[Cite as *State v. Dierkes,* 2009-Ohio-2530.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0085**
- vs -	:	
PAUL G. DIERKES, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Case No. R 2007 TRC 5934

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Scott R. Cochran, Atway & Cochran, 19 East Front Street, #1, Youngstown, OH 44503 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellant, Paul G. Dierkes, Jr., appeals the judgment of the Portage County Municipal Court, Ravenna Division, denying his motion to suppress and the conviction on his no contest plea of operating a vehicle with a prohibited blood-alcohol concentration. We are asked to consider whether the arresting officer had reasonable suspicion to detain appellant for field sobriety tests. For the reasons that follow, we affirm.

{¶2} On April 30, 2007, appellant was charged in the trial court with operating a vehicle under the influence of alcohol ("OVI"), in violation of R.C. 4511.19(A)(1)(a) and operating a vehicle with a prohibited blood-alcohol concentration, in violation of R.C. 4511.19(A)(1)(d), both misdemeanors of the first degree; failure to wear a seat belt, in violation of R.C. 4513.263; and failure to light his rear license plate, in violation of R.C. 4513.05. Appellant entered a not guilty plea and waived his right to a speedy trial. On August 29, 2007, appellant filed a motion to suppress. On February 25, 2008, the trial court conducted a hearing on appellant's motion.

{¶3} On Sunday morning, April 29, 2007, at 3:52 a.m., Trooper John Lamm of the State Highway Patrol was on routine patrol in Deerfield Township when he observed a 1997 Pontiac being operated on U.S. Route 224 westbound. The trooper observed the rear license plate light was not illuminated, and he decided to stop appellant for this violation.

{¶4} Trooper Lamm activated his overhead lights and pulled appellant over in the parking lot of a supermarket on Route 224. The trooper approached appellant's vehicle from the driver's side. The trooper asked appellant for his driver's license and registration and appellant complied. While talking to appellant, Trooper Lamm noticed a "moderate" odor of alcoholic beverage emanating from the interior of appellant's vehicle. Because appellant had one passenger in his vehicle, appellant's wife, the trooper could not determine the source of the odor. As a result, he asked appellant to leave his vehicle and join him in his cruiser.

{¶5} Trooper Lamm sat in the driver's seat of his cruiser and appellant sat in the front passenger seat next to him. While the trooper was talking to appellant, he still

smelled a moderate odor of alcoholic beverage on appellant's breath. Appellant said he had been drinking that evening. The trooper asked him how many drinks he had consumed. Appellant said he had four or five beers, and claimed he consumed his last drink at around 9:00 p.m.

{¶6} Trooper Lamm testified he was concerned because, although appellant said that he only had four or five beers and that he had his last drink at 9:00 p.m., he still detected a moderate odor of alcohol on appellant's breath. As a result, the trooper administered the Horizontal Gaze Nystagmus ("H.G.N.") test to appellant in the cruiser. The trooper observed six out of six clues, indicating impairment.

{¶7} The trooper then "offered" a portable breath test to appellant in his cruiser, which appellant agreed to take. The test result was .102, which is over the legal limit.

{¶8} The trooper then had appellant leave the cruiser so he could administer further field sobriety tests. First, he administered the one-leg-stand test. Appellant was unable to follow the trooper's instructions to keep his arms down and his leg raised. He put his foot down four times. The trooper observed two clues indicating impairment.

{¶9} The trooper then administered the walk-and-turn test. Appellant was unable to follow the trooper's instructions to touch his heel to toe, to keep his arms down, to stay on a straight line, or to turn. Appellant stepped off the line three times. Also, instead of turning and walking back nine steps as instructed, appellant just walked backwards. The trooper observed six clues on this test indicating impairment.

{¶10} Trooper Lamm then arrested appellant, handcuffed him from behind, and secured him in the back of his cruiser. At 4:09 a.m., the trooper left the scene and drove appellant to the Ravenna post to administer the breathalyzer test.

{¶11} Upon their arrival at 4:22 a.m., Trooper Lamm parked his cruiser outside the garage door and walked appellant into the "BAC room." He removed appellant's handcuffs and administered the BAC DataMaster test to him at 4:32 a.m. Appellant's test indicated a blood alcohol concentration of .104, which is over the legal limit.

{¶12} Appellant testified and agreed with the trooper's version of the statements he made regarding his alcohol consumption. He also testified the BAC DataMaster test was invalid because, unknown to the trooper, two hours earlier, he had put chewing tobacco in his mouth and was still swallowing the juices when he took the test.

{¶13} On March 19, 2008, the trial court issued its judgment denying appellant's motion to suppress. Appellant then pled no contest to operating a vehicle with a prohibited concentration of alcohol in the blood. The court found him guilty and sentenced him to 180 days in the Portage County Jail with 170 days suspended, fined him $350, and suspended his driver's license for 12 months. The trial court stayed appellant's sentence pending appeal. Appellant appeals his conviction and the trial court's judgment denying his motion to suppress, asserting two assignments of error. For his first assigned error, appellant contends:

{¶14} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED FROM A TRAFFIC STOP, WHERE THE TROOPER LACKED REASONABLE GROUNDS TO DETAIN MR. DIERKES FOR STANDARDIZED FIELD SOBRIETY TESTS."

{¶15} Appellant presents a narrow issue for our review. He argues Trooper Lamm lacked reasonable suspicion to detain him to conduct field sobriety tests and, thus, the results of those tests were inadmissible. He does not challenge the propriety

of the trooper's initial stop. Nor does he argue the field sobriety tests were administered in violation of National Highway Traffic Safety Administration ("N.H.T.S.A.") requirements.

{¶16} It is well settled that a motion to suppress presents a mixed question of law and fact. At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Smith* (1991), 61 Ohio St.3d 284, 288. The trier of fact is best able to view witnesses and observe their demeanor, gestures, and voice inflictions, using these observations in weighing the credibility of testimony. *Seasons Coal Company, Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80. As the trier of fact, the trial court is free to believe all, part, or none of the testimony of each witness. *State v. Long* (1998), 127 Ohio App.3d 328, 335.

{¶17} On review, an appellate court must accept the trial court's findings of fact if they are supported by some competent and credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting the factual findings as true, the reviewing court must then independently determine, as a matter of law, whether the applicable legal standard has been met. Id.; see, also, *State v. Swank*, 11th Dist. No. 2001-L-054, 2002-Ohio-1337, at ¶11.

{¶18} "This court has previously noted that there are three distinct stages in the typical drunk driving scenario: (1) the initial stop; (2) the request that the driver submit to field sobriety tests; and (3) the arrest." *State v. Richards* (Oct. 15, 1999), 11th Dist. No. 98-P-0069, 1999 Ohio App. LEXIS 4860, *5.

{¶19} It is well settled that where a police officer witnesses a minor traffic violation, he or she is justified in initiating a limited stop for the purpose of issuing a citation. *State v. Brickman* (June 8, 2001), 11th Dist. No. 2000-P-0058, 2001 Ohio App. LEXIS 2575, *5; *State v. Jennings* (Mar. 3, 2000), 11th Dist. No. 98-T-0196, 2000 Ohio App. LEXIS 800.

{¶20} The issue here is whether, after stopping appellant's vehicle, Trooper Lamm developed a reasonable suspicion based on specific, articulable facts that appellant was driving while under the influence of alcohol. If so, he would be justified in asking appellant to perform field sobriety tests. *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361, *5-*6; *State v. Teter* (Oct. 6, 2000), 11th Dist. No. 99-A-0073, 2000 Ohio App. LEXIS 4656, *10.

{¶21} A request to perform field sobriety tests is a greater invasion of an individual's liberty interests than the initial stop and therefore such a request must be justified by specific, articulable facts. *State v. Evans* (1998), 127 Ohio App.3d 56, 62, citing *Yemma*, supra. "Once the officer has stopped the vehicle for some minor traffic offense and begins the process of obtaining the offender's license and registration, the officer may then proceed to investigate the detainee for driving under the influence if he or she has a reasonable suspicion that the detainee may be intoxicated based on specific and articulable facts, such as where there are clear symptoms that the detainee is intoxicated." *Yemma* at *8.

{¶22} In *Evans,* supra, this court set forth a list of factors to be considered in determining whether a police officer has a reasonable suspicion of impaired driving justifying the administration of field sobriety tests. That list, on which no one factor is

dispositive, consists of the following: (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., Tuesday morning); (2) the location of the stop (whether near establishments selling alcohol); (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.); (4) whether there is a cognizable report that the driver may be intoxicated; (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.); (6) impairment of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.); (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath; (8) the intensity of that odor, as described by the officer ("very strong," "strong," "moderate," "slight," etc.); (9) the suspect's demeanor (belligerent, uncooperative, etc.); (10) any actions by the suspect after the stop that indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and (11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given. Id. at fn. 2.

{¶23} In *Brickman,* supra, this court noted that "[c]ourts generally approve an officer's decision to conduct field sobriety tests when the officer's decision was based on a number of factors [set forth in *Evans*]." Id. at *8, quoting *Evans*, supra.

{¶24} A similar sentiment was expressed by the Second District in contrasting its holding in *State v. Dixon* (Dec. 1, 2000), 2d Dist. No. 2000-CA-30, 2000 Ohio App. LEXIS 5661 with its holding in *State v. Downing*, 2d Dist. No. 2001-CA-78, 2002-Ohio-1302. In *Dixon*, the appellate court determined that the smell of alcohol and glassy eyes at a late hour, without more, is not sufficient to conduct a field sobriety test. Id. at *5. However, in *Downing*, the court concluded that "the additional element of erratic driving

or specifically a 'strong' odor of alcohol seem to tip the scales in favor of allowing the tests." Id. at ¶10.

{¶25} We observe that four of the eleven *Evans* factors are present in this case. First, the traffic stop occurred late Saturday night/early Sunday morning at 4:00 a.m. Second, upon approaching appellant in his vehicle, the trooper noticed an odor of alcohol emanating from inside the vehicle. He determined that odor was coming from appellant's breath. Third, the trooper characterized the intensity of that odor as "moderate," as opposed to slight. Fourth, appellant admitted that he had been drinking that evening and that he had consumed four to five beers, but claimed he stopped drinking at about 9:00 p.m. The trooper testified he was concerned because he still smelled a moderate odor of alcohol on appellant's breath, even though he said he only had four to five beers and had stopped drinking seven hours earlier.

{¶26} We note that neither the state nor appellant has provided this court with citation to any authority addressing facts similar to those presented here. Our independent research, however, indicates that several Ohio Appellate Districts have addressed facts strikingly similar to those presented in the case sub judice.

{¶27} In *State v. Osburn*, 9th Dist. No. 07CA0054, 2008-Ohio-3051, the trooper called the defendant, who was a tow truck driver, to come to an accident scene and tow a damaged vehicle. The trooper did not "see anything wrong with defendant's driving." However, while the trooper was conducting an inventory of the crashed vehicle, he smelled a "moderate odor" of alcoholic beverage on the defendant's breath, and the defendant admitted to drinking two beers prior to reporting to the scene. The trooper asked the defendant to perform field sobriety tests, which the defendant failed. In these

circumstances, the Ninth District held the trooper had a reasonable suspicion of a criminal act, which was supported by specific, articulable facts, which justified the trooper's decision to administer field sobriety tests to the defendant. Id. at ¶9-10.

{¶28} In *State v. Duffy*, 6th Dist. No. OT-06-014, 2007-Ohio-199, the officer observed a marked lane violation, which provided probable cause to stop appellant's vehicle. The Sixth District held: "Once the stop was effected, the odor of alcohol from within the car and appellant's admission to consuming alcohol provided reasonable articulable suspicion of impaired driving to warrant further detention for [field sobriety tests.]" Id. at ¶11.

{¶29} In *State v. Schott* (May 16, 1997), 2d Dist. No. 1415, 1997 Ohio App. LEXIS 2061, the officer approached the defendant's car, which was stopped in a "no parking" zone, to inform him he was not permitted to park in that area. When he approached the driver, the officer noticed a strong odor of alcohol. As a result, the officer required the defendant to submit to field sobriety tests. Based on his poor performance on the tests, the officer concluded the defendant was intoxicated and he therefore arrested him for driving under the influence of alcohol. The Second District held that while a strong odor of alcohol is insufficient to give rise to probable cause, the "strong odor of alcohol was sufficient to provide the police officer with reasonable suspicion that Schott was driving with a blood alcohol level that exceeded the legal limit. *** [T]he police officer was [therefore] permitted to subject Schott to field sobriety tests." Id. at *13.

{¶30} In the following year, the Second District reaffirmed its holding in *Schott* in *State v. Toler* (Jan. 30 1998), 2d Dist. No. 97 CA 47, 1998 Ohio App. LEXIS 232, in

which the court held: "the strong odor of alcohol *alone* is sufficient to provide an officer with reasonable suspicion of alcohol impairment and, therefore, enough to permit the officer to subject the stopped operator to field sobriety tests." (Emphasis added.) Id. at *6-*7.

{¶31} In *State v. Blackburn* (1996), 115 Ohio App.3d 678, the trooper stopped the defendant for not having a functioning license plate light. The trooper testified that when he asked for the defendant's license, he detected a strong odor of an alcoholic beverage on his breath. The defendant also admitted he had "a few beers" that evening. In these circumstances, the Seventh District approved the trooper's administration of field sobriety tests. The court held that "the facts available to Trooper Zook *** would warrant a man of reasonable caution in the belief that the defendant-appellant was driving under the influence of alcohol." Id. at 681.

{¶32} We do not agree with appellant that our decision in *Brickman*, supra, is controlling because in that case the officer detected only a "mild" odor of alcohol and the defendant admitted to having only one beer.

{¶33} Based on the foregoing, we hold the trial court did not err in essentially finding that Trooper Lamm had a reasonable suspicion that appellant was driving under the influence of alcohol, which justified appellant's detention for field sobriety testing.

{¶34} Appellant's first assignment of error is not well taken.

{¶35} For his second assigned error, appellant alleges:

{¶36} "THE TRIAL COURT ERRED IN NOT GRANTING MR. DIERKES' MOTION TO SUPPRESS THE BREATHALYZER ("BAC") TEST, WHERE THE STATE FAILED TO SHOW SUBSTANTIAL COMPLIANCE WITH O.A.C. 3701-53-02."

{¶37} Appellant argues the state failed to substantially comply with OAC 3701-53-02(D), which requires the officer administering the breathalyzer machine to observe the defendant for 20 minutes prior to testing to prevent oral intake of any material. Appellant argues that because he had ingested chewing tobacco about two hours before the breathalyzer test was administered and because, he says, he was swallowing juices from his “chew” when he took the test, this constituted oral intake, in violation of the regulation. We do not agree.

{¶38} Courts apply a burden-shifting procedure to govern the admissibility of breathalyzer test results. The defendant must first challenge the validity of the test by pretrial motion to suppress. *State v. Burnside,* 100 Ohio St.3d 152, 157, 2003-Ohio-5372. After a defendant challenges the validity of test results, the state has the burden to show the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Id. Once the state satisfies this burden, the burden shifts to the defendant to demonstrate he was prejudiced by anything less than strict compliance. Id.

{¶39} In *Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, this court held that during the twenty-minute observation period prior to the administration of a breathalyzer test, "the testing officer must ensure that the subject refrains from the oral intake of any material." Id. at ¶15, citing *State v. Trill* (1991), 66 Ohio App.3d 622, 625.

{¶40} The Supreme Court of Ohio has held that when two or more officers observe a defendant continuously for twenty minutes or more prior to the administration of a breath-alcohol test, the observation requirement has been satisfied. *Bolivar v. Dick*,

76 Ohio St.3d 216, 1996-Ohio-409. We note that in *Bolivar,* the observation began prior to arrival at the police station. The Supreme Court in *Bolivar* also noted that the focus of the mandatory observation period is '"to prevent oral intake of any material.'" Id. at 218, citing *State v. Steele* (1977), 52 Ohio St.2d 187. Further, a breathalyzer test administered in substantial compliance with department of health regulations is admissible absent a demonstration of prejudice. *Bolivar* at 218; *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3; *State v. Plummer* (1986), 22 Ohio St.3d 292, syllabus.

{¶41} In *State v. Bauerle*, 11th Dist. No. 2007-L-078, 2008-Ohio-1493, the defendant contended the breathalyzer test was invalid because she had gum in her mouth during the 20-minute period before the breathalyzer test was administered. The officer administering the test said that he watched her for the entire period and that he did not see anything in her mouth. The state offered the testimony of a forensic toxicologist, who said "it does not matter if something is in one's mouth as long as it was not put in one's mouth during the twenty minute observation period." Id. at ¶13. In these circumstances, this court held the breathalyzer test was administered in substantial compliance with the regulations.

{¶42} Trooper Lamm testified that when he first approached appellant in his car and spoke with him, he did not notice anything in his mouth. Next, while sitting next to appellant in his cruiser and talking to him, he saw appellant with his mouth open, but nothing came out of his mouth and he did not see anything in his mouth.

{¶43} The trooper testified that for appellant, the observation period began at 3:52 a.m., when he first approached appellant. He said he continuously had appellant under his observation from that time until he administered the breathalyzer test at 4:32

a.m., a total of 40 minutes. The trooper testified that at no time during this period did he observe appellant put anything in his mouth. The only thing he smelled on appellant's breath was the odor of alcoholic beverage. Moreover, he never saw appellant chew anything or spit anything out of his mouth.

{¶44} Appellant testified he woke up that morning at 2:30 a.m. He put chewing tobacco in his mouth, and left the house with the tobacco still in his mouth. He testified he does not spit when he chews; instead, he swallows it. He testified that when he took the breathalyzer test at the station, he still had the same chewing tobacco in his mouth.

{¶45} In its judgment entry, the trial court found:

{¶46} "Lamm testified that he did observe Dierkes for at least twenty minutes before administering the test, and that he had no oral intake during that time. 'Oral intake' specifically means placing something in one's mouth. The [chewing tobacco] that had been in Dierkes' mouth for more than a half hour before the traffic stop did not constitute oral intake during the twenty minutes preceding the B.A.C. Datamaster test.

{¶47} "The Court finds that the test was administered in compliance with D.O.H. regulations, and the result is admissible. ***"

{¶48} Contrary to appellant's argument, the trial court did *not* find appellant had chewing tobacco in his mouth during the observation period and when the breathalyzer test was administered. The court merely summarized appellant's testimony to this effect. Instead, the court found appellant had chewing tobacco in his mouth for one-half hour before he was stopped, and that this did not constitute oral intake during the 20 minutes prior to the breathalyzer test.

{¶49} Appellant's reliance on *State v. Smallwood* (August 31, 2000), 7th Dist. No. 99 CO 36, 2000 Ohio App. LEXIS 3980 is misplaced because in that case the court held that "oral intake" occurs when an individual being tested puts something into his mouth or vomits. Id. at *8. There is no evidence either occurred here.

{¶50} We hold the trial court did not err in finding that Trooper Lamm substantially complied with the 20-minute observation requirement. We further hold that appellant failed to demonstrate prejudice from any deviation from this requirement.

{¶51} Appellant suggests the trooper should have asked him whether he had any lingering digestive juices in his mouth during the observation period from something he ingested prior to that time. Appellant has not drawn our attention to any requirement in the Ohio Administrative Code or case law that such question be asked. In a similar context, in *State v. Delarosa*, 11th Dist. No. 2003-P-0129, 2005-Ohio-3399, this court held that since the N.H.T.S.A. standards do not require an officer administering the H.G.N. test to ask whether the defendant is wearing contact lenses, there is no such requirement. Id. at ¶47.

{¶52} As the Supreme Court held in *Bolivar*, supra, the purpose of the mandatory observation period is to prevent oral intake of any material by the defendant *during that period*. It would be futile to require officers administering breathalyzer tests to ask defendants if they had any digestive juices in their mouth from something previously ingested because the answer could not be verified. The obvious point of the observation requirement is to prevent oral intake by the defendant during the period of time the officer has him under observation.

{¶53} Appellant's second assignment of error is not well taken.

{¶54} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Portage County Municipal Court, Ravenna Division, is affirmed.

TIMOTHY P. CANNON, J., concurs,

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

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

{¶55} I respectfully dissent from the majority as I find merit in the first assignment of error. Mr. Dierkes did not exhibit sufficient signs of impairment to allow Trooper Lamm to administer field sobriety tests.

{¶56} The factors set forth in *Evans*, supra, to determine whether a driver is impaired are nonexclusive. They simply set forth certain facts indicating whether, under the totality of the circumstances, a peace officer has a reasonable belief that a stopped driver may be under the influence of drugs or alcohol. Cf. id. at 62-63. As the majority notes, four of the *Evans* factors were present in this case: the stop occurred early in the morning; the trooper smelled an odor of alcohol emanating from the vehicle; the smell of alcohol was "moderate;" Mr. Dierkes admitted having some beers.

{¶57} Unfortunately, the legislature still allows drinking and driving in Ohio. It is also legal to drive early in the morning. None of the truly important *Evans* factors were presented by Mr. Dierkes. He did not drive erratically; he was not belligerent; he displayed no signs of lack of coordination in exiting his vehicle or handing his license to the trooper. He did not even display "glassy" eyes or slurred speech. As Mrs. Dierkes

was also in the car, the trooper could not even determine if the "moderate" odor of alcohol emanated from Mr. Dierkes alone, or existed because Mrs. Dierkes had been drinking as well, until he removed Mr. Dierkes to his cruiser.

{¶58} Under the totality of the circumstances, the trooper had no *reasonable* grounds for believing Mr. Dierkes was driving under the influence, or was impaired. As such, the administration of field sobriety tests to him was illegal, and the motion to suppress should have been granted.

{¶59} I dissent.