[Cite as *State v. DeVault*, 2013-Ohio-2942.]

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

State of Ohio — Court of Appeals No. OT-12-027

Appellee — Trial Court No. TRC1101994

v.

Ryan A. Devault — **DECISION AND JUDGMENT**

Appellant — Decided: July 5, 2013

* * * * *

Mark Mulligan, Prosecuting Attorney, and Andrew M. Bigler, Assistant Prosecuting Attorney, for appellee.

Hector G. Martinez, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Ryan DeVault, appeals the judgment of the Ottawa County Municipal Court, convicting him of one count of operating a vehicle under the influence in violation of R.C. 4511.19, a misdemeanor of the first degree.

A. Facts and Procedural Background

{¶ 2} On Saturday, July 23, 2011, just past 8 p.m., Catawba Island police officer Sergeant James Stewart stopped appellant because he observed appellant's vehicle weaving off the right side of the road and then back on top of the center line. Stewart requested that appellant step out of the car with his license and registration. Once out of the car, Stewart observed appellant's glassy, bloodshot eyes and smelled the odor of alcohol on his breath. Appellant admitted to drinking vodka earlier in the day. Stewart communicated the lane violation he observed while trailing appellant's vehicle.

{¶ 3} Shortly thereafter, Stewart asked appellant if he would be willing to take some field sobriety tests, and appellant obliged. Stewart then administered the Horizontal Gaze Nystagmus Test (HGN) as well as a portable breathalyzer test. However, Stewart did not administer either the one-leg-stand test or the walk-and-turn test due to approaching inclement weather. Stewart testified that when he administered the HGN test to appellant he observed a lack of smooth pursuit, onset of distinct nystagmus, and onset of nystagmus prior to 45 degrees in both eyes. The portable breathalyzer test revealed that there were 11.8 grams of alcohol in appellant's blood per 210 liters of breath. Stewart then placed appellant under arrest for operating a vehicle under the influence of alcohol.

{¶ 4} On July 25, 2011, the state filed a complaint against appellant, alleging the charge of operating a vehicle under the influence. Appellant entered a plea of not guilty. Appellant then filed a motion to suppress evidence from the field sobriety test, and

requested an oral hearing. The hearing took place, and the trial court denied the motion to suppress. Appellant then changed his plea to no contest. Appellant was convicted and a judgment entry of sentence was filed.

B. Assignments of Error

{¶ 5} Appellant has timely appealed, raising three assignments of error:

1. The arresting officer lacked reasonable and articulable suspicion to justify an investigatory stop of Mr. DeVault's vehicle, thus implicating the protections of the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the Ohio Constitution.

2. The arresting officer lacked reasonable and articulable suspicion of criminal activity to continue the detention and request Mr. DeVault to exit his vehicle for the purposes of conducting further investigation, including, but not limited to, field sobriety exercises; thus, said evidence was illegally seized by officers and/or agents of the Catawba Island Township Police Department and is the fruit of an unconstitutional search and seizure in violation of the rights guaranteed Mr. DeVault by the Fourth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the Ohio Constitution.

3. The arresting officer did not have probable cause to arrest Mr. DeVault for Operating a Vehicle Under the Influence of alcohol (OVI), to wit, the field sobriety tests were not conducted in substantial compliance

with NHTSA standards, the results should not have been considered, and the remaining evidence did not support probable cause for arrest.

II. Analysis

{¶ 6} When reviewing a trial court's decision on a motion to suppress, we accept the trial court's findings of fact so long as they are supported by credible evidence. In contrast, legal conclusions of the court are shown no deference and are reviewed de novo. *State v. Guysinger*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (4th Dist.1993); *State v. Russell*, 127 Ohio App.3d 414, 416, 713 N.E.2d 56 (9th Dist.1998).

A. Reasonable Suspicion for an Investigatory Stop

{¶ 7} *Terry* stops must be supported by specific and articulable facts that would warrant a man of reasonable caution in the belief that the action taken was appropriate. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Here appellant argues there were no specific, articulable facts. In particular, appellant argues there were no facts that would support a reasonable suspicion of operating a vehicle under the influence. However, in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶16, the Ohio Supreme Court held that a trooper who witnessed a motorist cross a white edge line, without any further evidence of erratic driving or that the crossing was done in an unsafe manner, had reasonable and articulable suspicion that the motorist had violated the marked lanes statute. Notably, R.C. 4511.33, the marked lanes statute, requires a driver to drive a vehicle entirely within a single lane of traffic. Here, the officer observed appellant's vehicle weaving back and forth as well as riding on top of

the center line. Because appellant's vehicle did not stay within a single lane of traffic, there were specific and articulable facts to justify the initial stop of appellant's vehicle; additional suspicion of OVI was not necessary.[1]

{¶ 8} Accordingly, appellant's first assignment of error is not well-taken.

B. Reasonable Suspicion of Activity that Warranted Further Investigation

{¶ 9} Under his second assignment of error, appellant argues the trial court erred in finding that the officer had reasonable and articulable suspicion that appellant was driving under the influence to warrant further holding appellant in order to conduct field sobriety tests. "Because this is a greater invasion of an individual's liberty interest than the initial stop, the request to perform [field sobriety] tests must be separately justified by specific, articulable facts showing a reasonable basis for the request." *State v. Evans*, 127 Ohio App.3d 56, 63, 711 N.E.2d 761 (11th Dist.1998).

{¶ 10} Appellant relies on *State v. Spillers*, 2d Dist. No. 1504, 2000 WL 299550 (Mar. 24, 2000), in support of his argument that the officer lacked reasonable suspicion to conduct field sobriety tests. In that case, Spillers was weaving within his own lane of traffic when the officer pulled him over. Once pulled over, the officer observed glassy, blood shot eyes and smelled an odor of alcohol on defendant's breath. Defendant also admitted to having a few beers. In affirming the trial court's suppression of the field sobriety test results, the Second District concluded that "traffic violations of a de minimis

[1] Appellant argues the officer pulled him over and cited him for R.C. 4511.25, left of center. However, on the ticket the officer wrote marked lanes violation and testified that the reason he pulled appellant over was for a marked lanes violation.

nature are not sufficient, combined with a slight odor of an alcoholic beverage, and an admission to having consumed 'a couple' of beers, to support a reasonable and articulable suspicion of Driving Under the Influence." *Id.* at * 3.

{¶ 11} Similarly, appellant relies on *Whitehouse v. Stricklin*, 6th Dist. No. L-10-1277, 2012-Ohio-1877. There, Stricklin was pulled over for a headlight violation. Stricklin asked permission to get out of his vehicle and then proceeded to hit the headlight causing it to come back on. However, the officer prolonged the stop after smelling alcohol on Stricklin's breath, eventually subjecting him to field sobriety testing. This court held that the factors relied upon were not adequate to support a reasonable suspicion that Stricklin was driving under the influence. *Id.* at ¶ 16. Specifically, we concluded that the there were no other factors, such as erratic driving, that would suggest that Stricklin was intoxicated. *Id.* at ¶ 15.

{¶ 12} We conclude the present case is distinguishable from *Stricklin* and *Spillers* because here the observed traffic violation was not de minimis. Unlike having a headlight out like in *Stricklin*, or weaving slightly within the lane as in *Spillers*, appellant drove his vehicle across the white line and on the side of the road for approximately six seconds. Regardless of whether he drove in that manner because he was inebriated, or because, as he claims, he was distracted by his passengers, his driving coupled with the odor of alcohol on his breath, his glassy and bloodshot eyes, and his admission to drinking gave the officer reasonable suspicion to warrant conducting field sobriety tests.

{¶ 13} Accordingly, appellant's second assignment of error is not well-taken.

C. Lack of Probable Cause for Arrest

{¶ 14} In his third assignment of error, appellant contends that the trial court erred in finding that there was probable cause to arrest him for operating a vehicle under the influence of alcohol because the officer failed to administer all three field sobriety tests, and that the test that was conducted did not comply with The National Highway Traffic Safety Administration (NHTSA) standards, thus making the results inadmissible.

{¶ 15} The results of field sobriety tests are admissible where there is clear and convincing evidence that the officer substantially complied with the standards set forth by the NHTSA. R.C. 4511.19(D)(4)(b). The Ohio Supreme Court has held that the substantial compliance standard only excuses errors which are clearly de minimis. De minimis errors are "minor procedural deviations." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 34, citing *State v. Homan*, 89 Ohio St.3d 421, 732 N.E.2d 952 (2000).

{¶ 16} Appellant first argues that the officer failed to substantially comply by not administering the HGN test in conjunction with the walk-and-turn, and one-leg-stand tests. This issue has previously been addressed in *State v. Markin*, 149 Ohio App.3d 274, 2002-Ohio-4326, 776 N.E.2d 1163 (10th Dist.). In that case, the Tenth District held that a state trooper's failure to administer all three field sobriety tests did not render the results from one test inadmissible. In supporting its decision, the court in *Markin* interpreted the language from *Homan*, *supra*, as revealing that courts look at field sobriety tests in a singular form as opposed to plural when determining admissibility.

Additionally, the *Markin* court found that "The NHTSA Manual does not require that the HGN test, the walk-and-turn test, and the one-leg-stand test each be given for the test results to be a valid indicator of BAC above the legal limit of .10." *Markin* at ¶ 13. The court concluded,

> Although the degree of reliability of the results may increase with the number of standardized field sobriety tests administered, the accuracy of a field sobriety test, or a combination of field sobriety tests, in predicting a BAC above .10 is an issue going to the weight, not the admissibility, of the evidence for each field sobriety test administered in strict compliance with standardized testing procedures. Accordingly, *all three field sobriety tests need not be administered for any one test result, properly administered, to be admissible into evidence for consideration in determining probable cause for arrest.* (Emphasis added.) *Id.* at ¶ 15.

{¶ 17} Appellant also argues that the officer failed to substantially comply with the NHTSA standards by failing to conduct three of the ten administrative procedures associated with the HGN test, specifically, those relating to equal pupil size and resting nystagmus, tracking, and checking for vertical gaze nystagmus. In *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), the Ohio Supreme Court held that to suppress evidence from a warrantless search or seizure, the defendant must first demonstrate a lack of warrant, and secondly raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of

the basis for the challenge. The prosecutor then bears the burden of proof and the burden of persuasion in proving whether there was probable cause for the search or seizure. *Id.* at 218.

{¶ 18} Here, appellant failed in the trial court to state with particularity which provisions of the HGN test were administered improperly. *Compare State v. Nickelson*, 6th Dist. No. H-00-036, 2001 WL 1028878 (July 20, 2001) (suppression of evidence upheld where appellant stated provisions that were administered improperly with particularity and the state failed to meet its burden of proof). In fact, appellant failed to raise any argument regarding an improper HGN test at the trial court. It is well settled that parties cannot raise issues on appeal that were not initially brought in the trial court. *Crape v. City of Toledo*, 6th Dist. No. L-84-026, 1984 WL 7891 (June 1, 1984).

{¶ 19} In addition, at the suppression hearing, Sgt. Stewart testified that he attended several trainings on how to conduct field sobriety tests including the ADAP/NHTSA training. He also testified how to properly conduct an HGN test of which the court took judicial notice without objection. Therefore, in the absence of specific challenges, the state met its burden of proving that the HGN test was properly conducted. Further, the results of the field sobriety and portable breathalyzer tests, in addition to the other facts surrounding the traffic stop, were sufficient to give the officer probable cause to arrest appellant for OVI.

{¶ 20} Accordingly appellant's third assignment of error is not well taken.

III. Conclusion

{¶ 21} For the foregoing reasons, the judgment of the Ottawa County 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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE