[Cite as *State v. Kessler*, 2015-Ohio-3068.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 14-CA-58
	:	
KENNETH KESSLER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Municipal Court, Case No. TRC 1402154
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 27, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
DANIEL E. COGLEY Assistant Prosecutor City of Lancaster 123 E. Chestnut St. Lancaster, OH 43130	JESSICA G. FALLON 713 South Front St. Columbus, OH 43206

Delaney, J.

{¶1} Appellant Kenneth Kessler appeals from the June 26, 2014 Entry of the Fairfield County Municipal Court overruling his motion to suppress. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the transcript of the suppression hearing on June 25, 2014.

{¶3} This case arose on March 7, 2014, around 1:07 a.m. when Trooper Chad McMunn of the Ohio State Highway Patrol, Lancaster post, was dispatched to the scene of a single-vehicle crash on Main and Northern Road, near Slough Road, in Bloom Township, Fairfield County. McMunn's supervisor, Sgt. Lanning, also came to the scene. Upon McMunn's arrival, he discovered a badly-damaged vehicle about 20 yards off the roadway, which had evidently rolled over. The driver (identified as appellant) and a passenger stood near the vehicle. McMunn observed minor visible injuries to both and asked whether they wanted medical attention; both refused.

{¶4} Upon this initial contact, McMunn smelled the odor of an alcoholic beverage and observed both individuals had bloodshot eyes. Appellant and his passenger were eventually separated and appellant was seated in the rear of McMunn's cruiser. McMunn observed the odor of an alcoholic beverage emanating from appellant and noted appellant's bloodshot eyes and slurred speech. McMunn asked appellant whether he had been drinking and appellant said no; appellant said they were coming from "Shades," described by McMunn as a "restaurant/bar." Appellant said the crash occurred because he swerved to avoid an animal in the roadway.

{¶5} McMunn asked appellant to submit to a series of standardized field sobriety tests and appellant initially asked if he had to do them because he was "shaky." McMunn replied appellant was not required to complete the tests but he requested that he do so. Appellant submitted to the standardized field sobriety tests and one non-standardized field sobriety test. Based upon appellant's performance, together with his observations of appellant's physical condition and the scene, McMunn decided to arrest appellant for O.V.I.

{¶6} Prior to arresting appellant, McMunn asked again if he had anything to drink, and appellant now replied he had two drinks at Shades. Appellant was arrested, Mirandized, and placed in the rear of the cruiser. McMunn read appellant the "B.M.V. 2255" form describing the consequences for refusal of a chemical test.

{¶7} In the meantime, Christopher Kessler ("Kessler"), appellant's brother, appeared at the scene. Kessler advised McMunn he is an attorney and asked to speak with appellant. McMunn at first told Kessler he would permit him to talk to appellant. After conferring with Sgt. Lanning, however, McMunn refused Kessler's request.

{¶8} Kessler testified at the suppression hearing these conversations occurred while appellant was deciding whether he would submit to a chemical test.

{¶9} Appellant refused a requested breath test.

{¶10} Appellant was cited pursuant to Ohio Uniform Traffic Ticket (U.T.T.) with one count of O.V.I. pursuant to R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree, and one count of failure to control pursuant to R.C. 4511.202, a minor misdemeanor. Appellant entered pleas of not guilty and the case proceeded to pretrial litigation.

{¶11} On April 26, 2014, appellant filed a motion to suppress. Relevant here, appellant argued, e.g., he should have been permitted to consult with an attorney prior to making a decision about taking the breath test. A suppression hearing was held on June 25, 2014 and appellant's motion was granted in part and denied in part: results of the horizontal gaze nystagmus test were suppressed but appellant's remaining arguments were overruled from the bench and by entry dated June 26, 2014.

{¶12} The matter proceeded to trial by jury and appellant was found guilty as charged.

{¶13} Appellant now appeals from the judgment entry of his conviction and sentence and incorporates the judgment entry overruling, in part, his motion to suppress.

{¶14} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶15} "I. UNDER THE FACTS OF THIS CASE, APPELLANT SHOULD HAVE BEEN AFFORDED THE OPPORTUNITY TO EXERCISE HIS 5TH AND 6TH AMENDMENT RIGHTS TO SPEAK WITH COUNSEL PRIOR TO BEING ASKED TO SUBMIT TO A TEST OF HIS BLOOD, BREATH, OR URINE."

{¶16} "II. BECAUSE APPELLANT'S 5TH AND 6TH AMENDMENT RIGHTS WERE VIOLATED, THE JURY SHOULD NOT HAVE BEEN PERMITTED TO HEAR EVIDENCE OF HIS REFUSAL, AND THE "REFUSAL INSTRUCTION" SHOULD NOT HAVE BEEN PROVIDED TO THE JURY.

ANALYSIS

I., II.

{¶17} Appellant's two assignments of error are related and will be addressed together. Appellant argues he should have been afforded the opportunity to speak with "an on-site attorney" prior to being asked to submit to a breath test in violation of his rights pursuant to the 5th and 6th Amendments, therefore the jury should not have heard evidence of the refusal. 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, 661 N.E.2d 1030 (1996). 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 a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *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 (4th Dist.1991). 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, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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, 96,620 N.E.2d 906 (8th Dist.1994).

{¶20} In the instant case, appellant argues well-established case law regarding the right to counsel upon a request for a chemical test in an O.V.I. arrest should be revisited. The Ohio Supreme Court has ruled pursuant to the 6th Amendment that the right to counsel does not apply to the decision whether to consent to chemical testing because it is not a "critical stage" of the proceedings. *McNulty v. Curry*, 42 Ohio St.2d 341, 345, 328 N.E.2d 798 (1975). It is well-established that "the right to counsel associated with the protection against self-incrimination contained in the Fifth Amendment to the United States Constitution, or as guaranteed by the Sixth Amendment, does not apply to the stage at which the officer requested the chemical test for alcohol content." *Dobbins v. Ohio Bur. of Motor Vehicles*, 75 Ohio St.3d 533, 537, 1996-Ohio-454, 664 N.E.2d 908 (1996); see also, *State v. Frantz,* 5th Dist. Knox No. 04CA000013, 2005-Ohio-1755.

{¶21} Appellant acknowledges this well-established precedent but cites the decision of the United States Supreme Court in *Missouri v. McNeely* as support for his

argument that "when an attorney is on-site in an O.V.I. case, [ ] it is a violation of the [accused's] 5th, 6th, and 14th Amendment rights for an officer to refuse to let the [accused] speak to that attorney prior to submitting to a breath test." 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). *McNeely* addresses the 4th Amendment implications of a nonconsensual blood draw in an O.V.I. case. The Court held that the natural metabolization of alcohol in the bloodstream does not create a per se exigency justifying an exception to the Fourth Amendment warrant requirement for nonconsensual blood testing in all drunk-driving cases. Id. at 1556. The Court determined that each case must be reviewed based on the totality of the circumstances to determine whether an exigency exists. Id.

{¶22} Appellant argues McNeely represents a shift in the constitutional applications of O.V.I. issues and urges us to broadly read *McNeely* as a basis for invalidating Ohio's implied-consent law. Specifically, appellant asks that we require law enforcement to permit an accused to speak with an "on-site attorney." We note appellant's characterization of the "on-site attorney" highlights the key factor invalidating appellant's argument in this case: the record contains no evidence appellant requested to speak with an attorney. We are not disposed to overturn well-established law of this state regarding the 5th and 6th Amendment implications of law enforcement's request of an accused to submit to a chemical test. The facts of the instant case, in fact, do not support the application of the 5th and 6th Amendment analyses.

{¶23} As appellee notes, the record is devoid of any evidence appellant invoked his right to counsel.[1] In *State v. Williams*, the Ohio Supreme Court examined circumstances in which an attorney appeared at the scene of a defendant's arrest, approached law enforcement to identify himself as such, and told officers not to take the defendant's statement until he had a chance to speak with the attorney. 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446 (2003). The Court held the attorney could not invoke the defendant's Fifth Amendment rights because such rights are personal to the defendant:

> The Fifth Amendment right against self-incrimination is a personal right "that can only be invoked by the individual whose testimony is being compelled." *Moran v. Burbine*, 475 U.S. 412, 433, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), fn. 4 (during interrogation, police rebuffed attorney who had been hired by a Mirandized suspect's sister, where suspect had not requested assistance of counsel). Accord *State v. Benner*, 40 Ohio St.3d 301, 310, 533 N.E.2d 701 (1988); *State v. Carder*, 9 Ohio St.2d 1, 7, 38 O.O.2d 1, 222 N.E.2d 620 (1966) ("The determinative factor * * * is the desire of the accused to consult with counsel, not the desire of counsel to consult with the accused"). See, also, *Ajabu v. Indiana*, 693 N.E.2d 921, 932, 96 A.L.R.5th 669 (Ind.1998) (Miranda does "not give a

[1] We disagree with appellant's statement in his reply that appellant only refused the test upon being denied the opportunity to speak with his brother. This claim is not supported by the record.

> lawyer control over the interrogation unless the suspect requests it").
>
> *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶¶ 29-30.

{¶24} The evidence in the case sub judice demonstrates only that appellant weighed whether or not he should submit to the requested breath test, not that he requested the advice of any attorney, even his brother on the scene. We therefore find "the facts do not clearly establish an unequivocal request to see counsel" when law enforcement requested a chemical test. *Williams*, supra, 2003-Ohio-4164 at ¶ 33; see also *Cox v. State*, 5th Dist. Stark No. 2005CA00233, 2006-Ohio-4579 at ¶ 64.

{¶25} Appellant relies upon the dissent in *Fairborn v. Mattachione* to support his position that requests for chemical tests implicate broader constitutional protections than have previously been afforded. 72 Ohio St.3d 345, 347, 1995-Ohio-207, 650 N.E.2d 426 (1995) (Moyer, Wright, and Pfeifer dissenting). In that case, the dissent applies a 14th Amendment due process analysis to the accused's request for an attorney prior to consenting to a chemical test. The dissent relies upon evidence of "police misconduct" in the record; to wit, despite the defendant's unambiguous request for an attorney, and knowing an attorney was on the way, police told the accused no attorney was coming. On this basis the dissenting justices would find a violation of the accused's right to due process pursuant to the 14th Amendment. Id. at 347. However, the dissent concedes "whether a driver who seeks to communicate with an attorney has been deprived of her due process rights depends upon the facts of each case" and must be evaluated based upon the totality of the circumstances. Id. In the instant case, there

is no evidence of law enforcement duplicity or any facts establishing a due-process violation.

{¶26} The instant case does not support invalidation of well-established case law regarding the constitutional implications, or lack thereof, of law enforcement's request for consensual chemical tests in O.V.I. investigations. Appellant's two assignments of error are overruled.

CONCLUSION

{¶27} Appellant's two assignments of error are overruled and the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.