[Cite as *State v. Appelhans*, 2011-Ohio-487.]

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

State of Ohio	Court of Appeals No. WD-10-026
Appellee	Trial Court No. 09-TRC-09012
v.	
Erich Appelhans	**DECISION AND JUDGMENT**
Appellant	Decided: February 4, 2011

* * * * *

Matthew Reger, for appellee.

Corey J. Speweik, for appellant.

* * * * *

SINGER, J.

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

{¶ 2} Appellant was arrested for driving under the influence of alcohol on November 7, 2009. On March 3, 2010, he filed a motion to suppress. Following an evidentiary hearing, his motion was denied. Appellant then entered a no contest plea to the charge and was sentenced to ten days in jail. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court erred in finding reasonable, articulable suspicion existed to stop appellant, thereby denying appellant's right against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

{¶ 4} "II. The trial court erred in finding that reasonable, articulable suspicion existed to investigate appellant further for driving under the influence thereby denying appellant's rights against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, section 14 of the Ohio Constitution.

{¶ 5} "III. The trial court erred by finding that probable cause existed to arrest appellant, thereby denying appellant's rights against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, section 14 of the Ohio Constitution."

{¶ 6} In his first assignment of error, appellant contends that the court erred in denying his motion to suppress evidence in that the arresting officer did not have reasonable suspicion to make an investigative stop.

{¶ 7} An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez* (C.A.11, 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*, 6th Dist. No. WD-07-084, 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.

{¶ 8} 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. O*hio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. See, also, *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 296.

{¶ 9} Officer Edward Zeman of the Pemberville Ohio Police Department testified that he was on duty the early morning hours of November 7, 2009, when he observed a

car, driven by appellant, drive left of center. Zeman testified that he began to follow the car. He then saw railroad crossing lights flashing at a railroad crossing. Appellant's car was now stopped on top of the railroad tracks. Zeman testified that he turned his overhead lights on and pulled appellant over because "[appellant] went through the railroad crossing when the lights were flashing."

{¶ 10} R.C. 4511.62 provides:

{¶ 11} "(A)(1) Whenever any person driving a vehicle or trackless trolley approaches a railroad grade crossing, the person shall stop within fifty feet, but not less than fifteen feet from the nearest rail of the railroad if any of the following circumstances exist at the crossing:

{¶ 12} "(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train.

{¶ 13} "* * *

{¶ 14} "(C) Whoever violates this section is guilty of a misdemeanor of the fourth degree."

{¶ 15} As Officer Zeman testified, he observed appellant's car on the tracks as the warning lights were flashing, we conclude that he had a reasonable, articulable suspicion to stop appellant. Appellant's first assignment of error is found not well-taken.

{¶ 16} In his second assignment of error, appellant contends that Officer Zeman lacked specific and articulable facts to further detain him for purposes of administering the portable breathalyzer and field sobriety tests.

{¶ 17} The temporary detention of a person during a traffic stop is a seizure. *State v. Kazazi*, 6th Dist. No. WD-03-035, 2004-Ohio-4147. "When a law enforcement officer stops a vehicle for a traffic violation, the officer may detain the motorist for a period of time sufficient to issue the motorist a citation and to perform routine procedures such as a computer check on the motorist's driver's license, registration and vehicle plates." *State v. Aguirre*, 4th Dist. No. 03CA5, 2003-Ohio-4909. A traffic stop may last no longer than is necessary to resolve the issue that led to the original stop, absent some specific and articulable facts that further detention was reasonable. *State v. Chatton* (1984), 11 Ohio St.3d 59.

{¶ 18} Once an officer stops a vehicle for a traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for operating a vehicle under the influence if the officer has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is under the influence. *State v. Evans* (1998), 127 Ohio App.3d 56, 62-63.

{¶ 19} Circumstances from which an officer may derive a reasonable, articulable suspicion that the detained driver was operating the vehicle while under the influence include, but are not limited to: the time and day of the stop, any indicia of erratic driving before the stop that may indicate a lack of coordination, the condition of the suspect's eyes, impairments of the suspect's ability to speak, and the odor of alcohol coming from the interior of the car. Id. at 63.

{¶ 20} Here, Officer Zeman testified that when he initially approached appellant's car and asked him for his license, he noticed that his speech was slurred, his eyes were glassy and bloodshot, and that he was slow in producing his license. Officer Zeman took appellant's information and returned to his patrol car to determine whether appellant was a valid driver. Officer Zeman then went back to appellant's car. He testified that it was on his second approach to appellant's car that he smelled alcohol. He asked appellant to blow into his portable breathalyzer machine and appellant refused. Officer Zeman then asked appellant to exit the car for purposes of performing field sobriety tests. Based on the forgoing, we conclude that Officer Zeman had a reasonable suspicion that appellant was intoxicated. Appellant's second assignment of error is found not well-taken.

{¶ 21} In his third assignment of error, appellant contends that Officer Zeman lacked probable cause to arrest appellant for driving under the influence of alcohol.

{¶ 22} "Probable cause exists where there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in the belief that an individual is guilty of the offense with which he or she is charged." *State v. Medcalf* (1996), 111 Ohio App.3d 142, 147.

{¶ 23} The trial court excluded testimony relating to the scoring of the field sobriety tests finding that the tests were not conducted in substantial compliance with the National Highway Transportation Safety Administration (NHTSA) testing standards. Nevertheless, even when the results of field sobriety testing are suppressed, an officer may testify at trial, pursuant to Evid.R. 701, regarding his layman's observations made

during a defendant's performance of field sobriety tests. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶ 15. "It is generally accepted that virtually any lay witness, including a police officer, may testify as to whether an individual appears intoxicated." Id. at ¶ 12, citations omitted. Therefore, there is no reason to treat an officer's observations of a defendant's performance on those tests differently from his testimony regarding other indicia of intoxication, such as bloodshot eyes, slurred speech, and an odor of alcohol. Id., at ¶ 14. "Unlike the actual test results, which may be tainted [by the failure to follow NHTSA standards], the officer's testimony is based upon his or her firsthand observation of the defendant's conduct and appearance." Id. at ¶ 15.

{¶ 24} The fact that Officer Zeman witnessed appellant commit a traffic violation, the appearance of appellant's eyes, appellant's sluggish demeanor, the smell of alcohol from appellant's breath, his admission that he had consumed alcohol and the fact that Zeman testified that appellant was unable to keep his balance when performing the field sobriety test, all provided Officer Zeman the requisite probable cause to arrest appellant for driving while under the influence of alcohol. Appellant's third assignment of error is found not well-taken.

{¶ 25} On consideration whereof, the judgment of the Bowling Green Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.