[Cite as *Columbus v. Murphy*, 2011-Ohio-949.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-757 (M.C. No. 2008 TR C 204269)
Stephen A. Murphy,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 3, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias* and *Orly Ahroni*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, Stephen A. Murphy ("appellant"), appeals from the judgment of the Franklin County Municipal Court, entered upon a jury verdict convicting appellant of operating a motor vehicle while under the influence of alcohol.[1] For the following reasons, we affirm that judgment.

[1] As part of the same event, appellant was also charged with failure to control. He was separately found guilty of that charge and received a $150 fine and court costs. However, his conviction on that offense is not at issue in this appeal.

{¶2} On the evening of November 6, 2008, police responded to a call regarding an accident that occurred in the parking lot of an apartment/condominium complex on Sawdust Lane, in Franklin County, Ohio. Upon arrival, police observed a red Ford Mustang and a minivan, both of which had damage. The Mustang was owned by appellant. An officer spoke with appellant, who admitted to driving the Mustang and striking the minivan, which was unoccupied and parked in the lot. The officer detected an odor of alcohol and appellant also admitted to having consumed two beers earlier in the day. As a result, the officer asked appellant to perform field sobriety tests. Following the field sobriety tests, the officer arrested appellant.

{¶3} Appellant was arraigned on November 25, 2008 and filed a motion to suppress on February 12, 2009. A hearing was held on May 11, 2009, prior to the commencement of trial.

{¶4} At the hearing, counsel for appellant argued the police lacked reasonable suspicion to believe that appellant was impaired, the field sobriety tests were not conducted in compliance with the rules and regulations of the National Highway Traffic Safety Administration ("NHTSA") manual and were therefore unreliable indicators of impairment, and as a consequence, the officer lacked probable cause to arrest appellant. Counsel also argued any statements obtained from appellant should be suppressed. After hearing testimony, the trial court overruled the motion to suppress and trial commenced the following day.

{¶5} At trial, Officer Austin Przymierski ("Officer Przymierski") testified he was dispatched to the parking lot of the apartment/condominium complex and observed the two vehicles which had come into contact with one another. Officer Przymierski spoke

with appellant, who informed the officer he had been in an argument with his girlfriend or ex-girlfriend and was upset. Appellant admitted striking the minivan and estimated his speed at 30 mph. As appellant spoke to Officer Przymierski, the officer detected a strong odor of alcohol coming from appellant. Officer Przymierski also noticed appellant's speech was slurred. When asked if he had been drinking, appellant advised he had two Bud Lights prior to driving. Officer Przymierski asked appellant to perform three field sobriety tests to determine whether he was under the influence of alcohol.

{¶6} Officer Przymierski testified he was trained in the police academy in 2004 on the NHTSA manual standards and on how to comply with those standards. He received additional training on the NHTSA standards in August 2008, prior to his interaction with appellant in November 2008. In addition, he testified he had recently completed a class dedicated to the detection of people who are under the influence of alcohol and/or drugs. He also explained that he had been certified to administer field sobriety tests.

{¶7} Officer Przymierski testified he first asked appellant to perform the horizontal gaze nystagmus ("HGN") test. Officer Przymierski confirmed appellant did not have any eye problems or leg or ankle injuries, and then advised appellant he was going to check his eyes. Upon confirming that appellant could see the pen he used as a stimulus, he held the stimulus approximately 12 to 15 inches away from appellant’s face and slightly above his nose. Officer Przymierski had appellant place his hands underneath his eyes for officer safety reasons so that he could see appellant’s eyes as well as his hands. Next, the officer checked for equal pupil size and resting nystagmus and equal tracking. Then he proceeded with the testing.

{¶8} The HGN test was described as a test which looks for the involuntary jerking of the eyes. Officer Przymierksi testified that the eyes of someone who had not consumed alcohol would roll smoothly, but the eyes of a person who had consumed alcohol would jerk. He observed a lack of smooth pursuit in both of appellant's eyes. Officer Przymierski also testified he observed distinct and sustained nystagmus at maximum deviation in both eyes. He further testified he observed the onset of nystagmus prior to 45 degrees in both eyes. As a result, he observed six out of six clues with the HGN test. According to NHTSA guidelines, Officer Przymierski testified the presence of four out of six clues indicates the subject's blood alcohol content level is likely above .10.

{¶9} Officer Przymierski also had appellant perform the walk-and-turn test, where he detected five out of eight clues, as well as the one-leg stand test, where he observed three out of four clues indicating impairment. Officer Przymierski testified that he administered all three tests in accordance with the training he received.

{¶10} As a result of his observations during the field sobriety tests, as well as his earlier observations, which included detecting an odor of an alcoholic beverage and slurred speech, Officer Przymierski placed appellant under arrest for operating a vehicle under the influence of alcohol. While appellant was seated in the back of the cruiser, the officer read him the BMV 2255 form, which set forth the consequences for refusing to take a chemical test and for taking the test and exceeding the prohibited limits. Officer Przymierski testified that as he was reading the form, appellant was crying and visibly upset. Appellant also expressed a desire to harm himself, so instead of taking him to be booked at the jail, Officer Przymierski decided to take appellant to Riverside Methodist

Hospital to address his mental health issues. Officer Przymierksi stated appellant refused to take a chemical test.

{¶11} Terry Culp ("Ms. Culp"), the owner of the minivan, also testified for the City. She was alerted to the fact that her vehicle had been struck by a neighbor. She did not witness the accident but did see appellant in his vehicle after the accident occurred. As appellant exited his vehicle, he made contact with Ms. Culp and apologized profusely. He stated that he should not have been angry and should not have taken off in his car. Ms. Culp contacted police and advised appellant to settle down.

{¶12} Ms. Culp testified that during her conversation with appellant, she noticed that he smelled of liquor. She noted that he kept repeating himself and seemed to be "inebriated." (Tr. 126.) She also testified that she witnessed appellant remove a paper bag from his car, which he took into his condominium. Based on the shape of the bag, Ms. Culp believed the bag contained a bottle. Appellant then returned to his vehicle a short time later and soon thereafter, the police arrived.

{¶13} Appellant presented the testimony of Karen Bruggeman ("Ms. Bruggeman"), his former girlfriend and the mother of his child. Ms. Bruggeman and appellant dated for approximately three years. Appellant, Ms. Bruggeman, and their 19 month-old daughter had previously lived together, but shortly before the accident, Ms. Bruggeman and their daughter moved out of appellant's apartment. She testified that appellant was upset about this. Ms. Bruggeman also testified that appellant had certain behavioral or psychological traits which affected their relationship. She described appellant as a "clean freak" who had to have everything a certain way in the house, or otherwise he would become stressed out and anxious. (Tr. 158.) When appellant was

very anxious, he paced, to the point that he had worn marks in the carpet as a result of his repetitive pacing movements. Ms. Bruggeman also testified that changes or disruptions to appellant's routine caused him to pace or clean obsessively and he often repeated himself when he was upset.

{¶14} On the day of the accident, Ms. Bruggeman had a phone conversation with appellant, during which she informed appellant that she did not think she would be moving back in with him. Later, she received another phone call from appellant advising her he had been in an accident. Ms. Bruggeman testified she left work and went to the apartment/condominium complex and spoke briefly with appellant. She stated he was very distraught, stressed out, and crying, and was not the person she knew. Ms. Bruggeman testified that she did not know whether or not appellant had anything to drink that night and she did not observe appellant performing the field sobriety tests.

{¶15} Appellant also testified on his own behalf. Appellant testified he had some difficulties with school as a child. While attending school, he was engaged in speech therapy classes as well as other specialized classes. Appellant testified he suffers from a mental or nervous condition that causes him to become very anxious and to engage in compulsive behaviors, such as obsessively cleaning, washing his hands, and pacing. He testified that he didn't feel comfortable if things were not organized and that he goes through a routine of cleaning his apartment prior to going to work.

{¶16} Appellant testified he works various jobs. He organizes sports activities and classes for the Columbus Recreation and Parks Department and serves as a part-time custodian at a church. He also occasionally works a side job assisting a private contractor with home renovations.

{¶17} Appellant testified that prior to the accident, his girlfriend and daughter moved out of his apartment. Appellant was upset by this move. He was also upset about the pressure his grandmother was putting on him to marry Ms. Bruggeman.

{¶18} On the day of the accident, appellant went to a morning appointment with his psychiatrist and then picked up prescriptions at the Kroger pharmacy. At approximately 1:00 p.m., appellant had the lunch buffet and two Budweisers at the Grumpy Troll. He testified he was at the Grumpy Troll for approximately two hours before he went home. He was not scheduled to work that day.

{¶19} However, he was later contacted and asked to come in to work at the church. He went through his routine of cleaning and getting ready for work. While driving in the parking lot, he texted his boss to let him know he was on his way. As he was pulling out and coming around the bend, he "bumped into" a parked van. (Tr. 205.) He apologized to the owner of the van. Afterwards, he removed a brown paper bag containing his prescription medication from his vehicle and took it inside his apartment.

{¶20} Appellant testified he did not remember everything that happened after the accident. He remembered parts of the conversation with the officer, as well as sitting in the back of the police cruiser, feeling very upset, and starting to have "an episode." (Tr. 210.) He also recalled going to Riverside Methodist Hospital. However, he did not recall actually striking the van and did not remember the officer reading him the BMV 2255 form.

{¶21} The jury returned a verdict convicting appellant of one count of operating a motor vehicle while under the influence of alcohol, a violation of Columbus City Code 2133.01. The trial court sentenced appellant to 180 days in jail with 171 days suspended,

six days to be served in the county jail, and three days to be served in a treatment program. A one-year driver's license suspension was imposed. In addition, appellant was fined $600, costs were imposed, and he was placed on community control for one year. Appellant filed this timely appeal and now asserts a single assignment of error:

> ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ERRED WHEN IT ALLOWED THE CITY TO INTRODUCE INTO EVIDENCE THE TEST RESULTS OF THE HORIZONTAL GAZE NYSTAGMUS TEST WHEN THE TEST HAD NOT BEEN PROPERLY ADMINISTERED.

{¶22} In his sole assignment of error, appellant argues that because Officer Przymierski instructed appellant to place his hands underneath his eyes during the administration of the HGN test, the test was not administered in compliance with the rules and regulations set forth in the NHTSA manual, and therefore the results of the test were inadmissible. Appellant argues there is nothing within the procedure set forth in the NHTSA manual that states hands should be placed under the eyes during the administration of the test. Appellant argues substantial compliance cannot be established when this practice is not part of the written testing procedure. Appellant further argues this act is a visual distraction and because the officer interjected a variable that was not part of the standardized procedure, the validity of the test was affected and the City failed to show that the modified test was scientifically reliable. As a result, appellant submits admission of the HGN test results was error.

{¶23} In addition, appellant argues his ability to perform the other two field sobriety tests, which was dependent upon his ability to listen to, comprehend, and follow detailed instructions, was compromised due to his anxious and emotional mental state. As a result, appellant asserts his poor performance on those tests could be attributed to

his mental state, thereby making reliance upon the HGN test the key factor for determining his guilt. Therefore, he argues it was critical that the HGN test be properly administered. Because the City failed to demonstrate proper compliance, appellant argues the results of the test cannot be considered reliable without scientific evidence to establish that the added variable did not affect the validity of the test.

{¶24} In the instant case, we must consider whether the established facts demonstrate substantial compliance with the standards set forth in the NHTSA manual under a de novo standard of review. See *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8.

{¶25} Appellant was charged with a violation of Columbus City Code 2133.01(A)(1)(a), which states in relevant part: "No person shall operate any vehicle * * * within this City, if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶26} Pursuant to Columbus City Code 2133.01(D)(4)(b), the results of field sobriety tests are admissible at trial in a prosecution for a violation of Columbus City Code 2133.01(A) or (B) if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards set by NHTSA and in effect at that time. If such evidence is established, the officer may testify to the results of the field sobriety tests, the prosecution may introduce the results of the tests, and the court shall admit the testimony or evidence and the trier of fact shall give it the weight it deems appropriate. Columbus City Code 2133.01(D)(4)(b). See also *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, ¶12-15. This provision is identical to Ohio's statutory counterpart found in R.C. 4511.19(D)(4)(b).

{¶27} Moreover, "HGN test results are admissible in Ohio without expert testimony so long as the proper foundation has been shown both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test." Id. at ¶27.

{¶28} Appellant argues the City has failed to prove the HGN test was administered in substantial compliance with the testing standards set forth in the NHTSA manual for several reasons, one of which is the fact that the NHTSA manual was not introduced into evidence, and thus the applicable standards were not properly established. However, we reject that argument, based upon the authority of *State v. Perkins*, 10th Dist. No. 07AP-924, 2008-Ohio-5060. In *Perkins*, we held that while the NHTSA manual may be introduced, substantial compliance can also be demonstrated through witness testimony, which establishes what the NHTSA standards are and also demonstrates the officer's actions were in conformity with those standards. Id. at ¶16. See also *State v. Morgan*, 11th Dist. No. 2008-P-0098, 2009-Ohio-2795.

{¶29} Here, we find that Officer Przymierski's testimony established the NHTSA testing standards. The officer testified as to his education and training regarding the administration of the field sobriety tests using the NHTSA standards. He testified that he had received training in 2004 and 2008 and had also recently attended a "DICE" or "Driving Impaired, Criminal Enforcement" class, where he was re-trained on how to administer the standardized field sobriety tests. Officer Przymierski described the HGN test in detail and testified that under the NHTSA guidelines, an officer must observe four or more clues to indicate a failing test.

{¶30} We further find the trial court properly admitted the HGN test results at trial because the City demonstrated by clear and convincing evidence that Officer Przymierski conducted the test in substantial compliance with the NHTSA standards. The City laid the proper foundation regarding the officer's training and the technique used in administering the test. The officer's instruction advising appellant to place his hands on his face underneath his eyes was not contrary to the procedure set forth in the NHTSA manual, as the manual does not state where the subject's hands are to be placed while the test is being administered. Therefore, we find the HGN test was conducted in compliance with the manual. Several other Ohio appellate courts have made similar findings.

{¶31} In *State v. Pemberton*, 11th Dist. No. 2008-G-2870, 2009-Ohio-3177, the court found the HGN test was administered in substantial compliance with standard procedures where the deputy administering the test had the subject place his hands on his cheeks while the test was being administered. The court found "nothing in the NHTSA manual regulates where the subject's hands are to be placed and we fail to see how the placement of the subject's hands on his or her cheeks would impact the test result." Id. at ¶102. As a result, the appellate court determined there was no error in declining to suppress the officer's testimony regarding the results of the HGN test.

{¶32} Similarly in *State v. Howard*, 2d Dist. No. 2007 CA 42, 2008-Ohio-2241, the trooper administering the test instructed the subject to place his hands on his cheeks during the HGN test. The court found there was no evidence that the location of the subject's hands invalidated the test. Id. at ¶25. The court further found that, despite the trooper's testimony that the manual did not instruct the subject to place his hands on his

cheeks, there was no evidence that the instruction to have the subject place his hands on his cheeks was contrary to the manual. Id. The court ultimately determined the results of the test were admissible.

{¶33} Other courts have also found the HGN test to have been administered in substantial compliance with NHTSA standards where there was an instruction for the subject to place his hands on his face during the administration of the test. See *State v. Henry*, 12th Dist. No. CA2008-05-008, 2009-Ohio-10 (one of the instructions provided by the trooper included advising the subject to place his hands on his cheeks in order to steady his head; the appellate court found the trial court erred in holding the HGN test was not conducted in substantial compliance with NHTSA standards); and *Cleveland Heights v. Schwabauer*, 8th Dist. No. 84249, 2005-Ohio-24 (one of the instructions provided to the subject was to place his hands on his cheeks for officer safety and to ensure his head remained steady; the court determined the officer's instructions substantially complied with the NHTSA manual).

{¶34} Furthermore, at least two appellate districts have found that an HGN test is administered in substantial compliance with the NHTSA standards if the officer's instructions are not contrary to the manual and the test was performed in accordance with the officer's training. In *State v. Mendoza*, 6th Dist. No. WD-05-094, 2006-Ohio-6462, the court found that absent a specific requirement in the NHTSA manual stating that a subject must be standing during the administration of the HGN test, the results of a test conducted while the subject was seated were admissible, provided the officer was properly trained to administer the test and also testified that his administration of the test complied with his training. Id. at ¶34. A similar finding was also reached in *State v.*

Dohner, 11th Dist. No. 2003-P-0059, 2004-Ohio-7242, whereby the court found that in the absence of a specific requirement in the NHTSA manual, the admissibility of the HGN test was dependent upon how the officer was trained to administer the test and whether his actions complied with his training. Id. at ¶13. See also *State v. Hernandez-Rodriguez*, 11th Dist. No. 2006-P-0121, 2007-Ohio-5200, fn.1, citing *Dohner* at ¶13 ("Although the manual does not specifically authorize this practice, 'the admissibility of the results of the HGN test are dependent on how the officer is trained to adminster them and whether the officer's actions complied with this training.' ").

{¶35} Here, Officer Przymierksi testified he instructed appellant to place his hands underneath his eyes for officer safety reasons because he had been trained that hands can kill. By having the subject gently place his hands underneath his eyes, he explained the officer can see the subject's hands as well as his eyes. Officer Przymierski also testified that he was trained to conduct the test in this manner for officer safety reasons. He further acknowledged that the NHTSA manual does not contain an instruction which states the subject must put his hands on his cheeks during the administration of the HGN test. Yet, nothing in the manual indicates a particular location where the subject's hands should be placed during the administration of the HGN test.

{¶36} In addition, there was testimony explaining that the NHTSA manual includes a provision which requires the administrator of the HGN test to instruct the subject to keep his head still. The Twelfth District has found substantial compliance where the administrator of the HGN test instructed the subject to place his hands on his cheeks to steady his head. See *Henry* ¶21-23. And, the Eighth District, in *Schwabauer*,

also found substantial compliance where the officer instructed the subject to place his hands on his cheeks to keep his head steady and for officer safety. Id. at ¶22.

{¶37} Based upon the case law cited above, we find the officer conducted the HGN test in substantial compliance with the NHTSA manual. While the manual does not state where a person must place his hands during the test, it also does not prohibit the placement of the subject's hands on his face. Furthermore, Officer Przymierski testified that he had been trained to conduct the test in this manner for officer safety reasons. Thus, we find the officer's instructions were not contrary to the manual and were in substantial compliance with the NHTSA guidelines.

{¶38} We also note there has been no testimony or evidence to support appellant's contention that a subject would be distracted by the placement of his hands on his cheeks during the administration of the HGN test. There is nothing to indicate that such an action, which other courts have deemed to be in substantial compliance with the NHTSA manual, compromises the subject's ability to follow the stimulus with his eyes or prevents the administering officer from detecting any sign of jerking in the subject's eyes.

{¶39} Appellant has also argued that expert testimony is necessary to establish that the added variable of placing the hands on the face did not affect the validity of the test because the test was not conducted in substantial compliance with the NHTSA manual. However, we find the HGN test was administered in substantial compliance with the NHTSA standards. Therefore, an inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc*. (1993), 509 U.S. 579, 113 S.Ct. 2786 is inapplicable here, as the results of field sobriety tests are admissible so long as the tests were administered in

substantial compliance with NHTSA standards. See R.C. 4511.19(D)(4)(b) and Columbus City Code 2133.01(D)(4)(b); see also *Boczar* .

{¶40} Furthermore, although the results of a test administered in substantial compliance with the applicable NHTSA standards are admissible, the weight to be given to that evidence at trial is left to the trier of fact. *Columbus v. Weber*, 10th Dist. No. 06AP-845, 2007-Ohio-5446, ¶18. Here, because the tests were conducted in substantial compliance, admission of the results of the test was proper. However, appellant was free to challenge the weight of that evidence at trial. Consequently, appellant was free to argue, for example, that the officer did not strictly comply with the NHTSA guidelines or that appellant was distracted during the test, thereby making the test unreliable, and thus disputing the weight that should be given to those results, despite the admissibility of the results.

{¶41} Based upon our analysis as set forth above, we find the City demonstrated by clear and convincing evidence that Officer Przymierski administered the HGN test in substantial compliance with the NHTSA standards, and therefore the trial court properly admitted the introduction of the HGN test results into evidence. Accordingly, we overrule appellant's sole assignment of error and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.