

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

SEAN LEYDEN

Defendant-Appellee

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JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Craig R. Baldwin, J.

Case No. 16-CA-23

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Municipal Court,
Case No. 15TRC11826

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT:

August 29, 2016

APPEARANCES:

For Plaintiff-Appellant

J. MICHAEL KING
40 West Main Street
Fourth Floor
Newark, OH 43055

For Defendant-Appellee

KEVIN J. GALL
73 North Sixth Street
Newark, OH 43055

Farmer, P.J.

{¶1} On November 21, 2015, at approximately 2:28 a.m., Ohio State Highway Patrol Trooper Neal Everett pulled over a vehicle being operated by appellee, Sean Leyden, for speeding and travelling left of center. Following an investigation wherein Trooper Everett conducted field sobriety tests, appellant was cited for driving while under the influence of alcohol in violation of R.C. 4511.19, speeding in violation of R.C. 4511.21, travelling left of center in violation of R.C. 4511.25, and failure to wear a seat belt in violation of R.C. 4513.263.

{¶2} On January 15, 2016, appellee filed a motion to suppress, claiming Trooper Everett lacked probable cause to place him under arrest and request that he submit to a chemical test. A hearing was held on February 26, 2016. By judgment entry filed April 11, 2016, the trial court granted the motion, finding the trooper did not have probable cause to arrest appellee and request a chemical sample for testing.

{¶3} Appellant, the state of Ohio, filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT ERRED WHEN IT GRANTED THE APPELLEE'S MOTION TO SUPPRESS."

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{¶5} Appellant claims the trial court erred in granting appellee's motion to suppress as there was sufficient probable cause to justify the arrest. We agree.

{¶6} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In

reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning*, 1 Ohio St.3d 19 (1982); *State v. Klein*, 73 Ohio App.3d 486 (4th Dist.1991); *State v. Guysinger*, 86 Ohio App.3d 592 (4th Dist.1993). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams*, 86 Ohio App.3d 37 (4th Dist.1993). Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93 (8th Dist.1994); *State v. Claytor*, 85 Ohio App.3d 623 (4th Dist.1993); *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663 (1996), "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶7} As conceded by appellee and noted by the trial court in its judgment entry filed April 11, 2016, appellee did not challenge the stop or the trooper's right to conduct field sobriety tests. The sole issue was whether Trooper Everett had probable cause to arrest appellee for operating a vehicle while impaired and request a chemical sample for testing. In its April 11, 2016 judgment entry granting the motion to suppress, the trial court concluded the following:

According to the trooper's testimony, the five (5) following factors are present in the instant case:

- 1) erratic driving (speed and left of center);
- 2) condition of the suspect's eyes (bloodshot and "a little glassy");
- 3) slurred speech;
- 4) odor of alcohol coming from the defendant's person (mild); and,
- 5) admission of alcohol consumption (one drink).

The Court also viewed the video recording of the entire interaction between the defendant and the trooper prior to the arrest taking place, which allowed for independent observation of the defendant's performance on the SFST's.

Every probable cause determination is necessarily specific to the facts in evidence, which includes in most cases-as well as the case at bar-testimony and video. After considering the totality of the circumstances, the Court is not convinced that the trooper had probable cause to arrest the defendant for OVI and request a chemical sample for testing. Accordingly, the defendant's motion to suppress is GRANTED.

{¶8} As stated above, the legal determination of probable cause to arrest as applied to the trial court's findings of fact is subject to a de novo standard of review.

{¶9} Probable cause to arrest focuses on the prior actions of the accused. Probable cause exists when a reasonable prudent person would believe that the person arrested had committed a crime. *State v. Timson*, 38 Ohio St.2d 122 (1974). A

determination of probable cause is made from the totality of the circumstances. Factors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, association with criminals, and location. *Katz, Ohio Arrest, Search and Seizure*, Sections 2:13-2:19, at 59-64 (2009 Ed.). As the United States Supreme Court stated when speaking of probable cause "we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life in which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

{¶10} We have consistently pointed out in our review of probable cause issues that the probable cause determination is a subjective decision made by the officer at the scene given the objective facts that he/she perceives. As the trial court's decision indicates, it superimposed its own probable cause determination after hearing Trooper Everett's testimony and reviewing the video recording of the stop.

{¶11} Trooper Everett testified in speaking with appellee, he noticed "his eyes were bloodshot, his speech was a little bit slurred, eyes just appeared to be a little bit glassy as well." T. at 11. There was a mild odor of alcohol about his person. T. at 11-12.

{¶12} Trooper Everett conducted three field sobriety tests: the horizontal gaze nystagmus test, the one leg stand test, and the walk and turn test. On the horizontal gaze nystagmus test, appellee exhibited all six clues. T. at 16. On the one leg stand test, appellee exhibited two clues out of a possible four. T. at 17. On the walk and turn test, appellee exhibited two clues out of a possible eight. T. at 18-19. Trooper Everett asked

appellee if he had any medical conditions that would affect the latter two tests. T. at 34. Appellee indicated he had had a broken leg, but he believed he could do the tests. *Id.* Trooper Everett opined, "[b]ased on the totality of the circumstances, of all the tests, and the things I observed, I believe he was under the influence." T. at 20.

{¶13} The video recording was then played to the trial court. T. at 21; Plaintiff's Exhibit 2. In the video, appellee made two statements relative to the consumption of alcohol: "I may have had too much" and he had consumed three drinks during the evening. On the video, it is impossible to see the results of the horizontal gaze nystagmus test because appellee's back is to the camera. On cross-examination, defense counsel conceded he had to take Trooper Everett's word as true that appellee exhibited all six clues on the horizontal gaze nystagmus test because it was hard to see in the video what Trooper Everett was seeing. T. at 25. As for the other two tests, they are partially visible in the video, but appellee's feet are not always in the camera's view. The record demonstrates not just the five factors found by the trial court cited above, but six out of six clues on the horizontal gaze nystagmus test, appellee's shakiness, and his admission of consuming alcohol.

{¶14} We find the trial court erred in substituting its own judgment on the issue of probable cause. Upon review, we find the trial court erred in granting appellee's motion to suppress.

{¶15} The sole assignment of error is granted.

{¶16} The judgment of the Municipal Court of Licking County, Ohio is hereby reversed, and the matter is remanded to said court for further proceedings consistent with this opinion.

By Farmer, P.J.

Gwin, J. and

Baldwin, J. concur.

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