

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 09CA84
 vs. : T.C. CASE NO. TRC0908547
 KATHERINE MORRIS : (Criminal Appeal from
 Defendant-Appellant : Municipal Court)

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O P I N I O N

Rendered on the 16th day of July, 2010.

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Peter R. Certo, Jr., Pros Attorney, City of Beavercreek, Atty.
 Reg. No. 0018880, One South Main Street, Suite 1700, Dayton, OH
 45402
 Attorney for Plaintiff-Appellee

Jon Paul Rion, Atty. Reg. No. 0067020, P.O. Box 10126, 130 W. Second
 Street, Suite 2150, Dayton, OH 45402
 Attorney for Defendant-Appellant

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GRADY, J.:

{¶ 1} Defendant, Katherine Morris, appeals from her conviction
 and sentence for operating a motor vehicle while under the influence
 of alcohol.

{¶ 2} On August 25, 2009, at 1:39 a.m., Ohio Highway Patrol
 Trooper Nathan Stanfield was patrolling northbound I-675 near mile

marker sixteen when he observed Defendant's vehicle move from the middle lane to the right lane without signaling. Trooper Stanfield followed Defendant's vehicle as it exited I-675 and turned right onto North Fairfield Road. After turning onto North Fairfield Road, Defendant's vehicle moved from the far right hand lane to the far left hand lane, across three lanes of traffic, without signaling. Defendant's vehicle then turned left onto Crossing Boulevard, and in the process nearly struck a concrete barrier that divides the eastbound and westbound lanes of Crossing Boulevard. At that point, Trooper Stanfield activated his cruiser's overhead emergency lights and initiated a traffic stop of Defendant's vehicle.

{¶ 3} Upon making contact with Defendant, Trooper Stanfield noticed that Defendant's eyes were glassy and that a strong odor of alcohol was coming from inside Defendant's vehicle. When asked if she had consumed any alcoholic beverages, Defendant admitted drinking two vodka and cranberry juice drinks about an hour earlier.

Defendant also told Trooper Stanfield that she last ate at 7:30 p.m.

{¶ 4} Trooper Stanfield asked Defendant to exit her vehicle and perform several field sobriety tests. On the horizontal gaze nystagmus (HGN) test, Trooper Stanfield noticed six out of a possible six clues of intoxication. On the walk and turn test,

Trooper Stanfield noticed four out of a possible eight clues. On the one-leg stand test, Trooper Stanfield noticed two out of a possible four clues.

{¶ 5} Trooper Stanfield also had Defendant perform two tests not included in the National Highway Traffic Safety Administration tests, an alphabet test and a counting test. Defendant correctly performed the counting test, but not the alphabet test. Defendant was then arrested for operating a motor vehicle while under the influence of alcohol. A subsequent breath test administered to Defendant at the police station yielded a 0.146 result, well over the legal limit.

{¶ 6} Defendant was charged by complaint filed in Fairborn Municipal Court with operating a motor vehicle while under the influence of alcohol, R.C. 4511.19(A)(1)(a), operating a motor vehicle with a prohibited concentration of breath alcohol, R.C. 4511.19(A)(1)(d), and a turn signal violation, R.C. 4511.39(A).

Defendant filed a motion to suppress the evidence, which the trial court overruled following a hearing. Defendant subsequently entered no contest pleas to the charges and a magistrate found Defendant guilty of operating a motor vehicle under the influence of alcohol. R.C. 4511.19(A)(1)(a). The charges of operating a motor vehicle with a prohibited concentration of breath alcohol, R.C. 4511.19(A)(1)(d), and the turn signal violation, R.C.

4511.39(A), were dismissed. The magistrate sentenced Defendant according to law. The trial court adopted the magistrate's decision.

{¶ 7} Defendant timely appealed to this court. The trial court stayed execution of portions of Defendant's sentence pending this appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE OFFICER LACKED REASONABLE SUSPICION TO DETAIN THE APPELLANT AFTER INITIATING A TRAFFIC STOP AS THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT WAS IMPAIRED."

{¶ 9} Defendant does not contest that her initial stop for turn signal violations was lawful. *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431. Rather, Defendant claims that police lacked a reasonable suspicion that she was driving her vehicle while under the influence of alcohol, which is necessary to justify continuing her detention for further investigation for OMVI, and conducting field sobriety tests. *State v. Evans* (1998), 127 Ohio App.3d 56. Stated differently, Defendant argues that police lacked a sufficient basis, a reasonable suspicion that she was operating her motor vehicle while under the influence of alcohol, to justify administering field sobriety tests because the evidence only demonstrates Defendant's consumption of alcohol, not that she was impaired. *State v. Knox*, Greene App. No. 2005CA74,

2006-Ohio-3039. We disagree.

{¶ 10} Defendant relies upon previous decisions of this court wherein we stated that an odor of alcohol, or a slight odor of alcohol, coupled with a de minimus traffic violation, glassy bloodshot eyes, and an admission to having consumed one or two beers, was insufficient to create a reasonable suspicion of driving under the influence and justify the administration of field sobriety tests. *State v. Spillers* (Mar. 24, 2000), Darke App. No. 1504; *State v. Dixon* (Dec. 1, 2000), Greene App. No. 2000-CA-30.

This court has, however, repeatedly held that a strong odor of alcohol alone is sufficient to provide an officer with reasonable suspicion of criminal behavior. See: *State v. Marshall*, Clark App. No. 2001CA35, 2001-Ohio-7081 (and the cases cited therein).

{¶ 11} Here, Defendant was stopped at 1:40 a.m., following two turn signal violations and after she nearly hit a concrete divider while making a left turn from North Fairfield Road onto Crossing Boulevard. When Trooper Stanfield made contact with Defendant he noticed that her eyes were glassy and that a strong odor of alcohol emanated from Defendant's vehicle. Defendant admitted that she had consumed two vodka drinks an hour or so earlier. These facts, considered together, are clearly sufficient to give rise to a reasonable suspicion of criminal behavior, OMVI, and justify conducting field sobriety tests. *State v. Knox*, supra.

{¶ 12} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 13} "THE TRIAL COURT ERRED IN FINDING THERE WAS PROBABLE CAUSE TO ARREST THE APPELLANT."

{¶ 14} Defendant argues that because the horizontal gaze nystagmus (HGN) and one-leg stand tests administered by Trooper Stanfield were not in substantial compliance with National Highway Traffic Safety Administration (NHTSA) standards, the results of those tests were inadmissible, and without those test results Trooper Stanfield lacked probable cause to arrest Defendant for operating her vehicle while under the influence of alcohol.

{¶ 15} In *State v. Reed*, Montgomery App. No. 23357, 2010-Ohio-299, at ¶53, this court observed:

{¶ 16} "The results of field sobriety tests are admissible at trial if the State presents clear and convincing evidence that the officer administered the tests in substantial compliance with National Highway Traffic Safety Administration ('NHTSA') standards. R.C. 4511.19(D)(4)(b); *State v. Schmitt*, 101 Ohio St.3d 79, 801 N.E.2d 446, 2004-Ohio-37; *State v. Davis*, Clark App. No.2008-CA-65, 2009-Ohio-3759. The State can satisfy its burden without explicit testimony from the officer that he or she substantially complied with NHTSA standards in administering the tests. *Davis*. Neither is the State required to actually introduce

the NHTSA manual or testimony concerning the standards, where the record demonstrates, if only by inference, that the court took judicial notice of the NHTSA standards. *State v. Knox*, Greene App. No.2005-CA-74, 2006-Ohio-3039.”

One-Leg Stand Test

{¶ 17} Defendant argues that the State failed to demonstrate that the one-leg stand test was administered in substantial compliance with NHTSA standards because Trooper Stanfield’s testimony fails to demonstrate that he gave Defendant instructions for that test, or that he accurately timed the test, which according to the NHTSA manual should take exactly thirty seconds

{¶ 18} Trooper Stanfield testified at the suppression hearing that he was trained at the Ohio Highway Patrol Academy on the NHTSA manual. Trooper Stanfield explained in detail how he administered each of the three NHTSA field sobriety tests, including screening questions he asked, demonstrating how to perform the test, what he was looking for, and how and why Defendant failed each test.

In his testimony Trooper Stanfield indicated that he had Defendant assume an instructional position, toes and heels together, hands down by her side, standing straight upright, prior to starting the test, and that he did not make any observations about Defendant’s balance during the instruction portion of the test.

That testimony clearly implies that Trooper Stanfield did give

instructions to Defendant on how to perform the test. Furthermore, Trooper Stanfield testified that he demonstrated for Defendant how to perform the test, and that the test lasted thirty seconds.

The evidence presented is sufficient to demonstrate substantial compliance with NHTSA standards for the one-leg stand test.

HGN Test

{¶ 19} Defendant argues that the horizontal gaze nystagmus test was not administered in substantial compliance with NHTSA standards because Trooper Stanfield did not give Defendant any instructions for that test, and failed to follow the correct procedures when checking Defendant's eyes for nystagmus prior to forty-five degrees. We have reviewed Trooper Stanfield's testimony regarding how he administered the HGN test, and have compared that to the standards for that test set out in the NHTSA manual. Despite the lack of testimony by Trooper Stanfield about whether directions were given to Defendant for the HGN test, and whether Trooper Stanfield paused upon seeing nystagmus prior to forty-five degrees to verify whether the jerking of the eye continued, the evidence presented nevertheless demonstrates substantial compliance with NHTSA standards for the horizontal gaze nystagmus test.

Probable Cause To Arrest

{¶ 20} Even assuming *arguendo* that the horizontal gaze nystagmus test was not administered in substantial compliance with

NHTSA standards, and therefore that the results of that particular test were inadmissible, Trooper Stanfield nevertheless had ample probable cause to arrest Defendant for OMVI based upon the totality of the other facts and circumstances. *State v. Homan*, 87 Ohio St.3d 421, 2000-Ohio-212. Those facts and circumstances included Defendant's crossing three lanes of traffic without signaling, nearly striking a concrete median when making a left hand turn, her glassy eyes, a strong odor of alcohol coming from Defendant's vehicle, an admission that Defendant had consumed two drinks containing vodka, the last of which was just one hour earlier, and Defendant's failure to correctly perform the walk and turn and one-leg stand tests, which were administered in substantial compliance with NHTSA standards.

{¶ 21} Defendant's second assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. And FROELICH, J., concur.

Copies mailed to:

Peter R. Certo, Jr., Esq.
Jon Paul Rion, Esq.
Hon. Beth W. Root