

STATE OF OHIO, MONROE COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MO 8
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
KENNETH CUNNINGHAM,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 2007-348.

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee:

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JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: August 21, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Kenneth Cunningham appeals the decision of the Monroe County Common Pleas Court which denied his motion to suppress in a prosecution for operating a motor vehicle while under the influence of alcohol (OVI). Appellant contends that the arresting officer lacked reasonable suspicion to stop his vehicle and then to administer field sobriety tests and thus lacked probable cause to arrest him. He also argues that the state failed to show that the administration of the field sobriety tests or the refrigeration of the calibration solution substantially complied with the pertinent rules. For the following reasons, the judgment of the trial court is affirmed.

#### STATEMENT OF THE CASE

¶{2} On November 10, 2007 at 8:13 p.m., Officer Young, assistant chief of the Woodsfield Police Department, stopped a pick-up truck driven by appellant due to a loud muffler. Appellant could not provide a driver's license. (Tr. 94). Appellant attempted to provide the vehicle's registration by "fumbling" through the contents of the glove box, which he had removed. (Tr. 94-95). The officer saw appellant pass up the registration and then hand over the title to the vehicle. (Tr. 95).

¶{3} The officer noticed a strong odor of alcohol. (Tr. 96). At first, appellant would not look at the officer and stared through the windshield as the officer spoke to him and as he responded. When appellant finally looked over, the officer noticed that appellant's eyes were bloodshot. (Tr. 95). The officer asked appellant to step out of the vehicle for field sobriety testing. (Tr. 97). As he alighted from the vehicle, he knocked over and spilled a nearly full can of beer with his foot. (Tr. 99).

¶{4} The officer testified that during the walk-and-turn test, appellant failed to walk heel-to-toe on any of the nine steps down or nine steps back. (Tr. 102). On the one-leg stand test, appellant could only keep his right leg up for a count of five and could only keep his left leg up for a count of six, when the instructions were to try to

balance for a count of thirty. (Tr. 104). Appellant was then placed under arrest for OVI and transported to the station for a breath test, which registered .168.

¶{5} He was cited for OVI, driving under suspension, operating a vehicle with excess muffler noise, and open container. He was then indicted for various counts of OVI such as fourth degree felony OVI with a specification for this being his fifth OVI in twenty years and third degree felony OVI with a specification for prior felony OVI convictions.

¶{6} Appellant filed a motion to suppress. First, he argued that the officer lacked sufficient cause to stop, to compel field sobriety tests or to further test appellant. Second, he argued that the breath test results were not in compliance with the rules due to various allegations. The only allegation pertinent to this appeal concerns the “calibration sample procedure”. The matter was heard on May 22, 2008.

¶{7} On June 25, 2008, the court denied the motion to suppress. The court found that the officer’s good faith, subjective belief allowed him to stop appellant for the muffler noise, that the officer discovered facts thereafter which allowed him to investigate for OVI, and that this led to probable cause to arrest appellant. Although not raised in the motion, the court found that the field sobriety tests substantially complied with NHTSA standards. Finally, the court concluded that the calibration solution was refrigerated after each use and that the mere possibility of a power outage did not show a lack of compliance with the rule on refrigeration.

¶{8} On July 9, 2008, appellant entered a plea of no contest to OVI in violation of R.C. 4511.19(A)(1)(d), dealing with prohibited concentration of alcohol in breath, and the specification in R.C. 4511.19(G)(1)(e), which increases the offense to a third degree felony due a prior felony OVI conviction. The other OVI charges were dismissed as were the pending traffic citations in the county court case. Appellant was sentenced to three years in prison as recommended by the state in the plea agreement. Appellant filed timely notice of appeal from the September 18, 2008 sentencing entry.

¶{9} Our standard of review on a suppression decision requires us to determine whether the trial court's findings are supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶100. Thus, the

general rule is that the trial court as fact-finder is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. Our only independent determination is whether the trial court applied the appropriate legal standard. *Roberts*, 110 Ohio St.3d 71 at ¶100 (mixed question of law and fact).

#### ASSIGNMENTS OF ERROR NUMBERS ONE & FIVE

¶{10} Appellant's first and fifth assignments of error provide:

¶{11} "THE STATE LACKED PROBABLE CAUSE AND REASONABLE SUSPICION TO DETAIN DEFENDANT FOR OVI OR TO COMPEL SUBMISSION TO THE BAC DATAMASTER TEST RESULTING IN PREJUDICIAL ERROR."

¶{12} "WITH THE EXCLUSION OF IMPROPERLY ADMINISTERED FIELD SOBRIETY TESTS, THE STATE FAILED TO ESTABLISH PROBABLE OR JUST CAUSE TO FURTHER TEST AND DETAIN THE APPELLANT."

¶{13} Appellant first argues that the officer lacked reasonable suspicion to stop his vehicle and that the officer then lacked reasonable suspicion to administer field sobriety tests. The text of the first assignment also mentions probable cause to seek a breath test and thus to arrest for OVI, but no arguments are set forth regarding this topic. His fifth assignment of error raises a lack of probable cause if the field sobriety tests are excluded.

¶{14} Where a police officer has an articulable reasonable suspicion that any offense, including a minor traffic offense, is occurring, the officer is permitted to stop the vehicle, even if the stop is allegedly pretextual. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12. The reasonable suspicion test is met when the officer had before him specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted the stop and detention. *Terry v. Ohio* (1968), 392 U.S. 1, 21-22.

¶{15} Here, appellant contests the stop for a loud muffler and points to the testimony of a mechanic who found the exhaust to be working properly. However, the mechanic testified that the truck was equipped with a non-standard Glasspack performance muffler. (Tr. 82, 85). He opined that he did "not feel" that the muffler was excessively loud, noting that it was not as loud as his own muffler, but then

acknowledging that he had been stopped for his own loud muffler. (Tr. 82-83). He did not drive the subject vehicle on the street and pointed out that the noise level depends on how one drives the vehicle. (Tr. 86). Moreover, he inspected the muffler three or more months *after* the arrest.

¶{16} The arresting officer testified that as he was sitting in the center of town with his vehicle windows up at 8:13 p.m., he heard a “very loud” muffler. He looked up and rolled down his window to find the source of the noise. He spotted the vehicle driven by appellant one hundred feet away. When appellant shifted, the officer heard a loud crackling noise. (Tr. 90-91). The officer pulled out and heard the muffler again as appellant turned a corner and accelerated. (Tr. 91).

¶{17} Essentially, appellant is contesting the officer’s credibility as to whether the muffler noise was excessively loud. Notably, this is not the place to determine if appellant was actually guilty of the noise violation. Rather, we are determining whether a reasonable person would find from all the facts and circumstances whether an investigatory stop was proper. Besides the fact that his own expert’s testimony was not actually that favorable to his position and could be construed in favor of the officer’s position, the court was permitted to believe the officer’s assessment of whether the noise was excessive enough to warrant an investigatory stop. See *State v. Howiler*, 7th Dist. No. 06BE69, 2008-Ohio-1171, ¶24, 26; *State v. Snyder*, 7th Dist. No. 03BE15, 2004-Ohio-3400, ¶5, 7 (both holding that officer’s testimony on loud muffler noise provided reasonable, articulable suspicion for a stop).

¶{18} Thus, we move to appellant’s next argument that the officer had insufficient reasons to seek field sobriety testing. An officer must have reasonable suspicion (not probable cause) to believe a person is under the influence of alcohol in order to administer field sobriety tests. *State v. Keene*, 7th Dist. No. 08MA95, 2009-Ohio-1201, ¶12, citing *State v. Wilson*, 7th Dist. No. 01 CA241, 2003-Ohio-1070, ¶17. The court examines the totality of the circumstances to determine whether reasonable grounds for field sobriety testing existed. *Id.* Although erratic driving is a factor, it is obviously not required as an officer who notices sufficient indicia of intoxication at a standard traffic stop is not precluded from investigating further. See *State v. Maston*, 7th Dist. No. 02CA101, 2003-Ohio-3075, ¶21-22.

¶{19} Here, the officer pulled appellant over for having a loud muffler. It was very loud on acceleration, and the mechanic testified that the muffler is louder *depending on how one drives the vehicle*. (Tr. 86, 91). Appellant could not produce a license. (Tr. 94). He removed the entire contents of the glove compartment and “fumbl[ed]” through them. (Tr. 94-95). The officer noticed him pass right by the vehicle registration, which the officer had requested. Instead, appellant provided the vehicle’s title. (Tr. 95). Initially, appellant would not look at the officer when he talked. Oddly, he stared through the windshield during the conversation. When he finally did turn, the officer noticed that appellant’s eyes were bloodshot. (Tr. 95). In addition, the officer smelled a strong odor of alcohol. (Tr. 96). Also notable here is the time of day, 8:13 p.m.

¶{20} Appellant relies on a case from this district finding a lack of reasonable suspicion to seek field sobriety tests where the defendant was stopped for a loud muffler at 1:05 a.m. See *State v. Reed*, 7th Dist. No. 05BE31, 2006-Ohio-7075, ¶13. In *Reed*, the defendant’s eyes were red, and he admitted drinking two beers earlier in the night. However, the defendant produced a valid license and registration with no coordination problems, and the odor of alcohol was only said to be slight. See *id.*<sup>1</sup>

¶{21} The case at bar is distinguishable as here there is more than a loud muffler, bloodshot eyes and a slight odor of alcohol. In this case, the smell of alcohol was said to be strong. Appellant could not produce a license. He produced a title instead of the registration which he passed right by while “fumbling” through papers. This descriptor is a coordination indicator. Moreover, appellant’s act of staring through the windshield instead of the looking at the person to whom he was speaking was a further indication, in combination with the other facts and circumstances, that investigation was warranted before he was permitted to drive again. All of these facts are sufficient to constitute reasonable suspicion to believe that appellant may have been operating while under the influence of alcohol and to allow the officer to detain the offender in order to administer field sobriety tests.

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<sup>1</sup>Appellant also cites our *Derov* case. See *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672. However, the Supreme Court has reversed and remanded part of that case and ruled that the entire opinion cannot be cited as authority. *State v. Derov*, 121 Ohio St.3d 269, 2009-Ohio-1111.

¶{22} Finally, in determining the existence of probable cause to arrest for OVI, the court must determine whether, at the moment of arrest, the officer had information sufficient to cause a prudent person to believe that the suspect was driving under the influence. *State v. Homan* (2000), 89 Ohio St.3d 421, 427. All of the aforementioned facts and circumstances combined with the occurrences after appellant was asked to exit his vehicle constituted probable cause for arrest for OVI.

¶{23} That is, appellant kicked over a beer on his way out of the vehicle. (Tr. 99). This shows that he had been drinking. This also allows one to infer that appellant's coordination was so impaired that he failed to step over his beer and/or his memory was so affected that he forgot he hid his beer there. Appellant's performance on the field sobriety tests provides further evidence in support of impairment. Specifically, on the walk-and-turn test, he did not touch heel to toe even one time in eighteen steps, even though he had been instructed to do so and the officer had demonstrated the proper walking technique. (Tr. 102). This tends to show a lack of coordination or an inability to follow directions. In addition, on the one-leg stand test, he could keep his right leg up for only five seconds and his left leg up for six seconds, when thirty is the goal. (Tr. 104). This tends to show a lack of balance. These observations combined with the strong smell of alcohol, bloodshot eyes, staring through windshield while talking so as to avoid officer's gaze, fumbling through papers, passing the registration by and providing a title instead provide probable cause to arrest for OVI.

¶{24} As aforementioned, appellant's fifth assignment of error deals with whether there was probable cause if we agree that the field sobriety testing was not warranted or was not properly administered as argued in his second through fourth assignments of error. Regardless of our resolution of the latter assignments, lack of substantial compliance with testing standards goes toward the admissibility of test "results" but would not preclude the officer from testifying as to his observations. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶14-15. See, also *State v. Johnson*, 7th Dist. No. 05CO67, 2007-Ohio-602 ¶25 (even if final result should be suppressed, officer's observations of motions during test are evidence court can consider in probable cause evaluation and are not subject to statutory substantial compliance

test). Thus, the above recitation of the officer's testimony on appellant's performance could be considered in the probable cause evaluation even if testing was not performed in accordance with applicable standards. *Id.*

¶{25} Regardless, appellant's next three assignments of error, concerning the administration of the field sobriety tests, are without merit and do not warrant exclusion of the field sobriety tests.

#### ASSIGNMENTS OF ERROR NUMBER TWO, THREE & FOUR

¶{26} Appellant's second, third and fourth assignments of error provide:

¶{27} "IT IS PREJUDICIAL ERROR TO ADMIT EVIDENCE OF FIELD SOBRIETY TESTS WITHOUT OFFERING THE NHTSA TRAINING MANUAL OR FAILURE OF THE STATE TO REQUEST JUDICIAL NOTICE OF THE METHOD OF PROPER ADMINISTRATION OF NHTSA OR OTHER FIELD SOBRIETY TESTS AND THE FAILURE TO ESTABLISH THAT TESTING WAS PERFORMED IN SUBSTANTIAL COMPLIANCE WITH THESE RULES."

¶{28} "THE STATE FAILED TO ESTABLISH SUBSTANTIAL COMPLIANCE WITH NHTSA STANDARDS IN THE PERFORMANCE OF THE WALK AND TURN TEST AND THE ONE LEG STAND TEST RESULTING IN THEIR INADMISSIBILITY."

¶{29} "IT IS PREJUDICIAL ERROR TO ADMIT EVIDENCE OF A NON-STANDARDIZED FIELD SOBRIETY TEST WITHOUT PROOF OF THE PROPER METHOD OF PERFORMANCE OF SAID TEST."

¶{30} Pursuant to R.C. 4511.19(D)(4)(b), the results of field sobriety tests are admissible if:

¶{31} "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."

¶{32} Appellant argues that the state failed to show substantial compliance with NHTSA standards because the state failed to submit the NHTSA manual and failed to ask the court to take judicial notice of the manual.

¶{33} Contrary to this blanket statement, the state did provide the court with the entire NHTSA manual on CD-ROM. See State's Exhibit No. 6. The state also submitted a print-out of the relevant chapter in its post-trial brief. Counsel objected to the CD-ROM below on the grounds that this manual was the 2000 edition and two editions were printed after this edition. (Tr. 128). The state argued that the defendant would have the burden to show any relevant differences and noted that the Eighth District has found no pertinent differences in the 2000 and 2004 editions.

¶{34} Appellant makes no argument on appeal regarding the edition submitted. The state reiterates its argument that the manual is not different regarding the particular issue at bar: instructions for performing the one-leg stand and the walk-and-turn tests. See *City of Brookpark v. Key*, 8th Dist. No. 89612, 2008-Ohio-1811 (no substantial difference in 2000 edition and 2004 edition on instructions for walk-and-turn and one-leg stand).

¶{35} In addition, the state submitted a form checklist with instructions for the field sobriety tests, which had been printed off the police department's website and which had been received from the NHTSA. The form says, "Information obtained by www.nhtsa.gov". There was no objection to this form, and its submission was proper in any case as it was the same form used by the arresting officer. (Tr. 98, 102). The officer testified that he read the instructions from the form and demonstrated the test. He then recited the instructions at trial as to each test. (Tr. 101-103). Moreover, the chief testified that the officers regularly print the forms off the internet. (Tr. 64). There was and is no contention that the form does not coincide with the most recent manual.

¶{36} In any event, as the state points out, the suppression motion did not raise any issue regarding the propriety of the field sobriety testing procedures. The first branch of the motion alleged insufficient cause to stop, detain, or compel field sobriety tests or other tests. The second branch of the motion alleged that the breath test results were not in accordance with Department of Health rules.

¶{37} In *Keene*, we found a failure to shift a burden or the imposition of only a general burden where there were only general claims of noncompliance with NHTSA standards. *Keene*, 7th Dist. No. 08MA95 at ¶33-35, citing *Johnson*, 7th Dist. No. 05CO67 at ¶9 (characterizing this as an attempt to blindside the prosecution) and

*State v. Arnold*, 7th Dist. No. 05CO60, 2006-Ohio-5228, ¶10-12 (defendant should have alleged facts in his motion as to how officer instructed him to perform the tests and how they did not comply with standards).

¶{38} Here, the suppression motion contained absolutely no claims of noncompliance with the standards for field sobriety testing; the only reference to field sobriety tests was regarding the argument of insufficient cause to administer the tests. Thus, appellant failed to shift the burden to the state to prove compliance regarding field sobriety testing. See *State v. Shindler* (1994), 70 Ohio St.3d 54, 58 (“the defendant must state the motion’s legal and factual bases with sufficient particularity to place the prosecutor and court on notice of the issues to be decided”); Crim.R. 47 (a motion to suppress must state with particularity the grounds upon which it is made). Accordingly, these assignments of error are overruled.

#### ASSIGNMENT OF ERROR NUMBER SIX

¶{39} Appellant’s final assignment of error alleges:

¶{40} “THE ADMISSION OF BREATH TEST RESULTS WITHOUT EVIDENCE OF PROPER REFRIGERATION OF THE CALIBRATION SOLUTION DOES NOT CONSTITUTE SUBSTANTIAL COMPLIANCE WITH OHIO HEALTH DEPARTMENT RULES AND REGULATIONS AND MUST BE SUPPRESSED.”

¶{41} Pursuant to Ohio Administrative Code 3701-53-04(C), “After first use, instrument check solutions shall be kept under refrigeration when not being used.” See O.A.C. 3701-53-04(E) (for current version). Appellant argues a lack of substantial compliance with this requirement because there was no evidence regarding the temperature of the refrigerator and there was no guarantee that power outages had not occurred at the police station.

¶{42} The state first responds that the suppression motion raised only a general challenge and did not specifically mention refrigeration. The motion stated: “calibration sample procedure is defective and not in accordance with procedures and regulations of the Department of Health.” The state points to our holding that the issue of refrigeration must be properly raised in a suppression motion before the burden shifts to the state. *State v. Hull*, 7th Dist. No. 02CA147, 2003-Ohio-5306, ¶6-8 (a case finding that defendant did properly raise the issue of refrigeration in his

suppression motion). As suggested by the state, an allegation of a defective “calibration sample procedure” would lead a prosecutor to believe that the defendant is contesting the method of using the sample to calibrate the machine, rather than the storage of the calibration solution.

¶{43} In any event, the state set forth evidence from three officers that the calibration solution was stored in the refrigerator. Two senior operators testified that the solution was refrigerated at all times. (Tr. 34, 50). The calibration checklists before and after appellant’s breath test show that the solution had been refrigerated prior to the test. The refrigerator is located right under the breath test machine. (Tr. 35, 60). The chief testified that the refrigerator has been in working order and that it keeps things cool. (Tr. 61). He opined that the operators would have noticed if the refrigerator had not been working each time they utilized the solution for calibration. (Tr. 62). He also noted that the refrigerator, which is only twenty inches high, has a small ice compartment. (Tr. 60).

¶{44} Appellant makes much of the following testimony. Officers keep soft drinks in the refrigerator from time to time. (Tr. 36-37). The operators do not look at the thermometer located in the refrigerator to ensure it is working. (Tr. 40, 50, 62). The power does go off at the police station from time to time, and there is no backup for the refrigerator. (Tr. 41).

¶{45} However, the rules do not require a dedicated unit. In fact, the keeping of drinks in the same refrigerator would allow more frequent checking on whether the refrigerator was keeping items cold. Likewise, the rules do not mandate a certain temperature range. See O.A.C. 3701-53-04(C); *State v. Chrzanowski*, 11th Dist. No. 2008-P-0001, 2008-Ohio-6993, ¶50 (no temperature range requirement), citing *State v. McCardel*, 11th Dist. No. 2008-P-0093, 2008-Ohio-6993; *State v. Wyatt*, 12th Dist. No. CA2008-01-013, 2008-Ohio-5667, ¶24 (court cannot usurp Department of Health by imposing certain temperature requirement).

¶{46} Moreover, an officer and the chief testified that they were not aware of any power outage between the date this solution was first used on September 12, 2007 (and thus first refrigerated) and the date of the calibration performed the week after appellant’s breath test. (Tr. 42, 62-63). Appellant believes that just because two

individuals did not notice a power outage does not mean there was not one. However, the state met its minimal burden to show refrigeration after first use. See *State v. Bhatt*, 7th Dist. No. 03MA44, 2003-Ohio-7009, ¶12 (the burden on the state to show substantial compliance with the refrigeration requirement is minimal).

¶{47} The state was not charged with the burden to show there has never been a power outage during the time period the solution has been in the refrigerator. The defendant was permitted to show such fact, but he did not. We do not presume power outages; nor do we presume that a possible power outage would have been long enough to cause the solution to somehow be affected. As the state notes, items can stay cold during a power outage for some time, especially considering the fact that the small unit has a freezer section. After the state met its burden to show refrigeration, any burden to show refrigeration problems was on the defendant by putting on actual evidence, not by asking the court to engage in mere speculation. See *Chrzanowski*, 11th Dist No. 2008-P-0001 at ¶52-54, citing *McCardel*, 11th Dist. No. 2008-P-0093.

¶{48} Consequently, we conclude that the evidence presented by the state showed substantial and even strict compliance with the rule requiring refrigeration of the solution after first use. As such, this assignment of error is overruled.

¶{49} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.