[Cite as *State v. McCauley*, 2010-Ohio-6446.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0015**
- vs -	:	
RONALD McCAULEY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 244.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Ronald McCauley, appeals from the January 4, 2010 judgment entry of the Trumbull County Court of Common Pleas, in which he was sentenced for operating a motor vehicle under the influence of alcohol ("OVI").

{¶2} On July 13, 2009, appellant was indicted by the Trumbull County Grand Jury on one count of OVI, a felony of the fourth degree, in violation of R.C.

4511.19(A)(1)(a) & (G)(1)(d). The OVI charge carried a specification of prior OVI offender, pursuant to R.C. 2941.1413, and a specification of forfeiture, pursuant to R.C. 2941.1417(A). Appellant pled not guilty at his arraignment on July 28, 2009.

{¶3} On November 16, 2009, appellant filed a "Motion to Suppress Evidence or Redact Video," alleging that statements made by him to arresting officers were obtained in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, and that portions of the video are inadmissible pursuant to Evid.R. 401, 402, and 403.

{¶4} The matter proceeded to a jury trial which commenced on November 18, 2009. Just prior to the beginning of trial and after the jury was already selected and sworn, the trial court informally denied appellant's motion to suppress.

{¶5} At the trial, John Laneve testified for appellee, the state of Ohio. According to Laneve, appellant dated Laneve's sister-in-law. On February 15, 2009, around 10:00 p.m., Laneve called 9-1-1 seeking police assistance in removing appellant from his property, located at 625 Indiana Avenue, Niles, Trumbull County, Ohio, for the third time that day. Laneve indicated that appellant was skulking about the outside of his house while carrying a beer bottle and peeking into windows. Before the police arrived, Laneve stated that appellant jumped in his truck, backed out of Laneve's driveway, bumped a neighbor's mailbox, and continued down Indiana Avenue. While on the phone with 9-1-1, Laneve lost sight of appellant when appellant made a right hand turn onto Third Street.

{¶6} Patrolman Robert Makita, with the Niles City Police Department ("NCPD"), testified for the state that while traveling down Third Street, he noticed a truck, matching

the description of appellant's vehicle, in a snowy ditch. According to Patrolman Makita, appellant tried to extricate his vehicle from the ditch by spinning its wheels. Patrolman Makita stated that he observed appellant abandon his truck with the engine running when appellant saw the police cruiser. Patrolman Makita followed appellant's footprints in the snow and found him outside a home on Iowa Avenue.

{¶7} After requesting appellant to return to his truck, Patrolman Makita detected an odor of alcohol, noticed appellant was unsteady on his feet, and he was slurring his speech. Patrolman Makita administered three field sobriety tests, and appellant failed each of them. Specifically, Patrolman Makita observed that appellant exhibited all six clues on the Horizontal Gaze Nystagmus test ("HGN") indicating that he was under the influence of alcohol. Patrolman Makita then had appellant do the one-legged stand test, stating that appellant swayed back and forth and put his foot down three times, thereby failing that test. Finally, Patrolman Makita had appellant do the walk-and-turn test. He explained that appellant was unable to maintain the instructed position during the instructional and practical phases of the test, taking more than the nine required steps, thus failing that test as well. A redacted DVD, state's Exhibit 1, including the field sobriety tests, was played for the jury. In addition, Patrolman Makita indicated that a back-up officer discovered an open beer bottle in appellant's vehicle, which was also captured on the DVD.

{¶8} Patrolman Makita placed appellant under arrest and transported him to the station. The redacted DVD also includes the car ride to the station, which was played for the jury. Very little conversation occurs en route. Patrolman Makita asked appellant if he would submit to a breath test, to which appellant replied, "just between you and

me, I'm kind of f----- up[.]" Patrolman Makita explained that such terminology was slang for being intoxicated.

{¶9} Lastly, Patrolman Shawn Crank, with the NCPD, testified for the state that when appellant was given the option to take a breath test at the station, he refused it.

{¶10} Following the trial, the jury returned a guilty verdict on the sole count of OVI and the specification of prior OVI offender, but found that appellant's vehicle was not subject to forfeiture.

{¶11} Pursuant to its January 4, 2010 judgment entry, the trial court sentenced appellant to 24 months on the sole count of OVI and three years on the specification of prior OVI offender, to run consecutively for a total of five years in prison. The trial court also ordered appellant to pay a mandatory fine in the amount of $800; ordered him to submit to mandatory drug and alcohol counseling and to DNA testing; suspended his class 2 driver's license for 15 years; and notified him that post-release control is optional up to a maximum of three years. It is from that judgment that appellant filed a timely appeal, asserting the following assignments of error:

{¶12} "[1.] The trial court erred by denying the appellant's motion to suppress.

{¶13} "[2.] The appellant's convictions are against the manifest weight of the evidence."

{¶14} In his first assignment of error, appellant argues that the trial court erred by denying his motion to suppress.

{¶15} We note that the state maintains that appellant's motion to suppress was not timely filed.

{¶16} Regarding pretrial motions, Crim.R. 12(C)(3) provides that a motion to suppress evidence is a motion that must be raised prior to trial. Further, Crim.R. 12(D) states, in pertinent part, that "[a]ll pretrial motions *** shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. [However,] [t]he court in the interest of justice may extend the time for making pretrial motions."

{¶17} In the case at bar, appellant was arraigned on July 28, 2009. Thus, his motion to suppress was due to be filed between September 1, 2009 (35 days after arraignment) and November 11, 2009 (seven days before trial). However, appellant did not file the motion at issue until November 16, 2009, two days before the commencement of his jury trial and five days beyond the time frame of Crim.R. 12(D).

{¶18} Appellant's motion to suppress offered no explanation as to why it was untimely filed or why the interests of justice would nonetheless necessitate a merit review of the motion. Here, the jury had already been selected and sworn when the trial judge discovered the filing of appellant's motion to suppress. However, the record does not reveal that at any point in time the state objected to the filing of the motion out of rule. The trial judge did not have the opportunity to rule on an objection because one was never raised.

{¶19} The record reflects that appellant failed the field sobriety tests administered by Patrolman Makita, was placed under arrest for violating R.C. 4511.19(A), and was transported to the police station. As such, appellant was in custody. However, the facts do not establish that a custodial *interrogation* took place. Asking a suspect who has been placed under arrest whether he will submit to a breath test is not "custodial interrogation." By operating a motor vehicle on a public highway,

appellant impliedly consented to submit to a breath test. R.C. 4511.191(A)(2) and (3). The real question before us is whether the conduct of Patrolman Makita qualifies as "reasonably likely to elicit an incriminating response." See *Rhode Island v. Innis* (1980), 446 U.S. 291, 301.

{¶20} The Tenth District, in *Columbus v. Stepp* (Oct. 6, 1992), 10th Dist. Nos. 92AP-486 and 92AP-487, 1992 Ohio App. LEXIS 5209, at *11-12, stated:

{¶21} "Whether conduct qualifies as 'reasonably likely to elicit an incriminating response' necessarily depends upon an examination of the facts and circumstances of each case. In the present case, defendant initiated the exchange between himself and Smith at the hospital by asking why he had been placed under arrest. Such an open-ended question calls for an explanation of the reasons and circumstances behind the officer's actions. Smith's answer responds to defendant's question and does not, on its face, indicate an attempt to elicit an incriminating response, which is further supported by the fact that the officer's statement was not followed up by additional questions designed to draw such responses. Such a sequence of events at the hospital represents the type of situation in which 'the police surely cannot he held accountable for the unforeseeable results of their words or actions.'" (Citations omitted.)

{¶22} In the instant matter, Patrolman Makita's question to appellant about taking a breath test was not designed to elicit an incriminating response. The record establishes that appellant gave a non-responsive answer to Patrolman Makita's question. We stress that Patrolman Makita followed statutory duties and merely inquired if appellant would take a breath test. He did not ask appellant if he had been

drinking, how much he had to drink, or when he consumed his last alcoholic drink. Appellant elected to volunteer information that was not requested.

{¶23} The Supreme Court of the United States in *Miranda v. Arizona* (1966), 384 U.S. 436 defined custodial interrogation as "*questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. (Emphasis added.) Again, although appellant was in custody, no custodial *interrogation* took place in the car ride from Iowa Avenue to the police station.

{¶24} The trial court stated the following in-chambers on November 19, 2009:

{¶25} "I don't think somebody has to have his Miranda warnings in order to ask the question as to whether or not he is going to take the test or not. *** [W]hen one asks if you're going to take the test or not, that is something that they are required to ask independent of any advising of their Constitutional Rights. If he were to take a statement from or was inquiring and saying things like did you go buy any drugs or something like that, I don't know what questions he would ask about the various ways that somebody could be inebriated and perhaps if there is something there or says I want to take a statement. *** It would be like saying if you arrest somebody and if you ask them their [social] security number is after which is something that they would ask anybody regardless of the Miranda warning. It's ministerial in nature and I don't think it's any violation of his Constitutional Rights[.]"

{¶26} We agree. As appellant was not subject to a custodial *interrogation*, *Miranda* warnings did not apply. Thus, the trial court committed no error in admitting the unsolicited statement. We determine that the trial court did not abuse its discretion in

denying appellant's untimely motion. Additionally, we note that the trial judge viewed the dash cam video and properly admitted the DVD in its redacted form.

{¶27} Appellant's first assignment of error is without merit.

{¶28} In his second assignment of error, appellant contends his convictions are against the manifest weight of the evidence.

{¶29} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-15:

{¶30} "*** '[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶31} "'In determining whether the verdict was against the manifest weight of the evidence, "(***) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (***)"' (Citations omitted.) ***" (Emphasis sic.)

{¶32} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶33} With regard to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass* (1967), 10

Ohio St.2d 230, paragraph one of the syllabus. Here, the jury chose to believe the state's witnesses.

{¶34} Again, Laneve called 9-1-1 indicating that appellant was skulking about the outside of his house while carrying a beer bottle. Before the police arrived, appellant jumped in his truck and drove off. Patrolman Makita discovered appellant's vehicle in a snowy ditch. He testified that he observed appellant abandon his truck with the engine running when appellant saw the police cruiser. Patrolman Makita followed appellant's footprints in the snow and found him on a nearby street. He detected an odor of alcohol, noticed appellant was unsteady on his feet, and he was slurring his speech. Patrolman Makita testified he is certified by the National Highway Traffic Safety Administration to perform field sobriety testing. He administered three field sobriety tests and appellant failed each of them. Appellant offered no evidence at trial to suggest any alleged health issues which would have had any bearing on the tests performed. Also, a back-up officer discovered an open beer bottle in appellant's vehicle.

{¶35} Patrolman Makita placed appellant under arrest and transported him to the station. He asked appellant if he would submit to a breath test, to which appellant replied in slang terminology that he was intoxicated. Patrolman Crank testified that appellant refused to take a breath test at the station. The redacted DVD, which included the field sobriety tests, the open beer bottle discovered in appellant's truck, and the car ride to the station, was played for the jury. The state also introduced Exhibits 3A through E which listed appellant's five drunk driving convictions dating back to 1995.

{¶36} Based on the evidence presented, pursuant to *Schlee* and *Thompkins*, supra, we cannot say that the jury clearly lost its way in finding appellant guilty of OVI with a specification of prior OVI offender.

{¶37} Appellant's second assignment of error is without merit.

{¶38} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.