[Cite as *State v. Whitt*, 2010-Ohio-3761.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 10-CA-3
CRAIG C. WHITT	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Municipal Court, Case No. 09TRC8516
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 11, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
TRICIA MOORE 40 West Main Street Newark, OH 43055	ROBERT E. CALESARIC 35 South Park Place, Ste. 150 Newark, OH 43055

Gwin, P.J.

{¶1} Defendant-appellant Craig C. Whitt appeals the November 19, 2010 Judgment Entry of the Licking County Municipal Court overruling his motion to suppress evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On August 23, 2009, appellant was involved in a one-vehicle motorcycle accident. He was charged by a traffic citation on the same day for OVI in violation of RC 4511.19(A)(1)(a) and (f), No operator's license in violation of RC 4510.12, and Failure to Maintain reasonable control in violation of RC 4511.202.

{¶3} On October 9, 2009 appellant filed a motion to suppress in the trial court. A hearing was held on the motion on November 19, 2009. The following evidence was presented at the hearing on appellant's motion to suppress.

{¶4} Virgil Harris observed the accident. Mr. Harris testified that appellant had struck his head. Mr. Harris thought appellant was dead at the scene. Other witnesses to the accident made calls to the authorities.

{¶5} Trooper Ronald Schneider of the Ohio State Highway Patrol testified that, by the time he arrived at the scene of the accident, appellant had been transported to the hospital. Trooper Schneider estimated the time of the accident at 11:14 a.m. He completed the accident report and then went to the hospital to speak with appellant.

{¶6} Trooper Schneider spoke with appellant at Licking Memorial Hospital. However, after being read his Miranda Rights, appellant declined to answer any questions about the accident. Trooper Schneider then cited appellant for OVI. Trooper Schneider read and showed appellant a copy of the Ohio Bureau of Motor Vehicles

Form 2255, the so-called implied consent form. Appellant was advised that he would receive a ninety (90) day suspension of his driver's license if the chemical test to determine the amount of alcohol in appellant's bloodstream came back with a positive test result, but a one year suspension if he refused to submit to the test.

{¶7} Appellant testified that he submitted to the blood test because he was advised that he would have his license suspended for one year if he refused. The test was requested at 1:23 p.m. and drawn at 1:29 p.m.

{¶8} By Judgment Entry filed November 19, 2009, the trial court denied appellant's Motion to Suppress. On January 4, 2010, appellant entered a plea of "No Contest" to the charges and was found guilty.

{¶9} On January 5, 2010, appellant filed the instant appeal, assigning the following errors:

{¶10} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE COURT MADE FACTUAL FINDINGS THAT APPELLANT WAS NOT ARRESTED FOR OVI AS REQUIRED PRIOR TO REQUESTING A CHEMICAL TEST BUT THEN DID NOT EXCLUDE SAID TEST RESULT TAKEN AND OBTAINED PURSUANT TO AN IMPLIED CONSENT REQUEST.

{¶11} "II. WHERE ACTUAL CONSENT WAS GIVEN AFTER BEING ADVISED OF IMPLIED CONSENT PURSUANT TO R.C. 4511.191 AND 4511.192 AND WHERE THE OFFICER IMPROPERLY ADVISED APPELLANT OF CONSEQUENCES AND PENALTIES THAT WERE NOT APPLICABLE RENDER THE VOLUNTARY CONSENT INVOLUNTARY .

I.

{¶12} Appellant claims the trial court erred in denying his motion to suppress. We agree. Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 20030-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of Trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1; *State v. Medcalf* (1996), 111 Ohio App.3d 142, 675 N.E.2d 1268. However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539; See, generally, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review *Ornelas*, supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶13} In the case at bar, the trial court found the following: [appellant] wasn't arrested he was charged, but not arrested…. [However], the [appellant] freely and

voluntarily gave his consent to the…Trooper to have the blood drawn (inaudible) his testimony that he thought he had only one option…" (T. at 77).

{¶14} Appellant argues that his consent to the blood draw was coerced in that he was advised by the Trooper via the reading of BMV 2255 implied consent form that his driver's license would be suspended for one year as a consequence of refusal to submit to the blood draw. Appellant argues that the provisions of R.C. 4511.191 are not applicable unless he was validly arrested. *State v. Risner,* (1977), 55 Ohio App.2d 77, 379 N.E.2d 262. Arrest occurs when four elements are present: (1) an intent to arrest, (2) under real or pretended authority, (3) accompanied by actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested. *State v. Darrah* (1980), 64 Ohio St.2d 22.

{¶15} Appellee concedes the correctness of appellant's argument citing this Court's decision in *State v. Kirschner,* Stark App. No. 2001CA00107, 2001-Ohio-1915. In *Kirschner* this Court noted*, "*However, Ohio Bureau of Motor Vehicles Form 2255 includes the provision that an officer must read to the alleged offender a passage that specifically states that the offender is under arrest. Revised Code § 4511.191 provides: "(A) Any person who operates a vehicle upon a highway or any public or private property used by the public for vehicular travel or parking * * * shall be deemed to have given consent to a chemical test or tests of the person's blood * * * for the purpose of determining the alcohol * * * content of the person's blood * * * if arrested for operating a vehicle while under the influence of alcohol * * * or for operating a vehicle with a prohibited concentration of alcohol in the blood, breath, or urine." (Emphasis added.)

{¶16} "The Court of Appeals for the Seventh District in *State v. Rice* (1998), 717 N.E.2d 351, held that: 'Consent to a blood test is not voluntarily given where the officer was unable to conduct field sobriety tests at the scene or at the hospital, and where motorist "consented" to having his blood drawn only after officer told him that she was going to order the procedure and only after the officer read the motorist the implied consent form, which included information as to the consequences of his failure to consent to the draw.'

{¶17} "The Rice court went on to hold:

{¶18} "'The language of R.C. 4511.191 specifically provides that an arrest is necessary, and, throughout the additional sections accompanying this statute, reference is repeatedly made to "the person under arrest" and the "arresting officer." It would be absurd to conclude from Form 2255 that its language is sufficient to "imply" arrest, which is then sufficient to "imply" consent to draw body fluids from this implied arrestee. The mandatory statutory language, coupled with the legislative intent behind the statute and the Risner and Bustamonte cases, leads this court to hold that a valid arrest must precede the seizure of a bodily substance, including a blood draw, and must precede an implied consent given based upon Form 2255'. Id.

{¶19} "Upon review, we join the Seventh District and find the trial court erred in denying Appellant's motion to suppress…" *Kirschner*, supra at 2-3.

{¶20} In the instant case, the trial court specifically found that there was no arrest of appellant. As an appellate court, we are bound to accept factual determination of the trial court made during the suppression hearing so long as they are supported by

competent and credible evidence. The state concedes that the trial court's findings are supported by competent credible evidence.

{¶21} Accordingly, appellant's first assignment of error is sustained. In light of our disposition of appellant's first assignment of error, we find appellant's second assignment of error is moot.

{¶22} For the foregoing reasons, the judgment of the Licking County Municipal Court is reversed and appellant's conviction vacated. This case is remanded to the trial court for further proceedings in accord with the law and consistent with this opinion.

By Gwin, P.J., and

Delaney, J., concur;

Hoffman, J., concurs

separately

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY

WSG:clw 0729

Hoffman, J., concurring

{¶23} I generally concur in the majority's analysis and disposition of Appellant's assignments of error. My only disagreement is the majority's conclusion we are bound to accept the trial court's determination Appellant was not under arrest as a factual determination. (Majority Opinion at ¶20). I believe the status of being under arrest is a legal conclusion based upon the various facts in evidence. As such, I believe this Court reviews that legal conclusion under a de novo standard.

{¶24} However, because I agree with the trial court's conclusion Appellant was not under arrest, based upon the facts of this case, I concur in the majority's decision to reverse Appellant's conviction.

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HON. WILLIAM B. HOFFMAN

[Cite as *State v. Whitt*, 2010-Ohio-3761.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CRAIG C. WHITT	:	
Defendant-Appellant	:	CASE NO. 10-CA-3

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Municipal Court is reversed and appellant's conviction vacated. This case is remanded to the trial court for further proceedings in accord with the law and consistent with this opinion. Costs to appellee.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY