

[Cite as *State v. Smith*, 2010-Ohio-3041.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

GREGORY SMITH

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 09 CA 118

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 09 CR 109

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

June 29, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Wise, J.

{¶1} Appellant State of Ohio appeals the decision of the Licking County Common Pleas Court, which granted Appellee Gregory R. Smith's motion to suppress evidence in a drug possession case.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 6, 2009, Appellee Gregory R. Smith was indicted by the Licking County Grand Jury on one count of Aggravated Possession of Drugs, in violation of R.C. §2924.11(A)(C)(1)(a), a felony of the fifth degree.

{¶3} This charge resulted from analysis of a urine sample collected from Appellee while he was incarcerated at the county jail, pursuant to a search warrant issued on December 13, 2008.

{¶4} According to the return receipt, the urine sample was collected by Deputy B. Smith of the Licking County Sheriff's Office at 7:11 p.m. on December 13, 2008.

{¶5} A request for laboratory analysis submitted to the Ohio State Highway Patrol Crime Laboratory by Det. Blin stated that he took possession of the sample on December 13, 2008, at 9:30 p.m. and Criminalist Deanna Nielson received it into her custody on January 5, 2009, at 2:00 p.m. Chemical analysis of the sample was performed on January 21, 2009, with a report being prepared the same day.

{¶6} According to the urinalysis, Appellee's urine contained 208.63 ng/ml of amphetamines and 369.77 ng/ml of methamphetamines.

{¶7} On June 9, 2009, Appellee filed a motion to suppress the results of a urine test, which was the basis of the aforementioned charge, claiming that the urine had not been collected in substantial compliance with the Department of Health regulations.

{¶18} On June 12, 2009, Appellant State of Ohio filed a responsive motion asserting that the police do not need to comply with the Department of Health regulations when collecting urine in drug possession cases.

{¶19} On September 23, 2009, the trial court held a hearing on Appellee's motion to suppress. At said hearing, the State of Ohio chose not to call any witnesses, stating:

{¶10} "It's a matter of law, Your Honor. If this Court is going to rule against the State as a matter of law, that's the Court's discretion. But with regards to presumption, the defense claim is that the Ohio Department of Administration Code applies to non-OMVI cases; we're saying it does not. I don't think it's necessary to call witnesses. It's simply a matter of law for the Court to decide whether or not it does apply." (T. at 4).

{¶11} At the hearing, and by Judgment Entry filed September 24, 2009, the trial court ruled that Appellant State of Ohio had failed to demonstrate that the urine was collected in an appropriate manner and the urine results were suppressed.

{¶12} On September 25, 2009, the State of Ohio filed its notice of appeal which included a certification as required by Crim.R. 12(K).

ASSIGNMENT OF ERROR

{¶13} "I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE."

I.

{¶14} In its sole Assignment of Error, Appellant State of Ohio argues the trial court erred in granting Appellee's motion to suppress the evidence. We agree.

{¶15} 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. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this third 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 the given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726.

{¶16} We initially note under Crim.R. 47, a motion to suppress “shall state with particularity the grounds upon which it is made.” The State's burden of proof in a motion to suppress hearing is limited to those contentions that are asserted with sufficient particularity to place the prosecutor and court on notice of the issues to be decided. *Johnstown v. Jugan* (Apr. 24, 1996), Licking App. No. 95CA90, 1996 WL 243805. Failure of the defendant to adequately raise the basis of his challenge constitutes a waiver of that issue on appeal. *City of Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218-219, 524 N.E.2d 889; See also *State v. Kennedy*, Tusc. App. No. 2008 AP 04 0026, 2009-Ohio-1398.

{¶17} In the case sub judice, Appellee alleged in its motion to suppress that the State did not substantially comply with Ohio Adm.Code 3701-53-05, which governs the collection and handling of urine specimens, because (1) there was no indication in the documents submitted by the State that the collection of the sample was witnessed by

anyone other than the deputy who collected it; (2) the chain of custody documentation showed that more than two hours had passed between the time the sample collected and the time Det. Bline took possession; (3) twenty three days passed from the time Det. Bline took possession of the sample to when the OSP Crime Lab received the sample; and (4) no evidence was supplied that the sample was refrigerated when the sample was not in transit or being analyzed. (Appellee's Motion to Suppress, filed June 9, 2009).

{¶18} OAC 3701-53-05 provides as follows:

{¶19} "Collection and handling of blood and urine specimens

{¶20} "(A) All samples shall be collected in accordance with section 4511.19, or section 1547.11 of the Revised Code, as applicable.

{¶21} "(B) When collecting a blood sample, an aqueous solution of a non-volatile antiseptic shall be used on the skin. No alcohols shall be used as a skin antiseptic.

{¶22} "(C) Blood shall be drawn with a sterile dry needle into a vacuum container with a solid anticoagulant, or according to the laboratory protocol as written in the laboratory procedure manual based on the type of specimen being tested.

{¶23} "(D) The collection of a urine specimen must be witnessed to assure that the sample can be authenticated. Urine shall be deposited into a clean glass or plastic screw top container which shall be capped, or collected according to the laboratory protocol as written in the laboratory procedure manual

{¶24} "(E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:

{¶25} “(1) Name of suspect;

{¶26} “(2) Date and time of collection;

{¶27} “(3) Name or initials of person collecting the sample; and

{¶28} “(4) Name or initials of person sealing the sample.

{¶29} “(F) While not in transit or under examination, all blood and urine specimens shall be refrigerated.”

{¶30} Revised Code §4511.19(D) requires that the analysis of bodily substances be conducted in accordance with methods approved by the Ohio Director of Health, as prescribed in Ohio Administrative Code regulations. *State v. Raleigh*, Licking App.No. 2007-CA-31, 2007-Ohio-5515, ¶ 40.

{¶31} A related section, R.C. §3701.143, states:

{¶32} “For purposes of sections 1547.11, 4511.19, and 4511.194 of the Revised Code, the director of health shall determine, or cause to be determined, techniques or methods for chemically analyzing a person's whole blood, blood serum or plasma, urine, breath, or other bodily substance in order to ascertain the amount of alcohol, a drug of abuse, controlled substance, metabolite of a controlled substance, or combination of them in the person's whole blood, blood serum or plasma, urine, breath, or other bodily substance. ***.”

{¶33} The Ohio Supreme Court has held that absent a showing of prejudice by the defendant, rigid compliance with ODH regulations is not required as such compliance is not always humanly or realistically possible. *State v. Plummer* (1986), 22 Ohio St.3d 292, 294, 490 N.E.2d 902. See, also, *State v. Morton* (May 10, 1999), Warren App.No. CA98-10-131.

{¶34} These administrative code sections and the above cases, however, involve and are limited to OMVI cases in violation of R.C. §4511.19 and prosecutions of aggravated vehicular homicide pursuant to R.C. §1547.11, where proof of a violation of R.C. §4511.19(A) is an element. The crime in the case before the trial court was one of aggravated drug possession, not a vehicular offense.

{¶35} While we acknowledge that the Department of Health regulations governing techniques or methods for chemically analyzing bodily substances in order to ascertain the amount of alcohol or a drug of abuse are designed to ensure the accuracy of test results, we cannot find any such regulations that set forth a procedure for the collection, storage and analysis of bodily fluids in drug possession cases or non-OMVI cases. While consistent lab procedures are preferable, this matter is best left for the legislative branch.

{¶36} As the only issues raised by Appellee in his motion to suppress were violations of the Ohio Administrative Code, which we have found are inapplicable in the instant case, we find that the trial court's determination that the State failed to present evidence that the urine sample was taken in an appropriate manner was in error as Appellant did not have the burden on this issue.

{¶37} We therefore find that the motion to suppress was improperly granted in this matter. Appellant's sole Assignment of Error is sustained.

{¶38} For the reasons stated in the foregoing opinion, the judgment of the Common Pleas Court, Licking County, Ohio, is reversed and remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

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