

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-04-006
- vs -	:	<u>OPINION</u> 11/15/2010
MARILEE A. KOOGLER,	:	
Defendant-Appellee.	:	

CRIMINAL APPEAL FROM EATON MUNICIPAL COURT
Case No. 09TRC4568

Jill N. Allen, Eaton City Prosecutor, 328 North Maple Street, P.O. Box 27, Eaton, Ohio 45320, for plaintiff-appellant

Christopher W. Thompson, 130 West Second Street, Suite 2050, Dayton, Ohio 45402, for defendant-appellee

POWELL, J.

{¶1} The state asks this court to consider whether a law enforcement officer had sufficient justification to conduct field sobriety testing. We find under the totality of the circumstances, the Ohio State Highway Patrol trooper had sufficient

reasonable suspicion of criminal activity to detain the driver and administer field sobriety tests after he stopped the car for a minor nonmoving traffic violation and noticed the driver had glassy bloodshot eyes and an "easily detectable" odor of alcoholic beverage on her breath.

{¶2} A vehicle driven by Marilee Koogler was stopped for a possible window tint violation at 3:00 a.m. on U.S. 127 in Preble County. Trooper Chris Ward talked with her at the driver-side window. He said Koogler's eyes were glassy and bloodshot and her speech was slurred. He smelled "an odor of alcoholic beverage about her breath" when she was talking. The trooper later described the odor as "easily detectable." The trooper said he also smelled an odor of alcoholic beverage on Koogler after she stepped out of the vehicle. He did not ask her if she had anything to drink. Koogler's front-seat passenger, who the trooper said appeared to be intoxicated, was later found to possess what was described as an "open beer" container.

{¶3} The trooper administered field sobriety testing to Koogler. She was charged with two counts of R.C. 4511.19 (OVI), as well as a window tint violation. She moved to suppress all evidence obtained after the stop.

{¶4} The only issue contested by Koogler at the hearing, however, was whether the trooper had reasonable articulable suspicion to justify his conducting field sobriety tests. Eaton Municipal Court granted the motion to suppress, finding "the de minimus traffic violation, coupled with glassy bloodshot eyes and an unspecified odor of alcohol is insufficient justification to conduct field sobriety tests."

{¶5} The state appealed the trial court's decision on the motion to suppress

evidence.¹ Under the first assignment of error, the state challenges the weight of the evidence on the trial court's factual findings for the suppression motion. The state argues in its second assignment of error that the trial court erred in concluding there was insufficient reasonable suspicion for the investigatory detention.

{¶6} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact.² A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence.³ The appellate court then determines as a matter of law, without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard.⁴

{¶7} This court has previously stated that, after a valid stop, a police officer must have a reasonable suspicion of criminal activity to support administering field sobriety tests.⁵ In determining whether there is such reasonable suspicion, an arresting officer must point to specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant the intrusion.⁶ Only when there are no articulable facts which give rise to a suspicion of illegal activity does continued detention to conduct field sobriety tests constitute an illegal seizure.⁷ In determining whether there are articulable facts, the court must look to

1. See Crim.R. 12(K).

2. *State v. Long* (1998), 127 Ohio App.3d 329, 332.

3. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402.

4. *Id.*

5. See *State v. Robbins*, Clermont App. No. CA2002-10-082, 2003-Ohio-4457, ¶8.

6. *State v. Gustin* (1993), 87 Ohio App.3d 859, 860, citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, [internal citations omitted].

7. *Robbins*.

the totality of the circumstances.⁸

{¶18} This court explained in *State of Ohio/City of Fairfield v. Lucking* that the usual physical characteristics of alcohol consumption, such as the odor of alcohol, bloodshot eyes, flushed face, and slurred speech are sufficient to give rise to a reasonable suspicion of criminal activity.⁹ Other factors, such as the time and location of the stop, erratic driving, diminished coordination, demeanor of the driver, and admission of alcohol consumption are also relevant for consideration of whether reasonable suspicion of criminal activity exists in this context.¹⁰

{¶19} The trial court made the following findings in its decision granting Koogler's motion: the trooper noticed an odor of alcohol in the vehicle and on Koogler; the trooper also noted that her eyes appeared glassy; a male passenger in the vehicle had an open container of alcohol and appeared intoxicated; based on these observations, the trooper asked Koogler to step from the vehicle to perform field sobriety tests.

{¶10} We note that the record indicates that the trooper testified at the suppression hearing that Koogler's speech was slurred. A videotape from the trooper's cruiser was viewed at the hearing. While the alleged slurred speech was the subject of considerable questioning by Koogler's counsel, the trial court made no mention of the slurred speech in its decision. We do not know whether the trial court neglected to include the slurred speech in its findings or found not credible that portion of the trooper's testimony.

8. *State v. Freeman* (1980), 64 Ohio St.2d 291.

9. *State of Ohio/City of Fairfield v. Lucking*, Butler App. No. CA2002-12-303, 2004-Ohio-90, ¶9.

10. *Id.*; *State v. Evans* (1998), 127 Ohio App.3d 56.

{¶11} The state specifically argues that the odor of alcohol was not "unspecified" as found by the trial court. We note that these cases usually involve the use of such terms describing the intensity of the odor as "slight," "moderate," or "strong." The description provided here by the trooper was "easily detectable." However, the trooper said he smelled the odor of alcoholic beverage on Koogler's breath when she was talking and also detected it on her when she was outside of the vehicle. Trooper Ward stated, "You could still smell it [alcoholic beverage] outside the vehicle, and better coming directly from her breath."

{¶12} The trooper specifically described an easily detectable odor on Koogler's breath both inside the vehicle and when she was outside of vehicle and not sitting close to the open container of alcohol and the alleged intoxicated passenger. We agree with the state's argument that the trial court's finding of an "unspecified" odor of alcohol was not supported by competent, credible evidence in the record. We sustain the state's first assignment of error.

{¶13} As to the legal conclusion by the trial court, we find the previously mentioned *Lucking* case helpful to our discussion. In that case, the defendant was stopped for driving at night without his vehicle's headlights activated.¹¹

{¶14} The officer in *Lucking* initially observed bloodshot, glassy eyes and slightly slurred speech.¹² The defendant denied drinking. The trooper did not detect what he described as "an odor of alcoholic beverage" until he patted down the defendant who was now outside of the vehicle and away from the cigarette smoke

11. *Lucking*, 2004-Ohio-90 at ¶2.

12. *Id.*

inside the vehicle.¹³

{¶15} The *Lucking* defendant argued no reasonable suspicion existed to ask him to perform field sobriety tests because he was not driving erratically and there was no evidence the officer smelled alcohol before the request to take the tests.¹⁴ This court held there was reasonable suspicion to conduct the field sobriety tests.¹⁵ We found that while several indicia of intoxication may be necessary to support a reasonable suspicion of intoxication, not every factor must be present before the suspicion is reasonable.¹⁶

{¶16} Further, Koogler argues the trooper did not inquire about how long she had been awake or other questions that may have provided reasons other than alcohol consumption why her eyes were glassy and bloodshot. We noted in *Lucking* that glassy, bloodshot eyes are generally accepted as classic indicia of intoxication.¹⁷ The fact that there could have been another explanation for Koogler's glassy, bloodshot eyes does not diminish the relevance of these factors for the question of whether the trooper reasonably suspected she was intoxicated.¹⁸

{¶17} After applying the applicable standard of review for the suppression motion, we conclude that the totality of the circumstances supports a finding the trooper had a reasonable articulable suspicion of criminal activity, which justified the

13. Id. at ¶3, 12.

14. Id. at ¶10.

15. Id. at ¶12.

16. Id. at ¶10, 12.

17. Id. at ¶11.

18. See id.

continued detention to further investigate by conducting field sobriety testing. We sustain the state's second assignment of error and reverse the trial court's grant of Koogler's motion to suppress evidence.

{¶18} Judgment reversed and remanded for further proceedings.

YOUNG, P.J., and RINGLAND, J., concur.