

[Cite as *State v. Holzapfel*, 2014-Ohio-4251.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
DARKE COUNTY**

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 2013-CA-17
	:	
v.	:	Trial Court Case No. 13-TRC-001-1033
	:	
TYLER L. HOLZAPFEL	:	(Criminal Appeal from
	:	Darke County Municipal Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 5th day of September, 2014.

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FAIN, J.,

{¶ 1} Defendant-appellant Tyler Holzapfel appeals from his conviction and sentence for Operating a Vehicle Under the Influence of Alcohol, in violation of R.C. 4511.19(A)(1)(a).

Holzapfel contends that the trial court erred in overruling his motion to suppress evidence obtained from a horizontal-gaze nystagmus (HGN) field sobriety test administered during a traffic stop. According to Holzapfel, the State failed to establish that the test performed by the police officer substantially complied with the pertinent standards.

{¶ 2} We conclude that the trial court erred in overruling the motion to suppress the HGN test results. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

**I. Police Officer Wheeland Initiates a Traffic Stop  
When Holzapfel Drives Left of the Center Line**

{¶ 3} On an early morning in May 2013, Officer Jeremy Wheeland began following a vehicle driven by Holzapfel, after witnessing the vehicle being driven on the center line. While following the vehicle, Officer Wheeland witnessed the vehicle being driven on the center line for a second time, and then the vehicle crossed the center line. Officer Wheeland initiated a traffic stop. During the stop, Officer Wheeland determined that Holzapfel's license was suspended. Officer Wheeland also noticed a strong odor of alcohol and that Holzapfel had glassy, bloodshot eyes. Holzapfel agreed to perform the HGN field sobriety test, which Officer Wheeland determined showed four out of six clues for impairment. Holzapfel was arrested.

**II. Course of the Proceedings**

{¶ 4} Holzapfel was cited for Left of Center, in violation of R.C. 4511.25; Driving Under OVI Suspension, in violation of R.C. 4510.14; and Operating a Vehicle Under the

Influence of Alcohol, in violation of R.C. 4511.19(A)(1)(a). Holzapfel pled not guilty to the citations, and moved to suppress the arrest and observations of the officer and any statements made by Holzapfel. After an evidentiary hearing, the trial court sustained the motion to suppress any statements made by Holzapfel after arrest and prior to being given his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court overruled the remainder of the motion.

{¶ 5} Holzapfel entered into a plea bargain with the State. In exchange for the dismissal of the other two citations, Holzapfel pled no contest to Operating a Motor Vehicle Under the Influence of Alcohol. The trial court found him guilty as charged, and sentenced him to 90 days in jail, with 60 days suspended. The trial court also fined Holzapfel and suspended his license for one year.

{¶ 6} From his conviction and sentence, Holzapfel appeals.

**III. The State Failed to Elicit Testimony Showing that the Field Sobriety Test Was Administered in Substantial Compliance with the Standards Set by the National Highway Traffic Safety Administration**

{¶ 7} Holzapfel's sole assignment of error states:

THE TRIAL COURT ERRED IN ADMITTING THE HGN TEST RESULTS BECAUSE THE STATE FAILED TO MEET ITS BURDEN THAT THE TEST WAS ADMINISTERED IN SUBSTANTIAL COMPLIANCE WITH STATUTORY REGULATIONS.

{¶ 8} As part of his plea bargain with the State, Holzapfel pled no contest to the charge

of Operating a Vehicle Under the Influence of Alcohol, which preserved his ability to assert on appeal error in the denial of his motion to suppress. Crim.R. 12(I). In deciding a motion to suppress, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses. *State v. Hopfer*, 112 Ohio App.3d 521, 548, 679 N.E.2d 321 (2d Dist.1996), quoting *State v. Venham*, 96 Ohio App.3d 649, 653, 645 N.E.2d 831 (4th Dist.1994). The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac*, 2d Dist. Montgomery No. 20662, 2005-Ohio-3733, ¶ 8, citing *State v. Retherford*, 93 Ohio App.3d 586, 639 N.E.2d 498 (2d Dist.1994). Accepting those facts as true, the appellate court must then determine as a matter of law, without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶ 9} As part of his motion to suppress, Holzapfel requested that the trial court issue “an order suppressing the arrest and observations of the officer” due in part to the officer's failure to “perform the field sobriety test in substantial compliance with the procedures set forth in the National Highway Traffic Safety Administration Manual.” Dkt. 9.

{¶ 10} R.C. 4511.19(D)(4)(b) provides that evidence and testimony regarding the results of a field sobriety test may be presented “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 [.]”

{¶ 11} The Supreme Court of Ohio has held that HGN test results are admissible in

evidence “so long as the proper foundation has been shown both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test.” *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, 863 N.E. 2d 155, ¶ 28. In explaining the respective burdens of the parties, the Seventh District Court of Appeals recently stated:

We have held that “some evidence of the NHTSA or other testing standards is required to prove compliance with the administration of field sobriety tests. It is only logical that in order to prove substantial compliance with a given standard, there must be at minimum some evidence of the applicable standard for comparative purposes. Accordingly, where the suppression motion raises specific challenges to the field sobriety tests, the state must produce some evidence of the testing standards, be it through testimony or via introduction of the NHTSA or other similar manual or both.” *State v. Bish*, 191 Ohio App.3d 661, 2010-Ohio-6604, 947 N.E.2d 257, ¶ 27. Once the issue is properly raised by the Appellant, the burden shifts to the state to prove by clear and convincing evidence that it substantially complied with NHTSA, or other similar standards, in administering the field sobriety tests. *Id.* at ¶ 24.

*State v. Smith*, 7th Dist. Columbiana No. 13 CO 10, 2014-Ohio-2933, ¶ 18.

{¶ 12} The trial court overruled Holzapfel’s motion to suppress, finding, in part:

It was determined, through testimony, that defendant was first observed being in violation of driving left of center. Upon this observation, the officer activated his patrol lights and stopped the defendant. Upon the officer’s approach

to the vehicle, he observed a strong odor of alcohol on or about defendant's person. The officer also observed defendant's eyes were glassy and bloodshot. Defendant was asked to exit his vehicle and perform field sobriety tests. The officer performed the HGN in substantial compliance with NHTSA manual and received 4 out of 6 clues. The defendant subsequently refused the One-Leg Stand, Walk and Turn and a Portable Breath Test. Based upon the totality of the circumstances, the officer had reasonable suspicion upon which to stop, detain and arrest the Defendant for driving under the influence.

Dkt. 18, p. 1.

{¶ 13} At the suppression hearing, Officer Jeremy Wheeland testified regarding his traffic stop of Holzapfel. When asked about his training, Officer Wheeland testified as follows:

Q. And what training have you had to perform your duties?

A. Went through seven months at our training academy in Columbus.

Q. Now, does that include training on the National Highway Traffic Safety Administration Manual?

A. Yes, sir.

Q. Okay. You're familiar with that document?

A. Yes, sir.

Tr. 4.

{¶ 14} Officer Wheeland then testified about his administration of the HGN field sobriety test during his traffic stop of Holzapfel:

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A. \* \* \* First I asked him if I could check his eyes. He agreed to do that.

Checked the Defendant for HGN.

Q. Okay. What is the horizontal gaze and nystagmus test?

A. It's to check for the involuntary jerking of the eyes as to the eyes gaze towards the side.

Q. Are you trained in its use?

A. Yes, sir.

Q. Okay, you got that at the Academy as well?

A. Correct.

Q. Okay, how do you go about conducting the HGN test?

A. There's three clues we look for. There's three clues in each eye for a total of six clues. The first clue to check for is lack of smooth pursuit. I checked both eyes for lack of smooth pursuit and that clue was detected.

Second one was distinct and sustained nystagmus at maximum deviation. Checked both eyes for that. That clue was present in both eyes.

Then checked for the onset of nystagmus prior to 45 degree angle. Did not observe that in the Defendant. So I observed four out of six clues in his eyes.

Q. Is that an indicator of impairment?

A. Possible impairment, yes, sir.

Q. Okay. Did you offer him some other field sobriety tests?

A. Yes, I did.

Q. What did you offer him?

A. I asked him if he would take the SFSTs, the walk and turn, one leg

stand test. He refused to take those.

Q. Okay. Did you offer him a portable breath test?

A. Yes, I did.

Q. Did he respond?

A. Yeah. He refused to take that as well.

Tr. 8-9.

{¶ 15} Officer Wheeland testified that he received training on the National Highway Traffic Safety Administration Manual and that he is familiar with that document. He also testified briefly about some of the clues he looked for while administering the HGN test to Holzapfel. However, Officer Wheeland did not testify about what is required by the Manual, or whether he followed the Manual when administering the test. Moreover, the State elicited very few details about how the field sobriety test was performed. The State also failed to introduce the Manual into evidence. Finally, at no point did Officer Wheeland provide testimony from which the trial court could find that he substantially complied with the Manual or some other acceptable standard.

{¶ 16} In *State v. Hido*, 2d Dist. Clark No. 10CA0046, 2011-Ohio-2560, ¶ 15, we stated that the State is not “required to actually introduce the NHTSA manual or testimony concerning the standards, where the record demonstrates, if only by inference, that the court took judicial notice of the NHTSA standards.” (Citation omitted.) We then held that testimony by the officer that he had been trained to perform the HGN test under NHTSA standards and that the officer actually performed the tests in the manner in which the officer had been trained “would suffice for admission of the field sobriety test results, absent a challenge to some specific way the



officer failed to comply with NHTSA standards.” *Id.* at ¶ 16. Officer Wheeland testified that he received training on the NHTSA manual. Unlike the officer in *Hido*, however, Officer Wheeland failed to testify that he actually performed the HGN test in the manner in which he was trained.

{¶ 17} Holzapfel, in his motion to suppress, made it clear that he was challenging the administration of the field sobriety test. The burden was then placed on the State to show that the field sobriety test was performed in substantial compliance with the Manual. *Smith* at ¶ 18. There was insufficient evidence in the record to support the trial court’s finding that Officer Wheeland “performed the HGN in substantial compliance with NHTSA manual.” Therefore, the trial court should have sustained the motion to suppress to the extent that it sought exclusion of the HGN field sobriety test. *Boczar* at ¶ 28.

{¶ 18} Although there is other evidence in the record from which Holzapfel arguably could be found guilty of the OVI charge, this is not an overwhelming evidence case without the HGN test result, and we cannot say with confidence that Holzapfel would have been found guilty had he gone to trial without the HGN test result in evidence.

{¶ 19} Holzapfel’s sole assignment of error is sustained.

#### IV. Conclusion

{¶ 20} Holzapfel’s sole assignment of error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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FROELICH, P.J., and HALL, J., concur.

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