[Cite as *Bay Village v. Lewis*, 2006-Ohio-5933.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87416

CITY OF BAY VILLAGE

PLAINTIFF-APPELLEE

vs.

GLENN P. LEWIS, II

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Rocky River Municipal Court
Case No. 05 TRC 4154

BEFORE: Corrigan, J., Celebrezze, Jr., P.J., and McMonagle, J.

RELEASED: November 9, 2006

JOURNALIZED:

[Cite as *Bay Village v. Lewis*, 2006-Ohio-5933.]

ATTORNEY FOR APPELLANT

Shimane K. Smith
James M. Burge Co., L.P.A.
600 Broadway
Lorain, OH 44052

ATTORNEY FOR APPELLEE

Gary A. Hotz
Bay Village Prosecutor
24461 Detroit Road
Suite 209
Westlake, OH 44145

[Cite as *Bay Village v. Lewis*, 2006-Ohio-5933.]
MICHAEL J. CORRIGAN, J.:

{¶ 1} Appellant, Glenn Lewis ("Lewis"), appeals the municipal court's denial of his motion to suppress evidence obtained during a traffic stop. Lewis was initially stopped for traveling 14 miles over the speed limit. Although the police officer intended to issue Lewis a warning, that intention changed when he smelled alcohol on Lewis' breath and noticed Lewis' bloodshot eyes. After Lewis declined to take the Breathalyzer, the police officer administered three separate field sobriety tests to determine if Lewis was fit to drive. Lewis was placed under arrest when he failed the tests.

{¶ 2} After the evidence was presented at the suppression hearing, the municipal court denied Lewis' motion to suppress, specifically finding that the field sobriety tests were administered in substantial compliance with the requirements. Lewis now appeals, citing three assignments of error.

I.

{¶ 3} For his first assignment of error, Lewis argues that the trial court erred in holding that the arrest was lawful when he was held in the back of the police car and not permitted to leave. Although Lewis does not argue that the initial stop was unlawful, he contends that because he told the police officers he wanted to get out of the police car, his continued detention was unwarranted. However, Lewis' argument lacks merit.

{¶ 4} During a traffic stop, Ohio law permits a police officer to ask the driver to sit in the police car "when the officer has 'some reasonable justification [based on safety concerns] or when the detention is * * * a brief procedure employed in a routine traffic stop.'" *State v. Carlson* (1995), 102 Ohio App.3d 585, 595, 657 N.E.2d 591, quoting *United States v. Ricardo D.* (C.A.9, 1990), 912 F.2d 337, 341. The intrusion of asking the driver to sit in the police car to facilitate the traffic stop is considered minimal. *State v. Lozada*, 92 Ohio St.3d 74, 76, 2001-Ohio-149, 748 N.E.2d 520.

{¶ 5} Here, the police officer testified that he smelled alcohol masked by cologne when he approached Lewis. He also testified that Lewis' eyes were bloodshot. Based on these observations, the police officer asked Lewis to sit in the police car while he wrote out a warning ticket. This was a minimal intrusion to facilitate the traffic stop, especially in light of the alcohol odor, bloodshot eyes, and speeding.

{¶ 6} Likewise, simply because Lewis expressed his desire to get out of the police car does not negate the police officer's increased observations that Lewis might be under the influence of alcohol. As Lewis sat in the back of the car, the smell of alcohol increased and the otherwise routine traffic stop changed into a possible arrest for driving under the influence. The distinct odor of alcohol, coupled with Lewis' bloodshot eyes and speeding, justified his continued detention. Thus,

Lewis' first assignment of error is overruled as the police officer had a reasonable suspicion that Lewis was driving under the influence of alcohol.

II.

{¶ 7} Lewis argues in his second assignment of error that the trial court erred by finding that he consented to taking the field sobriety tests when such consent was based on a misrepresentation of the law. In particular, Lewis argues that the police officer told him that if he refused the Breathalyzer test, then the field sobriety tests had to be administered or Lewis would lose his license. Lewis maintains that this alleged misstatement of the law renders any consent to the field sobriety tests involuntary. However, upon review of the record, Lewis' argument lacks merit.

{¶ 8} The police officer specifically testified that it is his practice to ask someone who he believes has been drinking to take the Breathalyzer test and that if that person refuses to take it and the police officer has "enough probable cause," he can ask that person to step out of the vehicle to perform the field sobriety test. Here, Lewis refused to take the Breathalyzer test and consented to the field sobriety tests. There is nothing in the record before this court that suggests Lewis was coerced or threatened in consenting to the field sobriety test and there is no indication that Lewis was under a misapprehension of the law when he agreed to the tests. As the police officer testified, Lewis smelled of alcohol, his eyes were bloodshot, and he had been speeding. These factors constitute "enough probable cause" to

administer the field sobriety tests. Thus, Lewis' second assignment of error is overruled.

III.

{¶ 9} For his third and final assignment of error, Lewis argues that the trial court erred in finding that the police officer strictly complied with the requirements when he administered the field sobriety tests. However, Lewis' argument lacks merit.

{¶ 10} The Ohio Supreme Court held in *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212, 732 N.E.2d 952, paragraph one of the syllabus, that the results of a field sobriety test may serve as evidence of probable cause to arrest when the tests are administered in strict compliance with standardized testing procedures. However, the Ohio legislature amended the law, specifically changing R.C. 4511.19(D)(4)(b) to require only substantial compliance with the testing standards.

{¶ 11} Here, the police officer substantially complied with the testing standards in administering at least two of the three field sobriety tests. The municipal court found, based on the police officer's testimony and explanation of the tests, that the HGN and the one-leg stand tests were conducted in substantial compliance with testing standards. However, without any explanation of the third test, the "walk and turn," the municipal court specifically did not consider the results of that test in its determination of probable cause. Because Lewis' argument that the results of such tests required strict compliance is inaccurate, Lewis' third assignment of error is

overruled and the municipal court's decision denying Lewis' motion to suppress is affirmed.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN, JUDGE

FRANK D. CELEBREZZE, JR., P.J., CONCURS
CHRISTINE T. McMONAGLE, J., CONCURS
WITH SEPARATE OPINION

CHRISTINE T. MCMONAGLE, J., CONCURRING:

{¶ 12} I am in agreement with the majority that there was no error in placing appellant in the police car or in refusing to let him out of the police car (despite his requests) during the period of the initial detention and investigation. I likewise concur that the standard for administration of the field sobriety tests is "substantial

compliance" under R.C. 4511.19, rather than "strict compliance," as articulated in *State v. Homan* (2000), 89 Ohio St.3d 421. I diverge from the majority, however, who find that there was substantial compliance with the NHTSA guidelines for administering the field sobriety tests.

{¶ 13} Important to the analysis of this alleged error is a consideration of the burden of proof on a motion to suppress. In *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, the Ohio Supreme Court held that to suppress evidence obtained as a result of a warrantless search or seizure, the defendant must state the grounds upon which he challenges the search with sufficient particularity to put the State (here, the City) on notice of the basis of the challenge. Once the defendant has made this initial showing, the burden of proof and the burden of going forward rests with the prosecution.

{¶ 14} In this case, appellant's motion to suppress stated grounds with sufficient particularity to notify the City that the defense would claim that the field sobriety tests were not administered in accordance with NHTSA guidelines. Upon that showing, the burden shifted to the City.

{¶ 15} My review of the record indicates that the City failed to present any evidence whatsoever to demonstrate that the field sobriety tests were conducted in either substantial or strict compliance with NHTSA standards. No witness testified as to these guidelines, the City did not introduce the NHTSA manual regarding the tests, nor did any expert testify as to the standards. In short, there is no evidence in

this record by which this court might evaluate whether there was "strict," "substantial," or "no" compliance with the NHTSA standards. *Village of Gates Mills v. Mace*, Cuyahoga App. No. 84826, 2005-Ohio-2191.

{¶ 16} The original requirement of "strict compliance" articulated in *Homan*, supra, was born of a concern that deviation from the standardized testing procedures directly impacts the validity of the test results; i.e., if the test is not administered as specified, the results from the test might well be untrustworthy.

{¶ 17} When the legislature passed R.C. 4511.19 in response to *Homan*, requiring substantial compliance with the NHTSA standards rather than strict compliance, it was clearly not the purpose of the legislature to establish a "close-enough-for-government-work" standard, but, rather, to reduce the possibility that a slavish adherence to the minutae of the protocol might discredit the results of an otherwise clearly valid test. My concern with the opinion of the majority is that there is no evidence whatsoever in the record as to the NHTSA standards, such that an appellate panel might evaluate the nature of the compliance with the protocol.

{¶ 18} Accordingly, the City did not sustain its burden and the results of the field sobriety tests should be suppressed.

{¶ 19} That being said, the remaining inquiry is whether the other factors before the court were sufficient to constitute probable cause, which they were. The officer testified that the appellant had bloodshot eyes and a slight odor of alcohol not immediately detected by him because of the strong smell of cologne, was driving at

an excessive speed, and, most importantly, refused to take a portable breathalyzer test.[1] All of these observations of the officer are admissible facts under Evid.R. 401 and 402, and the inferences that may be drawn from them are more than sufficient for a trier of fact to conclude that the officer had adequate probable cause. *Columbus v. Dials*, Franklin App. No. 04AP-1099, 2006-Ohio-227; *Westerville*, supra.

[1]"Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt***." *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121, 122.