[Cite as *Columbus v. Bickis,* 2010-Ohio-3208.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 09AP-898
v.	:	(M.C. No. 08 TRC 150664)
Robert S. Bickis, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 8, 2010

Richard C. Pfeiffer, Jr. City Attorney, *Lara N. Baker,* City Prosecutor, *Melanie R. Tobias* and *Orly Ahroni,* for appellee.

Dennis C. Belli, for appellant.

APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶1} Defendant-appellant, Robert S. Bickis, Jr., appeals from a judgment of the Franklin County Municipal Court entered pursuant to defendant's plea of "no contest" to operating a vehicle under the influence of alcohol ("OVI"), failure to drive within marked lanes, and failure to display a front license plate, in violation of Columbus City Codes 2133.01(A)(1)(a), 2131.08(a)(1), and 2135.07(a), respectively. Defendant assigns a single error:

> The municipal court committed reversible error under state law and deprived Defendant-Appellant of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution when it denied his motion to suppress the audio/video recording and the police officers' observations of the field sobriety testing procedures, refusals, and events following the traffic stop.

Because the trial court properly granted, in part, and overruled, in part, defendant's motion to suppress evidence, we affirm.

I. Facts and Procedural History

{¶2} According to the evidence presented at the hearing on defendant's motion to suppress evidence, Columbus Police Officer David Decker was on routine patrol in his police cruiser in the vicinity of Nationwide Arena in Columbus at approximately 1:00 a.m. on June 6, 2008. While stopped at a traffic light at the intersection of Front Street and Nationwide Boulevard, the officer observed defendant driving southbound on Front Street, his vehicle straddling the dividing line where the street changes from one to two lanes. Defendant stopped his vehicle at the traffic light and then, without signaling, turned right onto Nationwide Boulevard into the left lane. Officer Decker followed defendant's vehicle and observed it cross over the dashed white line on Nationwide Boulevard, change to the right lane without signaling, come to a very slow stop at Neil Avenue, and, without signaling, turn right onto Neil Avenue into the left lane. Officer Decker activated the beacons on his police cruiser in an attempt to pull defendant's vehicle over, but defendant continued northbound on Neil Avenue, his vehicle weaving over the dashed white line. Defendant finally turned his vehicle onto Broadbelt Avenue, proceeded 100 to 200 yards, and stopped in the middle of the roadway.

{¶3} Officer Decker exited his cruiser and approached the driver's side of defendant's vehicle. The officer noticed a bar wristband on defendant's right wrist and smelled a "strong odor of alcoholic beverage" coming from defendant's vehicle. (Tr. 7.) Aside from the odor of alcohol, Officer Decker observed that defendant's speech was "slurred" and his eyes were "glassy and bloodshot." (Tr. 7.) Covering his mouth while he spoke, defendant told the officer he was coming from a bar where he had consumed "two beers," but he did not know the name of the bar. (Tr. 8.) Officer Decker took defendant's driver's license, returned to his cruiser, and turned the traffic stop over to Officer Barry Kirby, who had arrived at the scene and was trained in administering field sobriety tests. Kirby parked his cruiser behind defendant's vehicle and activated an audio/video machine in his cruiser that recorded the events after the traffic stop.

{¶4} Officer Kirby detected alcohol on defendant's breath and instructed him to walk back to his police cruiser to perform field sobriety tests. As defendant walked to the cruiser, Officer Kirby noticed defendant was unsteady on his feet, swayed as he walked, and stumbled at least one time. The officer first conducted the horizontal gaze nystagmus ("HGN") test. In the HGN test, an officer holds a "stimulus," such as a pen, at the driver's eye level approximately six to eight inches away from the driver. Moving the stimulus gradually out of the driver's field of vision toward the driver's ears, the officer observes the driver's eyes to detect signs of intoxication, such as eyes that display an inability to smoothly follow the slowly moving object. See *State v. Bresson* (1990), 51 Ohio St.3d 123. Officer Kirby observed defendant leaned and swayed at the beginning of the HGN test; defendant then had trouble staying focused, dropped his hands, and talked continually during the test. According to Kirby's testimony at the suppression hearing,

defendant demonstrated six out of six possible clues on the HGN test, which indicates a 77 percent likelihood the person's blood alcohol level is over the legal limit. Nonetheless, in completing the alcohol influence report after the incident, Kirby indicated defendant demonstrated only two out of six possible clues on the HGN test.

{¶5} After administering the HGN test, Officer Kirby requested that defendant perform the walk-and-turn field sobriety test, but defendant expressed reluctance and asked the officer what the consequences would be if he refused. Officer Kirby responded that he would arrest defendant if he refused the tests. Without waiting for Officer Kirby's instructions, defendant proceeded to perform his own version of the walk-and-turn test. Defendant had trouble maintaining his position, fell off the line a couple of times, and refused to continue after Kirby instructed him how to properly perform the test.

{¶6} Upon defendant's refusal to continue with any field sobriety test, Officer Kirby arrested him for OVI. According to Kirby, his decision to arrest defendant was based in part upon the traffic violations Officer Decker observed and defendant's performance on the HGN and walk-and-turn tests. Kirby testified he also based his decision to arrest defendant on his personal observations that defendant had a "strong odor of alcoholic beverage" on his breath, stumbled and swayed while walking, was "unable to stay focused and pay attention" during the field sobriety tests, and had "glassy and bloodshot eyes," "slurred speech," and a "thick tongue." (Tr. 31-32.) After arresting defendant, Officer Kirby advised him of the consequences of taking or refusing a breath alcohol content ("BAC") test, such as a breathalyzer. Defendant refused to submit to a BAC test. In addition to the OVI charge, defendant ultimately also was charged with failure to drive within marked lanes and failure to display a front license plate.

{¶7} After entering a not guilty plea to the charges, defendant filed a motion to suppress evidence obtained as a result of the traffic stop, including "any opinion or observations of the police officers regarding defendant's sobriety or alcohol level," defendant's statements to the officers, defendant's performance on the HGN test, his refusal to perform other field sobriety tests, and his refusal to submit to a BAC test. Defendant contended the audio/video recording and testimony regarding the HGN test were inadmissible at trial because Officer Kirby failed to conduct the HGN test in substantial compliance with accepted testing standards.

{¶8} Defendant further contended the audio/video recording and testimony concerning events that occurred after the HGN test, including his performance on the walk-and-turn test and his refusals to continue field sobriety testing and to take a breathalyzer test, also were inadmissible at trial. In support, defendant argued that because a field sobriety test is a search and seizure under the Fourth Amendment, defendant had to voluntarily consent to perform the walk-and-turn test. Defendant claimed his consent to the walk-and-turn test was not voluntary but coerced as the result of Kirby's alleged threat to arrest him if he refused the field sobriety tests. With that premise, defendant asserted all evidence relating to his performance on the walk-and-turn test and subsequent events was inadmissible at trial as products of the unlawful search and seizure. Defendant argued that absent the suppressed evidence, the police officers lacked probable cause to arrest him for OVI, requiring the charge be dismissed.

{¶9} Following a hearing on the motion, the trial court determined the police officers had reasonable suspicion to stop defendant for traffic violations and, based upon the totality of the circumstances, also had probable cause to arrest him. Finding that the

HGN test was not administered in substantial compliance with standardized testing procedures, the trial court suppressed the results of the HGN test but did not suppress observations of defendant during the HGN test. The trial court decided "the view of [defendant] on the video is critical to the issue of impairment, including during the HGN test." As a result, the court ruled the audio/video recording depicting defendant's performance of the HGN test would be admissible at trial. (Tr. 74.) The court further decided Officer Kirby would be permitted to testify at trial regarding his lay observations of defendant's performance of the HGN test. In so ruling, the court cautioned that the officer could not testify to the results of the HGN test or the test's "scientific reasoning or basis in science," but he could testify to such matters as whether defendant swayed, moved his head, or failed to cooperate or follow instructions during the test. (Tr. 74-75.) Lastly, the trial court concluded Officer Kirby's statement to defendant that he would arrest him if he did not perform the walk-and-turn test did not rise to the level of a constitutional violation because the statement was truthful and the officer did not act "in such a way as to rob [defendant] of his free will." (Tr. 75-76.) The trial court accordingly sustained defendant's motion to suppress the results of the HGN test but overruled the remainder of the motion.

{¶10} Following the court's rulings, defendant entered a no contest plea to the charges. The trial court adjudicated defendant guilty and sentenced him accordingly. Defendant appeals, asserting the trial court improperly overruled his motion to suppress evidence.

II. Standard of Review

{¶11} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest,* 4th Dist. No.

00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision granting the motion to suppress is two-fold. *State v. Reedy,* 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. Id., citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard. Id., citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627.

III. Assignment of Error

A. Admissibility of Evidence Regarding the HGN Test

{¶12} In his appeal, defendant states the trial court properly suppressed the HGN test "results" but erred by refusing to suppress not only the audio/video recording of the HGN testing procedures but also Officer Kirby's testimony regarding his observations of defendant during the HGN test. Defendant asserts the officer's failure to substantially comply with HGN testing standards in administering the HGN test calls into question the reliability of all evidence related to the test, including the tape recording of the test and the officer's observations of defendant during the test.

{¶13} A law enforcement officer who administers a field sobriety test in substantial compliance with accepted testing procedures may testify concerning the results of the field sobriety test. R.C. 4511.19(D)(4)(b)(i); *State v. Boczar*, 113 Ohio St.3d 148, 2007-Ohio-1251, ¶27-28. Conversely, a law enforcement officer who does not administer a field sobriety test in substantial compliance with the testing standards may not testify at trial

regarding the test results. *State v. Schmitt,* 101 Ohio St.3d 79, 2004-Ohio-37; *State v. Kennedy,* 5th Dist. No. 2008 AP 04 0026, 2009-Ohio-1398, ¶27.

{¶14} "It is generally accepted that virtually any lay witness, including a police officer, may testify as to whether an individual appears intoxicated." *Schmitt* at ¶12, citing *Columbus v. Mullins* (1954), 162 Ohio St. 419, 421. Such testimony "is relevant and admissible pursuant to Evid.R. 401 and Evid.R. 402" and "is often crucial in prosecuting drunk driving cases." Id. As a result, "courts have recognized that '[t]o prove impaired driving ability, the state can rely on physiological factors (e.g., slurred speech, bloodshot eyes, odor of alcohol) and coordination tests (e.g., field sobriety tests) to demonstrate that a person's physical and mental ability to drive is impaired.' " Id., quoting *State v. Wargo* (Oct. 31, 1997), 11th Dist. No. 96-T-5528.

{¶15} The Ohio Supreme Court thus found "no reason to treat an officer's testimony regarding the defendant's performance on a nonscientific field sobriety test any differently from his testimony addressing other indicia of intoxication, such as slurred speech, bloodshot eyes, and odor of alcohol." *Schmitt* at ¶14. The court reasoned in *Schmitt* that "[u]nlike the actual test results, which may be tainted, the officer's testimony is based upon his or her firsthand observation of the defendant's conduct and appearance" and "is being offered to assist the jury in determining a fact in issue, i.e., whether a defendant was driving while intoxicated." Id. at ¶15. Accordingly, well-established law indicates that even if the final results of a field sobriety test must be excluded at trial because the test was not administered in accordance with standardized testing procedures, an officer may testify at trial regarding observations of the defendant made during his or her performance on the test. *Schmitt* at syllabus. The "officer's

observations in these circumstances are permissible lay testimony under Evid.R. 701" and are not the "results" of field sobriety tests. Id. at ¶15.

{¶16} The "results" of an HGN test include an officer's opinion about whether a person "passed" or "failed" the test, the number of clues a person demonstrated on an HGN test, and, based upon the number of clues demonstrated during the HGN test, the statistical likelihood the person was under the influence of alcohol and had a BAC level over the legal limit. *Bresson* at 126-29; *Kennedy* at ¶27. In contrast, an officer's observation that a defendant was unable to focus steadily on the stimulus during the HGN test or swayed during a field sobriety test is the type of physiological factor about which an officer may testify even if the test was not administered in substantial compliance with the testing standards. *Wickliffe v. Kirara,* 11th Dist. No. 2006-L-172, 2007-Ohio-2304, ¶19; *State v. Koteff,* 5th Dist. No. 04-COA-035, 2005-Ohio-1719, ¶5, 18. Thus, an officer's observation that the defendant could not hold himself steady, lost his balance, stumbled or staggered when he walked, stepped off the line, could not follow simple directions, or used his arms for balance, is admissible as lay evidence of intoxication even if the final results of the field sobriety tests are inadmissible at trial due to a lack of substantial compliance with accepted testing standards. *Schmitt* at syllabus; *State v. Johnson,* 7th Dist. No. 05 CO 67, 2007-Ohio-602, ¶25; *State v. Green,* 8th Dist. No. 88234, 2007-Ohio-1713, ¶53; *Cleveland v. Hunter,* 8th Dist. No. 91110, 2009-Ohio-1239, ¶62-63; *State v. Lothes,* 11th Dist. No. 2006-P-0086, 2007-Ohio-4226, ¶59; *State v. Hammons,* 12th Dist. No. CA2004-01-008, 2005-Ohio-1409, ¶5. Admission of such evidence regarding the HGN test is no different from other nonscientific field sobriety tests. *Boczar* at ¶25-27.

{¶17} Here, because Officer Kirby did not conduct the HGN test in substantial compliance with accepted testing standards, the trial court properly suppressed evidence regarding the results of the HGN test and evidence regarding the technical or scientific basis for the test. Nonetheless, because an officer's observations are admissible as lay testimony to help the fact finder determine whether defendant was driving while intoxicated, *Schmitt* at ¶14, the trial court also properly ruled testimony to be admissible at trial concerning Officer Kirby's observations of defendant during the HGN test, including whether defendant swayed, had trouble staying focused, failed to follow instructions, or was uncooperative. *Schmitt; Boczar; Wickliffe; Koteff; Johnson.* Furthermore, because the audio/video recording of defendant during the HGN test depicts his performance, conduct and demeanor that Officer Kirby or a lay person could observe in witnessing the event, the audio/video recording of defendant during the HGN test also was admissible at trial.

B. Admissibility of Evidence Regarding Events After the HGN Test

{¶18} Defendant next asserts that the trial court erred by failing to suppress evidence regarding the events that occurred after the HGN test, including defendant's performance on the walk-and-turn test, his refusal to continue with the field sobriety testing, and his refusal to submit to a BAC test. Defendant argues that when the police officers stopped and detained him for traffic violations, they "seized" him within the ambit of Fourth Amendment protections. As a result, defendant argues, the field sobriety testing conducted during defendant's detention was tantamount to a search for physical evidence that required his voluntary consent. Defendant maintains that his partial performance of the walk-and-turn testing procedure following the HGN test was not voluntary because it

was induced by Officer Kirby's threat to arrest him if he refused to continue the field sobriety testing. Defendant therefore contends any evidence pertaining to the walk-and-turn test and to events that occurred after the test should have been suppressed on constitutional grounds.

{¶19} A person has been seized for purposes of the Fourth Amendment when an officer conducts an investigative stop and detains the person in order to administer field sobriety tests. *State v. Robinette*, 80 Ohio St.3d 234, 241, 1997-Ohio-343; *State v. Cominsky,* 11th Dist. No. 2001-L-023, 2001-Ohio-8734, appeal not allowed (2002), 95 Ohio St.3d 1421; *State v. Litteral* (June 14, 1994), 4th Dist. No. 93CA510 (determining roadside sobriety tests are a "search" within the meaning of the Fourth Amendment). A warrantless search or seizure is presumptively unreasonable unless it falls within one of the established exceptions to the warrant requirement. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514. One exception permits police to conduct warrantless searches with the voluntary consent of the individual. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 222, 93 S.Ct. 2041, 2045 (stating "a search conducted pursuant to a valid consent is constitutionally permissible"). Another exception allows a police officer to stop and detain an individual without a warrant when the officer has a reasonable suspicion based upon specific, articulable facts that criminal activity has just occurred or is about to take place. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. After making a valid investigatory stop, an officer who has reasonable and articulable suspicion that a driver is intoxicated may conduct field sobriety tests. *State v. Perkins,* 10th Dist. No. 07AP-924, 2008-Ohio-5060, ¶8; *State v. George,* 5th Dist. No. 07-CA-2, 2008-Ohio-2773, ¶22.

{¶20} Even if we assume for purposes of our analysis, without so deciding, that a field sobriety test is a "search" within the meaning of the Fourth Amendment, Officer Kirby's threat to arrest defendant if he did not perform the walk-and-turn or other field sobriety testing did not render defendant's consent involuntary. An officer's action in advising a person that he would be arrested if he refuses to perform field sobriety tests does not render the person's consent involuntary if the officer has probable cause to arrest the person for driving under the influence of alcohol. See *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, ¶72, citing *United States v. Johnson* (C.A.6, 2003), 351 F.3d 254, 263; *State v. Rupp,* 11th Dist. No. 2007-P-0095, 2008-Ohio-4052, ¶45. See also *Columbus v. Dixon,* 10th Dist. No. 07AP-536, 2008-Ohio-2018, ¶6-7; *State v. Morgan,* 11th Dist. No. 2008-P-0098, 2009-Ohio-2795, ¶67; *Martin v. Registrar, Bur. of Motor Vehicles* (Sept. 6, 1994), 10th Dist. No. 94APG02-220; *State v. Jenkins* (Oct. 27, 1993), 2d Dist. No. 3037 (all determining that a person's consent to a chemical test was voluntary even though a police officer informed the person that a refusal to take the test would result in the person being taken into custody).

{¶21} In determining whether a police officer had probable cause to arrest a suspect for driving under the influence, a court considers whether, at the moment of arrest, the officer had information within the officer's knowledge, or derived from a reasonably trustworthy source, of facts and circumstances sufficient to cause a prudent person to believe the suspect was driving under the influence. *State v. Homan* (2000), 89 Ohio St.3d 421, 427; *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 226; *Perkins at* ¶26. In making this determination, the trial court examines the totality of facts and circumstances surrounding the arrest. *Homan,* supra. Probable cause to arrest does not

have to be based, in whole or in part, upon a suspect's poor performance on one or more field sobriety tests. Rather, "[t]he totality of the facts and circumstances can support a finding of probable cause to arrest even where no field sobriety tests were administered or where * * * the test results must be excluded for lack of [substantial] compliance." Id.

{¶22} In this case, defendant initially agreed to do the walk-and-turn test but then expressed reluctance and inquired what the consequences would be if he refused field sobriety testing. Officer Kirby advised defendant that if he refused the field sobriety testing, he would arrest him for operating a vehicle while intoxicated. After experiencing difficulty in maintaining his balance during the walk-and-turn test, defendant refused to continue the test and Officer Kirby placed him under arrest.

{¶23} Officer Kirby's threat to arrest defendant was not coercive and did not render defendant's consent involuntary because, when the officer told defendant he would arrest him if he did not perform the field sobriety testing, the officer had probable cause to arrest defendant for OVI. Defendant had committed traffic violations that prompted defendant's traffic stop, including straddling the dividing line on Front Street, failing to signal while turning and changing lanes, and crossing over the dashed lines on Nationwide Boulevard and Neil Avenue. After the traffic stop was initiated at approximately 1:00 a.m., the officers observed that defendant had a strong odor of alcohol, "glassy and bloodshot" eyes, "slurred speech" and a "thick tongue." He had a bar wristband on his wrist and admitted he had consumed two beers. Prior to proceeding with the walk-and-turn test, defendant swayed, was unsteady on his feet, stumbled while walking, and had trouble staying focused and following instructions.

{¶24} Based upon the indicia of intoxication, Officer Kirby had probable cause to arrest defendant for OVI when he advised defendant that he would arrest him if he refused to do the walk-and-turn test. See *Homan* at 421-22 (finding probable cause to arrest the defendant for driving under the influence where defendant drove in an erratic manner, weaving and twice driving left of center, the defendant had a "strong" odor of alcohol, the defendant's eyes were "red and glassy," and the defendant admitted consuming three beers); *State v. Slocum,* 11th Dist. No. 2007-A-0081, 2008-Ohio-4157, ¶50 (concluding a 2:22 a.m. traffic stop of defendant who had bloodshot and glassy eyes, slurred speech, strong odor of alcohol, and admitted to having three beers constituted probable cause for OVI arrest); *State v. Caldwell,* 10th Dist. No. 02AP-576, 2003-Ohio-271, ¶27 (determining slurred, thick speech, failure to keep car in marked lane, failure to properly signal, and unsteady and forced gait were sufficient evidence of intoxication); *State v. Faykosh,* 6th Dist. No. L-01-1244, 2002-Ohio-6241, ¶45 (deciding erratic driving, red and glassy eyes, and strong odor of alcohol supported a finding of probable cause to arrest for DUI); *State v. Kirby* (Sept. 28, 2001), 6th Dist. No. OT-00-047 (finding sufficient evidence in weaving within lane, strong odor of alcohol, red and glassy eyes, slurred speech, and admission to consuming alcohol); *State v. Gray* (Apr. 19, 2001), 3d Dist. No. 11-2000-16 (concluding glassy, bloodshot eyes, lack of balance, and a strong odor of alcohol emanating from a person sufficient to support arrest).

{¶25} Because Officer Kirby had probable cause to arrest defendant, his threat to arrest defendant was not coercive. Thus, Officer Kirby's statement that he would arrest defendant for OVI if he refused to continue the field sobriety testing was a truthful statement of what the officer had a legal right to do. *Perez; Rupp,* supra. "The fact that

[defendant] made a difficult choice does not mean that []he made an involuntary or coerced choice." *Dixon* at ¶7. As a result, the trial court properly denied defendant's motion to suppress evidence relating to the walk-and-turn test, defendant's refusal to complete the test, and events that subsequently occurred. A defendant's refusal to perform field sobriety tests is relevant evidence under Evid.R. 401 and therefore admissible at trial. *State v. Denney,* 5th Dist. No. 03 CA 62, 2004-Ohio-2024, ¶21-24, appeal not allowed, 103 Ohio St.3d 1428, 2004-Ohio-4524.

{¶26} Accordingly, the trial court properly sustained, in part, and overruled, in part, defendant's motion to suppress evidence. Defendant's single assignment of error is overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

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