[Cite as *State v. Laughlin*, 2004-Ohio-7315.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 03 CA 101
BRETT J. LAUGHLIN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from Fairfield County Municipal Court Case No 03TRC06666
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	NOVEMBER 4, 2004

APPEARANCES:

For Plaintiff-Appellee
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P. O. Box 1008
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For Defendant-Appellant
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Boggins, J.

{¶1} This appeal is from a judgment rendered in a bench trial in Fairfield County Municipal Court.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant had been charged with operating a motor vehicle under the influence (R.C. 4511.19(A)(1)) and failing to drive in marked lanes (R.C. 4511.33).

{¶3} Appellant's original attorney, Richard Berens, after filing a suppression motion, was appointed as a judge in Fairfield County Common Pleas Court.

{¶4} The hearing on Appellant's motion was before Judge Steven Jackson who agreed to decide after receipt of written arguments.

{¶5} While Appellant's new counsel filed a timely memorandum in support of his motion, the assigned Assistant Prosecutor did not promptly file a response and then, through error, did not provide a copy to Appellant's counsel until three weeks after filing.

{¶6} Appellant filed a motion to strike the State's response. No appeal assignment raises abuse of discretion as to the State's response not being stricken.

{¶7} The City Prosecutor was David Trimmer who was elected to the Municipal Bench.

{¶8} A motion requesting Judge Trimmer's recusal was filed, as such Judge had been assigned to the pending case.

{¶9} A hearing on the recusal motion was had and Judge Trimmer denied such due to lack of involvement prior to his election.

{¶10} An evidentiary hearing was held, with a review of officer's video of the arrest events and Judge Trimmer found Appellant guilty.

{¶11} Four Assignments of Error are raised.

ASSIGNMENTS OF ERROR

{¶12} I. "THE TRIAL COURT ERRED IN FAILING TO REMOVE HIMSELF AS JUDGE AND TRIER OF FACT IN THE CASE OF BRETT J. LAUGHLIN (TRIAL TRANSCRIPT AT PP. 5011.)

{¶13} II. "THE TRIAL COURT ERRED IN OVERRULING THE MOTION TO SUPPRESS THE FIELD SOBRIETY TESTS AS EVIDENCE. (TRANSCRIPT OF OCTOBER 30 2003 HEARING AND TRIAL EXHIBIT VIDEOTAPE.)

{¶14} III. "THE TRIAL COURT ERRED IN FINDING BRETT J. LAUGHLIN GUILTY OF VIOLATING R.C. 4511.19 (A)(1) BECAUSE SUCH VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. (TRIAL TRANSCRIPT AND VIDEOTAPE – PASSIM.)

{¶15} IV. "THE TRIAL COURT ERRED IN FINDING BRETT J. LAUGHLIN GUILTY OF VIOLATING R.C. 4511.19(a)(1) BECAUSE THE VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE. (TRIAL TRANSCRIPT – PASSIM.)"

I.

{¶16} The First Assignment of Error questions the court's declination of recusal.

{¶17} We must agree with Appellee that R.C. 2701.031(A) and (B) provide the exclusive remedy if one actually questions the impartiality of a judge.

{¶18} R.C. 2701.031 states:

{¶19} "(A) If a judge of a municipal or county court allegedly is interested in a proceeding pending before the judge, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the judge or to a party's counsel,

or allegedly otherwise is disqualified to preside in a proceeding pending before the judge, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the court in which the proceeding is pending.

{¶20} "(B) An affidavit of disqualification shall be filed under this section with the clerk of the court in which the proceeding is pending not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

{¶21} "(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations;

{¶22} "(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

{¶23} "(3) A certificate indicating that a copy of the affidavit has been served on the judge of the municipal or county court against whom the affidavit is filed and on all other parties or their counsel;

{¶24} "(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

{¶25} We incorporate, rather than repeat the citations provided by Appellee and need not address the issue of waiver, thereby eliminating appellate review.

{¶26} As Appellant chose not to pursue the available procedure as to recusal as no affidavit of prejudice was filed, we must deny the First Assignment of Error.

II.

{¶27} The Second Assignment raises error as to the motion to suppress.

{¶28} 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. *See: State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 486, *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. *See: 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, 96, *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906, 908, and *State v. Guysinger* (1993), 86 Ohio App.3d 592. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, A. . .as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal."

{¶29} With respect to the motion to suppress the field sobriety tests the issue is as to whether the method of testing was in substantial compliance.

{¶30} The version of R.C. 4511.19 in effect at the time of arrest in Subsections (C)(4)(a) and (b) provides:

{¶31} “(4)(a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration" means the national highway traffic safety administration established as an administration of the United States department of transportation under 96 Stat. 2415 (1983), 49 U.S.C.A. 105.

{¶32} “(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:***”

{¶33} We should note that both Appellant and Appellee refer to the National Highway Traffic Safety Administration Manual (NHTSA) and apparently quote therefrom but neither introduces such manual and we are left with the testimony of Trooper Ward that he was trained in the requirements of such testing procedures and followed them.

{¶34} While Appellant refers to *State v. Schmitt* (2004), 101 Ohio St.3d 79, such case is inapplicable as the strict compliance with the NHTSA standard required by *State v. Homan* (2004), 89 Ohio St.3d 421, has been modified by the legislature in the referenced amendment to R.C. 4511.19 to substantial compliance therewith and the

court in *State v. Schmitt*, supra, clearly so states, but since the events in *Schmitt*, supra, predated the amendment due to the legislative action the *Schmitt*, supra, decision acknowledges it would have limited applicability.

{¶35} Of course, *Schmitt*, supra, also held that a law enforcement officer may testify as to his observations made during the driver's performance of field sobriety tests.

{¶36} Since we do not have in evidence the actual standards and procedures of the NHTSA's manual, we must presume the trial court applied the law correctly. *State v. Coombs* (1985), 80 Ohio St.3d 123, 125, citing *State v. Eubank* (1979), 60 Ohio St.2d 182. Where findings are general, an appellate court will assume regularity rather than irregularity in the trial court's findings. *State v. Asman* (1989), 63 Ohio App.3d 535, 540.

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

III., IV.

{¶38} The Third and Fourth Assignments raise manifest weight and sufficiency of the evidence as to the finding of guilt of Appellant.

{¶39} The standard of review for sufficiency of the evidence challenges is set forth in *State v. Jenks* (1981), 61 Ohio St.3d 259, syllabus two:

{¶40} An appellate court=s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant=s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶41} The weight to be given the evidence introduced at trial and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, syllabus. Further, it is not the function of an appellate court to substitute its judgment for that of the factfinder. *Jenks, supra*, at 279.

{¶42} Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279.

{¶43} In the case sub judice, Trooper Ward testified that Appellant's truck committed four marked lane violations resulting in the stop (Tr. 6).

{¶44} He smelled a strong odor of alcohol from Appellant who had bloodshot eyes (Tr. 8). Appellant stumbled getting out of his vehicle. (Tr. 9).

{¶45} The officer was trained with the NHTSA manual (Tr. 11).

{¶46} He performed the Horizontal Gaze Nystagmus test on Appellant in his cruiser so that the flashing lights would not affect the result. (Tr. 16). He found six clues as Appellant deviated during the test (Tr. 23).

{¶47} While Appellant had gout and right knee problems, he indicated he could do the walk and turn and one leg stands. Two clues were observed on the former (Tr. 27) and three clues on the latter (Tr. 29) because Appellant was incapable of performing these tests per instructions. (Tr. 27, 29).

{¶48} Based upon this testimony, we find that such not only results in the denial of the Second Assignment of Error, but met the manifest weight and sufficiency of evidence requirements warranting a guilty finding.

{¶49} Therefore, the Third and Fourth Assignments are also rejected.

{¶50} This cause is affirmed.

By: Boggins, J.

Gwin, P.J. and

Edwards, J. concurs.

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JUDGES

[Cite as *State v. Laughlin*, 2004-Ohio-7315.]

IN THE COURT OF APPEALS LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRETT J. LAUGHLIN		
	:	
	:	
Defendant-Appellant	:	CASE NO. 03-CA-101

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Municipal Court, Lancaster, Ohio, is affirmed. Costs assessed to Appellant.

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JUDGES