[Cite as *State v. Hessel*, 2009-Ohio-4935.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-031
	:	O P I N I O N
- vs -		9/21/2009
	:	
MICHAEL I. HESSEL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MASON MUNICIPAL COURT
Case No. 08TRC04203

Robert W. Peeler, Mason City Prosecutor, Bethany S. Bennett, 5950 Mason Montgomery Road, Mason, Ohio 45040, for plaintiff-appellee

Jeffrey C. Meadows, 8310 Princeton-Glendale Road, West Chester, Ohio 45069, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Michael Hessel, appeals the decision of the Mason Municipal Court denying his motion to suppress evidence obtained in an OVI case. We affirm.

{¶2} At approximately 3:45 a.m. on July 11, 2008, Deputy Shawn Embleton of the Warren County Sheriff's Office was at the Speedway gas station located on Kings Mills Drive

in Deerfield Township. Appellant and a female companion were inside the station convenience store. In the store, Dep. Embleton heard appellant talking in loud, slurred speech to the Speedway clerk. After appellant and the female exited the store, the clerk motioned to the deputy, indicating that the pair was intoxicated.[1]

{¶3} Dep. Embleton walked outside and noticed appellant and the female were standing beside their vehicle smoking. The deputy asked if they were driving, to which appellant replied "no." Dep. Embleton was joined at the station by Deputy Ryan Saylor. The deputies remained at the station for approximately ten minutes. Neither appellant, nor his female companion, entered the vehicle during that time. The deputies then drove to the McDonald's parking lot located across the street, where they continued to observe appellant. One minute later, appellant entered the driver's seat of the vehicle and drove south on Kings Island Drive.

{¶4} Dep. Embleton initiated a traffic stop. After stopping, appellant exited his vehicle and approached the deputy. Upon contact with appellant, Dep. Embleton testified that appellant's speech was slurred, he smelled an odor of alcoholic beverage on appellant's person, and observed appellant's eyes to be glassy and bloodshot. Appellant admitted to drinking a couple of beers earlier that evening and indicated that beer had been spilled on him. Dep. Embleton asked appellant if he had too much alcohol to be driving. Appellant replied that he did not know, but that he wished that he had taken the deputy's recommendation. Three field sobriety tests were administered and, thereafter, the deputy arrested appellant. Appellant was transported to the Deerfield Township patrol post, where appellant submitted to a chemical breath test, resulting in a BAC reading of .180.

{¶5} Appellant was charged with operating a vehicle under the influence of alcohol in

1. Appellant failed to file a transcript of the motion to suppress hearing in the instant appeal. Accordingly, we presume the regularity of the proceedings. App.R. 9(B); *State v. Lane* (1997), 118 Ohio App.3d 485, 488.

violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(h). Appellant filed a motion to suppress, challenging the validity of the stop and the field sobriety tests. The trial court denied the motion. Appellant entered a no contest plea on the charge of R.C. 4511.19(A)(1)(a) and the state dismissed the charge of R.C. 4511.19(A)(1)(h). Appellant timely appeals, raising one assignment of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶8} Under his sole assignment of error, appellant raises two issues for review. First, appellant challenges the validity of the stop. Appellant argues that the deputy did not have a reasonable, articulable suspicion that any criminal activity occurred to justify the warrantless stop. Second, appellant argues that, in conducting the field sobriety tests, the deputy substantially deviated from the NHTSA standards.

{¶9} Appellate review of a ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 329, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. A reviewing court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Bryson* (2001), 142 Ohio App.3d 397, 402. The appellate court then determines as a matter of law, without deferring to the trial court's conclusions, whether the trial court applied the appropriate legal standard. Id.

Traffic Stop

{¶10} The Fourth Amendment to the United States Constitution protects all persons against unreasonable searches and seizures. *Arizona v. Evans* (1995), 514 U.S. 1, 10, 115

S.Ct. 1185. The stop of a motor vehicle, even if for a limited purpose or a brief amount of time, constitutes the seizure of a person under the Fourth Amendment. *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, 556-558, 96 S.Ct. 3074.

{¶11} As explained in previous decisions by this court, two different types of "traffic" stops are recognized in Ohio, each with a different applicable constitutional standard. See *State v. Moeller* (Oct. 23, 2000), Butler App. No. CA99-07-128, at 3. A noninvestigatory stop is reasonable for Fourth Amendment purposes where an officer has probable cause to believe a traffic violation has occurred, such as where the officer observes a traffic violation. See *Whren v. United States* (1996), 517 U.S. 806, 810, 116 S.Ct. 1769; *Dayton v. Erickson,* 76 Ohio St.3d 3, 11, 1996-Ohio-431.

{¶12} The second type is referred to as an investigatory stop or "*Terry*" stop, which allows an officer to briefly stop and detain an individual, without an arrest warrant and without probable cause, in order to investigate a reasonable and articulable suspicion of criminal activity. See *Terry v. Ohio* (1967), 392 U.S. 1, 19-21, 188 S.Ct. 1868; *State v. Bobo* (1988), 37 Ohio St.3d 177, 178. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstances" as "viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *State v. LeClaire*, Clinton App. No. CA2005-11-027, 2006-Ohio-4958, ¶9, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, syllabus; and *Bobo* at 179.

{¶13} In the written decision on the motion to suppress, the trial court held, "the totality of the circumstances weighs in favor of finding that the deputy had reasonable articulable suspicion to stop the Defendant. Deputy Embleton was at the Speedway on Kings Mills when he heard the Defendant in the Speedway exhibit loud and slurred speech. The clerk thought something was wrong with the Defendant and indicated this to Deputy Embleton. Deputy Embleton asked the Defendant if he was going to drive, to which the

Defendant replied in the negative. Deputy Embleton remained in the area to observe the Defendant. A few minutes later, the Defendant got into his car and drove off.

{¶14} "Despite the fact that Defendant may not have committed any violations while driving, Deputy Embleton had reasonable suspicion to think the Defendant was under the influence of alcohol. He observed the Defendant show loud, and slurred speech at the Speedway counter, and additionally the clerk gave a tip to Deputy Embleton. The Defendant also told Deputy Embleton that he was not going to drive, but the Defendant did drive. * * * These facts are sufficient to provide reasonable articulable suspicion that the Defendant was operating his vehicle under the influence of alcohol."

{¶15} After review of the record, we agree with the decision of the trial court. Dep. Embleton personally observed appellant exhibit loud and slurred speech while at the gas station counter. Additionally, the deputy directly questioned whether appellant was going to drive and appellant responded in the negative. Appellant remained outside the vehicle while the deputy was present at the station. Not long after the deputy left the Speedway, appellant drove his vehicle.

{¶16} Further, the station clerk indicated to the deputy that appellant was intoxicated. When information possessed by the police stems from an informant's tip, the determination of reasonable suspicion will be limited to an examination of the weight and reliability due that tip. *Maumee v. Weisner*, 87 Ohio St.3d 295, 299, 1999-Ohio-68. Factors "highly relevant" in determining the value of an informant tip are the informant's veracity, reliability, and basis of knowledge. *Alabama v. White* (1990), 496 U.S. 325, 328, 110 S.Ct. 2412. When an informant is an identified citizen who based his or her tip upon personal observations, the tip "merits a high degree of value, rendering it sufficient to withstand the challenge without independent police corroboration." *State v. Abercrombie*, Clermont App. No. CA2001-06-057, 2002-Ohio-2414, ¶16.

{¶17} The tip, combined with the deputy's observations and brief interaction with appellant at the gas station, created a reasonable articulable suspicion that appellant was operating his vehicle under the influence of alcohol. Accordingly, based upon the totality of the circumstances, Dep. Embleton was justified in stopping appellant.

Field Sobriety Test

{¶18} In response to a motion to suppress evidence of the results of field sobriety tests, the state must show the requisite level of compliance with accepted testing standards. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, ¶9. The typical standards, as were used in this case, are those from the NHTSA. *State v. Jimenez*, Warren App. No. CA2006-01-005, 2007-Ohio-1658, ¶12. Strict compliance with the NHTSA standards is not necessary. R.C. 4511.19(D)(4)(b); see, also, *Schmitt* at ¶9. Rather, in order for the results of the field sobriety test to be admissible as evidence of probable cause to arrest, the tests must be administered in substantial compliance with standards set by the NHTSA. Id.

{¶19} In this case, appellant challenges the HGN, walk and turn, and one-leg stand tests administered by Dep. Embleton, arguing that NHTSA standards were not substantially complied with and, as a result, the trial court erred by failing to suppress the results of the tests. In his brief, appellant cites the omitted portions of the NHTSA instructions given by Dep. Embleton in administering the field sobriety test. Additionally, appellant complains that the stimulus used during the HGN was positioned well-below eye level, in violation of the NHTSA protocol.

{¶20} The trial court in this case held, "[d]uring the instruction stage of the walk and turn test, Deputy Embleton did not read the required procedures verbatim. However, his instructions to the Defendant clearly conveyed to the Defendant the test procedures. Further, Deputy Embleton's demonstration stage was followed verbatim with NHTSA

standards. Deputy Embleton was in substantial compliance with NHTSA requirements for the instructions on the walk and turn test. On the HGN and one-legged-stand test, the instruction portions were clearly performed in substantial compliance of NHTSA standards as well."

{¶21} In regard to the walk and turn and one-leg stand, appellant basically asks this court to engage in a word or phrase-counting analysis by comparing the NHTSA standards to the actual instructions given to appellant. We have rejected this type of analysis on several occasions. *State v. Wood*, Clermont App. No. CA2007-12-115, 2008-Ohio-5422, ¶29; *State v. Way*, Butler App. No. CA2008-04-098, 2009-Ohio-96, ¶25; *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶27.

{¶22} Moreover, in the matter at hand, we need not determine whether the evidence supports substantial compliance with the NHTSA guidelines because, even if there was no substantial compliance and the trial court erred by failing to suppress the field sobriety tests, any such error would be harmless. Ohio courts have repeatedly found that even if a trial court erroneously fails to suppress the results of field sobriety tests, when ample evidence exists to support the arrest, this error is harmless. *State v. Fink*, Warren App. Nos. CA2008-10-118, -119, 2009-Ohio-3538, ¶43; *State v. Calder*, Monroe App. No. 08 MO 5, 2009-Ohio-3329, ¶40 and ¶47; *Village of Gates Mills v. Mace*, Cuyahoga App. No. 84826, 2005-Ohio-2191, ¶29; *State v. Matus*, Wood App. No. WD-06-072, 2008-Ohio-377, ¶27 and ¶29.

{¶23} Here, even without the admission of the challenged field sobriety tests, sufficient evidence of impairment for a finding of probable cause existed to arrest appellant for operating a vehicle under the influence. When appellant approached the deputy at the outset of the traffic stop, Dep. Embleton noticed that appellant's speech was slurred, he smelled an odor of alcoholic beverage on appellant's person, and observed appellant's eyes to be glassy and bloodshot. Appellant admitted to drinking a couple of beers earlier that

evening and indicated that beer had been spilled on him. Dep. Embleton asked appellant whether he had too much alcohol to be driving. Appellant replied that he did not know, but that he wished that he had taken the deputy's recommendation from earlier.

{¶24} Appellant's sole assignment of error is overruled.

{¶25} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

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