

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

State of Ohio

Court of Appeals No. L-10-1075

Appellee

Trial Court No. TRC-09-11751

v.

Betsy E. Frase

DECISION AND JUDGMENT

Appellant

Decided: March 4, 2011

* * * * *

David Toska, City of Toledo Chief Prosecutor, and
Victoria L. Smith, Assistant Prosecuting Attorney, for appellee.

Amber VanGunten, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Betsy E. Frase, appellant, appeals her conviction in the Toledo Municipal Court of operating a vehicle while intoxicated (OVI), a violation of R.C. 4511.19(A)(1)(d). Appellant pled no contest to the charge after the trial court ruled on her pretrial motion to suppress evidence.

{¶2} In the pretrial motion to suppress, appellant sought to suppress all evidence at trial of field sobriety and breathalyzer testing of her. The trial court granted the motion in

part and overruled it in part in a judgment filed November 6, 2009. The trial court suppressed evidence of a horizontal gaze nystagmus ("HGN") test. The court overruled the motion with respect to the other field sobriety tests – a walk and turn test and a one leg stand test. The trial court also refused to suppress breathalyzer test results.

{¶3} Appellant pled no contest to the OVI charge on January 12, 2010. On February 8, 2010, the trial court sentenced appellant to serve 180 days imprisonment in the Correction Center of Northwest Ohio ("CCNO"), with all but five days at CCNO and 18 days of electronic home monitoring suspended. The court ordered appellant's driver's license suspended for a period of two years from the date of the offense, with limited driving privileges granted. The court also ordered appellant to pay \$600 in fines and court costs.

{¶4} Crim.R. 12(I) provides that a "plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion including a pretrial motion to suppress evidence." Issues relating to the motion to suppress are central to this appeal.

{¶5} Appellant asserts four assignments of error on appeal:

{¶6} "First Assignment of Error

{¶7} "The trial court erred in finding that the officer had a reasonable articulable suspicion to initiate a traffic stop.

{¶8} "Second Assignment of Error

{¶9} "The appellee failed to meet its burden of proof to show that Trooper Layson administered the field performance tests in substantial compliance with NHTSA regulations by clear and convincing evidence.

{¶10} "Third Assignment of Error

{¶11} "Trooper Layson lacked probable cause to arrest appellant for operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.10(A)(1)(a) and (d).

{¶12} "Fourth Assignment of Error

{¶13} "The maintenance and use of the BAC Datamaster did not conform with the Ohio Administrative Code Chapter §3701-53 and related case law."

{¶14} "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. An appellate court reviews a trial court's application of the law de novo. *Id.*; *State v. McNamara* (1997), 124 Ohio App.3d 706, 710.

{¶15} The only witness to testify at the hearing on the motion to suppress was Trooper Jacquelyn Layson of the Ohio State Highway Patrol. Trooper Layson testified that she was on patrol and stopped in her patrol car at the westbound entrance ramp to

Interstate 475 at Secor Road in Toledo, Ohio on May 23, 2009, at approximately 2:20 a.m. Appellant used the ramp to enter the expressway and the trooper followed the vehicle and others onto the interstate.

{¶16} Layson testified that she followed appellant for approximately three to four miles and witnessed three different marked lane violations. The trooper testified she saw appellant's vehicle cross lane markings first on the left and then on the right. As appellant negotiated a curve to head south on the interstate, her vehicle tires crossed over a white bold line marking the left side of the roadway. The record includes a video recording of the third lane violation. It is not claimed that these maneuvers presented any risk or danger to occupants of other vehicles on the roadway.

{¶17} Trooper Layson initiated the traffic stop at 2:26 a.m. and approached the vehicle. The trooper testified that she smelled a mild alcohol smell on appellant when they first spoke. According to Trooper Layson, appellant admitted that she had been drinking. She stated that she had two beers and was coming from Chuck's. The trooper instructed appellant to exit her vehicle and perform field sobriety tests. After field sobriety testing was completed, the trooper transported appellant to the Sylvania Police Department. There, breathalyzer testing was performed.

{¶18} Trooper Layson cited appellant with operating a vehicle while intoxicated (a violation of R.C. 4511.19(A)(1)(a)), operating a vehicle with 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 liters of the person's breath (a violation of R.C. 4511.19(A)(1)(d)), and a marked lanes violation (a violation of R.C. 4511.33).

{¶19} The trooper testified at the suppression hearing to the lane violations by appellant on May 23, 2009, and the vehicle stop, including field sobriety testing. Trooper Layson also testified to breathalyzer test results of a blood alcohol content reading of .092. The legal limit is .08.

Reasonable Articulate Suspicion of Violation of R.C. 4511.33
to Support Traffic Stop

{¶20} Under the First Assignment of Error, appellant argues that the evidence of momentary movement of appellant's vehicle across lane edge lines and back alone does not establish a prima facie violation of R.C. 4511.33 absent proof that the maneuver was unsafe. She argues that reasonable and articulable suspicion that appellant violated R.C. 4511.33 was lacking and that the trial court erred in failing to suppress all evidence from the traffic stop including field sobriety test results and breathalyzer test results.

{¶21} "The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of this provision. See *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 96 S.Ct. 3074, 3082, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni-Ponce*,

422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975)." *Whren v. United States* (1996), 517 U.S. 806, 809-810.

{¶22} In our view appellant's argument was considered and rejected by the Ohio Supreme Court in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539. The court in *Mays* resolved a conflict between judgments of the Fifth District and Third District Courts of Appeals on the issue: "May a police officer who witnesses a motorist cross a right white edge line and *without any further evidence of erratic driving or that the crossing was done in an unsafe manner* make a constitutional stop of the motorist?" (Emphasis added.) *Mays* at ¶ 1. The *Mays* court answered the question in the affirmative. Id.

{¶23} The facts considered in *Mays* are indistinguishable from those at bar: a highway patrol officer saw the defendant's vehicle "drift across the white fog line by approximately one tire width. A few moments later, he observed the same thing: the vehicle drifted across the right fog line by approximately a tire width and then drifted back into the lane." *Mays* at ¶ 2.

{¶24} As here, the constitutionality of the vehicle stop in *Mays* directly affected a prosecution for OVI. During the course of the traffic stop, the trooper observed signs of intoxication of the defendant motorist, conducted field sobriety tests, and arrested the defendant for both OVI and marked lane violations. *Mays* at ¶ 3.

{¶25} The *Mays* court found the facts supported a reasonable and articulable suspicion that the defendant had violated R.C. 4511.33. *Mays* at ¶ 21. The court

specifically rejected a claim that inadvertent movement out of lane without more does not present a violation of R.C. 4511.33. The *Mays* court cited the Seventh District Court of Appeals' decision in *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053 with approval and held that compliance with R.C. 4511.33(A)(1)'s requirement of remaining in marked lanes "as nearly as is practicable" is not discretionary under the statute. *Mays* at ¶ 18-19. "[T]he phrase requires the driver to remain within the lane markings unless the driver cannot reasonably avoid straying." *Mays* at ¶ 18.¹

{¶26} To the extent appellant argues that this court's decision in *State v. Downs*, 6th Dist. No. WD-03-030, 2004-Ohio-3003 supports a different result, *Downs* was decided prior to the Ohio Supreme Court's decision in *Mays* and we can find no basis to distinguish the *Mays* decision in this case. The Third District Court of Appeals' decision in *State v. Phillips*, 3d Dist. No. 8-04-25, 2006-Ohio-6338, on which appellant also relies was overruled in *Mays*. *Mays* at ¶ 1. *Phillips* was the conflicting case upon which conflict jurisdiction in the Ohio Supreme Court was based in *Mays*. *Id.*

{¶27} Accordingly, we conclude that appellant's contention that inadvertent crossing of lane lines does not, by itself, constitute a violation of R.C. 4511.33 is without merit. Under *Mays*, Trooper Layson held a reasonable articulable suspicion of a violation of R.C. 4511.33 by appellant and a constitutional basis for the vehicle stop. We find the First Assignment of Error is not well-taken.

¹The court followed the analysis in *Hodge* that "[t]he logical conclusion is that the legislature intended only special circumstances to be valid reasons to leave a lane, not mere inattentiveness or carelessness." *State v. Hodge* at ¶ 43.

Field Sobriety Testing

{¶28} Under the Second Assignment of Error, appellant argues that the trial court erred in overruling the motion to suppress evidence of the one leg stand and the walk and turn field sobriety tests of appellant. Appellant argues the state failed to demonstrate that the field sobriety testing was conducted in substantial compliance with the National Highway Traffic Safety Administration ("NHTSA") guidelines.

{¶29} R.C. 4511.19(D)(4)(b) allows for the admissibility of field sobriety test results "if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered * * *." Under the provision, "the arresting officer no longer needs to have administered field sobriety tests in strict compliance with testing standards for the test results to be admissible at trial." *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶ 9; *State v. Matus*, 6th Dist. No. WD-06-072, 2008-Ohio-377, ¶ 20. Evidence of the testing standard employed in the field sobriety test must be presented in order for a court to find substantial compliance under R.C. 4511.19(D)(4)(b). *State v. Sabo*, 6th Dist. No. L-08-1452, 2009-Ohio-6979, ¶ 37; *State v. Matus* at ¶ 21. "Part of the state's burden 'includes demonstrating what the NHTSA requirements are, through competent testimony and/or introducing the applicable portions of the NHTSA manual.' *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201." *State v. Matus* at ¶ 21. See *State v. Nickelson* (July

20, 2001), 6th Dist. No. H-00-036; *State v. Purdy*, 6th Dist. No. H-04-008, 2004-Ohio-7069, ¶ 27-28.

{¶30} Although the state trooper who administered the field sobriety tests testified at the hearing on the motion to suppress, the record does not include testimony or exhibits sufficient to establish the applicable NHTSA testing standards. The NHTSA manual was not entered into evidence at the suppression hearing. The trial court specifically declined to take judicial notice of NHTSA standards in its judgment ruling on the motion to suppress.

{¶31} Without evidence to establish the NHTSA requirements for the field sobriety tests, the trial court lacked a basis on which to determine whether the tests were administered in substantial compliance with NHTSA testing standards. As such a showing is required by R.C. 4511.19(D)(4)(b) to permit admission of test results into evidence, we conclude that appellant's Second Assignment of Error is well-taken and the results of the field sobriety tests should have been suppressed. We also conclude, however, that the error was harmless.

Probable Cause to Arrest

{¶32} Where a trial court erroneously fails to suppress results of field sobriety tests but probable cause to arrest is shown nevertheless to exist without consideration of the test results, the error is deemed harmless. *State v. Matus*, at ¶ 27; *State v. Purdy*, at ¶ 28-30; *State v. Nickelson*, *supra*. Evidence of observations of a driver's performance of the suppressed field sobriety tests is admissible to determine probable cause to arrest.

State v. Schmitt at ¶ 12-15. As discussed under appellant's Third Assignment of Error, we conclude that there was probable cause to arrest for OVI and that the trial court's error in failing to suppress the two field sobriety tests was harmless.

{¶33} Under the Third Assignment of Error, appellant argues that Trooper Layson lacked probable cause to arrest for OVI in violation of R.C. 4511.19(A)(1)(a) and (d).

{¶34} "In determining whether the police had probable cause to arrest an individual for DUI, we consider whether, at the moment of arrest, the police had sufficient 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. *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142, 145; *State v. Timson* (1974), 38 Ohio St.2d 122, 127, 67 O.O.2d 140, 143, 311 N.E.2d 16, 20. In making this determination, we will examine the 'totality' of facts and circumstances surrounding the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703, 710; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111, 534 N.E.2d 906, 908." *State v. Homan* (2000), 89 Ohio St.3d 421, 427 (superseded by statute on other grounds).

{¶35} Trooper Layson testified that appellant smelled of alcohol at the vehicle stop and that appellant admitted to drinking two beers that night at Chuck's. The traffic stop, including the field sobriety tests, was recorded from a camera mounted in the trooper's patrol car. The recording shows that appellant lost her balance repeatedly and was significantly unsteady on her feet. Under the totality of the circumstances, we find

that probable cause existed to arrest appellant without consideration of the results of the field sobriety tests. Accordingly, we find the failure to suppress the two field sobriety tests was harmless error. We conclude that appellant's Third Assignment of Error is not well-taken.

Age of Solutions Used in Instrument Checks

{¶36} By regulation, Ohio Adm.Code 3701-53-04, the Ohio Health Department mandates instrument checks, controls, and certifications of approved evidential breath testing instruments. "The instrument check process involves the use of an alcohol-based solution which is heated in a simulator jar to 34 degrees Celsius plus or minus .2 degrees to simulate the temperature of human breath. The gas generated by the heated solution is then pumped into the breath-testing device in much the same manner as a person would blow into the breath tube." Weiler & Weiler, *Ohio Driving Under the Influence Law* (West Group 2010 Ed.) 199, Section 8.19.

{¶37} The useful life of instrument check solutions is specified by regulation. Ohio Adm.Code 3701-53-04-(E) directs that a bottle of instrument check solution "shall not be used more than three months after its date of first use, or after the manufacturer's expiration date on the approved solution certificate, whichever comes first."

{¶38} Under the Fourth Assignment of Error, appellant argues that the trial court erred in failing to suppress her breathalyzer test results because the date of her breath test was more than three months after the bottle of testing solution was first used to test the device. In response, the state contends that appellant's argument considers the wrong

time period. Under the regulation, calibration solution may be used for a period up to three months as measured from the date of first use to the date the relevant instrument check is performed. The date a driver undergoes a breath test is not part of the calculation.

{¶39} Ohio Adm.Code 3701-53-04(A) provides for instrument checks by senior operators on approved evidential breath testing instruments no less than "once every seven days." This period includes instrument checks "performed anytime up to one hundred and ninety-two hours after the last instrument check." Id.

{¶40} The instrument used in appellant's breath test was checked on May 18, 2009, by senior operator Trooper Scott Gonzales. In conducting the test, Gonzales used an instrument check solution that had first been used on February 23, 2009, (batch 08170, bottle 1319). Accordingly, the test solution remained viable for use on May 18, 2009, as its use was within three months of February 23, 2009.

{¶41} Appellant's breath test was conducted on May 23, 2009. The next instrument check of the breathalyzer device was performed on May 25, 2009. Trooper Layson, also a senior operator, performed that equipment test. She used a new bottle (first use) of solution (batch 08360, bottle 1639) in the test. The May 25, 2009 test showed the machine to be working properly.

{¶42} Here, both equipment checks were conducted using testing solutions that were first placed in use less than three months before the time the equipment checks were performed. Accordingly, the equipment testing solutions complied with the age

limitations for such solutions as specified in Ohio Adm.Code 3701-53-04-(E). We find appellant's Fourth Assignment of Error is not well-taken.

{¶43} We conclude that substantial justice has been afforded the party complaining and affirm the judgment of the Toledo Municipal Court. Pursuant to App.R. 24, we order appellant to pay the court costs of this appeal.

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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.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>.