

[Cite as *State v. Whitty*, 2010-Ohio-5847.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-100101
		C-100102
Plaintiff-Appellant,	:	TRIAL NOS. C-09TRC-15859A
		C-09TRC-15859B
vs.	:	
JAMES WHITTY,	:	<i>DECISION.</i>
Defendant-Appellee.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed from Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 3, 2010

Joseph T. Deters, Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellant,

Robert P. Hastings, Jr., Hamilton County Public Defender, for Defendant-Appellee.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} The state of Ohio appeals from the order of the Hamilton County Municipal Court granting defendant-appellee James Whitty’s motion to suppress for lack of probable cause. Because we hold that the officer had probable cause to arrest Whitty for operating a vehicle under the influence of alcohol (“OVI”) in violation of R.C. 4511.19(A)(1)(a), we reverse.

{¶2} Blue Ash Police Officer Jun Cho arrested Whitty for OVI following a traffic stop for an equipment violation. Before the arrest, Cho noticed that Whitty had an odor of alcohol on his breath, that his eyes were bloodshot and watery, and that Whitty had mumbled and spoken with slurred speech. Moreover, Whitty had admitted to consuming alcohol before driving his car. Whitty also performed poorly on two field sobriety tests—the horizontal gaze nystagmus (“HGN”) test and the walk-and-turn test—but he performed the one-leg-stand test as instructed. After his OVI arrest, Whitty submitted to a breath-alcohol-content (“BAC”) test, which showed a concentration of .128 grams by weight of alcohol per 210 liters of breath, which was above the legal limit of .08. As a result, Cho charged Whitty with the separate offense of violating R.C. 4511.19(A)(1)(d).

{¶3} Whitty filed a motion to suppress the state’s evidence, including the arresting officer’s observations, the field sobriety test results, and the BAC results. His motion challenged the legal basis for the stop, the detention, and the arrest. He also alleged that the field sobriety tests had not been administered in compliance with standardized testing procedures and that, because of this, evidence of his performance on the tests could not serve as evidence of probable cause to arrest or be admitted as evidence of guilt at trial.

{¶4} At the suppression hearing, Whitty narrowed the trial court’s inquiry to whether there was “probable cause to arrest.”

{¶5} Cho testified at the suppression hearing. In addition, a recording of the stop was shown during cross-examination, but the recording was not admitted into evidence. In determining the facts for the probable-cause inquiry, the trial court found that Cho had not conducted the HGN test in substantial compliance with National Highway Transportation Safety Administration (NHTSA) testing standards. As a result, the court found that the HGN test results were “inadmissible.”

{¶6} With respect to the walk-and-turn and one-leg-stand tests, the court found that these tests were conducted in substantial compliance with NHTSA testing standards. But the court found also that Whitty had an ankle injury that may have affected his ability to perform the walk-and-turn test. Because of this ankle injury, the court determined that, before administering the test, Cho should have inquired further about the effect of the injury on Whitty’s ability to perform the test so the court could assess whether the test result and Cho’s observations could be considered reliable for determining probable cause. The court concluded that evidence concerning the test was “inadmissible” because Cho had administered the test without making this inquiry.

{¶7} Based on the remaining historical facts, the court found that Cho had lacked probable cause to arrest for the OVI offense. The remaining historical facts are the following: the traffic stop was initiated because of an equipment violation; Cho had experience investigating individuals who might have been operating motor vehicles under the influence of alcohol and drugs of abuse; Whitty exhibited an “unspecified” odor of alcohol emanating from his breath; Whitty admitted that he had consumed alcohol before driving his car; Whitty’s eyes were bloodshot and watery; Whitty mumbled and spoke with slurred speech; Whitty did not exhibit any

difficulty in producing identification; and Whitty performed the one-leg-stand test as instructed.

{¶8} The state raises three assignments of error in this appeal. It argues that the trial court erred by (1) “suppress[ing]” the results of the HGN test; (2) “suppress[ing]” the results and observations of Whitty’s walk-and-turn test; and (3) determining that Cho had lacked probable cause to arrest for OVI, where the historical facts found to exist before the administration of any field sobriety tests, and even more so after, met the legal standard for probable cause.

{¶9} With respect to the first two assignments of error, the state argues that the trial court erred when it “suppressed” the evidence related to the field sobriety tests because Whitty withdrew all challenges to the field sobriety tests before the suppression hearing. Our interpretation of the state’s argument is that the court “suppressed” this evidence for trial purposes.

{¶10} In response, Whitty argues that the state misreads the trial court’s decision. According to him, the trial court merely found the HGN test results and walk-and-turn-test-related testimony unreliable for determining probable cause and that the trial court’s use of the word “inadmissible” was limited to this context. He acknowledges that he was not seeking to suppress the results of the field sobriety test results.

{¶11} Our review of the record indicates that Whitty withdrew his challenge to the admissibility at trial of the prearrest evidence of the offenses, including the field sobriety test results. But Whitty never withdrew his argument that the arresting officer had lacked probable cause to arrest.

{¶12} As presented in the written suppression motion, Whitty’s probable-cause challenge attacked the reliability of the field sobriety test results due to alleged defects in the administration of the tests. Thus, the reliability of these tests remained

an issue for the trial court at the suppression hearing. The trial court's use of the term "inadmissible" in its decision, though imprecise and misleading, must be viewed in this context.

{¶13} We conclude that the trial court did not suppress the evidence related to the field sobriety tests. Thus, the state's first and second assignments of error are not supported by the record. Accordingly, we overrule them.

{¶14} In its third assignment of error, the state contends that the trial court erred by granting the motion to suppress because Cho had probable cause to arrest Whitty even without the results of Whitty's HGN and walk-and-turn tests, as well as Cho's observations of Whitty during those tests. Alternatively, the state contends that the trial court erroneously failed to consider this evidence as indicia of intoxication during its probable-cause inquiry.

{¶15} The legal standard for determining whether a law enforcement officer had probable cause to arrest an individual for OVI is whether, "at the moment of the arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence."¹ This is an objective standard, not a subjective one.²

{¶16} Our review of the trial court's findings of fact and legal conclusions entails a two-step inquiry. First, this court must review the trial court's findings of the historical facts only for clear error, "giving due weight to inferences drawn from those facts" by the trial court and local police officers.³ Next, accepting those properly supported facts as true, we must determine as a matter of law, without

¹ *State v. Homan*, 89 Ohio St.3d 421, 427, 2000-Ohio-212, 732 N.E.2d 952, superseded by statute on other grounds as recognized in *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E.2d 155.

² *State v. Deters* (1998), 128 Ohio App.3d 329, 333, 714 N.E.2d 972.

³ *Ornelas v. United States* (1996), 517 U.S. 690, 699, 116 S.Ct. 1657; see, also, *Deters*, supra, at 334.

deference to the trial court's conclusion, whether they met the applicable legal standard for probable cause to arrest.⁴ Importantly, in making our probable-cause determination, we look to the totality of the circumstances to confirm whether the arresting officer had a reasonable ground for a belief that an offense had been committed.⁵

{¶17} We find no clear error in the trial court's factual findings not related to the HGN and walk-and-turn tests. But assuming that the trial court's findings related to the HGN and walk-and-turn tests were also supported by the evidence, we disagree with the trial court's legal conclusion on the issue of probable cause.

{¶18} During the investigative stop of Whitty's vehicle, Cho observed several indicia of intoxication with respect to Whitty, including an odor of alcohol that emanated from his breath, bloodshot and watery eyes, and mumbled and slurred speech. And Whitty told Cho that he had consumed alcohol before driving. These facts and circumstances, when considered as a whole, would have justified an objectively reasonable officer in believing that Whitty had been driving under the influence of alcohol.⁶

⁴ Id.

⁵ *Maryland v. Pringle* (2003), 540 U.S. 366, 371-372, 124 S.Ct. 795; *Homan*, supra, at 427.

⁶ See, e.g., *Homan*, supra (evidence of erratic driving, red and glassy eyes, odor of alcohol on breath, and admission of alcohol consumption provided probable cause to arrest); *Cincinnati v. Bryant*, 1st Dist. No. C-090546, 2010-Ohio-4474 (evidence of backing out of one-way street, moderate odor of alcohol on person, slightly slurred speech, watery and glazed eyes, apparent confusion and clumsiness, and admission of alcohol consumption provided probable cause to arrest); *State v. Lopez*, 1st Dist. Nos. C-020516 and C-020517, 2003-Ohio-2072 (evidence of driving 26 m.p.h. over the speed limit and strong odor of alcohol on breath, bloodshot eyes, and admission of alcohol consumption provided probable cause to arrest); *State v. Jacobs*, 1st Dist. Nos. C-010279, C-010280, and C-010281, 2001-Ohio-4031 (evidence of abruptly pulling away from the curb without properly signaling, odor of alcohol on breath, slurred speech, bloodshot and glassy eyes, and repeated fumbling for license provided probable cause to arrest); *State v. Sims* (Oct. 26, 1991), 1st Dist. Nos. C-010178 and C-010179 (evidence of failure to stop at stop sign, strong odor of alcohol about person, admission of alcohol consumption, and watery and bloodshot eyes provided probable cause to arrest); *Deters*, supra (evidence of erratic operation of a watercraft, slurred speech, odor of alcohol, and admission of recent alcohol consumption provided probable cause to arrest); *State v. Tonne* (Sept. 24, 1999), 1st Dist. No. C-980710 (evidence of red, watery eyes, the odor of alcohol on the breath, the presence of empty beer cans in the car, and swaying back and forth provided probable cause to arrest); *State v. Denlinger* (Feb. 2, 1983), 1st Dist. No. C-820252 (evidence of odor of alcohol on the breath, glassy eyes, slurred speech, and admission to consuming four drinks provided probable cause to arrest).

{¶19} We hold, therefore, that there was sufficient evidence to establish probable cause to arrest, even without consideration of the evidence concerning the HGN and walk-and-turn tests. Accordingly, we sustain the third assignment of error.

{¶20} Consequently, we reverse the trial court's judgment and remand this case for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., HENDON and MALLORY, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.