

[Cite as *State v. Verity*, 2010-Ohio-1151.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
JONATHAN VERITY	:	Case No. 2009CA00156
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Massillon Municipal Court,
Case No. 2008TRC08756

JUDGMENT: Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT ENTRY: March 22, 2010

APPEARANCES:

For Plaintiff-Appellee

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Farmer, J.

{¶1} On October 22, 2008, appellant, Jonathan Verity, was charged with driving under the influence in violation of R.C. 4511.19, speeding in violation of R.C. 4511.21, and driving under suspension in violation of R.C. 4510.14.

{¶2} On January 12, 2009, appellant filed a motion to suppress, challenging the field sobriety tests and probable cause to arrest. A hearing was held on March 19, 2009. By judgment entry file March 23, 2009, the trial court denied the motion, finding substantial compliance with the guidelines for field sobriety testing and probable cause to arrest.

{¶3} On May 20, 2009, appellant pled no contest to the charges. By journal entry filed same date, the trial court found appellant guilty and sentenced him to one hundred eighty days in jail, all but thirty days suspended.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN FINDING THAT THE STANDARDIZED FIELD SOBRIETY TESTS WERE CONDUCTED IN SUBSTANTIAL COMPLIANCE WITH NHTSA GUIDELINES."

II

{¶6} "THE TRIAL COURT ERRED IN FINDING PROBABLE CAUSE FOR APPELLANT'S OVI ARREST."

I

{¶7} Appellant claims the trial court erred in finding the standardized field sobriety tests were conducted in substantial compliance with the National Highway Traffic and Safety Administration (NHTSA) guidelines. It is appellant's position that the NHTSA guidelines were not in evidence and therefore his motion to suppress should have been granted. We agree.

{¶8} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116

S.Ct. 1657, 1663, "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶9} At issue is appellant's conviction for driving under the influence in violation of R.C. 4511.19(A)(1)(a) which states the following:

{¶10} "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶11} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶12} R.C. 4511.19(D)(4) states the following:

{¶13} "(D)(4)(a) As used in divisions (D)(4)(b) and (c) of this section, 'national highway traffic safety administration' means the national highway traffic safety administration established as an administration of the United States department of transportation under 96 Stat. 2415 (1983), 49 U.S.C.A. 105.

{¶14} "(b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the

time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:

{¶15} "(i) The officer may testify concerning the results of the field sobriety test so administered.

{¶16} "(ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.

{¶17} "(iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate."

{¶18} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶34, the Supreme Court of Ohio explained "substantial compliance" as follows:

{¶19} "Precisely for this reason, we concluded in *Steele* that rigid compliance with the Department of Health regulations is not necessary for test results to be admissible. *Steele*, 52 Ohio St.2d at 187, 6 O.O.3d 418, 370 N.E.2d 740 (holding that the failure to observe a driver for a 'few seconds' during the 20-minute observation period did not render the test results inadmissible). To avoid usurping a function that the General Assembly has assigned to the Director of Health, however, we must limit the substantial-compliance standard set forth in *Plummer* to excusing only errors that are clearly de minimis. Consistent with this limitation, we have characterized those errors that are excusable under the substantial-compliance standard as 'minor

procedural deviations.' *State v. Homan* (2000), 89 Ohio St.3d 421, 426, 732 N.E.2d 952."

{¶20} As cited supra, the burden is on the state to show by clear and convincing evidence that the officer administered the field sobriety tests in substantial compliance with the NHTSA guidelines. R.C. 4511.19(D)(4)(b). In the case sub judice, the NHTSA manual was not admitted into evidence. The trial court denied appellant's attempt to admit an unauthenticated copy and refused to take judicial notice of the document. T. at 34.

{¶21} In *State v. Ryan*, Licking App. No. 02-CA-00095, 2003-Ohio-2803, ¶18-21, this court stated the following:

{¶22} "While we do not decide that the introduction of the NHTSA manual is a necessary predicate to this issue, we must agree with the court in *State v. Nickelson* (July 20, 2001), Huron App. No. H-00-036 when it concluded:

{¶23} " 'While appellee introduced testimony of officers as to which tests were conducted and how they were conducted, it did not introduce any evidence to prove that the tests were conducted in a standardized manner as provided by the National Highway Traffic Safety Administration. No witness testified as to these guidelines, and the manual itself was not admitted. Because appellee did not prove that the field sobriety tests were conducted in accordance with the manual, the results of the field sobriety tests should have been suppressed. See *State v. Homan* (2000), 89 Ohio St.3d 421, 732 N.E.2d 952.'

{¶24} "In the case sub judice, while Trooper Weaver testified as to his certification to administer the tests (T. at p. 7, 732 N.E.2d 952), he did not testify as to

the standardized requirements of the NHTSA guidelines but merely how appellant performed the walk and turn and one-leg stand. Also, as in *Nickelson*, supra, the manual was not introduced.

{¶25} "We find that the State therefore failed in its burden as to the evidence required to oppose the motion to suppress and that the burden had not shifted to appellant to establish the standardized manner of conducting such tests as required by the NHTSA by impeaching the Trooper. By placing this burden on appellant, he was required by impeachment or introduction of the NHTSA manual to carry the burden required of the State."

{¶26} During his direct testimony, the arresting officer, Jackson Patrol Officer Robert Rowland, testified he administered the field sobriety tests according to NHTSA guidelines. T. at 8-9. Officer Rowland testified although he was trained on the guidelines seven years ago, he nevertheless administered the tests once or twice a week. T. at 7, 15. Officer Rowland did not testify as to the standardized requirements of the NHTSA guidelines. There is extensive cross-examination testimony as to the administration of appellant's tests and appellant's performance. T. at 17-28. Officer Rowland found four clues on the horizontal gaze nystagmus (HGN) test: lack of smooth pursuit in both eyes and maximum deviation in both eyes. T. at 9, 24-25. He also found appellant failed the one-leg stand test because he swayed during the instructions and put his foot down during the test. T. at 10, 26-27.

{¶27} Following this court's decision in *Ryan*, we find the state failed to meet its burden as to the presumption of admissibility of the field sobriety tests under R.C. 4511.19(D)(4).

{¶28} Upon review, we find as to the field sobriety tests, appellant's motion to suppress should have been granted.

{¶29} Assignment of Error I is granted.

II

{¶30} Appellant claims Officer Rowland lacked probable cause to arrest him for driving under the influence. We disagree.

{¶31} Probable cause to arrest focuses on the prior actions of the accused. Probable cause exists when a reasonable prudent person would believe that the person arrested had committed a crime. *State v. Timson* (1974), 38 Ohio St.2d 122. A determination of probable cause is made from the totality of the circumstances. Factors to be considered include an officer's observation of some criminal behavior by the defendant, furtive or suspicious behavior, flight, events escalating reasonable suspicion into probable cause, association with criminal and locations. *Katz, Ohio Arrest, Search and Seizure* (2001 Ed.), 83-88, Sections. 3.12-3.19.

{¶32} In *State v. Koteff*, Ashland App. No. 04-COA-1719, 2005-Ohio-1719, ¶16-17, this court noted the following:

{¶33} "Probable cause to arrest a suspect for driving while under the influence of alcohol may exist without consideration of field sobriety tests. In *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212, 732 N.E.2d 952, the Ohio Supreme Court excluded the results of field sobriety tests administered to a suspect. The *Homan* Court went on to find that, even without the results of the field sobriety tests, probable cause existed to support the arrest of the suspect when the totality of the circumstances was considered. In *Homan*, the facts which supported a finding of probable cause were: red

and glassy eyes, breath which smelled of alcohol, erratic driving and an admission that the suspect had consumed alcohol.

{¶34} "In *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, the Ohio Supreme Court held that, even though the standardized procedures were not strictly followed, '[a] law enforcement officer may testify at trial regarding observations made during a defendant's performance of nonscientific standardized field sobriety tests.' *Id.*, at syllabus."

{¶35} Probable cause is a subjective determination. Officer Rowland's stop of appellant was not challenged and neither was the removal of appellant from the vehicle. Officer Rowland testified upon removing appellant from the vehicle, he smelled a strong odor of alcohol coming from appellant's breath and his eyes were glassy. T. at 12, 14. These observations triggered the administration of the field sobriety tests. Officer Rowland testified he performed these tests in substantial compliance and appellant demonstrated clues indicating intoxication. T. at 8-9.

{¶36} We find despite the lack of admissibility of the field sobriety tests as addressed in Assignment of Error I, Officer Rowland articulated factors that he believed led to probable cause to arrest. We find his observations were sufficient to substantiate probable cause and indicated more than a hunch or a guess by the officer.

{¶37} Upon review, we find the trial court did not err in finding the officer had probable cause to arrest appellant for driving under the influence.

{¶38} Assignment of Error II is denied.

{¶39} The judgment of the Massillon Municipal Court of Stark County, Ohio is hereby affirmed in part and reversed in apart.

By Farmer, J.

Edwards, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ John W. Wise

JUDGES

SGF/sg 0210

