland Municipal Court, Case No. 14-TRC-3711
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	April 27, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ANDREW N. BUSH Assistant Law Director 1213 E. Main Street Ashland, OH 44805	ROBERT GOLDBERGER 10 West Newlon Place Mansfield, OH 44902

Baldwin, J.

{¶1} Appellant Ryan W. Gray appeals a judgment of the Ashland Municipal Court convicting him of driving with a prohibited breath alcohol concentration (R.C. 4511.19(A)(1)(d)) and speeding (R.C. 4511.21(D)(1)) upon a plea of no contest. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On May 10, 2014, Trooper Richard Kluever stopped appellant for speeding on U.S. Route 250, just north of Ashland, Ohio. After administering field sobriety tests, the trooper asked appellant to submit to a portable breath test. During the first test, Trooper Kluever noticed that appellant appeared to have something in his mouth. He asked appellant if he had something in his mouth, and appellant replied, "Gum." The trooper asked, "Gum?" Appellant confirmed that he had gum in his mouth. The trooper then asked appellant to spit the gum out, and conducted a second portable breath test. Appellant was arrested and transported to the Ashland Highway Patrol Post. He submitted to a BAC test registering a result of .120.

{¶3} Appellant filed a motion to suppress, arguing that he had chewing tobacco in his mouth during the breath test. He testified at the suppression hearing that he told Tropper Kluever about the chew in his mouth, and the officer did not ask him to spit it out. The trooper testified that appellant only told him that he had gum in his mouth, and did not mention chew. He further testified that appellant showed no signs of using chewing tobacco. Sgt. Andrew Topp, who assisted Trooper Kluever, testified that he saw no indication that appellant was using chewing tobacco. A dash-cam video of the stop was also admitted into evidence at the hearing.

{¶4} The trial court found that appellant's testimony was not credible and overruled the motion to suppress. Appellant changed his plea to no contest and was convicted of driving with a prohibited breath alcohol concentration and speeding. For driving with a prohibited breath alcohol concentration, he was sentenced to 180 days in the Ashland County Jail with 90 days suspended and placed on intensive probation for one year. His operator's license was suspended for three years, and he was fined $525.00. He was also fined $70.00 for speeding.

{¶5} Appellant assigns a single error:

{¶6} "THE TRIAL COURT ERRED IN NOT SUPPRESSING THE RESULTS OF THE BAC DATAMASTER TEST OF APPELLANT'S BREATH FOR THE AMOUNT OF BREATH ALCOHOL."

{¶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*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141(1991); *State v. Guysinger*, 86 Ohio App.3d 592, 621 N.E.2d 726(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. *State v. Williams*, 86 Ohio App.3d 37, 619 N.E.2d 1141 (1993). 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, 641 N.E.2d 1172 (1994); *State v. Claytor*, 85 Ohio App.3d 623, 620 N.E.2d 906 (1993); *Guysinger, supra.* As the United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶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 the credibility of witnesses. 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).

{¶9} Appellant argues that the trial court's finding that he did not have chew in his mouth during the test is against the manifest weight of the evidence. He argues that although there was a burst of static from the police radio, the video of the stop reflects that he told the officer he had chew and gum in his mouth. We disagree. On the video, the officer asked appellant if he had anything in his mouth. Appellant appears to reply, "Gum," without stating that he also had chew. The officer repeats, "Gum?" Appellant responded, "Yeah." The video from the cruiser supports the trooper's testimony that appellant only told him he had gum in his mouth. Further, both officers who observed appellant during the relevant time period testified that they saw no indication that appellant was using chewing tobacco. The trial court was in a better position than this court to evaluate the credibility of witnesses. The court's finding that appellant did not

have anything in his mouth during administration of the BAC test is not against the manifest weight of the evidence.

{¶10} The assignment of error is overruled. The judgment of the Ashland Municipal Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.