

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT  
NOBLE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROCKY HAYES,

Defendant-Appellant.

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## OPINION AND JUDGMENT ENTRY

Case No. 22 NO 0492

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Criminal Appeal from the  
Court of Common Pleas of Noble County, Ohio  
Case No. 220-2048

### BEFORE:

Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

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### JUDGMENT:

Affirmed.

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*Atty. Jordan C. Croucher*, Noble County Prosecuting Attorney, 150 Courthouse, Caldwell, Ohio 43724, for Plaintiff-Appellee and

*Atty. Stephen E. Palmer*, Yavitch & Palmer Co., LPA, 511 South High Street, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: July 31, 2023

**HANNI, J.**

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{¶1} Defendant-Appellant, Rocky Hayes, appeals from a Noble County Common Pleas Court judgment overruling his motion to suppress evidence gathered at a traffic stop which was ultimately used to convict him of operating a vehicle under the influence of alcohol (OVI) during a jury trial.

{¶2} On August 15, 2020, at approximately 1:30 a.m., Ohio State Highway Patrol (OSHP) received a call reporting that Appellant was leaving RJ's Café and was possibly intoxicated. The OSHP forwarded the information to the Noble County Sheriff's Office. Consequently, Deputy Jonathan Redden and Deputy William Poling traveled to Appellant's residence to see if he was there. When they did not see Appellant's vehicle, they decided to watch for him in a nearby parking lot.

{¶3} Dep. Redden soon saw Appellant's vehicle turn onto Appellant's road without using a turn signal. He followed Appellant's vehicle, intending to effect a traffic stop for the turn signal violation. By the time Dep. Redden caught up with Appellant, Appellant was stopped in his driveway. Upon speaking with Appellant, Dep. Redden noticed that Appellant's speech was slurred, his eyes were bloodshot and glassy, an odor of an alcoholic beverage was coming from his person, and he was leaning on his vehicle. Appellant was cooperative with the Deputy. Dep. Poling soon arrived. Appellant told the deputy he had stopped at RJ's Café and had several beers on his way home from the lake.

{¶4} The deputies had Appellant perform field sobriety tests, including the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. There was no video of the tests. The deputies found that Appellant failed all three tests and subsequently arrested him for OVI. Appellant refused a breath test.

{¶5} Because Appellant had three prior convictions for OVI (in 2011, 2013, and 2017), a Noble County Grand Jury indicted him on one count of OVI in violation of R.C. 4511.19(A)(1)(a), with the specification of three prior OVI convictions within a ten-year period making the offense a fourth-degree felony pursuant to R.C. 4511.19(G)(1)(d).

{¶6} On December 15, 2020, Appellant filed a motion to suppress all evidence. In support of his motion, Appellant argued the deputies lacked reasonable suspicion and/or probable cause to effectuate a traffic stop, the deputies lacked reasonable suspicion to detain him for the purpose of conducting field sobriety tests, the deputies failed to administer the field sobriety tests in substantial compliance with the National Highway Traffic Safety Administration (NHTSA) standards, and the deputies lacked probable cause to arrest him for OVI.

{¶7} The trial court held a hearing on Appellant’s motion to suppress on April 6, 2021. It heard testimony from Deputies Redden and Poling. The court concluded: there was probable cause for the traffic stop; Dep. Redden had reasonable, articulable suspicion to detain Appellant for purposes of administering field sobriety tests; Dep. Redden substantially complied with the NHTSA standards; and probable cause existed to arrest Appellant for OVI. Thus, the court overruled Appellant’s motion to suppress.

{¶8} The matter proceeded to a jury trial on June 28, 2021. The jury found Appellant guilty as charged. The trial court held a sentencing hearing on August 9, 2021. It sentenced Appellant to 24 months in prison, imposed a mandatory \$1,350.00 fine, and suspended Appellant’s driver’s license for ten years.

{¶9} Appellant filed a motion for a delayed appeal on May 26, 2022, which this court granted. Appellant now raises a single assignment of error for our review.

{¶10} Appellant’s sole assignment of error states:

THE TRIAL COURT ERRED BY DENYING APPELLANT’S MOTION TO SUPPRESS IN VIOLATION OF THE REQUIREMENTS OF R.C. 4511.19 AND APPELLANT’S RIGHTS AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

{¶11} Appellant breaks his assignment of error into two issues.

{¶12} First, Appellant argues that Plaintiff-Appellee, the State of Ohio, did not meet its burden of establishing substantial compliance with NHTSA testing procedures. Therefore, he contends the evidence of the field sobriety tests should have been

suppressed. Appellant claims the State failed to present clear and convincing evidence that the deputies administered the field sobriety tests in substantial compliance with any Ohio or NHTSA standards. He states that neither deputy offered testimony describing the standards, the grading methods, or how to administer the tests. Appellant also argues the court did not, and could not, take proper judicial notice of the relevant portions of the NHTSA manual. Appellant goes on to argue that even if there was evidence of the proper standards for the field sobriety tests, the State failed to establish that the deputies complied with the standards.

{¶13} Our standard of review with respect to a motion to suppress is first limited to determining whether the trial court's findings are supported by competent, credible evidence. *State v. Winand*, 116 Ohio App.3d 286, 288, 688 N.E.2d 9 (7th Dist.1996), citing *Tallmadge v. McCoy*, 96 Ohio App.3d 604, 608, 645 N.E.2d 802 (9th Dist.1994). Such a standard of review is appropriate as, “[i]n a hearing on a motion to suppress evidence, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.” *State v. Venham*, 96 Ohio App.3d 649, 653, 645 N.E.2d 831 (4th Dist.1994). An appellate court accepts the trial court's factual findings and relies upon the trial court's ability to assess the witness's credibility, but independently determines, without deference to the trial court, whether the trial court applied the appropriate legal standard. *State v. Rice*, 129 Ohio App.3d 91, 94, 717 N.E.2d 351 (7th Dist.1998). A trial court's decision on a motion to suppress will not be disturbed when it is supported by substantial credible evidence. *Id.*

{¶14} In this case, the trial court did not set out any factual findings in its judgment entry overruling the motion to suppress. At the hearing, the court made a few limited findings. The court found that Dep. Redden noticed that Appellant failed to use his turn signal when making the turn onto his street. (Tr. 66). It noted that when Dep. Redden approached Appellant, he noticed the odor of an alcoholic beverage coming from Appellant's person and that Appellant's eyes were bloodshot. (Tr. 66). The court also pointed out that Appellant asked the deputies to “look the other way,” which the court interpreted as an admission that Appellant knew he was in no condition to be driving. (Tr. 66). The evidence supports these findings.

{¶15} Concerning an OVI arrest:

In Ohio, a warrantless arrest in an operating a motor vehicle while intoxicated case is constitutional so long as, at that moment, the officer had probable cause to make the arrest. *State v. Woodards* (1966), 6 Ohio St.2d 14, 215 N.E.2d 568. 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 substantial compliance, rather than strict compliance, with standardized testing procedures. R.C. 4511.19; R.C. 4511.19 [sic]; *State v. Schmitt*, 101 Ohio St.3d 79, 82, 2004-Ohio-37, 801 N.E.2d 446.

*Strongsville v. Troutman*, 8th Dist. Cuyahoga No. 88218, 2007-Ohio-1310, ¶ 22.

{¶16} In *State v. Bish*, 191 Ohio App.3d 661, 2010-Ohio-6604, 947 N.E.2d 257 (7th Dist.), we held that in order to shift the burden to the State to prove substantial compliance with testing procedures, a defendant's suppression motion must state the grounds for suppression with both specificity and particularity. *Id.* at ¶ 16. “[W]hen a motion to suppress the results of the field sobriety tests merely asserts that they were not performed in substantial compliance with the NHTSA standards and no factual basis is provided for why the defendant believed the officer did not comply with the NHTSA standard by pointing to facts that occurred during the tests or to instructions that the defendant believed did not comply with the standards, those allegations are not specific enough to shift the burden to the state to demonstrate compliance with the NHTSA guidelines.” *State v. Phillips*, 7th Dist. Monroe No. 08-MO-6, 2010-Ohio-1547, ¶ 17.

{¶17} In this case, the entirety of Appellant’s argument in his motion to suppress regarding substantial compliance with the NHTSA standards was as follows:

R.C. §4511.19(D)(4)(b) requires SFSTs to be administered in substantial compliance with the NHTSA manual, which trains law enforcement officers on how to administer SFSTs. There is nothing in the officer’s report indicating that he did in fact administer the tests in substantial compliance, nor is there body or dash camera footage to support the same was performed in substantial compliance.

Defendant therefore challenges substantial compliance in administering the HGN, VGN, Walk and Turn, and One Leg Stand tests and alleges the officer

failed, in whole or in part, to administer the same in substantial compliance with the NHTSA guidelines, which require him to perform the tests a particular way to ensure accuracy.

(Motion to Suppress). Appellant makes no allegations whatsoever as to how the deputies failed to comply with the NHTSA standards.

{¶18} This court has found such blanket statements are not specific enough to shift the burden to the state to demonstrate proper compliance with the NHTSA regulations on multiple occasions. See *Phillips*, at ¶¶ 18-20 (Phillips' grounds for suppression of the field sobriety tests were not specific enough to shift the burden to the state where they stated: (1) the tests were "not sufficiently reliable to establish impairment by alcohol"; (2) the officer did not have "sufficient qualifications to be deemed an expert and such tests were not performed in accordance with applicable standards"; and (3) the officer "performed tests not approved by NHTSA and are not standardizes [sic]"); See also *State v. Arnold*, 7th Dist. Columbiana No. 05-CO-60, 2006-Ohio-5228, at ¶ 12 ("Appellant failed to allege facts in his motion as to how \* \* \* [the officer] instructed him to perform the tests and how they did not comply with NHTSA standards. For this reason, the trial court did not err in denying appellant's motion to suppress the results of his field sobriety tests."); *State v. Gozdan*, 7th Dist. Carroll No. 03-CA-792, 2004-Ohio-3209, at ¶ 10 ("merely stating that \* \* \* [the field sobriety test] was not performed in strict compliance provides no factual basis to support the allegation.")

{¶19} Appellant's failure to make specific allegations as to how the deputies failed to comply with the NHTSA standards alone is sufficient to affirm the trial court's judgment overruling Appellant's motion to suppress. *Id.* at ¶ 20.

{¶20} Even disregarding the insufficiency of Appellant's suppression motion, his arguments still fail.

{¶21} Pursuant to R.C. 4511.19(D)(4)(b), a trial court shall admit officer testimony regarding field sobriety test results, which are admissible under the Rules of Evidence, for the trier of fact to consider "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 \* \* \*."

{¶22} In *Bish*, 2010-Ohio-6604, at ¶ 27, this court held that “some evidence of the NHTSA or other testing standards is required.” We reasoned 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.” *Id.* Thus, we stated that *where the suppression motion raises specific challenges to the field sobriety tests*, the State must produce some evidence of the testing standards, through testimony or introduction of the NHTSA or other similar manual or both. (Emphasis added); *Id.*

{¶23} The State can satisfy its burden without explicit testimony from the officer that he or she substantially complied with NHTSA standards in administering the tests. *State v. Reed*, 2d Dist. Montgomery No. 23357, 2010-Ohio-299, ¶ 53, citing *State v. Davis*, 2d Dist. Clark No. 2008 CA 65, 2009-Ohio-3759. “Neither is the State required to actually introduce the NHTSA manual or testimony concerning the standards, where the record demonstrates, *if only by inference*, that the court took judicial notice of the NHTSA standards.” (Emphasis added); *Id.*, citing *State v. Knox*, 2d Dist. Greene No.2005-CA-74, 2006-Ohio-3039.

{¶24} In this case, the trial court took judicial notice of the NHTSA manual.

{¶25} The deputies testified as to the results of the field sobriety tests, their training, and the NHTSA manual as follows.

{¶26} Dep. Redden testified that he was trained in administering field sobriety tests through the Ohio Police Academy. (Tr. 16). He stated that he was specifically trained in the test procedures in accordance with the NHTSA. (Tr. 17). The State asked the trial court to take judicial notice of the NHTSA manual. (Tr. 17). Appellant objected. (Tr. 18). Although the court did not initially agree to take judicial notice, after listening to the parties’ arguments regarding the issue, the court instructed the State to continue, thus indicating that it took judicial notice of the NHTSA manual. (Tr. 17-19). Dep. Redden then testified that, to his knowledge the testing procedures have remained the same since his training. (Tr. 19).

{¶27} Dep. Poling testified that he was trained in administering field sobriety tests through the Ohio Police Officer Training Academy. (Tr. 50). He too was trained using the NHTSA manual. (Tr. 50-51). Dep Poling stated that the most recent version of the

manual is from 2018. (Tr. 51). He stated that he was not trained on that version of the manual but that there were no changes as far as field sobriety testing. (Tr. 51).

**{¶28}** As to the HGN test, Dep. Redden testified that he followed the testing procedure for the HGN test set out in the NHTSA manual. (Tr. 17, 19). He stated that he is trained to look for six clues total, three in each eye, indicating impairment: lack of smooth pursuit, nystagmus at maximum deviation, and nystagmus prior to onset at 45 degrees. (Tr. 23-24). Dep. Redden testified that Appellant's eyes demonstrated all six clues. (Tr. 21-24).

**{¶29}** As to the walk-and-turn test, Dep. Redden testified as to the instructions he gave Appellant. (Tr. 24-25). He then testified that Appellant failed the test by demonstrating several clues such as starting the test before he was told to so, swaying while walking, failing to walk heel-to-toe, failing to take the proper amount of steps, and stepping off the line. (Tr. 26). And after testifying as to his training in accordance with the NHTSA, as to the walk and turn test, Dep. Poling corroborated this testimony. (Tr. 51-52).

**{¶30}** As to the one-leg stand test, Dep. Redden testified as to the instructions he provided to Appellant. (Tr. 27). He stated that Appellant failed this test as well because he stopped before he was instructed to do so, his arms broke the plain of balance, and he put his foot down several times. (Tr. 28). Deputy Poling corroborated this testimony.

**{¶31}** Given the above testimony, the deputies testified as to their training in administering field sobriety tests in compliance with the NHTSA manual. The trial court took judicial notice of the NHTSA as requested by the State. Finally, the deputies' testimony demonstrated substantial compliance with the testing standards.

**{¶32}** In sum, the trial court did not err in overruling Appellant's motion to suppress the evidence of the field sobriety tests. Appellant's motion was insufficient to shift the burden to the State to demonstrate substantial compliance. And even if the burden shifted to the state, the record indicates the trial court took judicial notice of the NHTSA manual and the deputies' testimony demonstrates substantial compliance.

**{¶33}** Appellant next argues that absent evidence of the field sobriety tests, there was not probable cause to arrest him. He points out that his only driving infraction was his failure to use his turn signal when turning onto his street.



{¶34} We have already determined that the evidence of the field sobriety tests was properly admitted. But even without that evidence the deputies had probable cause to arrest Appellant.

{¶35} Dep. Redden testified that he received a call from the OSHP that Appellant might be driving while intoxicated. (Tr. 6). Consequently, he checked Appellant's house and saw that Appellant's vehicle was not there. (Tr. 6). He then parked in a nearby parking lot. (Tr. 7). The deputy soon observed Appellant's vehicle approach his street. (Tr. 9-10). The vehicle turned right without using a turn signal. (Tr. 10). Dep. Redden followed Appellant's vehicle into his driveway. (Tr. 11-12). The deputy noted that when Appellant exited his vehicle, he was leaning against it. (Tr. 13). Dep. Redden noticed that Appellant had bloodshot, glassy eyes. (Tr. 14). He smelled an odor of an alcoholic beverage emanating from Appellant. (Tr. 14). Dep. Redden testified that when he asked Appellant to consent to the field sobriety tests, Appellant told the deputies "I don't mean no harm," "Look the other way," and "I won't do it again." (Tr. 15). Dep. Redden also testified that he has interacted with Appellant before, both when Appellant was sober and when Appellant was intoxicated. (Tr. 29). Based on his prior interactions with Appellant, Dep. Redden opined that Appellant was intoxicated. (Tr. 29). Additionally, Dep. Poling testified that Appellant told the deputies that he had stopped and had several beers on his way home from the lake. (Tr. 49).

{¶36} The legal standard for determining whether the police had probable cause to arrest an individual for OVI is whether, "at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *State v. Homan*, 89 Ohio St.3d 421, 427, 732 N.E.2d 952 (2000), superseded on other grounds by statute; *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The totality of the circumstances can support a finding of probable cause to arrest for OVI even where no field sobriety tests have been administered, or where the testimony related to the field sobriety testing cannot serve as evidence of probable cause. *Cincinnati v. Bryant*, 1st Dist. Hamilton No. C-090546, 2010-Ohio-4474, ¶ 26. In other words, field sobriety tests are not required in order to have probable cause to arrest for OVI.

{¶37} Here, the facts in support of probable cause are the following. The deputies received a tip from the OSHP that Appellant might be driving under the influence. Appellant committed a minor traffic violation when he turned without using his turn signal. Appellant's eyes were glassy and bloodshot. Appellant smelled of an odor of an alcoholic beverage. Appellant admitted to drinking "several" beers. Appellant was leaning against his vehicle. And when asked to perform the field sobriety tests, Appellant asked the deputies to "[l]ook the other way" and told them he "won't do it again."

{¶38} These facts, taken as a whole, are sufficient to support a finding of probable cause to arrest for OVI even without the results of the field sobriety tests. We have found similar facts sufficient to support a probable cause finding. See *State v. Leffler*, 7th Dist. Columbiana No. 18 CO 0032, 2019-Ohio-3964, ¶ 21 (probable cause to arrest for OVI based on refusal to submit to field tests and chemical tests, trying to avoid eye contact, strong odor of alcohol, admission of drinking, glassy and bloodshot eyes, and slurred speech); *State v. Smith*, 7th Dist. Columbiana No. 13 CO 10, 2014-Ohio-2933, ¶ 29 (probable cause to arrest for OVI existed where there was evidence of slurred speech, admission to consumption of alcohol, strong odor of alcohol, glassy eyes, and inability to walk a straight line).

{¶39} Thus, the trial court did not err in overruling Appellant's motion to suppress.

{¶40} Accordingly, Appellant's sole assignment of error is without merit and is overruled.

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

Waite, J., concurs.

D'Apolito, P.J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**