

[Cite as *State v. Murphy*, 2010-Ohio-4523.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT L. MURPHY

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 10-COA-001

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Ashland Municipal Court,
Case No. 2009CRB00791

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 22, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Robert L. Murphy appeals the October 23, 2009 Judgment Entry of the Ashland County Municipal Court overruling his motion to suppress evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On October 21, 2009, Fred Pryor, who lived at 525 ½ West 15th Street, Ashland, Ohio, heard a crash outside of his residence. Pryor observed a car off the roadway and a “smashed fence” on the property of Leonard Quinn at 1506 North Myers Street, Ashland, Ohio.

{¶3} Pryor saw a person standing near the driver’s side of the car. At the suppression hearing in this matter, Pryor identified that person as Appellant. Pryor testified Appellant “walked off” from the scene of the accident, and then returned stating “it looks like somebody had a car accident.” Appellant subsequently walked away again.

{¶4} Pryor testified he assisted another person on the passenger side of the vehicle, who later also left the scene of the accident.

{¶5} Neighbors called the Ashland Police Department, and informed the officers the occupants of the car had left the scene. The alleged driver was described as a white male wearing a white t-shirt and jeans. Upon the arrival of a police cruiser, Pryor used his flashlight to spotlight Appellant as he was walking down the road.

{¶6} Patrolman Brian Kunzen of the Ashland Police Department approached Appellant as he was walking on the street. Subsequently, Kunzen placed Appellant under arrest.

{¶17} Appellant was charged in case number 09 TRC 02585 with operating a vehicle while intoxicated, failure to stop after an accident and failure to control. Appellant was charged in case number 09 CRB 00791 with possession of marijuana.

{¶18} Appellant filed a motion to suppress. Following a hearing on the motion, the trial court overruled the motion via Judgment Entry of October 23, 2009.

{¶19} On December 2, 2009, Appellant entered pleas of no contest to the charges, and was sentenced accordingly.

{¶10} Appellant now appeals, assigning as error:

{¶11} "I. DEFENDANT WAS DENIED DUE PROCESS FO [SIC] LAW WHEN THE COURT OVERRULED THE MOTION TO SUPPRESS."

{¶12} 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 the findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue that 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 judgment of the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141. 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 that 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, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 620 N.E.2d 906; *Guysinger*. As the United States Supreme Court held in *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911, “[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal.”

{¶13} In *Terry v. Ohio* (1968), 392 U.S. 1, 22, 88 S.Ct. 1868, 20 L.Ed.2d 889, the United States Supreme Court determined that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.” However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 21, 88 S.Ct. 1868. Such an investigatory stop “must be viewed in the light of the totality of the surrounding circumstances” presented to the police officer. *State v. Freeman* (1980), 64 Ohio St.2d 291, 18 O.O.3d 472, 414 N.E.2d 1044, paragraph one of the syllabus.

{¶14} An investigatory detention is more intrusive than a consensual encounter, but less intrusive than a formal custodial arrest. The investigatory detention is limited in duration and purpose and can only last as long as it takes a police officer to confirm or to dispel his suspicions. *Terry*, *supra*. A person is seized under this category when, in view of all the circumstances surrounding the incident, by means of physical force or

show of authority a reasonable person would have believed that he was not free to leave or is compelled to respond to questions. * * * ” (Citations omitted.) *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-748, 667 N.E.2d 60.

{¶15} The record demonstrates as Officer Kunzen approached Appellant, he observed a urine stain on the front of Appellant’s pants, red, glassy, bloodshot eyes and detected a strong odor of alcohol. Appellant was unsteady on his feet. Kunzen ultimately placed Appellant under arrest and conducted a search incident to the arrest. At some point, Kunzen observed a motor vehicle key drop from Appellant’s person. The key matched the vehicle make of the car involved in the accident. Kunzen did not advise Appellant of his Miranda rights prior to the search. As a result of the search, Kunzen found marijuana on Appellant’s person. Appellant admitted to Kunzen he had consumed alcohol.

{¶16} Officer Kunzen testified on direct examination at the suppression hearing,

{¶17} “A. He was walking between the street and the sidewalk. And that, I don’t know that there is a sidewalk or a curb section of the street really.

{¶18} “Q. Okay. And what did you do when you came upon him? What did you do?

{¶19} “A. I exited my car, got out with him, identified him. Asked him his name and if he had any ID on him.

{¶20} “Q. When you approached him, did you immediately place him in detention or did you ask him simple questions?

{¶21} “A. No, just was asking questions. Who he was, where he was coming from, where he lived.

{¶22} “Q. Did you detain him in any way?

{¶23} “A. Not at that time, no.

{¶24} “Q. Okay. Was he responding to you, giving name and that information?

{¶25} “A. It became immediately apparent that he was under the influence of alcohol.

{¶26} “Q. Why do you say that?

{¶27} “A. I observed him. He had what appeared to be a urine stain on the front of his pants. Red, glassy, blood shot eyes, odor of alcohol very strong on him, very unsteady on his feet. I could see as I was, as I was approaching him, even before I exited my car.

{¶28} “Q. Okay. And did he respond to your questions? Did he answer the questions you were asking?

{¶29} “A. He was slightly evasive. He just said that - - he was acting like he had come out to see what was going on, even though he was walking away from the crash. He had told me that he was going back home. I asked him where home was. He gave me several answers. He said he lived on 15th street. Also said he lived in West Salem, I believe. Another address out in the county I believe.

{¶30} “Q. Okay.

{¶31} “A. Not very clear as to where he was going to.

{¶32} “Q. Did you have any conversation with him about the crash then?

{¶33} “A. I asked him if he was, had anything to do with the crash. If he was the driver, passenger, saw anything, knew anything about the crash. He denied knowing

anything about it. He said he just came out of his house on 15th Street somewhere, I believe 417 West 15th Street. He said he was staying there.

{¶34} “Q. And based upon your training and experience, then, you felt that he was under the influence at that point.

{¶35} “A. At that point, once I started asking him about the crash I actually watched him drop the key to the car on the ground and step away from it. At which point, I started questioning him more about the crash. And he, again, never got clear answer about it.

{¶36} “Q. He actually dropped a key on the ground at that point?

{¶37} “A. Yeah, he was holding it in his hands.

{¶38} “Q. Did you pick that key up and?

{¶39} “A. I observed it. It was a vehicle key. It wasn't, didn't look like a house key or anything. I believe it said Toyota on it. It's the kind of car he was driving. So I did pick that up. And I believe I placed him under arrest at that time.

{¶40} “Q. Well, let me get this straight. You pick this key up and it said Toyota on it, and that matched the type of vehicle that had crashed.

{¶41} “A. Correct.

{¶42} “Q. Okay. Based upon all this, based upon your observations of him matching the description of one of the persons leaving the scene of the accident, your observation of him being under the influence of alcohol, and the fact that he had a key to the vehicle, then what did you do?

{¶43} “A. I determined that he was probably the driver of the vehicle, at least an occupant of the vehicle. Knew something more at that time than he was telling me. Holding the key, I assumed at that time he was the driver of the vehicle.

{¶44} “Q. Okay. What did you do?

{¶45} “A. I placed him under arrest at that time.

{¶46} “Q. When you placed him under arrest, did you, what did you do at that point then? Did you have anything further - -

{¶47} “A. I advised him he was under arrest for operating a vehicle under the influence of alcohol. He was handcuffed at that time, placed - - well searched, and placed into the back of my cruiser.

{¶48} “Q. Did you advise him of his Miranda Rights at that point?

{¶49} “A. No, not for OVI.

{¶50} “Q. Okay. What did you do at that point then?

{¶51} “A. I searched him. I believe he had a cigarette pack in his pocket, I believe they were Basic cigarettes which contained three marijuana joints in it. And he was arrested at that time.

{¶52} “I believe I Mirandised him at that point once he had, once I discovered the narcotics.

{¶53} “Q. Did you have any conversation or more conversation with him about the accident or the narcotics or the OVI?

{¶54} “A. Once he was in the back of my car, we were on the way to the jail. I continued to ask him questions; he wasn't answering most of them. At one point he

said he might have information for me. He might know who else was in the car if I would let him bond out, or if I would release him without bond at the jail.

{¶55} “Q. Did he make any admissions about driving the vehicle, the marijuana, or anything else?”

{¶56} “A. I believe he said the marijuana wasn’t his. He never stated that he was driving the vehicle. He admitted that he knew something about a vehicle and a passenger in a vehicle which he would tell me about if I were to release him.

{¶57} “Q. Okay.

{¶58} “A. And that was the end of the conversation.

{¶59} “Q. And again, just so we’re clear, the indications or the observations you made that led you to believe that this person, this Defendant, was under the influence of alcohol, what’s the (inaudible) again?”

{¶60} “A. The odor of alcohol on his person, the red glassy bloodshot eyes, he was unsteady on his feet, urine stain on the front of his pants, obvious indication that he was intoxicated, impaired, or under the influence.

{¶61} “Q. And those are all things that you’re trained to look for in (inaudible) somebody is under the influence of alcohol?”

{¶62} “A. Through my training and experience, that is the signs of somebody who is under the influence.

{¶63} “Q. Okay. Did you factor in your consideration when you arrested him that this person matched the description of one of the occupants - -

{¶64} “Ms. Blazef: Objection, leading the witness.

{¶65} “The Court: Overruled. Motion hearing.

{¶166} “By Mr. Hunter:

{¶167} “Q. Did you factor in your decision prior to your arrest that this person matched the description of one of the persons walking away from the vehicle?

{¶168} “A. Yes.

{¶169} “Q. And the fact that he had the key to the vehicle in his possession?

{¶170} “A. Yes.

{¶171} “Q. Thank you.”

{¶172} Tr. at 25-32.

{¶173} On cross-examination, the following exchange occurred on the record:

{¶174} “Q. You’re taught to write down all pertinent important information in that report, correct?

{¶175} “A. Correct.

{¶176} “Q. And have you reviewed that report before testifying here today?

{¶177} “A. Yes, I did.

{¶178} “Q. And I believe you’ve been asked questions about the key, when you found this key, when you arrested him for the OVI.

{¶179} “A. Uh-huh.

{¶180} “Q. I believe your testimony here today was that you made a decision to arrest my client after you saw glassy, bloodshot eyes?

{¶181} “A. Uh-huh.

{¶182} “Q. The urine stain, he was unsteady on his feet, the odor of alcohol, and the key, correct?

{¶183} “A. Correct.

{¶184} “Q. Okay. And that key was a pretty important factor in you making the decision to arrest him. That tied him to a car; is that correct?”

{¶185} “A. Correct.”

{¶186} “Q. Okay. Well, is it fair to say that in your report that you wrote after he was unsteady on his feet that you placed him under arrest for OVI. And that as you were putting him in handcuffs, he dropped the key on the ground?”

{¶187} “A. Correct.”

{¶188} “Q. So you actually didn’t know that he had the key at the time that you arrested him for the OVI. Is that correct? Would you care to (inaudible) the police report?”

{¶189} “A. That’s correct.”

{¶190} “Q. And your testimony here today was you (inaudible) you knowing about the key before arresting him; is that what you’re saying?”

{¶191} “A. Not completely. I would say I would typically detain somebody for OVI. So he was being detained, if nothing else, to be brought to the scene for witnesses. He was being placed in handcuffs at that time.”

{¶192} “Q. My specific question is, The testimony here today was that you made the decision to arrest him after and including the fact that you saw a key that tied him to that car. Is that correct?”

{¶193} “A. No, it was including the key. Not just because of the key. No.”

{¶194} “Q. Including the key. That was one of the factors that you used - -

{¶195} “A. One of the many factors, yes.”

{¶196} “Q. Okay. And that is not what you put in your police report. Would you like to take a look at this or do you recall what - -

{¶197} “A. I recall - -

{¶198} “Q. Okay. So my question was - -

{¶199} “A. - - after you reminded me.

{¶100} “Q. - - that your testimony here today was incorrect. That you did not make the decision to arrest him, including the fact that he really had a key. You only knew he had a key after you handcuffed him and it fell to the ground. That’s in the police report. Is that correct?

{¶101} “A. He was being placed into handcuffs regardless whether the key was there or not.

{¶102} “Q. You had made the decision to arrest him without the key. That’s what I’m trying to ask you, Officer. That’s what - -

{¶103} “A. He was being detained if nothing else, correct.

{¶104} “* * *

{¶105} “Q. You arrested him for OVI.

{¶106} “A. Correct.

{¶107} “Q. But you at that point in time when you arrested him you had absolutely zero proof that he was driving a car at all that evening?

{¶108} “A. There were several factors which played a part in the arrest of the OVI including the key.

{¶109} “Q. Okay. But the key, we’ve already discussed, you did not find until after you handcuffed him and arrested him. So without the key you had nothing linking him

as a driver to a vehicle that evening when you made the decision to arrest him; is that correct?

{¶1110} "A. No. If I might add - -

{¶1111} "Q. Go ahead.

{¶1112} "A. - - to that. The registration on the vehicle returned to the address of which he told me he was going back to. So I connected the car to the address that he says he is staying at. So, I mean, I connected him to the car in that way before the key as well.

{¶1113} "Q. Okay. Well you connected him to the car, but you didn't have proof he was driving the car, correct?

{¶1114} "A. No.

{¶1115} "Q. Okay. Bloody black shot - - or what it is?

{¶1116} "A. Glassy bloodshot eyes.

{¶1117} "Q. Glassy bloodshot eyes. Thought he had urinated himself.

{¶1118} "A. It appeared so.

{¶1119} "Q. And a strong of alcohol - - strong odor of alcohol. Those were the factors you used in making the decision to arrest him. You never once asked him to take a field sobriety test.

{¶1120} "A. I believe I had probable cause with all the indicators that I had."

{¶1121} Tr. at 33-35; 44-46.

{¶1122} At the conclusion of the suppression hearing, the trial court stated on the record:

{¶123} “The Court: All right, there is some authority that I can’t cite, but some authority that presence at the scene of an accident in an intoxicated state is probable cause in and of itself.

{¶124} “Here we have other officers providing information to Officer Kunzen to connect him to this accident. His evasive answers would certainly enter into that. There’s adequate impairment of unsteadiness on his feet and red, glassy eyes, the odor of alcohol, the slurred speech, the urine stain. And his admission that he drank is enough to, certainly probable cause to arrest for OVI. And I think a very sufficient connection with the accident to justify the arrest for probable cause on the OVI. And the fact that there are no field sobriety tests does not change anything. I’m finding that there is no Miranda issue here.

{¶125} “So I am going to overrule the motion.”

{¶126} Tr. at 51-52.

{¶127} The trial court did not make a specific finding as to whether Officer Kunzen observed the key drop prior to placing Appellant under arrest. However, Kunzen’s testimony at the suppression hearing, albeit confusing and at times facially contradictory, fails to affirmatively establish the key drop was observed prior to his arrest. Rather, the arrest was based upon Appellant’s proximity to the vehicle in question, an odor of alcohol, urine on the front of his pants and glassy, bloodshot eyes.

{¶128} We disagree with the trial court’s conclusion presence at the scene of an accident while in an intoxicated state provides probable cause to arrest for OMVI. We know of no case law so holding, nor has Appellee directed us to any. Without more, we

would conclude while it was reasonable to suspect Appellant was the driver of the vehicle involved in the accident, his formal arrest was premature.

{¶129} However, in addition to the foregoing, Officer Kunzen's testimony connected the registration of the vehicle involved in the accident to the address where Appellant claimed to be residing. While neither party chose to bring this fact to this Court's attention in their briefs, we find it significant. The fact Appellant stated he was going home to the same address listed on the vehicle registration, along with Pryor's identification of Appellant standing at the driver's side of the vehicle following the crash, Appellant's demeanor and evasiveness, strong odor of alcohol and apparent urine stain on the front of his pants while walking away from the site of the accident provided sufficient grounds to establish probable cause for Appellant's arrest in this matter.

{¶130} The October 23, 2009 Judgment Entry of the Ashland County Municipal Court is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Farmer, J. concur

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

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

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

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

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT L. MURPHY

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 10-COA-001

For the reasons stated in our accompanying Opinion, the October 23, 2009
Judgment Entry of the Ashland County Municipal Court is affirmed. Costs to Appellant.

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

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

s/ Sheila G. Farmer
HON. SHEILA G. FARMER