

[Cite as *State v. Russo*, 2009-Ohio-6914.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF MEDINA    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No.     09CA0009-M

Appellee

v.

ANTHONY L. RUSSO

APPEAL FROM JUDGMENT  
ENTERED IN THE  
MEDINA MUNICIPAL COURT  
COUNTY OF MEDINA, OHIO  
CASE No.     08 TRC 06330

Appellant

DECISION AND JOURNAL ENTRY

Dated: December 30, 2009

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CARR, Presiding Judge.

{¶1} Appellant, Anthony Russo, appeals the judgment of the Medina Municipal Court which denied his motion to suppress. This Court affirms.

I.

{¶2} On July 20, 2008, Russo was cited for speeding in violation of R.C. 4511.21(C), and two counts of driving while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a) and (d). Prior to trial, Russo filed a motion to suppress certain evidence. A month later, Russo filed a supplement to his motion to suppress. The State did not file any responsive briefs.

{¶3} The trial court held a hearing on the suppression motion. On December 2, 2008, the trial court issued its judgment, granting the motion in part, and denying it in part. The trial court ordered that the results of the horizontal gaze nystagmus test would be inadmissible at trial. However, it denied the motion to suppress in regard to the remaining field sobriety tests and the

chemical breath analysis. The trial court further found that the police had probable cause to arrest Russo for operating a vehicle while under the influence of alcohol.

{¶4} Pursuant to plea negotiations, Russo entered a plea of no contest to driving under the influence of alcohol pursuant to R.C. 4511.19(A)(1)(d) (prohibitive breath alcohol concentration) in exchange for dismissal of the remaining two charges. The trial court found Russo guilty and sentenced him accordingly. Russo filed a timely appeal in which he raises two assignments of error for review.

## II.

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED IN DENYING ANTHONY L. RUSSO’S MOTION TO SUPPRESS THE BREATH TEST BECAUSE SAID TEST WAS CONDUCTED PURSUANT TO AN UNLAWFUL WARRANTLESS ARREST FOR WHICH THE ARRESTING OFFICERS LACKED PROBABLE CAUSE TO EFFECTUATE, IN CONTRAVENTION OF THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION AND OHIO CONSTITUTION ARTICLE I, SECTION 14.”

{¶5} Russo argues that the trial court erred by denying his motion to suppress the breath test because the police lacked probable cause to arrest him. This Court disagrees.

{¶6} “The review of a motion to suppress presents a mixed question of fact and law for an appellate court.” *State v. Farris*, 9th Dist. No. 03CA0022, 2004-Ohio-826, at ¶7, quoting *State v. Long* (1998), 127 Ohio App.3d 328, 332. This Court must accept the trial court’s factual determinations made during the suppression hearing, so long as they are supported by competent and credible evidence. *Farris* at ¶7; *State v. Robinson* (Oct. 25, 2000), 9th Dist. No. 19905. This Court, however, must review the trial court’s application of the law to those facts de novo. *Farris* at ¶7; *State v. Searls* (1997), 118 Ohio App.3d 739, 741. Moreover, “this Court reviews a

probable cause determination de novo.” *State v. Sunday*, 9th Dist. No. 22917, 2006-Ohio-2984, at ¶28, citing *State v. Salas*, 9th Dist. No. 21891, 2004-Ohio-6274, at ¶17.

{¶7} As a preliminary matter, we note that Russo does not challenge the propriety of the initial traffic stop. This Court has repeatedly recognized that “[a]n officer may stop a vehicle to investigate a suspected violation of a traffic law.” *Sunday* at ¶29, quoting *Akron v. Tomko* (Nov. 3, 1999), 9th Dist. No. 19253. Russo does not dispute that Sgt. Bruce Linville of the Hinckley Township Police Department stopped him for speeding. Accordingly, the initial traffic stop was not improper.

{¶8} Russo’s argument on appeal is that, if this Court concludes that the field sobriety tests are not admissible for purposes of establishing probable cause, then the State has failed to meet its burden of proving that, under a totality of the facts and circumstances as they existed at the time of the arrest, Sgt. Linville had probable cause to arrest him without a warrant. In effect, Russo asserts that only the results of field sobriety tests, administered in substantial compliance with standardized procedures, can support probable cause to arrest a suspect for driving under the influence of alcohol. Russo’s argument is premised on inaccurate statements of law.

{¶9} Before an officer may effectuate a warrantless arrest, he must have probable cause that the suspect is engaging in criminal activity. *State v. McGinty*, 9th Dist. No. 08CA0039-M, 2009-Ohio-994, at ¶11. An officer has probable cause to arrest a person for driving under the influence of alcohol “if, at the moment of the arrest, the totality of the facts and circumstances within the officer’s knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the suspect had violated R.C. 4511.19.” *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶17, quoting *In re V.S.*, 9th Dist. No. 22632, 2005-Ohio-6324, at ¶13.

{¶10} This Court has stated that the totality of the facts and circumstances can support probable cause for arrest even in the absence of the administration of field sobriety tests. *McGinty* at ¶20; see, also, *Kurjian* at ¶18, citing *State v. Homan* (2000), 89 Ohio St.3d 421, 427. In fact, we have held that “the totality of the facts and circumstances can support a finding of probable cause to arrest even when the results of the field sobriety tests must be excluded for lack of compliance to standardized procedures.” *Sunday* at ¶32, citing *Akron v. Buchwald*, 9th Dist. No. 21433, 2003-Ohio-5044, at ¶14. Assuming, without deciding, that the field sobriety tests were not administered in substantial compliance with the regulations, the police still had probable cause to arrest Russo.

{¶11} Sgt. Linville stopped Russo’s vehicle at approximately 2:12 a.m. on July 20, 2008. He testified that he had been a police officer for twelve years. The officer testified that when he approached Russo’s vehicle, he “immediately smelled the odor of an alcoholic beverage[,]” and noted that Russo’s eyes were “bloodshot and glossy[,]” thereby leading him to believe that Russo had been consuming alcohol that evening. He testified that, when he asked Russo whether he had consumed any alcohol that evening, Russo replied that he had had “a few” at his friend’s house.

{¶12} “Regardless of a challenge to field sobriety tests, an officer may testify regarding his observations made during administration of the tests.” *State v. Griffin*, 12th Dist. No. CA2005-05-118, 2006-Ohio-2399, at ¶11, citing *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, at ¶14-15. In addition to his observations above, Sgt. Linville testified that Russo began the one leg stand twice, putting his foot down within a few seconds each time. The officer testified that Russo swayed and lost his balance during the walk and turn test. As in *Sunday*, the totality of the facts and circumstances available to Sgt. Linville - the late hour, Russo’s bloodshot and

glossy eyes, the immediate smell of alcohol upon approach, Russo's admission to having had a few alcoholic beverages, and the officer's observations during the field sobriety tests, such as Russo's swaying – "were sufficient to warrant a prudent person in believing that the suspect had violated R.C. 4511.19." *Sunday* at ¶33; see, also *In re V.S.* at ¶13. Accordingly, even if Sgt. Linville did not administer the field sobriety tests in substantial compliance with the recognized standards, the totality of the facts and circumstances supports a finding of probable cause to arrest Russo for driving under the influence of alcohol. Russo's first assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

"THE TRIAL COURT ERRED IN DENYING ANTHONY L. RUSSO'S MOTION TO SUPPRESS THE BREATH TEST BECAUSE SAID TEST WAS NOT ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH THE REGULATIONS SET FORTH IN OAC 3701-53-04(B)."

{¶13} Russo argues that the trial court erred by denying his motion to suppress the results of the breath test because it was not administered in substantial compliance with the requirements of OAC 3701-53-04(B). This Court disagrees.

{¶14} This Court's standard of review in regard to a trial court's ruling on a motion to suppress is set forth above.

{¶15} The version of OAC 3701-53-04(A) in effect at the time relevant to this matter requires that a senior operator perform an instrument check on the breath testing instrument at least once every seven days in accordance with the appropriate instrument checklist. OAC 3701-53-04(B) requires that, before the instrument may be used to test subjects, an instrument check must be made when a new instrument is first placed in service or when the instrument is returned after service or repairs.

{¶16} In his motion to suppress, Russo generally asserted that “[a]n instrument check was not conducted at the time or in the manner required by OAC 3701-53-04(B).” On appeal, Russo asserts that the State failed to meet its burden to show substantial compliance with the regulations because it failed to present any testimony regarding whether the instrument was serviced or repaired after the previous calibration check but before the administration of the test to Russo.

{¶17} As this issue has evolved, “courts have applied a burden-shifting procedure to govern the admissibility of alcohol-test results.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶24. The *Burnside* court clarified:

“The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion waives the requirement on the state to lay a foundation for the admissibility of the test results. After a defendant challenges the validity of test results in a pretrial motion, the state has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health. Once the state has satisfied this burden and created a presumption of admissibility, the burden then shifts to the defendant to rebut that presumption by demonstrating that he was prejudiced by anything less than strict compliance.” (Internal quotations and citations omitted.) *Id.*

{¶18} In this case, Russo preserved the issue for appeal by challenging the validity of the alcohol test in a pretrial motion to suppress. Accordingly, the State assumed the burden of showing that the test was administered in substantial compliance with the OAC.

{¶19} Sgt. Linville testified that he prepared State’s Exhibit 3, which consists of his affidavit and a certified packet for the Intoxilyzer 5000, the breath testing instrument used to test Russo’s breath alcohol content on July 20, 2008. He testified that the instrument was calibrated before its first use. He averred in his affidavit that the instrument was calibrated on July 17, 2008, and again on July 21, 2008. The instrument check forms reference “Rule 3701-53-04.” Accordingly, the State presented evidence of the instrument’s timely calibration and, therefore,

met its burden to show substantial compliance with OAC 3701-53-04(B), thereby creating a presumption of admissibility of the results. The burden then shifted to Russo to demonstrate prejudice.

{¶20} On cross-examination, Russo failed to question the officer regarding whether the instrument had been removed for service or repair between its calibration on July 17, and Russo's breath test on July 20. Moreover, Russo failed to point to any facts obtained through discovery to support any allegation that the instrument may have been removed for service or repair in the interim. It was only during his closing argument that Russo for the first time asserted that the State had not presented sufficient testimony to show that there had been no repairs which would have required recalibration before his breath test. By failing to present any evidence that the instrument may have been removed for service or repair after the July 17 calibration, but before the July 20 breath test, after the State demonstrated timely calibration in substantial compliance with OAC 3701-53-04(B), Russo failed to meet his reciprocal burden of demonstrating prejudice. Russo's second assignment of error is overruled.

### III.

{¶21} Russo's assignments of error are overruled. The judgment of the Medina Municipal Court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Medina Municipal Court, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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DONNA J. CARR  
FOR THE COURT

WHITMORE, J.  
CONCURS

BELFANCE, J.  
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶22} I respectfully dissent from the majority’s resolution of the second assignment of error. We have acknowledged that analysis of “[r]esults of alcoholic concentration tests are admissible upon a showing of substantial compliance with the regulations of the administrative code.” *State v. Booth*, 151 Ohio App.3d 635, 2003-Ohio-829, at ¶13. We have also stated that “[o]nce the *state* has established substantial compliance with the administrative rules, the burden then shifts to the defendant to demonstrate that he would be prejudiced by anything less than literal compliance.” (Emphasis added.) *Id.* Thus, our precedent establishes that the State has the burden to establish substantial compliance with the administrative rules.



{¶23} In this matter, the Appellant specifically challenged the State's compliance with Ohio Adm.Code 3701-53-04(B). Ohio Adm.Code 3701-53-04(B) is not a complicated provision. It plainly states that an instrument check must be made when the instrument is either placed into service or when it is returned after service or repairs. *Id.* I agree that the trial court correctly found that the State had provided enough evidence to demonstrate that the machine had not been recently placed into service, as it had been used for several years. However, the State offered no evidence addressing the factual question as to whether the machine had been taken out for repairs between July 17, 2008 and July 20, 2008, the date the Appellant underwent the test. The majority suggests that the officer's testimony confirming calibration on July 17, 2008 and again July 21, 2008 and the introduction of two calibration records into evidence demonstrated compliance with Ohio Adm.Code 3701-53-04(B). However, although this testimony and the introduction of the records was one step in the process of establishing compliance, in my view, the State's evidence fell short of even establishing substantial compliance. In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, the Supreme Court of Ohio described substantial compliance as "de minimis" error or "minor procedural deviations." *Burnside* at ¶34, quoting *State v. Homan* (2000), 89 Ohio St.3d 421, 426. Because there was no evidence offered concerning whether the machine had undergone repair or servicing, it was impossible for the trial court to determine whether there was either full compliance with the instrument check requirement or whether there were even a minor procedural deviation from the requirements of Ohio Adm.Code 3701-53-04(B). Although the majority has attached some significance to the admission of State's Exhibit 3, which contained the officer's affidavit and two calibration forms, neither the affidavit nor the two forms provide a factual basis upon which to confirm whether or not the machine had been serviced or repaired. In order to establish

compliance with Ohio Adm.Code 3701-53-04(B), the State's witness or other evidence merely had to confirm that the machine had not been serviced or repaired at all, or if it had been serviced, that the proper instrument check was performed upon return from servicing. If the evidence established that the machine had never been serviced or repaired, then there would be no further inquiry as to whether there had been compliance with the instrument check requirement under Ohio Adm.Code 3701-53-04(B). Conversely, if the evidence established that the machine had been removed for service or repair, then the trial court would be required to consider whether there was either full or at least substantial compliance with Ohio Adm.Code 3701-53-04(B). In the alternative, the State could have asked its witness whether the records that comprised State's exhibit 3 reflected the complete servicing history of the machine during the period relevant to this matter. In such a case, the trial court could have then reasonably found that the machine had not undergone servicing in light of having the full servicing record before it. However, there was simply no evidence offered that established these basic facts. Thus, in order to arrive at the conclusion that the State demonstrated substantial compliance with Ohio Adm.Code 3701-53-04(B), the majority had to make factual assumptions that are not supported by the evidence adduced at the hearing. Accordingly, I dissent from the majority's resolution of the second assignment of error.

APPEARANCES:

VINCENT C. RUSSO, Attorney at Law, for Appellant.

ARTHUR E. FOTH, Medina City Prosecutor, for Appellee.