2009 WL 1629668

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fifth District, Delaware County.

STATE of Ohio, Plaintiff-Appellee
v.
Amy MOBERGER, Defendant-Appellant.

No. 08 CAC 06 0030. | Decided June 9, 2009.

West KeySummary

1 **Automobiles**
Intoxication

Trooper had probable cause to arrest defendant for operating a motor vehicle under the influence of alcohol, irrespective of the alleged errors in conducting the horizontal gaze nystagmus field sobriety test. Defendant exhibited blood shot eyes and a flushed face. The trooper could smell alcohol on the defendant. Further, defendant's performance on the walk-and-turn test and the one-legged stand test indicated she was intoxicated. R.C. § 4511.19(A)(1)(a).

Criminal Appeal from the Delaware Municipal Court, Case No. 07 TRC 15393.

Attorneys and Law Firms

Michael A. Marrocco, Assistant Prosecutor, Delaware, OH, for plaintiff-appellee.

Bradley P. Koffel, Koffel & Jump, Columbus, OH, for defendant-appellant.

Opinion

WISE, J.

***1** {¶ 1} Appellant appeals from her conviction, in the Delaware Municipal Court, Delaware County, for operating a vehicle under the influence of alcohol. This is a nunc pro tunc opinion to correct scrivener's errors at ¶ 23 and ¶ 37 regarding denial of appellant's suppression motion. The relevant facts leading to this appeal are as follows.

{¶ 2} On December 9, 2007, Trooper Tawanna Young of the Ohio State Highway Patrol stopped appellant's vehicle for speeding in a 45 MPH zone in Orange Township, Delaware County. The trooper proceeded to conduct field sobriety tests, including the horizontal gaze nystagmus ("HGN") test. Appellant was thereupon arrested by the trooper and transported to the Delaware County Sheriff's Department.

{¶ 3} Upon arrival, appellant was read and shown BMV form 2255. Appellant initially refused to provide a breath sample for testing with the BAC Datamaster breathalyzer. She then stated she would give a sample, but shortly thereafter refused again. After being taken to the booking area, appellant finally did provide a sample, which resulted in a reading of .151 g/210L.

{¶ 4} Appellant was ultimately charged with two counts of operating a motor vehicle while under the influence (R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(d), respectively), as well as a marked lane violation, speeding, and failure to wear a seat belt.

{¶ 5} On January 22, 2008, appellant filed a motion to suppress, which the court heard on April 11, 2008. Appellant filed a supplemental motion to suppress on April 15, 2008.

{¶ 6} On April 16, 2008m, the trial court issued a judgment entry denying appellant's motion to suppress. The supplemental motion to suppress was denied via a separate judgment entry on April 18, 2008.

{¶ 7} On May 21, 2008, appellant entered a no contest plea to the OMVI charge under R.C. 4511.19(A)(1)(d). The State dropped the remaining charges. The court thereafter sentenced appellant to a $350.00 fine and one

year of community control, ordered appellant into a driver intervention program, and suspended appellant's operator's license for six months.

{¶ 8} On June 11, 2008, appellant filed a notice of appeal. [1] She herein raises the following four Assignments of Error:

{¶ 9} "I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS WHEN THE OPERATOR OF THE BAC DATAMASTER DID NOT POSSESS A VALID PERMIT AS REQUIRED BY OAC 3701-53-07.

{¶ 10} "II. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS WHEN THE STATE DID NOT SHOW COMPLIANCE WITH THE REQUIREMENTS OF OHIO ADMIN. CODE 3701-53-04(A)(1) MANDATING A CHECK FOR RFI INTERFERENCE.

{¶ 11} "III. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS WHEN THE STATE DID NOT SHOW THAT THE BAC OPERATOR OBSERVED APPELLANT FOR TWENTY MINUTES PRIOR TO TESTING.

{¶ 12} "IV. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS THE HORIZONTAL GAZE NYSTAGMUS FIELD SOBRIETY TEST WHEN THE ARRESTING OFFICER DID NOT SUBSTANTIALLY COMPLY WITH NHTSA STANDARDS."

Standard of Review

***2** {¶ 13} 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 finding of fact. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third 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 the given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

I.

{¶ 14} In her First Assignment of Error, appellant argues the trial court erred in denying the motion to suppress on the basis that the BAC Datamaster operator's permit did not comply with the pertinent OAC provision. We disagree.

{¶ 15} R.C. 4511.19(D) requires that the analysis of bodily substances be conducted in accordance with methods approved by the Ohio Director of Health, as prescribed in Ohio Administrative Code regulations. *State v. Raleigh*, Licking App.No.2007-CA-31, 2007-Ohio-5515, ¶ 40. A related section, R.C. 3701.143, states as follows:

{¶ 16} "For purposes of sections 1547.11, 4511.19, and 4511.194 of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, controlled substance, metabolite of a controlled substance, or combination of them in the person's whole blood, blood serum or plasma, urine, breath, or other bodily substance. *The director shall approve satisfactory techniques or methods, ascertain the qualifications of individuals to conduct such analyses, and issue permits to qualified persons authorizing them to perform such analyses.* Such permits shall be subject to termination or revocation at the discretion of the director." (Emphasis added.)

{¶ 17} OAC 3701-53-07(C) additionally provides:

{¶ 18} "Breath tests used to determine whether a person's breath contains a concentration of alcohol prohibited or defined by sections 4511.19 * * * or any other statute or local

ordinance prescribing a defined or prohibited breath alcohol concentration shall be performed by a senior operator or an operator. A senior operator shall be responsible for the care, maintenance and instrument checks of the evidential breath testing instruments * * * .”

***3** {¶ 19} The Ohio Supreme Court has held that absent a showing of prejudice by the defendant, rigid compliance with ODH regulations is not required as such compliance is not always humanly or realistically possible. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 490 N.E.2d 902. See, also, *State v. Morton* (May 10, 1999), Warren App.No. CA98-10-131. Rather, if the state shows substantial compliance with the regulations, absent prejudice to the defendant, alcohol tests results can be admitted in a prosecution under 4511.19. *Id.* In *State v. Burnside* (2003), 100 Ohio St.3d 152, 159, 797 N.E.2d 71, the Ohio Supreme Court limited the substantial-compliance standard set forth in *Plummer* to “excusing only errors that are clearly de minimis.” The Court continued: “Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as ‘minor procedural deviations.’ “ *Id.*, citing *State v. Homan* (2000), 89 Ohio St.3d 421, 426, 732 N.E.2d 952.

{¶ 20} In the case sub judice, the arresting officer, Trooper Young, testified that she held a senior operator permit to conduct analyses of drivers' breath samples. It appears undisputed that the permit, issued June 6, 2007, contained the signature of Anne Harnish, the former acting Ohio Director of Health, even though appellant documented at the suppression hearing that Governor Strickland had appointed Alvin Jackson as the Ohio Director of Health effective June 1, 2007.

{¶ 21} In *Raleigh*, supra, we addressed a situation where a prosecutor had inadvertently admitted a trooper's senior operator permit that had previously expired, rather than providing a copy of the trooper's current permit. In rejecting appellant's claim of failure of substantial compliance with the permit requirement, we cited, inter alia, *Mason v. Armour* (Mar. 13, 1999), Warren App. No. 98-03-033, wherein the Twelfth District Court of Appeals held that “the key question in such cases is whether [the officer] had the status of senior operator on that date, not whether the state admitted the operator's license.” *Id.* at ¶ 42, additional citations omitted.

{¶ 22} Similarly, in the case sub judice, the apparent clerical error regarding the proper government official's signature on the operator's permit must be classified as de minimis given the uncontroverted additional evidence that Trooper Young is a certified senior operator for breath analyses. Her ODH certificate contained her permit number as well as the expiration date of her senior operator's status. The BAC Datamaster Operational Checklists set forth Trooper Young's operator's permit number of 78397-S-6 and expiration of June 6, 2008. Her valid permit number is also located on the individual breath sample tickets. The same permit number and expiration date are listed on her certificate. See State's Exhibit 2.

{¶ 23} The motion to suppress was thus properly denied on this issue. Accordingly, appellant's First Assignment of Error is overruled.

II.

***4** {¶ 24} In her Second Assignment of Error, appellant argues the trial court erred in denying the motion to suppress where the State did not comply with the pertinent OAC provision regarding testing for radio frequency interference (“RFI”). We disagree.

{¶ 25} In determining whether the State substantially complied with OAC regulations, the trial court is in the best position to resolve questions of fact and evaluate the credibility of the witnesses. See *State v. Williams* (1992), 82 Ohio App.3d 39, 42-43, 610 N.E.2d 1188.

{¶ 26} OAC 3701-53-04(A) states as follows:

{¶ 27} “A senior operator shall perform an instrument check on approved evidential breath testing instruments * * * no less than once every seven days in accordance with the appropriate instrument checklist for the instrument being used. The instrument check may be performed anytime up to one hundred and ninety-two hours after the last instrument check.

{¶ 28} “(1) The instrument shall be checked to detect radio frequency interference (RFI) using a hand-held radio normally used by the law enforcement agency performing

the instrument check. The RFI detector check is valid when the evidential breath testing instrument detects RFI or aborts a subject test. If the RFI detector check is not valid, the instrument shall not be used until the instrument is serviced."

{¶ 29} In *State v. Decosky*, Knox App.No. 07CA000013, 2007-Ohio-6760, ¶ 25, we held that Highway Patrol officers are not required under OAC 3701-53-04 to check for RFI with radios used by the sheriff's office or local police departments when the BAC Datamaster is located at the sheriff's office, where there is no evidence of any other portable radio operating in the testing area other than the OSHP's.

{¶ 30} We find the rationale of *Decosky* applicable in the case sub judice.

{¶ 31} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶ 32} In her Third Assignment of Error, appellant contends the trial court erred in denying her motion to suppress on the basis that law enforcement officers did not comply with the "twenty minute observation" rule at the time of BAC testing. We disagree.

{¶ 33} R.C. 4511.19(D) states that any bodily substance collected for the purpose of determining whether a person is in violation of the statute shall be analyzed in accordance with the methods approved by the director of health. Regulations promulgated by the Director of Health in OAC 3701-53-02(B) state in pertinent part that breath samples "shall be analyzed according to the operational checklist for the instrument being used." The operational checklist includes observing the person being tested for twenty minutes prior to testing to prevent oral intake of any material. See State's Exhibit 2.

{¶ 34} As appellant notes, this Court, in *State v. Karns* (July 21, 1998) Fairfield App. No. 97CA0002, held that the observation regulation is a "bright line" rule; i.e., either the subject did or did not have something in his or her mouth during the twenty minute observation period. Likewise, in *State v. Kirkpatrick* (June 1, 1988), Fairfield App. No. 43-CA-87, we concluded "that the twenty-minute observation period is mandatory and that there be no oral ingestion of any material during that observation period." Nonetheless, in *State v. Steele* (1977), 52 Ohio St.2d 187, 370 N.E.2d 740, the Ohio Supreme Court recognized that once the officer demonstrates it was highly improbable that the subject ingested any item during the twenty-minute period, it was up to the defendant to "overcome that inference" with proof that he or she had ingested some substance. Moreover, ingestion has to be more than just "hypothetically possible." *Steele* at 192, 370 N.E.2d 740.

***5** {¶ 35} In the case sub judice, Trooper Young, when placing appellant under arrest, handcuffed her and placed her in her cruiser. Trooper Young indicated this initiated the twenty-minute observation period prior to offering appellant a breath test. When they arrived at the sheriff's department, appellant was read her rights and BMV form 2255. After initially refusing a BAC test, appellant was allowed to attempt to contact legal counsel and said she would take the test. The instrument was readied for appellant's test. At this point, appellant had been observed for at least 20 minutes prior to the anticipated test. She subsequently refused to provide a sample of her breath at 2:14 a.m. Appellant was then taken to booking, where she again changed her mind and said she would provide a sample of her breath. Trooper Young therefore took appellant back into the BAC room, readied the machine again, and appellant provided a sample of her breath which resulted in a reading of .151g/210L. The test time was 2:25 a.m. Trooper Young testified that she observed appellant for the requisite twenty minutes prior to the first test (refusal), and that a deputy was there to watch appellant in the time period in between both tests. Tr. at 54, 55.

{¶ 36} Appellant did not propose that she had actually ingested something during the twenty-minute period. A mere assertion that ingestion during the twenty-minute period was hypothetically possible, without more, does not render the test results inadmissible. Accord, *Raleigh*, supra, at ¶ 51. Moreover, we are not inclined to apply the "twenty-minute" requirement in such a way as to allow suspected intoxicated drivers to subvert or unreasonably delay a valid law enforcement investigation by repeatedly granting and withdrawing consent to BAC testing, as may have been attempted in this instance.

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{¶ 37} The motion to suppress was also properly denied on this issue. Appellant's Third Assignment of Error is overruled.

IV.

{¶ 38} In her Fourth Assignment of Error, appellant argues the trial court erred in denying her motion to suppress concerning the results of the HGN test.

{¶ 39} Generally, a police officer has probable cause to arrest if the facts and circumstances within the officer's knowledge are sufficient to cause a prudent person to believe that a suspect has committed the offense. *State v. Heston* (1972), 29 Ohio St.2d 152, 280 N.E.2d 376. In this case, appellant's assigned error goes to the trooper's actions on the HGN test only, specifically as to whether the trooper had moved the stylus in front of appellant in accordance with the distance and angle parameters under the NHTSA manual. Appellant does not herein raise a "substantial compliance" argument regarding the other portions of the field sobriety testing. In *State v. Stout*, Licking App.No. 07-CA51, 2008-Ohio-2397, we found that although an arresting trooper had not conducted an HGN test in substantial compliance with the manual, under the facts of that case "there were other indicia of intoxication sufficient to establish probable cause for Appellant's arrest." *Id.* at ¶ 84.

***6** {¶ 40} In the case sub judice, based on the trooper's testimony in the record regarding the walk-and-turn test and the one-legged stand test, as well as the trooper's recollection of the odor of alcoholic beverage about appellant's person, her bloodshot eyes, her flushed face, and her apparent driving violations, we find probable cause existed for appellant's arrest and transfer to the sheriff's department, irrespective of the alleged errors in the conducting of the HGN test. See Tr. at 30-37. From that point forward, the propriety of the HGN test would be of limited import given her eventual plea of no contest to the count of driving with a prohibited breath alcohol concentration. As an appellate court, we are not required to issue rulings that cannot affect matters at issue in a case. See, e.g., *In re Merryman/Wilson Children*, Stark App.Nos.2004 CA 00056 and 2004 CA 00071, 2004-Ohio-3174, ¶ 59, citing *State v. Bistricky* (1990), 66 Ohio App.3d 395, 584 N.E.2d 75.

{¶ 41} We thus decline to further address appellant's Fourth Assignment of Error.

{¶ 42} For the reasons stated in the foregoing opinion, the judgment of the Delaware Municipal Court, Delaware County, Ohio, is hereby affirmed.

WISE, J., GWIN, P.J., and DELANEY, J., concur.

Parallel Citations

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Footnotes

1 The trial court also ordered a stay of execution of sentence on June 11, 2008.