[Cite as *State v. Harrington*, 2016-Ohio-4930.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellant,	:	Case No. 16CA2
vs.	:	
EDWARD HARRINGTON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

Justin Lovett, Jackson County Prosecuting Attorney, and Pat Story, Jackson County Assistant Prosecuting Attorney, Jackson, Ohio, for Appellant.

C. Michael Moore, Jackson, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-29-16

ABELE, J.

{¶ 1} This is an appeal from a Jackson County Common Pleas Court judgment that granted a motion to suppress evidence filed by Edward Harrington, defendant below and appellee herein. The State of Ohio, plaintiff below and appellant herein, assigns the following error for review:

> "THE TRIAL COURT, THE JACKSON COUNTY COURT OF COMMON PLEAS, ERRED BY PARTIALLY GRANTING HARRINGTON'S MOTION TO SUPPRESS AND EXCLUDING THE RESULTS OF A BREATH TEST OF HARRINGTON AND BY EXCLUDING THE RESULTS OF FIELD SOBRIETY TESTS OF HARRINGTON."

{¶ 2} On December 5, 2012, Ohio State Highway Patrol Trooper Benjamin Wallace encountered appellee after receiving a report that appellee's vehicle had broken down on the side of a road. When Trooper Wallace approached the vehicle, he noticed "a lot of empty beer bottles in the back of [appellee's] truck." Appellee informed the trooper that his vehicle ran out of gas while driving home. Trooper Wallace offered to drive appellee to a gas station. Appellee exited the vehicle, and the trooper "noticed that [appellee] was leaning into his vehicle * * * pretty much holding himself up." The trooper believed that appellee "was having difficulty standing up." As Trooper Wallace spoke with appellee, the trooper noticed an odor of alcohol. The trooper asked appellee whether he had been drinking, and appellee admitted that he had "too many."

{¶ 3} Trooper Wallace then decided to conduct field sobriety tests. Afterwards, he determined that appellee had been operating a motor vehicle while under the influence of alcohol.

{¶ 4} On December 28, 2012, a Jackson County grand jury returned an indictment that charged appellee with driving while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a). The incident further alleged appellee had been found guilty of five prior R.C. 4511.19 violations within the past twenty years.

{¶ 5} On May 30, 2014, appellee filed a combined motion to suppress evidence and motion in limine. Appellee requested the trial court to suppress, inter alia, evidence regarding the field sobriety tests and the subsequent breath alcohol tests.

{¶ 6} On August 22, 2014, the trial court held a hearing to consider appellee's motion to suppress. Trooper Wallace testified that he first administered the horizontal gaze nystagmus (HGN) test to appellee. Trooper Wallace explained the procedure that he used to administer the test: "I placed my finger * * * twelve to fifteen inches from his eyes. I made sure he didn't have

any resting nystagmus and then I * * * we do that just to make sure that there's no head trauma or anything then I did conduct the test and I did get six clues out of six clues that * * * are presented in the test." The trooper stated that one of the six clues is "lack of smooth pursuit." Trooper Wallace did not, however, testify regarding the recognized standards for administering the HGN test.

{¶ 7} Trooper Wallace testified that he next intended to administer the walk-and-turn test to appellee. The trooper explained, however, that as he started to give appellee the instructions, appellee "was having extreme difficulty standing up on his own so the test was stopped at that time." Trooper Wallace also explained and demonstrated the one-leg stand test for appellee. As with the walk-and-turn test, the trooper did not request appellee to perform the test because he had difficulty balancing.

{¶ 8} Trooper Wallace testified that after he arrested appellee, they returned to the patrol post where the trooper administered a BAC DataMaster breath alcohol test. Appellee's test result was .166.

{¶ 9} On cross-examination, Trooper Wallace admitted that if a BAC DataMaster indicates a "pump error," the instrument is immediately taken out of service. The trooper stated that he would question the reliability of a test from a machine that had indicated a pump error and that had not been properly serviced. Following Trooper Wallace's testimony, the state rested.

{¶ 10} Appellee presented testimony from Ohio State Highway Patrol Sergeant Michael McManus. Sergeant McManus testified that if an instrument check falls outside the acceptable tolerance range or indicates a "pump error," the instrument is taken out of service. Sergeant McManus stated that on November 24, 2012, the instrument responded with two "pump error"

results. The following day, the instrument again indicated a "pump error." The sergeant explained that even though the instrument should have been taken out of service after registering the pump errors, it was not. Instead, it was used on December 5, 2012 to measure appellee's breath alcohol content.

{¶ 11} On cross-examination, Sergeant McManus stated that the instrument underwent a calibration check the day before appellee's test and the results fell within the acceptable tolerance range. The sergeant also stated that another check performed on December 11, 2012 also fell within the tolerance range.

{¶ 12} On January 26, 2016, the trial court granted appellee's motion to suppress the results of the breath alcohol test and the field sobriety tests. The court determined that the instrument used to measure appellee's breath alcohol content was not in proper working order. The court found that the tests performed on November 24 and 25, 2012 indicated a pump error, but the instrument was not taken out of service. The court concluded that the failure to service the instrument following the pump errors rendered appellee's test results unreliable. With respect to the field sobriety test standards, the court found that the state failed to introduce any evidence regarding the generally accepted standards. Thus, the court suppressed the field sobriety test results. This appeal followed.

{¶ 13} In its sole assignment of error, the state asserts that the trial court erred by suppressing the results of appellee's BAC DataMaster test and the field sobriety test results.

A

STANDARD OF REVIEW

{¶ 14} Appellate review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. State v. Codeluppi, 139 Ohio St.3d 165, 2014–Ohio–1574, 10 N.E.3d 691, ¶7; State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶40; State v. Burnside, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶8; State v. Moore, 2013–Ohio–5506, 5 N.E.3d 41 (4th Dist.), ¶ 7.

> "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."

Burnside at ¶8 (citations omitted).

B

ALCOHOL TEST RESULT CHALLENGES

{¶ 15} A defendant who wants to challenge the validity of an alcohol test result must first file a motion to suppress. State v. Baker, 2016-Ohio-451, ¶23; State v. Burnside, 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶24. If the defendant challenges the validity of an alcohol test, the state bears the burden to establish that the testing procedures substantially complied with Ohio Director of Health (ODH) regulations. Baker at ¶23; Burnside at ¶24. The substantial compliance standard is limited "to excusing only errors that are clearly de minimis," i.e., irregularities amounting to "'minor procedural deviations.'" Burnside at ¶34, quoting State v. Homan, 89 Ohio St.3d 421, 426, 732 N.E.2d 952 (2000). Once the state shows substantial compliance with the regulations, the test result is presumptively admissible. Baker at ¶23;

Burnside at ¶24. The burden then shifts to the defendant to show prejudice resulting from "anything less than strict compliance." Burnside at ¶24.

C

ALCOHOL TEST ADMISSIBILITY

{¶ 16} R.C. 4511.19(D)(1)(b) governs the admissibility of evidence regarding a defendant's breath alcohol concentration:

> In any criminal prosecution * * * for a violation of division (A) or (B) of this section * * * the court may admit evidence on the concentration of alcohol * * * in the defendant's * * * breath * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. * * *
>
> The 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.

{¶ 17} R.C. 3701.143 grants the ODH the authority to approve techniques or methods to chemically analyzing a person's breath to determine alcohol content. The ODH has approved the BAC DataMaster as a means to test a person's breath-alcohol concentration. Ohio Admin. Code 3701-53-02(A)(1). The regulation requires the breath samples to be "analyzed according to the operational checklist for the instrument being used." Ohio Admin. Code 3701-53-02(D). Additionally, "[a] senior operator" must "perform an instrument check" on the instrument "no less frequently than once every seven days." Ohio Admin. Code 3701-53-04(A). The regulation further specifies that "[a]n instrument check result is valid when the result of the instrument check is at or within five one-thousandths (0.005) grams per two hundred ten liters of the target value for that approved solution." Ohio Adm.Code 3701-53-04(A)(2). If the check falls outside of the specified range, the senior operator must conduct a second test. Id. "If this instrument check

result is also out of range, the instrument shall not be used until the instrument is serviced or repaired." Id. Accord Weiler and Weiler, Ohio Driving Under the Influence Law, Section 8:33 (2015 ed.)

{¶ 18} In the case at bar, the trial court determined that appellee's breath test should be suppressed because it was not conducted in accordance with the BAC DataMaster operational checklist. Ohio Admin. Code 3701-53-02(D). The court found that the operator's manual indicates that if a pump error is displayed, the instrument will not function and that it should be taken out of service. Both Trooper Wallace and Sergeant McManus stated that an instrument that registers a "pump error" should be taken out of service and not used until serviced or repaired. Trooper Wallace indicated that an instrument that registers a "pump error" is taken out of service due to concerns about the instrument's reliability. Here, the trooper's and the sergeant's testimony supports the court's factual finding that the instrument should have been taken out of service once it returned "pump errors." Therefore, we do not believe that the trial court erred by determining that the state failed to establish that appellee's breath test substantially complied with the ODH regulations. Even if the state substantially complied with Ohio Admin. Code 3701-53-02(A) by conducting an instrument check within the seven-day period surrounding appellee's breath test, appellee presented evidence that his breath test was not administered in substantial compliance with Ohio Admin. Code 3701-53-02(A). Consequently, we do not believe that the trial court improperly suppressed the results of appellee's breath-alcohol test. See State v. Jimenez, 6th Dist. Erie No. E-13-030, 2013-Ohio-5469, ¶9 (concluding that trial court did not err by excluding breath test results when "at least nine calibration checks failed in a period of approximately 60 days after [the defendant]'s test").

D

ADMISSIBILITY OF FIELD SOBRIETY TESTS

{¶ 19} R.C. 4511.19(D)(4)(b) governs the admissibility of field sobriety tests and states:

> In any criminal prosecution * * * for a violation of division (A) or (B) of this section, * * * if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:
>
> (I) The officer may testify concerning the results of the field sobriety test so administered.
>
> (ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.
>
> (iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(I) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.

Thus, "the results of the field sobriety tests are not admissible at trial unless the state shows by clear and convincing evidence that the officer administered the test in substantial compliance with NHTSA guidelines." State v. Codeluppi, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶11. If the state fails to introduce evidence of "a reliable field sobriety testing standard, either via testimony or through the introduction of the applicable manual, the state has failed to meet its burden of demonstrating [substantial] compliance." State v. Aldridge, 3rd Dist. Marion No. 9-13-54, 2014-Ohio-4537, ¶18, quoting State v. Kitzler, 3d Dist. Wyandot No. 16–11–03, 2011–Ohio–5444, ¶13. As the Aldridge court explained:

> "'It is only logical that in order to prove substantial compliance with a given standard, there must be at minimum some evidence of the applicable standard for comparative purposes. Accordingly, where the suppression motion raises specific

> challenges to the field sobriety tests, the state must produce some evidence of the testing standards, be it through testimony or via introduction of the NHTSA or other similar manual or both.'
> [Kitzler at ¶13], quoting State v. Bish, 191 Ohio App.3d 661, 2010–Ohio–6604, 947 N.E.2d 257, ¶27 (7th Dist.). 'Testimony about how the trooper performed the field sobriety tests presents only half the picture.' Id., quoting Bish, 2010–Ohio–6604, at ¶28. Without any standards to which to compare the trooper's procedure, it is impossible to determine whether those tests are admissible. Id."

Id. at ¶18.

{¶ 20} While the state may show substantial compliance with standardized field sobriety tests by introducing the NHTSA manual, it need not necessarily introduce the NHTSA manual into evidence in every case. State v. Perkins, 10th Dist. Franklin No. 07AP-924, 2008-Ohio-5060, ¶16; State v. Barnett, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶25. Instead, the state may demonstrate substantial compliance through witness testimony to explain the NHTSA standards and the officer's compliance with those standards. Barnett at ¶23. Thus, "[e]vidence of the NHTSA procedures, either by witness testimony or the manual itself, is sufficient." Id. at ¶25.

{¶ 21} Suppression of field sobriety tests is warranted when the state fails "to present any evidence whatsoever to demonstrate that the field sobriety tests were conducted in either substantial or strict compliance with the NHTSA standards." Gates Mills v. Mace, 8th Dist. Cuyahoga No. 84826, 2005-Ohio-2191, ¶24. Moreover, an officer's testimony that he performed the field sobriety tests according to his training "is not the same as testifying that he administered the tests in substantial compliance with the guidelines set forth in the NHTSA manual." State v. Brown, 166 Ohio App.3d 638, 852 N.E.2d 1228, ¶25 (11th Dist.).

{¶ 22} In the case at bar, the officer explained that he administered the HGN test, but the state did not introduce evidence or testimony to demonstrate the standards applicable to

administering the HGN test. Thus, the state did not show that the officer administered the test in substantial compliance with the NHTSA manual or any other "generally accepted field sobriety tests." R.C. 4511.19(D)(4)(b). The state did not introduce as evidence any reliable field sobriety testing standard to show how the officer's field sobriety testing substantially complied with any recognized guidelines. While the state need not necessarily introduce the NHTSA manual into evidence, "there must be some evidence of the testing standards for comparative purposes." Aldridge at ¶20 (internal quotations omitted). In the case sub judice, the state did not introduce any evidence of the testing standards for comparative purposes. Consequently, the trial court appropriately determined to suppress the results of the HGN test. Furthermore, the trooper stated that he did not request appellee to perform the walk-and-turn test or the one-leg stand test because appellee had difficulty balancing. Given these circumstances, we do not believe that the trial court erred by suppressing the results of appellee's field sobriety tests.

{¶ 23} We recognize that the state complains that the trial court's decision prevents the trooper from testifying regarding his observations of appellee during the encounter. Here, our review of the trial court's decision shows that the court suppressed only the "results" of the field sobriety tests. The court did not mention whether the trooper could otherwise testify regarding his observations.[1] Consequently, because the trial court did not specifically rule on whether the trooper could otherwise testify regarding his observations, we will not address the issue.

[1] In State v. Schmitt, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, syllabus, the court held: "A law enforcement officer may testify at trial regarding observations made during a defendant's performance of nonscientific standardized field sobriety tests."

{¶ 24} We further observe that appellee challenges the trial court's finding that the trooper possessed probable cause to arrest him. Our decision upholding the trial court's decision to grant appellee's motion to suppress renders this issue moot. State v. Hudnall, 4th Dist. Lawrence No. 15CA8, 2015-Ohio-3939, ¶7 ("A[n issue] is moot when a court's determination on a particular subject matter will have no practical effect on an existing controversy."); State v. Moore, 4th Dist. Adams No. 13CA987, 2015-Ohio-2090, ¶¶6 and 7 ("The principle of "judicial restraint" mandates that Ohio courts should not exercise jurisdiction over questions of law that have been rendered moot"; and "an issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question."); Schwab v. Lattimore, 166 Ohio App.3d 12, 2006–Ohio–1372, ¶10 (1st Dist.) ("The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case."). We therefore need not address appellee's probable cause argument. See App.R. 12(A)(1)(c).

{¶ 25} Accordingly, based upon the foregoing reasons, we hereby overrule the state's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[Cite as *State v. Harrington*, 2016-Ohio-4930.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Jackson County Common Pleas Court to carry this judgment into execution.

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

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

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