

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
ADAM HAREN	:	Case No. 2014CA00196
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case No. 2014 TRC 0552
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT:	July 6, 2015
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APPEARANCES:

For Plaintiff-Appellee

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Farmer, J.

{¶1} On August 17, 2014, Ohio State Highway Patrol Sergeant David Garber stopped appellant, Adam Haren, for failing to display a front license plate on his vehicle. Upon investigation, Sergeant Garber performed field sobriety tests and administered a portable breath test. As a result of the tests, appellant was arrested and charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A) and failure to display a front license plate in violation of R.C. 4503.21. Appellant was taken to the Canton patrol post where he consented to a BAC DataMaster breathalyzer test, the result of which was .114.

{¶2} On September 26, 2014, appellant filed a motion to suppress, claiming an unreasonable stop and no probable cause to arrest. A hearing was held on October 2, 2014. At the conclusion of the hearing, the trial court denied the motion, finding a valid stop and probable cause to arrest (journalized on October 2, 2014). Appellant then pled no contest to the charges. By judgment entry filed October 2, 2014, the trial court found appellant guilty and sentenced him to one hundred eighty days in jail, all but three days suspended, and twenty-five hours of supervised community service.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS."

I

{¶5} Appellant claims the trial court erred in denying his motion to suppress. We disagree.

{¶6} 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. *State v. Williams*, 86 Ohio App.3d 37 (4th Dist.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 (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."

{¶7} Appellant's September 26, 2014 motion to suppress raised the following three issues:

- 1) No justification for investigating him existed;
- 2) There was a lack of probable cause to arrest him; and
- 3) There was no basis for asking Defendant to submit to a breathalyzer as he did not exhibit sufficient indicia of alcohol impairment so as to justify his arrest.

{¶8} Appellant argues the front license plate was in plain view on his dashboard and therefore the detention was prolonged, and the result of the portable breath test administered to him should not have been considered for probable cause to arrest.

{¶9} In *Terry v. Ohio*, 392 U.S. 1, 22 (1968), the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the police officer. *State v. Freeman*, 64 Ohio St.2d 291 (1980), paragraph one of the syllabus. Probable cause to arrest is not synonymous to probable cause for

search. Probable cause to arrest focuses on the prior actions of the accused. Probable cause exists when a reasonable prudent person would believe that the person arrested had committed a crime. *State v. Timson*, 38 Ohio St.2d 122 (1974). A determination of probable cause is made from the totality of the circumstances. Factors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, association with criminals, and location. Katz, *Ohio Arrest, Search and Seizure*, Sections 2:13-2:19, at 59-64 (2009 Ed.). As the United States Supreme Court stated when speaking of probable cause "we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life in which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

{¶10} During the suppression hearing held on October 2, 2014, the trial court heard testimony from Sergeant Garber and appellant's father, Edward Haren. The trial court was presented with the video recording of the stop, the BAC DataMaster breathalyzer consent form, the results of the breathalyzer test, and a photograph of appellant's front license plate displayed on the dashboard of his vehicle taken by his father. Plaintiff's Exhibits 1-3 and Defendant's Exhibit A. At the conclusion of the hearing, the trial court found the following facts (T. at 52-54):

On August 17th, 2014 Sergeant Garber is in a marked vehicle and he's - with his uniform on, traveling southbound on Cleveland Avenue south of Navarre in Stark County, Ohio. The ticket is marked it's within the

city limits of the City of Canton. He observes a vehicle northbound with what he said had no front registration. The - he turns his vehicle around. He stops the vehicle, and it is a vehicle being driven - the Durango, 2002 Dodge Durango, by Mr. Adam Haren. Stops the vehicle, immediately smells a strong odor from the defendant of alcohol. The defendant has glassy bloodshot eyes, and he asked the defendant - well, he asks him at that point how much he had to drink, so it's not - he - you hear him asking him how much he had to drink, you don't hear the response. Later the defendant says he had three beers. Gives him the field sobriety test. I - I think your issue with the Adderall's an interesting issue, but I think that's - that's an issue of fact for the jury to determine. The HGN is given, all six clues are demonstrated. The walk and turn is given, three clues are demonstrated. The one leg stand he's not able to do due to a work injury. You know, I don't think - when you say that the - the Adderall affects the NHTSA standards, I don't think it does. I mean, the tests are perf - they're - he instructs the - gives all his instructions pursuant to the NHTSA standards. I mean, you might have an issue of fact for the jury. I mean, I don't know what Adderall does. I mean, you - you're - you know, when you say Adderall's one of the drugs that affects the HGN, I mean, I don't know if that's true or not. I mean, you're not an expert and neither am I. Then based on the fact that totality of the circumstances he - he arrested defendant for OVI and he believes him to be impaired. The defendant's then taken back to the post, he's read the 2255 - excuse me, I should

throw in there also, he gave him the PBT which I guess I'm not supposed to consider, I never do, and he says he tested positive but he doesn't remember the - the results. You know, over the years I haven't let any troopers testify as to the PBT's so I guess that's one of the reasons that they don't put it in their reports. The defendant's taken back to the post, he tests point-one-one-four. Now during the cross examination of Sergeant Garber, he's shown Exhibit A. He testified that that's not how the - the plate was. It was laying flat on the dashboard. You couldn't see it. It wasn't discernable that evening.

{¶11} The trial court went on to determine that the front license plate was not "discernable, reasonable and articulable suspicion's there. That part's fine with me." T. at 54. The trial court also determined Sergeant Garber's testimony to be "very credible" and there was ample evidence for probable cause to arrest: "six clues on the HGN, three clues on the walk and turn, strong odor from the defendant of alcohol, glassy bloodshot eyes." T. at 54-55.

{¶12} We find the trial court's findings are supported by the record. Sergeant Garber observed no front license plate on the vehicle prior to the stop and as he approached the vehicle. T. at 7-8. The front license plate was laying flat on the dashboard, not upright as depicted in the photograph. T. at 27-28, 38-39; Defendant's Exhibit A. Pursuant to R.C. 4503.21, a front license plate must be displayed in "plain view." We concur with the trial court's determination of a valid stop as Sergeant Garber had "specific and articulable facts" to stop appellant.

{¶13} Upon contact with appellant, Sergeant Garber immediately detected a strong odor of alcohol coming from inside the vehicle and observed his glassy bloodshot eyes. T. at 8. Based upon these observations, Sergeant Garber conducted field sobriety tests. T. at 9. During the horizontal gaze nystagmus test, appellant exhibited six clues out of six. T. at 12. During the walk and turn test, appellant "moved his feet during the instruction phase, he did not walk heel to toe, and he turned incorrectly." T. at 13-14. The one leg stand test was not performed because appellant informed the sergeant he could not do the test because of a work injury. T. at 14. Sergeant Garber administered a portable breath test, but did not note the result or testify to the test or the result because "typically it doesn't come up in trials." T. at 35. On cross-examination, Sergeant Garber was asked why he conducted a portable breath test after the field sobriety tests (*Id.*):

A. Due to his injury.

Q. Due to his injury?

A. Yes, sir.

Q. Okay. So you hadn't made your decision yet?

A. That's correct.

Q. Okay. So he wasn't – you didn't have probable cause to arrest at that point?

A. I disagree with that.

Q. Well then why didn't you arrest him?

A. I don't make a decision until I've finalized everything...

Q. Okay, so you...

A. ...that I plan on doing

{¶14} Given his training, experience, observations, and the tests conducted, Sergeant Garber opined that appellant was under the influence of alcohol and placed him under arrest. T. at 17-18. Based upon the totality of the circumstances, there was ample evidence for Sergeant Garber to find probable cause to arrest exclusive of the result of the portable breath test.

{¶15} Upon review, we find the trial court did not err in denying appellant's motion to suppress as there was a valid stop, no prolonged detention, and probable cause to arrest.

{¶16} The sole assignment of error is denied.

{¶17} The judgment of the Canton Municipal Court of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, PJ. and

Wise, J. concur.

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