

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-08-070

Appellee

Trial Court No. 08-TRC-429

v.

Terry L. Rock

DECISION AND JUDGMENT

Appellant

Decided: June 30, 2009

* * * * *

Laura E. Alkire, Assistant Law Director, for appellee.

Timothy H. Dempsey, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Terry Rock, appeals from his conviction for driving while under the influence of alcohol ("DUI"), in violation of Huron Municipal Code 333.01. For the reasons that follow, we affirm.

{¶ 2} Appellant was arrested on April 2, 2008, and charged with DUI and driving left of center in violation of Huron Municipal Code 331.01. On June 3, 2008, appellant filed a motion to suppress arguing that his arrest was the result of an unlawful stop. Following a suppression hearing, the trial court denied appellant's motion. On September 16, 2008, appellant entered a no contest plea to the charge of DUI. The remaining left of center charge was ordered dismissed. Appellant was fined, received a license suspension and was ordered to serve three days in jail. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court erred by denying the motion to suppress.

{¶ 4} "II. The trial court erred by considering testimony regarding the portable breath test (PBT).

{¶ 5} "III. The trial court erred by not allowing testimony regarding the truthfulness of the police officer."

{¶ 6} In his first assignment of error, appellant contends that there was no probable cause to stop him for DUI.

{¶ 7} A stop is constitutional if it is supported by either a reasonable suspicion or probable cause. *Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129. "[T]he concept of an investigative stop allows a police officer to stop an individual for a short period if the officer has a reasonable suspicion that criminal activity has occurred or is about to occur." *State v. McDonald* (Aug. 27, 1993), 11th Dist. No. 91-T-4640. " In justifying the particular intrusion, the police officer must be able to point to specific and

articulable facts which would warrant a man of reasonable caution in the belief that the action taken was appropriate." *Id.*, quoting *State v. Klein* (1991), 73 Ohio App.3d 486, 488. "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881, 95 S.Ct. 2574, 45 L.Ed.2d 607, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889. "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty* (1984), 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317. Because the determination of whether an officer had reasonable suspicion depends on the specific facts of the case, the Ohio Supreme Court has consistently held that the propriety of such a stop "must be viewed in light of the totality of the surrounding circumstances." *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.

{¶ 8} At the suppression hearing, Officer Nathan Orzech testified that he has been a police officer with Huron Police Department for eight years. During that time, he has encountered numerous drunk drivers. He testified that that he was on duty on April 2, 2008, when he saw someone driving a white van, stop at a stop sign, and then make an extra wide, right turn. While turning, the van entered the opposite lane of traffic before the driver corrected himself and resumed travel in the proper lane. Officer Orzech testified that he then began following the van. He watched as the van swerved within its lane. The driver was also alternatively picking up speed and then slowing down. Orzech

testified that he saw the van travel left of center again, forcing a car in the opposite lane to swerve toward the berm. At that point, Orzech activated his overhead lights and stopped the van.

{¶ 9} In that Orzech observed appellant narrowly avoid an accident and commit two traffic offenses, specifically, driving left of center in violation of Huron Municipal Code 331.01, we conclude that Orzech had the requisite reasonable and articulable suspicion to conduct an investigatory stop of appellant's van.

{¶ 10} Next, appellant contends that Orzech lacked probable cause to arrest him for DUI.

{¶ 11} Probable cause for a warrantless arrest is based on "* * * whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed the offense." *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142.

{¶ 12} After stopping the van, Orzech testified that he exited his vehicle and approached the van's driver he identified as appellant, who is a paraplegic. Orzech testified that he immediately detected a strong odor of alcohol emitting from the van. Additionally, appellant's eyes were glassy and his speech was slurred. Appellant told Orzech that he did not think he had traveled left of center but he did acknowledge that he may have alternated his speeds when he was attempting to change radio stations. When asked if he had been drinking, appellant admitted that he had consumed a couple of beers.

Later, he admitted to also consuming whiskey. He told Orzech that he may be "under the influence" but that he did not feel intoxicated and that in his opinion, he could safely drive. Orzech testified that he then administered the horizontal gaze nystagmus test to appellant and appellant displayed six out of six clues of intoxication. Given these facts, coupled with the facts giving rise to Orzech's reasonable suspicion to stop appellant, we conclude that a prudent individual would conclude that appellant had committed the offense of DUI. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 13} In his second assignment of error, appellant contends that the court erred in considering the results of appellant's portable breathalyzer test in determining that there was probable cause to arrest appellant. We reject appellant's arguments for two reasons. First, as outlined above, there was a sufficient basis for probable cause without considering the breathalyzer results. Second, appellant has based this assignment of error regarding the admissibility of portable breathalyzer results on a case, *State v. Derov*, 176 Ohio App.3d 28, that has recently been reversed by the Supreme Court of Ohio. In *State v. Derov*, 121 Ohio St.3d 269, 2009 -Ohio- 1111, the court stated:

{¶ 14} "The record in the trial court concerning the portable breathalyzer test used in this case is not sufficient to support either the statements in the opinion of the court of appeals regarding the use of the portable breathalyzer and the value of its test results or the judgment that the trial court should not have considered the results of the portable

breath test. Accordingly, that portion of the judgment of the court of appeals is reversed, and the cause is remanded to the court of appeals for further proceedings."

{¶ 15} Appellant's second assignment of error is found not well-taken.

{¶ 16} In his third assignment of error, appellant contends that the court erred in not allowing evidence in regarding the credibility of Officer Orzech. On cross-examination, appellant's counsel attempted to question Orzech about a prior disciplinary suspension he had recently served. The state objected on the basis of relevance and the trial court sustained the objection. In its proffer, counsel explained:

{¶ 17} "This officer was- - it was indicated that he had popped a nitroglycerin tablet to beat a blood pressure test and qualify for a wellness credit under the city's health benefits plan. And the investigator's report indicated that he attempted to improperly affect the outcome of a health testing with the intent to alter the results; and he had engaged in conduct to defraud the health screening process. And because of that activity he was suspended for 45 days without pay, and I was going to ask him questions about that."

{¶ 18} The constitutional right of cross-examination includes the right to impeach a witness's credibility. *State v. Green*, 66 Ohio St.3d 141, 1993-Ohio-26; *State v. Younker* (Oct. 4, 2002), 2d Dist. No. 02CA1581, 2002-Ohio-5376; Evid.R. 611(B). Any denial of a defendant's right to full and effective cross-examination of his accuser is the denial of a fundamental constitutional right essential to a fair trial. *State v. Hannah* (1978), 54 Ohio St.2d 84; *Younker*, supra.

{¶ 19} On the other hand, trial courts have wide latitude in imposing reasonable limits on the scope of cross-examination based upon concerns about harassment, prejudice, confusion of the issues, the witness's safety, or repetitive, marginally relevant interrogation. *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 106 S.Ct. 1431. The standard of review for the admission or exclusion of evidence is abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. An abuse of discretion is more than an error in judgment, the term connotes that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. It is within the trial court's broad discretion to determine whether testimony is relevant, and to balance the probative value against the danger of unfair prejudice. *Younker*, supra. We will not interfere with the trial court's decision in those matters absent an abuse of discretion. *Id.*

{¶ 20} In this case, we find no abuse of discretion in the trial court's failure to allow counsel to question Orzech regarding his employment record as such information is unrelated to Orzech's execution of his duties as a police officer.

{¶ 21} Appellant next cites to minor inconsistencies in Orzech's testimony, arguing that he was not a credible witness. However, it is well settled that this court may not substitute its judgment for the trier of fact on issues as to the credibility of witness testimony. *State v. Walker* (1978), 55 Ohio St.2d 208, 212. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 22} On consideration whereof, the judgment of the Huron Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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