[Cite as *State v. Martinez*, 2017-Ohio-5727.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellant -vs- FRANCISCO MARTINEZ Defendant-Appellee	JUDGES: Hon. Patricia A. Delaney, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. 16-CA-107 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Municipal Court, Case No. 16 TRC 07601
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	June 29, 2017

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
J. MICHAEL KING Assistant Law Director City of Newark 40 West Main Street Fourth Floor Newark, Ohio 43055	DANIEL J. SABOL 580 East Rich Street Columbus, Ohio 43215

Hoffman, J.

{¶1} Plaintiff-appellant the state of Ohio appeals the December 19, 2016 Judgment Entry entered by the Licking County Municipal Court granting a motion to suppress evidence in favor of Defendant-appellee Francisco N. Martinez.

STATEMENT OF THE FACTS AND CASE[1]

{¶2} On July 24, 2016, at 3:30 a.m., while on routine patrol, Trooper A.D. Garwood observed Appellee operating a red Chevrolet. Appellee failed to stop at a red light while turning into an intersection. Trooper Garwood initiated a stop.

{¶3} Upon approaching the vehicle, Trooper Garwood observed a strong odor of alcohol emitting from the vehicle. Appellee presented with red, bloodshot, and glassy eyes, and slurred speech. Two empty and one partially consumed beer bottle were observed in the bed of the truck, directly behind the driver. Appellee stated he was coming from a friend's house, and was the sole occupant in the vehicle.

{¶4} Trooper Garwood proceeded in conducting field sobriety tests. Appellee was administered a BAC data test, and cited for OVI, in violation of R.C. 4511.19(A)(1).

{¶5} On August 31, 2016, Appellee filed a motion to suppress evidence obtained pursuant to the stop. The trial court conducted a hearing on the motion on December 12, 2016.

{¶6} Via Judgment Entry of December 19, 2016, the trial court denied the motion, in part, as to Trooper Garwood's authority to conduct the breath test, and granted the

[1] A full rendition of the underlying facts and procedural history is unnecessary for resolution of the appeal.

motion, in part, as to the lack of reasonable, articulable suspicion to expand the investigation and conduct the field sobriety tests.

{¶7} In the sole assignment of error, the State asserts,

I. THE TRIAL COURT ERRED WHEN IT RULED THAT THE TROOPER IMPERMISSIBLY EXPANDED THE STOP TO CONDUCT FIELD PERFORMANCE TESTS.

I.

{¶8} In the sole assignment of error, the State maintains the trial court erred in granting Appellee's motion to suppress finding Trooper Garwood lacked reasonable, articulable suspicion to continue and expand the detention of Appellee to conduct field sobriety tests.

{¶9} The Fourth Amendment to the United States Constitution and Section 14, Article I, Ohio Constitution, prohibit the government from conducting unreasonable searches and seizures of persons or their property. *See Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889; *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 565 N.E.2d 1271.

{¶10} 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 finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has

incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third 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 the given case. *See State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583; *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141; *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; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. The United States Supreme Court has held that "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal." *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911.

{¶11} Before a law enforcement officer may stop a vehicle, the officer must have a reasonable suspicion, based upon specific and articulable facts, an occupant is or has been engaged in criminal activity. *State v. Logan,* 5th Dist. Richland No. 07–CA–56, 2008-Ohio-2969, 2008 WL 2583246, ¶ 15, quoting *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, 611 N.E.2d 972. In a situation where the officer has observed a traffic violation, the stop is constitutionally valid. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 9, 665 N.E.2d 1091. In sum, " * * * if an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all the circumstances, then the stop is constitutionally valid." *State v. Adams,* 5th Dist. Licking No. 15 CA 6, 2015-Ohio-3786, 2015 WL 5478251, ¶ 23, quoting *State v. Mays,* 119 Ohio St.3d 406, 894 N.E.2d 1204, 2008-Ohio-4539, ¶ 8. Here, the trial court sustained the constitutionality of the traffic stop.

{¶12} Appellee further challenged the continued detention to conduct the field sobriety tests.[2] In analyzing the facts presented, we accept the template set forth by the Supreme Court of Ohio in *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, paragraph two of the syllabus: "The 'reasonable and articulable' standard applied to a prolonged traffic stop encompasses the totality of the circumstances, and a court may not evaluate in isolation each articulated reason for the stop." The intrusion on the drivers' 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. Knox*, Greene App. No. 2005-CA-74, 2006-Ohio-3039. See also, *State v. Bright*, 5th Dist. Guernsey App. No. 2009-CA-28, 2010-Ohio-1111.

{¶13} A request made of a validly detained motorist to perform field sobriety tests is generally outside the scope of the original stop, and must be separately justified by other specific and articulable facts showing a reasonable basis for the request. *State v. Albaugh,* 5th Dist. Tuscarawas No. 2014 AP 11 0049, 2015-Ohio-3536, 2015 WL 5096900, ¶ 18, quoting *State v. Anez* (2000), 108 Ohio Misc.2d 18, 26–27, 738 N.E.2d 491.

{¶14} In *State v. Hall,* 2016-Ohio-5787, cited by the trial court herein, the defendant presented without slurred speech, but with glassy bloodshot eyes and a significant odor of alcohol. This Court held, citing *State v. Smith*, 5th Dist. Licking App. No. 09-CA-42, 2010-Ohio-1232, where the odor of alcohol is combined with glassy, bloodshot

[2] We note, Appellant's argument relates solely to the officer's reasonable suspicion to proceed with the field sobriety tests, as opposed to issues concerning the technical aspects of the tests themselves.

eyes and *further indicia of intoxication*, such as an admission of having consumed alcohol, reasonable suspicion exists. This Court concluded red, watery, bloodshot eyes and an odor of alcohol, without additional indicia of intoxication, did not give the officer reasonable suspicion the driver was under influence. Hall did not have slurred speech, did not fumble with his wallet, or stumble upon exiting the vehicle. In addition, the stop was for a single marked lanes violation occurring during a left turn, without speeding or additional swerving; falling short of the erratic driving described in *Smith,* supra.[3]

{¶15} At the December 12, 2016 Suppression Hearing herein, a video recording of the traffic stop was introduced as evidence. Exhibit 1. The video demonstrates Appellee approach the intersection and proceed to turn right at the red light without stopping or slowing down. Trooper Garwood testified he conducted a traffic stop and, upon approaching, observed a strong odor of an alcoholic beverage emitting from the vehicle. He further observed two empty beer bottles and a half-full beer bottle in the bed of Appellee's truck, directly behind the driver's seat. Trooper Garwood asked Appellee to exit the vehicle based upon his slurred speech, his bloodshot glassy eyes, the empty beer bottles in the truck, and the strong odor of an alcoholic beverage.[4] During his conversation with Trooper Garwood outside the vehicle, Appellee admitted to consuming alcohol at a friend's.[5]

[3] This Court determined the initial stop valid in *Hall*, supra, was valid as we do in the case sub judice.

[4] During the stop, Appellant told Trooper Garwood the beer bottles in the bed of the truck belonged to a friend. He stated he was coming from a friend's house.

[5] This Court observed the statement on the video recording introduced at trial as Exhibit 1.

{¶16} While Appellee did not fumble with any identification and did not have difficulty exiting the vehicle or answering the trooper's questions, the testimony at the suppression hearing does demonstrate Appellee had red, glossy, bloodshot eyes, slurred speech and a strong odor of alcohol on his person both inside and outside the vehicle, and admitted to having consumed alcohol earlier. Trooper Garwood observed two consumed and one half consumed beer bottles in the truck bed, directly behind the driver. We find the state of the evidence herein differs from that in both *Hall* and *Smith* and presents sufficient indicia of intoxication to justify administration of the field sobriety tests.

{¶17} Based upon the totality of the circumstances, we find the officer herein relied upon specific, articulable facts giving rise to a reasonable suspicion Appellee was driving under the influence; justifying an extension of the initial detention for the performance of field sobriety testing. We find the trial court erred in overruling the motion to suppress the evidence.

{¶18} The assignment of error is sustained.

{¶19} The December 16, 2016 Judgment Entry of the Licking County Municipal Court is reversed, and the matter remanded to the trial court for further proceedings in accordance with the law and this Opinion.

By: Hoffman, J.

Delaney, P.J. and

Baldwin, J. concur