[Cite as *State v. McCall*, 2015-Ohio-1251.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellant v. ARTHUR MCCALL Appellee	C.A. No. 14CA010582 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 13CR086836

DECISION AND JOURNAL ENTRY

Dated: March 31, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant the State of Ohio appeals from the entry of the Lorain County Court of Common Pleas granting Defendant-Appellee Arthur McCall's motion to suppress. For the reasons set forth below, we affirm.

I.

{¶2} On February 23, 2013, around 6:15 a.m., police received several calls about a dark vehicle stopped at a green light in the northbound lanes of Lorain Boulevard in Elyria near State Route 57. The callers were concerned for the safety of the person in the vehicle as it did not appear the person was moving. Police located the vehicle at Lorain Boulevard and Foster Avenue. The vehicle was in a lane of traffic and was stopped at a green light.

{¶3} The driver, Mr. McCall, was the only person in the vehicle. Officers Patrick Jama and Scott Willis approached the driver's side and Officer Michael Darmstadt approached the passenger's side. Officers Jama and Willis were unable to wake Mr. McCall by calling out to

him or by tapping him. They thus proceeded to pull Mr. McCall out of the car. At that point, Mr. McCall became conscious and grabbed the steering wheel. Notwithstanding, the officers extracted Mr. McCall from the vehicle. Mr. McCall smelled of alcohol, had difficulty maintaining his balance, and had red glossy eyes.

{¶4} The officers handcuffed him, placed him in a cruiser, and transported him to the station. As Mr. McCall had several previous convictions for operating a vehicle while intoxicated, he was informed that if he refused a chemical test, the officers could use reasonable means to ensure that one was obtained from him. Mr. McCall refused a field sobriety test, but initially agreed to a urine screen. However, he ultimately refused to submit to a urine test but, according to the officers, agreed to a blood draw. Mr. McCall was transported to EMH Regional Medical Center where a phlebotomist drew his blood. The blood was tested in a forensics lab with the results concluding that Mr. McCall's blood plasma contained .2655 grams percent alcohol.

{¶5} Ultimately, Mr. McCall was indicted on one count of operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), along with a specification that in the past 20 years he had been convicted of five or more equivalent offenses, one count of operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(f), along with a similar specification, and one count of driving under suspension in violation of R.C. 4510.11(A).

{¶6} Mr. McCall filed a motion to suppress articulating 20 grounds for suppression. The State filed a written response opposing the motion. Only at the hearing did the State assert that Mr. McCall's motion failed to set forth the grounds with particularity. Following the hearing, the trial court allowed both sides to submit additional briefing on the issues.

{¶7} The trial court granted the motion to suppress concluding that, based upon *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the blood draw was impermissible as Mr. McCall did not consent to the blood draw and there were no exigent circumstances justifying the blood draw. Additionally, the trial court concluded that evidence obtained from the blood draw should be suppressed because the State failed to demonstrate substantial compliance with respect to Ohio Admin.Code 3710-53-05 and 3710-53-07.

{¶8} The State has appealed, raising three assignments of error which will be addressed out of sequence to facilitate our review.

II.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED IN GRANTING MCCALL'S MOTION TO SUPPRESS BASED UPON THE TRIAL COURT'S ERRONEOUS DETERMINATION THAT THE BLOOD DRAW PERFORMED UPON MCCALL WAS NOT IN COMPLIANCE WITH REQUIREMENTS OF THE OHIO ADMINISTRATIVE CODE.

{¶9} The State asserts in its third assignment of error that the trial court erred in granting the motion to suppress because it demonstrated substantial compliance with the requirements of the Ohio Administrative Code. Specifically, the State asserts that it substantially complied with the requirements of both Ohio Admin.Code 3701-53-05(C) and 3701-53-07(A). We do not agree that the State substantially complied with Ohio Admin.Code 3701-53-05(C). Accordingly, we see no need to address whether there was compliance with Ohio Admin.Code 3701-53-07(A).

> Appellate review of a motion to suppress presents a mixed question of law and fact. 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. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then

> independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.

(Internal citations omitted.) *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶10} "The General Assembly established the threshold criteria for the admissibility of alcohol-test results in prosecutions for driving under the influence and driving with a prohibited concentration of alcohol in R.C. 4511.19(D)." *Id.* at ¶ 9. R.C. 4511.19(D)(1)(b) states that a "bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to section 3701.143 of the Revised Code." R.C. 3701.143 provides that the director of health "shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood[or] blood serum or plasma[.]" Ohio Admin.Code 3701-53-05 provides the following regulations for the collection and handling of blood and urine specimens:

> (A) All samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable.
>
> (B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic.
>
> (C) Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.
>
> (D) The collection of a urine specimen must be witnessed to assure that the sample can be authenticated. Urine shall be deposited into a clean glass or plastic screw top container which shall be capped, or collected according to the laboratory protocol as written in the laboratory procedure manual
>
> (E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:
>
> (1) Name of suspect;
>
> (2) Date and time of collection;

> (3) Name or initials of person collecting the sample; and
>
> (4) Name or initials of person sealing the sample.
>
> (F) While not in transit or under examination, all blood and urine specimens shall be refrigerated.

"The purpose of these regulations is to ensure the accuracy of the alcohol-test results." *Burnside* at ¶ 21.

> [C]ourts have applied a burden-shifting procedure to govern the admissibility of alcohol-test results. 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.* at ¶ 24. Only clearly de minimis errors or minor procedural deviations from the standard are excusable under the substantial-compliance standard. *Id.* at ¶ 34.

{¶11} The State asserts that Mr. McCall's motion was not particularized enough to put the State on notice of the grounds of the motion to suppress. Thus, citing to *State v. Slates*, 9th Dist. Summit No. 25019, 2011-Ohio-295, the State maintains that it only had to demonstrate in "general terms[] that it substantially complied" with the relevant provisions.

{¶12} Mr. McCall alleged in his motion to suppress that, "Mr. McCall's blood was not drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested as required by [Ohio Admin.Code] []3701-53-05(C)." While the motion also contains numerous other similarly framed alleged violations, we cannot say that the

foregoing sentence did not put the State on notice as to what Mr. McCall was alleging. *See State v. Ragle,* 9th Dist. Summit No. 25706, 2012-Ohio-4253, ¶ 22.

{¶13} The Supreme Court has noted that the language in Ohio Admin.Code 3701-53-05(C) stating that blood "be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant" is a requirement not an advisement. *Burnside* at ¶ 36. Accordingly, where the State fails to demonstrate a solid anticoagulant was used in the blood draw, the State has not demonstrated substantial compliance with Ohio Admin.Code 3701-53-05(C). *Burnside* at ¶ 36; *see also Ragle* at ¶ 22-23.

{¶14} At the suppression hearing, the State submitted a checklist completed during Mr. McCall's blood draw. That checklist included a line that stated "Draw the blood with a sterile dry needle into a vacuum container with anticoagulant (gray top tube)." The box next to that line was checked. Officer Jama testified that the phlebotomist checked and verified the boxes as she went along; however, the phlebotomist testified that the officer present checked the boxes. Irrespective, the form does not indicate that the anticoagulant in the tube was a solid anticoagulant.

{¶15} Officer Jama also testified that, while he provided the phlebotomist with the kit for the blood draw, he did not have personal knowledge of what was in the kit or whether there was anything in the tube prior to the blood draw. While the phlebotomist indicated initially that items on the form were complied with and that there was an anticoagulant in the tube, she shortly thereafter asked that the question be repeated. When the question was repeated, she stated that she did not observe anything in the tube and acknowledged that she just assumed there was something in it.

{¶16} Based on the foregoing, we cannot conclude that the State substantially complied with Ohio Admin.Code 3701-53-05(C) as the State failed to demonstrate that Mr. McCall's blood was drawn into a tube containing a solid anticoagulant. Thus, the trial court did not err in granting Mr. McCall's motion to suppress the evidence obtained from the blood draw. *See Burnside* at ¶ 36. Because we conclude that the State failed to prove that it substantially complied with Ohio Admin.Code 3701–53–05(C), we decline to further address the State's arguments with regard to whether the State complied with Ohio Admin.Code 3701-53-07(A). *See Ragle* at ¶ 23.

{¶17} The State's third assignment of error is overruled.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN GRANTING MCCALL'S MOTION TO SUPPRESS BASED UPON *MISSOURI V. MCNEELY*, 133 S.Ct. 1552 (2013).

ASSIGNMENT OF ERROR II

> THE TRIAL COURT'S CONCLUSION THAT MCCALL DID NOT VOLUNTARILY CONSENT TO THE BLOOD DRAW IS A MISAPPLICATION OF THE LAW TO THE FACTS.

{¶18} The State contends in its first assignment of error that the trial court erred in granting Mr. McCall's motion to suppress based upon the principles outlined in *McNeely*. In its second assignment of error, the State asserts that the trial court erred in concluding that Mr. McCall did not consent to the blood draw. Because we have already concluded that the trial court did not err in granting the motion to suppress the results of the blood draw based upon the State's failure to demonstrate substantial compliance with Ohio Admin.Code 3701-53-05(C), even assuming that the trial court erred with respect to its interpretation of *McNeely* or the issue of consent, the error would be harmless under the circumstances. *See* Crim.R. 52(A). Thus, it is

unnecessary for this Court to analyze the substance of the issues presented by the State in its first and second assignments of error.

III.

{¶19} In light of the foregoing, we affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, 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(C). 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 Appellant.

JULIE SCHAFER
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellant.

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