[Cite as *State v. Shuck* , 2010-Ohio-2058.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA12
	:	
vs.	:	**Released: May 5, 2010**
	:	
JOSHUA M. SHUCK,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for Defendant-Appellant.

Roland W. Riggs, III, Marietta City Law Director, and Mark C. Sleeper, Marietta City Assistant Law Director, Marietta, Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Defendant-Appellant, Joshua M. Shuck, appeals the decision of the Marietta Municipal Court denying his motion to suppress the results of his breath alcohol concentration ("BAC") test. Shuck argues the trial court erred in 1) treating his motion to suppress as a motion in limine; and 2) denying the motion to suppress when the BAC test was administered outside the three-hour time limit imposed by R.C. 4511.19. For the reasons stated below, we overrule both assignments of error and affirm the decision of the trial court.

I. Facts

{¶2} During the early morning hours, while driving from a friend's home to his girlfriend's, the appellant, Joshua Shuck, wrecked his car by driving it into a mailbox post. Gary Hasley, residing near the scene of the accident, was preparing to leave for work when he heard the crash. Hasley went to the scene and briefly spoke with Shuck. After determining that Shuck was uninjured, Hasley drove on to work. Shuck left the site of the accident on foot and was soon afterward picked up by the Highway Patrol.

{¶3} The Highway Patrol officer detected a strong odor of alcohol coming from Shuck. And after Shuck demonstrated all six clues of the Horizontal Gaze Nystagmus test, he was placed under arrest. At 7:51 a.m., Shuck was given a BAC test and his breath alcohol level registered at .087. He was subsequently charged with operating a vehicle while under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a), and operating a vehicle with a prohibited breath-alcohol concentration, in violation of R.C. 4511.19(A)(1)(d).

{¶4} Seeking to suppress the BAC test results, Shuck filed a motion entitled "Motion in Limine/Motion to Suppress." The basis for the motion was that, according to Shuck, his test results were inadmissible because he had not been given the BAC test within three hours of the

accident, as required by R.C. 4511.19(D). After a full hearing, the trial court denied the motion and the matter proceeded to trial. The jury found Shuck not guilty on the first charge, operating a vehicle while under the influence of alcohol, but guilty on the second charge, operating a vehicle with a prohibited breath-alcohol concentration.

{¶5} Following sentencing, Shuck timely filed the current appeal, arguing the trial court erred in denying his "Motion in Limine/Motion to Suppress."

II. Assignments of Error

First Assignment of Error

> THE TRIAL COURT ERRED IN TREATING APPELLANT'S MOTION TO SUPPRESS THE RESULTS OF A BREATH-ALCOHOL TEST IN A PROSECUTION UNDER R.C. 4511.19(A)(1)(D) AS A MOTION IN LIMINE.

Second Assignment of Error

> THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS, IN FINDING THAT THE BREATH TEST WAS CONDUCTED WITHIN THREE HOURS OF APPELLANT'S OPERATION OF HIS VEHICLE, AND THEREFORE ADMISSIBLE TO PROVE THE PER SE OFFENSE.

III. First Assignment of Error

{¶6} In his first assignment of error, Shuck argues that the trial court erred in treating his motion to suppress the results of his BAC test as a motion in limine. As previously stated, Shuck's motion was entitled

"Motion in Limine/Motion to Suppress." The motion states that Shuck "requests the Court for an Order in Limine, or in the alternative an Order suppressing the chemical test results because they were not withdrawn or taken within the time limits, as prescribed under O.R.C. §4511.19(D)." No other differentiation is made between the two types of motions.

{¶7} Shuck argues that the following statements, made by the trial court in denying the motion, demonstrate that the court improperly treated the motion as a motion in limine:

{¶8} "And Mr. Hasley as you heard him testify, called his sister-in-law on his cell phone. If it should turn out that the Court is wrong by anybody looking at his cell phone records, I'm sure that is information that would be provided to you, and then the Court could of course, at that point correct any error that was made."

{¶9} "But at this time, your motion is denied. I find the time of the accident to be around 5:05, and the test was taken within the three hours."

{¶10} Motions to suppress and motions in limine generally serve separate, distinct functions. In *State v. French*, 72 Ohio St.3d 446, 1995-Ohio-32, 650 N.E.2d 887, the Supreme Court of Ohio defined the two motions and explained their roles:

{¶11} "A 'motion to suppress' is defined as a '[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the * * * U.S. Constitution. (Internal citation omitted.) Thus, a motion to suppress is the proper vehicle for raising constitutional challenges based on the exclusionary rule * * *. Further, this court has held that the exclusionary rule will not ordinarily be applied to suppress evidence which is the product of police conduct that violates a statute but falls short of a constitutional violation, unless specifically required by the legislature. (Internal citation omitted.) An important characteristic of a motion to suppress is that finality attaches so that the ruling of the court at the suppression hearing prevails at trial and is, therefore, automatically appealable by the state." Id. at 449.

{¶12} In contrast, a motion in limine is a pretrial motion that seeks to prohibit the other party from referring to, or offering into evidence, material that is so prejudicial that curative instructions to the jury would be inadequate. The purpose of the motion is to keep matters that are irrelevant, inadmissible, and prejudicial out of the consideration of the jury. Id. "A ruling on a motion in limine reflects the court's anticipated treatment of an evidentiary issue at trial and, as such, is a tentative, interlocutory, precautionary ruling. Thus, 'the trial court is at liberty to change its ruling

on the disputed evidence in its actual context at trial. Finality does not attach when the motion is granted.'" Id. at 450, quoting *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 4, 573 N.E.2d 32.

{¶13} "Confusion and inaccuracy may arise, however, because a motion in limine may be used in two ways. It may be used as a preliminary means of raising objections to evidentiary issues to prevent prejudicial questions and statements until the admissibility of the questionable evidence can be determined outside the presence of the jury. It may also be used as the functional equivalent of a motion to suppress evidence that is either not competent or improper due to some unusual circumstance not rising to the level of a constitutional violation." Id.

{¶14} The *French* Court went on to state that though challenges to the admissibility of chemical tests, based on Ohio Department of Health regulations, might not raise constitutional issues, "[t]he traditional distinction between a motion to suppress based upon a constitutional challenge and a motion in limine does not work as a bright-line rule where the motion to suppress is directed to breathalyzer test results based on a failure to comply with ODH regulations." Id., quoting *Defiance* at 4. As such, the Court found that a motion to suppress was the proper vehicle to challenge issues concerning the requirements of R.C. 4511.19(A)(1) through

(4). "[T]he Ohio Supreme Court held that a defendant must use a motion to suppress in order to contest the admissibility of blood alcohol test results on foundational grounds that relate to compliance with the directives of the Director of Health." *State v. Wang*, 5th Dist. No. 2007CAC090048, 2008-Ohio-2144, at ¶11.

{¶15} "The determination of whether a motion is a 'motion to suppress' or a 'motion in limine' does not depend on what it is labeled. It depends on the type of relief it seeks to obtain." *State v. Massie*, 2nd Dist. No. 2007 CA 24, 2008-Ohio-1312, at ¶10, quoting *State v. Davidson* (1985), 17 Ohio St.3d 132, 135, 477 N.E.2d 1141. In the case sub judice, and regardless of how it was captioned, Shuck's motion to exclude the results of his BAC test because of an alleged failure to comply with the three-hour time limit was a motion to suppress, not a motion in limine. As such, when the trial court denied the motion to suppress, finality attached. Despite any conditional language the trial court may have used, because the court was ruling on a motion to suppress, not a motion in limine, the ruling was neither tentative, interlocutory, nor precautionary. Accordingly, Shuck's first assignment of error is overruled.

IV. Second Assignment of Error

{¶16} In his second assignment of error, Shuck more directly challenges the trial court's decision. He argues that the trial court's determination, that the BAC test was administered at approximately 5:05 a.m., within three hours of the accident, was not supported by the evidence. Before proceeding to the merits of the argument, we first state that appropriate standard of review.

{¶17} An appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. In a motion to suppress, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594, 621 N.E.2d 726. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488, 597 N.E.2d 1141.

{¶18} During the suppression hearing, Shuck and the prosecution presented two very different timelines. Shuck's version is predicated upon calls he made the morning of the accident. His cell phone records show that he placed phone calls that morning at 4:39 a.m., 4:43 a.m., and 5:08 a.m. Shuck claims that he made the 4:39 a.m. phone call immediately after the accident occurred. Accordingly, in Shuck's version, the accident necessarily took place at least twenty minutes before five a.m. Because it is undisputed that the BAC test was administered at 7:51 a.m., under Shuck's timeline, the three-hour time limit imposed by R.C. 4511.19 would have expired before he was given the test.

{¶19} In contrast, the prosecution based its timeline upon the testimony of Gary Hasley. Hasley, who heard the accident as he was getting ready to leave for work, stated that it occurred sometime around 5:10 a.m. Hasley testified that he knew this because he had to be at work at six a.m., and for the past six years he had left his home for work at approximately ten minutes after five. Hasley further testified that, on the day in question, he was getting ready to open the door of his car and leave for work when the accident occurred. After briefly speaking with Shuck, Hasley drove on to work. And he testified that he arrived at work at the usual time that day.

{¶20} When asked if it was possible that the accident had occurred around 4:40 a.m., as Shuck claimed, Hasley stated that it was not:

{¶21} Q.: "You're absolutely sure?"

{¶22} A.: "I never leave at twenty minutes till five in the morning."

{¶23} Though he did not look at a clock and, thus, was not aware of the exact time of the incident, he adamantly stated that it happened after five a.m. "I'm sure it was after five o'clock." Under Hasley's version of events, the BAC test would have been administered well within the three-hour time limit.

{¶24} In a hearing on a motion to suppress, the trial court acts as the finder of fact. As such, it is in the best position to resolve questions of fact and evaluate witness credibility. After a thorough review of the record below, and based upon Hasley's impartial testimony, we find that there was competent and credible evidence for the trial court's decision. And because there was such competent, credible evidence, we are bound to accept the trial court's findings of fact on the issue of when the accident occurred. As the court found that the accident occurred at 5:05 a.m., Shuck was tested within the three-hour time limit imposed by R.C. 4511.19(D). Accordingly, his second assignment of error is also overruled.

V. Conclusion

{¶25} In our view, because the trial court was ruling on a motion to suppress, not a motion in limine, finality attached to the decision. As such, Shuck's first assignment of error has no merit. Further due to Hasley's testimony, we find the trial court had competent and credible evidence upon which to base its decision. Accordingly, we overrule both assignments of error and affirm the decision of the court below.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.