

[Cite as *Cleveland v. Krivich*, 2016-Ohio-3072.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103810

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

JOSEPH KRIVICH

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2015 TRC 32523

BEFORE: Kilbane, J., Jones, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 19, 2016

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MARY EILEEN KILBANE, J.:

{¶1} Plaintiff-appellant, city of Cleveland (“Cleveland”), appeals from the order of the Cleveland Municipal Court granting defendant-appellee Joseph Krivich’s (“Krivich”) motion to suppress the evidence obtained following a traffic stop. For the reasons set forth below, we affirm.

{¶2} On August 12, 2015, Ohio State Highway Patrol Officer Jose Manual Reyes (“Officer Reyes”) stopped Krivich in the area of West 117th Street and Interstate 90 in Cleveland. Officer Reyes subsequently cited Krivich for OVI, in violation of R.C. 4511.19(A)(1)(a), with a refusal to take a Breathalyzer test, and for failure to display headlights, in violation of R.C. 4513.14. On October 21, 2015, Krivich filed a motion to suppress all of the evidence obtained following the traffic stop. In support of his motion, Krivich argued that (1) there was no reasonable suspicion to administer field sobriety tests; (2) the “field sobriety tests were not conducted in compliance with [National Highway Traffic Safety Administration (“NHTSA”)] standards”; (3) there was no probable cause to arrest Krivich; and (4) any statements he made were obtained in violation of Krivich’s rights under the Fifth Amendment to the United States Constitution.

{¶3} The matter proceeded to an evidentiary hearing on November 16, 2015. Cleveland presented the testimony of Officer Reyes. Officer Reyes stated that on the evening of August 12, 2015, he was part of an “OVI unit.” While completing the stop

of another motorist, he observed Krivich's vehicle proceeding southbound on West 117th Street with no headlights on. According to Officer Reyes, Krivich did not stop right way, but eventually pulled into a parking lot.¹ Krivich appeared nervous. Officer Reyes asked Krivich for his driver's license three times, and Krivich "fumbled" in giving it to him. During this interaction, Officer Reyes detected the odor of alcohol on Krivich's breath. He radioed his license plate number to dispatch and turned off the lights of his cruiser in order to administer field sobriety tests. Officer Reyes further testified that he asked Krivich where he had been, and Krivich replied that he and his passenger had been at a baseball game. According to Officer Reyes, Krivich staggered as he got out of his vehicle.

{¶4} Officer Reyes next testified that he has been a state highway patrol officer for 16 years, and when he first became an officer, he had a one week-long course on detecting impaired driving, in accordance with the NHTSA Manual. He was "not sure if they changed [the manual] now," but he has taken various refresher courses. He further testified that he has been administering the standard field sobriety tests, including the horizontal gaze nystagmus "HGN," walk-and-turn test, and one-leg stand. He did not know who promulgated these tests. He also stated that he had not seen the 2013 participant guide for the NHTSA Manual. The manual was not admitted into evidence.

¹Dash-cam video recorded the stop, and the video was played for the trial court but not admitted into evidence. Cleveland initially moved to have the video admitted into the record on appeal, but following the objection of Krivich's counsel, Cleveland has withdrawn that motion. Therefore, the video is not part of the appellate record.

{¶5} Officer Reyes testified that when administering the HGN, he instructs the subject to place his or her arms at their sides. Next, they are to follow the tip of his finger with their eyes, but noted that in training, he was instructed to use a pen to administer this test. The subject is also told not to move his or her head. The officers are also instructed to ask the subject if they wear contact lenses, which could affect the test results. Officer Reyes admitted that he did not do so in this matter. Officer Reyes looks for involuntary jerking at 45 degrees, “when you put your finger all the way to the very end.” According to Officer Reyes, Krivich stopped part way through and staggered. He just stared ahead, and his eyes did not follow the officer’s finger as instructed.

{¶6} Officer Reyes further testified that he explained how to do the walk-and-turn test before he administered it. According to Officer Reyes, Krivich failed to count aloud, and also stopped, stepped off of the line, and staggered. When the officer administered the one-leg stand, Krivich put his foot down and could not follow the officer’s instructions. Officer Reyes therefore determined that Krivich failed the field sobriety tests, and he placed him under arrest.

{¶7} On cross-examination, Officer Reyes admitted that his NHTSA manual training “goes back to 2000, whatever manual was used back then.” He assumed that he had compared the 2000 manual to subsequent versions, but he admitted that he was never trained using the 2006 manual or the 2013 manual. He stated, however, that he

completes yearly training regarding updates. To his knowledge, the only changes in the manual reflect lowered blood alcohol levels for determining impairment.

{¶8} With regard to the HGN test, he admitted that the stimulus should be brought from the center outward in 2-4 seconds, but he stated that he believed he could continue to present the stimulus for a longer time if the nystagmus begins. Officer Reyes also did not know that subsequent to 2009, bloodshot eyes are no longer recognized as a cue for intoxication. In addition, he admitted that in administering the walk-and-turn test, he did instruct Krivich to walk nine steps, heel-to-toe, then turn around and walk back, but he did not demonstrate to Krivich how to complete the turn. He also admitted that he did not time him during the one-leg stand test, and did not instruct Krivich to keep his hands at his side during this test.

{¶9} At the conclusion of the hearing, the trial court stated:

I believe the officer had reason [to stop Krivich]. I believe the officer's testimony. My only concern is about the manual. That is my biggest concern. If there was a manual, supposedly introduced. I'm not a real stickler about that, I'm not. If he said he read the manual, he understood the manual. This is the manual he read and understood and it was applicable to the most recent one, then I have no problem accepting the officer's testimony. He's credible but that wasn't the case. There was no manual. He doesn't know 2000 to present. He hasn't looked at or read any other manual that could possibly get him some updates on. I'm not sure what the updates are for. That's all of them. This is 2008, 2007. I'm just not sure. The only thing I know, unequivocally, is that he took the course in 2000. The NHTSA manual has changed unless — I don't know. It has changed. If he said he had read that or he's familiar with that, he complied with that manual my ruling would be different than it's going to be right now.

I find the argument made by Counsel, that there's no NHTSA manual introduced in this hearing, I'm not real hung up on but since the Officer was

not familiar with the more recent, I have to grant his Motion to Suppress.

* * *

[T]he stop was crystal clear. He had a right to do that. He had a right, as far as I'm concerned * * * to get him out of the car, he smelled alcohol, based on that * * * erratic driving, I think that's enough to get him out of the car but after that, that was it.

{¶10} The trial court granted the motion to suppress in its entirety. Cleveland now appeals and assigns the following error for our review:

Assignment of Error

The trial court erred in finding that there was insufficient evidence to support the admission of any evidence after [Krivich] stepped out of his vehicle.

{¶11} Within its sole assignment of error, Cleveland asserts that the trial court erred in suppressing all of the evidence obtained after the start of the field sobriety tests.

Standard of Review

{¶12} In *Strongsville v. Vavrus*, 8th Dist. Cuyahoga No. 100477, 2014-Ohio-1843, this court set forth the standard of review for reviewing a motion to suppress as follows:

We note that appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In deciding a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Id.*,

citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). The reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, * * * 437 N.E.2d 583 (1982). With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

Id. at ¶ 8.

{¶13} A motion to suppress must state its legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided. *State v. Shindler*, 70 Ohio St.3d 54, 58, 1994-Ohio-452, 636 N.E.2d 319. Once a defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *Middleburg Hts. v. Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 10. In driving-under-the-influence cases, if a motion sufficiently raises an issue involving the applicable regulations, the state must then show substantial compliance with the regulation at issue. *Id.*

{¶14} Under R.C. 4511.19(D)(4)(b), an officer may testify “concerning the results of the field sobriety test” if the officer substantially complies with the testing standards. In order for the results of the field sobriety tests to be admissible, the state must

demonstrate by clear and convincing evidence that the officer performing the testing substantially complied with accepted testing standards. *Gettings* at ¶ 12; *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 42. The state may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual. *Id.*, citing *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 28. *Accord State v. Reddington*, 9th Dist. Medina No. 14CA0064-M, 2015-Ohio-2890, ¶ 19.

Horizontal Gaze Nystagmus Test

{¶15} With regard to the instructions that the officer is to give for the HGN test, the court in *State v. Secoy*, 5th Dist. Muskingum No. CT2008-0065, 2009-Ohio-5100, stated as follows:

According to the NHTSA manual, a police officer should instruct the suspect that they are going to check the suspect's eyes, that the suspect should keep their head still and follow the stimulus with their eyes, and that the suspect should do so until told to stop. After these initial instructions are provided, the officer is instructed to position the stimulus approximately 12 to 15 inches from the suspect's nose and slightly above eye level. The officer is then told to check the suspect's pupils to determine if they are of equal size, the suspect's ability to track the stimulus, and whether the suspect's tracking is smooth. The officer then checks the suspect for nystagmus at maximum deviation and for onset of nystagmus prior to 45 degrees.

Id. at ¶ 16-17. The officer need not read the instructions verbatim from the manual to substantially comply. *State v. Cox*, 5th Dist. Coshocton No. 08 CA0008, 2009-Ohio-1625, ¶ 35; *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 20.

{¶16} As to the results, this court in *S. Euclid v. Bautista-Avila*, 8th Dist.

Cuyahoga No. 102353, 2015-Ohio-3236, observed:

According to the NHTSA Standardized Field Sobriety Testing Appendix A online manual, when testing the HGN, the officer should look for three indicators, “(1) if the eye cannot follow a moving object smoothly, (2) if jerking is distinct when the eye is at maximum deviation, and (3) if the angle of onset of jerking is within 45 degrees of center.” National Highway Traffic Safety Administration, Standardized Field Sobriety Testing, http://www.nhtsa.gov/people/injury/alcohol/SFST/appendix_a.htm (accessed June 22, 2015).

Id. at ¶ 11.

{¶17} In this matter, Officer Reyes did not use a pen or object for the test; instead, he instructed Krivich to follow the tip of his finger with his eyes. Contrary to the NHTSA instructions, there was no instruction that the officer was going to check the suspect’s eyes, that the suspect should keep his head still and follow the stimulus with his eyes, or that the suspect should do so until told to stop. In evaluating the results, there was no indication that the officer positioned the stimulus approximately 12 to 15 inches from the suspect’s nose and slightly above eye-level, and no indication that he checked the suspect’s pupils to determine if they were of equal size. Accordingly, we conclude that the trial court properly found that this test was not administered in substantial compliance with current NHTSA standards.

Walk-and-Turn Test

{¶18} In *Bautista-Avila*, this court stated:

According to the NHTSA manual, “in the Walk-and-Turn test, the subject is directed to take nine steps, heel-to-toe, along a straight line. After taking the steps, the suspect must turn on one foot and return in the same manner

in the opposite direction.” National Highway Traffic Safety Administration, Standardized Field Sobriety Testing, http://www.nhtsa.gov/people/injury/alcohol/SFST/appendiz_a.htm (accessed June 22, 2015).

Id. at ¶ 15.

{¶19} In *Brookpark v. Key*, 8th Dist. Cuyahoga No. 89612, 2008-Ohio-1811, ¶ 89, this court noted that the “walk-and-turn instructions, however, require an officer to demonstrate 3 heel-to-toe steps.” *Accord Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 52 (“[t]he officer is told to demonstrate the instructions to ensure that the suspect fully understands”).

{¶20} Similarly, in *Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, this court stated:

Regarding the walk-and-turn test, the NHTSA manual states that an officer is required to first instruct the suspect of the initial positioning, which requires the suspect to stand with his arms down at his side, and to place his left foot on a line (real or imaginary). The suspect’s right foot is to be placed on the line ahead of the left foot, with the heel of the right foot against the toe of the left foot. The suspect is then told to remain in that position while further instructions are given. These further instructions include the method by which the suspect walks while touching his heel to his toe for every step, counting the nine steps out loud while walking down the line, and making a turn with small steps with one foot while keeping the other foot on the line. The officer is also told to demonstrate the instructions to ensure that the suspect fully understands.

Id. at ¶ 17.

{¶21} In this matter, Officer Reyes testified that when he administered the walk-and-turn test, he explained how to perform the test. However, he did not demonstrate three heel-to-toe steps, and Krivich was not shown how to make a turn with

small steps with one foot, while keeping the other foot on the line. Therefore, although Officer Reyes determined that Krivich made the turn improperly, the trial court properly determined that the city failed to establish substantial compliance with this test.

One-Leg Stand

{¶22} In *Secoy*, 5th Dist. Muskingum No. CT2008-0065, 2009-Ohio-5100, the Fifth District Court of Appeals outlined the NHTSA instructions for the one-leg stand as follows:

With respect to the OLS [one-leg stand] test, an officer is required to “inform suspect that [he] must begin the test with [his] feet together and that [he] must keep [his] arms at [his] side for the entire test. The officer also [must tell] the suspect that he must raise one leg, either leg, six inches from the ground and maintain that position while counting out loud for thirty seconds. * * * NHTSA standards provide that the counting should be done in the following manner: ‘one thousand and one, one thousand and two, until told to stop.’ Further the officer must ‘Tell suspect to [k]eep your arms at your sides at all time and keep watching the raised foot.’” Next, ask the suspect whether they understand. Finally, tell the suspect to begin.

Id. at ¶ 27.

{¶23} As to the results, this court stated:

According to the NHTSA manual, there are four indicators of impairment. These include, “swaying while balancing, using arms to balance, hopping to maintain balance, and putting the foot down.”

Bautista-Avila, 8th Dist. Cuyahoga No. 102353, 2015-Ohio-3236, at ¶ 16.

{¶24} In this matter, Officer Reyes concluded that Krivich failed the one-leg stand because Krivich put his foot down during the test. The record does not demonstrate, however, that Officer Reyes told Krivich that he must raise one leg, either leg, six inches

from the ground and maintain that position while counting out loud for thirty seconds. The record also fails to demonstrate that Officer Reyes instructed Krivich on the manner of counting, or to continue to watch the raised foot. Therefore, the trial court properly concluded that substantial compliance with NHTSA standards was not met as to this test.

{¶25} In accordance with the foregoing, the trial court properly suppressed all of the field sobriety tests. In this matter, Cleveland did not demonstrate by clear and convincing evidence that Officer Reyes performed the tests in substantial compliance with accepted testing standards. The applicable portions of the NHTSA manual were never introduced, and Officer Reyes admitted that his NHTSA manual training “goes back to 2000, whatever manual was used back then.” He assumed that he had compared the 2000 manual to subsequent versions, but he admitted that he was never trained using the 2006 manual or the 2013 manual.

Probable Cause to Arrest

{¶26} Cleveland additionally argues that even if the results of the field sobriety tests are suppressed, the evidence of Krivich’s demeanor, statements, and actions are admissible in order to determine whether he was intoxicated.

{¶27} We note that even where the results of field sobriety tests are properly suppressed, this does not prohibit a police officer from testifying about his observations of a suspect while administering or attempting to administer field sobriety tests.

Gettings, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, at ¶ 27; *Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, at ¶ 57.

{¶28} In *Dedejczyk*, this court observed:

In determining whether the police had probable cause to arrest appellant for OVI, we must determine whether, at the moment of arrest, the police had information sufficient to cause a prudent person to believe that the suspect was driving under the influence. *Id.* at 9. A probable cause determination is based on the “totality” of facts and circumstances within a police officer’s knowledge. *State v. Miller*, 117 Ohio App.3d 750, 761, 691 N.E.2d 703 (11th Dist.1997). While the odor of alcohol, glassy eyes, slurred speech, and other indicia of alcohol use by a driver are, in and of themselves, insufficient to constitute probable cause to arrest, they are factors to be considered in determining the existence of probable cause. *Kirtland Hills v. Deir*, 11th Dist. Lake No. 2004-L-005, 2005-Ohio-1563, ¶ 16.

Id. at ¶ 57; *Accord Bautista-Avila*, 8th Dist. Cuyahoga No. 102353, 2015-Ohio-3236, at ¶ 20.

{¶29} In *Gettings*, this court found that the “test results of the field sobriety tests should have been suppressed, * * * [but the officer’s] observations regarding [Gettings’s] performance are admissible in determining whether [the officer] had probable cause to arrest Gettings.” *Id.* The *Gettings* court then remanded that matter “for a

determination as to whether there was sufficient evidence, without the field-sobriety-test-results, to support Gettings'[s] conviction. *See State v. Purdy*, 6th Dist. Huron No. H-04-008, 2004-Ohio-7069.”

{¶30} In this matter, Officer Reyes testified about the field sobriety tests as well as his observations of Krivich prior to the field testing. He testified that Krivich was driving without his lights on and that he detected the odor of alcohol while speaking with Krivich. The trial court stated:

I believe the officer had reason [to stop Krivich]. I believe the officer's testimony. My only concern is about the manual. That is my biggest concern.

* * *

[T]he stop was crystal clear. He had a right to do that. He had a right, as far as I'm concerned * * * to get him out of the car, he smelled alcohol, based on that * * * erratic driving, I think that's enough to get him out of the car but after that, that was it.

{¶31} Based on the foregoing, it is clear the trial court considered all these factors when it determined that there was insufficient probable cause for the arrest. Therefore, the sole assignment of error is overruled.

{¶32} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 Cleveland Municipal Court to carry this judgment into execution.

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

MARY EILEEN KILBANE, JUDGE

LARRY A. JONES, SR., A.J., and
PATRICIA A. BLACKMON, J., CONCUR