

[Cite as *State v. Derov*, 2009-Ohio-5513.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 07 MA 71
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
JESSICA DEROV,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:

Remand from the Ohio Supreme Court
Criminal Appeal from County
Court No. 4, Case No. 06 TRC 5717.

JUDGMENT:

Reversed. Conviction Vacated.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Paul J. Gains
Prosecuting Attorney
Attorney Jennifer Paris
Assistant Prosecuting Attorney
6000 Mahoning Avenue
Youngstown, OH 44515

For Defendant-Appellant:

Attorney Robert Kokor
394 State Route 7, SE
P.O. Box 236
Brookfield, OH 44403

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: October 8, 2009

[Cite as *State v. Derov*, 2009-Ohio-5513.]
DeGenaro, J.

{¶1} Appellant Jessica Derov appeals her conviction and sentence by the County Court No. 4, Mahoning County, Ohio on one count of driving under the influence, and one count of driving with a prohibited blood-alcohol level in excess of 0.08. We vacated the conviction and sentence on direct appeal. That decision was reversed in part and remanded on further appeal to the Ohio Supreme Court. *State v. Derov*, 121 Ohio St.3d 269, 2009-Ohio-1111, 903 N.E.2d 636.

{¶2} On remand, we exercise our discretion to sua sponte notice plain error and hold the Trooper lacked reasonable articulable suspicion to conduct the field sobriety tests and the portable breath test in the first instance. Accordingly, the judgment of the trial court is reversed and Derov's conviction is vacated.

Facts and Procedural History

{¶3} On August 12, 2006, at approximately 2:30 A.M., Trooper Martin of the Ohio State Highway Patrol initiated a stop of Derov's car based upon the expired tags on her license plate. Prior to the stop, the Trooper had witnessed no erratic driving. During the stop, however, the Trooper noticed a strong smell of alcohol emanating from Derov's vehicle. The Trooper had Derov exit the vehicle. He then determined that the smell of alcohol was coming from Derov. The Trooper admitted that Derov had no difficulty producing her license, and registration, or exiting her car, and demonstrated no physical signs of impairment due to alcohol consumption.

{¶4} The Trooper then had Derov perform field sobriety tests including the walk and turn, the horizontal-gaze nystagmus (HGN), the one-leg stand, and a portable breath test. The Trooper testified that during the administration of the HGN test, Derov's eyes appeared glassy and red. The Trooper testified that Derov failed the HGN test and the walk-and-turn test, but passed the one-leg stand test. He stated that the portable breath test he administered revealed that Derov had consumed alcohol.

{¶5} At some point prior to placing Derov under arrest, the Trooper asked Derov whether she had consumed any alcohol. The Trooper testified that Derov answered in the affirmative. The Trooper first said he believed Derov specified that she had one beer, but then he said he really could not recall exactly how many beers she reported.

The Trooper then placed Derov under arrest for OMVI. He said he based his decision to arrest on the following factors: "[t]he strong odor of alcohol on or about her person, the glassy, red eyes, the field sobriety tests along with the portable breath test and the admission to consuming alcohol."

{¶6} Shortly after placing Derov under arrest and into his cruiser, the Trooper read Derov her *Miranda* rights and transported her to the post. There she was given a breath test (BAC test) which indicated her blood-alcohol content was 0.134. Derov was charged by complaint with one count of driving under the influence, in violation of R.C. 4511.19(A)(1)(a), one count of driving with a prohibited blood-alcohol level in excess of 0.08, in violation of R.C. 4511.19(A)(1)(d), one count of use of unauthorized plates in violation of R.C. 4549.08, and one count of expired registration in violation of R.C. 4503.11.

{¶7} On September 6, 2006, Derov filed a motion to suppress the results of all field sobriety tests, the BAC test, as well as all pre-*Miranda* statements made to the Trooper. On January 9, 2007, Derov filed a supplement to the motion to suppress that more specifically asked the court to suppress the results of the portable breath test. The State did not respond to either motion. A suppression hearing was held on January 10, 2007, during which only the Trooper testified. No additional substantive arguments were presented by either defense counsel or the State. On January 22, 2007, the trial court issued a ruling denying Derov's motion to suppress. Upon Derov's request, the trial court issued findings of fact and conclusions of law with regard to its suppression ruling.

{¶8} Derov subsequently pled no contest, and the trial court convicted her of one count of driving under the influence, in violation of R.C. 4511.19(A)(1)(a); one count of driving with a prohibited blood-alcohol level in excess of 0.08, in violation of R.C. 4511.19(A)(1)(d); one count of use of unauthorized plates, in violation of R.C. 4549.08; and, one count of expired registration in violation of R.C. 4503.11, and sentenced her accordingly.

{¶9} In her direct appeal to this court, Derov challenged her OMVI convictions, arguing that the trial court erred by overruling her motion to suppress. We vacated her

conviction and sentence in *State v. Derov*, 176 Ohio App.3d 43, 2008-Ohio-1672, 889 N.E.2d 1057. This court subsequently certified a conflict which the Ohio Supreme Court accepted, as well as the State's discretionary appeal on other issues. In a brief opinion, the Supreme Court dismissed the notice of a certified conflict for want of a conflict, sua sponte dismissed the appeal as to the other propositions raised by the State as having been improvidently accepted, and reversed in part and remanded the case for further proceedings. *Derov*, 121 Ohio St.3d 269.

Standard of Review

{¶10} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, 707 N.E.2d 539. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. Accepting these facts as true, the appellate court conducts a de novo review of whether the facts satisfy the applicable legal standards at issue in the appeal. *Id.*

{¶11} *Derov* argues that the field sobriety tests should have been suppressed, specifically because they were not administered in substantial compliance with NHTSA requirements. However, a threshold question we must resolve when reviewing OMVI stops on appeal is whether the officer could perform the field sobriety tests in the first instance. *State v. Swartz*, 2d Dist. No. 2008 CA 31, 2009-Ohio-902, at ¶11 (officer must have reasonable articulable suspicion to warrant removing a person from their vehicle to conduct field sobriety tests, citing, *State v. Knox*, Greene App. No.2005-CA-74, 2006-Ohio-3039, ¶ 11).

Sua Sponte Plain Error

{¶12} Although Derov failed to raise this issue on appeal, "[u]nder App.R. 12(A), a court of appeals is not *required* to consider issues not argued in the briefs; however, App.R. 12(A) does not *prohibit* it from doing so in the exercise of its sound discretion." *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490 (emphasis sic, citations omitted). While some language about reasonable suspicion was included in Derov's motion to suppress, the crux of Derov's motion was whether the field sobriety tests were conducted in substantial compliance with the applicable regulations, and whether portable breath tests are reliable. Thus, we would apply plain error analysis to the issue of reasonable suspicion. Pursuant to Crim.R. 52(B), plain error is an error which was an obvious defect in the trial proceedings, and which affected the defendant's substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. In order to find plain error under Crim.R. 52(B), it must be determined that, but for the error, the outcome of the case clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus. See, also, *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶378.

{¶13} In the interest of justice, we exercise our discretion pursuant to App.R. 12(A) to sua sponte consider whether there is plain error in this case. See *State v. Moore*, 3d Dist. Nos. 5-07-18, 5-07-20, 5-07-21, 2008-Ohio-1152 (sua sponte noticing the trial court's plain error in failing to provide appellant with proper notice regarding his post-release control); *State v. Zaslov*, 8th Dist. No. 91736, 2009-Ohio-3734 (sua sponte noticing plain error involving amount of trial court's restitution award); *State v. Byrd*, 12th Dist. No. CA2008-10-124, 2009-Ohio-1722 (sua sponte considering the trial court's misapplication of Crim.R. 16(B)(1)(g), but ultimately finding no plain error.)

Reasonable Suspicion

{¶14} A police officer must have reasonable articulable suspicion of an OMVI violation in order to conduct field sobriety tests. *Swartz*, at ¶11; *State v. Reed*, 7th Dist. No. 05BE31, 2006-Ohio-7075, at ¶9; see, also, *State v. Dixon* (Dec. 1, 2000), 2nd Dist. No. 2000-CA-30, at *2-3. In *Dixon*, the Second District Court of Appeals found no

reasonable and articulable suspicion to conduct field sobriety tests based on an odor of alcohol, red glassy eyes at 2:20 A.M., and an admission from the defendant that he had consumed one or two beers. *Id.* We recently cited *Dixon* with approval in *Reed*, *supra*. In *Reed*, we determined that there was no justification for conducting field sobriety tests based merely on a slight odor of alcohol, red glassy eyes at 1:05 A.M., and an admission from the defendant that he had consumed two beers. *Reed* at ¶¶2-3. Further, we have previously held that an odor of alcohol alone cannot justify conducting field sobriety tests. *State v. Downen* (Jan. 12, 2000), 7th Dist. No. 97-BA-53.

{¶15} In the present case, the Trooper asked Derov to submit to the field sobriety tests based solely on the time of night, Derov's red glassy eyes, and the fact he noticed a strong smell of alcohol coming from her person. The Trooper did not witness any erratic driving and stated that Derov had no trouble getting out of her vehicle. Additionally, he said Derov demonstrated no signs of physical impairment due to alcohol consumption. At some point Derov admitted to consuming alcohol but it is unclear from the Trooper's testimony whether she made the admission prior to the time the Trooper administered the field sobriety tests, and the trial court made no factual finding on this issue. We further note it is unclear from the record precisely when the Trooper noticed Derov's eyes were red and glassy. In its findings of fact, the trial court determined that the Trooper noticed the red, glassy eyes *before* he conducted the field sobriety tests. Since the record is somewhat unclear, we defer to the findings of the trial court, as the court was in the better position to make such factual determinations. See *Burnside* at ¶8.

{¶16} The facts of this case are strikingly similar to those in *Reed*, *supra*. Based on our holding in *Reed*, we must conclude that the Trooper in this case lacked reasonable suspicion to conduct the field sobriety tests. As such, the trial court erred by denying the motion to suppress for this reason.

{¶17} The lack of reasonable suspicion to conduct the field sobriety tests constitutes plain error. The error is an obvious defect in the proceedings, pursuant to settled case law in this district. See *Reed*, *supra*. Further, the error affected Derov's substantial rights, as a ruling on this suppression motion was a critical component of her

case. Moreover, but for the error, the outcome of the case clearly would have been different. Had the suppression motion been granted based on a lack of reasonable suspicion, it is unlikely that Derov would have been found guilty at a trial, since the remaining evidence against her would have been so scant.

{¶18} Thus, we maintain our previous conclusion that the trial court erred by denying Derov's motion to suppress, although for different reasons. Specifically, we hold that the Trooper lacked reasonable suspicion to conduct the field sobriety tests and the portable breath test in the first instance. Although reasonable suspicion was not argued at length in the trial court, nor raised on appeal, we exercise our discretion to sua sponte notice the plain error.

{¶19} Accordingly, the judgment of the trial court is reversed and Derov's conviction is vacated.

Donofrio, J., concurs.

Waite, J., concurs in judgment only.