

[Cite as *State v. Schwartz*, 2014-Ohio-4418.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,)	
)	CASE NO. 13 MA 79
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
BRANDON SCHWARTZ,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Mahoning County Court No. 5, Case No. 12 TRC 03564.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee: Attorney Paul J. Gains
Prosecuting Attorney
Attorney Ralph M. Rivera
Assistant Prosecuting Attorney
21 W. Boardman St., 6th Floor
Youngstown, OH 44503

For Defendant-Appellant: Attorney Edward Czopur
DeGenova & Yarwood, LTD.
42 North Phelps Street
Youngstown, OH 44503

Attorney Peter Klimis
4126 Youngstown-Poland Rd.
Youngstown, OH 44514

JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 25, 2014

[Cite as *State v. Schwartz*, 2014-Ohio-4418.]
DeGenaro, P.J.

{¶1} Defendant-appellant Brandon Schwartz appeals from the April 30, 2013 judgment of the Mahoning County Court No. 5 imposing sentence for his December 21, 2012 conviction of operating a motor vehicle under the influence. On appeal Schwartz argues that he was denied effective assistance of counsel due to his trial counsel withdrawing his motion to suppress and that his conviction was based on insufficient evidence requiring reversal. First, counsel was not ineffective for withdrawing the motion to suppress before it was considered by the trial court as Schwartz has not demonstrated a reasonable probability of success regarding the motion. Second, Schwartz's conviction for OVI is supported by sufficient evidence. Accordingly, Schwartz's arguments are meritless and the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} On August 9, 2012, Schwartz was ticketed for a turn signal violation, R.C. 4511.39, and driving while under the influence of alcohol and/or drugs, R.C. 4511.19(A)(1)(a). Schwartz filed a motion to suppress any information or evidence, including results of any and all field sobriety tests and statements made to the arresting officer, arguing that the officer lacked reasonable suspicion that he was involved in any criminal activity, including violation of a traffic offense. However, the motion was withdrawn and the case proceeded to bench trial.

{¶3} Trooper Charles Hoskin testified that on August 9, 2012, at approximately 3:00 a.m. he encountered Schwartz on Mahoning Avenue where he stopped and directed Schwartz to pull into a parking lot. The trooper noticed Schwartz because he failed to use a turn signal when switching lanes, and had also paced Schwartz's speed at 48 miles per hour in a 35 mile per hour zone. Further, Schwartz did not stop immediately when signaled to do so.

{¶4} During the traffic stop, a female passenger told Trooper Hoskin that she had been consuming alcoholic beverages and was unable to drive a vehicle. Further, Hoskin noticed that every time he asked a question, Schwartz looked to the passenger side to speak; Schwartz would not look Trooper Hoskin in the face

during the exchange and did not speak in the trooper's direction. Schwartz was "digging through the glove box" to locate the vehicle registration because it was his grandfather's car. Trooper Hoskin asked Schwartz to perform field sobriety tests which he refused. Hoskin then placed Schwartz under arrest and transported him to the Canfield post, where he read the BMV 2255 form to Schwartz, which includes an explanation of the consequences for refusing to take a breath test. After Trooper Hoskin offered Schwartz the opportunity to take a breath test, Schwartz refused.

{¶15} Trooper Hoskin's observations lead him to believe Schwartz was intoxicated:

"Just the looking away from me that I felt that he did not want to breathe any air in my general direction. When he got out of the vehicle, you could see he kind of stumbled to the left – or to the right, I believe it was. And then his slow movements back to my patrol car, the slow movements trying to lean back onto my patrol. I told him to lean, but, you know, it was just kind of like a real slow movement. His speech was just real slow. The red, bloodshot eyes after I got him out and the odor of an alcoholic beverage on his – on him after I got him out of the vehicle."

{¶16} On cross, Trooper Hoskin was further questioned about his report as to where the weaving occurred on the recorded events played to the court. Hoskin reaffirmed that he could smell alcohol coming from the vehicle and that there was a female passenger, but she was incapable of driving because she was clearly impaired. When Trooper Hoskin told Schwartz that his clothes smelled of alcohol, Schwartz denied having anything to drink, stating that his girlfriend must have spilled something on him. The trooper noted but did not question Schwartz about

his bloodshot eyes and admitted that there is more than one explanation for the condition.

{¶7} On April 30, 2013, the trial court issued a judgment entry finding Schwartz guilty of a turn signal violation and driving while under the influence of alcohol and/or drugs. He was sentenced to 180 days in jail with 177 days suspended, three days to serve in jail or at a driver's intervention program, fines and costs, which was stayed pending appeal.

Ineffective Assistance of Counsel

{¶8} Schwartz's first assignment of error states:

{¶9} "Appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution when trial counsel withdrew the motion to suppress challenging reasonable suspicion."

{¶10} Schwartz contends that the motion to suppress was likely to be successful and that counsel was ineffective for withdrawing it for two reasons. First, he asserts the trooper lacked reasonable suspicion to order him from the vehicle and secondly Schwartz contends the trooper lacked reasonable suspicion to conduct field sobriety tests as part of an OVI investigation. While Schwartz acknowledges that trial counsel's strategy was to argue that there was insufficient evidence to support a conviction, appellate counsel contends that proceeding on the motion would have furthered such strategy.

{¶11} To prove an allegation of ineffective assistance of counsel, the defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id.* at paragraph three of the syllabus.

{¶12} "[F]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Consequently, "the decision to withdraw a motion to suppress does not constitute per se ineffective assistance of counsel." *State v. Dominguez*, 12th Dist. No. CA2011-09-010, 2012-Ohio-4542, ¶20. Schwartz must show that the motion would have had a reasonable probability of success. See *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859. "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, ¶8. "[A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* Thus, an appellate court independently determines, "without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. McGee*, 2013-Ohio-4165, 996 N.E.2d 1048, ¶15 (7th Dist.) citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶13} This court recently addressed the same argument Schwartz raises here in *State v. Koczvara*, 7th Dist. No. 13 MA 149, 2014-Ohio-1946, holding:

"Although courts sometimes mention that an officer must have reasonable suspicion to remove a person from a car in order to conduct field sobriety tests, this reference to removal from the vehicle is not an accurate portrayal of the state of the law. As aforementioned, the administration of field sobriety tests must be justified by reasonable suspicion of OVI. *Reed*, 7th Dist. No. 05BE31 at ¶ 10, 27 (speaking of reasonable suspicion to detain and conduct field sobriety test, not to remove from vehicle). However, the removal from the vehicle is not subject to this scrutiny. (At least where the removal is initiated in the course of the traffic ticket, rather than after the ticketing process is complete). It is well-established that an officer can ask a person to alight from a vehicle during a lawful traffic stop without having

reasonable suspicion of any further criminal activity. This is known as a Mimms¹ order."

State v. Koczwara, 7th Dist. No. 13 MA 149, 2014-Ohio-1946, ¶17.

{¶14} Here, Trooper Hoskin stopped Schwartz because he failed to use a turn signal when switching lanes, as well as his paced speed at 48 in a 35 mile per hour zone; Schwartz was ultimately charged with the turn signal offense. As Schwartz was stopped for a traffic violation, the trooper could lawfully ask him out of the vehicle. "[M]erely because an officer wants to perform field sobriety tests (that are allegedly premature) and that is why he asked someone to exit the vehicle, this does not invalidate the request to exit the vehicle because a request to exit a vehicle during a traffic stop is not subject to constitutional inquiry; it is merely an acceptable continuation of the original traffic stop." *Id.* at ¶23. Thus, this argument is meritless.

{¶15} Turning to Schwartz's second argument regarding trial counsel's effectiveness, reasonable suspicion of impairment is sufficient to support the administration of field sobriety tests. *State v. Wilson*, 7th Dist. No. 01 CA 241, 2003-Ohio-1070, ¶17 ("[a]n officer must have reasonable suspicion, based on specific and articulable facts, to believe a person is under the influence of alcohol in order to administer field sobriety tests.") "Reasonable grounds to believe a person had been driving while under the influence of alcohol will be determined from the totality of all the facts and circumstances, including the person's actions immediately prior to his driving the motor vehicle; during the period of time he was driving including, but not limited to, the manner in which he was driving; and immediately after he discontinued driving, including his activities immediately after getting out of the motor vehicle." *Atwell v. State*, 35 Ohio App.2d 221, 301 N.E.2d 709 (8th Dist.1973), paragraph two of the syllabus.

{¶16} Schwartz argues that his case is similar to *State v. Reed*, 7th Dist. No. 05 BE 31, 2006-Ohio-7075, where we held that the officer lacked reasonable suspicion to

¹ *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

conduct field sobriety tests where the driver was stopped for a loud muffler at 1:05 a.m. *Id.* at ¶13. In *Reed*, the defendant's eyes were red, he admitted drinking two beers earlier in the night but was able to produce a valid license and registration with no coordination problems and the arresting officer smelled only a slight odor of alcohol coming from the defendant. See *id.*

{¶17} The present case is distinguishable from *Reed* as there is more than an equipment violation, bloodshot eyes and a slight odor of alcohol. Significantly, Trooper Hoskin noted three moving violations committed by Schwartz: a turn signal violation, weaving within his lane of traffic and speeding. Although, the smell of alcohol was detected but was not characterized as slight or strong, it was 3:00 a.m., Schwartz's speech and movements were characterized as slow, he had red, bloodshot eyes, and Schwartz would not breathe in the trooper's direction. These facts are sufficient to constitute reasonable suspicion to believe that Schwartz may have been operating a vehicle while under the influence of alcohol and to allow the trooper to lawfully administer field sobriety tests. Thus, this argument regarding counsel's ineffectiveness is meritless.

{¶18} In sum, Schwartz has not proven that trial counsel was ineffective for withdrawing the motion to suppress. Accordingly, this assignment of error is meritless.

Insufficient Evidence

{¶19} Schwartz's second of two assignments of error states:

{¶20} "Appellant's conviction was based on insufficient evidence thereby requiring reversal."

{¶21} Schwartz contends that there was no testimony that he was impaired, let alone based on alcohol consumption, emphasizing that there was no evidence indicating a lack of coordination to support an OVI conviction.

{¶22} Sufficiency of the evidence is a standard that is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Essentially, sufficiency is a test of adequacy. *Id.* "The

relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶23} Schwartz was convicted of violating R.C. 4511.19(A)(1)(a), which states, "No person shall operate any vehicle * * * within this state, if, at the time of the operation * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." Trooper Hoskin testified that he observed Schwartz at approximately 3:00 a.m. commit three separate moving violations: a turn signal violation, weaving within his lane of traffic, and speeding. He also testified that Schwartz had bloodshot eyes, an odor of alcohol, slow movements, slow speech, and would not breathe in his direction. Further, Hoskin had ample experience dealing with individuals who are intoxicated as he averaged 15 OVI arrests per month.

{¶24} Although some of the evidence in this case is circumstantial, even a conviction that is based solely on circumstantial evidence is no less sound than one based on direct evidence. *State v. Begley*, 12th Dist. No. CA92-05-076, 1992 WL 379379, *2 (Dec. 21, 1992). *State v. Apanovitch*, 33 Ohio St.3d 19, 26, 514 N.E.2d 394 (1987).

{¶25} Additionally, the trial court may consider a defendant's refusal to submit to field sobriety tests when looking at the totality of the circumstances. The Supreme Court of Ohio has held that a trier of fact may consider the refusal to submit to a chemical test along with all the other facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol. *Maumee v. Anistik*, 69 Ohio St.3d 339, 632 N.E.2d 497 (1994), at syllabus. Here, Schwartz refused all field sobriety tests and refused a breathalyzer test.

{¶26} Viewing this evidence in a light most favorable to the prosecution, there was sufficient evidence to support a conviction for operating a motor vehicle while impaired, thus the trial court properly found Schwartz guilty beyond a reasonable doubt. Accordingly, Schwartz's second assignment of error is meritless.

{¶27} In conclusion, both of Schwartz's assignments of error are meritless. First, counsel was not ineffective for withdrawing the motion to suppress before it was considered by the trial court as Schwartz has not demonstrated a reasonable probability of success regarding the motion. Second, Schwartz's conviction for OVI is supported by sufficient evidence. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.