

[Cite as *State v. Kale*, 2009-Ohio-6530.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	CASE NO. 08-CO-47
)	
RODNEY L. KALE, SR.,)	OPINION
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Columbiana County Municipal Court of Columbiana County, Ohio Case No. 2008TRC1421
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JUDGMENT:	Affirmed
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APPEARANCES:	
For Plaintiff-Appellee	Kyde Kelly Assistant Prosecutor 105 South Market Street Lisbon, Ohio 44432
For Defendant-Appellant	Attorney Douglas King Hartford, Dickey & King Co. LPA 91 West Taggart Street P.O. Box 85 East Palestine, Ohio 44413

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 9, 2009

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DONOFRIO, J.

{¶1} Defendant-appellant, Rodney Kale, Sr., appeals from a Columbiana County Municipal Court judgment dismissing his motion to suppress the results of his blood alcohol and field sobriety tests. Appellant entered a no contest plea to operating a motor vehicle while impaired (OVI) and lane violations.

{¶2} On March 30, 2008, Trooper Vic Wolfe stopped appellant for speeding and travelling left of center. Trooper Wolfe asked appellant to perform three field sobriety tests. After his performance of the field sobriety tests, Trooper Wolfe placed appellant under arrest for OVI. Appellant subsequently blew a .120 on his breathalyzer test.

{¶3} Trooper Wolfe issued appellant a citation for OVI and for driving left of center. Appellant was charged with OVI first offense, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1), OVI breath over .08 grams first offense, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(D)(1), and lane violations, a minor misdemeanor in violation of R.C. 4511.25.

{¶4} Appellant's counsel filed a motion to suppress the results of his field sobriety and breath tests asserting 12 grounds in support. Less than a month later, appellant retained new counsel. His new counsel then filed a supplement to the motion to suppress. The supplement asserted 55 additional grounds in support of suppression.

{¶5} On October 16, 2008, the court began a hearing on appellant's motion. The court first asked appellant if he could narrow his issues. Appellant stated that the allegations surrounding the calibration of the breathalyzer machine were no longer an issue. However, he stated that the remaining 55 grounds for suppression were still at issue. The court then began the hearing where the prosecutor questioned Trooper Wolfe on some of the issues. Appellant then began his cross examination on those issues. Due to time constraints, however, the court continued the hearing before appellant could finish his cross examination.

{¶6} On October 21, 2008, the state filed a motion to dismiss appellant's motion to suppress. The state alleged that appellant's motion failed to meet the

specificity and particularity requirements needed to put the state on notice of the nature of the challenge and shift the burden to the state. The state claimed that appellant's motion contained only "a standard boilerplate generalized set of non-specific allegations."

{¶7} The court held a hearing on the state's motion where both parties presented arguments. The court subsequently granted the state's motion and dismissed appellant's motion to suppress. In so doing, the court noted that the suppression motion did not allege a single fact unique to appellant's case. For instance, the court pointed out that appellant did not even bother to amend the boilerplate motion to reflect responses to discovery such as ground 16: "If the arresting officer noted nystagmus, the officer did not use proper technique to verify that the jerking continued." The court observed that the discovery provided to appellant provided the evidence to establish that the arresting officer did note nystagmus. In sum, the court determined that because appellant failed to allege any specific facts to support any of his 64 grounds for the motion, the burden did not shift to the state to prove compliance with the National Highway Traffic Safety Administration (NHTSA) standards. The court also noted appellant's argument that the state had waived its right to challenge the suppression motion because the suppression hearing had already commenced. However, the court found that there was no case law to support such a waiver.

{¶8} Appellant subsequently entered a no contest plea to the charges of OVI in violation of R.C. 4511.19(A)(1)(D)(1) and the lane violations. The state dismissed the remaining OVI charge. The trial court found appellant guilty. On the OVI count, the court sentenced appellant to 30 days in jail, 27 days suspended; one year probation; 30 hours of community service; suspended driver's license for six months; and a \$675 fine. On the lane violations, the court fined appellant \$30. The court stayed appellant's sentence pending this appeal.

{¶9} Appellant filed a timely notice of appeal on December 8, 2008.

{¶10} Appellant raises six assignments of error, the first of which states:

{¶11} “THE TRIAL COURT ERRED IN DISMISSING THE DEFENDANT/APPELLANT’S MOTION TO SUPPRESS AND THE SUPPLEMENT TO THE MOTION TO SUPPRESS FILED ON JULY 10, 2008 AND SEPTEMBER 3, 2008 RESPECTIVELY, BECAUSE OF INSUFFICIENT NOTICE.”

{¶12} Appellant argues that in his motion to suppress and supplement, he asserted four specific grounds for suppression supported by 67 total specific factual allegations. Appellant points out that his supplement states that the factual allegations contained therein were made based upon the information available to him. Appellant further argues that the 55 allegations in his supplement mirror the NHTSA’s manual for field sobriety tests. Due to this particularity, he contends the state and the court were on sufficient notice as to the basis for his challenge.

{¶13} In order to suppress evidence or testimony concerning a warrantless search, a defendant must “raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge.” *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, paragraph one of the syllabus. The defendant is required to set forth the basis for the challenge “only with sufficient particularity to put the prosecution on notice of the nature of the challenge.” *State v. Purdy*, 6th Dist. No. H-04-008, 2004-Ohio-7069, at ¶15, citing *State v. Shindler* (1994), 70 Ohio St.3d 54, 57-58. After the defendant sets forth a sufficient basis for a motion to suppress, the burden shifts to the state to demonstrate proper compliance with the regulations involved. *Id.* citing *State v. Johnson* (2000), 137 Ohio App.3d 847, 851.

{¶14} In dismissing appellant’s motion in this case, the trial court relied on this court’s opinions in *State v. Gozdan*, 7th Dist. No. 03-CA-792, 2004-Ohio-3209, and *State v. Arnold*, 7th Dist. No. 05-CO-60, 2006-Ohio-5228.

{¶15} In *Gozdan*, supra, the defendant’s motion to suppress read: “In addition, in order for the results of a field sobriety test to serve as evidence of probable cause to arrest, the police must have administered the test in strict compliance with standardized testing procedures [in] *State v. Homan* * * *. The

defendant does not believe the officer did so in this case.” This court affirmed the trial court’s decision to deny the motion to suppress the results of the field sobriety tests without holding a hearing. We maintained that merely stating that the tests were not performed in strict compliance provided no factual basis to support the allegation. *Id.* at ¶10. We reasoned that since the defendant had knowledge as to how he was instructed to perform the tests and since he had access to the knowledge as to how the field sobriety tests should be administered, he could have specifically alleged facts to support that the tests were not administered in compliance with the prescribed standards. *Id.*

{¶16} And in *Arnold*, *supra*, the defendant’s suppression motion stated: “[u]ntil and unless the prosecution can demonstrate that each and every field sobriety test was administered * * * [in the manner prescribed by the NHTSA], all such evidence must be suppressed under * * * [*State v. Homan*].” Relying on *Gozdan*, we found that the defendant’s motion was not specific enough to put the prosecution on notice of the nature of his challenge and to shift the burden of proof to the state. *Id.* at ¶10. We found that the defendant failed to allege facts as to how the arresting officer instructed him to perform the field sobriety tests and how they did not comply with the NHTSA standards. *Id.* at ¶12.

{¶17} In the present case, appellant took the opposite approach to his motion as did the defendants in *Gozdan* and *Arnold* with the same result. Instead of stating as grounds for suppression that the prosecution must prove that the field sobriety tests were administered in the manner prescribed by the NHTSA and leaving it at that, appellant spelled out each of the NHTSA’s standards and stated that the arresting officer did not comply with them. But not once did appellant ever reference a single, specific fact from his case. And he never described how Trooper Wolfe instructed him to perform the field sobriety tests. Furthermore, as the trial court observed, appellant did not amend his boilerplate language to reflect the information he learned through discovery. For instance, ground 16 for suppression states: “If the arresting officer noted nystagmus, the officer did not use proper technique to verify

that the jerking occurred.” The discovery provided to appellant by the state indicated that Trooper Wolfe did note nystagmus. Thus, there was no question as to “if” the arresting officer noted nystagmus.

{¶18} Appellant employed the “throw-everything-at-the-wall-and-see-what-sticks” approach to his motion. The prosecution asserted at the hearing, without objection or denial by appellant’s counsel, that appellant’s counsel has used this identical boilerplate motion in at least two other cases. (Oct. 31, Tr. 8). If in fact counsel uses the identical motion in other OVI cases, then there is no way that he is alleging facts specific to the circumstances at hand. A motion to suppress must “be more than a mere fishing expedition.” *Gozdan*, 7th Dist. No. 03-CA-792, at ¶9.

{¶19} Appellant did not assert facts with sufficient particularity so as to put the prosecution on notice and to shift the burden to the state. Accordingly, appellant’s first assignment of error is without merit.

{¶20} Appellant’s second and sixth assignments of error are quite similar. Therefore, we will address them together. They state, respectively:

{¶21} “THE TRIAL COURT’S DECISION OF NOVEMBER 3, 2008, VIOLATED THE DEFENDANT/APPELLANT’S SIXTH AMENDMENT RIGHT OF CONFRONTATION.”

{¶22} “THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY IMPROPERLY LIMITING THE CROSS EXAMINATION OF THE ARRESTING OFFICER IN LIGHT OF HIS DIRECT EXAMINATION TESTIMONY.”

{¶23} In these assignments of error, appellant argues that the trial court violated his Sixth Amendment right to confrontation when it did not allow him a full opportunity to cross examine Trooper Wolfe. He contends that he was entitled to cross examine Trooper Wolfe as to his reason for the initial stop, his reasonable, articulable suspicion, and his administration of the field sobriety tests.

{¶24} As set out above, the trial court began a hearing on appellant’s motion to suppress where the prosecutor began to question Trooper Wolfe and appellant started to cross examine him. Due to time constraints the hearing was continued.

Because the trial court soon thereafter dismissed appellant's motion to suppress, appellant never had the chance to complete his cross examination of Trooper Wolfe, nor did the prosecutor ever finish questioning him.

{¶25} The time limit for filing a motion to suppress is 35 days after arraignment or seven days before trial, whichever is earlier. Crim.R. 12(D). By the time the court dismissed appellant's motion, his 35-day time period had expired. Therefore, appellant could not have simply filed a new more specific motion and expected the court to entertain it, as appellee asserts. But appellant could have amended his motion to comply with the specificity and particularity requirements. Additionally, the trial court may, in the interest of justice, extend the time for filing pretrial motions. Crim.R. 12(D). Thus, appellant could have filed another proper motion in the hope that the court would consider it in the interest of justice.

{¶26} Despite the fact that appellant did not have the opportunity to fully cross examine Trooper Wolfe during the partial suppression hearing, this does not lead to the conclusion that appellant was denied his Sixth Amendment right to confront witnesses against him or was denied his right of cross examination. If appellant wanted to cross examine Trooper Wolfe, he could have proceeded to a trial where he would have had that opportunity. Instead, he chose to enter a no contest plea. By entering such a plea, he waived his right to cross examine the witnesses against him. See Crim.R. 11(C)(2)(c).

{¶27} Accordingly, appellant's second and sixth assignments of error are without merit.

{¶28} Appellant's third assignment of error states:

{¶29} "OHIO REVISED CODE SECTION 4511.19(D)(4)(b) ITSELF SHIFTS THE BURDEN TO THE STATE OF OHIO TO PROVE THAT FIELD SOBRIETY TESTS WERE DONE IN SUBSTANTIAL COMPLIANCE WITH ACCEPTED STANDARDS."

{¶30} R.C. 4511.19(D)(4)(b) provides:

{¶31} “(b) In any criminal prosecution or juvenile court proceeding 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:

{¶32} “(i) The officer may testify concerning the results of the field sobriety test so administered.

{¶33} “(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution * * *.

{¶34} “(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.”

{¶35} Appellant argues that this section automatically shifts the burden to the state to establish the officer’s substantial compliance with testing standards. He urges this court to reverse our decision in *Arnold*, supra, in light of R.C. 4511.19(D)(4)(b).

{¶36} This court has repeatedly held that a motion alleging specific facts is required to shift the burden to the state to demonstrate that field sobriety tests were performed in compliance with NHTSA standards. See *State v. Johnson*, 7th Dist. No. 05-CO-67, 2007-Ohio-602; *Arnold*, supra; *Gozdan*, supra. This holding is also in accord with Crim.R. 47 (a motion to suppress must state with particularity the grounds on which it is being made).

{¶37} Moreover, R.C. 4511.19(D)(4)(b) comes into play during an OVI trial. By its specific terms, this statutory section deals with situations when the prosecution

wants to call the arresting officer to testify regarding the defendant's performance on field sobriety tests or to admit the field sobriety test results into evidence. At the motion stage of the proceedings, where this case was, appellant had not yet reached this point.

{¶38} Accordingly, appellant's third assignment of error is without merit.

{¶39} Appellant's fourth and fifth assignments of error are closely related. Therefore, we will address them together. They state respectively:

{¶40} "THE TRIAL COURT'S DECISION OF NOVEMBER 3, 2008 WAS AN ABUSE OF DISCRETION."

{¶41} "THE STATE OF OHIO WAIVED ITS RIGHT TO CLAIM A LACK OF NOTICE WHEN IT FAILED TO OBJECT PRIOR TO GOING FORWARD WITH THE HEARING ON THE DEFENDANT/APPELLANT'S MOTION TO SUPPRESSION [sic.] AND THE SUPPLEMENT THERETO."

{¶42} Appellant contends that the trial court abused its discretion in dismissing his suppression motion after it had already commenced a hearing on the motion. He asserts that because the prosecutor initially went forward with the hearing on the suppression motion, the state waived any right to later assert lack of notice or understanding as to what the issues were.

{¶43} As discussed above, appellant could have amended his motion to comply with the specificity and particularity requirements once he received appellee's motion to dismiss. And as appellee notes, appellant can point to no case law that supports the notion of waiver in this particular situation.

{¶44} Furthermore, also as discussed above, a defendant's motion to suppress must allege specific, particular facts in order to shift the burden to the state to prove that field sobriety tests were performed in compliance with NHTSA standards. *Johnson, supra; Arnold, supra; Gozdan, supra.* Whether the state proceeded with a suppression hearing or not would not change the content of the defendant's motion. Either the motion is specific and particular or it is not. Either it

shifts the burden to the state or it does not. The state does not voluntarily assume the burden of proof because it filed a late or untimely motion to dismiss.

{¶45} Accordingly, appellant's fourth and fifth assignments of error are without merit.

{¶46} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.