Supreme Court of Ohio Clerk of Court - Filed July 18, 2016 - Case No. 2016-0172

IN THE SUPREME COURT OF OHIO
CASE NO. 2016-0172 and 2016-0282

CITY OF CLEVELAND Plaintiff-Appellant	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 102835
v.	:	
BENJAMIN S. OLES Defendant-Appellee	:	

MERIT BRIEF OF APPELLANT CITY OF CLEVELAND

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STATEMENT OF THE CASE AND FACTS

On September 19, 2014, Defendant-Appellee, Benjamin Oles, was arrested and charged with violations of R.C. 4511.19(A)(1)(a), DUI; R.C. 4511.19(A)(1)(d), DUI .08-.17 and, R.C. 4511.33, driving in marked lanes.

After a series of pre-trials, a hearing was held on a motion to suppress evidence. At the conclusion of the hearing on March 23, 2015, the trial court found that the initial traffic stop was reasonable. (Tr. 81). The court believed that Lieutenant Shepard, Unit #1404 of the Ohio State Highway Patrol, observed a smell of alcohol and the bloodshot eyes of Defendant-Appellee that caused him to further investigate. (Tr. 82). The court did not rule that the field sobriety tests were conducted inappropriately. Despite these findings, the trial court granted Defendant's motion to suppress. The basis for the ruling was that *Miranda* warnings were not given to Oles. The evidence that the court ordered suppressed was any evidence of the field sobriety testing done on Oles on September 19, 2014. (Tr. 82). The City of Cleveland filed a notice of appeal on March 30, 2015. After oral arguments, the Eighth District Court of Appeals issued its ruling on January 7, 2016 holding that the trial court was correct in granting the motion to suppress but also noted, sua sponte, that this holding was in conflict with other district courts. This court certified a conflict and consolidated cases on May 10, 2016.

LAW AND ARGUMENT

PROPOSITION OF LAW I: The investigative questioning of a driver in the front seat of a police vehicle during a routine traffic stop does not rise to the level of custodial interrogation and any statements elicited do not incur the protections of *Miranda*.

A. The Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution does not require a law enforcement officer to provide *Miranda* warnings when the initial questioning of a suspect who is removed from his vehicle and placed in the front seat of a police vehicle does not rise to the level of custodial interrogation.

The Eighth District erred in upholding the trial court's ruling on the motion to suppress, namely the suppression of the field sobriety tests of Defendant-Appellee based on *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, the initial questioning and field sobriety tests were done both at the roadside and in the front seat of the State Highway Patrol cruiser. These actions by Lt. Shepard did not rise to the level of "custodial interrogation." The Eighth District applied a "totality of the circumstances" analysis and found a reasonable person removed from his or her own vehicle and questioned about his or her alcohol consumption in the passenger seat of a police cruiser would not feel free to leave and would therefore be subject to custodial interrogation and the protections of *Miranda. City of Cleveland v. Benjamin S. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23

The U.S. Supreme Court in *Miranda* established procedural safeguards to protect an individual's Fifth Amendment rights. This long-established rule required that an individual be "mirandized" by law enforcement officials before they can be interrogated about their involvement in criminal activities. Defendant-Appellee argued at the suppression hearing that he was in custody once he was seated in the front passenger seat of the State Highway patrol car. (Tr. 49). The trooper testified that he did not advise Defendant-Appellee of his rights at that time but continued to question him. (Tr. 49). After a few brief questions in the cruiser the trooper asked Defendant-Appellee to exit the cruiser and conducted field sobriety tests. (Tr. 15-16). This roadside questioning was brief and did not constitute "custodial interrogation" which would incur *Miranda* warnings.

The issue is whether roadside questioning of a motorist pursuant to a traffic stop constitutes custodial interrogation and requires advisement of *Miranda* rights. The U.S. Supreme Court ruled on this very issue in *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138

82 L.Ed.2d 694 (1984). The *Berkemer* Court held that "persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*." *Id.* at 440. In this case, the trial court found that the initial traffic stop of Defendant-Appellee was reasonable. (Tr. 82). The trooper observed physical characteristics consistent with intoxication that prompted him to investigate the stop further to determine if Defendant-Appellee was driving under the influence of alcohol. (Tr. 13-16). This questioning did detain Defendant-Appellee temporarily. The trooper asked him a moderate number of questions during the investigation. The trooper asked some of these investigatory questions at the roadside and some in the front passenger seat of the cruiser. (Tr. 15, 50). According to the trooper's testimony, this was done to place him in a controlled environment to observe physical characteristics and determine where the odor of alcoholic beverage was coming from. (Tr. 15). After this initial questioning, the trooper asked Defendant-Appellee to exit the cruiser and perform field sobriety tests. These actions are not the "functional equivalent of formal arrest." *Berkemer* at 442. Defendant-Appellee was temporarily detained until after his field sobriety tests; and therefore, was not required to be advised of his *Miranda* rights either during the initial roadside questioning or during any questioning while he was in the front seat of the police cruiser. The trial court erred in suppressing the evidence of the field sobriety tests based on *Miranda*.

In addition, the Eighth District incorrectly upheld the trial court's order suppressing the field sobriety tests based on *Miranda* because the trooper was not required to read the *Miranda* warnings until it was determined that Defendant-Appellee was going to be arrested. In *Strongsville v. Kessler*, 8th Dist. Cuyahoga No. 71600, 1997 WL 476831 (Aug. 21, 1997) the court held that routine traffic stops did not require *Miranda* warnings because although the driver is detained during roadside questioning it does not rise to the level of custodial interrogation.

The court there stated "the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda itself. *Id.* at 5. The traffic stop in the instant case falls under the category of "routine;" and therefore, the initial roadside questioning and the field sobriety testing by the trooper did not rise to the level that would require *Miranda* rights be invoked. Accordingly, the trial court should not have suppressed the field sobriety testing based upon the fact that Defendant-Appellee was not advised of his Fifth Amendment rights prior to any questioning while he was in the front seat of the police cruiser.

B. The Eighth District erroneously extended the holding in *State v. Farris* in deciding that investigative questioning of a motorist during a routine traffic stop about alcohol consumption was tantamount to custodial interrogation.

The Eighth District relied on *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, to support its holding in this case. The *Farris* court held that the only relevant inquiry in determining whether a person is in custody is "how a reasonable [person] in the suspect's position would have understood [their] situation. *Id.* at 521. The Eighth District incorrectly extended *Faris* in this case opining that a reasonable person removed from his or her vehicle and questioned about his or her alcohol consumption in the passenger seat of a police cruiser would not feel free to leave. *Oles* at ¶19. The fact that Oles did not feel free to leave did not elevate the roadside questioning to custodial interrogation and incur the protections of *Miranda*.

The Eleventh District ruled on a factually similar case in *State v. Serafin*, 11th Dist. Portage No. 2001-P-0036, 2012-Ohio-1456. The *Serafin* court held that routine questioning of a detained motorist, including whether the motorist has been drinking, does not require the administration of the Miranda warnings. *Id* at ¶35 quoting *State v. Coleman*, 7th Dist. Mahoning No06MA41,

2007-Ohio-1573. The facts in *Oles* are substantially similar to the facts in *Serafin*. The drivers in both cases were stopped for traffic infractions. They were both ordered to the front passenger seat of the police cruiser. There is no indication that the trooper confiscated Oles' keys. Both drivers were in the front seat of the cruiser to help ascertain where the odor of alcoholic beverage was coming from and for investigative questioning. Neither driver was placed in handcuffs. The questioning of Oles in the vehicle was brief and he was then asked out of the vehicle to perform field sobriety tests. In fact, the entire encounter from the initial traffic stop to the breath test at the post lasted just over one hour including travel time from the roadside to the State Highway Patrol post. There is no indication that this encounter was excessively long in duration for a driving under the influence investigation which was a valid extension of the initial traffic stop. (Tr. 81).

In *Farris*, the initial stop for speeding was extended into a search for marijuana. The trooper in *Oles* was still investigating the traffic violation to determine if the additional violation of driving under the influence had occurred. The brief detention of Oles in the passenger seat of the police vehicle did not convert the routine traffic stop into a custodial interrogation. The extension of *Farris* to this case was incorrect and, as such, statements elicited from Oles and the results of the field sobriety tests should be allowed.

This Court should hold that a brief detention in the front passenger seat of a police vehicle during an investigation for driving under the influence does not constitute custodial interrogation. This bright-line holding would resolve conflicts within the various districts within the State of Ohio.

PROPOSITION OF LAW II: The evidence obtained independently in an investigation of driving under the influence during a routine traffic stop cannot be suppressed.

A. Independent of the Eighth District's ruling the evidence obtained independently in an investigation of driving under the influence during a routine traffic stop cannot be suppressed.

Plaintiff-Appellant submits that evidence obtained independently or without infringement of constitutional rights cannot be suppressed. In this case, the trial court suppressed the results of the field sobriety tests and the Eighth District upheld that order. The appellate court noted that the trooper may have had reasonable suspicion to conduct a field sobriety test after his initial interaction with Oles or based upon the odor of alcohol. *Oles* at ¶21. The Eighth District apparently determined that the suppression of the field sobriety tests were required based upon the timing of when the field sobriety test was conducted since it noted that its analysis was "controlled" by testimony that the trooper decided to perform field sobriety tests only after Oles' statements. *Id.*

In holding that the trial court was compelled to suppress the field sobriety test based upon the suppression of Defendant-Appellee's statements, the Eighth District failed to consider whether the field sobriety tests were based upon an independent source. The independent source doctrine permits the admission of evidence that has been discovered by means wholly independent of any constitutional violation. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964); *Kastigar v. United States*, 406 U.S. 441, 457, 458-459 (1972). Under the independent source doctrine, the suppression of statements regarding alcohol consumption made by Defendant-Appellee does not require the suppression of his performance on field sobriety tests where the investigating officer had reasonable suspicion to conduct the tests for reasons independent of the statement. In this case, the trooper had already observed an odor of alcoholic beverage and slow, deliberate movements by Oles prior to any statement about alcohol consumption.

The Eighth District held that Oles was under custodial interrogation and affirmed the suppression of the statements **as well as** the results of the field sobriety tests. The suppression of the field sobriety tests were affirmed even though the Eighth District readily acknowledged there may have been reasonable suspicion to conduct the field sobriety test for reasons independent of the statements. *Oles* at ¶21. Even if this Court were to conclude that Oles made statements that should be suppressed, that holding alone should not automatically exclude the results of the field sobriety tests. The trial court's exclusion of the field sobriety tests, and the Eighth District's subsequent affirmance, ignores the independent source doctrine.

The trooper had reasonable suspicion to conduct field sobriety tests based upon his observations that were independent from any questioning of Defendant-Appellee. In *Cleveland v. Reese*, 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, the Eighth District upheld the admission of field sobriety tests holding that a police officer only requires a reasonable suspicion based upon articulable facts that the motorist is intoxicated.

Applying the independent source doctrine in this matter demonstrates that the lower courts exceeded the scope of the constitutional challenge when it was held that both the statements and the field sobriety test be excluded as evidence. Even without the statements about alcohol consumption, there remained reasonable suspicion to conduct the field sobriety tests. The suppression of those tests was incorrect and unwarranted. Therefore, this Court should reverse the appellate court's affirmation of the trial court's exclusion of the field sobriety tests and remand this case for further proceedings.

CONCLUSION

Wherefore, Plaintiff-Appellant respectfully requests that this Honorable Court reverse the decision of the Eighth District Court of Appeals and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing merit brief has been served upon Joseph Patituce, 26777 Lorain Road, Suite 708, North Olmsted, Ohio 44070 via U.S. Mail on this 18th day of July, 2016 and Daniel T. Van, Cuyahoga County Prosecutor's Office via electronic mail at dvan@prosecutor.cuyahogacounty.us.

/s Jonathan L. Cudnik
JONATHAN L. CUDNIK

APPENDIX

Supreme Court of Ohio Clerk of Court - Filed February 22, 2016 - Case No. 2016-0282

IN THE SUPREME COURT OF OHIO

Case No.:_____

CITY OF CLEVELAND, Plaintiff-Appellant, -vs.- BENJAMIN OLES, Defendant-Appellee.	))))))))))	ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO CASE NO. CA-15-102835

NOTICE OF APPEAL

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NOTICE OF APPEAL OF APPELLANTS
THE CITY OF CLEVELAND

Appellant the City of Cleveland hereby gives its notice of appeal to the Supreme Court of Ohio from the judgment of the Eighth District Court of Appeals that was entered in Case Number 102835 on January 7, 2016.

Appellants' jurisdictional appeal is brought as this case presents a substantial constitutional question of public and great general interest. A date-time stamped copy of the Eighth District's "Journal Entry and Opinion" is attached to the accompanying Appellants' Memorandum in Support of Jurisdiction.

It should be noted that The Eighth District certified a conflict in this case on January 7, 2016. A separate notice of Certified Conflict was filed by Plaintiff-Appellant on February 4, 2016. It was assigned Case No. 2016-0172 before this Honorable Court.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was sent via regular U.S. Mail to Joseph Patituce, Esq., Attorney for Defendant, Benjamin Oles, 26777 Lorain Road, Suite 708, North Olmsted, Ohio, 44070, on this 22nd day of February, 2016.

By: _____
JONATHAN L. CUDNIK (0077308)
ASSISTANT CITY PROSECUTOR

Supreme Court of Ohio Clerk of Court - Filed February 04, 2016 - Case No. 2016-0172

IN THE SUPREME COURT OF OHIO

Case No.:_____

CITY OF CLEVELAND, Plaintiff-Appellant, -vs.- BENJAMIN OLES, Defendant-Appellee.	))))))))))	ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO CASE NO. CA-15-102835

NOTICE OF CERTIFIED CONFLICT FILED BY PLAINTIFF-APPELLANT CITY OF CLEVELAND

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Now comes Plaintiff-Appellant City of Cleveland and hereby gives notice of a certified conflict between *City of Cleveland v. Benjamin S. Oles*, 8th Dist. No. 102835, 2016-Ohio-23 and *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, *State v. Rice*, 1st Dist. Hamilton Nos. C-090071, C-090072, C-090073, 2009-Ohio-6332, *State v. Kraus*, 1st Dist. Hamilton Nos. C-070428, C-070429, 2008-Ohio-3965; *State v. Simmons*, 2d Dist. Montgomery No. 23991, 2011-Ohio-5561; *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330, *State v. Mullins*, 5ht Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674; *State v. Coleman*, 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573; *State v. Serafin*, 11th Dist. Portage No.2011-P-0036, 2012-Ohio-1456, and *State v. Brocker*, 11th Dist. Portage No. 2014 –P-0070, 2015-Ohio-3412. As provided by S.Ct.Prac.R.8.01(B), Plaintiff-Appellant attaches the following:

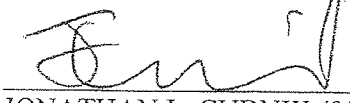
- A copy of the court of appeals order certifying a conflict;
- A copy of the certifying court's opinion; and
- Copies of the conflicting courts of appeal opinions.

The Eighth District certified a conflict in this case on January 7, 2016.

Respectfully submitted,

BARBARA LANGHENRY
LAW DIRECTOR
CITY OF CLEVELAND

KIMBERLY G. BARNETT-MILLS
INTERIM CHIEF PROSECUTOR

By: 

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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was sent via regular U.S. Mail to Joseph Patituce, Esq., Attorney for Defendant, Benjamin Oles, 26777 Lorain Road, Suite 708, North Olmsted, Ohio, 44070, on this 4th day of February, 2016.

By: _____
JONATHAN L. CUDNIK (0077308)
ASSISTANT CITY PROSECUTOR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah Byrd, Clerk of Courts

City of Cleveland

Appellant

COA NO. 102835 | LOWER COURT NO. TRC-050891-15

CLEVELAND MUNICIPAL COURT

-vs-

Benjamin S. Oles

Appellee

MOTION NO. 491486

Date 1/7/2016

Journal Entry

Sua Sponte, the Judges of the Court of Appeals of the Eighth Appellate District find that the judgment entered in this case is in conflict with the judgments of the First District Court of Appeals in *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312, *State v. Rice*, 1st Dist. Hamilton Nos. C-090071, C-090072, C-090073, 2009-Ohio-6332 and *State v. Kraus*, 1st Dist. Hamilton Nos. C-070428, C-070429, 2008-Ohio-3965, the Second District Court of Appeals in *State v. Simmons*, 2d Dist. Montgomery No. 23991, 2011-Ohio-5561, the Fifth District Court of Appeals in *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330 and *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674, the Seventh District Court of Appeals in *State v. Coleman*, 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573 and the Eleventh District Court of Appeals in *State v. Serafin*, 11th Dist. Portage No. 2011-P-0036, 2012-Ohio-1456 and *State v. Brocker*, 11th Dist. Portage No. 2015-Ohio-3412.

CA15102835 92387950

In the instant case this Court upheld a decision by the Cleveland Municipal Court granting a defendant's motion to suppress evidence where, during the course of a traffic stop, he was removed from his vehicle by a law enforcement officer and placed in the front seat of the officer's patrol vehicle. We held that the defendant was subjected to custodial interrogation when the officer questioned him within the patrol vehicle concerning his alcohol consumption without first providing *Miranda* warnings. Therefore, our opinion is in conflict with the judgments pronounced above on the question of whether detention for questioning in the front seat of a law enforcement vehicle during the course of a traffic stop constitutes custodial interrogation.

We certify the following question to the Supreme Court for review and final determination:

> During the course of a traffic stop, when a suspect is removed from his vehicle and detained in the front seat of a police vehicle for questioning, is he subjected to custodial interrogation?
>
> Stated differently, in the course of a traffic stop, does the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution require a law enforcement officer to provide *Miranda* warnings to a suspect who is removed from his vehicle and placed in the front seat of a police vehicle for questioning?

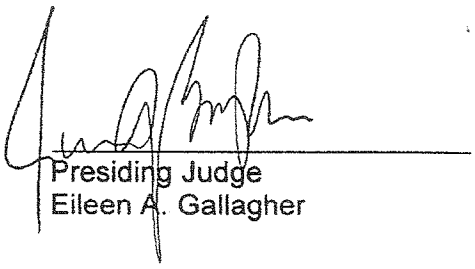
The attention of counsel for both appellant and appellee is called to the Rules of Practice of the Supreme Court, specifically S.Ct.Prac.R. 8.01, Institution of a Certified-Conflict Case.

The parties are directed to timely file the notice of certified conflict in the Supreme Court together with a copy of this order, our underlying decision in this case and the conflicting opinions cited herein within thirty days of the date of this order.

SO ORDERED.

Eileen T. Gallagher, Judge, Concurs

Melody J. Stewart, Judge Concurs



Presiding Judge
Eileen A. Gallagher

JAN - 7 2016

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102835

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

BENJAMIN S. OLES

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. TRC-050891-15

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

RELEASED AND JOURNALIZED: January 7, 2016

CA15102835
92580709

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EILEEN A. GALLAGHER, P.J.:

{¶1} Plaintiff-appellant city of Cleveland ("the City") appeals an order by the Cleveland Municipal Court granting defendant-appellee Benjamin Oles' motion to suppress evidence. For the following reasons, we affirm.

{¶2} On September 19, 2014, Oles was arrested in Cleveland, Ohio and charged with two counts of operation of a vehicle while under the influence of alcohol and a driving in marked lanes violation. Oles filed a motion to suppress evidence obtained during his traffic stop and the following evidence was introduced at a hearing on the motion.

{¶3} On September 19, 2014, at approximately 10:15 p.m., Lieutenant Eric Sheppard ("Sheppard") was positioned at the highway split of Interstate 90 westbound and Interstate 71 southbound performing "typical traffic monitoring traffic enforcement." Sheppard testified that he observed Oles'

> vehicle in the what would be the second to left lane, which would be the lane to go 90 west, that was traveling towards me. As it began to merge onto 90 to go west, it made a sudden movement crossing through that marked lanes or that gore area, cutting over to the lane which travels south on 71. In doing so, he came very close to hitting or striking the rear-end of my patrol car.

On cross-examination, however, Sheppard admitted that the vehicle was ten feet away from striking his vehicle.

{¶4} Sheppard pursued Oles during which time he did not observe any moving violations or indications of impaired driving and initiated a traffic stop.

While Oles was still seated in his own vehicle, he told Sheppard that he was coming from a wedding in downtown Cleveland. Sheppard detected an odor of an alcoholic beverage coming from within Oles' vehicle and observed Oles' actions to be "very slow and deliberate" when asked to produce his driver's license, registration and insurance.

{¶5} Based on his observations, Sheppard asked Oles to exit his vehicle and join him in the front seat of his patrol vehicle. Sheppard testified that his purpose in doing this was to determine if the smell of alcohol was coming from Oles himself or Oles' vehicle. Sheppard continued conversing with Oles and determined the smell of alcohol was coming from Oles' breath. He asked Oles how much alcohol he had consumed that evening and Oles indicated that he had four mixed drinks while at the wedding.

{¶6} At that point, Sheppard asked Oles to exit the vehicle and Oles submitted to multiple field sobriety tests. Based on Oles' inability to perform the field sobriety tests, Lieutenant Sheppard placed him under arrest. At no point during the encounter did Lieutenant Sheppard advise Oles of his *Miranda* rights.

{¶7} Lieutenant Sheppard testified that Oles was detained during the traffic stop and not free to leave. He further stated that had Oles attempted to leave during the questioning, he would have arrested Oles for an OVI violation based on his observations to that point.

{¶8} Based on the above testimony, the trial court granted Oles' motion to suppress, finding that "based on" *Miranda,* his rights had been violated thereby excluding Oles' statement to Lieutenant Sheppard and the results of the field sobriety tests.

{¶9} The City appeals and argues that the trial court erred in suppressing the evidence based on *Miranda* because Lieutenant Sheppard's questioning of Oles did not rise to the level of custodial interrogation.

{¶10} In *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, 907 N.E.2d 1254 (8th Dist.), this court outlined the standard of review on a motion to suppress:

> "Our standard of review with respect to motions to suppress is whether the trial court's findings are supported by competent, credible evidence. See *State v. Winand*, 116 Ohio App.3d 286, 688 N.E.2d 9 (7th Dist.1996), citing *City of Tallmadge v. McCoy*, 96 Ohio App.3d 604, 645 N.E.2d 802 (9th Dist.1994). * * * This is the appropriate standard because 'in a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.' *State v. Hopfer*, 112 Ohio App.3d 521, 679 N.E.2d 321 (2nd Dist.1996)."

Id. at ¶ 22, quoting *State v. Loyd,* 126 Ohio App.3d 95, 709 N.E.2d 913 (7th Dist.1998).

{¶11} After accepting such factual findings, the reviewing court must independently determine, as a matter of law, whether the applicable legal standard has been satisfied. *State v. Jones*, 8th Dist. Cuyahoga No. 99837, 2014-Ohio-496.

{¶12} The City argues that the trial court erred in finding that Oles' *Miranda* rights were violated when Lieutenant Sheppard placed Oles in his patrol car and questioned his alcohol consumption without providing him *Miranda* warnings.

{¶13} Prior to a custodial interrogation, the accused must be apprised of his or her right against self-incrimination and right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *Miranda* defines "custodial interrogations" as any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. A traffic stop alone does not render the person "in custody" within the meaning of *Miranda*. *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 13, citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). However, if that person "'thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.'" *Id.*, quoting *Berkemer* at 440. In determining whether police questioning constitutes "custodial interrogation" for *Miranda* purposes, the inquiry is whether a reasonable person would feel free to leave the interview under the totality of the circumstances presented at that time. *State v. Duhamel*, 8th Dist. Cuyahoga No. 102346, 2015-Ohio-3145, ¶ 21, citing *State v. Biros*, 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997).

{¶14} In *Farris*, the defendant was stopped for speeding and removed from his vehicle after the law enforcement officer detected the smell of burnt marijuana emanating from the defendant's vehicle. *Id.* at ¶ 1. The officer took Farris' car keys and placed Farris in the passenger seat of his police cruiser. *Id.* at ¶ 2.

{¶15} The *Farris* court held that the only relevant inquiry in determining whether a person is in custody is "how a reasonable [person] in the suspect's position would have understood [their] situation." *Id.* at ¶ 14. The court determined that a reasonable person in Farris' position would have understood himself to be in custody of a police officer, because the officer (1) patted down Farris; (2) took his car keys; (3) instructed him to enter the cruiser; and (4) told Farris that he was going to search Farris' car because of the scent of marijuana. *Id.* The court concluded that the defendant's pre-*Miranda* and post-*Miranda* statements were inadmissible.[1]

{¶16} However, other appellate districts, in applying *Farris*, have held that mere questioning of a defendant in a police cruiser does not necessarily convert a traffic stop into a custodial interrogation. Facing a nearly identical

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[1]We note that in *State v. Lozada*, 92 Ohio St.3d 74, 2001-Ohio-149, 748 N.E.2d 520, the Ohio Supreme Court upheld the practice of police officers placing motorists in patrol cars during the course of a traffic stop if such action prevents officers or the driver from being subjected to a dangerous condition. However, that case dealt with the Fourth Amendment implications of pat down searches administered before placing a motorist in the patrol car and did not address a defendant's *Miranda* rights stemming from questioning inside the vehicle.

factual situation to the present case, the Eleventh District Court of Appeals found that *Miranda* warnings were unnecessary where a state highway patrol officer questioned a defendant about his alcohol consumption in the passenger seat of his patrol vehicle. *State v. Serafin*, 11th Dist. Portage No. 2011-P-0036, 2012-Ohio-1456. As in the present case, the officer in *Serafin* testified that he removed the defendant from his vehicle and placed him in the front passenger seat of the officer's patrol car in order to determine if an alcohol scent the officer had detected was emanating from the defendant or his vehicle.

{¶17} The *Serafin* court distinguished *Farris* based on the additional custodial facts that Farris' car keys were confiscated and the officer informed Farris that his car would be searched. Neither of these factors is established in the record before us.

{¶18} Similarly, the First District held that *Miranda* warnings were not required where a police officer removed a defendant from his vehicle and placed him in the front passenger seat of his patrol vehicle for questioning regarding his alcohol consumption. *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312. As in *Serafin*, the *Leonard* court distinguished *Farris* based on the greater level of intrusion and custody the defendant faced in *Farris*. *Id.* at ¶ 21. In *Leonard*, the defendant was not subjected to a pat-down search, did not have his car keys confiscated and was not told his vehicle would be searched. *Id.* at ¶ 22. Based on the comparatively minimal intrusion, the First District found

that, despite being questioned in the front seat of a patrol car, Leonard "would have understood that he was not in police custody for practical purposes." *Id.* at ¶ 23. Therefore, the court concluded that *Miranda* warnings were unnecessary. At least two other districts have reached similar conclusions. *See, e.g.*, *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674 (finding no custodial interrogation where defendant was questioned about his alcohol consumption in the passenger seat of officer's patrol vehicle); *State v. Coleman*, 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573 (no violation of *Miranda* where defendant was questioned about his alcohol consumption in the officer's patrol vehicle because other custodial factors from *Farris* were not present).

{¶19} We decline to adopt the 1st, 5th, 7th and 11th Districts' distinguishment of *Farris*. Under the totality of the circumstances presented in this case, we find that a reasonable person, removed from his or her own vehicle and questioned about their alcohol consumption in the passenger seat of a police cruiser would not feel free to leave.

{¶20} We note that "[a] policeman's unarticulated plan [to arrest] has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442, 104 S.Ct. 3138, 82 L.Ed.2d 317; *State v. Raine*, 8th Dist. Cuyahoga No. 90681, 2008-Ohio-5993, ¶ 22. Lieutenant Sheppard conceded that had Oles attempted

to exit the vehicle, he would have arrested Oles for an OVI offense. Although Sheppard's undisclosed intent to arrest Oles for an OVI has no particular bearing on his individual custody analysis, we do believe it is instructive in a broader sense — a reasonable individual ordered to answer questions unrelated to the initial purpose of his traffic stop, in the front seat of a police cruiser, would not believe he was free to leave. Indeed, we find that to believe otherwise would be unrealistic and irrational.

{¶21} Finally, we note that it is unclear why Sheppard felt compelled to place Oles in his patrol vehicle in this instance. Although our analysis is controlled by Sheppard's testimony that he decided to perform a field sobriety test only after Oles' statements inside the patrol vehicle, we note that Sheppard may have had reasonable suspicion to conduct a field sobriety test after his initial interaction with Oles or had he merely removed Oles from the vehicle and confirmed the source of the alcohol odor outside Oles' vehicle. *See Cleveland v. Reese*, 8th Dist. Cuyahoga No. 100579, 2014-Ohio-3587, ¶ 19-20.

{¶22} Appellant's sole assignment of error is overruled.

{¶23} By separate entry, we certify a conflict between this decision and the decisions of the First, Fifth, Seventh and Eleventh Districts in: *Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312; *State v. Rice*, 1st Dist. Hamilton Nos. C-090071, C-090072 and C-090073, 2009-Ohio-6332; *State v. Kraus*, 1st Dist. Hamilton Nos. C-070428 and C-070429, 2008-Ohio-3965; *Mullins*, 5th Dist.

Licking No. 2006-CA-00019, 2006-Ohio-4674; *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330; *Coleman*, 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573; *Serafin*, 11th Dist. Portage No. 2011-P-0036, 2012-Ohio-1456, *State v. Brocker*, 11th Dist. Portage No. 2014-P-0070, 2015-Ohio-3412.

{¶24} The judgment of the trial court is affirmed.

It is ordered that appellee recover from 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 trial 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.

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN - 7 2016

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EILEEN T. GALLAGHER, J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY

2007 WL 1874232

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
First District, Hamilton County.

STATE of Ohio, Plaintiff-Appellee,
v.
Timothy LEONARD, Defendant-Appellant.

No. C-060595.
|
Decided June 29, 2007.

Criminal Appeal from Hamilton County Municipal Court.

Attorneys and Law Firms

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Scott M. Heenan, Assistant Prosecuting Attorney, for Appellee.

Steven R. Adams, for Appellant.

Opinion

SYLVIA SIEVE HENDON, Judge.

*1 {¶ 1} Following the denial of his motion to suppress, Timothy Leonard entered a no-contest plea to operating a vehicle under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a). The trial court accepted the plea, found Leonard guilty of the offense, sentenced him, and entered judgment accordingly.

{¶ 2} In a single assignment of error, Leonard now argues that the trial court erred by denying his motion to suppress.

{¶ 3} Appellate review of a motion to suppress presents a mixed question of law and fact.[1] In considering a motion to suppress, the trial court is in the best position to decide the facts and to evaluate the credibility of the witnesses.[2] Consequently, we must accept the trial court's findings of fact if they are supported by competent and credible evidence.[3] With respect to the trial court's conclusions of law, however, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard.[4]

The Traffic Stop

{¶ 4} On February 19, 2005, just after 2:00 a.m., Ohio State Highway Patrol Trooper Robert Hayslip stopped Leonard on suspicion that his van's windshield and side windows were excessively tinted. When Trooper Hayslip compared tint samples with Leonard's side windows, he determined that the windows were not excessively tinted, as he had initially believed. But his comparison of the tint samples to Leonard's windshield revealed that the windshield was excessively tinted. And the tint on Leonard's windshield extended well below its AS-1 line.[5]

{¶ 5} Trooper Hayslip asked Leonard for his driver's license and proof of insurance. Leonard said that he did not have his license with him, and that it was in his house. Trooper Hayslip could smell an odor of alcohol coming from inside Leonard's van. He saw an unopened container of beer in the van's console, and he noticed that Leonard's eyes were bloodshot and glassy. He asked Leonard if he had been drinking, and Leonard responded that he had not.

{¶ 6} Trooper Hayslip asked Leonard to get out of the van, and he explained the equipment violation. The trooper then asked Leonard to sit in the front passenger seat of his patrol car. Once Leonard was seated in the patrol car, Trooper Hayslip noticed a strong odor of alcohol on his breath. He asked Leonard how much he had had to drink. Leonard said that he had had "a couple," and that he had just left a bar.

{¶ 7} When Trooper Hayslip asked Leonard if he wanted to perform fieldsobriety tests, Leonard asked him if the testing was necessary. Then Leonard admitted that he had "shotgunned" four or five beers in the "last fifteen minutes" because he had been unable to sleep. At that point, Trooper Hayslip conducted a horizontal-gaze-nystagmus test.[6]

The Traffic Stop was Supported by Probable Cause

{¶ 8} First, Leonard argues that Trooper Hayslip's misunderstanding of Ohio's window-tinting law rendered the traffic stop nothing more than a random stop in violation of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution.[7]

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*2 {¶ 9} A traffic stop is reasonable for Fourth Amendment purposes if the police officer has "probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations." [8]

{¶ 10} Leonard argues that Trooper Hayslip made two misstatements with respect to Ohio's window-tinting law. At one point, Trooper Hayslip testified that a windshield "must allow 50 percent light through." At another point, Trooper Hayslip testified that tinting applied to a windshield may not extend downward beyond the AS-1 line.

{¶ 11} Both of these statements were incorrect. Contrary to Trooper Hayslip's assertion, Ohio requires a windshield to have a light transmittance of at least 70 percent. [9] In effect, Trooper Hayslip's misapprehension of this requirement would inure to a driver's benefit by allowing much less light transmittance. And contrary to Trooper Hayslip's testimony, Ohio's window-tinting regulations specifically apply to tinting material that extends downward beyond the windshield's AS-1 line (or five inches from the top of the windshield, whichever is closer to the top). [10]

{¶ 12} Despite Trooper Hayslip's misconceptions, we find the traffic stop was proper. In *United States v. Wallace,* [11] the United States Court of Appeals for the Ninth Circuit upheld a traffic stop conducted by a police officer who had mistakenly believed that *any* tinting of a vehicle's front windows was illegal. The court noted that "[t]he tinting *was* illegal but for a different reason-because it was over twice as dark as the law allows. * * * That [the officer] had the mistaken impression that all front-window tint is illegal is beside the point. [The officer] was not taking the bar exam. The issue is not how well [the officer] understood California's window tinting laws, but whether he had objective, probable cause to believe that these windows were, in fact, in violation."

{¶ 13} The Ohio Supreme Court cited *Wallace* with approval in *Bowling Green v. Godwin,* [12] where the court held that a police officer who observes a driver disregard a traffic-control device may have probable cause under the totality of the circumstances to stop the driver, even though the device was not installed in compliance with a local ordinance requiring approval of city council for the installation of traffic-control devices. [13] The court explained that a determination of probable cause depends on whether an objectively reasonable police officer would believe that a traffic or equipment violation has occurred. [14]

{¶ 14} In this case, the issue before us is not how well Trooper Hayslip understood Ohio's window-tinting law. Instead, we must determine whether an objectively reasonable police officer would have believed that the window tinting on Leonard's van constituted an equipment or traffic violation, based on the totality of the circumstances known to the officer at the time of the stop.

*3 {¶ 15} Here, Trooper Hayslip's initial observation of Leonard's van caused him to believe that its windshield was illegally tinted. Because this suspicion was confirmed when he compared his tint samples to Leonard's windshield, the traffic stop was supported by probable cause. Our determination that the officer had probable cause to believe that an offense had been committed obviates our need to separately consider the lesser standard of reasonable suspicion. [15]

{¶ 16} Because Trooper Hayslip had lawfully stopped Leonard for the window-tinting violation, he properly ordered Leonard to get out of the van. [16] And Leonard's failure to produce a driver's license was a lawful reason for detaining him in the patrol car. [17]

Leonard Was Not Subject to Custodial Interrogation

{¶ 17} Next, Leonard argues that the trial court should have suppressed the statements he had made after Trooper Hayslip ordered him to sit in the patrol car because the statements were obtained in violation of *Miranda v. Arizona.* [18]

{¶ 18} *Miranda* defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." [19] In determining whether a person was in custody for *Miranda* purposes, courts must make a two-part inquiry: "First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." [20]

{¶ 19} Generally, motorists temporarily detained pursuant to ordinary traffic stops are not in custody for purposes of *Miranda.* [21] Moreover, routine questioning of a motorist

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during a traffic stop does not automatically convert the detention into a custodial interrogation.[22] But if a stopped motorist is then subjected to treatment that renders him in custody for practical purposes, he is entitled to the protections spelled out by *Miranda.*[23]

{¶ 20} In *State v. Farris,*[24] after stopping a driver for speeding, a police officer smelled burnt marijuana coming from inside the car. The officer asked the driver to step out of the car, patted the driver down, and placed him in the front seat of his patrol car. Without administering a *Miranda* warning, the officer asked the driver about the smell of marijuana and told him that he was going to search the car. At that point, the driver admitted that a marijuana pipe was in a bag in the trunk.

{¶ 21} The Ohio Supreme Court held that the police officer's treatment of the driver after the traffic stop had placed the driver in custody for practical purposes. The court held that a reasonable driver would have understood himself to be in police custody as he sat in the police cruiser where the officer (1) had patted him down, (2) had taken his car keys, and (3) had told him that he was going to search his car. The court held that the driver's prewarning statements made while in custody should have been suppressed.[25]

*4 {¶ 22} Compared to the facts in *Farris,* the intrusion in this case was minimal. Trooper Hayslip did not conduct a pat-down search before placing Leonard in the front passenger seat of his patrol car and did not take Leonard's car keys or search his van. And Trooper Hayslip did not handcuff Leonard or subject him to a lengthy detention.

{¶ 23} Under these circumstances, a reasonable person in Leonard's position would have understood that he was not in police custody for practical purposes. Consequently, Leonard's statements to Trooper Hayslip were not obtained in violation of *Miranda.*

Probable Cause to Arrest

{¶ 24} Finally, Leonard argues that his arrest was not based upon probable cause. A warrantless arrest is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.[26] The existence of probable cause depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.[27]

{¶ 25} In this case, the strong odor of alcohol on Leonard's breath, his glassy and bloodshot eyes, his admission to having just left a bar where he had shotgunned four to five beers, and the unopened container of beer in the van's console amply supported Trooper Hayslip's decision to arrest Leonard.

{¶ 26} Consequently, we hold that the trial court properly denied Leonard's motion to suppress. We overrule the assignment of error and affirm the trial court's judgment.

Judgment affirmed.

PAINTER, P.J., and WINKLER, J., concur.

RALPH WINKLER, retired, of the First Appellate District, sitting by assignment.

Please Note:
The court has recorded its own entry on the date of the release of this decision.

All Citations

Not Reported in N.E.2d, 2007 WL 1874232, 2007 -Ohio- 3312

Footnotes

1 *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8.
2 *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972.
3 *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583.
4 *Burnside,* supra, at ¶ 8.
5 As Trooper Hayslip explained, the AS-1 line on the windshield is factory-installed.
6 Following the hearing, the trial court suppressed the results of the horizontal-gaze-nystagmus test.
7 See *Delaware v. Prouse* (1979), 440 U.S. 648, 99 S.Ct. 1391.

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8 *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, citing *Prouse,* supra, at 661, 99 S.Ct. 1391; see, also, *Dayton v. Erickson,* 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091.

9 See Ohio Adm.Code 4501-41-03(A)(2).

10 Ohio Adm.Code 4501-41-03(A)(5).

11 (C.A.9, 2000), 213 F.3d 1216, cert. denied sub. nom. *Wallace v. United States* (2002), 537 U.S. 1011, 123 S.Ct. 480.

12 110 Ohio St.3d 58, 2006-Ohio-3563, 850 N.E.2d 698, at ¶ 15.

13 *Id.,* syllabus.

14 *Id.* at ¶ 16.

15 See *Godwin,* supra, at ¶ 13, citing *Erickson,* supra, at 11, 665 N.E.2d 1091, fn.2.

16 See *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111, 98 S.Ct. 330, 333, fn. 6.

17 *State v. Lozada,* 92 Ohio St.3d 74, 77, 2001- Ohio-149,748 N . E.2d 520, citing *State v. Evans* (1993), 67 Ohio St.3d 405, 618 N . E.2d 162.

18 (1966), 384 U.S. 436, 86 S.Ct. 1602.

19 *Id.* at 444.

20 *Thompson v. Keohane* (1995), 516 U.S. 99, 112, 116 S.Ct. 457.

21 See *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S.Ct. 3138.

22 See *State v. Polen,* 1st Dist. Nos. C-050959 and C-050960, 2006-Ohio-5599, citing *State v. Kiefer,* 1st Dist No. C-030205, 2004-Ohio-5054; *Berkemer,* supra.

23 *Berkemer,* supra, at 440; *State v. Farris,* 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985.

24 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985.

25 *Id.* at ¶ 14.

26 See *United States v. Watson* (1976), 423 U.S. 411, 417-424, 96 S.Ct. 820; *Brinegar v. United States* (1949), 338 U.S. 160, 175-176, 69 S.Ct. 1302.

27 *Maryland v. Pringle* (2003), 540 U.S. 366, 371, 124 S.Ct. 795.

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2009 WL 4456214

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
First District, Hamilton County.

STATE of Ohio, Plaintiff-Appellant,
v.
Richard **RICE**, Defendant-Appellee.

Nos. C-090071, C-090072, C-090073.
|
Decided Dec. 4, 2009.

Criminal Appeal from Hamilton County Municipal Court.

Attorneys and Law Firms

John P. Curp, City Solicitor, Ernest F. McAdams, City Prosecutor, and Jennifer Bishop, Assistant City Prosecutor, for Plaintiff-Appellant.

James S. Arnold, for Defendant-Appellee.

Opinion

PER CURIAM.

*1 {¶ 1} This is an appeal from the trial court's partial granting of defendant-appellee Richard **Rice's** motion to suppress. For the following reasons, that part of the trial court's judgment suppressing evidence must be reversed.

Factual Background

{¶ 2} On August 16, 2008, Ohio **State** Highway Patrol Trooper Michael Shimko stopped **Rice** for failing to yield to a motorcycle as **Rice** merged onto I-275. Shimko approached the passenger side of **Rice's** vehicle, where he noticed both a strong odor of alcohol emanating from the car and that **Rice** had bloodshot eyes. After **Rice** admitted that he had consumed a few beers, Shimko had **Rice** exit from his vehicle. Shimko then conducted a brief pat-down search of **Rice** and placed **Rice**, unhandcuffed, in the back seat of his cruiser. While in the back seat, **Rice stated** that he had consumed four 16-ounce beers.

{¶ 3} Trooper Shimko conducted three field-sobriety tests on **Rice**. He testified at the hearing on **Rice's** motion to suppress that **Rice** had exhibited six out of six possible clues, or signs, of impairment on the Horizontal Gaze Nystagmus ("HGN") test. He further testified that **Rice** had exhibited three clues on both the walk-and-turn and the one-leg-stand tests.

{¶ 4} Following these tests, Trooper Shimko placed **Rice** under arrest and read him his *Miranda* rights. Shimko transported **Rice** to the trooper outpost station, where **Rice** submitted to a breath test. The breath test indicated that **Rice** had a breath alcohol content of .105 grams by weight of alcohol per 210 liters of breath. **Rice** was charged with driving under the influence, driving with a prohibited concentration of breath alcohol, and failure to yield.

{¶ 5} **Rice** filed a motion to suppress, which the trial court granted in part. Specifically, the trial court issued the following rulings: **Rice's** statements made in the back of the police cruiser were suppressed because he had been in custody but had not been read his *Miranda* rights; all evidence concerning the HGN field-sobriety test was suppressed; various clues derived from the walk-and-turn and the one-leg-stand tests were suppressed, but the remaining evidence concerning these tests was admissible; and all the evidence concerning the breath test conducted on **Rice** was suppressed because only one manual for the breath-testing machine had been present at the testing site.

Ohio Appellate Rule 3

{¶ 6} The **state** appeals from that part of the trial court's decision suppressing evidence and raises three assignments of error. It argues that the trial court erred in suppressing **Rice's** statements made while in the police cruiser; that the trial court erred in suppressing the evidence concerning the HGN field-sobriety test and various clues on the walk-and-turn and one-leg-stand tests; and that the trial court erred in suppressing the results of **Rice's** breath test.

{¶ 7} **Rice** also raises three assignments of error. But **Rice** has not filed a notice of appeal from the trial court's decision. App.R. 3(C) **states** when a notice of a cross-appeal is required. Section 3(C)(2) provides that "[a] person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal."

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*2 {¶ 8} **Rice** argues in his first and second assignments of error that the trial court erred in failing to suppress all the evidence concerning the walk-and-turn and one-leg-stand tests. These assignments of error seek a reversal of part of the trial court's decision and cannot be considered under App.R. 3(C)(2) in the absence of a notice of cross-appeal. Consequently, we strike **Rice's** first and second assignments of error. In his third assignment of error, **Rice** defends the trial court's suppression of the results of his breath test on additional grounds. This assignment of error may properly be raised without a notice of cross-appeal and will therefore be considered by this court.

{¶ 9} This court's review of a ruling on a motion to suppress presents a mixed question of law and fact. [1] We must accept the trial court's findings of fact if they are supported by competent, credible evidence, but we review de novo the trial court's application of the law to the relevant facts. [2]

Rice was not in Custody

{¶ 10} As we have **stated**, the trial court suppressed **Rice's** statements made while in the back seat of the police cruiser because it determined that **Rice** had been in custody at that point but had not been given his *Miranda* rights. In its first assignment of error, the **state** argues that *Miranda* warnings had not been required because **Rice** had not been in custody.

{¶ 11} *Miranda* warnings must be provided when a defendant is subject to a custodial interrogation. [3] A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." [4]

{¶ 12} Generally, "motorists temporarily detained pursuant to ordinary traffic stops are not in custody for purposes of *Miranda*." [5] But "if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*." [6]

{¶ 13} In this case, **Rice** was not in custody. Trooper Shimko had valid reasons for removing **Rice** from his vehicle and placing him in the cruiser. Two other passengers were in the vehicle that was stopped, and Shimko needed to determine whether the odor of alcohol had come from **Rice**. The interests of safety further justified placing **Rice** in the cruiser, since **Rice** had been stopped near high-speed traffic on the side of an interstate highway. [7]

{¶ 14} Although **Rice** had been placed in the back seat of the cruiser, this did not transform a routine stop into a custodial interrogation. Trooper Shimko did not subject **Rice** to a lengthy interrogation, and **Rice** was not handcuffed while he was in the cruiser. Further, the interaction between **Rice** and Shimko was neither combative nor intimidating.

{¶ 15} Because **Rice** had not been subject to a custodial interrogation, *Miranda* warnings were not required, and his statements made in the cruiser should not have been suppressed. The **state's** first assignment of error is sustained.

*3 {¶ 16} In its second assignment of error, the **state** argues that the trial court erred in suppressing the results of the HGN field-sobriety test and in suppressing various clues on both the walk-and-turn and the one-leg-stand tests.

{¶ 17} The results of a field-sobriety test are admissible when the **state** demonstrates by clear and convincing evidence that the officer has substantially complied with the regulations established by the National Highway Traffic and Safety Administration ("NHTSA"). [8]

1. HGN Test

{¶ 18} The trial court suppressed all the evidence concerning the HGN test, **stating** that "[t]he HGN is suppressed because part of the test was performed while the Defendant was viewing the flashing strobe lights from the police vehicle as well as incorrect timing on the onset prior to 45 degrees test."

{¶ 19} Trooper Shimko testified that he had performed the field-sobriety tests behind his cruiser for safety purposes. But because the tests were conducted in this location, they were not captured on the cruiser's camera. With respect to the strobe lights, Shimko testified that he had **Rice** face away from the strobe lights, which were still on but had been switched to a lower level. On this level, the red and blue lights were on, but the white lights had been eliminated.

{¶ 20} With respect to the onset-prior-to-45-degrees portion of the test, NHTSA regulations **state** that the officer should

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move the stimulus from the suspect's eye to his shoulder at a speed of four seconds. But Trooper Shimko testified that, for this portion of the test, it took him two seconds to move the stimulus across this distance. Shimko further referred to this portion of the test as "distinct nystagmus at 45 degrees."

{¶ 21} Following our review of the record, we conclude that the trial court's finding with respect to the flashing strobe lights was not supported by the evidence. Shimko testified that his lights had been lowered and that **Rice** had been facing away from the lights. Nothing from the cruiser's camera contradicted his statements, and **Rice** did not testify. Accordingly, the trial court did not have any persuasive evidence before it that the strobe lights had interfered with the HGN test. The evidence concerning the test should not have been suppressed on these grounds.

{¶ 22} The trial court correctly noted that Shimko had incorrectly timed the "onset prior to 45 degrees" portion of the test. And as we have noted, Shimko also incorrectly referred to this portion of the test as "distinct nystagmus at 45 degrees." But other than the incorrect timing and phrasing, Shimko performed the test correctly. An officer performing an HGN test is required to check for various factors; the "onset prior to 45 degrees" is just one part of the entire HGN test. The officer must also check for other factors, including tracking, lack of smooth pursuit, and nystagmus at maximum deviation. Given Shimko's otherwise accurate performance, we cannot conclude that incorrect timing on one portion of the test rendered all the evidence concerning the test inadmissible. Officers are required to substantially comply with the NHTSA regulations; strict compliance is not required.

*4 {¶ 23} The **state** presented clear and convincing evidence that Trooper Shimko had substantially complied with the NHTSA regulations for the HGN test, and the evidence concerning this test should not have been suppressed.

2. One-Leg-Stand and Walk-and-Turn Tests

{¶ 24} In a novel action, the trial court suppressed one clue on both the one-leg-stand and the walk-and-turn tests. The court otherwise admitted the remaining evidence concerning these tests.

{¶ 25} The trial court specifically **stated** that "[t]he walk-and-turn test clue of stopping in between steps is suppressed and not to be used against the defendant. The trooper never instructed the defendant, as NHTSA requires, that 'Once you start walking, don't stop until you have completed the test.' " The trial court further **stated** that "[t]he one-leg stand clue of Defendant putting his foot down is suppressed. In this case, the trooper gave an instruction to the Defendant, 'If you happen to put your foot down during the test, just pick it back up.' This is not an instruction per NHTSA, rather it is an instruction for the officer to tell the defendant only if he puts his foot down."

{¶ 26} We have found no legal support for the trial court's suppression of individual clues on field-sobriety tests. R.C. 4511.19(D)(4)(b) provides that a trial court must determine whether an officer has substantially complied with the NHTSA regulations for each test. It provides that the court must determine whether the entire test was conducted in substantial compliance with the regulations, rather than whether the officer's actions regarding the detection of each individual clue were in substantial compliance.

{¶ 27} In this case, the trial court found that the officer had failed to substantially comply with one portion of each of these two field-sobriety tests. The trial court's findings regarding how **Rice** was instructed were correct. But because all but one clue from each test was deemed admissible, it is clear that the trial court ruled that there was substantial compliance with the applicable regulations for each test. And following our review of the record, we hold that there was proof of substantial compliance.

{¶ 28} The trial court erred in suppressing one clue from both the walk-and-turn and the one-leg-stand tests. Because none of the evidence concerning the HGN, walk-and-turn, and one-leg-stand tests should have been suppressed, the **state's** second assignment of error is sustained.

Breath Test

1. State's Arguments

{¶ 29} In its third assignment of error, the **state** argues that the trial court erred in suppressing the results of **Rice's** breath test on the grounds that a procedural manual had not been present at the testing site.

{¶ 30} Ohio **State** Highway Patrol Trooper Kevin Long testified at the hearing on the motion to suppress that the

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operational manual for the breath-test machine, a BAC DataMaster, had been present. Trooper Long offered no testimony concerning a procedural manual.

*5 {¶ 31} In its decision suppressing the breath-test results, the trial court determined that both Ohio Adm.Code. 3701-53-01(B) and this court's decision in *State v. Douglas*[9] required the presence of two manuals in the testing area.

{¶ 32} The trial court was incorrect. Ohio Adm.Code 3701-53-01(B) states that "[a]t least one copy of the written procedural manual required by paragraph (D) of rule 3701-53-06 of the Administrative Code for performing blood, urine, or other bodily substance tests shall be on file in the area where the analytical tests are performed. In the case of breath tests using an approved evidential breath testing instrument listed in paragraphs (A) and (B) of rule 3701-53-02 of the Administrative Code, the operational manual provided by the instrument's manufacturer shall be on file in the area where the breath tests are performed."

{¶ 33} In our judgment, the Ohio Administrative Code requires the presence of one manual every time a test is performed on a bodily substance. In the case of breath tests conducted on an approved breath-testing instrument, that required manual is the operational manual provided by the instrument's manufacturer. The code does not require the presence of both an operational manual and a separate procedural manual when such breath tests are conducted.

{¶ 34} The trial court additionally relied on this court's holding in *State v. Douglas* to suppress the results of **Rice's** breath test. *Douglas* also involved a breath-alcohol test. In *Douglas,* this court noted that "Ohio Adm.Code 3701-53-01(B) requires that there be two manuals, one a written procedure manual for performing the substance tests to be kept in the area where the analytical tests are performed and the other an operational manual provided by the instrument's manufacturer to be kept where the breath tests are performed."[10] The *Douglas* court determined that the record in that case failed to include any evidence concerning the presence of an operational manual, and, consequently, that the state had failed to demonstrate substantial compliance with the Ohio Administrative Code.[11] But the *Douglas* decision made no reference to, and provided no analysis concerning, whether a separate procedural manual must be present when breath tests are conducted.

{¶ 35} To the extent that the *Douglas* decision might be read to require the presence of both a procedural and an operational manual when breath tests are conducted on approved breath-testing instruments, such language is dicta and is not binding in this case.

{¶ 36} The state must demonstrate substantial compliance with the Ohio Administrative Code regulations.[12] In this case, Trooper Long's testimony concerning the presence of an operational manual for the BAC DataMaster was sufficient to establish substantial compliance with Ohio Adm.Code 3701-53-01(B). The trial court should not have suppressed **Rice's** breath-test results on the ground that the regulation had been violated. The state's third assignment of error is sustained.

2. Rice's Arguments

*6 {¶ 37} In his third assignment of error, **Rice** argues that the trial court's suppression of his breath-test results should be upheld on several grounds not specifically relied upon by the court.

{¶ 38} **Rice** argues that the state failed to demonstrate substantial compliance with Ohio Adm.Code 3701-53-02(C), 3701-53-09(B), and 3701-53-07(C)(2). These provisions, respectively, require that breath samples be analyzed according to an operational checklist for the machine used to conduct the breath test; that the operator of the breath-test machine apply for a permit from the department of health for the specific machine being used; and that the operator of a breath-test machine demonstrate that he or she has completed an operator-training class for the breath-test machine that the operator utilizes.

{¶ 39} Ohio Adm.Code 3701-53-02(A) provides that the Ohio Department of Health has approved the following evidential breath-testing instruments: the BAC DataMaster, the BAC DataMaster cdm, and the Intoxilyzer. **Rice's** arguments focus on the difference between the BAC DataMaster and the BAC DataMaster cdm.

{¶ 40} In this case, **Rice's** breath test was conducted on a BAC DataMaster cdm. But the operational checklist present at the testing site was a checklist for a BAC DataMaster. And the troopers involved with **Rice's** case had a permit and training for the BAC DataMaster, but not the BAC DataMaster cdm. **Rice** asserts that, for these reasons, the

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state failed to demonstrate substantial compliance with the applicable regulations.

{¶ 41} We are not persuaded by **Rice's** arguments. Trooper Long testified in this case that the department of health has not issued a separate manual, checklist, or operational certificate for the BAC DataMaster cdm. Rather, the cdm version of the machine is referred to in the manual for the BAC DataMaster.

{¶ 42} If **Rice's** arguments were accepted, the BAC DataMaster cdm could never in practicality be used because the department of health has not issued a separate manual or checklist for that machine. We are skeptical that the department of health intended such a result.

{¶ 43} This issue has been analyzed in *State v. Staley.* [13] The *Staley* court first discussed the operational differences between the two machines and held that "[a]lthough much evidence was presented for this court's consideration, no evidence was presented that would lead this court to believe that ODH's issuance of a single permit authorizing operation of the DataMaster Standard and the DataMaster cdm contradicts the purpose of ensuring the most accurate and reliable BAC test result." [14] The court further noted that the Ohio Department of Health "was thorough and deliberate in considering whether the permit authorizing operation of the BAC DataMaster could authorize operation of the BAC DataMaster cdm as well." [15]

{¶ 44} We conclude that the presence of an operational checklist and permit for the BAC DataMaster when a BAC DataMaster cdm is used demonstrates substantial compliance with the Ohio Administrative Code. **Rice's** breath-test results should not have been suppressed due to the absence of a separate permit and checklist.

*7 {¶ 45} **Rice** next argues that the trial court correctly suppressed the results of his breath test because the **state** did not demonstrate substantial compliance with Ohio Adm.Code 3701-53-04(A)'s requirement concerning radio frequency interference. This provision **states** that "[a] senior operator shall perform an instrument check on approved evidential breath testing instruments and a radio frequency interference (RFI) check no less frequently than once every seven days."

{¶ 46} **Rice's** breath test was conducted at approximately 12:09 a.m. on August 17, 2008. Trooper Long testified that he had performed an RFI check on the BAC DataMaster cdm at approximately 1:37 a.m. on August 11, 2008. **Rice's** test was accordingly conducted within seven days of an RFI check, and the **state** demonstrated substantial compliance with Ohio Adm.Code 3701-53-04(A). **Rice's** breath-test results should not have been suppressed on the ground of an untimely RFI check, and **Rice's** third assignment of error is overruled.

{¶ 47} Having sustained the **state's** assignment of error with respect to the trial court's suppression of the breath-test results based on the absence of a procedural manual, and having overruled **Rice's** arguments seeking to uphold the suppression order on different grounds, we conclude that the trial court erred in suppressing the results of the breath test.

Conclusion

{¶ 48} The trial court erred in suppressing **Rice's** statements made while in the back seat of the police cruiser. The court further erred in suppressing all the evidence concerning the HGN field-sobriety test and various clues on the one-leg-stand and walk-and-turn tests. The evidence concerning these tests was admissible in its entirety. **Rice's** breath-test result was also admissible because the **state** demonstrated substantial compliance with the relevant Ohio Administrative Code provisions.

{¶ 49} That part of the judgment of the trial court suppressing evidence is reversed, and this case is remanded for further proceedings.

Judgment reversed and cause remanded

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

Please Note:
The court has recorded its own entry on the date of the release of this decision.

All Citations

Slip Copy, 2009 WL 4456214, 2009 -Ohio- 6332

Footnotes

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1 *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.
2 *Id.*
3 *Miranda v. Arizona* (1966), 384 U.S. 436, 467-468, 86 S.Ct. 1602.
4 *Id.* at 444.
5 *State v. Leonard,* 1st Dist. No. C-060595, 2007-Ohio-3312, ¶ 19, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S.Ct. 3138.
6 *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138.
7 See *State v. Polen,* 1st Dist. Nos. C-050959 and C-050960, 2006-Ohio-5599, ¶¶ 12-13.
8 R.C. 4511.19(D)(4)(b).
9 *State v. Douglas,* 1st Dist. No. C-030897, 2004-Ohio-5726.
10 *Id.* at ¶ 5.
11 *Id.* at ¶ 6.
12 *State v. Burnside,* supra, 100 Ohio St.3d 152, at ¶ 27.
13 *State v. Staley,* 141 Ohio Misc.2d 40, 2006-Ohio-7274, 868 N.E.2d 1284.
14 *Id.* at ¶ 15.
15 *Id.* at ¶ 19.

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2008 WL 3165934

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
First District, Hamilton County.

STATE of Ohio, Plaintiff-Appellee,
v.
Roger **KRAUS**, Defendant-Appellant.

Nos. C-070428, C-070429.
|
Decided Aug. 8, 2008.

Criminal Appeal from Hamilton County Municipal Court.

Attorneys and Law Firms

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Tanner B. McFall, Assistant Prosecuting Attorney, for plaintiff-appellee.

The Farrish Law Firm and Robert W. Dziech, II, for defendant-appellant.

Opinion

SYLVIA S. HENDON, Judge.

*1 {¶ 1} Defendant-appellant Roger **Kraus** challenges the trial court's decision overruling his motion to suppress. **Kraus** had been arrested for driving while under the influence and having improper rear lights. He had sought to suppress statements he had made to the arresting officer, as well as the results of field-sobriety and Intoxilyzer tests. The trial court overruled **Kraus**' motion, and, after **Kraus** entered pleas of no contest, found **Kraus** guilty of both offenses. **Kraus** has raised four assignments of error regarding the trial court's denial of his suppression motion.

{¶ 2} Because the trial court properly overruled **Kraus**' motion, **Kraus**' convictions are affirmed.

Kraus' Traffic Stop and Arrest

{¶ 3} On November 3, 2006, Ohio **State** Highway Patrol Trooper Richard Gabel had been conducting saturation patrol in an area surrounding a DUI checkpoint. While on patrol, Gabel initiated a traffic stop of **Kraus** after viewing **Kraus** driving with a rear license-plate light that was not functioning.

{¶ 4} After **Kraus** exited from his vehicle, Gabel smelled an odor of alcohol on his breath and noted that **Kraus**' eyes were glassy and bloodshot. Additionally, **Kraus** dropped several documents from his wallet without noticing while he was attempting to produce his driver's license. Gabel asked **Kraus** how much alcohol he had consumed, and **Kraus stated** "five or six beers." Gabel had **Kraus** sit in the front of his cruiser while he asked additional questions. In response to these questions, **Kraus** responded that he had felt the effects of the alcohol he had consumed and that, on a scale of zero to ten, with ten being the most impaired, he believed that he was a four to a six.

{¶ 5} Gabel then had **Kraus** perform three field-sobriety tests. He conducted the Horizontal Gaze Nystagmus ("HGN") test behind his cruiser so that **Kraus** was facing away from the overhead lights on the patrol car. **Kraus** failed this test, exhibiting six out of six possible clues, or signs, of impairment. Gabel next conducted the one-leg-stand test. On this test, **Kraus** exhibited one out of four possible clues. Last, Gabel conducted the walk-and-turn test. On this test, **Kraus** exhibited two out of eight possible clues of impairment.

{¶ 6} Following **Kraus**' performance on the field-sobriety tests, Gabel read him his *Miranda* rights and formally placed him under arrest. Gabel then transported **Kraus** to a nearby DUI checkpoint, where **Kraus** submitted to an Intoxilyzer test to determine his breath-alcohol content. Cincinnati Police Officer Steven Edwards administered the Intoxilyzer test. The test showed a breath-alcohol content of .142.

Standard of Review

{¶ 7} This court's review of a trial court's ruling on a suppression motion presents a mixed question of law and fact.[1] We must accept the trial court's findings of fact if they are supported by competent, credible evidence. But we review de novo the trial court's application of the relevant law to the facts.[2]

Miranda

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*2 {¶ 8} **Kraus** argues in his first assignment of error that the trial court erred in not suppressing the statements he had made to Trooper Gabel prior to Gabel's recitation of the *Miranda* warnings. Specifically, **Kraus** argues that the statements he had made while seated in Gabel's cruiser should have been suppressed because *Miranda* warnings were required in that situation.

{¶ 9} *Miranda* warnings must be provided when a defendant is subject to a custodial interrogation.[3] A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[4]

{¶ 10} Generally, the roadside questioning of a motorist following a traffic stop does not amount to a custodial interrogation.[5] But "if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*."[6]

{¶ 11} This court considered a similar situation in ***State** v. Leonard*.[7] A traffic stop had been initiated after the arresting officer viewed what he believed were excessively tinted windows on Leonard's vehicle. After initiating the traffic stop, the officer smelled an odor of alcohol coming from Leonard's car, saw an unopened can of beer in the vehicle, and noted that Leonard had glassy, bloodshot eyes.[8] The officer asked Leonard to sit in the front seat of his patrol car. While Leonard was seated in the patrol car, the officer asked him how much he had had to drink. Leonard responded, "[A] couple."[9]

{¶ 12} Leonard sought to suppress the statements he had made while seated in the patrol car because he had not been read his *Miranda* warnings at the time the statements were given. This court determined that *Miranda* warnings had not been required because Leonard had not been subject to a custodial interrogation.[10] We noted that any intrusion upon Leonard had been minimal, that Leonard had not been searched or handcuffed, and that he had not been subject to a lengthy detention.[11]

{¶ 13} Similar to *Leonard*, in this case any intrusion upon **Kraus** was minimal. Trooper Gabel had not conducted a search of **Kraus**' person or vehicle. He had not handcuffed **Kraus** or taken away his car keys. Nor was **Kraus** subject to a lengthy period of questioning.

{¶ 14} **Kraus** was not subject to any treatment that turned an ordinary traffic stop into a custodial interrogation. And because he was not subject to a custodial interrogation, *Miranda* warnings were not required. The trial court properly declined to grant **Kraus'** motion to suppress these statements. The first assignment of error is overruled.

Probable Cause

{¶ 15} In his second assignment of error, **Kraus** argues that the trial court erred in overruling his motion to suppress because his arrest had not been supported by probable cause.

*3 {¶ 16} A warrantless arrest is supported by probable cause when "the arresting officer, at the time of the arrest, possess[es] sufficient information that would cause a reasonable and prudent person to believe that a criminal offense has been or is being committed."[12] A court must examine the totality of the circumstances when determining whether probable cause to arrest existed.[13]

{¶ 17} Following our review of the record, we determine that **Kraus'** arrest was clearly supported by probable cause. Trooper Gabel smelled an odor of alcohol emanating from **Kraus**, and he noted that **Kraus** had glassy, bloodshot eyes. **Kraus** admitted to the consumption of alcohol and failed the HGN field-sobriety test. In this case, the totality of the circumstances supported Trooper Gabel's decision to arrest **Kraus**.

{¶ 18} Accordingly, the second assignment of error is overruled.

HGN Field-Sobriety Test

{¶ 19} In his third assignment of error, **Kraus** argues that the trial court erred in failing to suppress the results of the HGN field-sobriety test. Specifically, **Kraus** asserts that this test was not administered in accordance with the regulations promulgated by the National Highway Traffic Safety Administration ("NHTSA"), because his performance had been affected by the flashing strobe lights atop Trooper Gabel's patrol car.

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{¶ 20} NHTSA regulations direct that a suspect should be faced away from strobe lights when the HGN test is conducted.[14] In this case, Trooper Gabel testified that he had conducted the HGN test at the rear of his patrol car, and that he had **Kraus** face away from the flashing strobe lights atop the car. But **Kraus** argues, citing the videotape of the arrest from the patrol car, that the strobe lights had reflected off nearby cars and affected **Kraus'** performance.

{¶ 21} The trial court, in addition to being presented with Trooper Gabel's testimony, viewed the tape of the traffic stop from the patrol car. In denying **Kraus'** motion, the trial court clearly determined that Trooper Gabel had substantially complied with the NHTSA regulations and that **Kraus'** performance had not been affected by any reflection of the lights. This finding of fact was supported by competent and credible evidence. The trial court properly overruled **Kraus'** motion to suppress the results of the HGN test.

{¶ 22} **Kraus'** third assignment of error is overruled.

Twenty-Minute Waiting Period

{¶ 23} In his fourth assignment of error, **Kraus** argues that the trial court erred in failing to suppress the results of his Intoxilyzer test because the officers failed to comply with the required 20-minute waiting period before administering the breath test.

{¶ 24} Before a breath test is administered on an Intoxilyzer machine, the machine's operational checklist requires that the testing officer observe the subject for 20 minutes.[15] The purpose of such an observation period is to ensure that the suspect does not ingest any material that may affect the results of the test.[16]

*4 {¶ 25} In this case, Trooper Gabel testified on direct examination that he and **Kraus** had arrived at the DUI checkpoint approximately 10 to 15 minutes prior to the administration of the breath test. On cross-examination, Gabel backtracked on his testimony, **stating**, "Honestly, I don't know how long we were there * * * We had just done a test. I don't remember exactly how long we were there before the test was taken." But Officer Edwards, who had actually conducted the breath test and operated the Intoxilyzer machine, testified that he had complied with the 20-minute observation period.

{¶ 26} When issuing its ruling, the trial court **stated** that it had relied on Officer Edwards' testimony concerning the 20-minute observation period and that it found that the test had been done in compliance with Ohio Department of Health regulations. The trial court's finding was supported by competent and credible evidence. Because the **state** demonstrated substantial compliance with the required 20-minute observation period, the trial court properly declined to suppress the results of the Intoxilyzer test.

{¶ 27} **Kraus'** fourth assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN, P.J., and DINKELACKER, J., concur.

All Citations

Slip Copy, 2008 WL 3165934, 2008 -Ohio- 3965

Footnotes

1 ***State** v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8.
2 *Id.*
3 *Miranda v. Arizona* (1966), 384 U.S. 436, 468, 86 S.Ct. 1602.
4 *Id.* at 444.
5 *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138.
6 *Id.*
7 1st Dist. No. C-060595, 2007-Ohio-3312.
8 *Id.* at ¶ 5.
9 *Id.* at ¶ 6.
10 *Id.* at ¶ 23.

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11 *Id.* at ¶ 22.
12 ***State*** *v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N . E.2d 547, ¶ 39.
13 *Id.*
14 See ***State*** *v. Stritch,* 2nd Dist. No. 20759, 2005-Ohio-1376, ¶ 23.
15 See ***State*** *v. Booth,* 1st Dist. No. C-070184, 2008-Ohio-1274, ¶ 8.
16 *Id.*

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2011 WL 5138673

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Second District, Montgomery County.

STATE of Ohio, Plaintiff–Appellee
v.
James L. SIMMONS, Defendant–Appellant.

No. 23991.
|
Decided Oct. 28, 2011.

Criminal Appeal from Montgomery County Municipal Court —Western Division.

Attorneys and Law Firms

Mathias H. Heck, Jr., by Gregory P. Spears, Assistant Prosecuting Attorney, Dayton, OH, for plaintiff-appellee.

Carlo C. McGinnis, Dayton, OH, for defendant-appellant.

Opinion

FAIN, J.

*1 {¶ 1} Defendant-appellant James L. Simmons appeals from his conviction and sentence for Operating a Motor Vehicle While Under the Influence of Alcohol, R.C. 4511.19(A)(1)(a).

{¶ 2} Simmons contends that the trial court erred in overruling his motion to suppress because the trial court incorrectly found that there was reasonable articulable suspicion to justify the officer's request that he perform field sobriety tests (FST). Next, Simmons argues that certain statements made during the traffic stop should also be suppressed because he was not given the warnings required by *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Finally, Simmons argues that the trial court failed to state on the record its findings of fact material to its determination of his motion to suppress.

{¶ 3} We conclude that there was reasonable and articulable suspicion justifying the administration of field sobriety tests. We also conclude that Simmons was not in custody when he made the statements he sought to suppress, so that they were not subject to the requirements of *Miranda v. Arizona.* Finally, we conclude that Simmons did not request findings of fact, so that the trial court did not err in failing to provide them. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 4} One early morning in June 2009, Deputy Walt Steele of the Montgomery County Sheriff's Department came upon Simmons, who was driving a 1975 Chevy truck. Deputy Steele observed the truck weaving within its own lane and decided to run the license plate number. Deputy Steele discovered that the license plates were registered to a 1991 Buick. Deputy Steele stopped the truck because of the fictitious plates. The stop occurred in the parking lot of a bar.

{¶ 5} Deputy Steele asked Simmons if he was aware that the plates on the 1975 Chevy were registered to another vehicle. Simmons explained that the truck belonged to his niece, and he did not know about the fictitious plates. Deputy Steele testified that during this conversation, "I could smell a strong odor of alcohol coming from his breath. I noticed that his eyes were red and watery and I noticed that he was real slow answering my questions and kind of turning away from me, appearing confused." When questioned, Simmons denied having consumed alcohol. Deputy Steele then performed a Horizontal Gaze Nystagmus test, with a simple instruction to "follow with his eyes." Deputy Steele concluded that this test provided further support for his suspicion that Simmons was impaired. Steele requested Simmons to exit the vehicle and move to the back of the Steele's cruiser. Deputy Steele noted that Simmons was "slow and unsteady on his feet," when getting out of the truck.

{¶ 6} In Deputy Steel's police report, which he prepared immediately following the stop, Steele noted that Simmons was taking medication for diabetes, there was an odor of alcoholic beverage, his clothing was orderly, his attitude was sleepy, cooperative, and polite, his eyes were only bloodshot, and his speech was only fair. There were options on the police report form concerning the suspect's eyes and speech which were unchecked, such as "watery" and "confused." In the incident report Deputy Steele wrote later that morning, Steele noted that he smelled an odor of alcohol coming from Simmons, that Simmons's speech was slow, and that Simmons appeared confused.

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*2 {¶ 7} During the walk to Deputy Steele's cruiser, Steele again asked Simmons how many alcoholic drinks he had consumed. Again, Simmons denied having consumed any alcoholic beverages. After Simmons entered the rear of the police cruiser, Deputy Steele ran Simmons's license on his computer, which showed that Simmons was driving with a suspended license and had a previous Operating a Vehicle Under the Influence conviction. While in the police cruiser, Deputy Steele could smell the alcohol "even stronger" and, once again, asked Simmons how many alcoholic beverages he had consumed. At this time, Simmons admitted to consuming one beer. Deputy Steele then asked Simmons to perform several FST's and Simmons agreed to do so. Simmons was not handcuffed, but Deputy Steele acknowledged that he would not have let Simmons leave.

{¶ 8} Deputy Steele performed another HGN test, a walk-and-turn test, and a one-leg stand test. Deputy Steele noted on his report that Simmons tallied six out of six indicators, five out of eight indicators, and two out of four indicators, respectively, on the tests. In Deputy Steele's opinion, based on his training and experience, Simmons was under the influence. Simmons was given *Miranda* warnings at 2:01 a.m., and was advised of the offenses with which he was being charged. The total time of the stop was approximately half an hour.

{¶ 9} Simmons was cited for Unauthorized Use of Plates, driving under an ALS suspension, and Operating a Motor Vehicle Under the Influence. After his motion to suppress was heard and denied, Simmons pled no contest to Operating a Motor Vehicle Under the Influence and all other charges were dismissed.

{¶ 10} From his conviction and sentence, Simmons appeals.

II

{¶ 11} Simmons's First and Second assignments of error are as follows:

{¶ 12} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS.

{¶ 13} "THE TRIAL COURT SHOULD HAVE RULED THAT THERE WAS INSUFFICIENT REASONABLE ARTICULABLE SUSPICION TO JUSTIFY THE OFFICER'S REQUEST THAT DEFENDANT PERFORM FIELD SOBRIETY TESTS."

{¶ 14} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. *State v. Strope,* 2009–Ohio–3849 at ¶ 15. First, Simmons may challenge the trial court's findings of fact, in which event we must determine whether those findings are against the manifest weight of the evidence. Next, Simmons may claim that the trial court failed to apply the correct legal test to the facts, in which event we must determine whether the trial court committed an error of law. "Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case." *Id.*

*3 {¶ 15} Simmons does not dispute that Deputy Steele had the right to stop him for fictitious plates. The issue then becomes whether Deputy Steele had the right to administer FST's.

{¶ 16} In *State v. Dixon* (December 1, 2000), Greene App. No.2000–CA–30, and *State v. Spillers* (March 24, 2000), Darke App. No. 1504, this Court held that a "slight" odor, coupled with an admission of having consumed one or two alcoholic beverages and some other indicators was not enough to allow the administering of FST's. More specifically, we found in *Spillers* that traffic violations found by the trial court in that case to have been "de minimus," [1] combined with an admission to having consumed one or two beers and a "slight" odor of an alcoholic beverage, was not enough to justify the administration of field sobriety tests. In *Dixon,* the defendant was reported to have glassy, bloodshot eyes, admitted to having one or two beers, and having an odor of an alcoholic beverage emanating from him. There, we stated that: "The mere detection of an odor of alcohol, unaccompanied by any basis, drawn from the officers experience or expertise, for correlating that odor with a level of intoxication that would likely impair the subject's driving ability, is not enough to establish that the subject was driving under the influence nor is the subject's admission that he had had one or two beers."

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{¶ 17} On the other hand, in *State v. Brewer*, Montgomery App. 23442, 2010–Ohio–3441, this Court found there was reasonable articulable suspicion when the defendant appeared nervous, his clothes were in disarray, he was "thick-tongued," and was "slow-to-speech." The defendant, moreover, couldn't find his driver's license and upon returning to the defendant's vehicle, the police officer smelled a strong odor of alcohol. The defendant also admitted to drinking earlier in the day. *Id.*, at ¶ 23.

{¶ 18} In the case before us, Deputy Steele smelled "a strong odor of alcohol" emanating from Simmons during initial questioning. Deputy Steele also observed Simmons's eyes as red and watery and his speech was slow. Simmons appeared confused, and was looking away when answering questions. Simmons was slow and unsteady on his feet as he walked with Deputy Steele over to the police cruiser. Simmons also consented to take the FST's. The sum of these facts, we find, are more factually analogous to our decision in *Brewer* than *Spillers* and *Dixon*. We conclude, therefore, that Deputy Steele had reasonable articulable suspicion to administer FST's and the trial court did not err in denying the motion to suppress.

{¶ 19} Simmons's First and Second assignments of error are overruled.

III

{¶ 20} Simmons Third Assignment of Error is as follows:

{¶ 21} "THE TRIAL COURT SHOULD HAVE SUPPRESSED THE DEFENDANT'S STATEMENTS IN THAT HE WAS 'SUBJECTED TO TREATMENT' THAT RENDERED HIM IN CUSTODY AND ENTITLED TO MIRANDA WARNINGS."

*4 {¶ 22} Simmons claims that the statements he made after he was taken out of his vehicle should be suppressed, because Deputy Steele failed to administer *Miranda* warnings. *Miranda* warnings are required "when an individual is taken into custody or otherwise deprived of his freedom in any significant way and is subjected to questioning." *Miranda v. Arizona* (1966), supra, 384 U.S. 478. Questioning, by itself, does not trigger the requirement of *Miranda* warnings—the subject of the investigation must also be in custody. *State v. Goodspeed*, Montgomery App. No. 19979, 2004–Ohio–1819. Traffic stops, as noted by both the United States Supreme Court and by the Supreme Court of Ohio, do not trigger the need for Miranda. See *Berkemer v. McCarty* (1984), 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317; *State v. Farris* (2006), 109 Ohio St.3d 519. However, if the person stopped is then "subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." *Berkemer v. McCarty*, 468 U.S. 440. "The only relevant inquiry in determining whether a person is in custody is how a reasonable man in the suspect's position would have understood his situation." *Id.*, at 442.

{¶ 23} In *State v. Farris*, as Simmons notes in his amended brief, the Supreme Court of Ohio found that a reasonable person in the defendant's position would have understood himself to be in the custody of a police officer when the officer had taken his car keys, patted him down, told the defendant he was going to search the vehicle for drug paraphernalia, and instructed the defendant to sit in the police cruiser. Farris was deemed to have been placed in custody "for practical purposes" due to the officer's treatment after the original traffic stop. The defendant's statements in response to questioning were held to be inadmissible.

{¶ 24} On the other hand, we have held that an individual who was requested to exit a vehicle and sit in the back of a police vehicle without the option of leaving was not in custody and his statements were admissible. *State v. Wilkins*, Montgomery App. No. 20152, 2004–Ohio–3917. We noted that the defendant had not been handcuffed, that the defendant was merely invited by the police officer to sit in the police cruiser (it was raining heavily), and the police took no actions that would lead a reasonable person in the defendant's position to believe that he was going to be detained indefinitely.

{¶ 25} In the case before us, Deputy Steele repeatedly asked Simmons how many alcoholic beverages he had consumed after noticing a "strong smell of alcohol." Furthermore, Deputy Steele requested Simmons to exit his vehicle and sit in the police cruiser, took his driver's license in order investigate his driving record, and requested Simmons to perform FST's. All of these actions Simmons consented to. Simmons was not handcuffed at this time, but was not free to leave, according to Deputy Steele. Deputy Steele did not, at any time, inform Simmons that he was under arrest or give Simmons any indication he would be detained indefinitely. Simmons claims that Miranda warnings should have been given when he was not free to leave, he had been placed in the back of the cruiser, and when he was repeatedly questioned

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by Deputy Steele. We hold otherwise, based upon our holding in *Wilkins* and the holding of the Supreme Court of Ohio in *Farris.* Simmons was not given a reasonable basis to believe that he was under arrest; therefore, he was not in custody for purposes of *Miranda v. Arizona,* supra.

*5 {¶ 26} Simmons's Third Assignment of Error is overruled.

IV

{¶ 27} Simmon's Fourth Assignment of Error is as follows:

{¶ 28} "THE TRIAL COURT FAILED TO STATE ON THE RECORD ITS ESSENTIAL FINDINGS ON FACTUAL ISSUES INVOLVED IN DETERMINING DEFENDANT'S MOTION TO SUPPRESS."

{¶ 29} Criminal Rule 12(F) requires that: "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record." At the conclusion of the suppression hearing, the trial court took the matter under advisement and requested briefs. In its entry, the trial court merely stated: "After reviewing the facts presented in the case and after consideration of the Post Motion and Memorandums filed by Defense and Prosecution, the Motion to Suppress is hereby **DENIED.**"

{¶ 30} Because the cause remained pending before the trial court after the motion to suppress was denied, Simmons could have moved for findings of fact, or otherwise objected to the trial court's failure to make findings of fact with respect to his motion to suppress. He did not.

{¶ 31} "This court has consistently held that an appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, 117, vacated in part on other grounds, 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1156 (1978).

{¶ 32} Simmons could have, but did not, bring to the attention of the trial court its error in having failed to make findings of fact in connection with his motion to suppress, at a time when the trial court could have corrected its error by making findings of fact. Therefore, we agree with the State that Simmons has forfeited all but plain error. See Crim.R. 52(B).

{¶ 33} We further agree with the State that on this record the trial court's error in having failed to make findings of fact in connection with Simmons's motion to suppress has not been shown to have been plain error.

{¶ 34} Simmons's Fourth Assignment of Error is overruled.

V

{¶ 35} All of Simmons's assignments of error having been overruled, the judgment of the trial court is Affirmed.

GRADY, P.J., and FROELICH, J., concur.

All Citations

Slip Copy, 2011 WL 5138673, 2011 -Ohio- 5561

Footnotes

1 Although the police officer in that case testified that he observed the defendant cross a white line three times, and drive on a yellow line, the defendant testified that he did not commit any irregularities while driving, and the trial court, in resolving this conflicting testimony, found "de minimus" violations, which it did not specify.

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2008 WL 271816

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Delaware County.

STATE of Ohio, Plaintiff-Appellee
v.
Thomas CROWE, Jr., Defendant-Appellant.

No. 07CAC030015.
|
Decided Jan. 31, 2008.

Appeal from the Delaware County, Municipal Court Case No. 06TRC12173.

Attorneys and Law Firms

Peter B. Ruffing, Delaware City Prosecutor, Delaware, OH, for plaintiff-appellee.

Michael C. Hoague, Delaware, OH, for defendant-appellant.

Opinion

DELANEY, J.

*1 {¶ 1} Appellant Thomas Crowe, Jr. entered a no contest plea to driving under the influence of alcohol, R.C. 4511.19(B)(3), after the Delaware County Municipal Court overruled his motion to suppress. The court found him guilty, imposed sentence, and stayed the sentence pending appeal.

{¶ 2} The following facts were gleaned from the hearing on appellant's motion to suppress. On October 8, 2006 at approximately 2:00 a.m., Trooper Kasey Jones of the Ohio State Highway Patrol was driving northbound on U.S. Route 23. Trooper Jones observed a vehicle, later found to be operated by the appellant, traveling at an excessive speed. She paced the vehicle at 72 in a 55 zone and confirmed the speed using radar. The vehicle was drifting within its lane and touched the right lane line on two occasions and the left lane line on one occasion. During the examination of Trooper Jones, the videotape of the stop was admitted into evidence.

{¶ 3} Based on this information the trooper conducted a traffic stop. She approached the appellant's vehicle. There were two passengers in the vehicle. The trooper detected an odor of alcohol coming from inside the vehicle. She noticed appellant's eyes were glassy and bloodshot.

{¶ 4} At the trooper's request, the appellant got out of his vehicle and was seated in the front seat of the patrol cruiser. Upon questioning, appellant initially denied consuming alcohol. Trooper Jones administered the horizontal gaze nystagmus (HGN) test. Appellant exhibited two clues. Trooper Jones failed to complete the test because appellant began talking at the end of the test.

{¶ 5} Trooper Jones then informed appellant that she wanted him to submit to a preliminary breath test (PBT). She told him that she smelled alcohol on his breath and believed that he had been drinking. At this point, he admitted that he had a beer about an hour and half ago. She noted that appellant seemed extremely nervous, spoke quickly and had a shaky voice. He stated he did not have his identification and had borrowed his girlfriend's car to take her friends home from a party. Trooper Jones administered the PBT and he registered a .039. Upon further questioning, appellant stated he had two or three beers earlier in the evening.

{¶ 6} Trooper Jones placed appellant under arrest for operating a vehicle while under the influence of alcohol (OVI). Appellant was taken out of the cruiser, handcuffed and placed in the back seat. She stated to appellant that he was twenty years old and shouldn't have been drinking. Trooper Jones transported appellant to the patrol post. Trooper Jones and appellant had an extended conversation between the point of arrest and arrival at the post. Appellant again admitted to consuming alcohol but denied the existence of a beer bottle under the driver's seat as subsequently observed by the trooper. Appellant was courteous and cooperative with the trooper at during the stop.

*2 {¶ 7} Appellant was not given *Miranda* warnings until he arrived at the post. Trooper Jones read the BMV 2255 and administered a breath test on the BAC Data Master (BAC). Appellant tested .041 grams of alcohol per 210 liters of breath. Trooper Jones charged appellant with violations of R.C. 4511.19(A)(1), OVI, and R.C. 4511.19(B)(3), OVAUC, and R.C. 4511.21(D)(1), speed.

{¶ 8} Appellant pled not guilty and filed a motion to suppress. Appellant argued his arrest was without probable cause; and that his statements made prior to being advised of his Miranda rights should be suppressed. Appellant also moved

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to suppress the results of the PBT, HGNT, and BAC. The trial court granted the motion regarding post-arrest statements and the results of the HGN test, but overruled the motion as to the remaining evidence. Appellant entered a plea of no contest to the charge of R.C. 4511.19(B)(3), OVUAC.

{¶ 9} Appellant raises two Assignments of Error:

{¶ 10} "I. THE COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS BASED UPON A LACK OF PROBABLE CAUSE TO ARREST THEREBY VIOLATING APPELLANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION."

{¶ 11} "II. THE TRIAL COURT ERRED BY CONSIDERING THE RESULT OF A "PBT" TEST FOR PROBABLE CAUSE PURPOSES WITHOUT ANY FOUNDATIONAL EVIDENCE REGARDING THE MAKE, MODEL OR TYPE OF "PBT" DEVICE USED AND WHETHER IT WAS NHTSA APPROVED FOR PRELIMINARY BREATH TESTING AND WAS OPERATED AND FUNCTIONED PROPERLY."

I.

{¶ 12} In his first assignment of error, appellant argues the trial court erred in denying his motion to suppress on several grounds.

{¶ 13} First, we note there are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *See: State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E .2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141, *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *See: State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172, *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906, 908, and *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726.

*3 {¶ 14} In a motion to suppress, the trial court assumes the role of trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *Guysinger,* supra, at 594, citations omitted. Accordingly, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.*, citation omitted.

{¶ 15} Appellant first argues that the trial court's findings of fact were against the manifest weight of the evidence. He specifically argues the trial court erred in finding "the defendant was exceeding the speed limit and swerving outside his lane of travel." See, January 17, 2007 Judgment Entry.

{¶ 16} An investigatory stop is permissible if a law enforcement officer has a reasonable suspicion, based on specific and articulable facts, that the individual to be stopped may be involved in criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868. When determining whether or not an investigative traffic stop is supported by a reasonable, articulable suspicion of criminal activity, the stop must be viewed in light of the totality of circumstances surrounding the stop. *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph one of the syllabus, cert. denied (1988), 488 U.S. 910, 109 S.Ct. 264.

{¶ 17} At the suppression hearing, Trooper Jones testified she stopped appellant because "he was traveling at an excessive speed limit over 55 miles an hour." T. at 45. This Court, in *State v. McCormick* (Feb. 2, 2001), Stark App. No.2000CA00204, 2001 WL 111891, held that any traffic violation, even a de minimis violation, would form a sufficient basis upon which to stop a vehicle. "[T]he severity of the violation is not the determining factor as to whether probable cause existed for the stop." *State v. Weimaster* (Dec. 21, 1999), Richland App. No. 99CA36, 2000 WL 1615 at 3. Rather, ' * * * [w]here an officer has an articulable reasonable suspicion or probable cause to stop a motorist for any criminal violation, including a minor traffic violation, the

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stop is constitutionally valid * * * ' " *Id.* at 3, citing *Dayton v. Erickson* (1996) 76 Ohio St.3d, 665 N.E.2d 1091.

{¶ 18} Based on the foregoing, we find that Trooper Jones had a reasonable, articulable reason to stop appellant based on a speeding violation, the testimony of which was uncontested at the suppression hearing.

{¶ 19} Trooper Jones further testified that she "noticed at one point that Mr. Crowe was swerving in his lane he was traveling in the right hand lane." T. at 45. Appellant's counsel clarified this further on cross examination.

{¶ 20} Counsel: "Describe what you mean by swerve."

{¶ 21} Jones: "You can see on the tape as he's traveling in the right hand lane he actually he even touches the white fog line once or twice and just drifts over touches the line and then get's [sic] back over into the lane where he's driving down the middle of it."

*4 {¶ 22} Counsel: "So by swerve you mean drift?"

{¶ 23} Jones: "Yes."

{¶ 24} Counsel: "Your [sic] saying that that's visible on the tape?"

{¶ 25} Jones: "Yes."

{¶ 26} Counsel: "And your [sic] not saying he committed a marked lane violation?"

{¶ 27} Jones: "No he did not." T. at 56-57.

{¶ 28} While it is true the trial court characterizes this as "swerving" as opposed to "drifting" in its decision, Trooper Jones described appellant's actions as both swerving and drifting, and the videotape supports her testimony. Appellant was not charged with a marked lane violation. The information merely adds to Trooper Jones' impressions that evening as reasonable suspicion already existed to stop appellant for speeding. The trial court's findings were supported by competent and credible evidence.

{¶ 29} Next, appellant argues the trial court applied the wrong law to appellant's pre-Miranda statements. He asserts the trial court should have suppressed "all of the in cruiser statements and the physical evidence derived from those statements".

{¶ 30} A defendant has the constitutional right against self-incrimination under both the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. In interpreting this right, it has been held that the state may not use statements stemming from a custodial interrogation of the defendant unless it demonstrates the use of certain procedural safeguards to secure the privilege of against self-incrimination. *Miranda v. Arizona* (1966), 384 U.S. 436. The well-known *Miranda* warnings were thus created. *Id.*

{¶ 31} Over the years, the U.S. Supreme Court and the Ohio Supreme Court has developed case law pertaining to *Miranda* warnings in the context of roadside traffic stops. In *Berkemer v. McCarty* (1984), 468 U.S. 420, the U.S. Supreme Court held that roadside questioning of a motorist detained pursuant to a routine traffic stop did not constitute 'custodial interrogation" for purposes of the Miranda rule, so that pre-arrest statements motorist made in answer to such questioning were admissible against the motorist. If that person "thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*" *Id.* at 440.

{¶ 32} Recently, the Ohio Supreme Court decided *State v. Farris,* 109 Ohio St.3d 519, 2006-Ohio-3255 and applied *Berkemer* in finding the driver was "subjected to treatment" that rendered him in custody and entitled to *Miranda* warnings.

{¶ 33} In *Farris,* after stopping a driver for speeding, a police officer noticed the odor of burnt marijuana coming from inside the car. The officer asked the driver to step out of the car, patted the driver down, and placed him in the front seat of the patrol car. Without providing *Miranda* warnings, the officer asked the driver about the smell of marijuana and told him he was going to search the car. At that point, the driver admitted that a marijuana pipe was in a bag in the trunk.

*5 {¶ 34} The Ohio Supreme Court held "the officer's treatment of Farris after the original stop placed Farris in custody for practical purposes". *Id.* at ¶ 14. The Court, quoting *Berkemer,* held the only relevant inquiry in determining whether a person is in custody is "how a reasonable [person] in the suspect's position would have understood [their] situation." *Id.* The Court found that a reasonable person in Farris's position would have understood himself to be in

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custody of a police officer, because (1) the officer patted down Farris; (2) took his car keys; (3) instructed him to enter the cruiser; and (4) he told Farris that he was going to search Farris's car because of the scent of marijuana. *Id.* The Court held that the driver's pre-warning and post-warning statements were inadmissible.

{¶ 35} Comparing *Farris* to this case, we find *Farris* to be distinguishable as the appellant was not "subjected to treatment" which a reasonable person would have understood to be in police custody. The record does not demonstrate that Appellant was patted-down before being placed in the cruiser, he was not handcuffed, and his keys were not taken away, nor was he subjected to a lengthy detention or told his vehicle was going to be searched prior to arrest.

{¶ 36} Appellant's placement in the front seat of the cruiser under the circumstances herein was not the functional equivalent of an arrest. Since *Miranda* and *Berkemer*, the Ohio Supreme Court and other appellate courts have recognized that it is constitutionally permissible for a police officer to ask a driver to sit in his or her car to facilitate a traffic stop. *State v. Lozada,* 92 Ohio St.3d 74, 76, 2001-Ohio-149; *State v. Evans,* 67 Ohio St.3d 405, 407, 1993-Ohio-186; *State v. Leonard,* First Dist.App. No. C-060595, 2007-Ohio-3312; *State v. Coleman,* Seventh Dist.App. No. 06 MA 41, 2007-Ohio-1573; *State v. Carlson* (1995) 102 Ohio App.3d 585, 657 N.E.2d 591.

{¶ 37} In light of the above, the trial court correctly applied *Berkemer* to the facts of this case in overruling appellant's motion to suppress as to his pre-arrest statements.

{¶ 38} Appellant finally contends that the trial court incorrectly decided the ultimate issue. We have previously recited that a police officer does not have to observe poor driving performance in order to affect an arrest for driving under the influence of alcohol if all the facts and circumstances lead to the conclusion that the driver was impaired. See, e.g., *State v. Harrop* (July 2, 2001), Muskingum App. No. CT2000-0026, 2001 WL 815538, citing *Atwell v. State* (1973), 35 Ohio App.2d 221, 301 N .E.2d 709.

{¶ 39} An officer has probable cause for an arrest if the facts and circumstances within his knowledge are sufficient to cause a reasonably prudent person to believe that the defendant has committed the offense. *State v. Heston* (1972), 29 Ohio St.2d 152, 280 N.E.2d 376, *cert. denied,* 409 U.S. 1038, 93 S.Ct. 534, 34 L.Ed.2d 486.

*6 {¶ 40} Upon our review of the record, we find that Trooper Jones had probable cause to arrest appellant for driving under the influence of alcohol. Trooper Jones stopped appellant for speeding. She witnessed appellant drift between the lines. T. at 56-57. She detected the odor of alcohol on appellant. T. at 46, 47. She further noted that his eyes were bloodshot and glassy. T. at 47, 58.

{¶ 41} Based on the foregoing, we find Trooper Jones had probable cause to arrest appellant for OVI.

{¶ 42} Appellant's first assignment of error is overruled.

II.

{¶ 43} In his second assignment of error, appellant argues that the trial court should have taken foundational evidence regarding the preliminary breath test (hereinafter "PBT").

{¶ 44} The trial court stated: "There was sufficient probable cause without the consideration of the .039 reading of the PBT." January 17, 2007 Judgment Entry. The trial court further stated: "The court can and does consider the results of the PBT for probable cause purposes." *Id.*

{¶ 45} Upon review, we find that the totality of Trooper Jones observations, even without considering the PBT results, sufficiently establish probable cause for the arrest.

{¶ 46} Because we find probable cause without considering the PBT results, we find that appellant's second assignment of error is not well-taken.

{¶ 47} Appellant's second assignment of error is overruled.

{¶ 48} The judgment of the Delaware County Municipal Court is affirmed.

DELANEY, J., HOFFMAN, P.J. and WISE, J., concur.

All Citations

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Licking County.

STATE of Ohio, Plaintiff-Appellee
v.
Hershel A. MULLINS, Defendant-Appellant.

No.
2006
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-
00019

Decided Sept. 8, 2006.

Criminal appeal from the Licking County, Municipal Court, Case No. 05TRC11646.

Attorneys and Law Firms

Tricia M. Klockner, Newark, OH, for plaintiff-appellee.

David B. Stokes, Newark, OH, for defendant-appellant.

Opinion

GWIN, J.

*1 {¶ 1} Defendant-appellant Hershel A. Mullins appeals his convictions and sentences in the Licking County Municipal Court on one count of Driving Under the Influence in violation of R.C. 4511.19(A) 1 and one count of Failure to Dim Headlights in violation of Ohio Revised Code Section 4513.15(A). The appellee is the State of Ohio. The following facts give rise to this appeal.

{¶ 2} On October 18, 2005, Trooper Shawn Eitel observed a vehicle traveling in the opposite direction with its high beams on. (T. at 4). The vehicle continued toward the Trooper and passed without dimming the headlights. Trooper Eitel noted that the lights were extremely bright and glared in his eyes. Trooper Eitel initiated a traffic stop and approached the vehicle.

{¶ 3} Upon approaching the vehicle, Trooper Eitel noticed an open container of what appeared to be an alcoholic beverage, a strong odor of an alcoholic beverage, and slow and deliberate movements on the part of the appellant. (T. at 5). He also noticed that the appellant had bloodshot, glassy eyes and slurred speech. (*Id.*).

{¶ 4} As part of his normal procedure, Trooper Eitel asked the appellant to exit the vehicle and have a seat in the front seat of his cruiser to complete the paperwork and citation. (*Id.* at 6-7). During this time, the Trooper asked the appellant general investigative questions. During that conversation the appellant admitted to consuming alcohol. (*Id.*). At this time he was asked to submit to field sobriety tests. (*Id.* at 8-9). After the completion of those tests, the appellant was placed under arrest for operating a vehicle under the influence of alcohol. Appellant's BAC test result was a 0.255.

{¶ 5} Appellant filed a motion to suppress both the traffic stop and his statements to the Trooper. After an evidentiary hearing, the trial court denied appellant's motions by Judgment Entry filed January 27, 2006. On February 16, 2006 appellant pled no contest to both charges. The trial court found appellant guilty. The trial court sentenced appellant to a fine of $10.00 and court costs for the failure to dim headlights charge. On the OVI charge, the trial court ordered appellant to pay a fine of $300.00 plus court costs and further ordered appellant to serve 30 days in jail. The trial court suspended all but three days on the condition of appellant's probation for one year. Appellant was further ordered to complete the driver's intervention program, and received a one year driver license suspension.

{¶ 6} Appellant filed a notice of appeal and this matter is now before this court for consideration of the following two assignments of error:

{¶ 7} "I. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SUPPRESS DUE TO AN UNLAWFUL STOP.

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{¶ 8} "II. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY FAILING TO SUPRESS STATEMENTS ATTRIBUTED TO APPELLANT."

I. & II.

*2 {¶ 9} In his first assignment of error appellant maintains that the trial court erred in overruling his motion to suppress because the trooper did not have probable cause to effectuate a traffic stop. In his second assignment of error, appellant maintains that the trial court erred by overruling his motion to suppress his statements to the trooper. We disagree.

{¶ 10} There are three methods of challenging on appeal the trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1981), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726.

{¶ 11} Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141, overruled on other grounds.

{¶ 12} Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 620 N.E.2d 906.

{¶ 13} In a motion to suppress, the trial court assumes the role of trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *Guysinger*, supra, at 594 (citations omitted). Accordingly, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.*, citing *State v. Fausnaugh* (Apr. 30, 1992), Ross App. No. 1778.

{¶ 14} In his first assignment of error appellant argues that the traffic stop leading to his arrest was not based upon reasonable suspicion that he had committed a traffic violation. Appellant does not contest his arrest for driving under the influence; rather he contends that the initial stop was unlawful.

{¶ 15} "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact". *Ornelas v. United States* (1996), 517 U.S. 690, 695-96, 116 S.Ct. 1657, 1661-62. In general, we review determinations of historical facts only for clear error. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 698, 116 S.Ct. at 1663. On the other hand, determinations of reasonable suspicion and probable cause are reviewed de novo. *Id.*

*3 {¶ 16} The first issue is whether the factual findings, as determined by the lower court at the evidentiary hearing on the motion to suppress evidence, were clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.* (1947), 333 U.S. 364, 395. Moreover, where the evidence would support several conclusions but the lower court has decided to weigh more heavily in one direction, "[s]uch a choice between ... permissible views of the weight of evidence is not 'clearly erroneous'." *United States v. Yellow Cab Co.* (1949), 338 U.S. 338, 342.

{¶ 17} In the case at bar, appellant argues that he and his girlfriend both testified that he never utilizes his high-beam headlights when he drives at night, and further that the high-beam lights were not engaged when the truck was driven from the scene.

{¶ 18} In ruling upon appellant's motion the trial court noted that R.C. 4513.15 requires the operator of a motor vehicle at night to make sure that the headlight beams are not directed into the eyes of oncoming drivers. (T. at 30). The court found the officer's testimony to be credible in this respect. (*Id.*).

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{¶ 19} We conclude that the trial court's factual findings do not constitute clear error. Due weight has been given to the inferences drawn by the trial court and the testifying law enforcement officer. After careful review of the record, there is no indication that the trial court has made a mistake. The trial court has the authority to decide in whose favor the weight of the evidence will lie. Here, the trial court decided in favor of Trooper Eitel. Such a choice is not clearly erroneous. *Yellow Cab,* 338 U.S. at 342.

{¶ 20} Accordingly, the trial court did not err in overruling appellant's motion to suppress the traffic stop.

{¶ 21} The next question is whether the contact of the Trooper with appellant violated the appellant's Fourth Amendment rights. Contact between police officers and the public can be characterized in three different ways. *State v. Richardson,* 5th Dist. No.2004CA00205, 2005-Ohio-554 at ¶ 23-27. The first is contact initiated by a police officer for purposes of investigation. "[M]erely approaching an individual on the street or in another public place [,]" seeking to ask questions for voluntary, uncoerced responses, does not violate the Fourth Amendment. *United States v.. Flowers* (6th Cir.1990), 909 F.2d 145, 147. The United State Supreme Court "[has] held repeatedly that mere police questioning does not constitute a seizure." *Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); see also *INS v. Delgado,* 466 U.S. 210, 212, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick, supra,* at 434-435, 111 S.Ct. 2382 (citations omitted). The person approached, however, need not answer any question put to him, and may continue on his way. *Florida v. Royer* (1983), 460 U.S. 491,497-98 Moreover, he may not be detained even momentarily for his refusal to listen or answer. *Id.*

*4 {¶ 22} The second type of contact is generally referred to as "a *Terry* stop" and is predicated upon reasonable suspicion. *Richardson,* supra; *Flowers,* 909 F.2d at 147; See *Terry v. Ohio* (1968), 392 U.S. 1. This temporary detention, although a seizure, does not violate the Fourth Amendment. Under the *Terry* doctrine, "certain seizures are justifiable ... if there is articulable suspicion that a person has committed or is about to commit a crime" *Florida,* 460 U.S. at 498. In holding that the police officer's actions were reasonable under the Fourth Amendment, Justice Rehnquist provided the following discussion of the holding in *Terry:* "In *Terry* this Court recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Adams v. Williams* (1972), 407 U.S. 143, 145-47, 92 S.Ct. 1921, 1923-24, 32 L.Ed.2d 612

{¶ 23} The Fourth Amendment requires that the officer have had a "reasonable fear for his own or others' safety" before frisking. *Terry v. Ohio* (1968), 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889. Specifically, "[t]he officer ... must be able to articulate something more than an 'inchoate and unparticularized suspicion or hunch.' "United *States v. Sokolow* (1989), 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (quoting *Terry,* 392 U.S. at 27, 88 S.Ct. 1868). Whether that standard is met must be determined " 'from the standpoint of an objectively reasonable police officer,' " without reference to "the actual motivations of the individual officers involved." *United States v. Hill* (D.C.Cir.1997), 131 F.3d 1056, 1059 (quoting *Ornelas v. United States* (1996), 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911).

{¶ 24} The third type of contact arises when an officer has "probable cause to believe a crime has been committed and the person stopped committed it." *Richardson,* supra; *Flowers,* 909 F.2d at 147. A warrantless arrest is constitutionally valid if: "[a]t the moment the arrest was made, the officers had probable cause to make it-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 * * * [individual] had committed or was committing an offense." *State v. Heston* (1972), 29 Ohio St.2d 152, 155-156, 280 N.E.2d 376, quoting *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142. "The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these

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historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause." *Ornelas v. United States* (1996), 517 U.S. 690, 696, 116 S.Ct. 1657, 1661-1162. A police officer may draw inferences based on his own experience in deciding whether probable cause exists. *See, e.g., United States v. Ortiz* (1975), 422 U.S. 891, 897, 95 S.Ct. 2585, 2589.

*5 {¶25} When a police officer stops a motor vehicle for a traffic violation, the stop itself constitutes a 'seizure' within the meaning of both the Fourth Amendment of the United States Constitution; *Berkemer v. McCarty* (1984), 468 U.S. 420, 436-37, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317, 332-333; and Section 14, Article I, of the Ohio Constitution; see *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11, 665 N.E.2d 1091. The temporary detention involved in a traffic stop, however, is not considered "custody" triggering the *Miranda* protections of Fifth Amendment rights. *Berkemer,* 468 U.S. at 440. It is, instead, more akin to a "*Terry* stop," during which a police officer may briefly detain a person and conduct an investigation upon a reasonable suspicion of criminal activity. *Id.* at 439 (citing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889).

{¶ 26} When police observe a traffic offense being committed, the initiation of a traffic stop does not violate Fourth Amendment guarantees, even if the stop was pretextual or the offense so minor that no reasonable officer would issue a citation for it. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 1774-75. Nevertheless, even when the initial detention is permissible, a court must inquire whether the stop and the investigation are "reasonably related in scope to the purposes for their initiation." *Berkemer,* 468 U.S. at 439. A traffic stop implicates a lower level of constitutional protection because the resulting detention is "presumptively temporary and brief" and the police presence is "comparatively non-threatening" an "non-coercive." *Id.* at 437, 440. The logical corollary of this rule is that, when a traffic stop exceeds the duration and scope of what is "reasonably related" to the traffic investigation (or the investigation of other crimes for which police develop reasonable suspicions), it becomes a custodial detention. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*" *Id.* at 440. There is, however, no bright-line rule announcing when a traffic stop transforms into custody. See *Id.* at 441 ("[P]olice and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody.").

{¶ 27} In *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111, 98 S.Ct. 330, 333, 54 L.Ed. 331, 337, the Supreme Court held that an officer who lawfully detained a vehicle for a traffic offense could order the driver out of the vehicle, even if the officer had no reasonable suspicion of danger to justify the order. The court held that the additional intrusion upon personal liberty caused by such an order was *de minimis* and any inconvenience to the driver was outweighed by concerns for the safety of police officers. *Id.* at 111. A number of Ohio courts have held that a police officer can also order a traffic misdemeanant to remain in the police cruiser for the length of his detention. See *State v. Carlson* (1995), 102 Ohio App.3d 585, 596, 657 N.E.2d 591; *State v. Warrell* (1987), 41 Ohio App.3d 286, 287, 534 N.E.2d 1237; *State v. Block* (Dec. 15, 1994), Cuyahoga App. No. 67530, unreported, at 1, discretionary appeal denied (1995), 72 Ohio St.3d 1521.; *Middletown v. Downs* (March 19, 1990), Butler App. No. CA89-06-094, unreported, at 3. Courts have reasoned that the latter order, like the order permitted under *Mimms,* is a modest incremental intrusion justified by the nature of the traffic stop itself. See *Carlson,* 102 Ohio App.3d at 595-96, 657 N.E.2d 591; *State v. Wineburg* (March 27, 1998), 2nd Dist. No. 97 CA 58.

*6 {¶ 28} Contrary to appellant's assertion, there is no evidence that appellant was in custody or otherwise deprived of his freedom of action in any significant way at the time his statements to Trooper Eitel. Rather, the evidence is clear that such statement was made in response to "general on-the-scene questioning"

{¶ 29} Trooper Eitel further testified that appellant, during such time, was not under arrest or being detained in any manner. (T. at 6-7). Trooper Eitel performed a routine check of appellant's driving record, vehicle registration and driver's license. (*Id.* at 7). Appellant was not handcuffed and was permitted to sit in the front seat of the cruiser. (*Id.* at 6-7). The Trooper noticed an odor of an alcoholic beverage in the vehicle. (*Id.* at 5). Further, Trooper Eitel testified that he observed what he believed to be an open container of alcoholic beverage sitting in a cup holder next to appellant. (*Id.*). As he exited the vehicle appellant was off balance and lost his footing. (*Id.* at 6-6). Once appellant was inside the cruiser Trooper Eitel noticed an odor of alcoholic beverage on appellant. (*Id.*). He further observed appellant's bloodshot eyes and slurred speech. (*Id.*). Trooper Eitel then inquired as

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to whether appellant had been drinking. (*Id.*). Appellant was not placed under arrest until he later failed the horizontal gaze nystagmus test.

{¶ 30} Based on the foregoing, we find that the trial court did not abuse its discretion in denying appellant's motion to suppress his statements. Since appellant was not subject to a custodial interrogation, *Miranda* warnings were not required during his pre-arrest encounter with Trooper Eitel.

{¶ 31} Appellant's first and second assignments of error are overruled.

{¶ 32} Accordingly, the judgment of the Licking Municipal Court, Licking County, Ohio is affirmed.

GWIN, J., WISE, P.J., and EDWARDS, J., concur.

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2007 WL 969428

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Seventh District, Mahoning County.

STATE of Ohio, Plaintiff-Appellant,
v.
Michael COLEMAN, Defendant-Appellee.

No. 06 MA 41.
|
Decided March 27, 2007.

Criminal Appeal from Common Pleas Court, Case No. 05CR491.

Attorneys and Law Firms

Attorney Paul Gains, Prosecuting Attorney, Attorney Rhys Cartwright-Jones, Assistant Prosecuting Attorney, Youngstown, OH, for plaintiff-appellant.

Attorney John Juhasz, Youngstown, OH, for defendant-appellee.

Opinion

VUKOVICH, J.

*1 {¶ 1} The State of Ohio appeals the portion of the decision of the Mahoning County Common Pleas Court which suppressed the statement of defendant-appellee Michael Coleman that he drank a couple beers. The issue on appeal is whether the trooper's question as to how much appellee had to drink required *Miranda* warnings under the totality of the circumstances of this case, including the fact that appellee was in the patrol car at the time. For the following reasons, the judgment of the trial court is reversed.

{¶ 2} The trial court relied entirely upon an outdated case, which is no longer followed by this court, the Ohio Supreme Court or the United States Supreme Court. Thus, we could not uphold the trial court's evaluation of the totality of circumstances. Moreover, under the facts of this case, the officer's question was not posed during a custodial interrogation. Specifically, the adjournment to the police cruiser after the stop for speeding lacked the requisite custodial quality based on various factors discussed below, including the unique fact here that appellee was not in physical possession of his driver's license, his vehicle registration or his proof of insurance.

STATEMENT OF THE CASE

{¶ 3} On December 31, 2004, appellee was stopped for speeding and was thereafter arrested for driving under the influence of alcohol. The offense was a fourth degree felony under R.C. 4511.19(G)(1)(d), which applied when the offender had three or more driving under the influence convictions within the previous six years.

{¶ 4} On September 6, 2005, appellee's counsel filed a two-page suppression motion with an eighty-three page memorandum attached. Appellee proffered various grounds for suppression. For instance, he sought to suppress the results of the horizontal gaze nystagmus (HGN) test due to alleged failures in its administration. Appellee also alleged a lack of probable cause to arrest and to administer field sobriety tests. Pertinent to this appeal, appellee alleged that he was subjected to a custodial interrogation without the administration of *Miranda* warnings. Specifically, he wished to suppress his answer to the officer's question as to how many drinks he had that night.

{¶ 5} A suppression hearing was held on February 14, 2006, where the state presented the trooper's testimony. The trooper explained that he clocked appellee driving forty-five in a thirty-five mile per hour zone and thus stopped him for speeding. (Tr. 17, 20). Upon approaching the vehicle, he noticed a moderate smell of alcohol. (Tr. 24). Appellee could not produce his driver's license, his vehicle registration or his proof of insurance. (Tr. 23).

{¶ 6} In order to verify his identity, the trooper asked appellee to come back to his cruiser. He obtained appellee's purported social security number to run his name through dispatch. (Tr. 24). While verifying appellant's information in the cruiser, the trooper determined that the moderate smell of alcohol previously noticed was emanating from appellant's mouth, and he observed that appellee's speech was slurred, his eyes were bloodshot and his face was red. (Tr. 25-27). Dispatch responded that appellee had eleven prior driving under the influence convictions in his lifetime. (Tr. 38). When the trooper asked appellee if he had been drinking, appellee initially responded in the negative. (Tr. 27).

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*2 {¶ 7} The trooper decided to administer three field sobriety tests. He discovered four of the six clues on the HGN test, which established a 77% chance of having a blood alcohol content over .10, the legal limit at the time. (Tr. 31-33). Based upon the HGN test results, the trooper again asked if appellee had been drinking to which appellee admitted that he had a couple of beers at work. (Tr. 28, 34). Appellee then refused to perform the one-leg stand and the walk-and-turn field sobriety tests. (Tr. 28-29). At this point, the officer advised appellee that he was placing him under arrest. (Tr. 34). Appellee later refused the breathalyzer test. (Tr. 36).

{¶ 8} On March 13, 2006, the trial court released its suppression decision. The trial court expressly found the trooper's testimony credible. The court then found that the trooper had probable cause to administer field sobriety tests after detecting an odor of alcohol on appellee. The court also found substantial compliance with the proper HGN testing standards. However, the court suppressed the non-*Mirandized* statements made by appellee as to having a couple beers. In doing so, the court concluded that once the officer detected the odor of alcohol, appellee was not free to leave and was thus in custody for purposes of *Miranda*. The trial court based its suppression holding on *State v. Stefanick* (1984), 7th Dist. No. 83C51.

{¶ 9} The state filed timely notice of appeal certifying that the appeal was not filed for the purpose of delay and that the ruling on the suppression motion rendered the state's proof so weak in its entirety that any reasonable possibility of effective prosecution was destroyed. Crim.R. 12(K)(1) and (2). Although this court is hard pressed to give credibility to such a contention given the facts of this case and the trial court's findings relative to the propriety of the field sobriety test administered by the arresting officer, we cannot debate the propriety of the state's certification. See *State v. Bertram* (1997), 80 Ohio St.3d 281, 285; R.C. 2945.67(A). We feel compelled to point out that the indiscriminate use of such a tactic by the prosecutor's office can have dire consequences in the event an appellate court affirms a trial court's suppression of evidence order. That is, the state would be prohibited from prosecuting the defendant on the remaining evidence, no matter how strong that evidence might be. Crim.R. 12(K). The only exception is if the state produces newly discovered evidence that in the exercise of reasonable diligence could not have been discovered before filing the appeal. *Id.*

{¶ 10} Next, we note that appellee attempted to cross-appeal from the portion of the trial court's decision upholding the field sobriety test and the arrest. However, on May 1, 2006, this court dismissed the cross-appeal, stating that a trial court's suppression order was not final for purposes of a defendant's appeal. The state filed its merit brief in May 2006. Appellee filed his response in November 2006.

ASSIGNMENT OF ERROR

*3 {¶ 11} The state's assignment of error and accompanying issue presented provide:

{¶ 12} "COMPETENT AND CREDIBLE EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S GRANT OF DEFENDANT-APPELLEE'S MOTION TO SUPPRESS, AND THE TRIAL COURT ERRED IN GRANTING THE SAME."

{¶ 13} "UNDER OHIO LAW, SIMPLY REQUIRING DEFENDANT TO SIT IN A POLICE CAR FOR A SHORT PERIOD OF TIME TO ANSWER A FEW QUESTIONS DOES NOT ELEVATE THE SITUATION BEYOND THE REALM OF THE ORDINARY TRAFFIC STOP AND, THEREBY, DOES NOT IMPLICATE MIRANDA OR REQUIRE THAT AN OFFICER READ A SUSPECT HIS MIRANDA RIGHTS. YET THE TRIAL COURT SUPPRESSED COLEMAN'S UNMIRANDIZED STATEMENTS GIVEN NOT IN CUSTODY. MUST THIS COURT UPHOLD THE TRIAL COURT'S GRANT OF COLEMAN'S MOTION TO SUPPRESS?"

{¶ 14} The state contends that the trooper was not conducting a custodial interrogation for purposes of *Miranda*. The state argues that appellee was already properly stopped for speeding and as part of a *Terry* seizure to investigate a smell of alcohol, a police officer can ask a driver if he has been drinking without *Mirandizing* him. The state notes that it was a cold night on the last day of December and appellee failed to produce any of the three items required upon being validly stopped for speeding. Thus, the state concludes that asking if appellee would step back to the cruiser did not make the encounter more custodial than an ordinary traffic stop or *Terry* seizure.

LAW & ANALYSIS

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{¶ 15} A defendant has the constitutional right against self-incrimination under both the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. In interpreting this right, it has been held that the state may not use statements stemming from a custodial interrogation of the defendant unless it demonstrates the use of certain procedural safeguards to secure the privilege against self-incrimination. *Miranda v. Arizona* (1966), 384 U.S. 436. The well-known *Miranda* warnings were thus created. *Id.*

{¶ 16} However, the requirement of a *Miranda* rights warning is only triggered by a custodial interrogation. *State v. Mason* (1998), 82 Ohio St.3d 144, 153, citing *Berkemer v. McCarty* (1984), 468 U.S. 420. The mere exercise of police investigative duties does not equate with custody. For instance, in *Mason,* the Ohio Supreme Court determined that an interview of a suspect at a police station does not per se trigger *Miranda* even when the suspect was driven there in a patrol car.

{¶ 17} To determine whether a custodial interrogation occurred, one must ask how a reasonable person in the defendant's position would understand the situation. *Id.* at 154, citing *McCarty,* 468 U.S. at 442. If there was not a formal arrest, then to establish custody there must be a restraint on the freedom of movement to a degree associated with a formal arrest. See, e.g., *California v. Beheler* (1983), 463 U.S. 1121, 1125, and *Oregon v. Mathiason* (1977), 429 U.S. 492, 495.

*4 {¶ 18} The *McCarty* Court stated the requirement of *Miranda* warnings is not dependent regardless of the severity of the offense. *McCarty,* 468 U.S. at 440. However, they recognized that *Miranda* does not apply to *Terry* detentions. *Id.* A *Terry* stop is not an arrest requiring probable cause; rather, it is an investigative seizure made with mere reasonable suspicion of criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1. The Court then carved out a traffic stop exception to *Miranda* as well. *McCarty,* 468 U.S. at 440.

{¶ 19} According to the *McCarty* Court, the traffic stop (analogous to the *Terry* stop) exception to *Miranda* is constitutionally valid because a traffic stop is temporary, brief, public and substantially less police-dominated than the type of interrogation at issue in *Miranda* itself, especially where only one officer is present. *Id.* at 437-439. The Court stated that although a traffic stop curtails freedom of movement by the detainee and imposes some pressure to answer questions, the pressure does not sufficiently impair the privilege against self-incrimination to warrant a *Miranda* warning. *Id.* at 436-437. Thus, the Court determined that an officer making a traffic stop can "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." *Id.* at 439.

{¶ 20} Although the Court held it is possible that a motorist who has been detained pursuant to a traffic stop can thereafter be subjected to treatment that renders him "in custody" for practical purposes, the Court concluded that the roadside questioning of a motorist detained pursuant to a routine traffic stop is not a custodial interrogation. *Id.* at 440-441. The Court also explicitly held that the officer can ask the detained motorist if he had been drinking without providing *Miranda* warnings even though the motorist was not yet free to go. *Id.* (officer also performed field sobriety testing). Hence, the mere questioning appellee about whether he had anything to drink did not implicate *Miranda* even where appellee had been stopped for speeding and was not free to leave until the investigation for speeding and the subsequent investigation for driving under the influence were completed. See *id.*

{¶ 21} Thus, the trial court erroneously relied on a case cited by the defense for the proposition that the mere activation of overhead pursuit lights constitutes custody for purposes of *Miranda.* See *State v. Stefanick* (1984), 7th Dist. No. 83C51. Based upon *McCarty,* this court has since pointed out that *Miranda* is not triggered merely because an officer questions a stopped motorist in order to investigate suspicions of driving under the influence. *State v. Latham* (June 12, 1999), 7th Dist. No. 96BA30. In fact, this court has stated that *Miranda* is not required merely because the officer questions the number of drinks consumed by an individual suspected of driving under the influence. *State v. Smail* (July 9, 1997), 7th Dist. No. 95CO85 (no need to *Mirandize* before asking how much defendant had to drink or requiring him to perform field sobriety tests). Contrary to the defense's contention at oral argument, these were not Fourth Amendment as opposed to Fifth Amendment cases. Rather, both specifically dealt with *Miranda.* Because the law relied upon by the trial court was incorrect concerning the point of custody, the defense cannot argue that we should defer to the trial court's suppression decision on whether appellee was in custody.

*5 {¶ 22} It is clearly established that an officer making a traffic stop can generally request the defendant exit his vehicle, administer field sobriety tests and ask questions about the amount of alcohol consumed without needing to

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Mirandize the detainee. The extra fact we have in this case is the location of appellee in the police cruiser while being asked if he consumed alcohol. The question becomes whether the officer's act of requesting that appellee come back to the cruiser *in order to run his name through the system* escalated the situation to more than an ordinary traffic stop or *Terry* investigation. We find that it does not under the unique facts that exist here.

{¶ 23} Initially, we acknowledge that the *McCarty* Court found that under the facts of that case the defendant had not been arrested for purposes of *Miranda* until he was placed in the patrol car. However, in *McCarty,* the investigation had been completed and the mere stop turned to a formal arrest when the officer placed the defendant in his car in order to transport him. Whereas, in the case before us, the investigation was just starting at the point appellee was asked to join the officer in the cruiser. It is well-established that the point of custody is situation-based. *Beheler,* 463 U.S. 1121. As will be seen in the Ohio Supreme Court's recent *Farris* case reviewed below, the Court's suppression mandate in that case was the result of a multitude of situation-based custodial factors that occurred and did not merely rely on the fact that the defendant adjourned to the police cruiser to support its decision. *State v. Farris,* 109 Ohio St.3d 519, 2006-Ohio-3255.

{¶ 24} In *Latham,* this court noted that custody did not occur at the time the defendant was placed in the cruiser for administration of the HGN test. *Latham,* 7th Dist. No. 96BA30. Other appellate districts have concluded that simply requiring the defendant to sit in a police car for a short period of time to answer a few questions does not elevate the situation beyond the realm of the ordinary traffic stop approved in *McCarty* and into the realm of a formal arrest or its equivalent. See, e.g., *State v. Johnson* (May 1, 2000), 12th Dist. No. CA99-06-061; *State v. Warrell* (1987), 41 Ohio App.3d 286, 287 (Ninth District stated that a motorist questioned at an accident scene can reasonably expect that he will be requested to answer some questions and have his license and registration checked in order to complete an accident report). In fact, this court favorably cited the *Warrell* ruling in our *Smail* case cited above.

{¶ 25} Although not a case on point as the issue was suppression of cocaine found in a pat-down, the Ohio Supreme Court has found that an officer is permitted to routinely place a stopped motorist in his car. *State v. Lozardo* (2001), 92 Ohio St.3d 74, 76 (concluding, however, that the officer cannot pat the motorist down without more reason for placement in the car than routine). The *Lozardo* Court noted that numerous courts have held that an officer may ask a driver to sit in his or her patrol car to facilitate the traffic stop. *Id.* The Supreme Court cited the *Warrell* case (which we cited supra) and the *Carlson* case (which we cite infra) and distinguished its case based upon the fact that weapon searches were not performed in those two appellate cases. *Id.* In fact, the Court opined that the intrusion of asking a driver to sit in a patrol car to facilitate a traffic stop is relatively minimal. *Id.* (finding the level of intrusion on the driver dramatically increased when the driver is subject to a pat-down search for weapons before entering the patrol car).

*6 {¶ 26} As aforementioned, whether a custodial interrogation for purposes of *Miranda* took place in any given case depends on the circumstances existing therein. For instance, the time of night, type of traffic, weather and crime rate in the area are said to be relevant considerations. "It is certainly not unusual for persons who are stopped for traffic violations on major highways to be asked to sit inside a police cruiser while a citation is issued particularly at night time". *State v. Harris* (Nov. 3, 1992), 2d Dist. No. 13279. Another consideration is said to be whether the defendant was detained in the front or back seat of the patrol car. See, e.g., *State v. Prunchak,* 9th Dist. No. 04CA70-M, 2005-Ohio-869, ¶ 28 (not custody to place in front seat of patrol car and drive to a flat surface for field sobriety testing); *State v. Carlson* (1995), 102 Ohio App.3d 585, 596 (police officer may ask relevant questions to a motorist detained pursuant to a routine traffic stop in the front seat of the patrol car as a brief procedure to facilitate the traffic stop without violating *McCarty*).

{¶ 27} Here, it was explained that the traffic stop occurred while the trooper was on the midnight shift on December 31. Thus, the hour was late, and considering this took place in Northeastern Ohio, it was at least somewhat cold. We do not have specific testimony on whether appellee was in the front or back seat. However, for at least two reasons, it seems clear that he was in the front seat. First, the trooper testified that he noticed the moderate smell of alcohol coming from appellee's breath after entering the patrol car. Second, the HGN test was performed in the car, and one cannot assume that the officer sat backwards in the front seat looking through a wire cage in order to administer the gaze testing which he stated was performed with his pen approximately twelve inches from appellee's eyes.

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{¶ 28} Still, location in the front seat is merely one consideration. It is not determinative. See *State v. Farris,* 109 Ohio St.3d 519, 2006-Ohio-3255. In the *Farris* case, the defendant was stopped for speeding. The officer smelled marijuana, and thus, he decided to search the defendant's vehicle. In order to perform the vehicle search, the officer had the defendant exit the vehicle, confiscated his keys, patted him down, placed him in the front seat of the cruiser, disclosed that he smelled marijuana in the vehicle and advised that he was going to conduct a vehicle search for marijuana. *Id.* at ¶ 2-3, 14. The officer then asked if the defendant had any drugs or drug devices in the vehicle to which the defendant responded by admitting he had a "bowl" in the trunk. *Id.* at ¶ 3.

{¶ 29} The Court found the search of the passenger compartment of the vehicle permissible due to the smell of burnt marijuana. *Id.* at ¶ 12. But, the Court ruled the paraphernalia found in the trunk should have been suppressed because a trunk cannot be searched based upon a smell in the passenger compartment and because the defendant's admission to having paraphernalia in the trunk was made during a custodial interrogation prior to the required *Miranda* warnings. *Id.* at 13-15. In so holding, the Court noted that the extended detention in the cruiser was not based upon the purpose of the original stop, excessive speed, but upon the smell of marijuana. *Id.* at ¶ 12.

*7 {¶ 30} The Court pointed out how the state conceded in the lower courts that the defendant was in custody but now claimed that he was not in custody for purposes of *Miranda. Id.* at ¶ 13. Keeping in line with past precedent, the Court explained that one need not be formally under arrest to be in custody for purposes of *Miranda. Id.* "Although a motorist who is temporarily detained as the subject of an ordinary traffic stop is not 'in custody' for the purposes of *Miranda,* * * * if that person 'thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda'.* " *Id.,* citing *McCarty.*

{¶ 31} The Court found that the officer's treatment of the defendant after the original traffic stop placed him in custody for practical purposes. *Id.* at ¶ 14. The Court noted that the defendant was not free to leave the scene as he had no car keys and he reasonably believed that he would be detained at least as long as it would take for the officer to search his automobile. *Id.* at ¶ 14. The Court concluded that a reasonable man in the defendant's position would have believed that he was in police custody as he sat in the police cruiser under the facts of that case. *Id.* at ¶ 14.

{¶ 32} There are various notable distinctions between *Farris* and the case at bar. First, there is no indication that appellee was patted down before entering the cruiser. Second, the officer did not confiscate appellee's keys. Third, the officer did not indicate or even imply that appellee had to remain in the cruiser while the officer conducted a full search of appellee's vehicle. Fourth, there was no extended detention.

{¶ 33} Fifth, appellee's entry into the cruiser was based upon the original stop. That is, when appellee was asked to sit in the police cruiser, it was clear that the officer was investigating and processing the speeding violation. We note that the officer's subjective intent is irrelevant. *State v. Springer* (1999), 135 Ohio App.3d 767, 773 (where this court held that the subjective intent of the officer and the subjective belief of the suspect are irrelevant in determining whether one is "in custody" or otherwise significantly deprived of his freedom, for purposes of *Miranda*).

{¶ 34} We also note that in *Farris,* the officer was clearly and expressly investigating a new offense when he placed the defendant in the cruiser. See *Id.* at ¶ 12. On the contrary, the officer here did not "thereafter" subject appellee to custodial treatment outside the temporary detention for the traffic stop. See *Id.* at ¶ 13. A rational person stopped for speeding would anticipate all occurrences here as being commensurate with receiving a speeding ticket where that person failed to possess his driver's license, registration and proof of insurance.

{¶ 35} Contrary to appellee's contention, this did not become more than an ordinary traffic stop at the point of entry into the cruiser. At the point the officer asked appellee to enter his vehicle, the traffic stop for speeding was not yet complete. Once again, the inability to immediately complete the stop was due to appellee's failure to carry a driver's license, vehicle registration documents or proof of insurance. As a result of appellee's failure, the officer needed to obtain various items of personal information from appellee to run him through the system and to be assured the information obtained was actually that pertaining to appellee.

*8 {¶ 36} Notably, when a person is without official documentation, they can say they are anyone whose social security number they know. The officer needs simultaneous access to his database to quiz the motorist about various obvious or even obscure aspects of the motorist's background

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to ensure truthfulness. *As the trooper testified, he needed to compare the BMV picture of appellee on his cruiser's computer screen with appellee himself.* Retreat to the cruiser was thus made necessary and reasonable by appellee's own neglect. These facts make retiring to the cruiser much less custodial than any situation cited by appellee.

{¶ 37} To sum up all the facts here, appellee was stopped late at night on New Year's Eve. He was initially stopped for speeding, not to investigate suspicions of drunk driving. He failed to produce the three required documents essential for every traffic stop requiring more extensive investigation prior to writing the ticket. At the point of requesting appellee to enter the patrol car, the officer had not asked appellee to perform any field sobriety tests and did not otherwise indicate that he was under suspicion of some offense other than speeding. Appellee had not been handcuffed. He was not patted down. His car was not searched, nor were statements made about an impending search. His keys were not confiscated. He was placed in the front seat. There was only one officer on the scene. There was no lengthy detention as the processing within the police car entailed only a matter of minutes. Custody is situation-based, and this situation is wholly distinguishable from the situation that existed in the Ohio Supreme Court's *Farris* case.

{¶ 38} To a reasonable person, the traffic stop for speeding was merely being relocated to the officer's vehicle where appellee's identity and the car's ownership could be established through dispatch and photographic comparisons. This relocation did not elevate the traffic stop to the level of a formal arrest, nor was it the functional equivalent of an arrest.

CONCLUSION

{¶ 39} In conclusion, the trial court erroneously found that custody for purposes of *Miranda* began when the officer first noticed a smell of alcohol coming from appellee's vehicle. Moreover, the trial court erroneously relied on *Stefanick* for the proposition that the mere act of questioning a motorist after activating overhead police lights or the act of asking the motorist to alight for sobriety testing is a custodial interrogation. In adopting *Stefanick,* the trial court failed to recognize later decisions out of this district and the United States Supreme Court's *McCarty* decision, specifically holding that asking a motorist if they had been drinking after a traffic stop does not violate rights against self-incrimination as investigation conducted during a short traffic detention is not a custodial situation for purposes of *Miranda.* As such, the trial court's decision was based upon incorrect law.

*9 {¶ 40} In applying the correct law to the unique facts of this case and using the trial court's own finding that the trooper's testimony was credible, we conclude that appellee's rights against self-incrimination were not violated as he was not experiencing the functional equivalent of an arrest when he was asked how much he had to drink. Accordingly, the judgment of the trial court suppressing appellee's statement on the amount of alcohol consumed is hereby reversed.

DeGENARO, P.J., concurs.

DONOFRIO, J., dissents; see dissenting opinion.

DONOFRIO, J. dissenting:

*9 {¶ 41} I respectfully dissent from the majority opinion because I believe the trial court was correct to suppress the statement by defendant-appellee, Michael Coleman, that he drank a couple of beers.

{¶ 42} As indicated by the majority, *Miranda* rights warnings are required for a custodial interrogation. *Miranda v. Arizona* (1966), 384 U.S. 436. The relevant inquiry is whether a reasonable person in the suspect's position would understand that he was in the custody of the police at the time of the interrogation. *Berkemer v. McCarty* (1984), 468 U.S. 420, 422, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317. As acknowledged by the majority, *McCarty* held that even though the "roadside questioning of a motorist detained pursuant to a routine traffic stop is not a custodial interrogation," the Court added that "it is possible that a motorist who has been detained pursuant to a traffic stop can thereafter be subjected to treatment that renders him 'in custody' for practical purposes." *Id.* at ¶ 20, citing *McCarty,* 468 U.S. at 440-441, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317.

{¶ 43} I believe there are a combination of factors specific to this case, especially the timeline of events, that would lead a reasonable person in Coleman's position to understand that he was "in custody" for practical purposes when he was asked about drinking the *second* time. When Trooper Vail initially approached the vehicle, Coleman was unable to produce a driver's license, vehicle registration documents, or proof of insurance. Because of this, the majority reasons that Trooper Vail and Coleman needed to retreat to Trooper Vail's cruiser so that he could verify Coleman's identification

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and complete the traffic stop for speeding. *Id.* at ¶ 33, 35, 36. However, Trooper Vail testified that upon his initial approach to the vehicle, Coleman was able to provide Trooper Vail with a photo identification issued by his employer and his social security number. (Tr. 23.) Therefore, I'm not entirely convinced by the majority that there was a need for Coleman to return with Trooper Vail to the cruiser in order to verify his information.

{¶ 44} Also during the initial approach to Coleman's vehicle, Trooper Vail noticed a "moderate odor of alcohol coming from the *vehicle.*" (Tr. 24.) Notably, it was not until Trooper Vail had Coleman in the cruiser that he noticed that Coleman had a moderate odor of alcohol coming from his *person* and observed that Coleman had bloodshot eyes, slurred speech, and a red face (Tr. 24-27.)

*10 {¶ 45} Sometime between the initial stop and the HGN test, Trooper Vail asked Coleman for the first time if he had been drinking and Coleman replied that he had not. (Tr. 27.) Also, after Trooper Vail ran Coleman's social security number through dispatch, but before the HGN test, dispatch advised Trooper Vail (with Coleman still present in the cruiser) of Coleman's history of DUI convictions. (Tr. 38-39.) Trooper Vail then administered the HGN test to Coleman, which he failed and Trooper Vail informed Coleman of this fact. Based on these facts and how this traffic stop developed, I believe it was at this point that a reasonable person in Coleman's position would understand that he was "in custody" for practical purposes. Consequently, Trooper Vail should have informed Coleman of his *Miranda* rights before any further questioning, including his second inquiry to Coleman about whether he had been drinking.

{¶ 46} For these reasons, I would respectfully affirm the trial court's decision to suppress the statement of defendant-appellee.

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2012 WL 1106744

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Portage County.

STATE of Ohio, Plaintiff–Appellee,
v.
Steven A. SERAFIN, Defendant–Appellant.

No. 2011–P–0036.
|
Decided March 30, 2012.

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No.2010 TRC 16576.

Attorneys and Law Firms

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Opinion

DIANE V. GRENDELL, J.

*1 {¶ 1} Defendant-appellant, Steven A. Serafin, appeals the Judgment Entry of the Portage County Municipal Court, Ravenna Division, denying his Motion to Suppress. The issues before this court are whether the state highway patrolman, who stopped Serafin for speeding, possessed a reasonable suspicion of further wrongdoing, so as to justify his removal from his vehicle; and whether the patrolman's questioning of Serafin in his police cruiser constituted custodial interrogation, so as to require the Miranda warnings. For the following reasons, we affirm the decision of the court below.

{¶ 2} On December 23, 2010, Trooper Jonathan A. Ganley of the Ohio State Highway Patrol issued Serafin a Complaint, charging him with two violations of Operation of a Vehicle while Intoxicated, misdemeanors of the first degree in violation of R.C. 4511.19(A)(1)(a) ("under the influence of alcohol") and (A)(1)(d) (having "a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath"), and Speeding, a minor misdemeanor in violation of R.C. 4511.21(D)(2) ("operat[ing] a motor vehicle * * * [a]t a speed exceeding sixty-five miles per hour upon a freeway").

{¶ 3} On the same date, Serafin was arraigned in municipal court and entered a plea of "not guilty."

{¶ 4} On February 18, 2011, Serafin filed a Motion to Suppress, alleging that Trooper Ganley did not have a reasonable suspicion to remove him from his vehicle during a traffic stop and failed to administer Miranda warnings prior to custodial interrogation.

{¶ 5} On April 28, 2011, a suppression hearing was held. Trooper Ganley testified on behalf of the State.

{¶ 6} Trooper Ganley testified that at 12:59 a.m., on December 23, 2010, he was operating radar on Interstate 76, in Brimfield Township. Trooper Ganley clocked a westbound 2003 Mitsubishi Outlander, operated by Serafin, at 82 miles per hour. Trooper Ganley stopped the vehicle on the off-ramp to Route 43.

{¶ 7} Trooper Ganley testified that Serafin was the sole occupant of the vehicle. Serafin told Trooper Ganley, through the window of the vehicle, that he lived in Texas and was visiting Ohio. Serafin told him that he was returning to his mother's house in Richmond Heights, and was driving her vehicle.

{¶ 8} Trooper Ganley testified that Serafin's eyes were glassy and that there was a distinct odor of alcohol coming from the car. Serafin produced an Ohio driver license but could not produce the vehicle's registration.

{¶ 9} Trooper Ganley ordered Serafin out of the vehicle and to accompany him to the patrol car. Serafin was allowed to leave the car running.

{¶ 10} Trooper Ganley provided several explanations for doing so. He testified that it was his "regular practice * * * to have drivers exit the vehicle for no other reason than * * * that way I can do several things at once instead of making possibly two or three trips back to the vehicle for more information." Trooper Ganley also testified that he wanted to

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separate Serafin from the vehicle to determine the source of the odor. Finally, Trooper Ganley testified that the weather, cold with light flurries, made it more convenient to continue the stop in the patrol car.

*2 {¶ 11} After Serafin exited the vehicle, Trooper Ganley asked his permission to conduct a pat down search, which Serafin allowed. Trooper Ganley described this search as a consensual search, rather than a Terry-style pat down, as he did not have any particular suspicion that Serafin was armed.

{¶ 12} Trooper Ganley noted that Serafin showed "some signs of unbalance" and "serpentine walking" as they went toward the patrol car.

{¶ 13} Trooper Ganley and Serafin sat in the front seat of the patrol car. Trooper Ganley testified that the odor of alcohol was coming from Serafin's person. Trooper Ganley asked Serafin how much he had had to drink, and Serafin replied that he had had a couple of beers over dinner. At this point, Trooper Ganley began to conduct field sobriety tests.

{¶ 14} Serafin failed the field sobriety tests. At this time, Serafin was handcuffed and placed in the rear of the patrol car.

{¶ 15} A video recording of the stop was played before the court and admitted into evidence. In the video, Trooper Ganley is heard asking Serafin, while seated in the front of the patrol car: "how much have you had to drink tonight, I smell a pretty strong odor [of alcohol]?" The video revealed that approximately six minutes elapsed from the time of the initial stop until Trooper Ganley began conducting the field sobriety tests.

{¶ 16} Also on April 28, 2011, the municipal court denied the Motion to Suppress. The court entered the following (hand-written) Judgment Entry: "Hrg [hearing] on motion to suppress evidence. [Defendant] stipulates to results of FST [field sobriety tests] and chemical breath test. CT [the court] finds PC [probable cause] to request [defendant] to take FST. CT finds Miranda given prior to all post-arrest questioning. CT finds statements made prior to arrest are admissible. * * * CT further finds that even without [the defendant's] response to officer's questions, officer had PC to make arrest."

{¶ 17} Also on April 28, 2011, Serafin entered a plea of "no contest" to the charge of Operation of a Vehicle while Intoxicated (R.C. 4511.19(A)(1)(a)). The remaining charges were dismissed on motion of the prosecutor. The municipal court imposed a fine of $375; a sentence of 180 days in the Portage County Jail, with 177 days conditionally suspended; and a six-month license suspension. The court stayed execution of the sentence pending appeal.

{¶ 18} On May 24, 2011, Serafin filed his Notice of Appeal. On appeal, Serafin raises the following assignments of error:

{¶ 19} "[1.] Trooper Ganley did not have the reasonable suspicion required to remove the defendant from his vehicle."

{¶ 20} "[2.] Statements by the defendant during Trooper Ganley's custodial interrogation, as well as evidence obtained therefrom, should be suppressed."

{¶ 21} At a suppression hearing, "the trial court is best able to decide facts and evaluate the credibility of witnesses." *State v. Mayl,* 106 Ohio St.3d 207, 2005–Ohio–4629, 833 N.E.2d 1216, ¶ 41. "Its findings of fact are to be accepted if they are supported by competent, credible evidence, and we are to independently determine whether they satisfy the applicable legal standard." *Id.*, citing *State v. Burnside,* 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8; *State v. Morgan,* 11th Dist. No.2008–P–0098, 2009–Ohio–2795, ¶ 13 ("[o]nce the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts") (citation omitted).

*3 {¶ 22} Under the first assignment of error, Serafin objects that several actions taken by Trooper Ganley violated his Fourth Amendment right "to be secure * * * against unreasonable searches and seizures." Specifically, Serafin contends that Trooper Ganley "did not have sufficient justification [1.] to remove [him] from his vehicle, [2.] pat him down and [3.] place him in a police cruiser." Reply Brief of Appellant, 8.

{¶ 23} With respect to ordering Serafin out of his vehicle, the Ohio Supreme Court has held that "a police officer may order a motorist to get out of a car, which has been properly stopped for a traffic violation, even without suspicion of criminal activity." *State v. Evans,* 67 Ohio St.3d 405, 407, 618 N.E.2d 162 (1993), citing *Pennsylvania v. Mimms,* 434 U.S. 106, 111, fn. 6, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *State v. Wiesenbach,* 11 th Dist. No.2010–P–0029, 2011–Ohio–402, ¶ 20 ("a *Mimms* order does not have to be justified by any constitutional quantum of suspicion") (citations omitted). Accordingly, there was nothing constitutionally

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impermissible about Trooper Ganley ordering Serafin out of the vehicle.

{¶ 24} With respect to conducting a "pat down" or Terry search, the Ohio Supreme Court has held that "[t]he driver of a motor vehicle may be subjected to a brief pat-down search for weapons where the detaining officer has a lawful reason to detain said driver in a patrol car." *Id.* at paragraph one of the syllabus. However, "[d]uring a routine traffic stop, it is unreasonable for an officer to search the driver for weapons before placing him or her in a patrol car, if the sole reason for placing the driver in a patrol car during the investigation is for the convenience of the officer." *State v. Lozada,* 92 Ohio St.3d 74, 748 N.E.2d 520 (2001), paragraph two of the syllabus.

{¶ 25} The issue of the constitutionality of the pat down search in the present case need not be decided. Assuming, arguendo, a constitutional violation, the search produced no evidence that could be suppressed.

{¶ 26} With respect to having Serafin sit in the patrol car, the Ohio Supreme Court has held that "[p]lacing a driver in a patrol car during a routine traffic stop increases the intrusive nature of the detention." *Id.* at 78. However, "[t]he placement of a driver in a patrol car during a routine traffic stop may be constitutionally *permissible,*" and "[n]umerous courts have held that an officer may ask a driver to sit in his or her patrol car to *facilitate* the traffic stop." (Emphasis sic.) *Id.* at 76. In considering the constitutionality of a practice, "[t]he touchstone of [the] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Mimms,* 434 U.S. 106, 108–109, 98 S.Ct. 330, 54 L.Ed.2d 331, quoting *Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "[F]ailure to produce a driver's license during a traffic stop is a 'lawful' reason for detaining a driver in a patrol car." (Citation omitted.) *Lozada* at 77.

*4 {¶ 27} In the present case, Trooper Ganley identified several reasons for detaining Serafin in his patrol car. Some of these reasons were investigative, such as the need to verify the vehicle's registration and to determine the source of the odor of alcohol. Other reasons were for the sake of convenience, such as reducing the length of time of the traffic stop. Considering all the circumstances, Trooper Ganley's detention of Serafin in his patrol car for five minutes, until he decided to conduct field sobriety tests, was reasonable and did not violate Serafin's Fourth Amendment rights. *Lozada* at 78.

{¶ 28} We note that the Ohio Supreme Court has affirmed the reasonableness of detaining a motorist for the purpose of "run[ning] a computer check on the driver's license, registration, and vehicle plates." *State v. Batchili,* 113 Ohio St.3d 403, 2007–Ohio–2204, 865 N.E.2d 1282, ¶ 12. Moreover, other Ohio appellate districts have affirmed the permissibility of in-car detentions under similar circumstances. *See State v. Mendoza,* 6th Dist. No. WD–05–094, 2006–Ohio–6462, ¶ 29 (the driver was made to sit in the front seat of the patrol car after he produced his license but not his registration, smelled of alcohol and had glassy eyes); *Bay Village v. Lewis,* 8th Dist. No. 87416, 2006–Ohio–5933, ¶ 5 (the driver was made to sit in the patrol car where he smelled of alcohol, masked by cologne and had bloodshot eyes); *State v. Carlson,* 102 Ohio App.3d 585, 596, 657 N.E.2d 591 (9th Dist.1995) (driver was made to sit in the patrol car while the officer wrote up a written warning and verified the out-of-state driver's license).

{¶ 29} The case of *State v. Townsend,* 77 Ohio App.3d 651, 603 N.E.2d 261 (11th Dist.1991), relied upon by Serafin, is factually distinguishable in that it involved the pat down search of a passenger in a vehicle which resulted in the discovery of a weapon and a subsequent search of the vehicle. *Id.* at 654. Moreover, *Townsend* was decided before the significant Ohio Supreme Court decisions in *Evans* and *Lozada.*

{¶ 30} The first assignment of error is without merit.

{¶ 31} In the second assignment of error, Serafin argues that the statements made to Trooper Ganley while seated in the patrol car, i.e., that he had had a couple of beers over dinner, should have been suppressed as they were made during a custodial interrogation without the benefit of the Miranda warnings.

{¶ 32} Statements obtained during the custodial interrogation of a defendant are not admissible at trial unless the police have used procedural safeguards to secure the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to representation. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). "Only *custodial* interrogation triggers the need for *Miranda* warnings." (Emphasis sic.) *State v. Lynch,* 98 Ohio St.3d 514, 2003–Ohio–2284, 787 N.E.2d 1185, ¶ 47; *State v. Biros,* 78 Ohio St.3d 426, 440, 678 N.E.2d 891 (1997). "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into

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custody or otherwise deprived of his freedom of action in any significant way." *Miranda* at 444.

*5 {¶33} "Although a motorist who is temporarily detained as the subject of an ordinary traffic stop is not 'in custody' for the purposes of *Miranda,* * * * if that person 'thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda.*' " *State v. Farris,* 109 Ohio St.3d 519, 2006–Ohio–3255, 849 N.E.2d 985, ¶ 13, quoting *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

{¶ 34} In *Farris,* the Ohio Supreme Court held that the officer's treatment of the motorist following the traffic stop rendered him "in custody" for practical purposes, thus requiring the giving of the Miranda warnings prior to questioning. The Court noted the following: "Officer Menges patted down Farris, took his car keys, instructed him to enter the cruiser, and told Farris that he was going to search Farris's car because of the scent of marijuana." *Id.* at ¶ 14.

{¶ 35} Apart from the fact that Serafin consented to a pat down search for weapons, the facts of the present case are distinguishable from *Farris.* Serafin was allowed to keep his keys and to keep his vehicle running and Trooper Ganley gave no indication that the detention would extend beyond the purposes of the initial stop for Speeding. In these circumstances, Ohio appellate courts have regularly held that routine questioning of a detained motorist, including whether the motorist has been drinking, does not require the administration of the Miranda warnings. *State v. Coleman,* 7th Dist. No. 06 MA 41, 2007–Ohio–1573, ¶ 24 (noting that several Ohio "appellate districts have concluded that simply requiring the defendant to sit in a police car for a short period of time to answer a few questions does not elevate the situation beyond the realm of the ordinary traffic stop approved in *McCarty* and into the realm of a formal arrest or its equivalent").

{¶ 36} In *State v. Leonard,* 2nd Dist. No. C–060595, 2007–Ohio–3312, an officer stopped a motorist for a window-tinting violation and noticed an odor of alcohol and glassy eyes. The officer had the motorist sit in the front passenger seat of the police cruiser where he admitted that he had been drinking. *Id.* at ¶ 6. The court of appeals concluded the intrusion was minimal and held that these circumstances did not render a motorist in custody for practical purposes. *Id.* at ¶ 23. Apart from the fact that Serafin was subject to a pat down search, the facts of the present case are the same as those in *Leonard* with respect to the issue of whether the suspect was in custody.

{¶ 37} Similarly in *Coleman,* the officer stopped a motorist for Speeding and had him return to the patrol car to verify his information. *Coleman* at ¶ 6. While in the patrol car, the motorist eventually admitted to having "a couple of beers at work." *Id.* at ¶ 7. The court of appeals concluded that Miranda warnings were not necessary prior to questioning, noting the following factors: the stop occurred late at night; the motorist failed to produce the required documents; the motorist's keys were not confiscated; the motorist was not handcuffed; the motorist was placed in the front seat; there was no extended detention; the vehicle was not searched; and there was only one officer on the scene. *Id.* at ¶ 37. *See also State v. Mullins,* 5th Dist. No.2006–CA–00019, 2006–Ohio–4674, ¶ 2–4, 29 (Miranda warnings were not required where a motorist was stopped for failing to dim the high beam headlights and made to sit in the front seat of the patrol car while the officer completed paperwork to issue a citation).

*6 {¶ 38} The only significant difference between the present situation and the authorities cited above is that Serafin was subjected to a pat down search upon exiting his vehicle. In light of the other circumstances, this search did not convert this routine traffic stop into a custodial situation requiring the administration of the Miranda warnings. We note that the search was nominally consensual. Trooper Ganley asked Serafin if he could conduct a pat down search for weapons for his own protection. Serafin quickly answered, "sure," and the search was concluded in a few seconds. Nothing was found during the search and, so, the search did not alter the nature of the stop. In *Farris,* by contrast, the initial stop for speeding had already been extended into a search for marijuana. The brief and inconsequential nature of the pat down search in the present case is further demonstrated by the video of the traffic stop, which was introduced into evidence. For these reasons, Serafin was not in custody at the time of Trooper Ganley's questioning.

{¶ 39} The second assignment of error is without merit.

{¶ 40} For the foregoing reasons, the Judgment Entry of the Portage County Municipal Court, Ravenna Division, denying Serafin's Motion to Suppress, is affirmed. Costs to be taxed against appellant.

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MARY JANE TRAPP and THOMAS R. WRIGHT, JJ., concur.

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2015 WL 5005120

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Portage County.

STATE of Ohio, Plaintiff–Appellee,
v.
Braden K. BROCKER, Defendant–Appellant.

No. 2014–P–0070.
|
Decided Aug. 24, 2015.

Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 2014 TRC 5319.

Attorneys and Law Firms

Victor V. Vigluicci, Portage County Prosecutor, and Pamela J. Holder, Assistant Prosecutor, Ravenna, OH, for Plaintiff–Appellee.

David J. Betras, Betras, Maruca, Kopp, Harshman & Bernard, L.L.C., Canfield, OH, for Defendant–Appellant.

Opinion

THOMAS R. WRIGHT, J.

*1 {¶ 1} Appellant, Braden K. Brocker, seeks reversal of the trial court's denial of his motion to suppress. He claims he was subject to a custodial interrogation without being read his *Miranda* warnings. For the following reasons, we affirm.

{¶2} Appellant was pulled over for speeding by an Ohio State Highway Patrol trooper after midnight in April of 2014. He was alone in the car. The trooper told appellant that he was being issued a warning ticket for speeding.

{¶3} The trooper noticed that appellant's eyes were bloodshot and glassy and that he had a strong odor of alcoholic beverage coming from his mouth. He asked appellant to step out of his vehicle so that he could conduct his interview and to see if he could continue to smell alcohol. Appellant consented to a pat down search, and the trooper had him enter his patrol car. The trooper testified that he had appellant sit in the front seat of the patrol car while he checked appellant's license and plates. The trooper confirmed that the front door was unlocked; that appellant was not handcuffed; and that he was not under arrest at that point. However, appellant testified that he "believed" he was placed in the backseat of the patrol car and that he did not feel free to leave. Unlike the front seat, the trooper explained that someone placed in the back seat of a patrol car is in a cage and is not free to leave.

{¶ 4} While they were both seated in the patrol car, the trooper asked appellant a few questions pertaining to his alcohol consumption that day. Appellant admitted drinking a single beer three hours earlier and drinking quite a few earlier that day. Based on appellant's admissions, strong smell of alcoholic beverage, and glassy and bloodshot eyes, the trooper got appellant out of the patrol car and had him perform the standard field sobriety tests to determine whether he was okay to drive. Appellant explained that he felt compelled to perform the field tests because he thought he was under arrest or that he was going to be arrested because he was placed in the patrol car. Appellant performed very poorly on the field sobriety tests.

{¶ 5} After the completion of the field tests and the implementation of the portable breathalyzer test, the trooper placed appellant under arrest for operating his vehicle while impaired. Appellant was then handcuffed and read his *Miranda* warnings.

{¶ 6} Appellant pled not guilty and moved the trial court to suppress evidence from his traffic stop. The motion was heard by the Portage County Municipal Court and was denied via its September 12, 2014 Journal Entry.

{¶ 7} Following the denial of his motion to suppress, appellant pled no contest to the charge of OVI in violation of R.C. 4511.19(A)(1)(a). The trial court found him guilty. Appellant timely appeals and asserts one assignment of error:

{¶ 8} "The trial court failed to make findings of fact and thus did not articulate a legally sufficient ruling on the issue, raised in the Defendant–Appellant's Motion to Suppress Evidence, that he was subjected to custodial interrogation and in response made incriminating statements without first being read his Miranda Rights, in violation of his Constitutionally protected right to remain silent and privilege against self-incrimination."

*2 {¶ 9} The motion to suppress set forth three distinct grounds for suppression. Counsel raised each of these

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grounds at the suppression hearing and each was addressed by the prosecutor in his remarks. During his closing, appellant's counsel argued that appellant's admissions of drinking resulted in the administration of the field sobriety tests, and as a result, his arrest based on those tests was unlawful. The trial court judge never directly ruled on the issue as to whether appellant was in custody at the time of his admission. Appellant now challenges the trial court's lack of findings on this issue and claims that the subsequent field sobriety tests and arrest were contrary to law.

{¶ 10} Ordinarily an appellate court reviews a trial court's decision on a motion to suppress pursuant to a two-step process. First, an appellate court must accept findings of fact on a motion to suppress if they are supported by competent and credible evidence. *State v. Burnside,* 100 Ohio St.3d 152, 2003–Ohio–5372, 797 N.E.2d 71, ¶ 8 citing *State v. Fanning,* 1 Ohio St.3d 19, 1 Ohio B. 57, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). The trial court judge acts as the trier of fact and is in the best position to assess witness credibility. *Id.* Second, an appellate court must independently verify whether the facts found by the trial court satisfy the applicable legal standard. *Id.* citing *State v. McNamara,* 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶ 11} Pursuant to Crim.R. 12(F), a trial court "shall state its essential findings on the record" in order to facilitate effective appellate review. *Kirtland Hills v. Medancic,* 11th Dist. Lake Nos.2011–L–136 & 2011–L–137, 2012–Ohio–4333, ¶ 8, citing *State v. Marinacci,* 5th Dist. Fairfield No. 99–CA–37, 1999 Ohio App. LEXIS 5279, *4, 1999 WL 1071647 (Nov. 3, 1999). A trial court must recite its factual findings in order to enable an appellate court to determine whether the trial court's factual findings are supported by the record and if the trial court applied the correct law. *Kirtland Hills* at ¶ 8, citing *State v. Bailey,* 5th Dist. Muskingum No. CT2002–0041, 2003 Ohio App. LEXIS 5690, *6 (Nov. 21, 2003).

{¶ 12} In the instant case, we agree with appellant that the trial court failed to address this prong of his suppression motion. It did not make any findings on this issue either in its written decision or at the hearing. Nevertheless, no resulting prejudice is apparent, and appellant did not request findings of fact. This court has previously found that a trial court's failure to set forth its essential findings is not fatal if the record provides a sufficient basis to review appellant's assigned errors on appeal. *State v. Armstrong,* 11th Dist. Portage No.2012–P–0018, 2013–Ohio–2618, ¶ 24; *State v. Sands,* 11th Dist. Lake No.2006–L–171, 2007–Ohio–35, ¶ 36; *State v. Harris,* 8th Dist. Cuyahoga No. 85270, 2005–Ohio–2192, ¶ 18–19. Even absent findings and conclusions, the trial court's denial of the motion to suppress was legally justified and supported by the record.

*3 {¶ 13} *Miranda* warnings must be provided when a defendant is subject to a custodial interrogation. A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 384 U.S. 436, 444–468, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶ 14} The roadside questioning of a motorist detained pursuant to a routine traffic stop does not usually constitute a custodial interrogation and invoke the requirement that the driver be read his *Miranda* warnings. *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). In *Berkemer,* the Supreme Court held that *Miranda* was not implicated where the driver, who was stopped for swerving, was questioned about his drinking during the traffic stop. *Id.* at 439. Instead, the court explained that the "noncoercive aspect of ordinary traffic stops prompt us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda.*" *Id.* at 440. Instead, the *Miranda* safeguards are implicated when "a suspect's freedoms are curtailed to a 'degree associated with formal arrest.' " *Id.* quoting *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). "It is not a detainee's freedom of movement that makes a traffic stop constitutionally unoffensive. It is, instead, the relative brevity, limited scope, and non-threatening character of the police intrusion." *State v. Wineberg,* 2d Dist. Clark No. 97–CA–58, 1998 Ohio App. LEXIS 1159, *15, 1998 WL 409021 (Mar. 27, 1998), citing *Berkemer.*

{¶ 15} In *State v. Rice,* 1st Dist. Hamilton Nos. C–090071–C–090073, 2009–Ohio–6332, the First District reversed the trial court's suppression of the motorist's admissions made while he was in the back seat of the police cruiser before he was read his *Miranda* warnings during a traffic violation stop. It held that the defendant was not in custody for *Miranda* purposes. The officer smelled alcohol and placed the driver in the back of the cruiser to determine the source of the odor and to confirm that the smell was not coming from either of the two passengers. The officer explained that the driver was placed in the cruiser for safety reasons since there was high-speed traffic on the interstate. The court emphasized that the driver was not handcuffed at the time and that the officer's

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questioning was neither lengthy nor intimidating. *Id.* at ¶ 10–15.

{¶ 16} In *State v. Serafin,* 11th Dist. Portage No.2011–P–0036, 2012–Ohio–1456, this court held that the motorist was not in custody for *Miranda* purposes during a routine traffic stop. Serafin was alone when he was pulled over for speeding. The officer explained that Serafin smelled of alcohol and that his eyes were glassy. Serafin was ordered to accompany the officer to the patrol car so he could complete his investigation. The officer confirmed that the alcohol odor was coming from Serafin, so he asked him how much he had to drink that night. Serafin admitted to having a couple beers over dinner, and the officer then initiated the field sobriety tests. The video of the traffic stop confirmed that approximately six minutes passed from the time of the initial stop until the officer began the field tests. Serafin was subsequently arrested and read his *Miranda* warnings at that time. On appeal, we upheld the denial of the motion to suppress because the questioning in the cruiser during the temporary detention for speeding was never elevated beyond the purpose of the initial stop. *Id.* at ¶ 8–15.

*4 {¶ 17} Other appellate courts have considered comparable facts and agreed that most traffic stops and accompanying investigatory questioning do not constitute custodial interrogations warranting the right to *Miranda* warnings. *State v. Engle,* 2d Dist. Montgomery No. 25226, 2013–Ohio–1818; *State v. Barnett,* 2d Dist. Montgomery No. 14019, 1994 Ohio App. LEXIS 4767, 1994 WL 567551 (Aug. 31, 1994) (holding that roadside questioning of motorist while in the rear of the police cruiser for a short period of time does not constitute a custodial interrogation); *State v. Leonard,* 1st Dist. Hamilton No. C–060595, 2007–Ohio–3312, ¶ 22–23 (holding that the intrusion was minimal based on the short length of the detention and the fact that the officer did not take the defendant's keys or search his vehicle); *State v. Wineberg,* 2nd Dist. Clark No. 97–CA–58, 1998 Ohio App. LEXIS 1159, 1998 WL 409021 (Mar. 27, 1998) (holding in part that the detention of a driver in the back seat of a cruiser during a traffic stop does not invoke *Miranda* protection).

{¶ 18} Like the facts in *Serafin* and *Rice,* the record before us confirms that the routine questioning during the traffic stop detention in this case did not rise to a custodial interrogation, regardless of whether appellant was in the front or back seat of the patrol car at the time. A review of the DVD of the traffic stop reveals that the detention was brief, i.e., less than six minutes from the time the trooper approached appellant's car to the time he began the field tests, and that the questioning was neither lengthy nor intimidating. The trooper did not take appellant's keys and did not search appellant's vehicle. Instead, appellant's incriminating admissions were made during the traffic stop and attendant investigation for the issuance of the warning for speeding. Accordingly, *Miranda* warnings were not required before appellant made his incriminating statements. The trial court appropriately denied the motion to suppress.

{¶ 19} Based on the foregoing, it is the judgment and order of this court that the decision of the Portage County Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

*4 {¶ 20} As the majority notes, failure by a trial court to set forth its essential findings of fact in a suppression hearing pursuant to Crim.R. 12(F) may not be reversible error if the record provides a sufficient basis for an appellate court to review any error assigned. *Armstrong, supra,* at ¶ 24. Unlike the majority, however, I do not find the record in this case sufficient to decide appellant's contention he was held in custody prior to being *Mirandized* without a finding on this issue by the trial court.

{¶ 21} According to Trooper Engle's testimony, he stopped appellant for speeding, and observed typical indicia of intoxication: bloodshot, glassy eyes, and a strong odor of alcohol. The trooper asked appellant to exit his car, and performed a pat down, then placed appellant in the front seat of his cruiser, and questioned him about his drinking. The trooper emphasized that he does not consider a person under arrest until he or she is placed in the secure back seat of the cruiser. The trooper then exited the cruiser, and took appellant out by the passenger door, and had him perform the field sobriety tests, prior to placing him under arrest.

*5 {¶ 22} Even on the trooper's own testimony, appellant might reasonably consider himself in custody when he was placed in the front seat of the cruiser, before being questioned about his drinking. I respectfully question whether a reasonable person would consider him or herself free to

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not answer questions, and leave, under these circumstances. If not, this was custodial interrogation, and appellant should have been given his *Miranda* warnings at the time. *See, e.g., Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

{¶ 23} Further, there is a discrepancy between the testimony of the trooper, and appellant. The majority states appellant testified he "believed" he was placed in the back seat, not the front seat, of the cruiser. The actual testimony elicited is as follows:

{¶ 24} Defense counsel: "When you were in his—the first time he placed you in the car, were you in the back seat or the front seat?"

{¶ 25} Appellant: "I believe was in the back seat."

{¶ 26} Defense counsel: "You believe or you know?"

{¶ 27} Appellant: "I was in the back seat."

{¶ 28} The trooper's own testimony was that he considers a person under arrest when placed in the back seat of his cruiser. When an issue of credibility is essential to determining a motion to suppress, and a trial court makes no finding regarding credibility, the proper response of an appellate court is to reverse and remand, so the trial court can make that finding. *State v. Payne,* 9th Dist. Wayne No. 11CA0029, 2012–Ohio–305, ¶ 13–15.

{¶ 29} I would reverse and remand for the trial court to make further findings under Crim.R. 12(F).

{¶ 30} I respectfully dissent.

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THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS RATIFIED BY THE STATES

Preamble to the Bill of Rights

CONGRESS OF THE UNITED STATES
BEGUN AND HELD AT THE CITY OF NEW-YORK, ON
WEDNESDAY THE FOURTH OF MARCH,
ONE THOUSAND SEVEN HUNDRED AND EIGHTY NINE

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

(Note: The first 10 amendments to the Constitution were ratified December 15, 1791, and form what is known as the "Bill of Rights.")

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

gious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

(1851)

WRIT OF HABEAS CORPUS.

§8 The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

(1851)

BAIL.

§9 All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great and except for a person who is charged with a felony where the proof is evident or the presumption great and who where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the State of Ohio.

(1851, am. 1997)

TRIAL FOR CRIMES; WITNESS.

§10 Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine

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the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(1851, am. 1912)

RIGHTS OF VICTIMS OF CRIME.

§10a Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the General Assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(1994)

FREEDOM OF SPEECH; OF THE PRESS; OF LIBELS.

§11 Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

(1851)

TRANSPORTATION, ETC. FOR CRIME.

§12 No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

(1851)

QUARTERING TROOPS.

§13 No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

(1851)

SEARCH WARRANTS AND GENERAL WARRANTS.

§14 The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

(1851)

NO IMPRISONMENT FOR DEBT.

§15 No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)