

STATE OF OHIO                    )  
  )ss:  
COUNTY OF MEDINA         )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.       09CA0065-M

Appellee

v.

ANDREW J. JALWAN

APPEAL FROM JUDGMENT  
ENTERED IN THE  
MEDINA MUNICIPAL COURT  
COUNTY OF MEDINA, OHIO  
CASE No.       08TRC08499

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

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BELFANCE, Judge.

{¶1} Appellant-Defendant Andrew J. Jalwan appeals the judgment of the Medina Municipal Court that denied his motion to suppress. We affirm, in part and reverse, in part.

BACKGROUND

{¶2} Jalwan was stopped in the early morning hours of September 28, 2008, by Ohio State Patrol Officer Craig Malone. Trooper Malone stopped Jalwan after observing him commit a lane violation while exiting the highway. Once Trooper Malone spoke with Jalwan, he began to suspect that Jalwan was driving under the influence of alcohol. Trooper Malone determined that the roadway where he initially stopped Jalwan to be unsafe, so he directed Jalwan to drive his vehicle to a nearby business parking lot. Jalwan completed three field sobriety tests and subsequently consented to a breath test. As a result of his performance on these tests and the trooper's observations, Jalwan was cited with operating a vehicle under the influence of alcohol,

operating a vehicle with a prohibited concentration of alcohol in his breath, and a marked lanes violation.

{¶3} On October 24, 2008, Jalwan filed a motion to suppress the tests, the trooper's observations and Jalwan's statements made at the time of the stop. Jalwan argued that Trooper Malone lacked probable cause to arrest him and that the sobriety tests and results should not be admitted due to lack of compliance with applicable standards. The State responded, requesting additional specificity with respect to the alleged lack of compliance. Jalwan filed a court-ordered supplement on November 10, 2008, outlining the alleged violations of the Ohio Administrative Code.

{¶4} The trial court held a hearing on the motion to suppress on December 8, 2008. Trooper Malone was the only witness called and the parties offered as joint exhibits the video taken by the camera in the trooper's patrol car and a copy of the standards for field sobriety tests in effect at the time of the traffic stop.

{¶5} On June 18, 2009, the trial court issued a ruling on the motion to suppress. The trial court suppressed the horizontal gaze nystagmus test, but denied the remainder of the motion to suppress relating to the other field sobriety tests and the breath test. The trial court also held that Trooper Malone had a reasonable, articulable suspicion of criminal activity to justify the stop of Jalwan's vehicle and probable cause to arrest Jalwan for the crimes charged.

{¶6} Pursuant to plea negotiations, Jalwan pled no contest to a violation of R.C. 4511.19(A)(1)(d), operating a vehicle with a prohibited concentration of alcohol in his breath. The trial court found Jalwan guilty and dismissed the remaining charges.

{¶7} Jalwan has appealed the court's ruling on the motion to suppress. Jalwan has assigned one error on appeal in which he argues that: (1) he was arrested without probable cause

and (2) the breath test was not completed in substantial compliance with the regulations of the Ohio Department of Health.

#### STANDARD OF REVIEW

{¶8} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court’s findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10, citing *Ornelas v. United States* (1996), 517 U.S. 690, 699, and quoting *Akron v. Bowen*, 9th Dist. No. 21242, 2003-Ohio-830, at ¶5. A reviewing court accepts the trial court’s findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, this Court will review the trial court’s application of the law to the facts de novo. *Id.* That is to say that this Court will determine whether “the facts [found by the trial court] meet the appropriate legal standard.” (Internal quotations and citations omitted.) *State v. McCoy*, 9th Dist. No. 08CA009329, 2008-Ohio-4947, at ¶4.

#### PROBABLE CAUSE

{¶9} Jalwan contends that Trooper Malone lacked probable cause to arrest him for driving while impaired because the totality of the circumstances does not demonstrate impairment. Specifically, Jalwan argues, inter alia, that he committed a minor traffic violation, that he drove appropriately to the parking lot where the field sobriety tests were conducted, and that he performed satisfactorily on those tests.

{¶10} In order to effectuate an arrest, the arresting officer must have probable cause to believe that the person to be arrested is engaging in criminal activity. (Internal citation omitted.)

*Kurjian* at ¶18, quoting *State v. Tejada*, 9th Dist. No. 20947, 2002-Ohio-5777, at ¶8. An officer possesses probable cause to arrest a person for a violation of R.C. 4511.19(A)(1) when the totality of the circumstances at the time of arrest would lead a reasonable person to believe that the person to be arrested is operating a vehicle while impaired. *Kurjian* at ¶17. The totality of the circumstances includes the officer's observations relating to alcohol consumption as well as the driver's performance on field sobriety tests. *State v. Homan* (2000), 89 Ohio St.3d 421, 427. The officer's observations may include the indicia of alcohol consumption, such as slurred speech, glassy or bloodshot eyes, poor coordination, odor of alcohol, and admission of alcohol consumption. See *State v. Evans* (1998), 127 Ohio App.3d 56, 63, fn. 2.

{¶11} In the instant matter, a video camera mounted in Trooper Malone's patrol car captured his interaction with Jalwan from the time he was originally stopped to his arrest. A copy of the video was admitted into evidence and played during the suppression hearing so that the trial court was able to observe the manner in which Jalwan drove from the highway to the parking lot. The trial court also observed Jalwan's performance on the field sobriety tests in light of the conditions that night and Trooper Malone's directions. At the hearing, Jalwan accentuated various inconsistencies between Trooper Malone's testimony and his observations at the time of the incident as reflected in his report. The trial court had the benefit of the video to resolve the inconsistencies.

{¶12} Unfortunately, the video is not part of the record on appeal. The record on appeal must contain the transcripts of proceedings held in the trial court as well as papers and exhibits filed below. App.R. 9(A). Although Jalwan provided this Court with a copy of the transcript of the suppression hearing, his argument relies heavily on the video of the stop. In order to determine whether the trial court's findings of fact were supported by competent, credible

evidence, *Metcalf* at ¶6, we must be able to review all of the evidence the trial court had before it. Thus, in the absence of portions of the record necessary for our review, we must presume regularity in the trial court's proceedings and affirm its ruling. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, we affirm the trial court's ruling that Trooper Malone had probable cause to arrest Jalwan for operating a vehicle while impaired based on the totality of the circumstances.

#### FAILURE TO COMPLY WITH REGULATIONS

{¶13} Jalwan further argues in his sole assignment of error that the trial court erred in failing to suppress the results of the breath test because the State did not demonstrate substantial compliance with Ohio Department of Health regulations. In particular, Jalwan asserts that the State did not substantially comply with Ohio Adm.Code 3701-53-04(B) and (E), which, at the time of Jalwan's offense addressed instrument checks and recordkeeping with respect to such checks.

{¶14} At the time of the offense, Ohio Adm.Code 3701-53-04(B) provided that an instrument check must be performed on a breath testing machine when the instrument is initially placed into service and when it is placed into service after servicing or after repairs have been made. Paragraph (E) mandated: "[r]esults of instrument checks, calibration checks and records of service and repairs shall be retained in accordance with paragraph (A) of rule 3701-53-01 of the Administrative Code." Ohio Adm.Code 3701-53-04(E). This means that all records of instrument checks, required by that version of the Administrative Code to be performed no less than once every seven days, see Ohio Adm.Code 3701-53-04(A), and records pertaining to the service or repair of the instrument must be retained.

{¶15} Courts apply a burden-shifting procedure to a defendant's challenge to the admissibility of alcohol tests. *Burnside* at ¶24.

“The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion waives the requirement on the state to lay a foundation for the admissibility of the test results. After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance. Hence, evidence of prejudice is relevant only after the state demonstrates substantial compliance with the applicable regulation.” (Internal citations and quotations omitted.) *Id.*

Unlike strict compliance, substantial compliance allows for de minimis errors, such as minor procedural deviations. *Id.* at ¶34.

{¶16} Jalwan raised the issue concerning the breath test in his motion to suppress and further explained his position in his supplement to the motion. Thus, the burden shifted to the State to demonstrate substantial compliance with the applicable regulations. *Id.* at ¶24.

{¶17} Trooper Malone testified on behalf of the State with respect to the instrument check performed on the machine used to test Jalwan's breath alcohol content prior to testing Jalwan. He did not have any records nor personal knowledge concerning prior testing or repair of the machine. He also stated that he had requested the record pertaining to the check performed on the instrument when it was initially placed into service at the patrol post. At the time of the hearing, the record had not arrived from patrol headquarters in Columbus. Over the objection of Jalwan's counsel, the trial court permitted the State to submit the record after the hearing date. The trial court stated that it preferred that the State submit the information along with an affidavit explaining the records. The State ultimately submitted a single document indicating that the machine was tested on the first date it was put into service along with the

printouts from the machine on the day it was first tested. The State did not submit an affidavit or any other explanatory document.

{¶18} On appeal, Jalwan has asserted that the record was not properly authenticated, thus, it was not proper to admit it. The document was filed by the State on December 23, 2008 and was sent to Jalwan’s counsel on the same date. The trial court issued its ruling on the motion to suppress on June 18, 2009. In the interim, Jalwan did not object below to the State’s submission of the record. As a result, he has forfeited the issue on appeal. *Holman v. Grandview Hosp. & Med. Ctr.* (1987), 37 Ohio App.3d 151, 157 (“Issues not raised and tried in the trial court cannot be raised for the first time on appeal.”). Accordingly, the State’s document concerning the initial calibration of the breath-testing machine is properly part of the record. We shall now turn to the substance of Jalwan’s argument with respect to substantial compliance with Health Department regulations.

{¶19} This Court has recently decided a case presenting a similar issue with respect to the Administrative Code. *State v. Russo*, 9th Dist. No. 09CA0009-M, 2009-Ohio-6914. However, that case is factually distinguishable from the case at bar. In *Russo*, we held that the State demonstrated substantial compliance, raising the presumption of admissibility of the breath test, but that Russo failed to rebut the presumption by demonstrating prejudice. *Id.* at ¶¶19-20; but, see, *id.* at ¶¶22-23 (Belfance, J., concurring in part, and dissenting in part). Thus, the results of the test were admissible. *Id.* at ¶13. In *Russo*, the State elicited testimony from the arresting officer concerning his affidavit and certified records demonstrating the calibration of the breath-testing machine twice within days of Russo’s test. *Id.* at ¶19. Here, the State did not present such evidence and only presented a document pertaining to the initial calibration of the machine.

Moreover, unlike the present case, Russo did not contend on appeal that the State had not substantially complied with Ohio Adm.Code 3701-53-04(E).

{¶20} Unlike in *Russo*, at Jalwan's suppression hearing, the State did not produce any records or testimony relative to compliance with Ohio Adm.Code 3701-53-04(B) or (E). The transcript of the hearing reveals that Jalwan objected to the State's failure to present the required calibration records at the suppression hearing because the parties had agreed during a previous hearing that the State would produce those records at the suppression hearing. The State offered the testimony of Trooper Malone, who had only worked at the particular patrol post for three months. Trooper Malone admitted a lack of personal familiarity with the records of the instrument due to his brief period of time at that post and was only able to testify as to the general requirements with respect to calibration and records retention. He had no knowledge of whether the machine had been repaired or serviced and simply knew that it was originally placed in service more than three years prior to the date Jalwan was stopped. Trooper Malone also conceded that he was not the keeper of the records at the patrol post.

{¶21} The documents the State did eventually submit indicate that the instrument was tested on March 17, 2006, the day it was first put into service; but do not indicate that any other tests, calibrations, or repairs were or were not performed from that date to the date of Jalwan's test on September 28, 2008. Ohio Adm.Code 3701-53-04(B) requires that a machine be calibrated after it has been serviced or repaired. The State's document was unaccompanied by any documentation, such as an affidavit, indicating that it was the sole record pertaining to this instrument and that the machine had never been serviced or repaired. Without information as to whether the breath machine had been taken out for service or repairs, the trial court could not determine if the State substantially complied with Ohio Adm.Code 3701-53-04(B).



Additionally, the trial court could not assume that the absence of repair records meant that the machine had not been repaired. Doing so would require the trial court to assume facts not in the record.

{¶22} Nor did the State sustain its burden to demonstrate substantial compliance with its obligation to retain the results of instrument checks, calibration checks, and records of service and repairs as required by Ohio Adm.Code 3701-53-04(E) given that Trooper Malone admitted a lack of personal familiarity with the records of the instrument. Upon submission of the single initial calibration record, without more, the trial court could not know whether that was the only record required to be retained with respect to this breath machine and hence, whether the State demonstrated substantial compliance with Ohio Adm.Code 3701-53-04(E).

{¶23} The State's evidence fell short of demonstrating substantial compliance with the regulations promulgated by the Ohio Department of Health. Because the State submitted a single document without any further explanatory information, the trial court could not determine whether the State substantially complied with Ohio Adm.Code 3701-53-04(B) and Ohio Adm.Code 3701-53-04(E). In light of the State's failure to demonstrate substantial compliance, the burden did not shift to Jalwan to demonstrate prejudice. See *Burnside* at ¶24. Thus, the trial court erred in denying Jalwan's motion to suppress the results of the breath test.

### CONCLUSION

{¶24} Jalwan's sole assignment of error is overruled as to lack of probable cause, but is sustained as to lack of substantial compliance with the Ohio Administrative Code. The judgment of the Medina Municipal Court is affirmed in part and reversed in part.

Judgment affirmed in part,  
reversed in part,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Medina Municipal Court, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

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EVE V. BELFANCE  
FOR THE COURT

MOORE, J.  
DICKINSON, P. J.  
CONCUR

APPEARANCES:

J. JEFFREY HOLLAND, Attorney at Law, for Appellant.

J. MATTHEW LANIER, Prosecuting Attorney, for Appellee.