

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Court of Appeals No. WD-09-013

Appellee

Trial Court No. 2008CR0011

v.

Calvin Hummel

DECISION AND JUDGMENT

Appellant

Decided: March 19, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

William F. Hayes, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas which denied appellant's motion to suppress blood alcohol content ("BAC") test result evidence in a two-count, felony-level operation of a motor vehicle under the

influence case. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Calvin Hummel, sets forth the following two assignments of error:

{¶ 3} "A. The trial court erred in denying Defendant/Appellant's Motion to Suppress the results of the breath test where evidence demonstrated Defendant/Appellant ingested a foreign substance during the twenty-minute observation period required by the Ohio Department of Health.

{¶ 4} "B. The trial court erred in denying Defendant/Appellant's Motion to Suppress the results of the breath test where the state made no showing of compliance with the Ohio Department of Health's requirement that the BAC DataMaster instrument-check solution be refrigerated after first use."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. On December 12, 2007, appellant was arrested and subsequently indicted on two counts of operation of a motor vehicle while under the influence of alcohol, in violation of R.C. 4511.19(A)(1), felonies of the fourth degree.

{¶ 6} On May 12, 2008, appellant filed a motion to suppress his BAC test results. In July 2008, a bifurcated hearing was conducted on the motion to suppress. On July 7, 2008, the state presented the testimony of its chief witness, Officer Lowery of the Bowling Green Police Department, the officer who conducted appellant's BAC test. Officer Lowery testified regarding the proper calibration of the machine being conducted. Officer Lowery further testified that he observed the appellant for the requisite 20-minute

time frame prior to operating the BAC machine upon appellant and performed all other mandatory procedures in connection with appellant's BAC testing.

{¶ 7} On July 21, 2008, the second portion of the motion to suppress hearing was conducted. Additional testimony was taken from Deputy Santibanez. Deputy Santibanez, the arresting officer, testified that he detected a very strong odor of alcohol emanating from appellant's person, observed an open can of beer in the front seat of appellant's vehicle, observed appellant to be disoriented, observed appellant mumbling loudly, and testified that appellant refused to cooperate with the deputy to such an extent that the deputy was compelled to draw his weapon during the arrest for his own protection.

{¶ 8} In addition, Deputy Santibanez testified that he recalled escorting appellant to a drinking fountain on one occasion that he subsequently believed occurred during the observation period. By contrast, Officer Lowery, the officer who actually observed appellant during the requisite 20-minute period, disputed that appellant was removed from his observation during the observation period and testified that proper protocol was followed.

{¶ 9} On July 25, 2008, the trial court denied appellant's motion to suppress. In support of its judgment, the trial court noted that it found the evidence of the testing officer stating that appellant had been continuously and properly observed for the requisite 20-minute period prior to testing to be more persuasive than the arresting deputy who subsequently came to believe that he escorted appellant to the water fountain during that period.

{¶ 10} On September 11, 2008, subsequent to the denial of the motion to suppress, appellant entered no contest pleas. On December 23, 2008, appellant was sentenced to a two-year term of incarceration, a three-year license suspension, and the imposition of a \$5,000 fine. Timely notice of appeal was filed.

{¶ 11} It is well-established that in reviewing a disputed motion to suppress judgment, the appellate court may not reverse the trial court ruling if it is supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. The rationale underlying this deferential standard of review is in recognition that the trial court is most effectively situated to weigh and consider the evidence, witness credibility, and resolve factual questions. *State v. Mills* (1992), 62 Ohio St.3d 357, 366.

{¶ 12} In the first assignment of error, appellant asserts that the trial court erred in admitting appellant's .142 BAC results given the claim that appellant was improperly furnished water during the observation period.

{¶ 13} We have carefully reviewed and considered the record of evidence, paying particular attention to the transcript of the motion hearing central to this case. The record demonstrates that the testing officer furnished clear, competent and credible evidence both that proper procedures were adhered to and that he had observed appellant without interruption for the requisite observation period prior to administering the BAC test.

{¶ 14} Although the arresting officer inconsistently came to believe that he had allowed appellant to go to a drinking fountain on one occasion during the observation period, the record clearly establishes that the trial court judgment was supported by the competent, credible evidence of the testing officer who was actually in charge of

performing the visual observation of appellant prior to administering the test. We find appellant's first assignment of error not well-taken.

{¶ 15} In appellant's second assignment of error, he argues that the trial court erred in denying the motion to suppress based upon his contention that the state failed to demonstrate compliance with Ohio Department of Health ("ODH") regulations that the BAC instrument solution be refrigerated after first usage.

{¶ 16} Contrary to appellant's assertions, our review of the record shows that the ODH approval certificate for the solution verifying its compliance with state standards was admitted into evidence. In addition, testimony from Officer Lowery, the testing officer, established that the solution was certified by the Department of Health and was properly utilized for the test. Officer Lowery's testimony established that the solution's usage was in conformity with the certification's expiration date and discard date for that batch of solution. Given these facts and circumstances, we find appellant's second assignment of error not well-taken.

{¶ 17} On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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