

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

JOSEPH FRANCIS

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 15-CA-31

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Municipal
Court, Case No. 14-TRC-13577

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 4, 2016

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

RANDALL ULLOM

Law Director

DANIEL E. COGLEY

Assistant City Prosecutor

Lancaster City Law Director's Office

123 E. Chestnut Street

Lancaster, Ohio 43016

SAMUEL H. SHAMANSKY

DONALD L. REGENSBURGER

COLIN E. PETERS

JULIE G. KEYS

523 South Third Street

Columbus, Ohio 43215

Hoffman, P.J.

{¶1} Defendant-appellant Joseph Francis appeals his conviction for operating a vehicle with a prohibited concentration of alcohol, in violation of R.C. 4511.19(A)(1)(d), a misdemeanor of the first degree, entered by the Fairfield County Municipal Court. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On November 16, 2014, at approximately 2:14 a.m, Trooper Kaitlin Fuller of the Ohio State Highway Patrol was traveling northbound on Hill Road when she came into contact with Appellant's vehicle. Trooper Fuller observed Appellant's vehicle northbound on Hill Road over U.S. 33, increasing in speed. Trooper Fuller increased speed to attempt to pace Appellant's vehicle. She then observed Appellant fail to utilize a turn signal while changing lanes on the ramp and then once again while merging onto U.S. 33. Trooper Fuller paced Appellant's vehicle at 68 miles per hour down the ramp and onto U.S. 33. She observed Appellant's right side tires come onto the white line and partially over the line. Trooper Fuller then initiated a traffic stop.

{¶3} Upon approaching the vehicle, Trooper Fuller noticed a "very strong odor of cologne" on Appellant's person. Appellant told Trooper Fuller he was coming from the Old Town Tavern, and had just sprayed himself with cologne before leaving the bar. Appellant immediately handed over his driver's license. He then continued to shuffle through cards in his wallet, indicating to Trooper Fuller he was searching for his identification, despite having already handed his identification to her.

{¶4} Due to the time of day, Appellant's indication he was coming from a bar, the strong odor of cologne, and his shuffling in his wallet, Trooper Fuller asked Appellant to

exit the vehicle. After exiting the vehicle and as Appellant was talking, Trooper Fuller could smell an odor of an alcoholic beverage on Appellant's person. Trooper Fuller also observed Appellant's eyes were glassy. Appellant displayed six of the six possible clues on the FST test. Appellant then admitted to consuming a shot and one Jim Beam and Coca Cola.

{¶5} Trooper Fuller then asked Appellant to recite the alphabet from "E" to "W" which he was able to do, and then to count backward from "67" to "54." Appellant stopped on "53."

{¶6} Trooper Fuller then administered the walk-and-turn test. Appellant displayed three clues on the test, and then performed the one leg stand test, on which Appellant displayed only one clue.

{¶7} Trooper Fuller stated he placed Appellant under arrest for operating a vehicle impaired based upon the totality of the circumstances, the time of day, Appellant's admission to the consumption of alcohol, the strong odor of cologne, the difficulty in providing the vehicle registration and insurance information, and the standardize field sobriety tests.

{¶8} At the Lancaster Patrol Post, Appellant submitted to a chemical breath test, which reported a blood alcohol level of .143.

{¶9} Appellant was charged with Operating a Motor Vehicle While Under the Influence of Alcohol, in violation of R.C. 4511.19(A)(1)(a); Operating a Motor Vehicle with a Prohibited Concentration of Alcohol, in violation of R.C. 4511.198(A)(1)(d), and Failure to Signal, in violation of R.C. 4511.39.

{¶10} Immediately prior to trial, the State filed a nolle prosequi as to the OVI impaired and Failure to Signal charges citing insufficient evidence to proceed with prosecution. The state proceeded to trial with the OVI *per se* charge.

{¶11} On March 13, 2015, Appellant filed a motion to suppress all evidence seized on November 16, 2014, including the HGN test and the chemical breath test. Appellant submitted he was detained to perform field sobriety tests in the absence of reasonable suspicion and his arrest was not based on probable cause.

{¶12} Via Journal Entry of April 7, 2015, the trial court overruled Appellant's motion to suppress. The parties stipulated the chemical test paperwork was in order and in compliance with the law and no evidence or arguments were presented regarding that branch of the motion to suppress. The trial court found Appellant was initially stopped for speed, driving on the fog line and failing to properly use his turn signal. Once Appellant was stopped, Trooper Fuller was confronted with the strong odor of cologne, which Appellant admitted to spraying on prior to leaving a local bar. Upon exiting the car, Trooper Fuller observed a strong odor of alcohol on Appellant, and Appellant admitted to consuming alcohol at the bar. The trial court found, based upon these findings, Trooper Fuller had a reasonable suspicion to perform tests upon Appellant.

{¶13} A jury found Appellant guilty of the *per se* violation. The trial court imposed a thirty day jail sentence, suspending twenty-seven, in lieu of a residential treatment program. The trial court further suspended Appellant's license for six months, and imposed a \$375 fine, plus costs.

{¶14} Appellant appeals, assigning as error:

{¶15} “I. THE TRIAL COURT FAILED TO SUPPRESS EVIDENCE OF APPELLANT’S CHEMICAL BREATH TEST AFTER HE WAS DETAINED IN THE ABSENCE OF REASONABLE SUSPICION, IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶16} “II. THE TRIAL COURT FAILED TO SUPPRESS EVIDENCE OF APPELLANT’S CHEMICAL BREATH TEST AFTER HE WAS ARRESTED IN THE ABSENCE OF PROBABLE CAUSE, IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶17} “III. THE TRIAL COURT’S APPLICATION OF STATE V. VEGA, WHICH IS VIOLATIVE OF THE OHIO CONSTITUTION ON ITS FACE, DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONTATION AND DUE PROCESS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶18} “IV. THE TRIAL COURT’S RULING DENYING APPELLANT THE OPPORTUNITY TO PRESENT THE VIDEO OF THE TRAFFIC STOP AT TRIAL VIOLATED HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶19} “V. THE TRIAL COURT’S RULING PREVENTING APPELLANT FROM INTRODUCING EVIDENCE OF FIELD SOBRIETY TESTING AFTER THE STATE ELICITED TESTIMONY REGARDING THE SAME VIOLATED HIS RIGHTS TO DUE PROCESS AND CONFRONTATION AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.”

I.

{¶20} We will address Appellant's first two assigned errors together as they raise common and interrelated arguments.

{¶21} Appellant maintains the trial court erred in failing to suppress evidence of Appellant's chemical breath test after he was detained and arrested in the absence of reasonable suspicion and probable cause.

{¶22} 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*.

{¶23} Appellant was convicted of operating a vehicle with a prohibited concentration of alcohol, in violation of R.C. 4511.19(A)(1)(d), a per se violation under Ohio Law. The statute reads,

(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.

{¶24} As set forth in the Statement of the Facts and Case, supra, and in the trial court's April 7, 2015 Journal Entry, Appellant was initially stopped for speed, driving on the fog line, and failing to properly use his turn signal. Once Appellant's vehicle was stopped, Trooper Fuller was confronted with the strong odor of cologne, Appellant had difficulty with his wallet and Appellant admitted he had sprayed the cologne upon leaving a local bar. Furthermore, the stop occurred at approximately 2:30 a.m. on a Sunday morning. Once outside of the vehicle, Trooper Fuller noticed a strong odor of alcohol on Appellant's person and Appellant admitted to consuming alcohol and driving the vehicle. We find Trooper Fuller had reasonable grounds to stop the vehicle and to have Appellant submit to the chemical testing as well as probable cause to arrest for OVI. Appellant's first and second assigned errors are overruled.

III.

{¶25} In the third assignment of error, Appellant maintains the trial court erred in not allowing him to attack the general scientific reliability of the chemical breath test machine.

{¶26} In *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (1984), the Ohio Supreme Court held general attacks on the reliability of breathalyzer test are prohibited at trial. Furthermore, this prohibition does not violate an individual's constitutional rights. *State v. Sabo*, 10th Dist. 2006, 2006-Ohio-1521. The Ohio Legislature delegated to the Director of Health, not the courts, the discretionary authority to determine which tests and procedures are generally reliable and admissible under the statute. *State v. Butler* (2013), 5th Dist. 2013-Ohio-4451. While the Ohio Supreme Court is authorized to overturn its decision in *Vega*, we are not.

{¶27} Appellant's third assignment of error is overruled.

IV.

{¶28} In the fourth assigned error, Appellant maintains the trial court erred in denying him the opportunity to present video tape evidence of the traffic stop at trial; thereby violating his due process rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

{¶29} Appellant maintains he sought to introduce evidence of the field sobriety tests through cross-examination of Trooper Fuller and the video recording of the traffic stop. Appellant submits the testimony and the video were proffered as relevant to whether the breath test was accurate in this case.

{¶30} As set forth in the third assigned error, Appellant cannot generally attack the reliability of the breathalyzer test. Further, in this case, Appellant was convicted of the per se violation only. Accordingly, the state need only prove Appellant operated the vehicle with a prohibited concentration of alcohol. The evidence Appellant sought to introduce is inadmissible to challenge the scientific reliability of the chemical breath test machine. Appellant was convicted of only the per se violation; therefore, the State need only prove Appellant operated a vehicle with a prohibited concentration of alcohol.

{¶31} The fourth assignment of error is overruled.

V.

{¶32} In the fifth assignment of error, Appellant asserts the trial court erred in preventing Appellant from introducing evidence of the field sobriety tests after the State elicited testimony regarding the same.

{¶33} In this case, as set forth in our analysis and disposition of Appellant's other assigned errors, the field sobriety indicators are irrelevant as they pertain to a per se violation. Even though we agree with Appellant the state opened the door inferring Appellant failed the tests, any error in prohibiting evidence in rebuttal is harmless because it is irrelevant rebuttal evidence of the state's irrelevant evidence concerning the per se violation. Accordingly, even though we find the trial court erred in not allowing Appellant the opportunity to offer rebuttal evidence once the State introduced testimonial evidence of the field sobriety testing, we find the error was harmless.

{¶34} The fifth assignment of error is overruled.

{¶35} The judgment of the Fairfield County Municipal Court is affirmed.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur