[Cite as *State v. Wood*, 2023-Ohio-3735.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO Appellee v. MICHAEL WOOD Appellant	C.A. No. 2022-CA-67 Trial Court Case No. 22-CR-0488 **ORDER ON APPLICATION FOR RECONSIDERATION**

PER CURIAM:

{1} This matter is before the court on appellant Michael Wood's timely App.R. 26(A) application for reconsideration. In his application, Wood requests this court to reconsider certain aspects of its opinion issued on August 11, 2023, i.e., *State v. Wood*, 2023-Ohio-2788, __ N.E.3d __ (2d Dist.). The State did not file a response opposing Wood's application. The matter is now ripe for consideration.

Law Pertaining to Applications for Reconsideration

{2} "The test generally applied to an application for reconsideration is whether it 'calls to the attention of the court an obvious error in its decision or raises an issue for

consideration that was either not considered at all or was not fully considered by the court when it should have been.' " *Sexton v. Healthcare Facility Mgmt. LLC*, 2d Dist. Montgomery No. 29262, 2022-Ohio-2376, ¶ 5, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981). " 'An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court.' " *Id*., quoting *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Rather " 'App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law.' " *State v. Gillispie*, 2012-Ohio-2942, 985 N.E.2d 145, ¶ 47 (2d Dist.), quoting *Owens* at 336.

Relevant Facts and Course of Proceedings

{3} Wood appealed from his conviction for operating a vehicle under the influence of alcohol ("OVI") in violation of R.C. 4511.19(A)(1)(b) following a jury trial in the Clark County Court of Common Pleas. Wood raised several arguments on appeal, including, but not limited to, three arguments that challenged the trial court's decision overruling his motion to suppress. Wood's first two suppression arguments concerned the trial court's failure to suppress evidence flowing from the traffic stop that resulted in his OVI arrest. Specifically, Wood claimed that the deputy who initiated the traffic stop, Deputy Brenden McDuffie, did not have: (1) reasonable, articulable suspicion of criminal activity to warrant extending the traffic stop into an OVI investigation; or (2) probable cause to arrest Wood for OVI.

{4} After reviewing the totality of the circumstances, we rejected both of the aforementioned arguments. With regard to reasonable suspicion, we found that "Wood's lack of cooperation, his glassy eyes, the strong odor of an alcoholic beverage emanating from his breath, the two open beer cans observed in his vehicle, his known history of habitual drinking and driving, and his occasional slow speech [were] all factors that provided Dep. McDuffie with reasonable suspicion to detain Wood for an OVI investigation." *Wood*, 2023-Ohio-2788, __ N.E.3d __, at ¶ 42. With regard to probable cause, we considered the same factors that we considered for reasonable suspicion, as well as the fact that Wood had refused to submit to field sobriety tests. *Id*. at ¶ 48. Based on all those factors, we held that a reasonable police officer in Dep. McDuffie's position would have been justified in believing that Wood was committing an OVI offense, thereby establishing probable cause for Wood's OVI arrest. *Id*. at ¶ 49. Accordingly, we found no Fourth Amendment violation warranting the suppression of evidence flowing from the traffic stop or Wood's arrest.

{5} For his third suppression argument, Wood claimed that the trial court should have suppressed evidence of his blood-alcohol test results based on certain testimony given by his expert witness. Wood's expert testified that the one-hour-fifty-minute delay in refrigerating his blood sample rendered the sample unreliable due to the sample undergoing the process of fermentation, i.e., the biological process that converts sugars into cellular energy and produces ethanol (alcohol) and carbon dioxide as byproducts. In other words, Wood claimed that his expert's testimony established that the delay in refrigerating his blood sample resulted in additional alcohol being produced in the sample by virtue of fermentation, thus skewing the test results in a prejudicial manner.

{6} After reviewing the matter, we found that the testimony of Wood's expert "failed to establish that Wood had been prejudiced by the one-hour-fifty-minute delay in refrigerating his blood sample." *Wood* at ¶ 54. We reached this conclusion because Wood's expert "did not specifically testify that the delay in refrigeration was what had caused the blood sample to undergo fermentation" and because the expert's "testimony did not establish what amount of ethanol was produced through the fermentation of Wood's blood sample." *Id*. We therefore found that "it would be pure speculation to conclude that the fermentation prejudiced Wood" since "it is possible that the amount of ethanol produced through fermentation was negligible and did not significantly skew the blood-alcohol test results." *Id*. Accordingly, we found that the expert's testimony regarding fermentation "went to the weight of the blood-alcohol test results, not their admissibility." *Id*.

{7} Because we found no merit to any of Wood's three suppression arguments, we found that the trial court had properly denied his motion to suppress and thus overruled his first assignment of error. We also overruled every other assignment of error raised by Wood in his appellate brief and affirmed his OVI conviction. After we issued our opinion, Wood filed the instant application for reconsideration pursuant to App.R. 26(A). In the application, Wood asks this court to reconsider its decision affirming the denial of his motion to suppress. Specifically, Wood requests this court to reconsider its probable cause analysis and its analysis of his expert's testimony on fermentation.

Probable Cause Analysis

{8} Wood claims that reconsideration of our probable cause analysis is appropriate because we did not consider certain constitutional arguments that he raised in his appellate brief. One of those arguments was that it is unconstitutional to use a motorist's refusal to submit to field sobriety tests as a factor in the probable cause analysis because such a refusal is protected by the Fifth Amendment privilege against self-incrimination. In support of this argument, Wood cited to *Pennsylvania v. Muniz*, 496 U.S. 582, 101 S.Ct. 2368, 110 L.Ed.2d 528 (1990). We find no merit to Wood's claim.

{9} In *Muniz*, the United States Supreme Court considered whether various incriminating utterances made by a drunken-driving suspect during a series of field sobriety tests constituted testimonial responses to a custodial interrogation for purposes of determining whether the utterances should be excluded under the Fifth Amendment right against self-incrimination. In addressing that issue, the court explained that "[t]he privilege against self-incrimination protects an 'accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature[.]' " *Id.* at paragraph (a) of the syllabus, quoting *Schmerber v. California*, 384 U.S. 757, 761, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The court also explained that "to be testimonial, the communication must, 'explicitly or implicitly, relate a factual assertion or disclose information.' " *Id*., quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988).

{10} With those principles in mind, the court in *Muniz* held that slurred speech and other evidence of lack of muscular coordination revealed by the drunken-driving suspect's responses to simple identification questions constituted nontestimonial

components of those responses that were not protected by the Fifth Amendment privilege against self-incrimination. *Id.* at paragraph (b) of the syllabus. However, on the other hand, the court also held that when the suspect was asked to give the date of his sixth birthday, the suspect's response was testimonial and incriminating because it was elicited not just for its manner of delivery, but to show the suspect's mental state or degree of sobriety. *Id*. at paragraph (c) of the syllabus. Specifically, the court found that the suspect's inability to provide the date of his sixth birthday amounted to a testimonial response because the content of the suspect's response supported an inference that the suspect's mental state was confused. *Id*. Accordingly, the court held that Fifth Amendment protections applied to that response. *Id*.

{11} Wood relies on *Muniz* for the proposition that a motorist's refusal to submit to field sobriety tests is protected by the Fifth Amendment privilege against self-incrimination, and that the Fifth Amendment protection prohibits using the refusal as a factor in the probable cause analysis. *Muniz*, however, does not address whether a *refusal* to submit to field sobriety tests is testimonial. *Muniz* only concerns the performance of field sobriety tests. Several courts across the country have held that a refusal to submit to field sobriety tests is not testimonial in nature and thus not protected by the Fifth Amendment privilege against self-incrimination. *See, e.g., City of Seattle v. Stalsbroten*, 138 Wash.2d 227, 234-35, 978 P.2d 1059 (1999); *Herrera v. State*, 448 P.3d 844, 852-853, 2019 WY 93 (2019); *State v. Ferm*, 94 Hawai'i 17, 29, 7 P.3d 193, 205 (2000); *State v. Mallick*, 210 Wis.2d 427, 430-436, 565 N.W.2d 245 (1997); *Farmer v. Commonwealth*, 12 Va.App. 337, 341, 404 S.E.2d 371 (1991).

{12} That said, the bigger problem with Wood's argument is that it confuses the protections afforded by the Fourth and Fifth Amendments. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), the United States Supreme Court explained that:

> [T]he Fourth Amendment * * * operates in a different manner than the Fifth Amendment * * * [.] The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. *See Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial. *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion. *United States v. Calandra*, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974); *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 3411, 82 L.Ed.2d 677 (1984).

Id. at 264.

{13} Accordingly, "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." *Schneckloth v. Bustamonte*, 412 U.S. 218, 240-41, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Because

of this, “a completely different analysis of the circumstances is required.” *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir.1993).

{14} In this case, Wood raised his Fifth Amendment self-incrimination argument in relation to whether there was probable cause to arrest him for OVI. Probable cause to arrest, however, is a Fourth Amendment issue that concerns whether there was an unreasonable seizure that necessitates the suppression of evidence flowing from the arrest. Whether Wood’s refusal to submit to field sobriety tests was protected by the Fifth Amendment had absolutely no bearing on the probable cause determination. Therefore, we declined to address Wood’s Fifth Amendment argument in our opinion because it was irrelevant to the probable cause issue being argued. Accordingly, as it relates to Wood's first constitutional argument, Wood failed to call to this court’s attention an obvious error in its decision or raise an issue for consideration that was either not considered at all or was not fully considered by this court when it should have been.

{15} Wood’s next constitutional argument is that the consideration of his refusal to submit to field sobriety tests in the probable cause analysis violated his right to due process because such a consideration punished him for exercising his legal right to decline field sobriety testing. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (“[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”). This argument lacks merit because the refusal to submit to field sobriety tests does not by itself trigger a finding of probable cause to arrest for OVI and does not act as a punishment. Rather, the refusal to submit to field sobriety tests is simply a factor that may be considered in the probable cause analysis. *See State v. Hall,* 2016-Ohio-783, 60 N.E.3d 675, ¶ 30 (1st Dist.) (“when

other incriminating factors are present, the refusal to submit to a field-sobriety test can serve as a factor in support of a finding of probable cause"); *Johnson v. Kentucky-Cty. of Butler*, W.D.Ky. No. 1:12CV-37-JHM, 2014 WL 4129497, *8 (Aug. 18, 2014) ("[w]hile the refusal to take a field sobriety test standing alone may not provide a basis for probable cause, it may be considered a factor in establishing probable cause").

{16} As discussed in our opinion, the probable cause analysis involves considering the totality of the circumstances surrounding the arrest and determining whether the facts and circumstances within the arresting officer's knowledge were sufficient to cause a reasonable person to believe that an OVI offense had been committed. *Wood*, 2023-Ohio-2788, __ N.E.3d __, at ¶ 43. Under this analysis, the refusal to submit to field sobriety tests would only have a negative impact, i.e., result in arrest, if the totality of all the circumstances established that the motorist in question was driving under the influence of alcohol. We do not find that such an analysis offends fundamental notions of fairness and due process. To the extent Wood claims otherwise, such argument lacks merit.

{17} We do recognize, however, that there would be an issue if probable cause to arrest were based exclusively on Wood's refusal to submit to field sobriety tests. But that is not what happened here. In this case, Wood's refusal to submit to field sobriety tests was just one of many factors considered. For example, we considered that Wood was uncooperative when Dep. McDuffie asked him to identify himself, that Wood had a strong odor of an alcoholic beverage emanating from his breath, that Wood had glassy eyes and occasionally slow speech, that there were two open containers of beer discovered inside Wood's vehicle, and that Wood had a known history of habitual drinking

and driving. As discussed in our opinion, the totality of these circumstances and Wood's refusal to submit to field sobriety tests provided Dep. McDuffie with probable cause to arrest Wood for OVI.

{18} Regardless, it is well established in Ohio that a refusal to submit to field sobriety tests is a factor that may be considered in determining the existence of probable cause in an arrest for driving under the influence of alcohol. *See State v. Molk*, 11th Dist. Lake No. 2001-L-146, 2002-Ohio-6926, ¶ 19; *State v. Terry*, 2d Dist. Montgomery No. 16066, 1997 WL 309410, *2 (June 6, 1997); *State v. Lilly*, 2d Dist. Montgomery No. 13390, 1992 WL 337640, *1 (Nov. 19, 1992); *State v. May*, 7th Dist. Columbiana No. 10 CO 23, 2011-Ohio-6637, ¶ 29; *Hall*, 2016-Ohio-783, 60 N.E.3d 675, at ¶ 30. Because Wood simply disagrees with our decision to adhere to this well-established principle, his argument is not well taken. Therefore, like his first constitutional argument, Wood's second constitutional argument also fails to call to this court's attention an obvious error in its decision or raise an issue for consideration that was either not considered at all or was not fully considered by this court when it should have been.

{19} The third and final constitutional argument raised by Wood alleges that his due process rights were violated by virtue of consideration of his criminal history as a factor in the probable cause analysis. Wood claims that such a consideration violates due process because it constitutes impermissible use of other acts evidence. However, the use of other acts evidence is governed by the Rules of Evidence, specifically Evid. R. 404(B). The Rules of Evidence "govern proceedings in the courts of this state," and "provide procedures for the adjudication of causes[.]" Evid.R. 101(A); Evid.R. 102. They do not govern questions of probable cause. *United States v. Courtney*, 730 Fed.Appx.

287, 291 (6th Cir.2018); *United States v. Harris*, 403 U.S. 573, 594, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). It is, therefore, inappropriate to apply the rules of evidence as a criterion to determine probable cause. *Brinegar v. United States*, 338 U.S. 160, 174, 69 S.Ct. 1302, 93 L.Ed. 1879, fn. 12 (1949). Accordingly, Wood's argument pertaining to other acts evidence has no bearing on the probable cause analysis.

{20} Furthermore, it is well established that " 'when used in connection with other evidence, a suspect's criminal history can support a determination of probable cause.' " *State v. Jones*, 3d Dist. Marion No. 9-20-04, 2020-Ohio-6667, ¶ 22, quoting *State v. Shepherd*, 4th Dist. Scioto No. 07CA3143, 2008-Ohio-5355, ¶ 11; *State v. Bass*, 2d Dist. Greene No. 2011-CA-01, 2012-Ohio-3275, ¶ 9; *United States v. Dyer,* 580 F.3d 386 (6th Cir.2009); *United States v. Smith*, 6th Cir. No. 21-1457, 2022 WL 4115879, *5 (Sept. 9, 2022). Again, because Wood simply disagrees with this court's decision to adhere to this well-established principle, his argument is not well taken. For the foregoing reasons, all the constitutional arguments that Wood discusses in his application for reconsideration lack merit.

Expert Testimony Analysis

{21} In the second portion of his application for reconsideration, Wood challenges our analysis of his expert witness's testimony on fermentation. As previously discussed, Wood's expert testified that the one-hour-fifty-minute delay in refrigerating his blood sample rendered the sample unreliable due to the sample undergoing the process of fermentation. In his appeal, Wood claimed that his expert's testimony established that

his blood-alcohol test results were prejudicially skewed by fermentation, which warranted the suppression of the test results.

{22} After analyzing the expert's testimony on appeal, we found that the testimony failed to establish that Wood had been prejudiced by the delay in refrigerating his blood sample. We reached this conclusion because: (1) the expert did not specifically testify that the delay in refrigeration was what had caused the blood sample to undergo fermentation; and (2) the expert's testimony did not establish what amount of alcohol was produced in the sample by fermentation. As a result, we found that "it would be pure speculation to conclude that the fermentation prejudiced Wood," and we noted that "it is possible that the amount of [alcohol] produced through fermentation was negligible and did not significantly skew the blood-alcohol test results." *Wood*, 2023-Ohio-2788, __ N.E.3d __, at ¶ 54. We also found that the expert's testimony regarding fermentation "went to the weight of the blood-alcohol test results, not their admissibility." *Id*.

{23} In his application for reconsideration, Wood claims that our analysis of this issue suggests that we did not understand the process of fermentation. Specifically, Wood claims that we failed to understand the fact that fermentation creates additional alcohol in a blood sample after the sample is drawn. We can assure Wood, however, that we had a firm grasp on the concept of fermentation when we made our decision, and we think that fact is readily apparent from our opinion. For Wood to claim otherwise is improper and serves as yet another example of Wood's simply disagreeing with this court's decision to uphold his conviction.

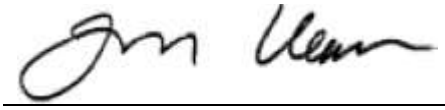
{24} Although the testimony of Wood's expert may have established that some amount of alcohol had been produced in Wood's blood sample through fermentation,

Wood concedes that his expert could not quantify the amount of alcohol produced. Therefore, as explained in our opinion, Wood cannot overcome the possibility that the amount of alcohol produced by fermentation was negligible and did not significantly skew his blood-alcohol test results. Accordingly, we stand by our decision finding that it would be pure speculation to conclude that the fermentation prejudiced Wood and that the expert's testimony went to the weight of the blood-alcohol test results not their admissibility. Therefore, because Wood simply disagrees with the court's logic on this matter and has not pointed to an obvious error or issue that we failed to consider, his argument is not well taken.

Conclusion

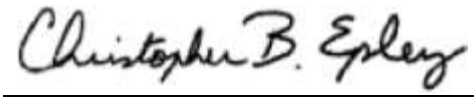
{25} Because Wood failed to establish that this court made an obvious error or rendered an unsupportable decision under the law, his application for reconsideration is DENIED.

SO ORDERED.



JEFFREY M. WELBAUM, PRESIDING JUDGE

MICHAEL L. TUCKER, JUDGE



CHRISTOPHER B. EPLEY, JUDGE