[Cite as *State v. Wojewodka,* 2010-Ohio-973.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0029**
- vs -	:	
DAVID WOJEWODKA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2008 TRC 3645 K.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Timothy J. Kucharski, First Floor, Ste. 1, 1200 West Third Street, Cleveland, OH 44113 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, David Wojewodka, appeals the Judgment Entry of the Portage County Court of Common Pleas, in which the trial court denied Wojewodka's Motion to Suppress. For the following reasons, we affirm the decision of the trial court.

{¶2} On December 13, 2008, Officer James Ennemoser, Jr., of the Kent Police Department observed Wojewodka's vehicle traveling 39 miles per hour in a 25 mile per hour zone. Ennemoser subsequently conducted a traffic stop of Wojewodka's vehicle.

{¶3} When Ennemoser approached Wojewodka's car, he detected a strong odor of alcoholic beverage. Wojewodka admitted that he had consumed three beers and that he was the designated driver for the other passengers in the car. Ennemoser noted that Wojewodka's eyes were red and watery and his speech was slow. Ennemoser asked Wojewodka to exit the vehicle in order to perform sobriety testing. Ennemoser still noticed a strong odor of alcoholic beverage when Wojewodka exited the vehicle.

{¶4} Ennemoser first performed the horizontal gaze nystagmus (HGN) test. Ennemoser found two indicators of intoxication while performing the first portion of the test. Ennemoser next administered the walk-and-turn test. Ennemoser noted three indicators; Wojewodka stepped off the line during the test twice and he used his arms for balance. Lastly, Ennemoser administered the one-legged stand test. He received two indicators; Wojewodka swayed while he was balancing and put his foot down during the test. Ennemoser then placed Wojewodka under arrest for Operating a Vehicle While Intoxicated (OVI). At the station, Wojewodka's breathalyzer reading was .087.

{¶5} Wojewodka was subsequently charged with one count of OVI, in violation of R.C. 4511.19(A)(1)(A), and violation of R.C. 4511.19(A)(1)(d), for driving with a concentration of .08-.17 of alcohol on his breath.

{¶6} Wojewodka filed a Motion to Suppress/Dismiss, contending that there was no reasonable suspicion to stop or detain him, no probable cause to arrest him, the field sobriety tests were administered in an inappropriate manner, and Wojewodka's statements made to the police were in violation of his Miranda rights.

{¶7} After a hearing on the motion, the court found that there was a reasonable articulable suspicion to stop Wojewodka; the officer had a reasonable basis for inquiring of Wojewodka and had further authority to continue the investigation based on his observations; the officer performed the field sobriety tests in substantial compliance with the NHTSA standards; and there was probable cause to arrest Wojewodka. The court overruled Wojewodka's motion and set the matter for trial.

{¶8} Thereafter, Wojewodka entered a plea of no contest, and the court found him guilty of OVI and sentenced Wojewodka to 180 days in jail, 177 suspended, a fine of $1,075, $550 suspended, and 30 hours of community service. The fine and jail time were suspended on the condition that Wojewodka complete drug intervention school within 90 days, have no alcohol related offense for two years, and pay all fines and costs as ordered. The court stated that Wojewodka would receive credit for the remaining three days jail time once he had completed 72 hours of drug intervention school. Further, Wojewodka was placed on supervised probation for 12 months and a license suspension for 12 months, with credit from the date of his arrest.

{¶9} Wojewodka timely appeals and raises the following assignment of error:

{¶10} "The trial court erred to the prejudice of Defendant-appellant by failing to grant his Motion to Suppress in violation of his rights pursuant to Fourth, Fifth and

Fourteenth Amendments to the United States Constitution and Sections 10, 14, and 16, Article I of the Ohio Constitution."

{¶11} We first note that Wojewodka's plea of no contest does not act to waive his assigned error regarding his motion to suppress. Unlike a plea of guilty, a plea of no contest does not preclude a defendant from asserting on appeal that the trial court erred in ruling on a Motion to Suppress. See Crim.R. 12(I).

{¶12} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Ferry*, 11th Dist. No. 2007-L-217, 2008-Ohio-2616, at ¶11 (citations omitted). "The trial court is best able to decide facts and evaluate the credibility of witnesses. Its findings of fact are to be accepted if they are supported by competent, credible evidence." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at ¶41. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." *Ferry*, 2008-Ohio-2616, at ¶11 (citations omitted); *Mayl*, 2005-Ohio-4629, at ¶41 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

{¶13} Wojewodka first contends that Officer Ennemoser did not have reasonable suspicion to require him to perform field sobriety testing. He argues that reasonable articulable suspicion was not present to perform the testing; "[t]he officer could not and did not determine any level of intoxication or impairment from observing Mr. Wojewodka driving or from speaking with him." We disagree.

{¶14} This court has held that "[o]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle

without violating the Fourth Amendment's proscription of unreasonable searches and seizures[;] *** it is proper for an officer to order a driver to exit a lawfully stopped vehicle, even if there was no reasonable suspicion of criminal activity." *State v. Lett,* 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶¶17-18 (citations omitted).

{¶15} Furthermore, "[p]robable cause is not needed before an officer conducts field sobriety tests. Reasonable suspicion of criminal activity is all that is required to support further investigation." *Columbus v. Anderson* (1991), 74 Ohio App.3d 768, 770, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 178; *State v. Penix*, 11th Dist. No. 2007-P-0086, 2008-Ohio-4050, at ¶20 (reasonable suspicion was necessary to detain appellant further after the initial stop to conduct field sobriety tests).

{¶16} Ennemoser initially noticed a strong odor of alcoholic beverage upon approaching Wojewodka's vehicle. Wojewodka admitted to consuming three beers. Ennemoser also noticed Wojewodka's eyes were watery and red and his speech was slow. Upon Wojewodka's exit of the vehicle, the strong odor of alcohol remained. In the present case, the officer's conduct was proper. See *State v. Stanley*, 11th Dist. No. 2007-P-0104, 2008-Ohio-3258, at ¶19 ("[a]fter briefly conversing with appellant, *** Officer Lewis noticed appellant had glassy, bloodshot eyes, slurred speech, and further perceived a strong odor of alcohol emanating from the vehicle. Appellant additionally admitted to having 'a couple of beers.' From these facts, the officer had reasonable, articulable suspicion to further investigate appellant for OVI via the administration of field sobriety tests"); *State v. Mapes*, 6th Dist. No. F-04-031, 2005-Ohio-3359, at ¶42 (finding reasonable suspicion to conduct sobriety tests when the officer "noticed an odor

of alcohol in the vehicle as well as appellant's glassy and bloodshot eyes *** [and] appellant's speech was 'somewhat slurred'").

{¶17} Wojewodka next argues that Officer Ennemoser "deviated from the NHTSA standards" when he administered the field sobriety tests and, "[a]s a result, the officer lacked any probable cause to arrest David Wojewodka and the trial court should have granted his motion to suppress."

{¶18} "In determining whether the police had probable cause to arrest an individual for OVI, we consider whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. *Beck v. Ohio* (1964), 379 U.S. 89, 91 ***; *State v. Timson* (1974), 38 Ohio St.2d 122, 127." *State v. McNulty*, 11th Dist. No. 2008-L-097, 2009-Ohio-1830, at ¶19.

{¶19} Moreover, "probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's *** performance on one or more of these tests. The 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." Id. at ¶20 (citation omitted). See also, *Penix*, 2008-Ohio-4050, at ¶29 ("the totality of the circumstances can support a finding of probable cause to arrest, even where no field sobriety tests were administered"); *State v. Homan*, 89 Ohio St.3d 421, 2000-Ohio-212, at 427 ("the arresting officer, admitted to having not *** complied with established police procedure when administering to [Homan] the HGN and walk-and-turn tests. [The court] nevertheless agree[d] *** that the totality of facts

and circumstances surrounding [Homan's] arrest support[ed] a finding of probable cause").

{¶20} Wojewodka's eyes were red and watery; Ennemoser smelled a strong odor of alcoholic beverage in the car, as well as when Wojewodka exited his vehicle; Wojewodka admitted to consuming three beers; and his speech was slow. Even without taking into consideration the field sobriety tests, the totality of the facts and circumstances can support a finding of probable cause to arrest Wojewodka.

{¶21} Consequently, there was probable cause to arrest Wojewodka for OVI.

{¶22} Wojewodka's sole assignment of error is without merit.

{¶23} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, denying Wojewodka's Motion to Suppress, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶24} From the record, it appears that appellant passed the initial "divided attention" tests administered by the arresting officer. He was polite and cooperative, and followed the instructions given him. Further, I must agree with appellant that the arresting officer appears not to have substantially complied with the NHTSA standards

in administering the field sobriety tests, which should not have been admitted to establish probable cause.

{¶25} Of course, I agree with the majority that an officer may arrest for operating a vehicle under the influence even without administering tests, if the "totality of the circumstances" justifies it. I find nothing in the record indicating that the circumstances surrounding appellant's arrest, singly or in their totality, justified it.

{¶26} As I would reverse and remand, I must respectfully dissent.