[Cite as *State v. Reddington*, 2015-Ohio-2890.]

<table>
<tr><td>STATE OF OHIO

COUNTY OF MEDINA</td><td>)
)ss:
)</td><td>IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT</td></tr>
<tr><td colspan="2">STATE OF OHIO

Appellant

v.

THOMAS J. REDDINGTON

Appellee</td><td>C.A. No. 14CA0064-M

APPEAL FROM JUDGMENT
ENTERED IN THE
MEDINA MUNICIPAL COURT
COUNTY OF MEDINA, OHIO
CASE No. 13 TRC 02665</td></tr>
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DECISION AND JOURNAL ENTRY

Dated: July 20, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, the State of Ohio, appeals from the entry of the Medina Municipal Court granting Defendant-Appellee, Thomas J. Reddington's, motion to suppress. For the reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} On May 15, 2013, Officer Brett Harrison of the Montville Township Police Department was on routine patrol. At approximately 8:00 p.m., he received a report from radio dispatch that a possibly impaired driver was driving westbound on Medina Road. The dispatcher reported that the vehicle in question was a black SUV with the license plate "GCOFFEE" and was making marked lane violations. Officer Harrison then stationed himself along Medina Road and waited for the vehicle.

{¶3} When the black SUV passed his location, Officer Harrison turned onto Medina Road and started following the vehicle. Officer Harrison then activated a radar device inside of

the cruiser and began pacing the black SUV. The radar device and Officer Harrison's pacing both indicated that the black SUV was driving anywhere from 35 to 37 miles per hour in a posted 25 mile per hour zone. Officer Harrison subsequently effectuated a traffic stop of the black SUV.

{¶4} Upon approaching the stopped SUV, Officer Harrison smelled the odor of an alcoholic beverage coming from within the vehicle. The driver, later identified as Thomas J. Reddington, informed the officer that he was driving home from a work function at a bar in Fairlawn. Mr. Reddington admitted to consuming three beers prior to driving home. Officer Harrison observed that Mr. Reddington's eyes were bloodshot and glossy. Officer Harrison also testified that he had to remind Mr. Reddington to hand over his insurance information, and that Mr. Reddington fumbled around with his insurance card while removing it from his wallet. Once another police officer arrived as backup, Officer Harrison instructed Mr. Reddington to exit the SUV to perform field sobriety tests.

{¶5} Officer Harrison had Mr. Reddington perform three field sobriety tests, the Horizontal Gaze Nystagmus (HGN), the Walk and Turn (WAT) test, and the One Leg Stand (OLS) test. Officer Harrison detected four clues on the HGN, four clues on the WAT test, and two clues on the OLS test. As a result of Mr. Reddington's performance on the field sobriety tests, Officer Harrison placed him under arrest.

{¶6} Mr. Reddington was charged with driving under the influence of alcohol and refusing to submit to a chemical test in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(2)(b), respectively, as well as speeding in violation of R.C. 4511.21(C). Mr. Reddington pled not guilty to all charges and filed a motion to suppress. A suppression hearing was held on January 24, 2014, where only one witness, Officer Harrison, testified. The trial

court took the matter under advisement and subsequently granted Mr. Reddington's motion to suppress on July 31, 2014.

{¶7} The State filed this timely appeal, raising four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE ERRED [SIC] AS A MATTER OF LAW AND TO THE PREJUDICE OF THE STATE OF OHIO IN FINDING THE OFFICER'S STOP OF THE DEFENDANT'S CAR WAS BASED ON THE OFFICER'S UNAIDED VISUAL ESTIMATION OF THE SPEED OF THE VEHICLE RENDERING THE TRAFFIC STOP IMPROPER.

{¶8} In its first assignment of error, the State contends that the trial court erred by granting Mr. Reddington's motion to suppress because Officer Harrison possessed at least a reasonable articulable suspicion that a traffic violation had been committed such that the traffic stop in this case was justified. We agree.

{¶9} The Ohio Supreme Court has articulated the standard of review in suppression cases as follows:

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning*, 1 Ohio St.3d 19 (1982). Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

State v. Burnside, 100 St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶10} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Article I, Section 10 of the Ohio Constitution protect

individuals from unreasonable searches and seizures. The United States Supreme Court established the basic standard for reviewing the propriety of a traffic stop through its holdings in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Delaware v. Prouse*, 440 U.S. 648 (1979). Under this standard, "a law enforcement officer may stop a vehicle when the officer has a reasonable suspicion, based on specific and articulable facts, that an occupant is or has been engaged in criminal activity." *State v. Epling*, 105 Ohio App.3d 663, 664 (9th Dist.1995). "Reasonable suspicion is something less than probable cause." *Id.,* citing *State v. VanScoder*, 92 Ohio App.3d 853, 855 (9th Dist.1994). In addition, when "analyzing whether reasonable suspicion existed, this Court looks to the facts available to the officer at the moment of the seizure or the search and considers whether those facts would warrant a man of reasonable caution in the belief that the action taken was appropriate." (Internal citations and quotations omitted.) *State v. Blair*, 9th Dist. Summit No. 24208, 2008-Ohio-6257, ¶ 5. Reasonable suspicion is based on the totality of the circumstances. *See United States v. Cortez,* 449 U.S. 411, 417–418 (1981). Finally, any violation of traffic law provides the reasonable suspicion required to make an investigatory stop. *State v. Johnson,* 9th Dist. Medina No. 03CA0127-M, 2004-Ohio-3409, ¶ 11, citing *Whren v. United States*, 517 U.S. 806 (1996); *State v. Wilhelm*, 81 Ohio St.3d 444 (1998); *Dayton v. Erickson*, 76 Ohio St.3d 3 (1996); *see also State v. Barbee,* 9th Dist. Lorain No. 07CA009183, 2008-Ohio-3587, ¶ 9.

{¶11} In this case, the trial court concluded that the initial detention of Mr. Reddington's vehicle was not constitutionally supported. In reaching this conclusion, the trial court found that Officer Harrison did not observe any other traffic violations besides the alleged speeding, and that he relied upon an "unknown radar device" in determining the vehicle's speed. As such, the trial court stated that "the only indication of excess speed [was] the officer's unaided visual

estimate" of the vehicle's speed. In citing to *State v. Miller*, 5th Dist. Fairfield No. 2012-CA-25, 2012-Ohio-6147, the trial court determined that because a traffic stop based *solely* upon an officer's unaided visual estimate is not valid under Ohio law, Officer Harrison lacked a reasonable and articulable suspicion to believe that Mr. Reddington was speeding.

{¶12} We determine that the trial court's analysis on this point is misplaced for three reasons. First, the trial court's statement that "no testimony [at the suppression hearing] established that either [the MPH Industries Python Radar or the MPH Industries K-55 Radar] was used in this case" is incorrect. The transcript of the suppression hearing reflects the following exchange:

> Prosecutor: Now, would you describe for the Court your experience in the operation of the speed-measuring devices.
>
> Officer: Yes. I took a – I believe it was a two-week (inaudible) course radar (inaudible) class. I believe that was in 2008 that I took that class.
> And then I use our radar – Python – every day that I work.
>
> Prosecutor: Which Python?
>
> Officer: The Python – the MPH.
>
> Prosecutor: K-55?
>
> Officer: Yeah.
>
> Prosecutor: Your Honor, I'd ask the Court to take judicial notice of the accuracy of the Python K-55.
>
> The Court: [defense counsel]?
>
> Defense counsel: (Inaudible).
>
> The Court: The Court has previously done that after a hearing with regard to scientific testimony on the issue, but it's your choice as to whether you wish to argue about my accepting the judicial notice as to (inaudible).
>
> Defense counsel: May I ask the Court, is there a specific model Python K-55 that the Court has taken judicial notice of, or is it just radar in general?

The Court: No. The K-55 model used by law enforcement in this district.

Defense counsel: Your Honor, may I ask, is the K-55 brand names "Python"?

The Court: Yeah. It's an MPH Python K-55 radar.

The Court then took judicial notice of the radar device, without objection from defense counsel. This exchange reveals that Officer Harrison was trained to use, and utilized on a frequent basis, some sort of radar device. Officer Harrison initially stated that he uses a radar device known as the Python. This exchange also reveals that the prosecutor and the trial judge were responsible for creating any confusion surrounding which radar device was actually used to determine Mr. Reddington's speed, not Officer Harrison. In the aggregate, this leads to the conclusion that Officer Harrison did in fact use a radar device to gauge Mr. Reddington's speed on the night in question.

{¶13} Second, to the extent that the trial court relied on *Miller* to buttress its conclusion that Officer Harrison lacked reasonable suspicion to justify stopping Mr. Reddington, we find that case distinguishable from the circumstances present here. In *Miller*, a police officer was walking across a street when he heard a car revving its engine while stopped at a traffic light one block away. As the vehicle began approaching where the officer was walking, the officer visually estimated that the vehicle was driving in excess of the posted speed limit. The officer then signaled with his flashlight for the vehicle to stop and the motorist complied. The officer subsequently arrested the motorist for OVI and operating a vehicle with a suspended license after interacting with the motorist.

{¶14} In determining that the investigative stop in *Miller* was "based on nothing more substantial than inarticulate hunches[,]" *Miller*, 2012-Ohio-6147, at ¶ 15, the Fifth District Court of Appeals reasoned that "[a]llowing an officer to *stop* a vehicle on their subjective impressions

that a vehicle is traveling in slight excess of the legal speed limit" would permit officers to do exactly what the Ohio General Assembly had sought to abolish by enacting R.C. 4511.091(C)[1], *id*. at ¶ 12. Stated differently, the *Miller* court held that it is violative of R.C. 4511.091(C) for officers to stop a vehicle with nothing more than their own personal belief that a vehicle is exceeding the legal speed limit.

{¶15} Here, even assuming arguendo that the pacing of a motorist's vehicle does constitute as an "unaided visual estimation" of another vehicle's speed, Officer Harrison's pacing of Mr. Reddington's vehicle was but one factor contributing to his belief that the black SUV was speeding. The record is clear that at the time he stopped Mr. Reddington's vehicle, Officer Harrington also had two different readings on his in-cruiser radar device indicating that the black SUV was driving above the posted speed limit. As such, Officer Harrison stopped Mr. Reddington equipped with more than a subjective impression that the vehicle was speeding.

{¶16} Third, an officer's reasonable articulable suspicion does not require proof beyond a reasonable doubt that the defendant's conduct has satisfied every element of the offense, *see e.g. Westlake v. Kaplysh*, 118 Ohio App.3d 18, 20 (8th Dist.1997), or that an officer adequately predicted the outcome of an arrestee's legal defenses or ultimate conviction, *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶ 17; *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, ¶ 15; *State v. Haas*, 3d Dist. Henry No. 7-10-15, 2012-Ohio-2362, ¶ 28 (stating that "an officer's reasonable articulable suspicion is not negated by the failure to ultimately establish

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[1] R.C. 4511.091(C)(1) provides in pertinent part:

> No person shall be arrested, charged, or convicted of a violation of any provisions of divisions (B) to (O) of Section 4511.21 or Section 4511.211 of the Revised Code or a substantially similar municipal ordinance based on a peace officer's unaided visual estimation of the speed of a motor vehicle, trackless trolley, or streetcar.

that a traffic offense occurred and to attain a conviction."). Applying this statement of law to the facts of the instant case, the fact that Officer Harrison may have relied upon a radar device known to him, but improperly identified at the suppression hearing, to determine whether a motorist was driving in excess of the posted speed limit is immaterial to whether he had a proper basis for effectuating an investigatory stop. Officer Harrison testified at the suppression hearing that he received a report via radio dispatch that a potentially impaired motorist was driving westbound on Medina Road and in his direction. Officer Harrison also testified that upon locating the vehicle, he determined that the vehicle was speeding based upon an in-cruiser radar device's readings and by pacing the vehicle using the cruiser's speedometer as a gauge.

{¶17} Based on the totality of the circumstances, we conclude that Officer Harrison had reasonable suspicion to stop Mr. Reddington's vehicle and the trial court erred by determining otherwise. Therefore, the State's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF THE STATE OF OHIO IN SUPPRESSING THE RESULTS OF THE HORIZONTAL GAZE NYSTAGMUS FIELD SOBRIETY TEST ADMINISTERED TO THE DEFENDANT.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF THE STATE OF OHIO IN SUPPRESSING THE RESULTS OF THE WALK AND TURN AND ONE LEG STAND FIELD SOBRIETY TESTS ADMINISTERED TO THE DEFENDANT.

{¶18} In its second and third assignments of error, the State essentially argues that the trial court erred by granting Mr. Reddington's motion to suppress the results of the field sobriety tests because Officer Harrison substantially complied with National Highway Traffic Safety Administration (NHTSA) standards for generally-accepted field-sobriety tests. We disagree.

{¶19} In order for the results of field-sobriety tests to be admissible, the state is not required to show strict compliance with testing standards, but instead bears the burden of demonstrating that the officer substantially complied with NHTSA standards. R.C. 4511.19(D)(4)(b); *State v. Clark,* 12th Dist. Brown No. CA2009–10–039, 2010–Ohio–4567, ¶ 11. "A determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis." *State v. Fink,* 12th Dist. Warren Nos. CA2008–10–118, CA2008–10–119, 2009-Ohio-3538, ¶ 26. " 'The state may demonstrate what the NHTSA standards are through competent testimony and/or by introducing the applicable portions of the NHTSA manual.' " *Middleburg Hts. v. Gettings*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-3536, ¶ 12, quoting *Parma Hts. v. Dedejczyk*, 8th Dist. Cuyahoga No. 97664, 2012-Ohio-3458, ¶ 42, citing *State v. Boczar,* 113 Ohio St.3d 148, 2007–Ohio–1251, ¶ 28.

{¶20} In the instant matter, Officer Harrison was the only witness to testify at the suppression hearing. In his testimony, Officer Harrison described how he performed all three field sobriety tests. The trial court also took judicial notice of the 2013 NHTSA manual. However, while the trial court took judicial notice of the NHTSA manual, the State did not make the manual part of the appellate record. Without any standards in the record with which to compare Officer Harrison's actions, it is impossible for this Court to determine whether the three field sobriety tests were given in substantial compliance. *State v. Mencini*, 9th Dist. Summit No. 27322, 2015-Ohio-89, ¶ 21, citing *State v. Aldridge*, 3d Dist. Marion No. 9-13-54, 2014-Ohio-4537, ¶ 18. Thus, this Court is left to presume regularity. *See State v. Daniel*, 9th Dist. Summit No. 27390, 2014-Ohio-5112, ¶ 5 ("[W]here the appellant has failed to provide a complete record to facilitate appellate review, this Court is compelled to presume regularity in the proceedings below and affirm the trial court's judgment."), citing *State v. McGowan*, 9th Dist. Summit No.

27092, 2014-Ohio-2630, ¶ 6; *see also State v. Taylor,* 9th Dist. Lorain Nos. 13CA010366, 13CA010367, 13CA010368, 13CA010369, 2014–Ohio–2001, ¶ 6; *State v. Jalwan,* 9th Dist. Medina No. 09CA0065–M, 2010–Ohio–3001, ¶ 12.

{¶21} The State's second and third assignments of error are overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AS A MATTER OF LAW AND TO THE PREJUDICE OF THE STATE OF OHIO IN FINDING THERE WAS NO PROBABLE CAUSE TO ARREST THE DEFENDANT FOR OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL.

{¶22} In its fourth assignment or error, the State argues that the trial court erred by finding that Officer Harrison lacked probable cause to arrest Mr. Reddington for OVI. We agree.

{¶23} " 'An officer possesses probable cause to arrest a person for a violation of R.C. 4511.19[ ] when the totality of the circumstances at the time of arrest would lead a reasonable person to believe that the person to be arrested is operating a vehicle while impaired.' " *State v. Vonalt*, 9th Dist. Medina No. 10CA0103-M, 2011-Ohio-3883, ¶ 10, quoting *Jalwan* at ¶ 10. In evaluating whether probable cause exists, an officer's observations concerning a defendant's performance on nonscientific standardized field sobriety tests are admissible even if the results are not. *State* ***v.*** *Schmitt****,*** 101 Ohio St.3d 79, 2004–Ohio–37, ¶ 14–16; *see also Vonalt* at ¶ 12.

{¶24} In the instant matter, Officer Harrison testified at the suppression hearing that Mr. Reddington was speeding at the time of the traffic stop, that the smell of an alcoholic beverage emanated from within Mr. Reddington's vehicle, and that Mr. Reddington admitted to consuming three beers prior to driving home that night. Officer Harrison also stated that Mr. Reddington had bloodshot and glossy eyes, needed to be reminded to hand over his insurance information, and struggled in handing over his insurance information to him. Moreover, Officer Harrison testified concerning his observations of Mr. Reddington's performance on the field

sobriety tests. Officer Harrison indicated that Mr. Reddington had to be reminded twice to hold his head steady during the HGN test and that when he failed to do so, Officer Harrison instructed Mr. Reddington to hold his head steady with his own hands. Moreover, Officer Harrison testified that Mr. Reddington did not seem to understand his instructions for the WAT test and that Mr. Reddington interrupted him during those same instructions. Mr. Reddington also interrupted Officer Harrison's instructions for the OLS test. Lastly, Mr. Reddington testified that during the OLS test, he could smell the odor of an alcoholic beverage coming from Mr. Reddington's mouth while he was speaking.

{¶25} We determine that the totality of the facts and circumstances available to Officer Harrison was sufficient to warrant a prudent person in believing that the suspect had violated R.C. 4511.19. Accordingly, even if Officer Harrison 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 Mr. Reddington for driving under the influence of alcohol. The trial court therefore erred in concluding otherwise.

{¶26} The State's fourth assignment of error is sustained.

III.

{¶27} The State's first and fourth assignments of error are sustained and its second and third assignments of error are overruled. The judgment of the Medina Municipal Court is affirmed in part and reversed in part and this matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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(C). 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 equally to both parties.

JULIE A. SCHAFER
FOR THE COURT

CARR, P. J.
CONCURS IN JUDGMENT ONLY.

MOORE, J.
CONCURRING IN JUDGMENT ONLY.

{¶28} Although I agree with the majority that the first assignment of error has merit, I would analyze that assignment of error somewhat differently.

{¶29} Nothing in the officer's testimony indicates that the stop was based only upon an "unaided visual estimation" of speed. Officer Harrison testified that he paced the vehicle using his speedometer, and he used a radar. The failure of the State to prove the reliability of the radar is not dispositive. *See State v. Shinholster,* 9th Dist. Summit No. 25328, 2011-Ohio-2244, ¶ 8,

quoting *Alabama v. White*, 496 U.S. 325, 330 (1990) ("[R]easonable suspicion can arise from information that is less reliable than that required to show probable cause."); *State v. Timson*, 38 Ohio St.2d 122, 127 (1974) (For probable cause to arrest "the arresting officer must have sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused."). However, irrespective of issues pertaining to the radar, the officer testified that he paced the vehicle by keeping a steady distance behind it while checking the officer's speedometer to determine the speed of Mr. Reddington's vehicle. Therefore, the officer did not visually estimate Mr. Reddington's speed without aid; he testified that he relied upon his own speedometer to determine Mr. Reddington's speed, and the trial court made no indication that it found Officer Harrison's testimony not to be credible on this point. *See* R.C. 4511.091(C)(1)(a) (Prohibition on arrest, charge or conviction based on peace officer's unaided visual estimation of speed does not "[p]reclude the use by a peace officer of a stopwatch, radar, laser or other electrical, mechanical, or digital device to determine the speed of a motor vehicle[.]"), and *State v. West*, 2d Dist. Montgomery No. 26355, 2015-Ohio-442, ¶ 13 (Speedometer qualifies as an "electric[al], mechanical or digital device[.]"). Accordingly, the holding in *State v. Miller*, 5th Dist. Fairfield No. 2012-CA-25, 2012-Ohio-6147, ¶ 12-14, that an officer's "*subjective* impression[] that a vehicle is traveling in slight excess of the legal speed limit" does not provide reasonable suspicion to justify a stop, is inapposite to this case. (Emphasis added.) Given the officer's testimony, I would conclude that the initial stop was justified.

{¶30} I concur in the majority's resolution of the second and third assignments of error.

{¶31} In regard to the fourth assignment of error, I note that none of the evidence at issue was obtained after Mr. Reddington's arrest, and I "question whether it was necessary or

appropriate" for Mr. Reddington to have moved to suppress, or the trial court to grant that motion, on the basis of lack of probable cause to arrest. *See State v. Rospert*, 9th Dist. Medina No. 12CA0033-M, 2012-Ohio-6110, ¶ 5. It is not clear from the motion to suppress precisely what evidence Mr. Reddington sought to suppress. However, because the State does not argue that suppression of the evidence was error for this reason, I believe it is appropriate that we proceed to review the issue of probable cause to arrest. *See id.* I concur in the majority's determination that there did exist probable cause under the totality of the facts and circumstances of this case. *See State v. Snow*, 9th Dist. Medina No. 14CA0019-M, 2015-Ohio-358, ¶ 14-15.

{¶32} Therefore, I concur in the judgment.

APPEARANCES:

GREGORY HUBER, J. MATTHEW LANIER, JOHN Q. QUILLIN, and MICHAEL JOHN, Prosecuting Attorneys, for Appellant.

MARK GARDNER, Attorney at Law, for Appellee.

ERIN R. FLANAGAN, Attorney at Law, for Appellee.