[Cite as *State v. Holbrook*, 2017-Ohio-2972.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. 16-CA-61
	:	
BRYAN HOLBROOK	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Municipal Court, Case No. 16-TRC-2369

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: May 8, 2017

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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Delaney, P.J.

{¶1} Appellant Bryan Holbrook appeals from the July 28, 2015 Judgment of Conviction of the Licking County Municipal Court. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the record of appellant's jury trial before the Licking County Municipal Court. Appellee introduced a video of the traffic stop as State's Exhibit 1.

{¶3} This case arose on March 20, 2016 around 2:30 a.m. in Union Township, Delaware County when Trooper Jarrod Myers of the Ohio State Highway Patrol observed a blue Ford Explorer drifting in its lane. Myers described the vehicle as "bouncing back and forth" in the lane. He pulled up for a closer look while the vehicle was still in a 35-mile-per-hour zone and observed three distinct lane violation clues in which the Explorer touched the yellow center line.

{¶4} As the Explorer entered a 55-mile-per-hour zone, it sped up to 65 miles per hour. Myers activated his radar and paced the vehicle at 66 miles per hour for one mile. During this time the Explorer continued to drift in its lane, touching the center line and the fog line multiple times. Myers observed a distinct left-of-center violation just past Canal Road and initiated a traffic stop. The Explorer continued a short distance before stopping, longer than average in Myers' estimation.

{¶5} Myers radioed dispatch to advise of the stop and approached the Explorer on the driver's side. He identified appellant as the driver and sole occupant of the vehicle. Appellant's window was down upon Myers' approach and the trooper

noticed a strong odor of an alcoholic beverage emanating from the vehicle. Myers asked appellant why he was speeding and appellant apologized. Myers requested his operator's license, registration, and proof of insurance; appellant produced those items and a police I.D. card. Myers asked appellant how much he had to drink and appellant responded a "few beers." Appellant's eyes were bloodshot and glassy. Myers asked when he last had something to drink and appellant did not answer. Myers apologized and told appellant he would have to ask him to exit the vehicle to be "checked." Myers testified he felt uncomfortable because appellant had shown the police I.D. and Myers was aware he was investigating a police officer.[1] However, based upon the clues he had already observed, Myers felt he had no choice but to investigate further.

{¶6} Appellant took longer than average to exit the vehicle and "just sat there" for a few moments.

{¶7} Myers proceeded to administer a series of standardized field sobriety tests, beginning with the horizontal gaze nystagmus test (H.G.N.). Appellant had difficulty following the stimulus and kept moving his head, requiring Myers to re-start portions of the test. Myers observed a lack of smooth pursuit in each eye, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus prior to 45 degrees. In other words, Myers noted six out of a possible six clues of impairment.

[1] Testimony later established appellant had retired as deputy chief of the Bexley Police Department a few days before and was due to be rehired the following Monday.

{¶8} Myers moved on to administer the walk-and-turn test; appellant moved his feet to keep balance. After Myers' instructions and demonstration of the test were complete, appellant paused and stated he didn't want to complete the test. Myers decided not to offer the one-leg stand test. Instead, he asked appellant to complete a divided attention test by stating the alphabet from D to W. Appellant said D, D, F, G, H, and then A to Z, which Myers deemed a failure of the test. He asked appellant to count backward from 69 to 57 and appellant stopped at 55.

{¶9} Throughout the investigation, Myers noted a strong odor of an alcoholic beverage from appellant's breath; glassy, bloodshot eyes; and difficulty in listening to and following instructions. Appellant twice told Myers "I really appreciate what you're doing" and Myers responded appellant put him in a difficult position because he didn't want to arrest a police officer.

{¶10} Myers based the decision to arrest appellant upon a number of factors cited at trial leading Myers to conclude appellant was impaired: erratic driving including his observation of the Explorer drifting, touching the center line multiple times, speeding, and the left-of-center violation; the odor of an alcoholic beverage upon his approach to the vehicle and from appellant's breath; appellant's glassy, bloodshot eyes and admission of drinking; his slow exit from the vehicle; his inability to follow instructions; the 6 out of a possible 6 clues on the H.G.N. test; and the failure on the alphabet test.

{¶11} When Myers asked appellant to turn around to place him under arrest, appellant fell backwards.

{¶12} Myers placed appellant in his cruiser and Mirandized him. The Explorer was registered to the city of Bexley and arrangements were made for someone to pick up the vehicle and to give appellant a ride.

{¶13} Myers read the B.M.V. 2255 form to appellant, advising him of the consequences of failure to submit to a chemical test, including a one-year suspension of the operator's license. Appellant refused a breath test and Myers advised him of his right to get an independent test.

{¶14} Shortly thereafter someone picked appellant up and claimed the Explorer, which was registered to the city of Bexley.

{¶15} Appellant was charged by Uniform Traffic Ticket with one count of O.V.I. pursuant to R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree, and one count of speeding pursuant to R.C. 4511.21, a minor misdemeanor. Appellant entered pleas of not guilty and appealed his administrative license suspension. A hearing was held on April 8, 2016, and the appeal was denied. Appellant appealed to this court from the trial court's decision overruling the A.L.S. appeal, and we affirmed in *State v. Holbrook*, 5th Dist. Licking No. 16 CA 0029, 2016-Ohio-5302.

{¶16} Appellant did not file a motion to suppress.

{¶17} On July 26, 2017, appellee filed a motion in limine stating defense trial counsel sent Myers a "packet of documents * * * concerning case studies, articles, and opinions from other states concerning the reliability of the [H.G.N.]" indicating appellant planned to present the documents at trial. Appellee moved to exclude introduction of this material as a general attack on the unreliability of a standardized field sobriety test. The record does not contain a written response by

appellant. On July 27, 2016, the trial court granted appellee's motion by judgment entry, stating an attack on the general reliability of the H.G.N. is not consistent with R.C. 4511.19(D)(4)(b) and the proper method of challenging the admissibility of evidence of the H.G.N. would have been a motion to suppress. Ultimately, the trial court held: "It is the ruling of the Court that [appellant] may not challenge the *general* reliability of an H.G.N. test. [Appellant] may conduct cross-examination to challenge whether the test *in this case* was properly conducted to explore what weight the jury should give to it. (Emphasis in original)."

{¶18} The matter proceeded to trial by jury. Appellee presented the testimony of Myers and the videotape of the stop. Appellant testified on his own behalf and presented several witnesses who interacted with him on the night of the arrest who testified he was not impaired. At the conclusion of the trial, appellant made the following proffer:

> * * *. While I respect The Court's ruling, relative to [the prosecutor's] novel argument to repress and suppress my cross-examination of this Trooper relative to the H.G.N. and the science underpinning the H.G.N., I would have questioned him about the articles we sent, tests that are critical of the H.G.N., jurisdictions that don't allow it, and I would have fully attacked the science underpinning [H.G.N.] had I been so permitted. Thank you.
>
> T. 255.

{¶19} Appellant entered a plea of guilty to the speeding offense and was found guilty as charged upon the O.V.I. The trial court sentenced appellant to, e.g., a term of 30 days in jail with 27 suspended on the condition that appellant complete a 3-day driver intervention program.

{¶20} Appellant now appeals from the trial court's judgment entry of conviction and sentence, incorporating the entry of July 27, 2016 granting appellee's motion in limine.

{¶21} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶22} "THE TRIAL COURT ERRED BY RESTRICTING DEFENSE COUNSEL'S QUESTIONING OF THE TROOPER REGARDING THE HGN IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND CONFRONTATION UNDER THE UNITED STATES AND OHIO CONSTITUTIONS."

ANALYSIS

{¶23} Appellant argues the trial court should not have "restricted" his potential cross examination of the trooper about the scientific underpinning of the H.G.N. We disagree with appellant's characterization of the trial court's decision and with his legal arguments arising therefrom.

{¶24} The admission or exclusion of relevant evidence is a matter left to the sound discretion of the trial court. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore*, 9 Ohio St.2d

122, 128, 224 N.E.2d 126 (1967). We further note that a trial court's ruling upon a motion in limine "is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue" and "finality does not attach when the motion is granted." *State v. Grubb*, 28 Ohio St.3d 199, 201–02, 503 N.E.2d 142 (1986), citing *State v. White*, 6 Ohio App.3d 1, at 4, 451 N.E.2d 533 (8th Dist.1982). The trial court is at liberty to reconsider the ruling if circumstances arise at trial that further reflect upon the admissibility of the disputed evidence.

{¶25} In this case, appellant made no attempt to address the admissibility of the disputed evidence at trial. We note that Trooper Myers' testimony about the H.G.N. was not challenged with any "scientific" evidence in any form, nor is it clear to us from the record what this purported evidence would have consisted of. Although appellant made a proffer at the end of the trial, he only generally cited documentation of articles "critical of the H.G.N." Any such articles have not been made part of the record for our review, thus we refer generally to appellant's "scientific challenge" to the H.G.N. The trial court's ruling excluding appellant's "scientific challenge" to the H.G.N. was not unduly restrictive and was in accordance with R.C. 4511.19(D)(4)(b), which states in pertinent part:

> In any criminal prosecution * * * for a violation of [R.C. 4511.19(A)], 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:
>
> (i) The officer may testify concerning the results of the field sobriety test so administered.
>
> (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.
>
> (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.

{¶26} It is well-established that “a properly qualified officer may testify at trial regarding a driver's performance on the HGN test as to the issues of probable cause to arrest and whether the driver was operating a vehicle while under the influence of alcohol,” although appellee may not attempt to extrapolate from that testimony a potential alcohol concentration level of the driver to prove an O.V.I. offense. *State v. Bresson*, 51 Ohio St.3d 123, 130, 554 N.E.2d 1330 (1990).

{¶27} In the instant case, there is no evidence Myers failed to administer the H.G.N. in substantial compliance with the N.H.T.S.A. testing standards because appellant did not file a motion to suppress. Appellee presented Myers’ testimony

about the H.G.N. in accordance with the guidelines of R.C. 4511.19(D)(4)(b) and did not attempt to extrapolate appellant's potential alcohol concentration level.

{¶28} We need not reach the merits of the parties' arguments as to the scientific reliability of the H.G.N., or the applicability of *Vega* to standardized field sobriety tests, because we are unwilling to find the trial court abused its discretion in granting the motion in limine on this record.[2] Appellant never raised his "scientific challenge" during trial and the proffer described the purported evidence in only the vaguest terms.

{¶29} The trial court's decision on appellee's motion in limine does not constitute a violation of appellant's rights to confrontation and due process, and his sole assignment of error is overruled.

[2] In *State v. Vega,* the Ohio Supreme Court held an accused may not make a general attack upon the reliability and validity of the breath testing instrument. 12 Ohio St.3d 185, 190, 465 N.E.2d 1303 (1984) (per curiam).

CONCLUSION

{¶30} Appellant's sole assignment of error is overruled and the judgment of the Licking County Municipal Court is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Hoffman, J., concur.