

[Cite as *Rocky River v. Bucci*, 2018-Ohio-393.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105803

CITY OF ROCKY RIVER

PLAINTIFF-APPELLANT

vs.

MELISSA L. BUCCI

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Rocky River Municipal Court
Case No. 2016 TRC 07611

BEFORE: Blackmon, J., E.T. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 1, 2018

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PATRICIA ANN BLACKMON, J.:

{¶1} Plaintiff-appellant, the city of Rocky River, appeals from the trial court's order that suppressed field sobriety test results in connection with Melissa Bucci's ("Bucci") arrest for OVI and other charges. Rocky River assigns the following error for our review:

The trial court erred when it granted [Bucci's] motion to suppress the "results" of the standardized field sobriety tests from being introduced as evidence at trial because the record reflects that the state did in fact demonstrate substantial compliance with the National Highway Safety and Traffic Administration ["NHTSA"] standards in effect at the time that [Bucci] was arrested.

{¶2} Having reviewed the record, the arguments of the parties and the pertinent law, we affirm the decision of the court. The apposite facts follow.

{¶3} On September 22, 2016, Bucci was charged with weaving in violation of Rocky River Municipal Code ("RRMC") 331.34(B), OVI in violation of R.C. 4511.19(A)(1)(a), and operating a vehicle with a prohibited breath alcohol content in violation of R.C. 4511.19(A)(1)(d). Bucci filed a motion to suppress, arguing, inter alia, that the arresting officer lacked probable cause to stop her vehicle, and that the field sobriety tests were not administered in substantial compliance with the procedures set forth by the National Highway Traffic Safety Administration ("NHTSA").

{¶4} The motion was heard before a magistrate. Rocky River's evidence demonstrated that at approximately 3:00 a.m. on September 22, 2016, Rocky River Police Officer Neil Czaplicki observed Bucci's vehicle traveling westbound on Lake Road. According to the officer, she did not stop at a stop bar on the road. She then abruptly

turned onto Elmwood Road after the officer began to follow her, and failed to properly stop at the intersection of Elmwood Road and Detroit Road. After Bucci turned down Bates Road and again returned to Detroit Road, the officer determined that she was trying to evade him. He subsequently stopped her vehicle for weaving.

{¶5} The officer further testified that he asked Bucci if she was trying to avoid him, and she stated that she was lost and was looking for River Oaks Drive, which was in the opposite direction. During the conversation, the officer detected the odor of alcohol, and Bucci and her passenger both told the officer that they had consumed alcohol that night. Bucci stated that she had consumed two drinks.

{¶6} The officer instructed Bucci to step out of her car for field sobriety tests. He testified that he uses the protocols and procedures of the NHTSA manual in administering field sobriety tests. He stated that he was originally trained in 2009 under the NHTSA Manual in effect at that time and took a refresher course in 2012 or 2013. He was not aware of the requirements of the 2015 Manual, but the city maintained that there was no substantive change from the 2013 and 2015 versions, and offered both into evidence.

{¶7} The officer testified that he administered the Horizontal Gaze Nystagmus (“HGN”) test, the One-Leg Stand test (“OLS”), and the Walk and Turn test (“WT”). He stated that Bucci displayed impairment under the HGN, but he admitted that he did not perform this test in substantial compliance with the 2015 NHTSA Manual, which required a slower tracking procedure, and placement of the tracking object further away

from the subject's face. Rocky River does not appeal the suppression of the HGN test results.

{¶8} The officer also testified that Bucci displayed impairment during the OLS because she swayed and put her foot down twice. However, under the 2013 and 2015 versions of the NHTSA Manual, before administering the OLS, the officer must inquire as to whether the suspect has a bad back, leg problem, inner ear problem, and must also determine if the suspect is more than 50 pounds overweight. Here, Bucci informed the officer during the test that she has a chronic autoimmune disorder that causes muscle inflammation, but, he testified, he “took into account that it was probably an excuse[.]”

{¶9} Additionally, according to the officer, Bucci displayed impairment during the WT test because she started to walk as he gave instructions, stepped off the line, and did not walk in a heel-to-toe fashion for all of her steps. However, he did not instruct her not to commence the test until she had the complete instructions, and did not ask her whether she understood the instructions before beginning the test, as required under the 2013 and 2015 Manuals.

{¶10} Bucci testified that she was not evading the officer but was following instructions from a GPS device. She also stated that due to her autoimmune disorder, her muscles were fatigued and cramping during the field sobriety tests. Bucci acknowledged being unsteady during the OLS but she denied that she swayed in this test or during the WT test.

{¶11} The magistrate issued findings of fact and conclusions of law concluding that there was reasonable suspicion to stop Bucci’s vehicle, and that although the HGN results were not admissible, the OLS and WT test were administered in substantial compliance with the NHTSA testing requirements.

{¶12} Bucci filed numerous objections. In relevant part, Bucci maintained that the officer was unfamiliar with the 2015 NHTSA Manual, and that the field sobriety tests were not properly administered. In opposition, Rocky River asserted that there were no relevant changes in the NHTSA Manual from 2013 to 2015 and that Bucci “failed to demonstrate that there had been any relevant changes.”

{¶13} After undertaking a full review of the entire record, the trial court held that the stop of Bucci’s vehicle was proper, and that after the officer’s conversation with Bucci in which he smelled alcohol, it was proper to administer the field sobriety tests. With regard to whether the officer substantially complied with NHTSA standards in light of the dispute about whether there was compliance with the 2013 or 2015 version of the NHTSA, the court held that this issue did not necessarily preclude the city from demonstrating substantial compliance and invited additional briefing from the parties. However, the court noted that the HGN test was not given in substantial compliance with the NHTSA Manual, so the results of this test were inadmissible.¹ The court also noted that the officer did not inquire whether Bucci had back, leg, or inner ear problems, and did not determine if she was more than fifty pounds overweight, as required under the

¹Again, Rocky River is not appealing this portion of the trial court’s ruling.

NHTSA Manual before administering the OLS, and “it is unclear whether” he instructed her to stand in a certain position until all instructions were complete before beginning the WT test, but the court deferred its ruling on the admissibility of the results from these two tests until May 9, 2017.

{¶14} Following an additional hearing on May 9, 2017, the trial court again noted that there was no inquiry regarding possible medical issues prior to the OLS and that the officer failed to instruct Bucci to wait until the instructions were complete before starting the WT test. The court ruled that Rocky River was precluded from introducing the results of these field sobriety tests, and that “it appeared the officer was not familiar with the 2015 Manual” and “there was shucking [of the requirements] of the 2015 manual.”

Therefore, the court ruled that Rocky River could not introduce test results but could only introduce evidence regarding the officer’s observations, for whatever value they might have with the jury.

{¶15} In its sole assignment of error, Rocky River argues that the trial court erroneously determined that the officer’s testimony regarding administration of the field sobriety tests in accordance with the NHTSA 2013 Manual was insufficient to demonstrate substantial compliance. In opposition, Bucci asserts that the trial court actually held that Rocky River’s reference to the 2013 NHTSA Manual (rather than the 2015 Manual) did not, in and of itself, demonstrate substantial compliance, but each of the three tests was improperly performed.

Burdens and Standard of Review

{¶16} Appellate review of a motion to suppress presents a mixed question of law and fact. *Strongsville v. Vavrus*, 8th Dist. Cuyahoga No. 100477, 2014-Ohio-1843, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The *Vavrus* court explained:

In deciding a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). The reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, * * * 437 N.E.2d 583 (1982). With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

Id. at ¶ 8.

Substantial Compliance With NHTSA Standards

{¶17} With regard to driving-under-the-influence cases, R.C. 4511.19(D)(4)(b) states an officer may testify “concerning the results of the field sobriety test” if the 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[.]

Id. Therefore, once a 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.

Middleburg Hts. v. Gettings, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 10. If the motion sufficiently raises an issue involving the applicable regulations, the state must demonstrate by clear and convincing evidence that the officer performing the testing substantially complied with accepted testing standards. *Id.* at ¶ 12; *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 42; *Brookpark v. Key*, 8th Dist. Cuyahoga No. 89612, 2008-Ohio-1811, ¶ 49.

{¶18} The state may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual. *Id.*, citing *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155, ¶ 28; *Key* at ¶ 49. The officer need not read the instructions verbatim from the manual to substantially comply. *Cleveland v. Krivich*, 2016-Ohio-3072, 65 N.E.3d 279, ¶ 15 (8th Dist); *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 20. Instead, the instructions provided may deviate from the quoted language found in the NHTSA manual so long as they are sufficient to apprise the accused of the manner in which he is to perform the test. *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 24; *State v. King*, 11th Dist. Portage No.

2009-P-0040, 2010-Ohio-3254, ¶ 26. It is then up to the trial court to determine, on a case-by-case basis, whether substantial compliance has been met. *Key* at ¶ 52.

{¶19} Even where the results of field sobriety tests are properly suppressed, this does not prohibit a police officer from testifying about his observations of a suspect while administering or attempting to administer field sobriety tests. *Krivich* at ¶ 27; *Gettings* at ¶ 27; *Dedejczyk* at ¶ 57.

Revisions to NHTSA Manual

{¶20} With regard to allegations that the officer relied upon the incorrect version of the NHTSA Manual, this court in *Key* considered the claim that the prosecuting attorney could not establish substantial compliance with NHTSA testing standards due to revisions to the manual after the officer had been trained. To maintain its burden of proof, the prosecuting attorney outlined the portions of both manuals that set forth the requirements for field sobriety testing, and the differences in both versions. This court reviewed the evidence presented at trial and also independently reviewed the changes in the manuals and determined that the changes “were not significant to show prejudice to Key.” *Id.* at ¶ 80. *Accord State v. Cunningham*, 7th Dist. Monroe No. 08 MO 0008, 2009-Ohio-4394, ¶ 14.

{¶21} In this case, the trial court specifically found that despite “the objections raised by [Bucci] as to * * * reliance on a 2013 NHTSA Manual as opposed to a 2015 NHTSA Manual, [Rocky River] may still demonstrate substantial compliance with the NHTSA standards regardless of which manual is presented[.]” The court then gave the

parties an opportunity to brief the issue and supplement the record. The court subsequently concluded that “it appeared the officer was not familiar with the 2015 Manual” and “there was shucking [of the requirements] of the 2015 manual,” as well as failure to inquire regarding medical issues before administering the one leg stand and the officer did not properly instruct Bucci before administering the walk and turn test.

{¶22} Viewing the record as a whole, we conclude that the officer’s lack of familiarity with the 2015 NHTSA Manual does not in and of itself establish lack of substantial compliance with testing procedures and does not, standing alone, provide a basis for suppression of the test results. However, the record in this case clearly demonstrates that the trial court concluded that the OLS and WT tests were not administered in substantial compliance with the NHTSA. Therefore, under the two issue rule, we may affirm the suppression order, if these alternative reasons for the court’s ruling are not erroneous. *State v. Young*, 5th Dist. Coshocton No. 2015CA0005, 2016-Ohio-621, ¶ 14.

Administration of OLS and WT Test

{¶23} In general, we note that “[i]t is unfair to hold a suspect’s failure to complete an aspect of a field sobriety test against him if the suspect has not been properly instructed as to how to complete the test.” *State v. Henry*, 12th Dist. Preble No. CA2008-05-008, 2009-Ohio-10, ¶ 28.

{¶24} In *Krivich*, this court outlined the instructions for the OLS as follows:

With respect to the OLS [one-leg stand] test, an officer is required to “inform suspect that [he] must begin the test with [his] feet together and that [he] must keep [his] arms at [his] side for the entire test. The officer also [must tell] the suspect that he must raise one leg, either leg, six inches from the ground and maintain that position while counting out loud for thirty seconds. * * * NHTSA standards provide that the counting should be done in the following manner: ‘one thousand and one, one thousand and two, until told to stop.’ Further the officer must ‘Tell suspect to [k]eep your arms at your sides at all time and keep watching the raised foot.’” Next, ask the suspect whether they understand. Finally, tell the suspect to begin.

Krivich, 2016-Ohio-3072 at ¶ 22, quoting *State v. Secoy*, 5th Dist. Muskingum No. CT2008-0065, 2009-Ohio-5100, ¶ 27.

{¶25} The *Krivich* court also outlined the instructions for the WT test as follows:

Regarding the walk-and-turn test, the NHTSA manual states that an officer is required to first instruct the suspect of the initial positioning, which requires the suspect to stand with his arms down at his side, and to place his left foot on a line (real or imaginary). The suspect’s right foot is to be placed on the line ahead of the left foot, with the heel of the right foot against the toe of the left foot. The suspect is then told to remain in that position while further instructions are given. These further instructions include the method by which the suspect walks while touching his heel to his toe for every step, counting the nine steps out loud while walking down the line, and making a turn with small steps with one foot while keeping the other foot on the line. The officer is also told to demonstrate the instructions to ensure that the suspect fully understands.

Id. at ¶ 20, quoting *Gettings*, 2013-Ohio-3536, ¶ 17.

{¶26} Having thoroughly reviewed the record and the video from the stop, we agree with the trial court's conclusions as to both the OLS and the WT tests. With regard to the OLS, the video demonstrates that the officer made no inquiry into Bucci's medical condition and sought no additional information after she informed him of her diagnosis. He also testified that he "took into account that it was probably an excuse," and he conceded that nothing about this remark appears in his report of the incident. Additionally, he did not note her weight and had no recollection regarding whether the manual requires any consideration of this additional factor in the OLS.

{¶27} With regard to the WT test, the video demonstrates that the officer provided the instructions very rapidly, and said "like this." He halted his instructions as if to suggest that Bucci was to begin. He admitted that he penalized Bucci for beginning the test prematurely before instructing her not to begin the walk and turn test until the instructions were finished. He also admitted that he penalized her for not following instructions without first asking her whether she understood the instructions.

{¶28} Therefore, after reviewing the record as a whole, we agree with the trial court's conclusion that Rocky River did not present clear and convincing evidence that the field sobriety tests were conducted in substantial compliance with the NHTSA requirements, and we conclude that the trial court did not err in suppressing these test results.

{¶29} In this regard, we find this matter distinguishable from *Key*, which also involved some defects to the instructions, yet affirmed a finding of substantial compliance

in the officer's administration of the field sobriety tests. In *Key*, the defendant asserted that the instructions were deficient as to the OLS because the officer did not inform Key that he needed to wait to start the test until told to do so, failed to ask if he understood the instructions at that point, and failed to tell him to keep watching the raised foot and keep both legs straight. However, the record demonstrated that the officer "made sure that Key did not have any problems with his legs that would prevent him from standing," "instructed Key on how to perform the test and demonstrated how to do it." Further, Key failed this test not because he was penalized for noncompliance with the defective instructions, but because he "started to fall" and "stumbled to his right." Key also lost his balance while listening to the WT instructions and failed that test not due being penalized for failure to follow instructions, but because he walked "just like he was walking down the sidewalk, * * * did not count heel to toe * * * and [lost his balance at the seventh step and] was falling to his right." Here, however, taken as a whole, the instructions were issued too rapidly and in a confusing manner, and Bucci was in turn penalized due to failure to follow the defective instructions.

{¶30} In accordance with the foregoing, the assigned error is without merit.

{¶31} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Rocky River Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR