[Cite as *State v. Sabo*, 2009-Ohio-6979.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1452

Appellee — Trial Court No. 08TRC01784

v.

Terry S. Sabo — **DECISION AND JUDGMENT**

Appellant — Decided: December 31, 2009

* * * * *

Tim A. Dugan, for appellee.

Alan J. Lehenbauer, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals from his conviction in the Oregon Municipal Court for driving under the influence of alcohol, a violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} On June 21, 2008, a citizen informant called 911 to report what he believed to be an intoxicated driver at a gas station. The informant stated that the driver spoke with slurred words and had "weird eyes." Also, the informant provided his name and contact information along with a description of the vehicle, a license plate number, and the direction the vehicle was traveling. The caller observed appellant going to a restaurant and kept him in sight until the officer arrived.

{¶ 3} While on the phone with the caller, dispatch notified an officer to be on standby for further notice about the possible drunk driver. After the caller hung up, a second call was placed to 911 by a different citizen informant from the restaurant. This caller identified herself and stated that there was a "very drunk man" at the drive-thru window. She was told that there was an officer on site who would see to the matter.

{¶ 4} At trial, the officer testified that on June 21, 2008, he received a call from dispatch informing him about a possible drunk driver and was given the license plate number and description of the vehicle. He testified that when he arrived at the restaurant he observed a vehicle stopped at the drive-thru window and, upon identification of the vehicle as the one in question, he parked his patrol car near the exit of the restaurant parking lot in order to intercept appellant. The officer testified that once the car approached the exit of the parking lot, he exited his patrol car and told the driver to stop and pull forward into a parking space about 15 feet in front of him, and the driver properly complied.

{¶ 5} The officer testified that upon approaching the vehicle, he asked appellant, Terry Sabo, for his license, registration and proof of insurance and noticed appellant's face was a little flushed, his eyes were glazed over and bloodshot, his pupils a little dilated, his speech slurred and his breath smelled of an alcoholic beverage. He further testified that appellant stated that he had been sleeping and just awoken, and had come to get food.

{¶ 6} The officer then testified that he asked appellant for his information a second time and noticed that appellant was fumbling around to find the paperwork while they were already in his hand. The officer also testified that he concluded there was a high possibility that appellant was under the influence of alcohol and, therefore, decided to administer field sobriety tests on appellant, which he failed.

{¶ 7} On October 21, 2008, appellant withdrew his request for a jury trial and entered a plea of no contest to the charges. The trial court accepted the no contest plea and found appellant guilty.

{¶ 8} On December 1, 2008, appellant was sentenced to 180 days at jail, with 120 days suspended on appellant meeting certain conditions, $750 in fines and costs and an 18 month license suspension.

{¶ 9} From this judgment of conviction, appellant now brings this appeal and asserts the following assignments of error:

{¶ 10} "I. The trial court erred in denying appellant Sabo's motion to suppress evidence, in violation of the fourth amendment to the United States Constitution, and section 14, Article I of the Ohio Constitution, in that the state did not have reasonable suspicion to make an investigative stop.

{¶ 11} "II. The trial court erred in denying appellant Sabo's motion to suppress evidence, in violation of the fourth amendment to the United States Constitution, and Section 14, Article I of the Ohio Constitution, in that the state did not have probable cause to arrest and as the court placed the burden of proof on appellant.

{¶ 12} "III. The trial court erred in finding appellant guilty upon his no contest plea to a misdemeanor as the state failed to present an explanation of circumstances supporting any of the elements of the offense.

{¶ 13} "IV. The trial court failed to comply substantially with the requirements of criminal rule 11 when it accepted appellant Sabo's plea of no contest.

{¶ 14} "V. The trial court failed to comply with R.C. 2945.05 and denied appellant Sabo the right to a jury trial in violation of his sixth amendment rights.

{¶ 15} "VI. The trial court erred in denying appellant's motion to suppress and/or in failing to suppress the field sobriety tests as the state failed to present evidence that field sobriety tests were performed in accordance with the standards set forth by the national highway traffic safety administration ('NHTSA')"

{¶ 16} In his first assignment of error, appellant contends that the court erred in denying his motion to suppress evidence in that the state did not have reasonable suspicion to make an investigative stop. An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez* (1992), 949 F.2d 1117, 1119; *State v. Long* (1998), 127 Ohio App.3d 328, 332. During a suppression hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills* (1992) 62 Ohio St.3d 357, 366; *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548. As a result, an appellate court must accept a trial court's factual findings if they are supported by competent and credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594; *City of Bowling Green v. Cummings*, 2008 Ohio 3848, ¶ 9. The reviewing court must then review the trial court's application of the law de novo. *State v. Russell* (1998), 127 Ohio App.3d 414, 416; *State v. Klein* (1991), 73 Ohio App.3d 486, 488; *State v. McNamara* (1997), 124 Ohio App.3d 706; *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶ 17} The investigative stop exception to the Fourth Amendment allows "a police officer to stop an individual, provided the officer has the requisite reasonable suspicion, based upon specific and articulable facts, that a crime has occurred or is imminent." *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926, ¶ 15, citing *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868;

see, also, *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 296. Where an officer makes an investigative stop by relying solely on a dispatch call, the state has the burden of proving that the officer making the stop had a reasonable suspicion of criminal activity. *Terry*, at 22. An officer may rely on a dispatch call or a flyer and does not need to have knowledge of specific facts in order to have a justified reasonable suspicion of criminal activity to make an investigative stop. *Weisner*, at 297.

{¶ 18} When information an officer received from dispatch is based solely on an informant's tip, the reliability and weight of the tip must be examined to determine whether it warranted reasonable suspicion. *Weisner*, at 299. "Under the totality of circumstances, a tip from an identified citizen will establish reasonable suspicion if it is sufficiently reliable." *State v. Brant*, 10th Dist. No. 01AP-342, ¶ 8, citing *State v. Ramsey* (Sept. 20, 1990), 10th Dist. No. 89AP-1298, 1299. Moreover, an officer need not witness or be informed of improper driving in order to make an investigative stop on suspicion of driving while impaired. *State v. Stricker*, 5th Dist. No. 06 CA 122, 2007-Ohio-4074.

{¶ 19} The Supreme Court of Ohio has identified three types of informants, the anonymous informant, the known informant and the identified citizen informant. *Weisner*, at 295. "Information from an ordinary citizen who has personally observed what appears to be criminal conduct carries with it indicia of reliability and is presumed to be reliable." *State v. Loop* (Mar. 14, 1994), 4th Dist. No. 93CA2153, quoting *State v. Carstensen* (Dec. 18, 1991), 2d Dist. No. 91-CA-13.

{¶ 20} Here, both of the citizen informants identified themselves when calling about appellant and are considered identified citizen informants. The first informant gave his name, place of employment and telephone number, and related that he saw appellant with "weird eyes," stumbling and slurring his words, while inside a gas station convenience store. He additionally reported a description of the vehicle appellant was driving, including the make, model, color and license plate number, and he followed appellant to a fast food restaurant. Simultaneous with the officer's arrival at the fast food restaurant, dispatch received a call from the second informant. She gave her name and place of employment and stated that there was "a very drunk man," appellant, at the drive-thru window and also confirmed the type of car appellant was driving.

{¶ 21} Based on the information received from the two citizen informants, the law enforcement officer, as a whole, knew that appellant was seen with "weird eyes," slurring his words while staggering in and out of a gas station convenience store, as well as the precise location, model, make, color, and license plate number of the car he was driving. Specifically, the staggering and slurring of words point to a reasonable suspicion of driving while impaired. Therefore, the officer had a reasonable suspicion of criminal activity, based on reliable and articulable facts from two identifiable citizen informants, which warranted an investigative stop.

{¶ 22} Next, in his second assignment of error, appellant contends that the court erred in denying his motion to suppress evidence in that the state did not have probable

cause to arrest him and the court placed the burden of proof on appellant. An appellate court may only review appellant's assignment of error under a plain error standard when appellant fails to raise an issue in the lower court. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62. When it can be said that, if not but for the error, the outcome would clearly have been otherwise, plain error does exist. *Id.*

{¶ 23} In determining whether the officer had reasonable suspicion and probable cause to arrest appellant, the totality of facts and circumstances surrounding the arrest must be examined. *Weisner*, at 298; see *State v. Miller* (1997), 117 Ohio App.3d 750, 761; *State v Brandenburg* (1987), 41 Ohio App.3d 109, 111. It must be considered whether, "at the moment of arrest, the police had information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *State v. Thompson*, 3d Dist. No. 14-04-34 & 14-04-35, 2005 Ohio 2053, ¶ 18; citing *State v. Homan* (2000), 89 Ohio St.3d 421; superseded by statute on other grounds as stated in *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251. Also, as long as the law enforcement system, as a whole, has complied with the Fourth Amendment and possesses facts that add up to probable cause, the arrest is valid even if the arresting officer does not know specific facts. *State v. Henderson* (1990), 51 Ohio St.3d. 54, 57, citing *Whitely v. Warden, Wyoming State Penitentiary* (1971), 401 U.S. 560, 568.

{¶ 24} Here, it was reported by a citizen informant that appellant was seen with "weird eyes," slurring and stumbling into and out of a convenience store. It was also reported by another informant that appellant seemed intoxicated while at a drive-thru window of a restaurant. In addition, the officer observed that appellant was slurring and mumbling his words, had glazed over eyes and a flushed face, and also looked for his paperwork when they were already in his hand. Appellant also failed the field sobriety tests that the officer administered on him. Based on the facts that the officer had received from dispatch, as well as his own personal observations and the results of the field sobriety tests administered on appellant, the totality of the facts and circumstances did give the officer probable cause to arrest appellant.

{¶ 25} Additionally, even though the lower court incorrectly stated, in the order denying appellant's motion to suppress evidence, that appellant had not met his burden of proof, appellant did not bring this issue to the attention of the trial court and, therefore, the issue must be reviewed under the plain error standard. Looking at the context of the rest of the lower court's order, there is no evidence that the burden of proof was actually put on appellant and it is clear that it was a typographical error that did not substantially affect the rights of appellant.

{¶ 26} In his third, fourth and fifth assignments of error, appellant contends that the court erred in finding him guilty upon his no contest plea, as the state failed to present an explanation of circumstances supporting any of the elements of the offense, that in

accepting appellant's plea of no contest the court failed to substantially comply with the requirements of Crim.R.11, and that the court failed to comply with R.C. 2945.05 in denying appellant's right to a jury trial in violation of his Sixth Amendment rights.

{¶ 27} R.C. 2937.07 requires that before a court finds a defendant guilty following a no contest plea, an explanation of the circumstances surrounding the finding of guilt must be made on the record. Similarly, in "misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such a plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty." Crim.R. 11(E). However, R.C. 2937.07 has not been superseded by the enactment of Crim.R. 11 because "the statutory provision confers a substantive right." *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148, 150-151.

{¶ 28} "A no contest plea may not be the basis for a finding of guilty without an explanation of circumstances." *Cuyahoga*, at 150. The requirement of an explanation of circumstances need not be satisfied by sworn testimony, rather, some explanation of the facts surrounding the offense should be stated in order to ensure that the trial court does not make a finding of guilty in a perfunctory fashion. *Cuyahoga*, at 151; *State v. Herman* (1971), 31 Ohio App.2d 134. When the record does not show an explanation of circumstances, it is unclear to the reviewing court whether the trial court made its finding of guilt based on the evidence or in a perfunctory fashion. *State v. Puterbaugh (*2001), 142 Ohio App.3d 185, 189. When a court fails to receive an explanation of

circumstances after receiving a no contest plea, the plea must be vacated and the conviction must be reversed on review. *Cuyahoga*, at 151; *State v. Parsons* (Mar. 17, 2000), Wood App. No. WD-99-022.

{¶ 29} A trial court must substantially comply with the requirements of Crim.R. 11 before it accepts a plea of guilty or no contest. *State v. Veney*, 120 Ohio St.3d 176, 2008 Ohio 5200; *State v. Stewart* (1977), 51 Ohio St.2d 86. A trial court must engage the defendant in a colloquy and explain to appellant the effect of his plea, so that "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Lamb*, 6th Dist. No. L-07-1181, 2008-Ohio-1569, ¶ 10, quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶ 30} R.C. 2945.05 provides in part that in "all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such a waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof." Once a defendant has filed a demand for a jury trial, a trial court may not try the defendant without a jury unless the defendant knowingly makes a written waiver of his right to a jury trial. *Toledo v. Prude*, 6th Dist. No. L-02-1250, 2003-Ohio-3226; citing *State v. Tate* (1979), 59 Ohio St.2d 50.

{¶ 31} Here, the record fails to show that any dialogue between the trial court and appellant took place at the time the no contest plea was accepted. Rather, the record

shows that the trial court did not give an explanation of the circumstances supporting appellant's no contest plea and did not inform appellant of the effects of his plea of no contest. The trial court did not address appellant at all. This is evidenced by the following colloquy in the record:

{¶ 32} "THE COURT: Good morning. This matter was scheduled for tomorrow for jury trial. How do we wish to proceed?

{¶ 33} "[Defense Counsel]: Yes, Your Honor. We would move to withdraw our request for a jury trial in this matter and enter a plea of no contest, consent to the finding guilt to the charges set forth in this matter.

{¶ 34} "THE COURT: Thank you. I will accept the no contest plea to the charge of OVI refusal A1A, finding of guilt."

{¶ 35} Moreover, appellant properly demanded a jury trial after entering a plea of guilty. The record shows that upon entering his plea of no contest, the trial court did not seek a written waiver to a jury trial from appellant as is required. Instead, the trial court simply withdrew the request for a jury trial without addressing appellant. Hence, the trial court erred in accepting appellant's plea of no contest without first explaining the effects of and the circumstances supporting the no contest plea, resulting in the trial court's failure to substantially comply with the requirements of Crim.R. 11.

{¶ 36} Finally, in his sixth assignment of error, appellant contends that the court erred in denying his motion to suppress and/or in failing to suppress the field sobriety

tests because the state failed to present evidence that field sobriety tests were performed in accordance with the standards set forth by the NHTSA.

{¶ 37} R.C. 4511.19(D)(4)(b) states that as long as the field sobriety tests are given in substantial compliance with the testing standards, the results are admissible at trial, and that strict compliance with the testing standards are no longer required. *State v. Matus*, 6th Dist. No. Wd-06-072, 2008- Ohio-377, ¶ 20. Regardless, in order for the court to determine whether the standards have been substantially complied with, some evidence of compliance with the testing standards must be presented. *Id.*

{¶ 38} On cross-examination, the officer testified that he had received training for field sobriety testing, specifically in regards to the three tests he administered on appellant, in compliance with NHTSA standards, at the Owens Police Academy in spring of 2005. The officer also described how each test was given and demonstrated the horizontal gaze nystagmus ("HGN") test on a volunteer for the court to see. Based on the officer's testimony, the state did provide evidence that the field sobriety tests were given in substantial compliance with NHTSA standards.

{¶ 39} Accordingly, we conclude that the trial court did not err in finding that the officer had probable cause to make an investigative stop and to arrest appellant, and that the trial court made a typographical mistake, when incorrectly placing the burden of proof on appellant, that did not substantially affect appellant's rights. Appellant's first, second and sixth assignments of error are found not well-taken. However, we conclude

that the trial court did err procedurally in accepting appellant's plea of no contest, therefore, appellant's third, fourth and fifth assignments of error are found well taken.

{¶ 40} On consideration, the judgment of the Oregon Municipal Court is reversed and the case is remanded for further proceedings. It is ordered that appellee pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART
AND REVERSED, IN PART

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE