

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 14AP-652
Plaintiff-Appellant,	:	(M.C. No. 2014 TRC 106291)
v.	:	
	:	(REGULAR CALENDAR)
Philip Gervais,	:	
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on March 17, 2015

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*Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, Melanie R. Tobias, and Orly Ahroni, for appellant.*

*Meeks and Thomas Co. LPA, David H. Thomas, and Lisa M. Tome, for appellee.*

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APPEAL from the Franklin County Municipal Court

LUPER SCHUSTER, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from a decision and entry of the Franklin County Municipal Court granting the motion to suppress of defendant-appellee, Philip Gervais. Because the trial court did not err in granting Gervais' motion to suppress, we affirm.

**I. Facts and Procedural History**

{¶ 2} Following a motor vehicle accident on January 23, 2014, the state cited Gervais with one count of operating a vehicle while under the influence of alcohol ("OVI"), in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree, and one count of operating a vehicle with a prohibited breath alcohol concentration, in violation of R.C. 4511.19(A)(1)(d), a misdemeanor of the first degree. Gervais entered a plea of not guilty.

{¶ 3} On April 10, 2014, Gervais filed two motions: a motion to suppress the chemical breath test and a motion to suppress evidence. At an August 14, 2014 hearing, Gervais withdrew the motion to suppress the breath alcohol test and the trial court proceeded to hear evidence on Gervais' motion to suppress evidence based on lack of probable cause and reasonable suspicion. By stipulation, the state agreed that the horizontal gaze nystagmus ("HGN") test was not conducted in substantial compliance with National Highway Traffic Safety Administration ("NHTSA") testing standards.

{¶ 4} According to the evidence at the suppression hearing, Officer Brian Schwotzer of the Madison Township Police Department was on duty during the late evening hours of January 23, 2014. It was snowing and cold that evening. When Officer Schwotzer responded to a dispatch report of a traffic accident on eastbound State Route 33 at Bixby Road, he observed Gervais standing next to his car on the berm of the road. The other car involved in the accident was in a ditch. Officer Schwotzer spoke with Gervais and thought he smelled alcohol, but Officer Schwotzer was congested from a cold that affected his sense of smell. After noticing "a slurred speech pattern," Officer Schwotzer asked Gervais to take a seat in his police cruiser. (Tr. 11.) Officer Schwotzer also testified he observed Gervais to have bloodshot eyes. The occupants of the other vehicle involved in the accident told Officer Schwotzer that they had been driving slowly due to poor weather conditions when they were rear-ended by Gervais' car. Although he could not remember exactly, Officer Schwotzer said he asked Gervais whether he had consumed any alcohol and Gervais denied that he had. Suspecting alcohol may have been a factor in the traffic accident, Officer Schwotzer called Sergeant Victor Boyd to come to the scene and see if he could smell the odor of alcohol on Gervais. Once Sergeant Boyd and Officer Jacob Short responded to the scene, Officer Schwotzer turned the investigation over to them.

{¶ 5} Officer Short, also of the Madison Township Police Department, testified that when he responded to the scene of the traffic accident with Sergeant Boyd, Gervais was already seated in the back of Officer Schwotzer's cruiser. Officer Schwotzer had already advised Officer Short before he arrived at the scene that Gervais was the at-fault driver and was possibly under the influence of alcohol. Officer Short said the other vehicle involved in the accident was not in a ditch but was "well off to the side of the

road." (Tr. 26.) When Officer Short first spoke to Gervais through a rolled-down window in the patrol cruiser, the first thing Officer Short noticed was the "strong odor of alcoholic beverage." (Tr. 27.) Officer Short also observed Gervais to have bloodshot and glassy eyes and slurred speech. Officer Short then asked Gervais to submit to a series of field sobriety tests including the HGN, the walk-and-turn test, and the one-leg stand test, which Gervais agreed to do.

{¶ 6} The state provided to the trial court the police cruiser video which recorded the administration of the field sobriety tests, but no audio from the traffic stop was recorded on the video. The state asked Officer Short to narrate the video. Officer Short described administering the walk-and-turn test. He said that during the instructions portion of the walk-and-turn test, Gervais "couldn't keep his balance," he used his arms to try to keep his feet from breaking apart, he asked for instructions again midway through the test, and he took the wrong number of steps both on the walk out and the walk back. (Tr. 33.) Officer Short said Gervais' performance on the walk-and-turn test showed four out of a possible eight clues of intoxication, deeming Gervais' performance as not "sufficient enough to show that he was not impaired." (Tr. 34.) After the test, Officer Short said Gervais told him he did not understand the instructions and that Gervais and Sergeant Boyd "went back and forth a couple times until [Gervais] did say that he did understand the test again." (Tr. 36-37.)

{¶ 7} Officer Short then described the instructions he provided to Gervais in administering the one-leg stand test, telling Gervais "to stand with his feet touching, his arms at his sides. I asked him to choose whichever foot he decided, lift it up approximately six inches off the ground, pointing the -- so that the width is parallel to the ground, and then to count by 30 by thousandths and then I demonstrated the test along with the count." (Tr. 35.) Watching Gervais perform the test, Officer Short said he observed two out of a possible four clues of intoxication: he used his arms for balance and he put his foot down during the test. After discussing what he had just observed with Sergeant Boyd and Officer Schwotzer, Officer Short then placed Gervais under arrest. Once Gervais was taken to the Madison Township Police Department, Officer Short administered the breath alcohol test.

{¶ 8} In an oral decision at the hearing, journalized in a written entry filed August 18, 2014, the trial court granted Gervais' motion to suppress, concluding Officer Short lacked probable cause to arrest Gervais for OVI. The trial court concluded that because the video did not include any audio recording of the officer's instructions during the field sobriety tests, the trial court could only rely on "what the officer said he said" to Gervais by way of instruction. (Tr. 66.) Determining that Officer Short's testimony indicated "there were not complete instructions given" on the field sobriety tests, the trial court found a "lack of evidence to support the field sobriety tests in this case." (Tr. 66.) Without the field sobriety tests to consider, the trial court further found that the characterization of the other indicia of intoxication in this case, including odor of alcoholic beverage and a traffic violation, was not "strong enough to validate an arrest in the absence of field sobriety tests." (Tr. 66.) Because the trial court concluded there was not sufficient probable cause for the arrest, the trial court suppressed the breath alcohol test. The state timely appeals.

## **II. Assignment of Error**

{¶ 9} The state assigns the following error for our review:

The trial court erred in suppressing [Gervais'] breath-alcohol test results because the officer had probable cause to arrest [Gervais] for operating a vehicle while under the influence of alcohol.

## **III. Standard of Review and Applicable Law**

{¶ 10} "'Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.'" (Citations omitted.) *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

#### IV. Discussion

{¶ 11} In its sole assignment of error, the state argues the trial court erred in granting Gervais' motion to suppress. The state presents a two-pronged argument. The state first argues Officer Short had probable cause to arrest Gervais even in the absence of the field sobriety tests. The state then argues that, even if the trial court could not consider the results of the field sobriety tests, it nonetheless should have included the officer's observations during the field sobriety tests as part of its probable cause analysis.

{¶ 12} "In determining whether a police officer has probable cause to arrest a suspect for OVI, a court considers whether, at the moment of arrest, the officer had information within the officer's knowledge, or derived from a reasonably trustworthy source, of facts and circumstances sufficient to cause a prudent person to believe the suspect was driving under the influence of alcohol, drugs, or both." *State v. Montelauro*, 10th Dist. No. 11AP-413, 2011-Ohio-6568, ¶ 20, citing *State v. Homan*, 89 Ohio St.3d 421, 427 (2000), *superseded by statute on other grounds*. The trial court must examine the totality of the circumstances surrounding the arrest in making this determination. *Id.* Probable cause does not have to be based, in whole or in part, upon a suspect's poor performance on one or more field sobriety tests. Rather, "[t]he totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where \* \* \* the test results must be excluded" for lack of substantial compliance. *Homan* at 427.

{¶ 13} Initially, we note the state does not argue on appeal that the trial court erroneously excluded the results of the walk-and-turn test and the one-leg stand test for the officer's failure to administer the tests in substantial compliance with NHTSA testing standards. Instead, the state first argues the trial court erred when it did not conclude there was probable cause to arrest Gervais based solely on the officers' observations before Officer Short administered any field sobriety tests. More specifically, the state asserts Officer Short had probable cause to arrest Gervais based on (1) Gervais being the at-fault driver in a traffic crash, (2) his observation that Gervais emitted a strong odor of an alcoholic beverage, (3) his observation that Gervais had bloodshot and glassy eyes, and (4) his observation that Gervais exhibited slurred speech and slow responses.

{¶ 14} The state relies on this court's decision in *State v. Belmonte*, 10th Dist. No. 10AP-373, 2011-Ohio-1334 for the proposition that probable cause to arrest for OVI may exist even in the absence of field sobriety tests. In *Belmonte*, we stated that probable cause may exist, "even without field sobriety test results, if supported by such factors as: evidence that the defendant caused an automobile accident; a strong odor of alcohol emanating from the defendant; an admission by the defendant that he or she was recently drinking alcohol; and other indicia of intoxication, such as red eyes, slurred speech, and difficulty walking." *Belmonte* at ¶ 11.

{¶ 15} We first note, as Gervais points out, that probable cause is a "fluid concept" based on very specific, particular factual contexts, and " 'because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, "one determination will seldom be useful 'precedent' for another." ' " *State v. Morgan*, 10th Dist. No. 05AP-552, 2006-Ohio-5297, ¶ 26, quoting *Ornelas v. United States*, 517 U.S. 690, 698 (1996), quoting *Illinois v. Gates*, 462 U.S. 213, 238, fn. 11 (1983). Additionally, *Belmonte* is distinguishable from the present case. In *Belmonte*, the defendant admitted to consuming a "couple" of beers. *Belmonte* at ¶ 13. The *Belmonte* decision specifically highlights the "admission by the defendant that he or she was recently drinking alcohol" as a relevant factor. *Id.* at ¶ 11. Here, there is no such admission from Gervais that he consumed any alcohol.

{¶ 16} Similarly, the state attempts to rely on the Supreme Court of Ohio's decision in *Homan* to support its argument that there were sufficient factual circumstances here to find probable cause to arrest prior to Officer Short conducting any field sobriety tests. In *Homan*, the law enforcement officer "observed erratic driving on the part of" the defendant prior to stopping the defendant's vehicle. *Homan* at 427. Upon stopping the defendant's vehicle, the officer "observed that [defendant's] eyes were 'red and glassy' and that her breath smelled of alcohol." *Id.* The defendant then "admitted to the arresting officer that she had been consuming alcoholic beverages." *Id.* The Supreme Court concluded that "[t]he totality of these facts and circumstances amply supports [the officer's] decision to place [defendant] under arrest." *Id.*, citing *Mason v. Murphy*, 123 Ohio App.3d 592, 598 (12th Dist.1997).

{¶ 17} Similar to the state's reliance on *Belmonte*, *Homan* is readily distinguishable from the present case. In *Homan*, the officer observed erratic driving prior to stopping the defendant. Here, no officer witnessed Gervais driving his car. Instead, Officer Schwotzer responded to the scene of the accident after it had occurred and interviewed the occupants of the other vehicle and then relayed that information to Officer Short before Officer Short arrived at the scene. Additionally in *Homan*, the defendant admitted to consuming alcohol. As we have already noted, Gervais did not admit to consuming any alcohol here.

{¶ 18} The state next argues that even if the officer lacked probable cause to arrest Gervais before conducting the field sobriety tests, the trial court erred in not considering the officer's observations during the field sobriety tests when it conducted its probable cause analysis. More specifically, although the state does not dispute the field sobriety tests were not conducted in substantial compliance with the NHTSA testing standards and, thus, the results were not admissible, the state asserts the trial court could still rely on the officer's lay observations during those tests and factor those observations into the totality of the circumstances supporting probable cause to arrest.

{¶ 19} Generally, a law enforcement officer may not testify at trial regarding the test results of a field sobriety test when the law enforcement officer does not administer the field sobriety test in substantial compliance with the testing standards. *Columbus v. Bickis*, 10th Dist. No. 09AP-898, 2010-Ohio-3208, ¶ 13, citing *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37. However, "well-established law indicates that even if the final results of a field sobriety test must be excluded at trial because the test was not administered in accordance with standardized testing procedures, an officer may testify at trial regarding observations of the defendant made during his or her performance on the test." *Id.* at ¶ 15, citing *Schmitt* at syllabus. Under these circumstances, the officer's observations are permissible lay testimony under Evid.R. 701 and are not the "results" of field sobriety tests. *Id.*, citing *Schmitt* at ¶ 15.

{¶ 20} The state asserts the trial court erred when it did not consider the officer's lay observations that Gervais had difficulty maintaining his balance and difficulty following instructions, including the fact that Gervais took the wrong number of steps and turned incorrectly, as part of its probable cause analysis. We do not find Gervais'

difficulty following instructions to be relevant here as the state previously conceded the officer did not properly instruct Gervais on how to perform the tests. Additionally, there is nothing in the record suggesting the trial court did not consider the officer's testimony regarding Gervais' difficulty maintaining his balance when it made its probable cause determination. The trial court noted the state's arguments and weighed the evidence before it but concluded it had not "found characterization of those other indicia in this case to be strong enough to validate an arrest in the absence of field sobriety tests." (Tr. 66.) The state does not argue the trial court made impermissible factual findings based on the evidence before it; instead, the state disagrees with the trial court's application of those factual findings to the probable cause analysis. Because competent, credible evidence supports the trial court's factual findings, we must defer to them. *Upper Arlington v. Wissinger*, 10th Dist. No. 13AP-922, 2014-Ohio-1601, ¶ 34. Given those factual findings, we cannot say, under the totality of the circumstances, that the trial court erred in concluding the officer lacked probable cause to arrest Gervais for OVI, and we overrule the state's sole assignment of error.

#### **V. Disposition**

{¶ 21} Based on the foregoing reasons, the trial court did not err in granting Gervais' motion to suppress. Having overruled the state's sole assignment of error, we affirm the decision of the Franklin County Municipal Court.

*Judgment affirmed.*

TYACK and HORTON, JJ., concur.

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