[Cite as *State v. Swiger*, 2015-Ohio-2999.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 15-COA-004
SAMUEL B. SWIGER	:	15-COA-005
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Ashland Municipal Court, Case No. 14-TRC-4860ABCD
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 27, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DAVID R. STIMPERT Ashland County Prosecutor 1213 E. Main St. Ashland, OH 44805	BRETT MURNER 208 N. Main Street Wellington, OH 44090

Gwin, P.J.

{¶1} Appellant Samuel B. Swiger [“Swiger”] appeals the December 26, 2014 Judgment Entry of the Ashland Municipal Court denying his motion to suppress evidence. Appellee is the State of Ohio.

Facts and Procedural History

{¶2} On July 5, 2014, Sergeant Brad Bishop a 16-year veteran of the Ohio State Highway Patrol was on routine patrol in the vicinity SR 511 and New London Eastern Road. Sergeant Bishop was in a marked cruiser equipped with a properly functioning dash cam digital video recorder. This video camera had both audio and video capabilities. Sergeant Bishop's personal audio recording device was inoperable for the entirety of the stop and his shift that evening. The dash cam video possesses enhanced computer software that allows recording time to begin sometime prior to the activation of the light bar on the cruiser. A review of the dash cam video entered into evidence indicates that this device began recording at 22:17:21. Sgt. Bishop activated his light bar at 22:18:49, as Swiger was turning from traveling southbound on SR511 to eastbound on New London Eastern Road. Sergeant Bishop testified that Swiger’s vehicle crossed the centerline of the roadway as it made this right hand turn.

{¶3} Sergeant Bishop further testified that before the activation of his light bar and the recording of the driving during the "look back" period, he observed Swiger’s vehicle cross the white line twice by a tire width of less than a foot on SR 511. Sergeant Bishop further testified that these alleged violations were not recorded on the dash cam video of the stop.

{¶4} Sergeant Bishop testified that SR511 was poorly lit, rural highway. Sergeant Bishop was approximately 700 to 1,000 feet behind Swiger's vehicle when he observed the two marked lanes violations.

{¶5} As he approached the vehicle, Sergeant Bishop observed Swiger's speech was slow and slurred. He further noticed that Swiger was smoking a cigarette that had approximately one half inch of ashes on the end. Swiger had ashes down the front of his shirt. Swiger's face was flush and Sergeant Bishop smelled a strong odor of an alcoholic beverage on Swiger's breath.

{¶6} Swiger was unable to provide Sergeant Bishop with either a driver license or a registration for the vehicle. Swiger was asked to step out of the vehicle. After conducting a protective search of Swiger, Sergeant Bishop placed him in his cruiser in order to verify Swiger's identity and the registration of the vehicle. As he was seated inside the cruiser, Sergeant Bishop continued to smell the strong odor of an alcoholic beverage on Swiger's breath. When asked, Swiger admitting that he had been drinking. Upon checking it was determined that Swiger had nineteen open driver license suspensions, including security suspensions. (T. Oct. 6, 2014 at 61).

{¶7} Upon exiting the cruiser in order to perform the standardized field sobriety tests ["SFST"], Swiger dropped the cell phone that had been on his lap. As he attempted to pick up the phone, Swiger lost his balance and nearly fell in a ditch at the roadside.

{¶8} Sergeant Bishop testified that Swiger stated he was unable to perform the Walk-and Turn and One-leg Stand SFST's because he had bad legs and had fallen at work the previous week. (T. Oct. 6, 2014 at 22). Accordingly, only the Horizontal Gaze

Nystagmus test ["HGN"] was given to Swiger. Sergeant Bishop testifed that his attempt to administer the HGN to Swiger was frustrated by Swiger's refusal or inability to follow the instructions given by Sergeant Swiger for performing the HGN. (T. Oct. 6, 2014 at 21-23).

{¶9} Swiger was placed under arrest and given his *Miranda* warnings. Swiger refused a BAC test.

{¶10} After the suppression hearing was concluded, the parties submitted proposed Findings of Facts and Conclusions of Law. On November 21, 2014, Magistrate Oxley issued a written opinion overruling Swiger's motion to suppress. Swiger filed objections to the magistrate decision. The trial court overruled Swiger's objections and the magistrate's opinion was adopted in its entirety by the presiding judge on December 26, 2014. Swiger subsequently entered pleas of No Contest to all charges, was found guilty and sentenced on January 12, 2015.

Assignments of Error

{¶11} Swiger has raised four assignments of error,

{¶12} "I. THE TRIAL COURT ERRONEOUSLY RULED THAT THERE WAS REASONABLE SUSPICION TO STOP AND/OR DETAIN DEFENDANT-APPELLANT.

{¶13} II. THE TRIAL COURT ERRONEOUSLY RULED THAT THERE WAS PROBABLE CAUSE TO ARREST DEFENDANT-APPELLANT WITHOUT A WARRANT.

{¶14} "III. THE TRIAL COURT ERRONEOUSLY RULED THAT THE FIELD SOBRIETY EXERCISE ADMINISTERED BY THE ARRESTING OFFICER WAS

CONDUCTED IN SUBSTANTIAL COMPLIANCE WITH STANDARDIZED TESTING PROCEDURES.

{¶15} "IV. THE TRIAL ERRONEOUSLY RULED THAT THE STATEMENTS MADE BY DEFENDANT -APPELLANT WERE NOT IN VIOLATION OF HIS MIRANDA RIGHTS."

I.

{¶16} In his first assignment of error, Swiger argues that the trooper did not have a reasonable articulable suspicion to stop Swiger's vehicle.

{¶17} 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.

A. The Stop.

{¶18} 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).

{¶19} In *Mays,* the defendant argued that his actions in the case – twice driving across the white edge line – were not enough to constitute a violation of the driving within marked lanes statute, R.C. 4511.33. Id. at ¶15. The appellant further argued that the stop was unjustified because there was no reason to suspect that he had failed to first ascertain that leaving the lane could be done safely or that he had not stayed within his lane "as nearly as [was] practicable," within the meaning of R.C. 4511.33(A)(1). The Supreme Court found,

> Appellant's argument is not persuasive. R.C. 4511.33 requires a driver to drive a vehicle entirely within a single lane of traffic. When an officer observes a vehicle drifting back-and-forth across an edge line, the

> officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33.

Mays at ¶16. Further, the Supreme Court noted,

> The question of whether appellant might have a possible defense to a charge of violating R.C. 4511.33 is irrelevant in our analysis of whether an officer has a reasonable and articulable suspicion to initiate a traffic stop. An officer is not required to determine whether someone who has been observed committing a crime might have a legal defense to the charge.

Id. at ¶17. The Supreme Court concluded that a law-enforcement officer who witnesses a motorist drift over lane markings in violation of a statute that requires a driver to drive a vehicle entirely within a single lane of traffic has reasonable and articulable suspicion sufficient to warrant a traffic stop, even without further evidence of erratic or unsafe driving.

{¶20} In the case at bar, Sergeant Bishop testified that Swiger drifted over lane markings on two occasions. Sergeant Bishop further testified that Swiger's vehicle crossed the centerline as it made a right turn.

{¶21} 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 admitted during the suppression

hearing represents competent, credible evidence that Swiger was not traveling within the lanes marked for travel and that he crossed the centerline.

{¶22} Reviewing courts should accord deference to the trial court's decision concerning the credibility of the witnesses because the trial court has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record, *Miller v. Miller*, 37 Ohio St.3d 71, 523 N.E.2d 846(1988). In *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273(1984), the Ohio Supreme Court explained: "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." See, also *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), syllabus 1.

{¶23} We accept the trial court's conclusion that Swiger's violations of the traffic laws gave Sergeant Bishop reasonable suspicion to stop Swiger's 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 Swiger's motion to suppress on the basis that the initial stop of his vehicle was valid. *State v. Busse*, 5th Dist. Licking No. 06 CA 65, 2006-Ohio-7047, ¶ 20.

{¶24} Swiger's first assignment of error is overruled.

II. & III.

{¶25} Because Swiger's second and third assignments of error raise common and interrelated issues, we shall address them together.

{¶26} In his second assignment of error, Swiger contends that the trooper lacked sufficient probable cause to arrest him for OVI. In his third assignment of error, Swiger 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.

{¶27} 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.

{¶28} 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.

{¶29} 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. Delaware 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.

{¶30} In the case at bar, probable cause to arrest Swiger existed because he was driving under a suspended driver's license. The probable cause to arrest Swiger for OVI was supported by the trooper's observation of strong odor of alcohol. Upon exiting the vehicle, Swiger dropped his phone and nearly fell in the ditch on the side of the road. In spite of Sergeant Bishop's repeated attempts to administer the HGN test, Swiger either refused or was unable to perform the test, something Sergeant. Bishop testified as being consistent with impairment.

{¶31} 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 Swiger's arrest for OVI.

{¶32} Swiger's second and third assignments of error are overruled.

IV.

{¶33} In his fourth assignment of error, Swiger argues he was subjected to a series of questions during his detention that were designed to elicit incriminating responses without first being given *Miranda* warnings.

{¶34} "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶35} In *Berkemer v. McCarty*, 468 U.S. 420,104 S.Ct. 3138, 82 L.Ed.2d 317(1984) the Supreme Court held that roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" under the rule announced in *Miranda, supra. See Berkemer, supra*, 335-340. Although an ordinary traffic stop limits the " 'freedom of action' " of the detained motorist and imposes certain pressures on the motorist to answer questions, such pressures do not sufficiently impair the motorist's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. Id. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way. Id. at 438. Moreover, the typical traffic stop is conducted in public, where "[p]assersby, on foot or in other cars, witness the interaction of the officer and motorist." Id. Therefore, the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda.*

However, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*." Id. at 440. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his situation." Id. at 442.

{¶36} In *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172(1988), the Supreme Court held that an ordinary traffic stop during which the police officer asked the driver a modest number of questions at a location visible to passing motorists did not involve custody for purposes of *Miranda*. The Court noted its holding in *Berkemer* applied only to ordinary traffic stops, and observed a motorist "might properly" be found to have been placed "in custody" for purposes of *Miranda* safeguards where he was detained for over one-half hour and subjected to questioning while in a patrol car. *Bruder, supra*, at 11, f.n. 2. The Court noted that *Berkemer* applies only to "ordinary traffic stops" and not to the "unusual traffic stop" where a motorist is subjected to "prolonged detention" while in a patrol car.

{¶37} In the case at bar, Swiger does not cite this Court to any particular statement he contends was obtained in violation of his *Miranda* rights. The Ohio Supreme Court has held that physical sobriety tests are real or physical evidence and are not statements or testimony and, therefore, the nonverbal results of such tests are not self-incriminating statements protected by the constitutional privilege against self-incrimination. *State v. Henderson*, 51 Ohio St.3d 54, 554 N.E.2d 104(1990); *Piqua v. Hinger*, 15 Ohio St.2d 110, 238 N.E.2d 766(1968). Consequently, the failure to advise

defendant of his rights under *Miranda* prior to his performance of sobriety tests does not render the results of such tests inadmissible. *Henderson, supra; Piqua, supra*.

{¶38} The only potentially incriminating statement referred to in the decision of the magistrate was Swiger's admission that he had been drinking.

{¶39} The United States Supreme Court has held that coerced confessions can be subjected to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302(1991); *State v. Edgell*, 30 Ohio St.2d 103, 283 N.E.2d 145(1972) at para. 3 of the syllabus.

{¶40} In *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, the Ohio Supreme Court considered the standard to be applied in determining harmless error where a criminal defendant seeks a new trial because of the erroneous admission of evidence under Evid.R. 404(B). The court summarized its analysis in the subsequent decision of *State v. Harris*, 2015-Ohio-166, —— N.E.3d ——, ¶ 37:

> Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and nonconstitutional errors under Crim.R. 52(A). Id. at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. Id. at ¶ 25 and 27. Second, it must be

> determined whether the error was not harmless beyond a reasonable doubt. Id. at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt.

Id. at ¶ 29, 33.

{¶41} Based upon the entire record before us, we conclude that any error in the admission of the testimony was harmless and if that error had not occurred, the trier of the facts would have made the same decision.

{¶42} The trial court did not err in overruling Swiger's motion to suppress.

{¶43} Swiger's fourth assignment of error is overruled.

{¶44} For the foregoing reasons, the judgment of the Ashland Municipal Court, Ashland County, Ohio is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur