[Cite as *State v. Spitler*, 2015-Ohio-2286.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MATTHEW SPITLER Defendant-Appellant	JUDGES: Hon. W. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 2014CA00157 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case No. 2014TRC1629
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 8, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH MARTUCCIO Canton Law Director TYRONE HAURITZ Canton City Prosecutor ANTHONY J. FLEX Assistant City Prosecutor 218 Cleveland Ave SW Canton, Ohio 44702	JEFFRY V. SERRA The Ferruccio Law Firm, L.P.A. 301 Cleveland Ave NW Canton, Ohio 44702

Hoffman, P.J.

{¶1} Defendant-appellant Matthew Spitler appeals the June 5, 2014 Judgment Entry entered by the Canton Municipal Court denying his motion to suppress evidence following his arrest for operating a vehicle while intoxicated, in violation of R.C. 4511.19(A)(1)(a). Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In the early morning hours of March 20, 2014, Appellant was driving northbound on Market Avenue in Canton, Ohio. Trooper McAllister of the Ohio State Highway Patrol observed Appellant's vehicle travelling at a speed of 48 mph in a posted 35 mile per hour speed limit zone. As a result, Trooper McAllister initiated a traffic stop.

{¶3} The stop occurred at approximately 3:30 a.m. Trooper McAllister testified at the suppression hearing, upon approaching the vehicle, Appellant rolled the window down and he detected an odor of an alcoholic beverage. As there was a passenger in the car, the trooper did not know from whom the odor was emanating. Appellant told the officer he was coming from a nearby bar. Trooper McAllister observed Appellant's eyes were red and bloodshot.

{¶4} Trooper McAllister asked Appellant to exit the vehicle in order to determine whether the odor of alcohol was emanating from Appellant's person, and to further determine whether Appellant was able to drive the vehicle.

{¶5} After exiting the vehicle, Appellant admitted to Trooper McAllister he had been drinking. Appellant was then asked to submit to a battery of field sobriety tests. Appellant failed six of the nine clues of impairment on the HGN test. Appellant refused

the one-step walk-and-turn test and the one-leg stand test. As a result, Appellant was placed under arrest for OVI.

{¶6} Appellant filed a motion to suppress evidence. Following a hearing on the motion, the trial court denied the motion to suppress via Judgment Entry filed June 5, 2014.

{¶7} Appellant entered a plea of no contest to the charges of operating a vehicle under the influence of alcohol and/or drugs, in violation of R.C. 4511.19(A)(1)(a), and one count of speeding, in violation of R.C. 4511.21(C). The trial court ordered Appellant pay a fine of $700.00, plus courts costs, sentenced him to 180 days in jail, and serve six of those days at Oriana House, while suspending the remaining 174 days in jail. The trial court further suspended Appellant's driver's license for a period of one hundred and eighty days, and assessed points against his driver's license.

{¶8} Appellant appeals assigning as error:

{¶9} "I. THE TRIAL COURT'S FINDINGS OF FACT ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BASED UPON THE TESTIMONY OF TROOPER MCALLISTER.

{¶10} "II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE TROOPER MCALLISTER LACKED A REASONABLE SUSPICION TO REQUEST THE APPELLANT TO EXIT HIS VEHICLE TO PERFORM FIELD SOBRIETY TESTS IN VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

{¶11} "III. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE ARRESTING OFFICER LACKED PROBABLE CAUSE TO ARREST THE APPELLANT FOR OVI."

I., II. and III.

{¶12} Appellant's assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶13} 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 the findings of fact are against the manifest weight of the evidence. See: *State v. Fanning (1982),* 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein (1991),* 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger (1993),* 86 Ohio App.3d 592, 621 N.E.2d 726.

{¶14} Secondly, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. See: *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141.

{¶15} 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 (1994),* 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor (1993),* 85 Ohio App.3d 623, 627, 620 N.E.2d 906; and *State v. Guysinger (1993),* 86 Ohio App.3d 592, 621 N.E.2d

726. As the United States Supreme Court held in *Ornelas v. U.S. (1996),* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶16} In the matter presently before us, we find appellant challenges the trial court's decision concerning the ultimate issue raised in his motion to suppress. Thus, in analyzing appellant's sole assignment of error, we must independently determine whether the facts meet the appropriate legal standard.

{¶17} Appellant maintains Trooper McAllister was only able to ascertain the odor of alcohol on Appellant's person after Appellant exited the vehicle. Appellant cites us to *State v. Bright* 5th Dist.No. 2009 CA 28, 2010-Ohio-1111, asserting Appellant did not admit to consuming alcohol until after he stepped out of the vehicle.[1]

{¶18} Requiring a driver to submit to a field sobriety test constitutes a seizure within the meaning of the Fourth Amendment. Courts have generally held the intrusion on the driver's liberty resulting from a field sobriety test is minor, and the officer therefore need only have reasonable suspicion the driver is under the influence of alcohol in order to conduct a field sobriety test. *State v. Bright*, 5th Dist. No. 2009 CA 28, 2010-Ohio-1111, citing *State v. Knox*, 2nd Dist. No. 2005 CA 74, 2006-Ohio-3039. In determining whether an officer has reasonable suspicion to justify the administration

[1] Trooper McAllister asked Appellant to step out of vehicle as he could not distinguish from whom the odor of alcohol was emanating. The trial court found Trooper McAllister had observed Appellant's eyes were red and bloodshot. Appellant asserts the trial court's findings are against the manifest weight of the evidence as Trooper McAllister stated Appellant's eyes "were a little red and bloodshot." We disagree the findings are not supported by the weight of the evidence, and although not a verbatim statement of the testimony, we do not find the trial court mischaracterizes the evidence, and find the trial court's findings supported by the evidence.

of field sobriety tests, we must look at the totality of the circumstances and a number of factors. *State v. Evans*, 127 Ohio App.3d 56 (1998).

{¶19} Appellant was stopped in the early morning hours of March 20, 2014 at approximately 3:30 a.m. Trooper McAllister testified at the suppression hearing, upon approaching the vehicle, Appellant rolled the window down and the trooper smelled the odor of an alcoholic beverage. As there was a passenger in the car, the trooper did not know from whom the odor was emanating. Appellant told the officer he was coming from a bar. Trooper McAllister observed Appellant had red, bloodshot eyes.

{¶20} Trooper McAllister asked Appellant to exit the vehicle in order to determine whether the odor of alcohol was emanating from Appellant's person. After exiting the vehicle, Appellant admitted to Trooper McAllister he had been drinking. Appellant was then asked to submit to a battery of field sobriety tests. After failing six of the nine clues of impairment on the HGN test, Appellant refused the one-step walk-and-turn test and the one-leg stand test. As a result, Appellant was placed under arrest for OVI.

{¶21} Here Appellant was stopped in the early morning hours for excessive speed[2] and the officer immediately detected an odor of alcohol emanating from the vehicle, in addition to Appellant's having red, bloodshot eyes. Upon exiting the vehicle, Appellant admitted to consuming alcohol. We find Trooper McAllister had reasonable

[2] *Bright and Knox* involved a registration check and equipment violation, respectively, whereas the instant case involves a moving violation. While we readily acknowledge speed in and of itself is certainly not conclusive of OVI, it is nonetheless an indicator. The fact others frequently speed in this same area, while diminishing the significance of this indicator, does not eliminate it from consideration under the totality of circumstances analysis.

suspicion Appellant was driving under the influence in order to conduct the field sobriety tests, and, following the HGN and refusal of the other tests, probable cause to arrest.

{¶22} We find the trial court did not err in denying the motion to suppress evidence herein. Appellant's three assignments of error are overruled.

{¶23} The June 5, 2014 Judgment Entry of the Canton Municipal Court is affirmed.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur