

[Cite as *State v. Foster*, 2009-Ohio-4764.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

JAMES L. FOSTER

Defendant-Appellee

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Julie A. Edwards, J.

Case No. 2009AP020007

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2008CR030074

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

September 10, 2009

APPEARANCES:

For Plaintiff-Appellant

MICHAEL J. ERNEST
125 East High Avenue
New Philadelphia, OH 44663

For Defendant-Appellee

GARY L. GREIG
153 North Broadway
New Philadelphia, OH 44663

Farmer, P.J.

{¶1} On March 13, 2008, the Tuscarawas County Grand Jury indicted appellee, James Foster, on one count of possession of a controlled substance in violation of R.C. 2925.11. The charge arose from a search of appellant's vehicle after he was stopped and subsequently arrested for operating a motor vehicle while under the influence of alcohol.

{¶2} On December 9, 2008, appellee filed a motion to suppress all evidence based upon an unreasonable stop. A hearing was held on January 15, 2009. By judgment entry filed January 29, 2009, the trial court granted the motion.

{¶3} Appellant, the State of Ohio, filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶4} "THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION TO SUPPRESS ALL EVIDENCE FOUND AS RESULT OF AN ARREST ON THE BASIS THAT THE INVESTIGATING OFFICER DID NOT HAVE REASONABLE SUSPICION TO HAVE THE APPELLEE PERFORM FIELD SOBRIETY TESTS."

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{¶5} Appellant claims the trial court erred in granting appellee's motion to suppress. Specifically, appellant claims Dover Police Officer Jason Peters had reasonable articulable suspicion of impaired driving to warrant the field sobriety tests. We agree.

{¶6} 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. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. 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. 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; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶7} The trial court's January 29, 2009 judgment entry gives us very little guidance. It does not contain any specific findings of facts and is merely conclusory:

{¶8} "The Court **FINDS** that after considering the evidence presented at the 1/15/2009 **Oral/Evidentiary** hearing and, further, after considering the legal memoranda filed by Mr. Greig and Mr. Ernest subsequent to the **Oral/Evidentiary** hearing, the undersigned concludes that Officer Jason Peters, Dover Ohio Police Department, although having sufficient, legal probable cause to effect a traffic stop of

the motor vehicle operated by James L. Foster in the City of Dover, Ohio on 12/15/2007 (nearly flat tire), Officer Peters did **not** have the legal basis to require James L. Foster to perform certain sobriety tests which, ultimately, led to his arrest and subsequent search of the Defendant and/or the motor vehicle where the contraband, i.e. crack cocaine, was discovered.

{¶9} "**FINDS** that the Defendant's 12/29/2008 **Motion to Suppress Evidence** should be **Granted.**"

{¶10} The very narrow issue is whether Officer Peters had the right to have appellee exit the vehicle and perform field sobriety tests. Upon approaching the vehicle, Officer Peters described appellee's demeanor as follows:

{¶11} "I spoke with him. He seemed to be a little nervous. He looked straight ahead most of the time. He kept his hands on the wheel. I could smell alcohol but there was also two other people in the car. He did give me a license. I think his passenger, he gave me – I don't think he had a license. I think what he gave me was a prison I.D. if I remember right." T. at 13.

{¶12} After checking appellee's license, Officer Peters asked appellee to exit the vehicle to determine if the odor of alcohol was coming from appellee. T. at 13-14. Officer Peters explained this to appellee, and after appellee exited the vehicle, Officer Peters determined the alcohol was coming from appellee. T. at 14. Upon questioning, appellee admitted to being at a bar and drinking. T. at 15. After this response, Officer Peters asked appellee to perform field sobriety tests. Id.

{¶13} It is generally held that in order to hold a driver following a traffic stop, the officer must have ample, reasonable, and articulable suspicion. *State v. Frady* (2001),

142 Ohio App.3d 776; *State v. Anez* (2000), 108 Ohio Misc.2d 18. As stated in *State v. Evans* (1998), 127 Ohio App.3d 56, reasonable suspicion will be based on the totality of the circumstances. As a guide, *Evans* enumerated the following factors at 63, fn. 2:

{¶14} "Without citing the numerous cases which have been canvassed, it may be said these factors include, but are not limited to (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) impairments 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 might 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. All of these factors, together with the officer's previous experience in dealing with drunken drivers, may be taken into account by a reviewing court in determining whether the officer acted reasonably. No single factor is determinative."

{¶15} It is appellee's position that a simple "odor of alcohol" is not sufficient. However, appellee overlooks the other factors involved in the case. The arrest was

made in downtown Dover during the midnight shift (11:00 p.m. to 7:00 a.m.). T. at 10. When approached, appellee's demeanor was nervous and guarded and when questioned, appellee admitted to coming from a bar and having consumed alcohol. T. at 13, 15. Further, appellee was driving on a "left rear tire [that] was just about flat." T. at 11.

{¶16} We find the facts, when taken "in total" were sufficient articulable facts for Officer Peters to proceed to the field sobriety tests.

{¶17} Upon review, we find the trial court erred in granting appellee's motion to suppress.

{¶18} The sole assignment of error is granted.

{¶19} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby reversed.

By Farmer, P.J.

Wise, J. and

Edwards, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Julie A. Edwards

JUDGES

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JAMES L. FOSTER	:	
	:	
Defendant-Appellee	:	CASE NO. 2009AP020007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

JUDGES