[Cite as *State v. Draper*, 2010-Ohio-6592.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

KATHERINE DRAPER

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 10 CA 29

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Municipal Court, Case No. 09 TRC 10368

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 27, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Wise, J.

{¶1} Appellant Katherine R. Draper appeals her convictions on one count of Failure to Control and one count of Operating a Vehicle Under the Influence of Alcohol and/or a Drug of Abuse entered in the Fairfield County Municipal Court following a jury trial.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} On October 31, 2009, at approximately midnight, Ohio State Highway Patrol Trooper Donald Ward was dispatched to a one-car accident on Rt. 664 in Rushcreek Township in Fairfield County, Ohio. Upon arriving on the scene, Trooper Ward observed Appellant's vehicle laying on its right side in the middle of the roadway. It was Trooper Ward's testimony that he could tell that the vehicle had been driven off the right side of the roadway, up an embankment, and through some trees before rolling over and coming to rest. Trooper Ward located the driver of the vehicle, Appellant Katherine R. Draper, in the Bremen Emergency Squad where she was being evaluated for injuries. Appellant Draper refused transport to the hospital. At this time Trooper Ward requested that she sit in the front seat of his patrol car and complete a crash statement.

{¶4} Appellant wrote in her statement that she fell asleep at the wheel and flipped her vehicle. Trooper Ward stated that during this interaction with Appellant, he noticed a strong odor of alcohol on Appellant's breath. Based on the accident and the odor of alcohol, Trooper Ward read Appellant her rights and questioned her about her alcohol consumption. Appellant admitted to consuming two bottles of Smirnoff and also to taking Hydrocodone earlier in the evening.

{¶5} Trooper Ward requested that Appellant perform field sobriety tests, which resulted in Trooper Ward observing six clues on the horizontal gaze nystagmus test (HGN), two clues on the vertical gaze nystagmus test (VGN), four of eight clues on the walk and turn test (WAT) and two of four clues on the one leg stand test (OLS). Appellant was also asked to recite the alphabet from C to Q which she did complete after asking for additional instructions.

{¶6} Based on the foregoing, Trooper Ward placed Appellant under arrest for OVI and Failure to Control. When Trooper Ward attempted to place the handcuffs on Appellant she protested, stating that he was not going to arrest her. After further conversation, Appellant was handcuffed and placed in the back of the patrol car where she removed her handcuffs twice. Upon being told that she was going to be taken to jail, Appellant complained that her back hurt and that she wanted the ambulance to return and take her to the hospital.

{¶7} Appellant then requested that the ambulance transport her to Zanesville for insurance reasons. The squad ultimately took her to Fairfield Medical Center, where she refused to submit to a blood or urine test.

{¶8} On November 4, 2009, Appellant appeared for her arraignment in the Fairfield County Municipal Court and entered pleas of "not guilty" to the charges. Appellant also petitioned the trial court for a court-appointed attorney at this time and was denied.

{¶9} On April 27, 2009, a jury trial was held on the OVI charge and the failure to control charge was tried to the bench. Appellant was found guilty on both counts.

{¶10} Appellant now appeals such verdicts.

{¶11} Initially, we must begin by noting that Appellant has failed to comply with App.R. 16., which provides:

{¶12} "(A) Brief of the appellant

{¶13} "The appellant shall include in its brief, under the headings and in the order indicated, all of the following:

{¶14} "(1) A table of contents, with page references.

{¶15} "(2) A table of cases alphabetically arranged, statutes, and other authorities cited, with references to the pages of the brief where cited.

{¶16} "(3) A statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected.

{¶17} "(4) A statement of the issues presented for review, with references to the assignments of error to which each issue relates.

{¶18} "(5) A statement of the case briefly describing the nature of the case, the course of proceedings, and the disposition in the court below.

{¶19} "(6) A statement of facts relevant to the assignments of error presented for review, with appropriate references to the record in accordance with division (D) of this rule.

{¶20} "(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

{¶21} "(8) A conclusion briefly stating the precise relief sought."

{¶22} Appellant's brief does not satisfy the majority of the requirements of App.R. 16, not the least of which it does not present this Court with a stated assignment of error. Such deficiency is tantamount to the failure to file a brief. Although this Court has the authority under App.R. 18(C) to dismiss an appeal for failure to file a brief, we shall not do so here.

{¶23} Appellant has, however, set forth the following "Statement of the Issues":

{¶24} 1. Defendant's Attorney James Dye did not request or present medical records of defendant's injury received from accident.

{¶25} 2. Trooper Ward did not follow NHTSA guidelines for SFST.

{¶26} 3. SFST video inadmissible because of appellant's injuries from accident and NHTSA guidelines not followed.

I.

{¶27} Based on the foregoing issues and the arguments presented in support thereof, we find that Appellant is making a claim for ineffective assistance of counsel.

{¶28} Our standard of review is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and whether counsel violated any of his or her essential duties to the client.

{¶29} If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such

that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* at 141-142. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie,* 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267.

{¶30} Appellant herein argues that her defense counsel was ineffective failing to introduce her medical records, failing to file a motion to suppress challenging the introduction of the field sobriety tests and failure to object to the introduction of the videotape of the field sobriety tests.

{¶31} Upon review, we find defense counsel's failure to introduce Appellant's medical records could have been trial strategy. As stated by Appellee in its brief, it is possible that such records may not have supported Appellant's claimed injuries or that such records could have provided further proof of Appellant's alcohol and/or hydrocodone levels.

{¶32} We likewise find that counsel's failure to object to the videotape could also have been a trial tactic in so much as counsel attempted to use the video to highlight Appellant's lack of coordination in removing her boots, in an attempt to controvert Trooper Ward's testimony. Counsel also used the video to bring to light those parts of the tests that Appellant successfully performed.

{¶33} Finally, Appellant also seems to be arguing that Appellant's counsel was ineffective for failing to file a motion to suppress based on the argument that Trooper Ward failed to strictly comply with NHTSA guidelines as required by *State v. Homan* (2000), 89 Ohio St.3d 421.

{¶34} As stated by this Court in *State v. Cline,* Licking App. No. 09CA52, 2009-Ohio-6208, at ¶ 19:

{¶35} "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."

{¶36} In *State v. Homan* (2000), 89 Ohio St.3d 421, 732 N.E.2d 952, the Supreme Court of Ohio held that in order for the field sobriety tests to serve as evidence of probable cause to arrest, such tests must be performed in strict compliance with the procedures promulgated by the NHTSA.

{¶37} However, R.C. §4511.19(D)(4)(b), effective April 9, 2003, provides in pertinent part:

{¶38} "(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:

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

{¶40} "(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.

{¶41} "(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."

{¶42} The Supreme Court of Ohio recognized that under this amended version of R.C. §4511.19(D)(4)(b), "the arresting officer no longer needs to have administered field sobriety tests in strict compliance with testing standards for the test results to be admissible at trial." *State v. Schmitt,* 101 Ohio St.3d 79, 801 N.E.2d 446, 2004-Ohio-37, at ¶ 9. Rather, an officer may now testify concerning the results of a field sobriety test administered in substantial compliance with the testing standards. *Id.* Additionally, "HGN test results are admissible in Ohio without expert testimony so long as the proper foundation has been shown both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering

the test." *State v. Boczar,* 113 Ohio St.3d 148, 863 N.E.2d 155, 2007-Ohio-1251, at ¶ 27.

{¶43} This Court has previously held that field sobriety tests must be administered in substantial compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered. *Homan*, supra. Further, the Ohio Supreme Court has made clear that the officer may testify regarding observations made during a defendant's performance of standardized field sobriety tests even absent proof of "strict compliance." *State v. Schmitt* (2004), 101 Ohio St.3d 79, 84, 2004-Ohio-37 at ¶ 15, 801 N.E.2d 446, 450.

{¶44} In the instant case, Trooper Ward testified that he has been employed with Ohio State Highway Patrol for thirteen (13) years, that he is certified in the administration of standardized field sobriety test and that he has administered such tests countless times.

{¶45} Further, the record reflects that based upon the one car accident and Appellant's strong odor of alcohol combined with her admission of consuming alcohol and hyrdrocodone, there was sufficient competent, credible evidence apart from the field sobriety tests that Appellant was under the influence of alcohol and drugs.

{¶46} Upon review, we find that Appellant has failed to demonstrate a reasonable probability a motion to suppress would have been granted based upon the record before us.

{¶47} Further, Appellant has failed to demonstrate prejudice as a result of any alleged deficiency in trial counsel's representation.

{¶48} Appellant's Assignment of Error is overruled.

{¶49} For the reasons stated in the foregoing opinion, the judgment of the Municipal Court of Fairfield County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 1215

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KATHERINE DRAPER	:	
Defendant-Appellant	:	Case No. 10 CA 29

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Fairfield County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES