[Cite as *State v. Smith*, 2009-Ohio-5651.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- JEAN CLAUDE SMITH Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 09-CA-55 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2006-CR-0663
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 21, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO BY: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	R. JOSHUA BROWN 32 Lutz Avenue Lexington, Ohio 44904

Hoffman, J.

{¶1} Defendant-appellant Jean Claude Smith appeals his conviction and sentence entered by the Richland County Court of Common Pleas, on two counts of felony DUI, following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On October 5, 2006, the Richland County Grand Jury indicted Appellant on one count of DUI, in violation of R.C. 4511.19(A)(1)(a), a felony of the fourth degree; and one count of DUI, in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree. The felony four DUI carried a specification Appellant had been convicted of five or more equivalent offenses within twenty years. Appellant appeared before the trial court for arraignment on November 13, 2007, and entered a plea of not guilty to the Indictment. The trial court released Appellant on his own recognizance, and placed him on electronic monitoring. The matter was originally scheduled for trial on December 20, 2007, but was continued due to the illness of the mother of defense counsel, Edith Gilliland. Attorney Gilliland subsequently withdrew as counsel, and Attorney Mark Cockley was appointed to represent Appellant.

{¶3} The matter proceeded to jury trial on February 21, 2008. The following evidence was adduced at trial.

{¶4} On July 15, 2006, at approximately 2:00am, Trooper James Adam Burkhart was on routine patrol on State Route 39 at Plymouth-Springmill Road, heading north toward Shelby, Ohio. The trooper observed a vehicle turn left off of Plymouth-Springmill onto State Route 39, heading south toward Mansfield. Trooper Burkhart

turned around and proceeded to follow the vehicle. At that point, the driver, who was subsequently identified as Appellant, accelerated his vehicle to 70 miles per hour in a posted 55 miles per hour zone. Appellant attempted to make a left turn, but was traveling at such a high rate of speed the vehicle crossed the lane of travel. Appellant continued to cross the marked lane, and for a period of time, traveled down the center of the road. Appellant slammed on the brakes in an attempt to slow the vehicle down enough to get back into the proper lane.

{¶5} Trooper Burkhart activated his overhead lights. Appellant did not stop, but slowed down, continuing his travel along Lexington-Springmill Road. Appellant ultimately brought the vehicle to a stop. The trooper approached the vehicle and immediately noticed a strong odor of alcohol emanating from Appellant's breath. Trooper Burkhart also noticed Appellant was extremely nervous, his hands and body both visibly shaking, and his eyes were bloodshot and glassy. When Trooper Burkhart asked him for identification, Appellant stated he did not have any identification on his person and stated his name was "Blake Weiss". The first social security number Appellant gave the trooper did not match the name "Blake Weiss," neither did the second social security number Appellant gave. The date of birth provided by Appellant did not match "Blake Weiss". Appellant finally admitted his name was "Jean Claude Smith," and told the officer he did not have a driver's license.

{¶6} Appellant admitted he had been drinking that evening, stating he had consumed three beers. The trooper initiated standard field sobriety tests, beginning with the horizontal gaze nystagmus. Appellant exhibited six out of six clues. Appellant successfully completed the one leg stand, and walk and turn tests. Trooper Burkhart

placed Appellant under arrest and transported him to the Ohio State Highway Patrol Post. Appellant was read the BMV 2255 form, but refused to submit to a breath test. The trooper subsequently learned Appellant had been convicted of at least five prior DUI's.

{¶7} After hearing all the evidence and deliberations, the jury found Appellant guilty of both charges. The trial court merged the counts and sentenced Appellant to a period of twenty-four months in prison. As to the specification, the trial court imposed an additional three year period of incarceration.

{¶8} It is from this conviction and sentence Appellant appeals raising the following assignments of error:

{¶9} "I. THE TRIAL COURT ERRED BY ADMITTING TESTIMONY, IN A PROSECUTION FOR A VIOLATION OF R.C. 4511.19(A)(1)(a), CONCERNING THE STATISTICAL PROBABILITY THAT APPELLANT WOULD HAVE TESTED OVER THE LEGAL LIMIT BASED UPON THE RESULT OF THE HORIZONTAL NYSTAGMUS TEST.

{¶10} "II. APPELLANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."

I

{¶11} In his first assignment of error, Appellant maintains the trial court erred in admitting testimony concerning statistical probability he would have tested over the legal limit for blood alcohol based upon the results of the horizontal gaze nystagmus test.

{¶12} The trial court's decision to admit evidence will not be reversed unless the court has clearly abused its discretion and the defendant has been materially prejudiced thereby. *State v. Slagle* (1992), 65 Ohio St.3d 597, 602, 605 N.E.2d 916. See also, *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the trial court that is unreasonable, unconscionable, or arbitrary. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 506, 589 N.E.2d 24.

{¶13} As stated supra, Appellant challenges the trial court's admission of Trooper Burkhart's testimony there was a 77% probability Appellant would have tested over the legal limit based upon the results of the HGN test.

{¶14} We find the trial court did not err in permitting Trooper Burkhart to testify Appellant was over the legal limit based upon his exhibiting six of six clues on the HGN test. A review of the transcript reveals defense counsel did not object to Trooper Burkhart's specific testimony, "if you get four or more clues from the horizontal gaze nystagmus, then there's a seventy-seven percent chance that that person will test .10 or above." Transcript of Proceedings at 150. See, also, Tr. at 151, 152, 158, 161. Because trial counsel failed to object to the testimony, we must review this assignment of error under the plain error doctrine. *State v. Maurer* (1984), 15 Ohio St.3d 239.

{¶15} In order to prevail under a plain error analysis, Appellant bears the burden of demonstrating the outcome of the trial clearly would have been different, but for the error. Crim. R. 52(B). Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶16} We find Appellant has failed to establish a reasonable probability exists the outcome of his trial would have been different had trial counsel objected to the testimony at issue. While we find the challenged testimony inadmissible applying the rationale set forth in *State v. Bresson*, (1990), 51 Ohio St.3d 123, its admission does not rise to the level of plain error in this case. Trooper Burkhart testified he observed Appellant traveling 70 mph in a posted 55 mph zone. Appellant continued to accelerate his vehicle even after the trooper pursued him with the cruiser lights and siren activated. Appellant could not maneuver a turn due to the high rate of speed, and, as a result, traveled over the center lane. Appellant drove for some distance before stopping. When Trooper Burkhart made contact with Appellant, the trooper noticed a strong odor of alcoholic beverage coming from Appellant's breath, and glassy, bloodshot eyes. Appellant repeatedly gave the trooper incorrect identification information. Appellant admitted to consuming several beers that evening. Trooper Burkhart observed six out of six clues on the HGN test, and one clue on the leg stand. Based upon the totality of the circumstances, we find the jury could reasonably determine Appellant was operating a motor vehicle under the influence of alcohol.

{¶17} We note a properly qualified officer may testify at trial regarding a driver's performance on the HGN test as to the issues of probable cause to arrest and use the same in forming an opinion whether the suspect is under the influence of alcohol. See R.C. 4511.19(A)(1). However, we find such testimony may not be admitted to show what the exact alcohol concentration level of the driver was, or to conclude the driver would have tested over the legal limit for purposes of demonstrating a violation of R.C. 4511.19(A)(2), (3), or (4).

{¶18} Appellant's first assignment is overruled.

II

{¶19} In his second assignment of error, Appellant raises a claim of ineffective assistance of counsel.

{¶20} The standard of review of an ineffective assistance of counsel claim is well-established. Pursuant to *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 673, in order to prevail on such a claim, the appellant must demonstrate both (1) deficient performance, and (2) resulting prejudice, i.e., errors on the part of counsel of a nature so serious that there exists a reasonable probability that, in the absence of those errors, the result of the trial court would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶21} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. Id. at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

{¶22} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley,* supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

{¶23} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Bradley at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶24} Appellant maintains he was denied effective assistance of counsel due to trial counsel's failure to file any pretrial motions, in particular, a motion to suppress the results of the HGN test, as well as trial counsel's failure to introduce medical records to verify the testimony of Appellant's sister who testified Appellant previously had sustained head injuries. We address each in turn.

{¶25} The failure to file a suppression motion does not constitute per se ineffective assistance of counsel. *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted. *State v. Butcher,* Holmes App.No. 03 CA 4, 2004-Ohio-5572, ¶ 26, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

{¶26} With respect to the HGN test, Appellant contends the bulk of the State's evidence against him was the results of the test; therefore, it was essential for defense counsel to determine whether the officer substantially complied in the administration of the test. Appellant notes the trooper administered the HGN test in less than one minute and the NHTSA guidelines for performing the test is 68 seconds.

{¶27} Following voir dire, but prior to the presentation of testimony, defense counsel made several oral motions, including a motion to exclude the evidence of the

HGN test. The trial court overruled the motion. See, Tr. at 115. Accordingly, we find defense counsel was not ineffective.

{¶28} With respect to the medical records, Appellant explains such records would have developed the effect of Appellant's prior head injuries on the HGN results, and put into question whether Trooper Burkhart took Appellant's injuries into consideration when he administered the test.

{¶29} Although such evidence might have been helpful to Appellant's defense, we, nonetheless, find he is unable to establish the second prong of the *Strickland* test as there does not exist a reasonable probability the outcome of the trial would have been different. Evidence of Appellant's previous head injury was introduced through the testimony of his sister. Further, the NHTSA guidelines regarding head injuries were discussed during Trooper Burkharts' direct testimony and cross-examination. Prior to performing the field sobriety tests, Appellant did not advise the trooper of any medical problems he had or any prescription medicines he was taking.

{¶30} Appellant's second assignment of error is overruled.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JEAN CLAUDE SMITH	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-55

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY